A

PRACTICAL TREATISE

OF THE

LAW OF EVIDENCE,

AND

DIGEST OF PROOFS,

IN

CIVIL AND CRIMINAL PROCEEDINGS.

SECOND EDITION,

WITH CONSIDERABLE ALTERATIONS AND ADDITIONS.

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VOL. I.

LONDON:

J. & W. T. CLARKE,

LAW BOOKSELLERS AND PUBLISHERS,

PORTUGAL-STREET, LINCOLN'S-INN.

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LONDON:
James & Luke G. Hansard & Sons,
near Lincoln's-Inn Fields.

ADVERTISEMENT.

THE Author duly impressed with the kind reception which the First Edition of this Treatise has met with from the Profession, and the intimations which he has received that a New Edition would be acceptable, has to regret that he has not been able to comply with them at an earlier opportunity. He begs leave to add, that the delay is in a considerable degree attributable to his anxiety to improve the structure of the original work, and he trusts that the numerous alterations and additions that he has made, will be sufficient to evince his earnest desire to render the present Edition useful to the Profession.

PREFACE

TO THE FIRST EDITION.

THE investigation of truth, the art of ascertaining that which is unknown from that which is known, has occupied the attention, and constituted the pleasure as well as the business of the reflecting part of mankind in every civilized age and country. But inquiries of this nature are nowhere more essential to the great temporal interests of society than where they are applied to the purposes of judicial investigation in matters of fact. Their importance is obviously commensurate with the interests of justice and of right; the best and wisest laws are useless until the materials be provided upon which they can safely be exercised; in other words, the administration of a law assumes the truth of the facts or predicament to which it is applied.

With those who regard law as a science which rests on certain fixed and equitable foundations, and who view its decisions not as arbitrary precedents, but valuable only as they illustrate the great principles from which they emanate, this branch of jurisprudence, which comprises the rules and practice of judicial investigation, must exceed all others in point of interest. However widely different codes may vary from each other in matters of arbitrary positive institution, and of mere artificial creation, the general means of investigating the truth of contested facts must be common to all. Every rational system which provides the means of proof must be founded on experience and reason, on a well-grounded knowledge of human nature and conduct, on a consideration of the value of testimony, and on the weight due to coincident circumstances. Here, therefore, the object of the law is identified with that of pure science; the common aim of each is the discovery of truth; and all the means within the reach

of philosophy, all the connections and links, physical or moral, which experience and reason can discover, are thus rendered subservient to the purposes of justice. In different systems of law, the great principles on which the rules of evidence depend may be and are variously modified; but every departure from those principles, wheresoever it occurs, must constitute a corresponding and commensurate imperfection.

Notwithstanding, however, the universality of the great principles of the science, it is essential in practice to guard and limit the reception of evidence by certain definite and positive rules. Nature has no limits; but every system of positive law must, on grounds of policy, prescribe artificial boundaries, even in its application to a subject which from its independent nature least of all admits of such restraint. These, however, are necessarily for the most part of a negative description, the effect of which is to exclude evidence in particular cases, and under special circumstances, on general grounds of utility and convenience; yet even here so difficult is it to prescribe limits on such a subject, without the hazard of committing injustice, that rules, the general policy of which is obvious, are by no means favoured. Thus, although according to the Law of England he who is interested is also incompetent to be a witness, yet the Courts are ever anxious to apply the objection, as natural reason would apply it, to the credibility rather than to the competency of a party, to receive and to weigh his testimony rather than wholly and peremptorily to exclude it. It is true, that in many instances the law may by rules of a positive nature annex a technical and arbitrary effect to particular evidence, which does not actually appertain to it. Thus, by our law, a judgment is frequently absolute and conclusive evidence of the facts which have been already contested; but one general observation is applicable to this and to most instances of a similar nature, including the numerous cases of legal presumption, that they are not used as the means or instruments of truth, but are in virtue and effect nothing more than mere technical and positive rules, which are wholly independent of the principles of evidence (*), and whose only foundation is their general utility and convenience.

(*) See the observations on this subject, under the title PRESUMPTION.

To go farther, and by any positive and arbitrary rules to annex to particular evidence any technical and artificial force which it does not naturally possess, or to abridge and limit its proper and natural efficacy, must in all cases, where the object is simply the attainment of truth, not only be inconsistent and absurd in a scientific view, but what is worse would frequently be productive of absolute injustice (*). To admit every light which reason and experience can supply for the discovery of truth, and to reject that only which serves not to guide, but to bewilder and mislead, are the great principles which ought to pervade every system of evidence. It may safely be laid down as an universal position, that the less the process of inquiry is fettered by rules and restraints, founded on extraneous and collateral considerations of policy and convenience, the more certain and efficacious will it be in its operation.

To pursue such general observations further in this place would interfere too much with the arrangement of the present work, the objects of which are now to be announced.

It is proposed in the following treatise to consider the practice of the law in England on the subject of judicial proofs. With this view, the elementary principles by which the admissibility of evidence to prove matters of fact before a Jury is governed will first be considered. A second division will contain an enumeration of the different instruments of evidence. In a third, the application of these principles and instruments to the purposes of proof will be considered, as also the distinction between law and fact, and the force and effect of direct and circumstantial evidence; and, lastly, the evidence essential to the proof of particular issues will be detailed, and references made to the leading decisions connected with the particular subject of proof.

Nothing can be more agreeable than to compare the Law of Evidence as it now exists, with the rude practice which formerly prevailed, when its principles were so dubious and unsettled, that the very means devised for the discovery of truth and advancement of justice were not unfrequently perverted to the purposes of injustice, and made the instruments of the most grievous and cruel oppression. Whoever institutes that comparison, will find

(*) See tit. PRESUMPTION.

great reason to approve of the changes which have taken place; but no mistake can be more injurious to the Law, as a system, or oppose a greater obstacle to all future improvement, than to suppose that the Law of Evidence has attained to its highest perfection. It is, however, far from the Author's present purpose to enter into any discussion on the subject of the imperfections and anomalies which yet encumber this branch of the Law. To the learned judges of modern times the highest praise is due for the strenuous exertions which they have made to reduce the Law of Evidence to a system, founded on just and liberal principles; and it is to be hoped not only that those imperfections which still subsist, which have been spared from their antiquity, and exist as a kind of prescriptive evils, will in time be removed by legislative, if they be beyond the reach and scope of judicial authority; but that such other improvements will be made as reason exercised on mature experience shall warrant.

LAW

OF

EVIDENCE.

EVERY system of municipal law consists of *substantive* and *adjective* provisions.

Substantive, which define primary (*a*) rights (*b*) and duties; adjective, which provide means for preventing or remedying the violation of substantive provisions.

If all were both able and willing to fulfil the substantive provisions of the law, those which are merely adjective would be unnecessary. But without adjective provisions for *preventing* and *remedying* violations of the mandatory branches of the law, by imposing actual restraint in some instances, and annexing penal or remedial consequences to disobedience, in others, such laws would be of no greater, frequently of less effect, than mere moral precepts. It is of the very essence of a municipal law, not only to prescribe a rule of conduct, but to compel obedience, either by actual restraint, or by annexing such consequences to disobe-

(*a*) That is, which exist independently of any violation of a law, as contradistinguished from those which are consequent upon disobedience. Thus the right of personal liberty is a substantive primary right, as contradistinguished from a right to damages for imprisonment, which results from a violation of the primary right.

(*b*) Right, in its primitive legal sense, is that which the law directs: in popular acceptation, that which is so directed for the protection or advantage of an individual, is said to be *his* right.

When it is said that *A.* has a right to an estate or to damages, it is meant, that under the circumstances the law directs that he shall have that estate or shall have damages. When it is said that *B.* has a right of action, it is meant, that the law under the circumstances provides means for enforcing his claim.

When the learned author of the Commentaries, in the language of the civil law, speaks of the *rights of things*, he uses the term in its primitive sense, and treats of those legal incidents which the law prescribes as to things, such as possession, enjoyment, succession or transfer.

dience as may be sufficient to ensure obedience to such an extent that any addition or excess would be productive of more evil than good.

Such adjective provisions are either *preventive* or *remedial*.

Preventive, which are devised for the actual prevention of violations of the law;

Remedial, which are devised for the purpose of repairing the consequences of disobedience.

Preventive provisions, again, are either such as are designed to prevent violations of the law by interposing actual forcible corporeal restraint; as where one is prevented by force from doing some special injury to the person or the property of another, or is restrained from doing mischief generally by imprisonment; or they are such as operate on the mind by the fear of *penal consequences* annexed to defined transgressions (*c*).

Remedial, which afford a remedy or reparation in respect of some violation of right, consist either in awarding specific restitution, as by an actual restoration of goods wrongfully detained from

(*c*) A wrong, the subject of legal visitation, consists abstractedly in the mere privation of right: the boundaries of right and wrong, in a legal sense, are identical, and to define the limits of the one is to define the limits of the other. This consideration by no means dispenses with the definition of particular wrongs and their consequences; so far from it, that in practice mere adjective provisions, by defining wrongs and their consequences, in fact, define and determine not merely the value but the extent of the right. And this must be the natural if not the necessary consequence of a system, which depends in a great measure on precedent and usage: for instance, the law directs generally that a man has a right to his reputation, but the extent of the right and its value depend upon the extent to which that right is protected by annexing remedial or penal consequences to invasions of that right. To say that a man is a thief is actionable; it is a wrong in contemplation of law, and therefore to that extent the party has a *right* to his reputation in the first instance, and a *right* to damages for the violation of right in the second. But to say that a man is a drunkard or a swindler is *per se* neither actionable nor indictable, consequently to say so does not constitute a *wrong* in a legal sense; and therefore in this respect a man has not a legal right. And therefore, though wrong be generally nothing more than a privation of right, yet in practice it frequently happens that the extent and limits of the right are defined by the extent and limits of the wrong. Again, the value of a legal right obviously depends on the nature and extent of the adjective provisions, whether remedial or penal, by which it is protected. Be the right in its own nature ever so precious, its practical value must depend on the efficacy of the adjective provisions by which it is guarded. To punish a wilful homicide by the infliction, not of death, but of a pecuniary fine, like the Saxon were-gild, would be to render life itself precarious; to punish theft merely by the infliction of a trifling fine, would render property of little value.

the owner; or in giving damages co-extensive with the particular injury.

In order to annex either remedial or penal consequences to their proper predicaments in fact, it is essential that the true state of facts should be *investigated* by competent means; that the legal consequences appertaining to such ascertained facts, as previously defined by the law, should be declared by *judicial* authority; and lastly, that the legal consequence, if not already annexed, should be actually annexed by an *executive* process.

To the *investigative* process, again, it is essential that the parties should by their pleadings mutually state what each deems to be essential to his claim or charge, or defence, and that each should be allowed to dispute or deny the statement of his adversary. By this means, if any facts be disputed, they are distinguished from the admitted facts, in order to be submitted to inquiry before the proper tribunal.

It is incumbent on the party who makes a claim or charge, to state facts which, if true, show that the charge or claim is founded in law: the law of England requires the defendant either by a demurrer to admit the facts and deny the legal consequence contended for by the plaintiff or prosecutor, or to deny the facts so alleged, wholly or in part, *or*, admitting the facts so alleged to be true, to state others, which, taken in connection with the facts already stated, show that the claim or charge is unfounded in law.

Again, where such additional facts are pleaded in defence, it is for the prosecutor or plaintiff, in his turn, either to deny some material fact so pleaded in defence, *or*, admitting those facts to be true, either to demur in law, so as to raise a mere question of law, *or* to allege still further facts; and in like manner, so long as further facts are pleaded by the one party, the other may either deny one or more of such facts, or demur, or allege further facts. It is obvious that such a series of mutual allegations, where the condition is that each which does not terminate the series must contain the averment of some new and material fact, must rapidly converge to an issue either of law or fact (*d*).

(*d*) The law, however, frequently sanctions a generality in pleading, which leaves the fact which is to be tried intermixed with most important legal considerations. For instance, the declaration in an action of trover alleges in substance nothing more than the conversion by the defendant of the plaintiff's goods; the defendant by his plea denies such conversion; and the question for the jury is, whether the defendant has so converted the goods of the plaintiff; and this issue frequently involves not merely one or more simple facts, but difficult legal considerations, such as questions of

By the law of England, questions or issues of fact thus agreed

title, the law of bankruptcy, the right of stoppage *in transitu*, and many others. It is obvious, that such an intermixture of law and fact could not be avoided without the aid of minute and particular pleadings, in the course of which the real merits and justice of the case would frequently be embarrassed with difficulties, arising from a necessary adherence to technical rules. The science of special pleading having been frequently perverted to the purposes of chicane and delay, the Courts have, in some instances, and the Legislature in many more, permitted the general issue to be pleaded, which leaves every thing open,—the fact, the law, and the equity of the case; and though it should seem as if much confusion and uncertainty would result from so great a relaxation of the strictness anciently observed, yet experience has shown it to be otherwise, especially with the aid of a new trial, in case either party be unfairly surprised by the other. 3 Bl. Comm. 306.

For the finding a verdict on every issue, it is essential, in the *first* place, to know what facts, when proved, will satisfy the issue in point of law; and *secondly*, to inquire whether such facts have been proved. The office of the jury is confined altogether to the latter question; their duty is to ascertain the existence of facts by means of the judgment which they form of the credibility of witnesses, and by the inferences which they make from the circumstances submitted to their consideration. For the due discharge of this important function, they are supposed to be peculiarly well qualified by their experience of the conduct, affairs and dealings of mankind, and the manners and customs of society. In this respect, and to this extent, the law confides implicitly in their knowledge, experience and discretion. It interferes no further than by laying down cautionary rules to prevent the jury from being deceived or misled, by providing, as far as can be done, that the evidence of none but faithworthy witnesses shall be admitted, and by excluding all such as flows from corrupt or suspicious sources. Having done this, the rest is left to the conscience and discretion of the jury.

It is with a view to those objects that the rules of evidence are almost exclusively framed. But, in the next place, a knowledge whether particular facts, if established to the conviction of the jury, will satisfy the issue, or the allegations to be proved, is also essential to a verdict; and this is usually a question of law, and therefore within the province of the Judge. In such cases, therefore, it is for the Court to instruct the jury in point of law, to inform them what facts are essential to the proof of the issue, and that they ought to give their verdict in the affirmative or negative, according to the opinion of the jury that the particular facts are proved or disproved.

The jury, in finding a general verdict, are bound to find it according to the just application of the law as they receive it from the Court, and their own judgment whether the facts are proved or not; and every such verdict is presumed to be founded upon the law so expounded, and the facts so found.

If the jury in a civil proceeding wilfully misapply the law, they do it at the risk and peril of an attaint; a proceeding which has now fallen into disuse, and which has been superseded by a more easy and efficacious remedy *.

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* *i. e.* By moving for a new trial.

upon are usually to be tried by the country, that is, by a jury of twelve men, a part of the great body of the community (*e*).

(*e*) Notwithstanding the difference of opinion which has prevailed among legal antiquaries as to the origin of the English jury, there seems to be great reason for supposing that it is derived from the *patria*, or body of suitors who decided causes in the county courts of our Saxon ancestors. That the trial *per juratam patriæ* of Glanville was derived from the trial *per patriam*, as used both before and after the Conquest, is rendered highly probable, not only by the

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to the party injured. But the jury are not in any case, whether civil or criminal, bound to apply the law; they are always at liberty to find a special verdict, that is, to state specially what facts they find to be proved; and the remainder of that process which is essential to the verdict, that is, the application of the law to the facts so found, is left to be executed by the Court. In finding a special verdict the jury discharge the whole of their office, for a special verdict does not contain merely a detail of the evidence given by the witnesses, but is conclusive as to the existence of all the ultimate specific facts of the case, which are essential to its determination, founded upon an examination of the credit due to the witnesses, and upon presumptions and inferences derived from all the circumstances of the case as detailed in evidence.

It is interesting to observe how nearly the law of England corresponds with the ancient Roman law in several most important points of its practical administration. In the first place, the pleadings in the practice of the Roman law were transacted before the prætor, as they are with us in the courts above, or, as it is technically called, in Bank. The plaintiff, when he had brought his adversary into court, and had not agreed with him upon an *Imparlance*, then formally (*edebat actionem*) declared against him: "Quod si nec vindices dati, nec de lite in via transactum in jus veniri solebat ubi actor impetrata loquendi potestate reo edebat actionem, id est indicabat qua demum actione adversus reum experiri vellet quum enim de uno eodemque facto plures sæpe actiones competerent eligenda erat una ea que edenda reo." Hein. A. R. v. 2, p. 227.

It must be allowed, that however our modern system of pleading may excel that of the Romans in other respects, the latter were at least entitled to the merit of conciseness; take, for instance, a declaration in *assumpsit* upon a special agreement. A Roman declaration in such a case ran thus: "Aio te mini triticum de quo inter nos convenit ob polita vestimenta tua dare oportere." It is amusing to contrast the laconic brevity of this form with a modern declaration, expanded upon the record, and amplified by counts on considerations executory and executed, work and labour, the money counts, and on an account stated.

After the declaration followed the defendant's plea, (*exceptio*,) and upon that the plaintiff's *replication*, the defendant's rejoinder, (*duplicatio*,) &c., until the matter in difference was reduced to a single question of law or fact. If the whole resolved itself into a question of law, then, as upon *demurrer*, it was decided by the prætor: but if the question ultimately depended upon a disputed fact, then came the joining of issue, the "*contestatio litis*," by

This justly celebrated institution is not more strongly recom-

the very description of the trial *per patriam*, yet retained, but even still more strongly by the powers, qualifications and duties incident to the *jurata patriæ* of Hen. 2. and Hen. 3. This hypothesis seems to explain many singular incidents to the early trial *per juratam patriæ*, incidents which it would be difficult, if not impossible, to account for in any other manner. The *jurata patriæ*, like the *patria*, decided on their *own knowledge*: for this purpose they were selected from the *vicinage*; those (in the case of an assise) who had no knowledge of the facts were excluded to make room for such others as were supposed to know them; and although the concurrence of 12 was essential to the verdict, yet as 11 might have been of a contrary opinion, a *majority* in effect decided: and in the case of a disputed deed, the witnesses were included among the jury, and their duty was, as it is still, in the language of our records, *Dicere veritatem*. Such incidents afford obvious reasons for supposing that juries were but selections from the *patria* or general assembly, who

must

by which the litigants put themselves to the proof of the fact by witnesses: "Festus ait, tum demum litigantes contestari litem dici, cum ordinato judicio utraque pars diceret testes estote." Hein. A. R. 2. v. 246. The issue was then sent to be tried by *Judices*, who in many respects bore a close resemblance to an English jury. "Si enim de jure disceptabatur, ipse præto rqui dicebat extra ordinem sin de facto judex dabatur, unde formula si paret condemna." Conf. Seneca de Benef. III. 7. The judices were, like our jurors, private persons, selected for the trial of matters of fact upon the particular occasion. Their decision, however, was final; and instead of returning their verdict to the Court above, in order that final judgment might be pronounced, the jury themselves pronounced the sentence, according to the direction in the Formula, "*si paret condemna.*"

The principal and characteristic circumstance in which the trial by a Roman differed from that of a modern jury, consisted in this, that in the former case, neither the prætor, nor any other officer distinct from the jury, presided over the trial to determine as to the competency of witnesses, the admissibility of evidence, and to expound the law as connecting the facts with the allegations to be proved on the record; but in order to remedy the deficiency, they resorted to this expedient; the jury generally consisted of one or more lawyers, and thus they derived that knowledge of law from their own members which was necessary to enable them to reject inadmissible evidence, and to give a correct verdict as compounded both of law and fact. "Denique ut tanto minus esset periculi ne imperite judicarent, solebant aliquando iis unus aut plures judicii socii jurisperiti adjungi, quorum consilio omnia agerent." Gell. Noct. Att. XII. 13 Conf. Sigon. Hein. A. R. lib. 4, tit. 5, s. 3. Upon the trial, the plaintiff proved his declaration or replication, or the defendant his plea, or rejoinder (*duplicatio*), accordingly as the pleadings threw the burthen of proving the affirmative on the one or the other. "Ubi ad judicium ventum, actor suam actionem et replicationem, reus exceptionem et duplicationem probabat. Nam et reus excipiendo actor fiebat." L. 1. D. de Excep. Hein. A. R. 2 V. 291.

mended by its intrinsic excellence as a mode of attaining to the truth (*f*), than by considerations of extrinsic policy.

(*f*) The trial by jury possesses in many instances another advantage, which, though collateral to the main object, ought not to pass unnoticed; that is, the clearness and facility given to the administration of the adjective provisions of the law, by the separation of law and fact; and in the simplicity which proceeds from regarding particular questions as questions for the jury, rather than as questions of law to be determined by precedent.

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must have acted in the double capacity of witnesses and jurors.

Although this *jurata patriæ* differed from its original, the *patria*, both in respect of number and of the obligation of an oath, these were transitions which might not only easily be made, but which were likely to be made, and which we know actually were made, in the most ancient, perhaps, of all our courts, that is, the county court; where though, among the Saxons, and even after the Conquest, the verdict was given by the whole *comitatus*, and is still supposed to be the verdict of the suitors, yet it is in fact given by 12 jurors on oath. In the reign of H. 2, Glanville speaks of the trial *per juratam patriæ* as a known and established institution. Whether the practice of occasionally delegating the duty of decision to a select portion of the body of suitors, and that sworn, was coeval with the popular tribunal itself, or subsequently introduced for the trial of civil rights, as we know it to have been for the purpose of criminal presentments, may be doubtful. It is probable, however, that the complete and final establishment of the jury system is attributable to many concurrent causes. In the first place, it is clear that an appeal from the *patria* to a select number was a practice of great antiquity; of this practice there is a very curious memorial in the *Monumenta Danica*, lib. 1, p. 72: "Erat universa ditio in certas paræcias sive curias divisa, hæ statis temporibus locisque per se quæque seorsim suis cum armis, patente sub Dio in campis conveniebant, aderantque ejusdem loci viri nobiles qui velut testes judicio assiderent. Ibi in medium prodibant qui contra alios litem se habere existimabant, auditisque et cognitis partis utriusque actionibus defensionibusque, conventus universus in concilium, ibat, idque temporis spatium quod interim deliberando terebatur, curam vocabant. Expensis diligenter et velitatis in partem utramque controversiis, in consessum redibant, vocatisque litigatoribus, de jure pronunciabant. Si quis stare judicio non vellet, ad duodecim constitutos sive judices *sive arbitros* et ab his ad universæ ditionis conventum provocare ei licebat." The expression "sive judices sive arbitros" is singularly coincident with the doctrine in Bracton, f. 193, that the *jurata* was not liable to a conviction, as the assise was, for a false verdict, because the parties had made the jurata "*quasi judicem ex consensu.*"

In the next place, there are evident traces of this practice in our own country; in illustration of which, the celebrated trial in the county court before Odo, bishop of Baieux, in the time of William the Conq. may be cited, where the verdict by the *patria* was required to be confirmed by the oaths of 12 selected for the purpose from the body of suitors. There are in fact many other vestiges of the (at least) occasional practice of delegating the task of decision to a select part; 12 and its multiples appears to have been a favourite number for this purpose, not

Secret and complicated transactions, such as are usually the subject of legal investigation, are too various in their circumstances

only among the Saxons, but other nations of antiquity.

Again, that the modern jury are the same with the *jurata patriæ* of Glanville and Bracton, their name, number and general duty, which to this day is *dicere veritatem*, sufficiently prove, although it is clear that a most important change has taken place as to the manner of exercising their important functions. Even so lately as the reign of Hen. 3 they exercised a kind of mixed duty, partly as witnesses, partly as judges of the effect of testimony; in the case of a disputed deed, the witnesses were enrolled amongst the jury, and the trial was *per patriam et per testes*; and to so great an extent was their character then of a testimonial nature, that it was doubted whether they were capable of deciding in the case of a crime secretly committed, and where the *patria* could have no actual knowledge of the fact. (Bracton, f. 137). It was, however, at this period that the capacity of juries to exercise a far wider and more important function, in judging of the weight of testimony and circumstantial evidence, began to be appreciated, for about this time the trial by ordeal fell into disuse; and when this superstitious invention, the ancient refuge of ignorance, had been rejected as repugnant to the more enlightened notions of the age, it happily became a matter of necessity to substitute a rational mode of inquiry by the aid of reason and experience, for such inefficacious and unrighteous practices. From this æra probably may be dated the commencement of the important changes in the functions of the jury, which afterwards, though perhaps slowly, took place, until they were modelled into the present form.

The learned author of the Commentaries is inclined to derive the modern jury immediately from the Saxons, referring to the law of Ethelred, which provides that twelve men, *ætate superiores*, shall, with the *præpositus*, swear that they will condemn no innocent, absolve no guilty person. It is clear, however, that this constitution of thirteen men was merely in the nature of a *jurata delatoria*, or jury of accusation, not of trial, for the effect of a charge by the thirteen was merely to consign the accused to the *triplex ordalium*.—Others have asserted, that the origin of the present jury was the assise established in the reign of Henry 2d. It appears, however, very clearly from Glanville's Treatise, that the jury of twelve was of more ancient origin; for it is repeatedly spoken of in that work as a known and existing institution, and as the ordinary means of inquiry in the case of purprestures, nuisances, and trespasses which did not amount to disseisins. These were then tried *per juratum patriæ sive vicineti coram justiciariis*. Glanv. l. 9, c. 11.

M. Meyer, in his truly valuable and interesting work (*Institutions Judiciaires*), is disposed to fix the origin of our juries at so late a date as that of Henry 3d. Inst. Jud. vol. 2, p. 165. But it is remarkable, that one reason which he strongly urges in support of this opinion, is the total silence of Glanville on this subject: "Dans cet ouvrage il ne se rencontre ni le nom de jury ni la chose même, quoiqu'il soit souvent question de l'assise," &c. Ins. Jud. vol. 2, p. 169. Glanville himself affords the most decisive refutation of this argument. See l. 9, c. 11, l. 14, c. 3; see also l. 2, c. 6, l. 5, c. 4, l. 7, c. 16: and consequently the hypothesis of an origin later than the time when Glanville wrote necessarily falls to the ground.

to admit of decision by any systematic and formal rules; the only sure guide to truth, whether the object be to explore the mysteries of nature, or unravel the hidden transactions of mankind, is reason aided by experience.

It is obvious, that the experience which would best enable those whose duty it is to decide on matters of fact, arising out of the concerns and dealings of society, to discharge that duty, must be that which results, and which can only result, from an intimate intercourse with society, and an actual knowledge of the habits and dealings of mankind: and that the reasoning faculties best adapted to apply such knowledge and experience to the best advantage in the investigation of a doubtful state of facts, are the natural powers of strong and vigorous minds, unincumbered and unfettered by the technical and artificial rules by which permanent tribunals would be apt to regulate their decisions (g).

The trial by jury, though undoubtedly known and used in the king's courts in the reign of Henry 2d, had become much more frequent in the reign of Henry 3d, an æra from which its gradual change to its present form may be dated. It is not improbable, as far as regards the county court, that when its powers had been greatly abridged, the substitution of twelve jurors for the whole *comitatus* was adopted as a change of great convenience to the suitors of the court, as well as the litigant parties; the former would be more rarely called on to perform a burthensome duty, the latter would have their causes more patiently tried.

If it was ever the practice, either previous or subsequent to the Conquest, that the verdict by the *patria* or *comitatus* should be subject to an appeal to or confirmation by twelve of the *pares* on an oath, and of this, as has been seen, some traces are to be found, the transition to the select part would be perfectly easy; it would in effect be nothing more than the mere omission of a step in the process which had become useless and burthensome; experience having shown that justice was better done by a limited number, acting under the obligation of an oath, than by the precarious determination of a large and indefinite body, few of whom would possess any knowledge of the facts.

(g) The present Lord Chancellor, in a recent case, in directing an issue at law, thus expressed his opinion on the subject:

"I certainly retain the opinion which I always held in common with all the profession, that the best tribunal for investigating contested facts is a jury of twelve men, of various habits of thinking, of various characters of understanding, of various kinds of feeling, of moral feeling, all of which circumstances enter deeply into the capacity of such individuals. A jury is, as I have more than once observed in this place, an instrument peculiarly well contrived in two cases—of assessing damages and giving compensation in the nature of damages assessed, and finding the way for the Court, which is ultimately to decide, through a mass of conflicting testimony. The diversity of the minds of the jury, even if they are taken without any experience as jurors, their various habits of thinking and feeling, and their diversity of cast of understanding, and their discussing the matter among themselves, and the

Nor is the trial by jury less recommended by considerations of extrinsic policy. It constitutes the strongest security to the liberties of the people that human sagacity can devise; for, in effect, it confides th' ' ing and guardianship of their liberties to those whose interes. .s to preserve them inviolable; and any temptation to misapply so great an authority for unworthy purposes, which might sway a permanent tribunal (*h*), can have no influence when entrusted to the mass of the people, to be exercised by particular individuals but occasionally.

In addition to this, no institution could be better devised for securing, on the part of the people, a lively attachment to the constitution and laws, in the practical administration of which they act so important a part, in diffusing a knowledge of the laws themselves, and producing ready obedience to a system which they know to be justly and impartially administered.

That which is legally offered by the litigant parties to induce a jury to decide for or against the party alleging such facts, as contradistinguished from all comment and argument on the subject, falls within the description of *evidence*.

Where such evidence is sufficient to produce a conviction of the truth of the fact to be established, it amounts to proof.

The origin, nature and quality of such evidence, the principles and rules which regulate its admissibility and effect, and its application to the purposes of proof, form the subject of the present Treatise.

The brief outline which has been given to show the relation which this branch of the law bears to the whole system, is sufficient to manifest its great importance.

very fact of their not being lawyers, their not being professional men, and believing as men believe, and act on their belief, in the ordinary affairs of life, give them a capacity of aiding the Court in their eliciting of truth, which no single Judge, be he ever so largely gifted with mental endowments, be he ever so learned with respect to past experience in such matters, can possess in dealing with either of those two matters."

(*h*) The power of deciding on matters of fact is much more capable of abuse, and liable to corrupt partiality, without appearing to be manifestly unjust, than the power of deciding on matters of law is. A judgment in law on ascertained facts, must be justified by comparison with precedents, and it attracts public notice, because in its turn it becomes a precedent for future decisions. It is therefore the subject of public attention, and any material departure from ordinary principles would necessarily be remarked; but the testimony and evidence offered in proof of facts in particular instances, are capable of such infinite complexity and variety, that they admit of no certain standard for judging, and consequently a corrupt or erroneous decision is the less easy to be detected.

There is, perhaps, no greater blessing incident to a highly improved state of civilization, than the substitution of a rational and satisfactory mode of judicial proof, for the rude, barbarous, and even impious practices resorted to in the dark and unlettered ages. Without certain modes of investigating truth, in cases where its light is ever liable to be obscured by fraudulent practices exercised for the evasion of justice, the wisest laws are but vain and ineffectual: they may embellish the statute-book, as beautiful in theory, but in other respects they are a dead letter; frequently even worse; for where offenders cannot be detected and punished, the laws may do mischief in holding out a show of protection, which being but delusive, tends to induce a false and dangerous sense of security: what is still worse, whilst the criminal escapes, they may stamp the innocent with infamy, and crush them with judgments designed only for the guilty; and under an arbitrary constitution, may be converted into a dangerous instrument in the hands of power, for the destruction of those whose possessions are tempting, or principles obnoxious.

In order to appreciate the advantages which result from modes of investigation founded on just and rational principles, we have only to recollect the absurd, monstrous and impious practices resorted to by our own ancestors, in common with other nations of antiquity (*i*). It was for the want of them that judicial oaths were multiplied to an extent of itself sufficient to bring the obligation into contempt: it was vainly hoped that the rank and number of compurgators, who swore not to any fact, but to mere belief, would compensate for their want of knowledge. Hence the superstitious appeals to the Deity by the trial by ordeal, and the ferocious and impious practice of the trial by duel. They did not venture to rely on the simple oaths of individual witnesses to facts, although with a flagrant degree of inconsistency they gave credit to the cumulative oaths of those who knew nothing of the facts: whilst they were either too ignorant or too indolent to try the credit of witnesses by diligent examination and comparison of testimony and facts, judicial oaths were multiplied to an absurd and profli-

(*i*) In spite of the somewhat romantic notions which moderns are apt to entertain of the virtues and simplicity of ancient times, history teaches, what indeed our own experience might lead us to suspect, that the most rude and uneducated in every age are usually the most addicted to deceit, falsehood and perjury. See the remarks of Mr. Hume, *History of England*, vol. i. p. 222: "Whatever we may imagine concerning the moral truth and sincerity of men who live in a rude and barbarous state, there is much more falsehood, and even perjury among them, than among civilized nations."

gate extent. Hence also the rude limits of prescription, which were established for the purpose of avoiding the necessity for inquiry (*k*). It may, however, be recollected to their credit, that the shocking expedient of applying torture to extort confession, a practice sanctioned by many, even Christian legislators, was never resorted to by the Anglo-Saxons.

But however absurd, objectionable and mischievous such practices must appear at the present day, the progress of improvement has been slow; for though the trial by duel in civil suits received a considerable check in the reign of Henry II. in consequence of the introduction of the trial by the grand assize, yet the practice was continued in appeals till long afterwards, and has but very lately ceased to be the law; and though the trial by ordeal seems to have fallen into disuse ever since the early part of the reign of Henry III. without any formal abolition, the doctrine of compurgation by wager of law remains in force to the present day. It was not until long after the establishment of the jury trial that the investigation was conducted by the open examination of witnesses, and that the functions of jurors and witnesses were distinguished and separated; it was not until the reign of queen Anne that witnesses for prisoners tried for felony were examined upon oath.

It is not, however, any part of the present design to enter into any historical detail of the law on this interesting subject, further than as reference to the ancient law may be occasionally connected with its present details.

The subject may be conveniently considered,

First. In relation to the elementary principles on which the legal doctrine rests.

Secondly. The instruments of evidence, as governed by these principles and elementary rules.

Thirdly. Their application to the purposes of proof, either generally or particularly.

First, then, as to the general principles on which the law of evidence is founded.

The means which the law employs for investigating the truth of a past transaction are those which are resorted to by mankind for similar, but extra-judicial purposes. These are the best, usually the only means of inquiry, and it is for this reason that a jury of the country forms a tribunal so well qualified to judge

(*k*) If a man wounded his slave he was not to be presumed to be guilty of the murder, unless the slave died the day after.

of mere matters of fact; for, subject to certain exceptions, they decide by the aid of experience and reason, as they would do on any extra-judicial occasion. With these general principles the law can interfere in two ways only; either by excluding or restraining mere natural evidence by the application of artificial tests of truth, or annexing an artificial effect to evidence beyond that which it would otherwise possess. Hence it is that the great principles of evidence may be reduced to three classes, comprising,

1st. The principles of evidence which depend on ordinary experience and natural reason, independently of any artificial rules of law;

2dly. The artificial principles of law, which operate to the partial exclusion of natural evidence by prescribing tests of admissibility, and which may properly be called the excluding principles of law;

3dly. The principles of law which either create artificial modes of evidence, or annex an artificial effect to mere natural evidence.

In the first place, it rarely happens that a jury, or other tribunal (*l*), whose business it is to decide on a matter of fact, can do so by means of their own actual observation. It is obvious, that when inquiry is to be made into the circumstances of a past transaction before a jury, information must be derived for the most part from the same sources, and must be judged of and estimated, to a great extent, by the same rules that would be resorted to and applied by any individual whose business or whose interest it was, in the ordinary course of human events, to institute such an inquiry.

What, then, are the means to which a person interested in such an inquiry into a past transaction would naturally resort? He would, in the first place, ascertain what witnesses were present at the transaction, and would obtain all the information which they could supply. If none were present, or none could be found from whom he could obtain immediate intelligence, he would procure information from others who, although they had not actual personal knowledge of the fact, had yet derived information on the subject, either directly or mediately, from others who pos-

(*l*) To a limited extent, a jury or Court, in deciding matter of fact, may have actual personal knowledge. Thus a jury may have a view of lands, &c. the subject of litigation: Judges may decide by inspection of a record, or of the person in cases of disputed infancy. So also of a jury of matrons in case of alleged pregnancy, &c.

sessed or had acquired and communicated such their knowledge, either orally or in writing.

Again, in the absence of other information on the subject, he would endeavour carefully to ascertain the circumstances which accompanied the transaction, and had such a connection with it as enabled him to draw his own conclusions on the subject of inquiry.

In short, where knowledge cannot be acquired by means of actual and personal observation, there are but two modes by which the existence of a by-gone fact can be obtained:

1st. By information derived either immediately or mediately from those who had actual knowledge of the fact; or,

2dly. By means of inferences or conclusions drawn from other facts connected with the principal fact which can be sufficiently ascertained.

In the first case, the inference is founded on a principle of faith in human veracity sanctioned by experience. In the second, the conclusion is one derived by the aids of experience and reason from the connection between the facts which are known and that which is unknown. In each case the inference is made by virtue of previous experience of the connection between the known and the disputed facts, although the grounds of such inference in the two cases materially differ.

All evidence thus derived, whether immediately or mediately, from such as have had, or are supposed to have had, actual knowledge of the fact, may not improperly be termed *direct* evidence; whilst that which is derived merely from collateral circumstances may be termed *indirect* or inferential evidence.

It is obvious that the *means* of indirect proof must usually be supplied by direct proof; for no inference can be drawn from any collateral facts until those facts have themselves been first satisfactorily established, either by actual observation, or information derived from others who have derived their knowledge from such observation.

Such, then, being the ordinary sources of evidence (*m*), what are the *excluding* principles which restrain the admission of evidence? As juries must decide by the aid of the same general principles of belief on which any individual would act who was

(*m*) The principles on which the force and efficacy of mere natural evidence, unaffected by technical considerations, depend, will be more conveniently considered hereafter, in discussing the application of the rules of evidence to the general purposes of proof.

desirous of satisfying himself by inquiry as to the truth of any particular fact, and as an individual inquirer would not think it necessary to limit himself by any particular rules, why should the evidence to be submitted to a jury be limited or affected by any technical rules?

The answer is, that the law interferes for two purposes; first, in order to provide more certain tests of truth than can be provided, or indeed than are necessary, in the ordinary course of affairs, and thereby to exclude all weaker evidence to which such tests are inapplicable, and which, if generally admitted, would be more likely to mislead than to answer the purposes of truth; and in the next place, by annexing an artificial effect to particular evidence, which would not otherwise belong to it, on grounds of general policy and convenience.

The great principle on which the law proceeds in laying down rules of an exclusive operation is, not to alter the value and effect of evidence in the investigation of truth; that would be absurd, especially where the tribunal vested with the power of decision consisted of jurors selected from the great body of the people, who, being unskilled in technical rules and unaccustomed to judicial habits, must necessarily decide by the aid of their own experience of things and natural power of their reason, by principles on which they would act in the affairs of ordinary life: on the contrary, one great object of the law is to aid the natural powers of decision, by adding to the weight and cogency of the evidence on which a jury is to act. Another great object is, to prevent the reception of evidence which in its general operation would injure the cause of truth, by its tendency to distract the attention of a jury, and even to mislead them.

The necessity for resorting to superior tests of truth, the effect of which is to exclude evidence not warranted by those tests, is founded on the apprehension that the evidence on which an individual in the ordinary transactions of life might safely rely, could not, without the additional sanction of such tests, be safely relied upon, or even admitted, in judicial investigations. For in the first place, in the ordinary business of life neither so many temptations occur, nor are so many opportunities afforded for practising deceit, as in the course of judicial investigations, where property, reputation, liberty, even life itself, are so frequently at stake: in the common business of life each individual uses his own discretion with whom he shall deal and to whom he shall trust; he has not only the sanction of general reputation and character for the confidence which he reposes, but slight circum-

stances, and even vague reports, are sufficient to awaken his suspicion and distrust, and place him on his guard; and where doubt has been excited, he may suspend his judgment till by extended and repeated inquiries doubt is removed. In judicial inquiries it is far otherwise; the character of a witness cannot easily be subjected to minute investigation, the nature of the proceeding usually excludes the benefit which might result from an extended and protracted inquiry, and a jury are under the necessity of forming their conclusions on a very limited and imperfect knowledge of the real characters of the witnesses on whose testimony they are called on to decide.

It has been truly observed, that there is a general tendency among mankind to speak the truth, for it is easier to state the truth than to invent; the former requires simply an exertion of the memory, whilst to give to false assertions the semblance of truth is a work of difficulty. It is equally apparent that the suspicion of mankind would usually depend on their ordinary experience of human veracity; if truth were always spoken no one would ever suspect another of falsity, but if he were frequently deceived he would frequently suspect. Hence it is that jurors, sitting in judgment, would usually be inclined to repose a higher degree of confidence in ordinary testimony than would justly be due to it in the absence of peculiar guards against deceit; for as the temptations to deceive by false evidence in judicial inquiries are far greater than those which occur in the course of ordinary transactions of life, they would be apt to place the same reliance on the testimony offered to them, as jurors, to which they would have trusted in ordinary cases, and would consequently, in many instances, overvalue such evidence.

The law therefore wisely requires that the evidence should be of the purest and most satisfactory kind which the circumstances admit of, and that it should be warranted by the most weighty and solemn sanctions. This indeed is but a consequence of one great and important rule of law, viz. that the best evidence shall be adduced; the effect of which is, as will afterwards be seen, to exclude inferior evidence, whenever it is offered in place of that which is of a superior degree and more convincing nature.

Again, for the purposes of saving both time and expense, and to prevent the minds of juries from being disturbed from that which is material, it is indispensably necessary to place bounds to collateral evidence, and to exclude such as is of too weak

and suspicious a nature to deserve credit, and which, though it possessed no tendency to mislead, would still be mischievous in occasioning delay and expense, and attracting fruitless attention.

In order to exhibit clearly the nature and extent of the excluding tests recognized by the law of England, it is essential first to consider the different classes of evidence to which such tests apply; and then to consider what tests are applicable to each of such classes.

Evidence, direct or indirect.

For this purpose all evidence may be divided into two classes: 1st. *Direct*, which consists in the testimony, whether *immediately* or *mediately* derived from those who had actual knowledge of the principal or disputed fact; or 2dly, *indirect* or inferential evidence, where an inference is made as to the truth of the disputed fact, not by means of the actual knowledge which any witness had of the fact, but from collateral facts ascertained by competent means.

Immediate or mediate.

Direct or testimonial evidence, again, is either *immediate*, that is, where a witness states his own actual knowledge of the fact, or *mediate*, where the information is communicated, not immediately by the party who had actual knowledge of the fact, but from him through the intermediate testimony of one or more other witnesses.

First, then, what are the principles which govern the reception of immediate testimony?

Principles which regulate the admission of immediate testimony.

To render the communication of facts perfect, the witness must be both *able* and *willing* to speak or to write the truth. It is necessary that he should have had, in the first place, the means and opportunity of acquiring a knowledge of the facts; and, in the second, that he should possess the power and inclination to transmit them faithfully; consequently, the first great object of the law is to secure, by proper means, the inclination of the witness to declare the truth, and to ascertain his ability to do so by adequate tests; and it is for the jury afterwards to judge of the credit due to the witnesses, considering their numbers, their opportunities for observing the facts, the attention which they paid, their faculties for recollecting and transmitting them, their motives, their situation with respect to their parties, their demeanour, and their consistency.

Oath.

In order to exclude impure or suspicious testimony, and to add the most solemn and binding sanction to that which is admitted, the law, in the first place, excludes all testimony which is not given under the sanction of an *oath*: and in the next place, sub-

jects the witness to *cross-examinati*[illegible] the party against whom the evidence is offered.

Tests of truth—disqualification, turpitude.

An immediate consequence of the first test is, that the testimony of a person who by the turpitude of his conduct has made it probable that he would not regard the obligation of an oath, ought not to be received; and therefore it may be taken as a general rule, that no witness is competent to give evidence in a court of justice who has been convicted of any infamous crime. What is to be considered as an *infamous crime*, which will thus wholly render a witness incompetent; 2dly, in what manner the testimony of such a witness is to be objected to; and 3dly, by what means his competency may be restored, will be more properly considered hereafter.

Disqualification, interest.

And, in the next place, the law will not receive the evidence of any person, even under the sanction of an oath, who has an *interest* in giving the proposed evidence, and consequently whose interest conflicts with his duty.

This rule of exclusion, considered in its principle, requires little explanation; it is founded on the known infirmities of human nature, which is too weak to be generally restrained by religious or moral obligations, when tempted and solicited in a contrary direction by temporal interests. There are, no doubt, many whom no interested motive could seduce from a sense of duty, and by their exclusion this rule may, in particular cases, operate to shut out the truth. But the law must prescribe general rules; and experience renders it probable that more mischief would result from the general reception of interested witnesses than is occasioned by their general exclusion. The principle is sufficiently obvious; its application frequently difficult. The very extensive operation of this principle will afterwards be considered in all its different bearings; it remains at present to sketch the outline of its general and immediate consequences.

Disqualification by interest—necessity for defining the rule.

The necessity for defining and limiting the extent of the operation of this principle is an immediate consequence of its adoption, both for the sake of certainty in its application, and also to prevent its operating too largely in the exclusion of evidence, which would be productive of great inconvenience. Hence the law defines the kind of interest which shall exclude; it must be a *legal interest* in the event, as contra-distinguished from affection, prejudice or bias. Here the law draws the line of distinction, which must be drawn somewhere, and which would exclude too much of the means of discovering the truth, were it to incapacitate every witness who from kindred, friendship, or any

other strong motive by which human nature is usually influenced, might be suspected of partiality. Hence, although a man and his wife cannot give evidence for each other (*m*), (for their interests are in law identical), yet no other degree of relationship or connection in society, whether natural or artificial, will incapacitate the parties from giving evidence for each other. A father is a competent witness for his son (*n*), and the son for the father; the guardian and his ward, the master and his servant, may mutually give evidence for each other (*o*).

This rule reasonable.

It is no fair ground of objection, that the law excludes a witness who is interested in the event to the smallest pecuniary extent, and yet admits those who, influenced by the strongest ties of natural affection, lie under a much greater temptation to deceive. Is any exclusive rule necessary? Assuming that the law properly recognizes such a test, and that the exclusion of a witness actually interested in the event is in some cases necessary, the law must exclude all such witnesses, however trifling the amount of that interest may be; for a general rule must be laid down; and as it is impossible to define what extent or degree of interest shall incapacitate a witness, the necessary consequence of recognizing this principle is, to exclude all who are so interested to any extent (*p*). Now what would be the consequence of extending the rule to cases where the witness is influenced by the ties of blood, or of friendship, or by any other of the relations which exist in society? Where is the line to be drawn? If a father cannot be admitted as a witness for his son, must not the same principle exclude the testimony of a brother in favour of a sister; and if so, why not that of an uncle for his nephew, or of one intimate friend for another? and where is the line of exclusion to be drawn? Would it be possible to define the particular degree of influence or bias which would render the witness incompetent? If that were not,

(*m*) Nor against each other, as will be seen, on grounds of policy.

(*n*) The application of the principle by the civil law was much more strict, and mutually excluded father and son, patron and client, guardian and ward, from giving evidence for each other; a servant or other dependent was also incompetent to give evidence for his master, and the testimony of a friend or enemy was regarded with great jealousy. Pand. lib. 22, tit. 5, s. 140.

(*o*) For the application of this rule, see tit. INTEREST.

(*p*) See, however, the observations of Best, L.C.J. in *Hovill* v. *Stephenson*, 5 Bing. 497; and *infra*, tit. INTEREST.

Exclusion by interest.

as it is, an insuperable difficulty, it would be inconsistent and unreasonable to assign an arbitrary limit not co-extensive with the operation of the principle itself. If, on the other hand, all who labour under influence, prejudice or bias, were to be excluded, the consequence would be that the rule would be too vague and indefinite to be put in practice; of which any one may easily convince himself, who attempts to conceive the extent of its operation, and the infinity of motives and prejudices which arise out of human affairs, gradually diminishing from the most potent by slight shades whose boundaries are imperceptible, and which become at last so faint and weak as to leave the mind in doubt where the operation of the principle terminates. No inconsistency, therefore, in this respect, is attributable to the law, as admitting more suspicious evidence than that which it rejects. The law excludes *all* who have an actual legal interest in the event, however minute that interest may be; because it must exclude all or none; but it does not exclude those who labour under a mere influence, because it cannot lay down any rule short of excluding all who are influenced or prejudiced; and this rule is impracticable from its ambiguity and extent. The difficulty arises from the general and extensive nature of human motives and prejudices, which exclude any definite limitation; and it is no fair ground of objection to the law, that it lays down one rule which is essential to the pure administration of justice, and is capable of practical application, and does not lay down another which would be impracticable and mischievous.

Reasonableness of this distinction.

There is another strong reason of a practical nature for making this distinction: where the legal interest in the event is small, although it must, as long as it exists, exclude the testimony, yet it may in most instances be removed by means of a release, or by payment; but partiality or influence, arising from natural affection or friendship, admits of no release.

Nature of the interest.

What constitutes a legal interest in the event of a cause, will be hereafter fully considered (*p*); it may, however, be stated generally, that it must either be a *direct and certain* interest in the event of the cause, or an interest in *the record* for the purposes of evidence. The law considers it to be more safe to admit the evidence where there is a doubt, than to exclude it altogether; for on the one hand, the rejection is peremptory and absolute; on the other, if the witness be received, it is still

(*p*) See tit. WITNESS—INTEREST.

for the jury to consider what credit is due to his testimony, taking into consideration all the circumstances of the case, and the motives by which he may be influenced. Hence it is the inclination of the courts, that objections of this nature should go to the *credit* of the witness rather than to his *competency*; and they will not wholly exclude a witness from giving evidence, unless he would be immediately and directly affected by a result contrary to the tendency of his testimony, or unless he has an immediate interest in the record. It is of the highest importance that a fundamental rule of this nature, which is so extensive in its operation, should be simple, and easy to be applied in practice; a very sufficient reason for confining it to cases where the interest is certain and immediate, and not permitting it to operate where it is contingent, remote and dubious the uncertainty of such a rule would be productive of infinite contention; the evil would be certain, the advantage doubtful. The law, therefore, never excludes testimony unless the interest of the witness be direct and certain. It must, however, be recollected that in all cases, even where the witness is strictly competent, the degree of credit which he deserves is always a question for the peculiar consideration of the jury, who are to form their judgment as to his veracity, from his demeanour, his situation, and all the surrounding circumstances. Nature of the interest.

Two classes of cases are here to be noticed where a witness is competent, notwithstanding his interest. 1st. Where the witness has previously, and with a view to deprive a party of the benefit of his testimony, or even wilfully and wantonly, acquired an interest in the event; for this is to be considered as a species of fraud upon the individual or the public, who had an interest in his testimony. 2dly. There is a class of cases where the law admits the testimony of an interested witness, on the ground of the *necessity* of the case, and where, in the common course of human affairs, if the witness were to be considered as incompetent, a failure of justice would result from defect of testimony. These exceptions, however, are rare, and seem to be confined to the case of a servant who transacts his master's business, and who in the usual course of affairs is the only person who can give evidence for his master; and to a person who brings an action against the hundred under the statute to recover the value of the property of which he has been robbed; for here, from the very nature of the case, it is highly improbable that he should be able to adduce any witness to prove the robbery. It is not sufficient that the inability to procure evidence should result from Exceptions.

the circumstances of a particular case, for that would amount to little short of the destruction of the general rule; the necessity must arise from a general presumption arising from the nature of the case, that in the common course of human affairs there will be a defect of evidence and a failure of justice, unless such evidence be admitted. Since the benefit of such testimony is purchased at the price of a departure from a most beneficial and fundamental rule, it is not probable that the courts would be willing to extend this class of exceptions.

Operation of this excluding principle.

The operation of this excluding principle is not confined to the mere rejection of interested witnesses, but also excludes all written evidence which proceeds from an interested source. Hence the deposition of one who, being interested, could not have been examined as a witness, cannot be read; and this seems to be one principal reason for rejecting, in a civil action, a record in a criminal proceeding, as proof of the fact found by the verdict in the criminal proceeding: for the verdict on the trial of the indictment may have been procured by the evidence of the party who seeks to avail himself of it in the action, and therefore to admit such evidence would virtually be to allow the party to give evidence in his own cause. So that if *A.* indict and convict *B.* of an assault, and afterwards bring an action against him to recover damages for the same injury, the record of the conviction would not be admissible to prove the assault, since that conviction may have resulted entirely from the credit given to *A.*'s testimony (*p*).

Obligation of an oath.

The first great safeguard which the law provides for the ascertainment of the truth in *ordinary* cases, consists in requiring all evidence to be given under the sanction of an oath. This imposes the strongest obligation upon the conscience of the witness to declare the whole truth that human wisdom can devise; a wilful violation of the truth exposes him at once to temporal and to eternal punishment.

A judicial oath may be defined to be a solemn invocation of the vengeance of the Deity upon the witness, if he do not declare the whole truth, as far as he knows it (*q*).

What belief is necessary.

Hence it follows that all persons may be *sworn* as witnesses who believe in the existence of God, in a future state of rewards and punishments, and in the obligation of an oath, that is, who believe that Divine punishment will be the consequence of per-

(*p*) See tit. JUDGMENT, &c. and Gilb. L. E. 31.

(*q*) Est autem Jusjurandum religiosa adseveratio per invocationem Dei tanquam vindicis, si juratus sciens fefellerit. Heineccius, pars 3, s. 13.

jury; and therefore Jews (*r*), Mahometans (*s*), Gentoos (*t*), or, in short, persons of any sect possessed of such belief, are so far competent witnesses (*u*). Hence also it follows, that children who are too young to comprehend the nature of an oath (*w*), and adults, who, from mental infirmity or for want of instruction, do not understand this solemn obligation, or who do not believe in the existence of a Deity, or in a state where that Deity will punish perjury (*x*), cannot be admitted as witnesses; since in all these cases, either from want of understanding, or want of belief, that obligation to speak the truth is wanting which the law has appointed on such occasions as an indispensable security.

Form of an oath.

As the object of the oath is to bind the conscience of the witness, it follows that some form of swearing must be used which the witness considers to be binding (*y*); and therefore every witness is now (*z*) sworn according to the form which he holds to be the most solemn, and which is sanctified by the usage of the country or of the sect to which he belongs. A Jew is sworn upon the Pentateuch (*a*), and a Turk upon the Koran (*b*); so it has been held that a Scotch covenanter (*c*) may be sworn accord-

(*r*) It was held that Jews might be sworn on the Pentateuch, previous to their expulsion from England; *i. e.* before the 18 Ed. 1, when they were first expelled from the kingdom. *Wells* v. *Williams*, 1 Lord Raym. 282; Vernon, 263; Cowp. 389. See Seld. tom. 2, fol. 1467, as to the form of swearing a Jew, temp. Ed. 1.

(*s*) *Fachina* v. *Sabine*, Str. 1104; *Morgan's Case*, Leach, 52; 2 Hawkins, c. 46, s. 152. *Omichund* v. *Barker*, 1 Atk. 21; 1 Wils. 84. *Rex* v. *Taylor*, Peake, 11.

(*t*) *Ramkissensent* v. *Barker*, 1 Atk. 19.

(*u*) According to some, swearing on the New or Old Testament was held to be essential; 2 Haw. c. 46, s. 148; but this idea has been exploded. See Atk. 21; 2 Hale, 279; Cowp. 390.

(*w*) Vide *supra*; and see East's P. C. 441; and *R.* v. *Powell*, Leach's C.C.L. 128. 237.

(*x*) An Atheist is not competent. B. N. P. 262. *Rex* v. *White*, Leach's C. C. L. 483. *Lee* v. *Lee*, 1 Atk. 43. 45. Co. Litt. 6. 2 Inst. 479; 3 Inst. 165; 4 Inst. 279; Fleta, b. 5, c. 22. Bract. 116. See *Rex* v. *Taylor*, Peake, Ca. Ni. Pri. 11, where Buller, J. held that the proper question to be asked of a witness is, whether he believes in God, the obligation of an oath, and in a future state of rewards and punishments.

(*y*) On the principles of common law no particular form is essential to the oath. Cowp. 389. *Dutton* v. *Cole*, 2 Sid. 6.

(*z*) It was formerly doubted whether the oath must not be taken on the Old or New Testament; 2 Hale, 279; but it is now settled that it need not. 1 Atk. 21; 2 Eq. Ab. 397; 1 Wils. 84; Cowp. 390,

(*a*) Cowp. 389; 1 Lord. Raym. 282.

(*b*) *Fachina* v. *Sabine*, Str. 1104. *Morgan's Case*, Leach, C. C. L. 64.

(*c*) Per Lord Mansfield, Cowp. 390. *Rex* v. *Mildrone*, Leach C. C. L. 459. *Mee* v. *Read*, Penke's Ca. Ni. Pri. 23. *Rex* v. *Fitzpatrick*, Leach, 459;

ing to the form of his sect, by holding up his hand without kissing the book (*d*).

Oath must be judicial.

The testimony must be sanctioned, not merely by an oath, but by a judicial oath, in the course of a regular proceeding, administered by an authorized person; for if the oath were extra-judicial, the witness could not be punished for committing perjury under that oath; and therefore one of the securities for truth which the law has provided would be wanting. Hence, although every other legal requisite may concur to render what a party has sworn admissible, and although the fullest opportunity has been afforded to the opposite party to cross-examine the witness, yet if the oath was extrajudicial, the testimony given under it is not admissible. A further objection to such evidence is, that the party against whom it was offered was not bound to notice it, and he ought not to be placed in a worse situation by omitting to make himself a party to an extrajudicial and illegal proceeding. This doctrine, and the minor distinctions arising upon it, will be more fully discussed hereafter, when the different cases relating to the reception of judicial proceedings in evidence are considered; for the present, it may suffice to observe, that it is a general rule that testimony given under an oath merely extrajudicial, cannot afterwards be admitted in evidence, for the reasons already stated.

Declaration by a party in extremis.

There are two exceptions to the general rule: the case of declarations made by a person under the apprehension of impending dissolution, and the exception introduced by the express provision of the Legislature in favour of the religious scruples of Quakers. The principle upon which the first of these exceptions stands is very clear and obvious; it is presumed that a person who knows that his dissolution is fast approaching, that he stands on the verge of eternity, and that he is to be called to an immediate account for all thet he has done amiss, before a Judge from whom no secrets are hid, will feel as strong a motive to declare the truth, and to abstain from deception, as any person who acts under the obligation of an oath. The exception in favour of Quakers, formerly confined to civil, has lately been extended to criminal proceedings (*e*). The rank or age of the party in no

Affirmation by a Quaker.

2 Sid. 6. *Dutton* v. *Cole*. When Lord Hardwicke was desired to appoint a form for swearing the Gentoos, he said that it was improper, and that it must be taken according to the form which they held to be most solemn. *Ramkissensent* v. *Barker*, 1 Atk. 19.

(*d*) The form of the oath taken by those who matriculate in the University of Cambridge differs from the common form; the words, instead of "So held you God," being "Sic te adjuvet Deus et sancta Dei Evangelia."

(*e*) 9 G. 4, c. 15.

case forms an exception. A peer of the realm cannot give evidence without being sworn (*f*), and will incur a contempt of court if he refuses to be sworn (*g*). It is now settled that the testimony of a child cannot be received except upon oath (*h*), although the contrary practice once prevailed (*i*).

Witnesses for prisoners are now to be sworn.

Formerly, the general rule did not extend to the witnesses examined on behalf of prisoners charged upon an indictment (*j*) with felony or treason (*k*); an exception which certainly was not founded in principle, and which was reprobated by Lord Coke (*l*). The statute 4 Jac. 1, c. 1, directed, that upon the trial of offenders in the three northern counties, for offences committed in Scotland, the defendants' witnesses should be examined upon oath; and a like provision was made by the stat. 7 Will. 3, c. 3, in all cases of treason which worked corruption of blood. The exception was finally and generally abolished by the stat. 1 Ann. c. 9, s. 3, which directed that the witnesses for the prisoner should be sworn in *all cases*.

It will presently be seen under what circumstances evidence is admissible, though it want the sanction of an oath.

Test of cross-examination.

And next, the power given to the party against whom evidence is offered, of *cross-examining* the witness upon whose authority the evidence depends, constitutes a strong test both of the ability and of the willingness of the witness to declare the truth. By this means, the opportunity which the witness had of ascertaining the fact to which he testifies, his ability to acquire the requisite knowledge, his powers of memory, his situation with respect to the parties, his motives, are all severally examined and scrutinized.

(*f*) *Rex* v. *Lord Preston*, Salk. 278.

(*g*) Ibid. And it has been said that the same rule applies to the Sovereign himself; 2 Rol. Abr. 686; Hob. 213; but in the time of Ch. 1 the question was not allowed to be agitated. 1 Parl. Hist. 43. See 3 Woodeson, 276, Com. Dig. Testmoigne, A. 1.

(*h*) *Rex* v. *Brasier*, Leach, C. C. L. 3d ed. 237; Ib. 128. And see the cases, East's P. C. 441; and post. tit. INFANT. But in some cases, where a child, from ignorance of the obligation of an oath, cannot be sworn, the Court will put off the trial, to afford an opportunity of instructing the child.

(*i*) The Court should hear the information of children not of discretion to be sworn, without oath. 1 Hale, H. P. C. 634; 2 Hale, H. P. C. 279. 284. But Lord Hale adds, that such testimony is not sufficient of itself. 1 Hale, H. P. C. 634.

(*j*) But the evidence for a defendant upon an appeal, or on an indictment or information for a misdemeanor, was always on oath. 1 Sid. 211. 325.

(*k*) 2 Hale, 283; 2 Bulst. 147. *Rex* v. *Throgmorton*, State Tr. 1 M.; Haw. c. 36. *Rex* v. *College*, 3 Inst. 79; 4 State Tr. 178; Cro. Car. 292.

(*l*) 3 Inst. 79. The practice was derived from the civil law. 4 Bl. Com. 352.

Test of cross-examination.

It is not intended in this place to enter into a detail of the numerous consequences which follow from the adoption of this test (*m*). It may be observed, generally, that it operates to the exclusion of all that is usually described as *res inter alios acta*; that is, to all declarations and acts of others which tend to exclude or affect the rights of a mere stranger.

Thus the depositions of witnesses before magistrates, under the statutes of Phil. & Mary, and the late stat. 7 Geo. 4, c. 64, are not admissible against the accused, unless he has had an opportunity to cross-examine those witnesses.

The voluntary affidavit of a stranger is not evidence against one who had not the power to cross-examine him (*n*). An answer in chancery is not evidence against one who neither was a party to the suit, nor claims in privity with a party who had the opportunity (*o*). And, in general, the mere act, declaration or entry of a stranger, as to any particular fact, is not evidence against any other person (*p*), so as to conclude him.

To satisfy this principle, it is not necessary that the party on whose authority the statement rests should be present at the time when his evidence is used, in order that he may then be cross-examined; it is sufficient if the party against whom it is offered has cross-examined, or has had the opportunity, having been legally called upon to do so when the statement was made. Hence it is that examinations or depositions taken in a cause or proceeding between the same parties are evidence, the witnesses or deponents being dead; for in such case the party has had, or might have had, the benefit of a cross-examination. With respect to these classes of cases, it is worthy of notice, that if the party might have had the benefit of a cross-examination in the course of a judicial proceeding, it is the same thing as if he had actually availed himself of the opportunity. It is also to be observed, that if the examination or deposition was taken in the course of an extrajudicial proceeding, it will not afterwards be admissible in evidence, although the witness be since dead; because the party against whom the evidence is offered was under no obligation to pay any attention to it (*q*).

(*m*) See tit. JUDGMENTS—DEPOSITIONS.

(*n*) Bac. Ab. Ev. 627; Sty. 446; Bac. Ab. Ev. 628. And see *Rex* v. *Erith*, 8 East, 539. *Sir John Fenwick's Case*, Obj. 4. 5 State Tr. 69.

(*o*) Hardres, 315.

(*p*) See Index, tit. RES INTER ALIOS.

(*q*) See tit. RES INTER ALIOS—JUDICIAL PROCEEDINGS, &c.

This test of truth not only excludes evidence of mere hearsay, for there the party on whose authority the statement rests cannot be cross-examined; but also decrees and judgments in private matters, in causes to which the party against whom they are offered was not privy, and consequently where he had not the opportunity to cross-examine the witnesses on whose testimony the judgment or decree was founded. For since it would be dangerous to admit the testimony of a witness given upon a former occasion, where the party to the present cause had no opportunity to cross-examine him, it would be equally so to admit the judgment or decree which is founded upon that testimony; it would be indirectly giving full effect to evidence which is in itself inadmissible. Excludes hearsay evidence.

It is, however, to be observed that there is one class of cases where decrees or judgments are evidence against a party, although he was not actually privy to the proceeding or suit in which the judgment or decree was pronounced. This happens where the suit or proceeding does not relate to a mere private transaction between individuals or particular parties, but to some more public subject-matter beyond the mere rights of the litigants, in which the public possess an interest. It will be necessary hereafter to consider these cases with some minuteness; for the present, it may suffice to advert to them generally, and briefly to state the principle on which such evidence is admissible; and how far it is inconsistent with the general and ordinary rule, that a party is not to be affected either by any testimony or judgment founded upon that testimony, where he has not had an opportunity to cross-examine the witness and to controvert his testimony. In many instances a court possesses a jurisdiction which enables it to pronounce on the nature and qualities of particular subject-matter, where the proceeding is, as it is technically termed, *in rem*: as where the Ordinary or the Court Christian decides upon questions of marriage or bastardy; or the Court of Exchequer upon condemnations; or the Court of Admiralty upon questions of prize; or a court of quarter sessions upon settlement cases. Decisions of this nature, as will be seen (*r*), are for the most part binding and conclusive upon all the world. At present it is to be observed, in the first place, that this class of cases is scarcely to be considered as an exception to the general rule; because, in most instances, every one who can possibly be affected by the decision may, if he chuse, be admitted to assert his rights to cross-examine and to

(*r*) See JUDGMENTS, &c. IN REM.

controvert by evidence. But, secondly, if this class of cases is to be considered as forming an exception to the general rule, it is a necessary exception, since in such cases a final adjudication is absolutely essential to the interests of society, which require that the subject-matter should be settled and ascertained, and cannot bear that such questions should be left in a precarious, doubtful and fluctuating state. For example: the Spiritual Court has an immediate and direct jurisdiction upon the validity of marriages; a jurisdiction which involves questions of the greatest importance to society in general—rights of property—questions of bastardy—and even criminal liabilities. It is therefore obviously essential to the existence of such a jurisdiction for useful and beneficial purposes, that its adjudication upon the subject-matter should be binding upon all; it would be in vain that a sentence of nullity of marriage should be pronounced in a spiritual court, if the marriage could still be considered in courts of law to exist as to all the legal rights and consequences of a valid marriage; and it would produce infinite inconvenience and confusion, if the same marriage could be considered as existing for some purposes, but not as to all; not to mention the great evil of permitting interminable litigation on the same question, which would be left open to dispute as often as the fluctuation of times and of circumstances introduced new interests, and brought fresh litigants into the field.

Exception. Dying declaration.

There is another exception to the general rule, in the case where a declaration made by a person in *extremis*, and under the apprehension of approaching dissolution, is received in evidence; for such declarations are admitted to be proved, although the party against whom they are offered was not present, and therefore had not an opportunity to cross-examine and elicit the whole of the truth. But as this is an exception to a rule which is in general to be considered as absolutely essential to the ascertainment of truth, it is to be received with the greatest caution, and is never admitted unless the Court be first satisfied that the party who made the declaration was under the impression of approaching death. It has indeed been said, that the depositions of witnesses taken *in the absence of the prisoner* before justices of the peace, and before coroners, by virtue of the statutes 1 & 2 Philip & Mary, c. 10, and 2 & 3 Philip & Mary, c. 13, are admissible in evidence against the prisoner after the death of the deponent; but it seems now to be settled that such depositions before justices are not admissible, unless the prisoner

was present, and had the benefit of cross-examination (*s*); and depositions taken by coroners, under the same statutes, seem to stand upon the same foundation. This subject will afterwards be more fully considered in its proper place; it must be recollect that at present the object is to consider the general operation of this principal test of truth established by the law. How far reputation and tradition are to be looked upon as exceptions to this general rule will afterwards be considered (*t*).

Thus far as to the immediate testimony of witnesses as to facts within their own actual knowledge, under the obligation of an oath, and subject to cross-examination.

Mediate testimony.

Next, as to the admissibility of evidence derived not immediately from those who have, or are supposed to have actual knowledge of the fact, but mediately through the testimony of one or more other witnesses (*u*).

Original or secondary.

Such mediate testimony is in some particular cases to be regarded as *original* evidence; but in general it is of so inferior and *secondary* a nature as to be admissible only in cases of urgency, on the failure of better evidence, and under the sanction of particular circumstances, which warrant its admissibility.

In the first place, such evidence is in some instances admissible originally, and without any proof of the failure of better evidence. Thus general reputation is in many instances receivable, although it may rest on no other foundation than what the witness may have heard from others (*x*).

Reputation.

General reputation is the general result or conclusion formed by society as to any public fact or usage, by the aid of the united knowledge and experience of its individual members: such a general concurrence and coincidence of opinion on facts known to many, affords a reasonable degree of presumption that their conclusion is correct; and therefore in particular cases, where the fact is of a public nature, general reputation is admissible evidence to prove it. But as it could not be necessary, and otherwise would not be practicable, to examine the whole body of society as to the pre-

(*s*) See tit. DEPOSITIONS.

(*t*) There are also some exceptions which have been introduced by, and which wholly depend upon, particular statutes; but as these are mere arbitrary exceptions, unconnected with general principles, they need not be noticed here.

(*u*) Or by the writing of the original witness, for both must depend on the same principle; the only difference is that writing is the surer medium.

(*x*) Reputation is sufficient evidence of marriage, although the parties are still alive, and the party seeks to recover as heir-at-law. *Dier* v. *Fleming*, 4 Bing. 1266. See tit. CUSTOM—MARRIAGE—PEDIGREE—PRESCRIPTION.

General reputation.

valence of general reputation on any particular fact, it is sufficient to call individual witnesses, a portion of society, who can, under the sanction of an oath, and subject to cross-examination, pledge their personal knowledge that such reputation exists.

It is observable that such evidence can scarcely be considered as forming an exception to the general rule which requires the sanction of an oath and the opportunity to cross-examine; for the witnesses are called to prove what they actually know, viz. that such a reputation exists: they are sworn and subject to cross-examination, and the very nature of such evidence excludes any more solemn sanction.

The particular subjects to which such evidence is applicable requires further consideration.

It is to be observed that many facts, from their very nature, either absolutely or usually exclude direct evidence to prove them, being such as are in ordinary cases imperceptible by the senses, and therefore incapable of the usual means of proof. Among these are questions of pedigree or relationship, character, prescription, custom, boundary, and the like. Such facts, some from their nature, and others from their antiquity, do not admit of the ordinary and direct means of proof by living witnesses; and, consequently, resort must be had to the best means of proof which the nature of the cases affords. Now the knowledge of facts of this description consists either in the knowledge and recollection of that part of society which has had the means of observing them, or in the traditionary declarations of those who were likely to have possessed a knowledge on the subject, derived either from their own observation, or the information of others; or, lastly, in questions of skill and judgment, the knowledge of the relation must be derived from those who are possessed of the proper qualifications for forming a conclusion on the subject. The character of a particular individual in society is formed by society from their experience and observation of the conduct of the individual; and here reputation is not so much a circumstance from which the character of the individual is to be presumed, as the very fact itself, proved by the direct evidence of witnesses who constitute part of that society. The knowledge of the existence of a particular public custom does not reside peculiarly in the breast of any one individual whatsoever, but in the opinion and conclusions which society, or some indefinite part of it, have collected from actual observation and experience.

Pedigree.

In cases of *pedigree*, the nearest relation, even that of parent and child, can seldom be proved, after the death of the parents,

by direct evidence; and no knowledge upon the subject exists except that which is inferred from circumstances, or derived from the hearsay testimony of those who, from their intimacy with the family, possessed peculiar means of knowledge. The circumstance that the parents cohabited as husband and wife, acknowledged and addressed each other in society as such; that they recognized and educated children as their own, and introduced them to the world on a variety of occasions as their legitimate offspring; that a pedigree was hung up in the family mansion, stating the different degrees of relationship of the members of the family; that similar entries were made in a family bible; that a monument or tombstone was exhibited to the public, announcing a relation between the deceased and the surviving, or deceased and late, members of a family; all such circumstances are either strictly facts, or are solemn and deliberate declarations accompanying facts, and partaking of the nature of facts, which, in the absence of all suspicion of fraud, afford the strongest presumptions that the parties really did stand in the relative situation of husband and wife, parents and children; for it is improbable that such circumstances should have been acted with a view to deceive, particularly in a manner so open and public as to render the fraud liable to immediate detection. From such circumstances the belief is formed, by those who are acquainted with the family, and a *reputation* obtains in society that they are so related; for reputation seems to be no more than hearsay, derived from those who had the means of knowing the fact. Hence it is that the reputation may exist when those who were best acquainted with the fact are dead; and that such reputation and even traditionary declarations become the best, if not the only, means of proof; and when they are derived from those who were most likely to know the truth, and who lay under no bias or influence to misrepresent the fact, they afford a fair and reasonable presumption of the truth of the fact.

Reputation in case of pedigree.

Again: upon questions of fact, to which antiquity is essential, as of prescription, custom and boundary, (and also of pedigree, where the relationship is to be traced through a remote ancestor,) the evidence of living witnesses is of little avail, except as to the observance of the right, privilege or obligation, in modern times; for any knowledge concerning such rights, drawn from times more remote, recourse must be had to reputation and tradition; such evidence requires to be supported by proof of the enjoyment of such rights and privileges, and of acquiescence in them in more recent times.

Ancient facts.

Presumptions, why founded on reputation.

On these grounds, therefore, general reputation is admissible evidence, as affording presumptions upon which juries are to exercise their discretion in cases of this nature. Such instances have, it seems, been regarded as anomalous, and as forming exceptions to the general rule which has already been noticed, viz. that mere naked declarations are too vague, uncertain and fallacious, to afford sufficient presumptions for the consideration of a jury (*y*). Such evidence is at all events warranted by the necessity of the case. The particular objection which excludes mere hearsay in general does not apply to those cases which are of a public nature, which may be presumed to be matters of public notoriety, as in the instances of public prescriptions and customs.

Reputation, in what cases evidence.

Hence, therefore, common reputation is evidence to prove, 1st, a man's character in society (*z*); 2dly, reputation and (as will afterwards be seen) traditionary declarations are evidence to prove a pedigree, including the state of a family as far as regards the relationship of its different members, their births, marriages and deaths; 3dly, reputation and traditionary declarations are evidence to prove certain prescriptive or customary rights and obligations, and matters of public notoriety. But it seems, that inasmuch as the reception of such evidence is founded upon the supposition that the persons from whom it is derived possessed the means of knowledge; and since such evidence is in its own nature very weak, unless it be supported by other circumstances (*a*), the following sanctions appear to be necessary to warrant a presumption from such evidence.

1. The facts must be of a public nature.

First, In order to warrant such a presumption, the fact to which the reputation or tradition applies, must in general be of

(*y*) Per Lord Ellenborough, C. J. The admission of hearsay evidence upon all occasions, whether in matters of *public* or *private right*, is somewhat of an anomaly, and forms an exception to the general rules of evidence. And his Lordship afterwards observed, "I confess myself at a loss fully to understand upon what principle, even in matters of public right, reputation was ever deemed admissible evidence. It is said, indeed, that upon questions of public right all are interested, and must be presumed conversant with them; and that is the distinction taken between public and private rights; but I must confess that I have not been able to see the force of the principle on which this distinction is founded, so clearly as others have done, though I must admit its existence." *Weeks* v. *Sparke*, 1 M. & S. 686.

(*z*) See tit. CHARACTER.

(*a*) 1 M. & S. 687. Reputation is, in general, weak evidence; and when it is admitted, it is the duty of the Judge to impress upon the minds of the jury how little conclusive it ought to be, lest it should have more weight with them than it ought to have. Per Lord Ellenborough, 1 M. & S. 686.

a *public* nature; for otherwise it cannot be presumed that the persons from whom the knowledge is derived possessed the means of knowledge, or if they did possess the means, that their attention and observation were attracted to it; and therefore such evidence is admissible in cases of character, public prescriptions, and customs relating to manors (*b*), parishes, and of rights of common, and public boundaries and highways (*c*). Such evidence is also received with respect to the existence of a modus (*d*), because, although it is in strictness a private right, yet it affects a great number of occupiers within a district (*e*). Of a public nature.

So where the defendant in trespass pleaded a prescriptive right of common over the *locus in quo*, at all times, for his cattle levant and couchant, and the plaintiff, in his replication, prescribed in right of his messuage to use the *locus in quo* for tillage with corn, and until the taking in of the corn to hold and enjoy the same in every year, and traversed the defendant's prescription, on which issue was joined, it was held (*f*) that many persons besides the defendant having a right of common over the *locus in quo*, evidence of reputation, as to the right claimed by the plaintiff, was admissible, a foundation having been first laid, by evidence of the enjoyment of such right. But it seems to be now settled, although the question was long *sub judice*, that general evidence of reputation is not admissible in the case of a private prescription or other claim. In the case of *Morewood* v. *Wood* (*g*), the question was, whether general evidence of reputation as to a prescriptive right of digging stones on the lord's waste, annexed to a particular estate, was admissible; and the Judges were divided upon it (*h*). In *Outram* v. *Morewood* (*i*), Lord Kenyon said, "that although a general right might be proved by traditionary evidence, a particular fact could not." There the question was, whether Cow Close had been part of the estate of Sir J. Zouch,

(*b*) *Barnes* v. *Newsom*, 1 M. &. S. 77.

(*c*) 1 M. & S. 686. See tit. CUSTOM—PRESCRIPTION, &c.

(*d*) 2 Vez. 512. Gwill. 854.

(*e*) Per Dampier, J. 1 M. & S. 691; see tit. TITHES.

(*f*) *Weeks* v. *Sparke*, 1 M. & S. 691.

(*g*) 32 G. 3, B. R. 15 East, 327, in note.

(*h*) Lord Kenyon, and Ashurst, J., who were for rejecting the evidence, were of the Oxford circuit, on which such evidence had usually been rejected; and Buller and Grose, Js., deemed it admissible, in conformity with the practice of their own, the western circuit. Report is not evidence to prove private rights. Per Lord Kenyon, 2 East, 357. Report is evidence to prove reputed ownership of goods, if supported by facts. *Oliver* v. *Bartlett*, 1 B. & B. 269.

(*i*) 5 T. R. 123.

Of a public nature.

out of which certain rents and coals had been reserved; and the Court held that the fact could not be proved by entries made by a third person deceased, in his books of receipts of rents from his tenant, such entries being considered as no more than a declaration of the fact by such third person; which was different from entries by a steward, who thereby charged himself with the receipt of money. In *Doe* v. *Thomas* (*k*), where in an action of ejectment the lessor of the plaintiff claimed as tenant in tail under the will of *A.* who gave *B.* his son an estate for life, and the defendant claimed as the devisee of *B.*, the question was, whether the land in dispute was part of the entailed estate, or had been purchased by *B.*; it was held that evidence of reputation that the land had been purchased of *J. S.* by *A.* was inadmissible (*l*). And although traditionary reputation is evidence of boundary between two parishes and manors (*m*), it is not evidence of boundary between two private estates (*n*). Upon the principle that it is a matter of general and public notoriety, a particular historical fact may, as it seems, be proved by reputation of the fact, and (as falling within the scope of such evidence) by a generally received historical account of it (*o*).

2. Must be general.

2dly. Neither reputation nor traditionary declarations are admissible as to a particular fact (*p*). Evidence of reputation upon general points is receivable, because all mankind being interested in them, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them (*q*), all having the same means of information; but this does not apply to particular facts, which may not be notorious, which may be misrepresented or misunderstood, and which may have been connected with other facts by which their effect would be limited and explained. Such evidence would obviously be open to all the uncertainty, and liable to all the objections,

(*k*) 14 East, 323.

(*l*) In the *Bishop of Meath* v. *Lord Belfield*, B. N. P. 295, it was held that evidence of reputation was admissible, in *quare impedit*, to prove that one Knight had been in by the presentation of one from whom the defendant claimed. But in *R.* v. *Eriswell*, 3 T. R. 723, Lord Kenyon denied that this case was law.

(*m*) *Nicholls* v. *Parker*, Ex. Summer Ass. 1805, cor. Le Blanc, J., Taunt. 1795; *R.* v. *Parish of Hammersmith*, Sitt. after Hil. 1776; *Down* v. *Hale*, cor. Lawrence, see 14 East, 331. Peake's Ev. App. 33; *Ireland* v. *Powell*, Salop S. Ass. Peake's Ev. App. 33.

(*n*) *Clothier* v. *Chapman*, 14 East, 331, in the note.

(*o*) B. N. P. 248; 1 Salk. 282; 1 Vent. 151; Skinn. 14. 623.

(*p*) Per Lord Kenyon, *Outram* v. *Morewood*, 5 T. R. 123.

(*q*) Per Lord Kenyon; see *Morewood* v. *Wood*, 14 East, 339.

incident to mere hearsay evidence, and is therefore of too slight a nature to support any presumption. And therefore, upon a question of modus, evidence of the declaration of an old person, since deceased, that so much per acre had always been paid in lieu of tithes, would be good evidence as to reputation; but a declaration by such a person that he paid so much in lieu of tithes would not be admissible, since it is a particular fact (*r*). So in those cases where evidence of perambulations is admitted, it is in the nature of hearsay evidence, not of particular acts done, as that such a turf was dug, or such a post put down in a particular spot; but it is evidence of the ambit of any particular place or parish, and of what the persons accompanying the survey have been heard to say and do on such occasions (*s*).

3. Must be supported by proof of acts of enjoyment.

3dly. If the reputation or tradition relate to the exercise of a right or privilege, it should be supported by proof of acts of enjoyment of such right or privilege within the period of living memory (*t*); and when that foundation has been 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 conversant with the neighbourhood where the right is claimed, of what they have heard other old persons, who were in a situation to know what the rights were, say concerning them (*u*).

Direct mediate.

Another class which falls within the description of direct mediate evidence, and which is admissible, though the usual tests are inapplicable, consists of declarations made by one of the parties to a suit, in the nature of a confession or admission contrary to his own interest. Whatever a party voluntarily admits to be true, though the admission be contrary to his interest, may reasonably be taken for the truth. The same rule it will be seen applies to admissions by those who are so identified in situation and interest with a party that their declarations may be considered to have been made by himself (*x*). As to such evidence the ordinary tests of truth are properly dispensed with; they are inapplicable: an oath is administered to a witness in order to impose an additional obligation on his conscience, and so to add weight to his testimony; and he is cross-examined to ascertain his means of knowledge, as well as his intention to speak the truth. But where a man voluntarily admits a debt or

(*r*) *Harwood* v. *Sims*, 1 Wightw. 112.

(*s*) Per Lord Ellenborough, 1 M. & S. 687.

(*t*) See the observations of the Judges in *Weeks* v. *Sparke*, 1 M. & S. 679, and of Grose, J. 5 T. R. 32.

(*u*) 1 M. &. S. 679; 14 East, 330; 12 East, 65.

(*x*) See Vol. II. tit. ADMISSIONS.

confesses a crime, there is little occasion for confirmation; the ordinary motives of human conduct are sufficient warrants for belief.

Declaration accompanying an act.

There is also another species of hearsay evidence which in some instances may be referable to this class. Where a declaration accompanies an act, it is frequently admissible as part of the act itself. Such declarations, it will be seen, are more frequently used as collateral or iridirect evidence from which some other fact is to be inferred, than as direct evidence of a fact; and as such will be afterwards considered. Suffice it to observe, for the present, that declarations are usually admissible where the fact which they accompany is material and admissible, and where the nature and quality of the act are also material; for in such instances a declaration accompanying the act may either be regarded as part of the act itself, or as the most proximate and satisfactory evidence for explaining and illustrating the fact.

Experience supplies a reasonable presumption that a declaration made by a person in doing an act, as to his intention and object, and where that person laboured under no temptation to deceive, was spontaneous, natural, and consistent with truth. The most usual example (*y*) adduced in illustration of this doctrine, is that of a declaration made by a trader, at the time of deserting his house or place of business, as to his intention and object in so doing, in order to prove an act of bankruptcy. Here it is observable the fact of departure is material: the question is as to the nature and quality of the act, that is, as to the object and intention of the trader in doing that act; and to prove this, the declaration which he made at the time of leaving his house or counting-house, are constantly admitted in proof of his design, as being natural and spontaneous indications of the truth, although his subsequent declarations even upon oath would be absolutely rejected.

These classes of mediate evidence are distinguishable from all others by this characteristic difference, that such evidence may be resorted to in the first instance as original evidence, whilst all other mediate testimony is admissible only on a principle of necessity, as SECONDARY evidence, after the failure of evidence of a higher and more satisfactory nature.

Secondary mediate testimony.

Next, as to such mediate testimony as is of a *secondary* description.

As information derived mediately through another person is in its own nature inferior in point of certainty to that which is de-

(*y*) See below, tit. WITNESS; Vol. II. tit. BANKRUPT.

rived immediately from an eye or ear witness (*z*), so, even in cases where the party from whom such testimony is derived delivered

(*z*) The highest degree of certainty of which the mind is capable, with respect to the existence of a particular fact, consists in a knowledge of the fact derived from actual perception of the fact by the senses; and even this degree of evidence is obviously capable of being strengthened or weakened by particular circumstances. It is seldom, however, that a jury can act upon knowledge of this description; it rarely happens that a fact which can be decided by mere inspection is submitted to their consideration. In some instances, however, an inspection by the jury conduces to their decision; where the question turns upon local situation a view is necessary. So the Judges, in cases of mayhem, act *super visum vulneris*; so a jury of matrons, upon a plea of pregnancy, inspect the person of the prisoner. The degree of evidence which ranks the second in the scale, consists of information derived, not from actual perception by our senses, but from the relation and information of others who have had the means of acquiring actual knowledge of the facts, and in whose qualifications for acquiring that knowledge, and retaining it, and faithfulness in afterwards communicating it, we can place confidence.

Information thus derived is evidently inferior, in point of certainty, to that knowledge which is acquired by means of the senses, since it is one step removed from the highest and most perfect source. The truth of the fact in question depends upon the powers of perception possessed by another; the opportunity afforded him of applying them; his diligence in making that application; the strength of his recollection, and his inclination to speak or to write the truth. It is, however, upon knowledge thus derived that juries must in general act; they must be informed of the *res gestæ* by those who have been eye and ear-witnesses of them; their means of knowledge, and their faithful communication of it, being guarded by the securest means which the law can devise. A third, and still inferior ground of belief, consists in information which we derive, not immediately from one who has had actual knowledge of the fact by the perception of his senses, but from one who knows nothing more of the fact than that it has been asserted by some other person: this species of evidence, which is generally termed hearsay evidence, is evidently inferior in point of certainty to the former, even for the common purposes of daily intercourse in society; for although the author of the assertion may be known, and his veracity highly appreciated, there is a greater latitude afforded for deception, mistake and misapprehension, and for defect of memory, and hence a degree of doubt must result, which must evidently be increased in proportion to the number of persons through whom the communication has been transmitted; and, consequently, where the author is unknown, and the number of intermediate parties who have acted in the transmission is also unknown, the knowledge must also be vague and uncertain, even as applied to the common affairs of life. But for the purposes of proof in a court of justice, a still stronger reason operates to the rejection of such evidence, namely, that it cannot be subjected to the ordinary tests which the law has provided for the ascertainment of truth, the obligation of an oath, and the opportunity afforded for cross-examination; for these, or equivalent ones, are the guarantees of truth, which the law in

Mediate testimony.

it under the sanction of a judicial oath, and although the party to be affected by it had the opportunity to cross-examine, yet the testimony so given would still be inferior in degree to the direct testimony of the same witness, and consequently such inferior evidence would be excluded by the general principle already adverted to, so long as the original witness could himself be produced.

But in ordinary cases, where the testimony formerly given consists of mere declarations, which rest principally, if not entirely on the credit of the party who made them, such evidence is of a still weaker and more imperfect description, not being sanctioned by either of the great tests of truth already mentioned. Hence the general rule of law is, that such evidence cannot be received except in particular instances where the necessity is urgent, and peculiar considerations sanction a departure from the general rule.

ordinary cases invariably requires. In the common course of life, evidence of this nature is frequently, nay usually, acted upon without scruple; but in the ordinary affairs of life there is, in general, no considerable temptation to deceive: on the contrary, a legal investigation of a fact, which involves the highest and dearest interests of the parties concerned—property, character, nay liberty, or life itself—presents the greatest possible temptations to deceive; and therefore that evidence which is admitted before a jury must be guarded and secured by greater restraints, and stricter rules, than those which are sufficient for the common purposes of life.

If it were to be assumed, that one who had been long enured to judicial habits might be able to assign to such evidence just so much and no greater credit than it deserved, yet, upon the minds of a jury unskilled in the nature of judicial proofs, evidence of this kind would frequently make an erroneous impression. Being accustomed, in the common concerns of life, to act upon hearsay and report, they would naturally be inclined to give such credit when acting judicially; they would be unable to reduce such evidence to its proper standard, when placed in competition with more certain and satisfactory evidence; they would, in consequence of their previous habits, be apt to forget how little reliance ought to be placed upon evidence which may so easily and securely be fabricated; their minds would be confused and embarrassed by a mass of conflicting testimony; and they would be liable to be prejudiced and biassed by the character of the person from whom the evidence was derived. In addition to this, since every thing would depend upon the character of the party who made the assertion, and the means of knowledge which he possessed, the evidence, if admitted, would require support from proof of the character and respectability of the asserting party; and every question might branch out into an indefinite number of collateral issues.

Upon these grounds it is that the mere recital of a fact, that is, the mere oral assertion or written entry by an individual that a particular fact is true, cannot be received in evidence.

Mediate secondary evidence.

Where a witness to facts might be produced and examined on oath, little doubt could be entertained that hearsay evidence of his mere declaration, heard and detailed by another, ought to be excluded, so infinitely inferior in degree must such hearsay evidence be when compared with direct testimony delivered in open court.

Immediate testimony is given under the solemn sanction of an oath, in the presence of the public; the jury have the advantage of observing the deportment of the witness, the manner in which he gives his testimony; in particular, whether, as one relying on the consistency of truth, he answers promptly and readily according to the suggestions of his memory, or with hesitation and difficulty, either attempting to evade direct answers, or to gain time to weigh them, in order to avoid contradictions and inconsistency; whether he readily answers all questions indifferently, whether they make in favour of or against the party whose witness he is, or he gives favourable answers on the one side with willingness and readiness, on the other with difficulty and reluctance. The attention of such a witness is called directly and immediately to the very facts the disclosure of which is material; his means of knowledge, his memory, and his situation, connection with the parties, and his motives, are subject to the severe and trying test of cross-examination, by means of which fraudulent witnesses are often surprised and detected.

In all these important particulars mediate testimony is usually defective; for although no doubt be entertained that the witness examined heard from another the statement which he is ready to repeat, yet that other did not make the communication under the sanction of an oath; there are no sufficient means of ascertaining whether he had the opportunity or the capacity for minute and accurate observation, nor of judging as to the tenacity of his memory: his attention in making the communication may not have been sufficiently directed to many of the particular facts, which afterwards appear to be material; he may have omitted many which are important, or not knowing that any such use would afterwards be made of his declarations, may have expressed himself without that caution and accuracy which he would have deemed to be necessary had he been examined under the sanction of an oath before a public tribunal, having his attention particularly directed to each material fact, and with a full knowledge of the important consequences which might result from his testimony with respect to the property, liberty or lives of others, and the necessity for attention and caution in

Mediate testimony.

his answers. In addition to this, he may have been induced to misrepresent facts on the particular occasion, under the influence of indirect motives, which, without the opportunity for cross-examination, it is impossible to trace or even to surmise.

Where the communication is derived through several intermediate witnesses, it is still weaker in degree; there is greater latitude afforded for misunderstanding and mistake, or even designed wilful misrepresentation; and it is more difficult to appreciate the veracity of the original witness, the means which he possessed of acquiring information, and the motives by which he was actuated in making the communication. Ordinary experience shows how little credit is due to such mediate testimony, and how frequently it happens that even most absurd and improbable reports acquire credit.

But where such immediate testimony is *unattainable*, and declarations oral or written can be proved to have been made, why, it may be asked, should not these, in default of better evidence, be admitted; as such evidence would, in numerous instances, be sufficient to convince an ordinary individual, why should truth derivable from such evidence be excluded? The answer is, because if such evidence were *generally* receivable, the uncertainty and confusion which would result from its general reception would far outweigh the benefit which might possibly be derived from its admission in particular instances.

The law for regulating the reception of evidence ought to proceed upon certain grounds, and prescribe plain and determinate limits: if none were to be prescribed, the most serious inconvenience would be experienced in the administration of justice; the trials of causes would be unnecessarily protracted by the admission of unnecessary evidence, and the attention of the jurors would often be distracted from the consideration of that which was material and useful, and applied to that which was unimportant or even irrelevant: on the other hand, indefinite and obscure boundaries, which occasioned the admission of evidence to be encumbered with doubts and difficulties, would be worse than none.

To take a strong case: suppose that a man, asserting that he is urged by the reproaches of his conscience to confess a crime of great enormity, surrenders himself into the hands of justice, and that his ample confession involves others as having been his guilty associates; it may easily be supposed that in such a case the apparently sincere penitence of the self-accuser, and the great improbability that such a statement under the circumstances could possibly be founded on any but sincere motives, would strongly

tend to induce one who heard the confession and knew the circumstances under which it was made to give it credit. This may readily be admitted: the question, however, is not what might happen under special circumstances, but whether they warrant a general rule, and whether a general rule which would include such evidence would not also include a great deal more of a suspicious and unsatisfactory nature. In order to form a conclusion on this subject, all peculiar and adventitious circumstances as to the particular manner, conduct and demeanour of the penitent, his expressions of sorrow and contrition, must be left out of the account; these are merely adventitious, and are circumstances in themselves too variable and indefinite to furnish a rule of admission or exclusion. Stripped of such merely casual circumstances as, whatever their influence might be in particular instances, could supply no general and certain rule, the question would be, whether the consideration that the party accusing another avowed his own guilt, to the same or it may be to a less extent, supplies a general sanction for the reception of such evidence. On this question it is difficult to raise a doubt. Mediate testimony.

To ascertain by what impulses and motives a person so situated might be believed in making such a statement, is far beyond the power of human wisdom; that he was really the guilty person he avowed himself to be, might indeed be readily inferred as far as he alone was concerned; but in charging others as his associates, it is far from impossible that he might practise deceit or misrepresentation from sinister motives: it might be in the hope of procuring in his own favour a mitigation of punishment or even a pardon; it might be for the purpose of extenuating his own conduct; or even that he acted from motives of malice and revenge, or for the sake of reward, in a case where security and reward were held out as inducements to a detection, or might expect such a result in the event of the conviction of the party whom he thus charged with being a guilty associate.

To establish therefore a general rule, that where a self-accuser at the time of his confession charged another with the commission of the same crime, the confession should be received against the latter, would be to admit evidence in many cases of too suspicious and dangerous a description to be relied on generally, especially by juries, who would frequently be destitute of those collateral aids which would enable an individual acquainted with all the minute circumstances of the case to form his own judgment, and who for want of such means might frequently be induced to give credit to a statement where an individual would have withheld his confidence altogether.

Mediate secondary evidence.

Again, in respect of civil liability, it is very possible that a declaration by *A.* that he was jointly liable with *B.* to the payment of a debt or duty, would, under particular circumstances, entitle him to credit; it might be that the very circumstance of his at once admitting his own responsibility would be a sanction for believing that *B.* was also liable: but it might also happen that such an admission was but a mere artifice, resorted to for the purpose either of causing another who was not liable to contribute to the payment of *A.*'s debt, or even have resulted from collusion with a supposed creditor to defraud *B.*

It is obvious, therefore, that a general rule which admitted the mere statement of one man to be used against another, merely on the ground that such statement was apparently contrary to the interest of him who made it, though it would occasionally tend to the ends of justice, would in other instances be productive of mischief and injustice.

But if the consideration that the statement was apparently contrary to the interest of the party who made it, would not in general warrant its reception; it is plain that the reasons for exclusion would operate still more forcibly to the general exclusion of statements the reception of which was not sanctioned by some general rule of law. In individual instances, casual and adventitious circumstances, and in particular a full conviction of the veracity and accuracy, as well of the party who made as of the party who communicated the declaration, would be a sufficient ground for belief, on which an individual might safely act; but such special grounds can seldom form the basis of a general rule; and the consideration that a man might in particular instances trust to such evidence, would supply no sufficient reason for the general reception of such evidence before a jury, who would usually be destitute of those peculiar means of judging of the credit due to the evidence by the aid of which an ordinary individual would be enabled to decide, and consequently be peculiarly liable to imposition were such evidence to be generally admissible.

Hence it is that, except in the instances which will presently be noticed, where a rule of exception can be established to the contrary, the law excludes all mediate or hearsay evidence of mere hearsay declarations made to those who are sworn and examined. In so doing, the truth may sometimes be excluded, but ample compensation is made by the further exclusion of a mass of evidence which would tend to deceive and mislead: the result is, on the whole, greatly on the side of justice; the rule obstructs one source of truth, but it also excludes a flood of error.

Next, then, in what instances and under what sanction does the law admit mediate secondary evidence?

Mediate secondary evidence.

In the first place, then, it seems to be a general rule, that where a witness already examined in a judicial proceeding between the same parties is since dead, his former examination is admissible as secondary evidence; for in such case the testimony was given under the obligation of an oath, and the adversary had or might have had the benefit of a cross-examination.

Depositions of witnesses in former proceeding.

Where, however, the party against whom the evidence is offered had not the opportunity to cross-examine, the deposition or examination is usually inadmissible, at least its admissibility is not warranted by the rule just adverted to. On this ground it is that the depositions of witnesses taken by magistrates in cases of felony, under the statutes 1 & 2 Ph. & M. c. 10, and 2 & 3 Ph. & M. c. 13, though admissible when taken in the presence of the prisoner, who has thus had the opportunity to cross-examine, have been held to be inadmissible as depositions when taken in the absence of the prisoner (*a*). It is again to be observed, that where a party against whom such evidence is offered had the opportunity to cross-examine, it is the same thing in effect as if he had availed himself of the opportunity, provided it was taken in the course of a proceeding to which he was a party, for otherwise he was not bound to pay any attention to it.

Traditionary evidence.

The first great class where mediate testimony is receivable as secondary evidence on special grounds, although the statement was not on oath, and although the adversary had no opportunity to cross-examine, consists of the declarations made by persons since deceased, on the subject of pedigree, custom, boundary, and the like, where from the nature of the subject-matter of the declaration and situation of the party it is reasonably to be presumed that he knew the fact.

In the first place, the fact to be proved must be of a public nature; otherwise it is not to be presumed that the individual from whom the tradition was derived had the means of knowledge.

2dly, As in the case of general reputation, such evidence must, in all cases where any question of public concern is in issue, be confined to general declarations, to the exclusion of mere declarations as to particular facts.

3. Derived from persons likely to know the facts.

3dly, Traditionary evidence as to rights must be derived from those persons who were in a situation to know what the rights

(*a*) *Infra*, tit. DEPOSITIONS; and see Vol. II. tit. DEPOSITIONS. It has been said that a deposition before coroners is admissible after the death of the witness, although not taken in the presence of the prisoner; *sed qu.*

were; and in the case of pedigree, declarations are not admissible unless they be derived from such as were connected with the family.

Must be free from suspicion.

4thly, As evidence of this description partakes of the weakness and infirmities of hearsay report (*b*), its credibility depends mainly on the absence of all temptation to misrepresent the facts; it follows that it cannot be trusted, and is inadmissible, under circumstances which were likely to influence and bias those from whom it is derived. Upon this principle it has been held that a declaration relating to a pedigree made *post litem motam*, cannot be received (*c*). But in the case of *Nicholls* v. *Parker*, traditionary evidence of what old persons, then dead, had said concerning the boundaries of the parish and manors (the subject of the action) was admitted in evidence, although the old persons were parishioners, and claimed rights of common on the wastes which would be enlarged by their several declarations, there not appearing to be any dispute at the time respecting the right of the old persons making the declarations, at least no litigation pending. (Although, in fact, the boundary had been long in dispute between the respective parishes and manors, and intersecting perambulations had been made both before and after such declarations by the respective parties.) So that those persons could not be considered as having it in view to make declarations for themselves at the time.

Lastly, as in the case of general reputation, such evidence is of little or no weight, unless it be supported and confirmed by evidence of the actual exercise and enjoyment of the right to which such traditionary declaration relates.

(*b*) Grose J., in the case of *Morewood* v. *Wood*, 14 East, 330, states the case of a pedigree which was tried at Winchester, where there was a strong reputation throughout all the country one way, and a great number of persons were examined to it; but after all, the whole was overturned, and proved to have no foundation whatsoever, by the production of a single paper from the Heralds' office; which shows (observed the learned Judge) how cautiously this sort of evidence ought to be admitted. See also Lord Ellenborough's observations, 1 M. & S. 616, 7, where he observes that reputation in general is weak evidence; and of Buller, J. *Morewood* v. *Wood*, 1 M. & S. 330.

(*c*) *Case of the Berkeley Peerage*, 4 Camp. 401. See the case below, tit. PEDIGREE; and see *Rex v. Cotton*, 3 Camp. 444, cor. Dampier; where, upon an indictment against an occupier of a farm, for not repairing a road *ratione tenuræ*, an award made many years before, when the same subject was in dispute between a former occupier and the township, was rejected as inadmissible, on the ground that the declarations of witnesses, since deceased, made before the arbitrator on that occasion, could not have been received, having been made *post litem motam*, and that the opinion of the arbitrator founded upon such testimony could not be entitled to greater credit.

Declarations, &c. made against the interest of the party.

In the next place, notwithstanding the general rule, that the mere declarations of a person, as to a particular fact, are not evidence of that fact; and notwithstanding the limitations by which the reception of evidence of reputation and tradition is guarded, particularly those which confine the admission of such evidence to matters of some public nature and interest, and exclude reputation and tradition, which relate merely to particular facts; there are some cases which form exceptions to these rules, and where the privacy of the fact, so far from excluding the hearsay declaration concerning it, seems to induce the necessity of its admission. As far as these are referable to any certain principles (for some of them have been looked upon as mere anomalies and arbitrary exceptions, and the boundaries by which this class of cases is to be limited are not very clearly ascertained) (*d*), they seem to be confined to instances of facts known only to a few individuals who possessed peculiar means of knowledge, and consequently where, if the declaration of such individuals were not admissible, all evidence on the subject would be excluded. And, secondly, according to the authorities, the reception of such declarations seems to be principally warranted by the consideration that the declaration or entry was made against the interest of the party who made it, which affords a presumption that the fact was true; or, at all events, it seems to be necessary that the declaration should have been made by one who had peculiar knowledge of the fact, and who had no interest to falsify it (*e*). Most of these exceptions seem to have been founded upon the presumption, that the party who made the entry or declaration would not have made it contrary to his own interest, unless it had been true. Where a steward has admitted, by entries in his accounts, the receipt of rents (*f*), or churchwardens have made similar entries of the receipt of monies from the inhabitants of a subdivision of the parish, for parochial purposes, such admissions have been held to be evidence of payments for those purposes (*g*).

The declaration of a deceased tenant, that he held the land under a particular person, was held to be admissible to prove the seisin of that person; such a declaration was in some degree against his interest, since it would have been evidence against him, by the landlord, in an action for use and occupation (*h*).

(*d*) See Lord Kenyon's observation, 5 T. R. 123.

(*e*) See Lord Ellenborough's observations in *Roe* v. *Rawlings*, 7 East, 290.

(*f*) *Barry* v. *Bebbington*, 4 T. R. 514.

(*g*) *Stead* v. *Heaton*, 4 T. R. 669.

(*h*) *Uncle* v. *Watson*, 4 Taunt. 16. See also *Perigal* v. *Nicholson*,

Mediate secondary evidence.

There are, however, several instances to be found where the declaration of a party as to a fact, where he possessed peculiar means of knowing the fact, and laboured under no temptation, bias or influence, to misrepresent it, have been admitted in evidence after his death. As the rules by which the reception of this class of evidence is governed do not appear to be very distinctly defined, the decisions on the subject will be detailed at a future opportunity; for the present, it will suffice to make a few observations on the general principle which ought to regulate the admissibility of such evidence.

In the first place, as such mediate testimony is in general excluded on the grounds already adverted to, it is essential that some special necessity should exist in the particular class of cases for deviating from the general rule, and that such evidence should never be resorted to until the higher degree of evidence be no longer attainable.

And even then, in order to warrant the reception of such secondary evidence, it is essential that circumstances should exist which afford a reasonable presumption that the person who spoke or wrote that which is offered in evidence had peculiar means of knowing the fact, and that he was not likely to have misrepresented it. The circumstance that the entry or declaration was contrary to the interest of the party who made it, affords, as has been already observed, sufficient reason for presuming on his veracity, to the extent at least of admitting the declaration or entry to be read in evidence.

There may, however, be many instances where such evidence derives credit from circumstances, independently of the consideration of an interest to the contrary on the part of the person who made it: where, for instance, it is made by a party in the usual course of his profession, trade or business. An entry so made obviously derives its claim to credit from a consideration of the great improbability that such a person would, without any assignable motive, wantonly make an entry of a false fact. The consideration that the entry was accompanied with this further circumstance, viz. that it contained an acknowledgment as of the receipt of money by which, if untrue, the party might be prejudiced, is entitled to

1 Wightw. 65. See also *Higham* v. *Ridgway*, 10 East, 109, where it was held that an entry made by a deceased man-midwife that he had delivered a woman of a child on a particular day, and referring to his ledger, in which the charge for his attendance was marked *paid*, was evidence on the trial of an issue as to the age of the child.

very little weight, and more perhaps is attached to it than it really deserves; for in the absence of all suspicion of fraud, and supposing the entry to be genuine, the circumstance that the party had been paid for a particular service stated to have been performed, would not materially add to the probability derived from the mere entry itself; and the probability of fraud in the one case rather than the other, founded on the acknowledgment against the interest of the party, is of little or no weight; for it would be just as easy for one who made a false entry with a view to evidence, to make it with or without such an admission or acknowledgment as might, if genuine, weigh against his own interest. Mediate secondary evidence.

The bare possibility of the casual publication of a false entry, made for the purpose of future evidence, could have little weight when compared with the importance of the object to be ultimately attained.

In such cases, therefore, no distinction can be made on the supposition or probability of fraud, in the one case, rather than the other; it must, to prevail, depend on the position, that where the entry contains no acknowledgment against the interest of the vouchee, there exists a greater probability that it was wantonly, carelessly or mistakenly made; this, however, must depend on the circumstances under which it was made; if it was a written entry made in the usual course of a man's profession or trade, in the absence of fraud, it carries with it a reasonable degree of probability that it was made according to the truth. At all events, it is difficult to see how the further circumstance of admitted payment can stamp the evidence with such an additional degree of credit, as to make the difference between the admission of the evidence and its absolute rejection.

By way of illustration, suppose a professional accoucheur to have made an entry in the ordinary course, of his attendance on a particular individual, and her delivery of a son: in the absence of all suspicion of fraud, could it fairly be doubted that the fact had taken place; could it be supposed that, without motive, such a person would wilfully have made an entry of a fact which he knew to be untrue? In such a case, how would the addition that he had received such a fee for his attendance, operate? Not at all, it is quite clear, so far as any suspicion of fraud was concerned, for it would have been just as easy to make that addition as to omit it; and if such an entry were forged, the addition, it is clear, would not have been omitted. Mistake, in such a case, is out of the question. How then does any consideration of interest operate? How can such an entry, doubly false, in stating a service

Mediate secondary evidence.

done and remuneration made, affect the interest of a party? How, if published, is it to operate to his prejudice; but still more, how is it to have that effect when it remains in his own private keeping? If these observations be just, it follows that, although the admission of mediate secondary evidence may, in some instances, be founded on the consideration that the original declaration or entry was made contrary to the interest of the party who made it, yet that where it is sanctioned by the consideration that the entry was made in the ordinary course of a man's profession, trade or business, the mere circumstance of an admission made remotely against his interest is of little weight.

Indirect evidence.

Next, as to the admission of indirect evidence.

Having now briefly noticed the general principles which govern the reception of direct evidence to prove a disputed fact by the aid of testimony, whether immediate or mediate, we are next to consider those which govern the admission of indirect evidence; that is, of facts collateral to the disputed fact, but from the existence of which the truth of the fact in dispute may be inferred.

Necessity for resorting to indirect evidence.

The necessity for resorting to indirect or circumstantial evidence is manifest. It very frequently happens that no direct and positive testimony can be procured; and often, where it can be had, it is necessary to try its accuracy and weight by comparing it with the surrounding circumstances.

The want of written documents, the treachery and fallaciousness of the human memory, the great temptations which perpetually occur to exclude the truth, by the suppression of evidence, or the fabrication of false testimony, render it necessary to call in aid every means of ascertaining the truth upon which the law can safely rely.

Where direct evidence of the fact in dispute is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be. It is possible that some circumstances may be misrepresented, or acted with a view to deceive; but the whole context of circumstances cannot be fabricated; the false invention must have its boundaries, where it may be compared with the truth; and therefore, the more extensive the view of the jury is of all the minute circumstances of the transaction, the more likely will they be to arrive at a true conclusion. Truth is necessarily consistent with itself; in other words, all facts which really did happen, did actually consist and

agree with each other. If then the circumstances of the case, as detailed in evidence, are incongruous and inconsistent, that inconsistency must have arisen either from mistake, from wilful misrepresentation, or from the correct representation of facts prepared and acted with a view to deceive. From whatever source the inconsistency may arise, it is easy to see that the greater the number of circumstances is which are exhibited to the jury, the more likely will it be that the truth will prevail; since the stronger and more numerous will be the circumstances on the side of truth. It will be supported by facts, the effect of which no human sagacity could have foreseen, and which are therefore beyond the reach of suspicion: whilst, on the other hand, fraudulent evidence must necessarily, either be confined to a few facts, or be open to detection, by affording many opportunities of comparing it with that which is known to be true. Fabricated facts must, in their very nature, be such as are likely to become material. Hence it has frequently been said, that a well-supported and consistent body of circumstantial evidence is sometimes stronger than even direct evidence of a fact; that is, the degree of uncertainty which arises from a doubt as to the credibility of direct witnesses, may exceed that which arises upon the question whether a proper inference has been made from facts well ascertained. A witness may have been suborned to give a false account of a transaction to which he alone was privy, and the whole rests upon the degree of credit to be attached to the veracity of the individual; but where a great number of independent facts conspire to the same conclusion, and are supported by many unconnected witnesses, the degree of credibility to be attached to the evidence increases in a very high proportion, arising from the improbability that all those witnesses should be mistaken or perjured, and that all the circumstances should have happened contrary to the usual and ordinary course of human affairs. The consideration, however, of the credit due to circumstantial evidence, belongs to another place (*l*); at present, the subject is mentioned merely with a view to illustrate the necessity of opening to a jury the most ample view of all the facts which belong to the disputed transactions; leaving the consideration of the importance due to such evidence to be examined hereafter.

Evidence of circumstances connected with the fact.

Agreeably to this notion, and according to the simplicity of the ancient law, it was provided that every trial should be had before a jury who lived so near to the scene of the disputed

Juries formerly returned from the vicinage.

(*l*) Vide *infra*, tit. CIRCUMSTANTIAL EVIDENCE.

Ancient practice as to juries.

transaction that they might reasonably be supposed to possess actual and personal knowledge of the circumstances, to have heard and seen what was done (*m*). Later experience has shown that a knowledge of the facts to be tried, such as a residence in the neighbourhood supplies, affords but an imperfect and dubious light for the investigation of truth; and that justice suffers more from the prejudices and false notions of the facts which a residence in the neighbourhood usually supplies, than it gains in point of certainty from a previous knowledge, on the part of the jury, of the parties or of the circumstances of the case. At this day, therefore, it is no longer necessary, either in civil or in criminal cases, that the jury should be returned from the vicinage; they are taken, without distinction, from the body of the county at large; and being in general strangers to the litigant parties and to the facts in dispute, may be presumed to discharge their important duties without partiality or prejudice. Still, however, the end to be attained is the same, although the means of attaining it are different; it is still the great object of the law that the jury should be fully possessed of all the facts and circumstances of the case; and as they have not been actually witnesses of the transaction, either in fact or in contemplation of law, the scene is to be exhibited to them by the only means of recalling a past transaction, that is, by oral evidence and written documents, and the jury are to collect the facts by the senses and perceptions of others, to whose account credit is due.

In consequence, too, of the frequent failure of direct and positive evidence, recourse must be had to presumptions and inferences from facts and circumstances which are known, and which serve as indications, more or less certain, of those which are disputed and contested. It is, consequently, a matter of the highest importance to consider the grounds, nature and force of such indirect evidence; and to inquire what facts, either singly or collectively, are capable of supplying such inferences as can safely be acted upon (*n*).

Presumptions, and strong ones, are continually founded upon knowledge of the human character, and of the motives, passions and feelings, by which the mind is usually influenced. Experience and observation show that the conduct of mankind is governed by general laws, which operate, under similar circumstances, with almost as much regularity and uniformity as the mechanical laws

(*m*) See the observations made above.

(*n*) See Vol. II. tit. PRESUMPTIONS.

of nature themselves do. The effect of particular motives upon human conduct is the subject of every man's observation and experience, to a greater or less extent; and in proportion to his attention, means of observation, and acuteness, every one becomes a judge of the human character, and can conjecture, on the one hand, what would be the effect and influence of motives upon any individual under particular circumstances; and on the other hand, is able to presume and infer the motives by which an agent was actuated, from the particular course of conduct which he adopted. Upon this ground it is that evidence is daily adduced in courts of justice of the particular motives by which a party was influenced, in order that the jury may infer what his conduct was under those circumstances; and on the other hand, juries are as frequently called upon to infer what a man's motives and intentions have been, from his conduct and his acts. All this is done, because every man is presumed to possess a knowledge of the connection between motives and conduct, intention and acts, which he has acquired from experience, and to be able to presume and infer the one from the other.

Foundation of presumptions as to motives.

The presumption of conduct, or of any particular act, from the motives by which the supposed agent was known to be influenced, is more or less cogent as the motive itself was stronger or weaker, and as experience has proved it to be more or less efficacious in affecting a man's conduct. The presumption of particular intention, from a man's acts and conduct, is more or less forcible, according to their nature, and their greater or less tendency to effect the supposed intention, and the improbability, derived from experience, that they could have resulted from any other motive, or have been done with any other intention. Presumptions of this nature are of most essential importance in criminal cases. Where a heinous crime has been committed, as for instance, murder, by means of poison, and where it is obvious that theft was not the object of the guilty party, it is essential to inquire whether the accused was influenced by any motive to commit such an offence; the absence of all motive, whether of avarice or revenge, affords a strong presumption of innocence, where the fact is in other respects doubtful, because experience of human nature shows that men do not commit mischief wantonly and gratuitously, without any prospect of advantage; still less do they perpetrate enormous crimes, and subject themselves to the severest penalties of the law, without the strongest motives: when, on the contrary, other strong presumptions appear against the accused, the knowledge that he was influenced by a very

Presumptions from conduct.

strong motive to commit such a crime, must of necessity greatly add to the probability of his guilt.

Presumptions from conduct as to motive.

In criminal cases a question usually arises as to the intention of the accused, since it is, in general, the guilty intention with which an act is done that renders it criminal; and in numerous instances a particular intention is made an essential ingredient in the statutory offence. But the intention, which is the mere internal and invisible act or resolve of the mind, cannot be judged of except from external and visible acts; and in all such cases, and many others, a man's object and motives must be inferred from his *conduct*; and what particular acts and conduct are sufficient to indicate the guilty intention which is imputed to the accused, is a question of fact to be decided by those who are conversant in human affairs, and whose experience enables them to judge of the connection between conduct and intention.

In many of the common concerns of life a man may act from a complication of motives which human sagacity cannot unravel; the secret workings of which Omniscience alone can understand; but in the case of a crime defined by the law, and where, consequently, both the act itself and the intention are simple and definite, so much difficulty does not prevail in the ascertainment of intention; in such instances it is reasonable to infer, that a man intended and contemplated that end and result which is the natural and immediate consequence of the means which he used; and this is the ordinary presumption of law. In criminal proceedings, the consideration of the *conduct* of the accused will, in other respects, be found to be of great importance in determining upon his guilt or innocence, where there is either no direct evidence of the fact, or such as cannot alone be safely relied upon.

The *conduct* which may afford an inference in such a case, may consist either in the seeking opportunities and means for committing such an act, or in attempting to avoid suspicion or injury by flight, or in concealing any evidence of guilt, or even in showing an anxiety to do so; for it is certain that the guilty person must have had the opportunity and means of committing the offence; and it is probable that he would previously watch for such an opportunity, and he must have procured the means. Again, it is also probable that the guilty person, goaded by the stings of conscience, or at least actuated by fear of detection and of punishment, would use every effort within his power to avoid suspicion, or at least inquiry; and experience fully proves that means, in the hour of terror and alarm, are often

resorted to by the guilty, in the hope of providing security, which so far from preventing or lulling suspicion, provoke and excite it, and turn out to be forcible evidence of guilt. Flight; the fabrication of false and contradictory accounts, for the sake of diverting inquiry; the concealment of the instruments of violence; the destruction or removal of proofs tending either to show that an offence has been committed, or to ascertain the offender, are circumstances indicatory of guilt, since they are acts to which *some* motive is attributable, and are such as are not likely to have been adopted by an innocent man; but such, on the contrary, as according to experience are usually resorted to by the guilty. A full *confession* (*n*) of guilt, although it be but presumptive evidence, is one of the surest proofs of guilt, because it rests upon the strong presumption that no innocent man would sacrifice his life, liberty, or even his reputation, by a declaration of that which was untrue. The presumption immediately ceases as soon as it appears that the supposed confession was made under the influence of threats or of promises, which render it uncertain whether the admissions of the accused resulted from a consciousness of guilt, or were wrung from a timid and apprehensive mind, deluded by promises of safety, or subdued by threats of violence or of punishment. It may be proper also to remark in this place, that some of those presumptions which have lately been touched upon are to be regarded with great caution; for it sometimes happens that an innocent, but weak and injudicious person, will take very undue means for his security, when suspected of a crime. A strong illustration of this is afforded by the case of the uncle, mentioned by Lord Hale. His niece had been heard to cry out, "Good uncle, do not kill me!" and soon afterwards disappeared; and he being suspected of having destroyed her, for the sake of her property, was required to produce her before the justices of assize: he being unable to do this, (for she had absconded,) but hoping to avert suspicion, procured another girl resembling his niece, and attempted to pass her off as such. The fraud was however detected; and, together with other circumstances, appeared so strongly to indicate the guilt of the uncle, that he was convicted and executed for the supposed murder of the niece, who, as it afterwards turned out, was still living.

Presumptions as to motives.

In civil cases also, the most important presumptions are (as will be afterwards more fully seen) continually founded upon the conduct of the parties: if, for instance, a man suffer a great

(*n*) See tit. ADMISSION.—CONFESSION.

Presumptions from conduct.

length of time to elapse without asserting the claim which he at last makes, a presumption arises, either that no real claim ever existed, or that, if it ever did exist, it has since been satisfied (*o*); because, in the usual course of human affairs, it is not usual to allow real and well-founded claims to lie dormant. So the uninterrupted enjoyment of property or privileges for a long space of time raises a presumption of a legal right; for otherwise it is probable that the enjoyment would not have been acquiesced in (*p*). Upon this principle the Legislature seems to have founded the provision in the Statute of Limitations, which raises a presumption that after a lapse of six years a debt on simple contract has been satisfied; a presumption liable to be rebutted by proof of a promise to pay the debt, or an acknowledgment that it still remains due, made within the six years (*q*).

Omission to produce evidence within the knowledge and power of the party.

The *conduct* of a party in omitting to produce that evidence, in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him; since it raises a strong suspicion that such evidence if adduced would operate to his prejudice. So forcible is the nature of this presumption, that the law founds upon it a most important elementary rule, which excludes secondary evidence where evidence of a higher degree might have been adduced; and this it does, because it is probable that a party who withholds the best and most satisfactory evidence from the consideration of the jury, and attempts to substitute other and inferior evidence for it, does so because he knows that the better evidence would not serve his purpose (*r*).

Upon the same principle, juries are called upon to raise an inference in favour of a defendant from the goodness of his character in society; a presumption too remote to weigh against evidence which is in itself satisfactory, and which ought never to have any weight except in a doubtful case (*s*).

Upon similar grounds, presumptions may be derived from the artificial course and order of human affairs and dealings, wherever any such course and order exist; because, in the absence of

(*o*) See Vol. II. tit. PRESUMPTIONS.—LIMITATION.—PRESCRIPTION.

(*p*) Where a party neglects to take out execution within a year after his judgment, he must, in general, revive it by *scire făcias* before he can proceed to execution; and this is founded upon a presumption that the debt or damages have in the meantime been paid.

(*q*) See tit. LIMITATIONS. Such promises, to be available, must now be in writing.

(*r*) Vide *infra*, tit. BEST EVIDENCE.

(*s*) See tit. CHARACTER.

any reason to suppose the contrary, a probability arises that the usual course of dealing has been adopted. Hence presumptions are founded upon the course of trade, the course of the post, the customs of a particular trade, or of a particular class of people, and even the course of conducting business in the concerns of a private individual, to prove a particular act done in the usual routine of business (*t*).

Presumptions from the course of dealing.

In all such cases the course of dealing may be proved before the jury, and is evidence in matters connected with it. The usual time of credit in a particular trade is evidence to show that goods were sold at that credit; the course of the post is evidence to show that a particular letter, proved to have been put into the post-office, was received in the usual time by the party to whom it was directed. The ground of presumption in this and a multitude of similar instances is, that where a regular course of dealing has once been established, that which has usually happened did happen in the particular instance; and such presumptions, like all others, ought to prevail, unless the contrary be proved, or at least be encountered by an opposite presumption.

Presumption as to continuance.

Where a fact or relation is in its nature continuous, after its existence has once been proved, a presumption arises as to its continuance at a subsequent time; for, from the nature of the fact or relation, a very strong presumption arises that it did not cease immediately after the time when it was proved to exist; and as there is no particular time when the presumption ceases, it still continues; therefore, where a *partnership* between two persons has once been established, its continuance at a later period is to be presumed, unless the termination be proved (*u*). So, where the existence of a particular individual has once been shown, it will, within certain limits, be presumed that he still lives. The presumption as to a man's life after a number of years must depend upon many circumstances; his habits of life, his age, and constitution: the probable duration of the life of a person, as calculated upon an average, may of course be easily ascertained in every particular case; but for the sake of practical convenience, the law lays down a rule in some instances, which appears to have been very generally adopted, that after a person has gone abroad, and has not been heard of for seven years, it is to be presumed that he is dead (*w*).

(*t*) See *Lord Torrington's case*, 1 Salk. 285.

(*u*) See tit. PARTNERSHIP.

(*w*) See tit. POLYGAMY.—EJECTMENT BY HEIR at LAW.—DEATH.

Circumstantial and presumptive evidence in general.

In general, all the affairs and transactions of mankind are as much connected together in one uniform and consistent whole, without chasm or interruption, and with as much mutual dependence on each other, as the phænomena of nature are; they are governed by general laws; all the links stand in the mutual relations of cause and effect; there is no incident or result which exists independently of a number of other circumstances concurring and tending to its existence, and these in their turn are equally dependent upon and connected with a multitude of others. For the truth of this position the common experience of every man may be appealed to; he may be asked, whether he knows of any circumstance or event which has not followed as the natural consequence of a number of others tending to produce it, and which has not in its turn tended to the existence of a train of dependent circumstances. Events the most unexpected and unforeseen are so considered merely from ignorance of the causes which were secretly at work to produce them; could the mechanical and moral causes which gave rise to them have been seen and understood, the consequences themselves would not have created surprise.

It is from attentive observation and experience of the mutual connection between different facts and circumstances, that the force of such presumptions is derived; for where it is known from experience that a number of facts and circumstances are necessarily, or are uniformly or usually connected with the fact in question, and such facts and circumstances are known to exist, a presumption that the fact is true arises, which is stronger or weaker as experience and observation show that its connection with the ascertained facts is constant, or is more or less frequent.

The presumptions or inferences above alluded to are chiefly those which are deducible by virtue of mere antecedent experience of the ordinary connection between the known and the presumed facts (*x*); but circumstantial or presumptive evidence in general embraces a far wider scope, and includes all evidence which is of an indirect nature, whether the presumption or inference be drawn by virtue of previous experience of the connection between the known and the inferred facts (*y*), or be a conclusion of reason from the circumstances of the particular case, or be the result of reason aided by experience.

(*x*) See tit. CIRCUMSTANTIAL EVIDENCE.

(*y*) See tit. CIRCUMSTANTIAL EVIDENCE; Vol. II. tit. PRESUMPTIONS 3 Comm. 371; Gil. L. Ev. 160.

General rule, all facts are evidence which afford reasonable inferences.

From what has been said, it seems to follow that all the surrounding facts of a transaction, or as they are usually termed, the *res gestæ*, may be submitted to a jury, provided they can be established by competent means, and afford any fair presumption or inference as to the question in dispute; for, as has already been observed, so frequent is the failure of evidence, from accident or design, and so great is the temptation to the concealment of truth and misrepresentation of facts, that no competent means of ascertaining the truth can or ought to be neglected by which an individual would be governed, and on which he would act, with a view to his own concerns in ordinary life. Let it be considered, then, *first*, what is the kind of evidence to which he would naturally resort; and in the next place, how far the law interferes to limit and restrain the reception of such evidence; remembering, at the same time, that all *artificial* and purely *conventional modes of evidence* form a subject for future consideration.

Natural course of inquiry on failure of direct evidence.

Where an ordinary inquirer could not obtain information from any witness of the fact which he was anxious to ascertain, either immediately from such witness, or mediately through others, or where the information which he had obtained was not satisfactory, his attention would be directed to the circumstances which had a connection with the transaction, as ascertained either by his own observation, or by means of the information of others, to enable him to draw his own conclusions; and in pursuing such an inquiry, where it was a matter of importance and interest, he would neglect no circumstances which were in any way connected with the transaction, which could, either singly or collectively, enable him to draw any reasonable inference on the subject. All his experience of human conduct, of the motives by which such conduct was likely to be influenced under particular circumstances, of the ordinary usages, habits and course of dealing among particular classes of society, or in particular transactions, even his scientific skill in medicine, surgery or chemistry, abstract probabilities or natural philosophy, might be called into action, to enable him, by a general and comprehensive view of all the circumstances, and their mutual relations to each other, to draw such a conclusion as reason, aided by experience, would warrant.

There is, in truth, no connection or relation, whether it be natural or artificial, which may not afford the means of inferring a fact previously unknown, from one or others which are known.

Where the connection between facts is so constant and uniform that from the existence of the one that of the other may be inme-

Presumption.

diately inferred, either with certainty, or with a greater or less degree of probability, the inference is properly termed a presumption (*a*), in contradistinction to a conclusion derived from circumstances by the united aid of experience and reason.

Circumstantial evidence.

Circumstantial proof is supplied by evidence of circumstances the effect of which is to exclude any other supposition than that the fact to be proved is true.

The nature and force of such proof will be more properly considered at another opportunity. The mere question at present is, how far the law interferes to limit and restrain the admission of evidence of collateral circumstances tending to the proof of a disputed fact.

In the first place, as the very foundation of indirect proof is the establishment of one or more other facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, in the same manner as if they were the very facts in issue.

The next question then is, what limit is there to the admission of collateral evidence for the purpose of indirect proof.

To what extent admissible.

The nature of the evidence, and the principles by which it is to be appreciated, are, as has already been observed, to a great extent common to judicial and extrajudicial inquiries. Its force and efficacy, in the one case as well as in the other, must necessarily depend either on the known and ordinary connection between the facts proved and the fact disputed, or on the force and tendency of the facts proved to establish the truth of the disputed fact or issue, by the excluding any other supposition.

Great latitude is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but of supplying an invaluable protection against imposition. The law interferes to exclude all evidence which falls within the description of "*res inter alios acta*;" the effect of which is, as will presently be seen, to prevent a litigant party

(*a*) Such inferences are wholly independent of any actual knowledge of the necessity of the connection between the known and unknown facts. Many of the presumptions which we have to deal with, as connected with the present subject, are legal presumptions, where the law itself establishes a connection or relation between particular facts or predicaments; as that the heir to a real estate was seised, or that a bill of exchange was founded on a good consideration. These, however, will be a subject for consideration when inquiry is made with respect to the artificial effect annexed by the law to particular evidence; for such presumptions are of an artificial and technical nature, whilst those at present considered are merely natural.

from being concluded, or even affected, by the evidence, acts, conduct or declarations of strangers. And this rule is to be regarded, to a great extent at least, not so much as a limitation and restraint of the natural effect of such collateral evidence, but as a restraint limited by and co-extensive with the very principle by which the reception of such evidence is warranted; for the ground of receiving such evidence is the connection between the facts proved and the facts disputed; and there is no such general connection between the acts, conduct and declarations of strangers, as can afford a fair and reasonable inference to be acted on generally even in the ordinary concerns of life, still less can they supply such as ought to be relied on for the purpose of judicial investigation. And therefore this extensive branch of the rule which rejects the *res inter alios acta*, may be considered as founded on the same principles of natural reason and justice which warrant the reception of indirect evidence.

Res inter alios acta, grounds of the rule.

In the first place, the mere declarations of strangers are inadmissible, except in the instances already considered, where on particular grounds, and under special and peculiar sanctions, they are admissible as direct evidence of a fact. Declarations so circumstanced may be used either for the purpose of directly establishing the principal fact in dispute, or for the purpose of proving the existence of collateral facts from which the principal fact may be inferred; but other declarations, which are of too vague and suspicious an origin to be received as evidence of the facts declared, must also, on the same principle, be rejected as indirect evidence. If such declarations as to the principal fact be inadmissible, they must also be at least equally inadmissible to establish any collateral fact, by the aid of which the principal fact may be indirectly inferred. It would be inconsistent to reject them when offered as direct testimony, but to receive them as collateral evidence, the more especially as even immediate testimony is in one sense but presumptive evidence of the truth; for it is but on the presumption of human veracity, confirmed by the usual legal tests, that credit is usually (*b*) given to human testimony.

Declarations by strangers.

If, for example, the question were whether *A.* had way-laid and wounded *B.*, if the declaration of a third person, not examined on the trial, that he saw the very fact, could not be received in evidence, neither, on any consistent principle, could his decla-

(*b*) Usually, but not necessarily; for belief, amounting to certainty, may be founded on the mere coincidence of testimony, without any consideration of the credit due to human veracity.

Res inter alios, grounds of the rule.

ration that he saw *A.* near the place, armed with a weapon, be received in order to establish that fact as a link in the chain of circumstantial evidence.

Neither, in general, ought any inference or presumption to the prejudice of a party to be drawn from the mere acts or conduct of a stranger; for such acts and conduct are but in the nature of declarations or admissions, frequently not so strong; and such declarations are inadmissible, for the reasons already stated. Neither can an admission by a stranger safely be received as evidence against any party; for it may have been made, not because the fact admitted was true, but from motives and under circumstances entirely collateral, or even collusively, and for the very purpose of being offered in evidence. On a principle of good faith and mutual convenience, a man's own acts are binding upon himself (*c*), and his acts and conduct are evidence against him; but it would not only be highly inconvenient, but also manifestly unjust, that a man should be bound by the acts of mere unauthorized strangers.

But if a party ought not to be bound by the acts of strangers, neither ought their acts or conduct to be used as evidence against him for the purpose of concluding him; for this would be equally objectionable in principle, and more dangerous in effect, than the other. It is true, that in the course of the affairs of life a man may frequently place reliance on inferences from the conduct of others. If, for instance, *A.* and *B.* were each of them insurers against the same risk, *A.* to a large, and *B.* to a small amount, it is very possible that, on a claim made against each for a loss, which was admitted and paid by *A.* to the extent of his liability, *B.*, trusting to the knowledge and prudence of *A.*, might reasonably infer that the loss insured against had occurred, and that he also was bound to pay his proportion. It is plain, however, that such an inference would rest on the special and peculiar circumstances of the case; and that, so far from warranting the general admission of such evidence by inference on a legal trial to ascertain the fact, it would supply no general rule, but must be regarded as an exception even in the ordinary course of business.

In addition to this, it is obvious that whilst an individual might with discretion rely on the conduct of others, where, under the peculiar circumstances, there was no reason for suspicion (in which case a principle of self-interest would usually secure the exercise of a sound discretion), such inferences could

(*c*) See Vol. II. tit. ADMISSIONS.

not be safely left to a jury, who could not possibly be put in possession of all the collateral reasons by which an individual might properly be influenced in trusting to such evidence, and, which is more material, could not act on those collateral circumstances of suspicion which would have induced an individual to withhold his confidence. Res inter alios.

The rule, therefore, operates to the exclusion of all the acts or declarations or conduct of others, as evidence to bind a party, either directly or by inference; and, in general, no declaration or written entry, or even affidavit, made by a stranger, is evidence against any man (*d*). Neither can any one be affected, still less concluded, by any evidence, decree or judgment, to which he was not actually or in consideration of law privy. Effect of the rule.

As this is a rule which rests on the clearest principles of reason and natural justice, it has ever been regarded as sacred and inviolable.

The importance of the principle, and the extent of its operation, make it desirable to ascertain its limits, by inquiring negatively what it does not exclude. Does not exclude:

In the first place, then, it is scarcely necessary to observe, that a man's own acts, conduct and declarations, where voluntary, are always admissible in evidence against him. The acts and admissions of a party.

As against himself, it is fair to presume that his words and actions correspond with the truth: it is his own fault if they do not. In many instances he is conclusively bound, more especially where he has formally engaged to be so bound; in others, his declarations or acts furnish mere *primâ facie* presumptions against him. The rule, therefore, above adverted to never excludes evidence of any acts or declarations made either by the party himself, or which he has authorized, or to which he has assented (*e*).

It is plain also that this principle does not exclude the operation of any general rule of law or custom; of these, and all their consequences, he is bound to take notice at his peril. Laws and customs.

It follows, therefore, that even the acts and declarations of others are not excluded by this principle, whenever they have any legal operation which is material to the subject of inquiry; for legal consequences can no more be regarded as *res inter alios* than the law itself. For instance, where the contest is as to the right to a personal chattel, evidence is admissible, even against

(*d*) For illustrations of this general principle, vide *infra*, tit. Depositions.—Judgments.—Examinations.

(*e*) Vol. II. tit. Admissions.—[illegible]go v. *Brown*, 9 B. & C. 936.

Does not exclude facts which have a legal operation on the question.

a party who proves that he never sold the chattel, of a subsequent sale of the property in market overt; for although he was no party to the transaction, which took place entirely between others, yet as such a sale has a legal operation on the question at issue, the fact is no more *res inter alios* than the law which gives effect to such a sale. So in actions against a sheriff, it very frequently happens that the law depends wholly on transactions to which the sheriff is personally an entire stranger; where the question is as to the right of ownership to particular property seized under an execution, all such transactions and acts between others are admissible in evidence, which in point of law are material to decide the right of property.

So in all cases where any statute or law, or decree or judgment, is of a public nature, or operates *in rem*; for to such proceedings all are privy.

Nor does the objection ever apply where the conduct or declaration of another operates not by way of admission or mere statement, but *as evidence*. Thus, if *A*. make a private memorandum of a fact in which *B*. has an interest, that memorandum, generally speaking, would not be evidence against *B*.; it would fall within the description of *res inter alios*; but if it were a memorandum of a fact peculiarly within the knowledge of *A*., and made in the usual course of business, and especially if *A*. by that entry charged himself, it would be admissible in evidence after the death of *A*.; not that it operates against *B*. by way of admission of the fact, for if so it would be admissible whether *A*. were living or dead, but because, under those circumstances, the law considers the entry as a proper medium for communicating the original fact to the jury, the testimony of *A*. himself being unattainable.

Effect of the rule as to declarations, &c.

So the declarations of deceased persons, and evidence of reputation, in matters of public prescription and pedigree, are admissible, not because strangers have any power to conclude a party by what they may choose wantonly to assert upon the subject, but because the law considers the evidence to be sufficiently deserving of credit, as a means of communicating the real fact, to be offered to a jury. And whenever that is the case, it is obvious that such declarations or reputation are no more *res inter alios* than if the declarants themselves had stated what they knew upon oath to the jury.

Declarations accompanying acts.

In the next place, although the general principle above announced excludes the declarations, writings, acts and conduct of strangers, as falling within the general description of *res inter*

alios acta, the objection does not extend to a class of declarations already described as, declarations accompanying an act; for these, when the nature and quality of the act are in question, are either to be regarded as part of the act itself, or as the best and most proximate evidence of the nature and quality of the act. Why admissible.

Hence it is that declarations made by a trader at the time of his departure from his residence or place of business, are evidence of the intention with which he went. His real intention, in such a case, cannot be inferred otherwise than from external appearances, from his acts, and his declarations are collateral indications of the nature of his acts and his intention in doing them. (*f*) Upon the same principle, in *Lord George Gordon's case*, the cries of the mob, at the time they were committing acts of violence, were held to be admissible evidence to show their intention (*g*). Such evidence is also admissible in actions against the hundred, in case of an action to recover the value of property feloniously demolished by persons riotously assembled. In the case of *Aveson* v. *Lord Kinnaird* (*h*), declarations by the wife, at the time of the plaintiff's effecting an insurance on her life, were admitted, for the purpose of showing that she was in a bad state of health at the time. Again, in order to prove that a husband had obliged his wife to leave his house by ill treatment, the declaration of the wife at the time of leaving the house was held to be admissible evidence against the husband to prove the fact. Here the fact itself of leaving the house was material and admissible, and the declaration accompanying the fact was collateral evidence of the nature of the act.

It is, however, to be particularly observed, that in these cases, when declarations or entries (*i*) are admitted in evidence as part of the *res gestæ* or transaction, they are admitted, either because they constitute the very fact which is the subject of inquiry (*k*), or because they eludicate the facts with which they are connected, having been made without premeditation or artifice, and without a view to the consequences; and as such they are the best evidence, it may be better than even the subsequent testimony of the party who made them, to prove the object for which they are admitted in evidence; for the party who made the declaration, if he were competent as a witness, would frequently be under a Declarations, when part of the res gestæ, how proved.

(*f*) See tit. BANKRUPT.

(*g*) 21 Howell's St. Tr. 542.

(*h*) 6 East, 188.

(*i*) In future, to avoid repetition, the term declaration alone will be used; but it must be remembered, that the same principle applies to a written entry.

(*k*) See *Kent* v. *Lowen*, 1 Camp. C. 177; and see tit. ENTRIES BY THIRD PERSON.

temptation to give a false colouring to the circumstance when its tendency was known; besides, as in this case the effect of the evidence is independent of the credit due to the party himself, it could be of no use to confirm his credit by examination upon oath, and his declaration as a mere fact is as capable of being proved by another witness as any other fact is.

A recital may be evidence for some purposes, although not for others.

It sometimes happens that a declaration is evidence for a particular purpose, although it is not to be taken as evidence to prove the truth of the fact declared; for the rule seems to be, that if the declaration be evidence as a circumstance in the cause, for any purpose, it is to be received; and the jury are to be directed not to consider it as in evidence for other purposes, for which, abstractedly, it could not have been received; as, for instance, where it is used as introductory of some other matter. Suppose the question to be, whether *A.* had wounded *B.*, if *C.* had asserted in the presence of *A.* that he had seen him wound *B.*, this would be admissible evidence, but only as introductory, and for the purpose of introducing and explaining *A.*'s conduct and behaviour when the charge was made, and his answer upon that occasion, and not as having any intrinsic tendency to prove the fact asserted.

Collateral facts.

In the next place, it is observable that the principle is confined to those cases where an inference is attempted to be made from the acts, conduct or declarations of strangers, on the presumption that they would not have done such acts, or made such declarations, had not the fact so to be inferred been true; and that it is the want of any certain or known connection between such acts or declarations and the truth of the fact which occasions the exclusion. Hence it is that the principle does not extend to the exclusion of any of what may be termed real or natural facts and circumstances in any way connected with the transaction, and from which any inference as to the truth of the disputed fact can reasonably be made.

Thus upon the trial of a prisoner on a charge of homicide or burglary, all circumstances connected with the state of the body found, or house pillaged, the tracing by stains, marks or impressions, the finding of instruments of violence, or property, either on the spot or elsewhere, in short, all visible *vestigia*, as part of the transaction, are admitted in evidence, for the purpose of connecting the prisoner with the act.

Such facts and circumstances have not improperly been termed inanimate witnesses. It may be asked, whether the same principle which excludes all inferences from the acts, conduct and declarations of others, ought not also to exclude such real cir-

cumstances; for an artful person may not only deceive by speaking and writing, but may also create false and deceptive appearances, calculated to induce others to draw false conclusions from them; he may act as well as speak a lie, and may deceive by false facts as well as false expressions (*l*). Real facts, that is, such as are the object of actual observation, in contradistinction to mere recitals of facts, are in themselves always true, whilst a mere recital or statement may be wholly false; and although collateral circumstances, when considered without careful comparison, may, either in consequence of contrivance and design, or even from accident, present appearances which tend to false conclusions, that tendency is always subject to be corrected by a multitude of other facts which are genuine. Collateral facts.

The whole context of facts must be consistent with truth; to speak more properly, they constitute the truth; if all were known, nothing would be left for inquiry; the greater the number known, the more probable will it be that an artificial or spurious fact, from inconsistency with the rest, will be detected, and the truth manifested.

This is the more evident, when it is considered that the prac-

(*l*) An ancient and celebrated argument supplies an illustration. A young man who was blind, a resident in his father's house, was charged by his stepmother with having assassinated his father by stabbing him whilst he slept. The evidence was circumstantial; and one of the prominent facts urged against the son was the circumstance that the walls of the apartments which separated the chamber of the father from that of the son were smeared with the impressions of bloody hands, preceeding from the chamber of the father to that of the son. With respect to such evidence, which according to the rules of our law would clearly be admissible, it may be objected, that such appearances may have resulted from the art and cunning of another, for the very purpose of implicating the accused; and also it may be, as suggested in the case cited, for the further purpose of screening the real perpetrator of the offence.

Since, then, it is possible that such appearances may be the result of fraud and artifice, ought they to be admitted; or, at least, are they not subject to the same objection which is urged against the receiving evidence of the declarations or writings of others? The answer seems to be, that although a possibility exists that such appearances may have resulted from contrivance and design, yet that much less danger is to be apprehended from the reception of such evidence of actual facts than would result from receiving evidence of mere statements of facts.

In the case above supposed, two circumstances tended to show that the traces on the walls were the result of artifice and imposture. The accused being blind, night to him was the same as the day, and being familiar with the apartments, he wanted not the walls for his guidance. The impressions on the walls were all equally clear and distinct; had they been natural and genuine, they would have gradually become faint and indistinct.

Collateral circumstances.

tice of creating false appearances must always be difficult, limited in its extent, and constantly subject to detection and exposure from a comparison of the deceptive fact with such as are undoubtedly genuine.

By way of illustration, the following instance may be selected: A person having been robbed and murdered, the body is so placed by the offender, with a discharged pistol beside it, as naturally to induce the inference that the deceased had fallen by his own hand; but on close examination, it is discovered that the ball extracted from the body, and which occasioned death, is too large to have been discharged from that pistol, an inconsistency which immediately detects the imposture, and refutes the false inference to which *some* of the circumstances apparently tend.

The general admission, therefore, of evidence of the actual visible state of things, in the absence of any special reason for suspecting fraud, is quite consistent with the exclusion of statements or declarations, as contradistinguished from real facts; such statements may be altogether fictitious, they are easily invented, and would therefore be the more dangerous, because if they were to be admitted to any credit they would usually be conclusive.

At all events, there is a strong practical necessity for resorting, especially in criminal proceedings, to the aid of circumstantial evidence; the consequences would be infinitely mischievous if such evidence were to be excluded; and the real practical result from any suggestions as to the probability of fraud and deception being practised through the medium of such evidence, is, that it ought in all cases to be received and acted on with the highest degree of caution and circumspection.

Possession; ancient instruments.

As the possession and enjoyment of disputed property are always indirect evidence of right, by reason of the obvious and natural presumption, when the right is in other respects doubtful, that such possession and enjoyment so acquiesced in had a lawful origin; so, acts of open delivery of possession, or written instruments by which a dominion over such property was exercised, and with which the possession and enjoyment correspond, are also presumptive evidence of right; for these are, in fact, not mere recitals of a fact, but are themselves acts of dominion and ownership. Hence, when such instruments are so ancient that their connection with acts of enjoyment and dominion cannot be proved by the testimony of living witnesses, they are nevertheless admissible as the best and most proximate evidence to explain the origin and nature of such possession and enjoyment, where they can by other evidence be sufficiently connected with those facts.

Essentials to such proof.

Hence it seems that to support any presumption or inference from such an instrument, first, its antiquity is essential; secondly, that it should have been found in the place or repository in which a true and genuine deed or writing of that kind would have been deposited (*m*); thirdly, that it should be free from all suspicion which may rebut the presumption raised in its favour (*n*); fourthly, in order to give it any weight, it should be supported by proof of possession or enjoyment, corresponding and consistent with it (*o*). Upon such a connection the force, if not the admissibility, of such evidence essentially depends. Declarations are, as has been seen, evidence as explanatory of the act which they accompany; and where long-continued enjoyment, and user of a right, has been proved, extending as far back as the duration of human life will permit, a deed or writing which is consistent with such usage and enjoyment, and explanatory of it, may, under the same principle, be fairly admitted, as affording a presumption that it was a genuine instrument which has been used and acted on. And where proof of the actual execution and use of such instruments would have been evidence, then when such proof is absolutely excluded by lapse of time, the production of the deed, coupled with such circumstances as give it credit, appears to be the next best evidence which the case admits of, and when accompanied with proof of actual enjoyment, affords a strong presumption as to the existence of the right according to that deed. Hence ancient licenses on the court-rolls, granted by the lords of a manor in consideration of certain rents, to fish in a particular river, are evidence to prove a prescriptive right of fishery in that river, without any proof of the rents being paid, where it appears that such rents have been paid in modern times, or that the lords of the manor have exercised other rights of ownership over the fishery (*p*). But it was held, that to give any weight to such evidence it was necessary to support it by evidence of payments, or of acts of ownership (*q*).

Where the question was, whether by the custom of a particular manor, a custom existed that after the turbary had been cleared away from a certain moss, the lord had a prescriptive right to hold the land cleared away, free from all right of common, it was held (in an action between a grantee of the land

(*m*) Vide *infra*, PRIVATE WRITINGS—ANCIENT DEEDS.

(*n*) Ibid.

(*o*) Ibid.

(*p*) *Rogers and others* v. *Allen*, cor. Heath, J. 1 Camp. 309.

(*q*) Per Heath, J. 1 Camp. 311.

and one who claimed right of common in the *locus in quo*, in respect of an ancient messuage) that counterparts of old leases found among the muniments of the lord of the manor, by which such cleared portions of the moss had from time to time been granted by the lord, were admissible in evidence, although they were so old that no one could speak to possession under them. It was objected, both at the trial and on a motion for a new trial, that such evidence ought not to be admitted without proof of enjoyment under those leases. But the Court held that it was clear that such leases might be given in evidence; they only showed the existence of a fact, viz. that at the time of the dates of the leases the lord granted the land after the moss had been taken away (*r*).

Declarations admissible as explanatory evidence.

It is to be observed that oral or written declarations, although excluded as direct evidence of a fact, by the rules which govern the reception of such evidence, may still in many instances be used indirectly as explanatory of other evidence. Thus though a letter, stating particular facts, could not be read in evidence merely because it was so sent, yet if the party to whom it was addressed wrote an answer, such answer might be read as evidence against the party who wrote it, and the letter to which it was an answer would be admissible for the purpose of explaining such answer.

So letters and declarations in themselves inadmissible, are admissible if they communicate any fact to the party against whom they are read which either affects the rights in question or explains his subsequent conduct. Thus the proof of notice of the dishonour of a bill of exchange to a drawer or indorser is evidence, not of the fact of dishonour stated in the notice, but because such notice casts a legal liability on the party to whom it was given. So again, in an action on a policy of insurance, for a libel, keeping a mischievous animal, malicious prosecutions, policies, or indeed in any other case where the knowledge, motives or intentions of the parties were material, communications, whether oral or written, might be very important evidence, though not of the truth of the facts communicated, yet for judging as to the motives, intention and honesty of the party to whom the communication was made.

On questions of skill.

Of the class of facts which require proof by means of indirect evidence, there are some of so peculiar a nature that juries cannot without other aid come to a correct conclusion on the subject. In such instances, where the inference requires the judgment

(*r*) *Clarkson* v. *Woodhouse*, 5 T. R. 412.

of persons of peculiar skill and knowledge on the particular subject, the testimony of such as to their opinion and judgment upon the facts, is admissible evidence to enable the jury to come to a correct conclusion. Thus the relation between a particular injury inflicted on a man's body and the death of that man, is an inference to be made by medical skill and experience, and may be proved by one who possesses those qualifications. So again, where the question is as to a general result from books, &c., accounts of a voluminous nature are admissible in evidence; a general result from them may be proved by the testimony of one who has examined them. Questions of skill.

Having thus noticed the great principles which affect the admissibility of evidence in reference to the main sources from which it is derived, whether it be in its nature direct, as derivable from original testimony, or indirect and collateral, as consisting in facts and circumstances collateral to the principal subject of inquiry; another rule, which operates to the exclusion of evidence, not generally, but on comparison with other and more satisfactory evidence, is next to be noticed. It is a general rule of evidence already adverted to, that evidence of an *inferior degree* shall not be admitted whilst evidence of a *higher* and more satisfactory degree is attainable. This rule, it will be seen, depends on a well-founded jealousy that the best evidence is withdrawn, and the inferior substituted, from a desire to suppress the truth. As this is a principle which affects the general nature of proofs, its application will be better considered hereafter, in conjunction with other rules applicable to the nature and modes of proof. Exclusion of secondary evidence.

There are some instances where the law excludes particular evidence, not because in its own nature it is suspicious or doubtful, but on grounds of public policy, and because greater mischief and inconvenience would result from the reception than from the exclusion of such evidence; on this account it is a general rule, that the husband and wife cannot give evidence to affect each other, as it seems, either civilly or criminally. For to admit such evidence would occasion domestic dissension and discord; it would compel a violation of that confidence which ought, from the nature of the relation, to be regarded as sacred; and it would be arming each of the parties with the means of offence, which might be used for very dangerous purposes (*s*). Exclusion from policy. Husband and wife.

(*s*) Co. Litt. 6. b. See Vol. II. Husband and Wife. The rule, it will be seen, does not extend to criminal charges founded on violence offered to the wife.

Confidential communication to a barrister, attorney, &c.

Upon the same principle, the law prohibits a barrister, solicitor or attorney, from divulging that which has been reposed in him confidentially by his client. This prohibition rests on very obvious principles of convenience and policy. It is absolutely essential to the ends of justice that the fullest confidence should prevail between a litigant and those who conduct his cause; and it is equally clear that there would be an end of all such confidence, if the agent could be compelled to divulge all he knew. It is sufficient here, according to the plan originally proposed, to state this principle generally: its practical operation and effect, as to the relative situation of the parties when the communication was made, the nature, time and manner of the communication, will be discussed hereafter (*t*). It may be observed here, that this is the privilege, not of the counsel or attorney, but of the client; and, therefore, that the former ought not to be allowed to divulge his client's secrets, even though he should be willing to do so.

The same principle evidently applies to the case of an interpreter between an attorney and his client.

Extent of the privilege.

Here, however, the law draws the line, and the principle of policy which, in the instances of husband and wife, and of attorney and client, forbids a violation of confidence, ceases to operate. The law will not permit any one to withhold from the information of the jury any communication which is important as evidence, however secret and confidential the nature of that communication may have been, although it may have been made to a physician or a surgeon, or even to a divine, in the course of discharging his professional duties; for it has even been held, that a minister is bound to disclose that which has been revealed to him as matter of religious confession (*u*).

Witness not bound to criminate himself.

Upon a principle of humanity, as well as of policy, every witness is protected from answering questions by doing which he would criminate himself. Of policy, because it would place the witness under the strongest temptation to commit the crime of perjury; and of humanity, because it would be to extort a confession of the truth by a kind of duress, every species and degree of which the law abhors (*x*). It is pleasing to contrast the

(*t*) See Vol. II. tit. CONFIDENTIAL COMMUNICATION.

(*u*) Peake, N.P.C. 77; *Butler* v. *Moore*, Macnall, 253; *Vaillant* v. *Dodemead*, 2 Atk. 524.

(*x*) It is partly upon this principle that an examination of a prisoner, taken before a magistrate on oath, cannot be afterwards read against him as a confession. Another reason is, that the oath is extra-judicial.

humanity and delicacy of the law of England in this respect with the cruel provisions of the Roman law, which allowed criminals, and even witnesses in some instances, to be put to the torture, for the purpose of extorting a confession (*y*).

On grounds of state policy.

There are also some instances in which particular evidence is excluded on grounds of policy, where the disclosure might be prejudicial to the community. Thus, in a state prosecution, a witness cannot be called upon to disclose the names of those to whom he has given information of practices against the State, whether such persons be magistrates, or concerned in the administration of government, or be merely the channel through which information is communicated to government (*z*). So it was held, that an officer from the Tower of London could not be examined as to the accuracy of a plan of the Tower which was produced (*a*). Upon the same ground, an official communication between the governor of a colony and the law-officers there, relating to the state of the colony, cannot be disclosed (*b*). So it seems, that the orders given by the governor of a foreign colony to a military officer acting under his command, ought not to be produced (*c*). The same objection applies to letters written by a secretary of state to a person acting under his authority (*d*); and, as it seems, to minutes taken before the privy council (*e*).

(*y*) See Quintilian's Inst. C. De Tormentis, Pan. lib. 48, s. 242.

(*z*) *R.* v. *Watson*, 2 Starkie's C. 135; and a note from *Hardy's Case*, by Abbott, J. ib. 136; and Lord Ellenborough's observations as to *Stone's Case*, ib. 137; 24 Howell's State Tr. 753.

(*a*) *R.* v. *Watson*, 2 Starkie's C. 148.

(*b*) *Wyatt* v. *Gore*, Holt's C. 299.

(*c*) *Cooke* v. *Maxwell*, 2 Starkie's C. 185. The document was there called for, in order to prove that the plaintiff's factory had been destroyed in consequence of orders from the defendant; and it was held, that although on principles of public convenience the document could not be read, the effect was the same as if the document had not existed, and that the witness might be asked whether what had been done had not been done by order of the defendant.

(*d*) 2 Starkie's C. 186.

(*e*) 6 St. Tri. 281, *Layer's Case*, Where the commander-in-chief directed the defendant, a major-general, with six other officers, to inquire into the conduct of a plaintiff, and to report the opinion of the officers, and the plaintiff brought an action for an alleged libel contained in that report, and the secretary of the commander-in-chief attended with the minutes of the report, the Court refused to allow it to be read. *Home* v. *Bentinck*, 2 B. & B. 130. So official communications between an agent of government and a secretary of state; *Anderson* v. *Sir W. Hamilton*, 2 B. & B. 156; are also privileged. For further observations on this subject, see tit. WITNESS—CONFIDENTIAL COMMUNICATION.

Creation of artificial and conventional evidence.

Thus far the law controls the admission of ordinary evidence, by the application of excluding tests; it is next to be considered how far the law interferes to create evidence, or to add to its efficacy, by artificial means.

It is essential, in the first place, that the law should provide the means of preserving public statutes and ordinances, the decrees and judgment of its courts, and many other transactions of public interest, and for authenticating them as such when it should become necessary; and it is also essential to the convenience of individuals that the evidence of their mutual dealings and engagements should not be left to depend on the defective memories of living witnesses, but should be preserved by the aid of written memorials, mutually agreed upon, for the purpose of perpetuating those transactions. The law itself, therefore, provides authentic memorials of judicial proceedings, and of many other matters of a public nature, by means of its own officers specially delegated to the trust (*f*).

Records. Of this description are the rolls of Parliament, public registers, and all records of courts of justice; and as these are made by ministers or officers specially authorized by the law, for the very purpose of perpetuating the facts which they contain, it is to be presumed that they are true memorials, and they are admissible evidence of those facts, though they are not sanctioned by the ordinary tests of truth. And it may further be observed, that as these memorials relate for the most part to matters of public concern and notoriety, the application of the ordinary tests is not so requisite as in ordinary cases. On this principle, even books of history are admissible to prove public and notorious historical facts.

But though the law in such cases does not require the aid of the ordinary tests of truth, yet in these, as well as in all other instances, the *res inter alios acta* is always excluded. Many of the matters which the law records by instruments of its own creation are of a public nature, to which all may be considered privy; as in the case of public proclamations, acts of state, public registers of birth and marriages. In the case of judicial records, although in one sense they are of public notoriety, and therefore, although such a record is always evidence of the mere fact that such a cause was litigated and such a judgment given, whenever the mere fact is material, yet they are not admissible evidence of the facts and rights *decided* by the decree or judgment,

(*f*) See tit. JUDGMENT.—RECORD.

where they are of a private nature, unless as against one who was party or privy to the proceeding, nor usually, as will be seen, even then, unless he who offers the evidence was also a party or privy; in all other cases the objection that the affair was *res inter alios acta* must prevail (*g*). Records.

As the law creates instruments for the purpose of evidence, so it frequently annexes to them an artificial weight and consequence on grounds of legal policy.

Thus a record in a judicial proceeding is in many instances not simply admissible evidence, but conclusive as to the facts adjudged (*h*).

It is however very clear, that the previous verdict of a jury is not only inconclusive, but that in its own nature it cannot possibly be conclusive as to the truth of a fact which it proposes to ascertain, where that fact is again disputed. It is possible that the former jury may not have been supplied with sufficient evidence to enable them to come to a correct conclusion, or that they may have fallen into error, or even that they have been swayed by indirect motives. But the law, on a strong principle of policy and convenience, and in order to exclude continual litigation, frequently annexes an artificial conclusive effect to a former verdict. Verdict.

Again, where formal instruments are prescribed or adopted by convention, for the purpose of manifesting and perpetuating the acts and transactions of private individuals, the law interferes not only in prescribing the manner and form, but also in giving an artificial effect to such instruments. Conventional evidence.

The ordinary instances in which the law prescribes the form and manner in which private persons shall express their acts, intentions, and record their engagements, are, in cases of wills of real property, grants of incorporeal rights, which must be evidenced by a specialty; agreements, which in many instances prescribed by the statute of frauds (*i*), must be evidenced by some written memorandum of the transaction. In these and other instances where the law prescribes the form, the evidence of the fact must of course consist in proof that the legal requisites have been complied with in the particular instance.

The admissibility of such conventional means of perpetuating the transactions between individuals, falls for the most part within the ordinary and natural rules of evidence. They are, in effect, formal admissions by the parties who make them, and as against themselves are therefore admissible. The admission of such

(*g*) See tit. JUDGMENT. (*h*) See tit. JUDGMENT.—RECORD.

(*i*) See FRAUDS, ST. OF.

Conventional evidence.

evidence is quite consistent with the general rule which excludes all that is *res inter alios*; such evidence would therefore be *admissible* independently of any artificial rule of law, but when admitted, the law frequently annexes an artificial efficacy which it would not otherwise possess (*k*).

The law not only in many instances prescribes the manner and form of the instrument by which such acts and intentions shall be signified, but frequently annexes an artificial and arbitrary effect to such evidence. Thus the law provides that a specialty, such as a bond, shall carry with it intrinsic and conclusive evidence that it was founded on a good and sufficient consideration, without any other proof; that a bill of exchange shall afford, not conclusive, but *primâ facie* evidence of consideration; whilst in other cases of mere parol engagements a consideration will not be presumed, but to give them effect must usually be alleged and proved.

Estoppels.

The doctrine of estoppels by deed affords another prominent instance of the law's interference to annex an artificial effect to particular evidence. It is a general rule of law that a man shall be estopped or excluded from the averment or proof of that which is contrary to his admission by deed (*l*); but he is not estopped in the strict legal sense of the term by a mere oral admission, or even a written one not under seal. Independently of an artificial rule, there is no reason why a man should be estopped or excluded from asserting the truth in one case and not in the other. So also there are numerous instances where, on a just and

(*k*) See tit. BOND.—DEED.—BILL OF EXCHANGE.

(*l*) See tit. DEED. In an original writ the defendant was described as *T. B.* of *C.* in the county of *N.*; upon a writ of error brought to reverse the outlawry, the errors assigned were, that *T. B.* was not before, or at the time of the original writ, of or conversant in *C.* aforesaid, and that there was not any town, hamlet or place of the name of *C.* in that county. Plea to this assignment of errors, that plaintiff prosecuted his writ with intent to declare upon a bond made by the defendant, by which he was described as *T. B.* of *C.* in the county of *N.* Held, that this was an estoppel. *Bonner* v. *Wilkinson*, 6 B. & A. 682.

The rule that a party is estopped by his deed, does not hold where he is contracting for the benefit of the public; thus, as a trustee under a public turnpike act, or where to admit it would control a public statute. *Fairtitle*, ex dem. *Mytton* v. *Gilbert*, 2 T. R. 169.

A. having obtained a patent as for a new invention, but which in fact had been discovered already, enters into an agreement, under seal, with *B.*, permitting him to use it in a particular manner. In an action on the agreement by *A.* against *B.* for using it in a different manner, *B.* is not estopped by his deed from disputing the novelty of the invention. *Hayne* v. *Maltby*, 3 T. R. 438.

Presumptions.

equitable principle, the Courts hold a man to be concluded by his own conduct and representation of a fact, although contrary to the truth. If, for instance, a man induces a tradesman to supply a woman with goods by a representation that she is his wife, he will be concluded by that representation, and will not afterwards be admitted to show that she was not his wife (*m*).

In the next place, the law interferes by annexing to particular classes of evidence artificial presumptions, as contradistinguished from the natural inferences and presumptions which a jury would have made by virtue of their own knowledge and experience. Such presumptions are not rules for arriving at the simple truth; on the contrary, they are frequently used for the very purpose of excluding the truth on grounds of special legal policy. Their object is to annex particular consequences to certain defined predicaments; in fact, therefore, they are in their operation mere rules of law.

For instance, the law raises a presumption of title on an undisputed possession of land for twenty years; but if from such a possession unanswered, title must be presumed, the result is precisely the same as if the law had said at once, that twenty years of adverse possession, unanswered, shall confer a title.

Such artificial presumptions are of two kinds; first, those which are made by the law, that is, by the Courts which administer the law, without the aid of a jury; secondly, such as cannot be made but by the aid of a jury. The former again consist of conclusive presumptions, which, like the presumptions *juris* and *de jure* of the civil law, admit of no proof to the contrary, or are simply presumptions *juris*, which may be rebutted in fact, or by some other presumption raised by the facts. Thus a deed under seal, where the execution of the instrument stands unimpeached, affords conclusive evidence of consideration (*n*).

But although the law will presume or intend, on proof of a fine, that it was levied with proclamations, or that the heir-at-law of one who died seised of an estate was in possession of that estate, yet these are but *primâ facie* presumptions, which may be repelled by actual proof to the contrary.

(*m*) See Vol. II. tit. ADMISSIONS. Where a person assents to an act, and derives and enjoys a title under it, he cannot impeach it. *Rex* v. *Stacey*, 1 T. R. 4.

Where a copyholder has been admitted to a tenement, and done fealty to a lord of a manor, he is estopped, in an action by the lord for a forfeiture, from showing that the legal estate was not in the lord at the time of admittance. *Nepean* v. *Budden*, 5 B. & A. 626.

(*n*) Vol. II. tit. PRESUMPTIONS.

Presumptions.

Other presumptions, again, which may be termed presumptions in law and fact, are those which are recognized and warranted by law as the proper inferences to be made by juries under particular circumstances; these, it will be seen, are founded on principles of policy and convenience, and not unfrequently on an analogy to express rules of law. Thus, in the instance above mentioned, a jury would be warranted in presuming, and even directed to presume a right, from evidence of an adverse and uninterrupted enjoyment of lands for twenty years, in analogy to the provisions of stat. 21 Jac. 1; although if the jury did not infer the right from such evidence, the Court could not do it.

OF THE INSTRUMENTS OF EVIDENCE.

Of the instruments of evidence.

HAVING thus considered generally the principles which regulate the admission of evidence, we are next to consider what are the means and instruments of evidence; how they are to be procured and used; their admissibility and effect. These are, first, oral witnesses, examined *vivâ voce* in court as to facts within their own knowledge, and in some particular instances, as to what they have heard; and secondly, written evidence.

Oral evidence, its natural priority.

And first, as to oral witnesses. Oral testimony, it is to be remarked, in natural order precedes written evidence. It is in general more proximate to the fact than written evidence, being a direct communication by one who possesses actual knowledge of the fact by his senses; whilst written evidence in itself requires proof, and must ultimately be derived from the same source with oral evidence, that is, from those who possessed actual knowledge of the facts.

Under this head may be considered,

1st. The mode of enforcing the attendance of a witness in civil and criminal cases, and his production of writings in his possession. The incidents to his attendance and default.

2dly. Objections in exclusion of his testimony.

3dly. The mode of examination in chief; cross-examination, and re-examination.

4thly. The mode of rebutting his testimony.

5thly. The mode of confirming his testimony.

1st. The mode of enforcing the attendance of a witness in civil and criminal cases, and also of enforcing his production of writings in his possession, and the incidents to his attendance or default.

1. His attendance upon the trial is enforced by *subpœna* or *habeas corpus*, in civil as well as criminal cases, and also in the latter by means of his recognizance.

Compulsory process on witness not in custody.

The attendance of a witness in *civil* cases (*o*) is compelled (where the witness is not in custody) by means of a subpœna, which is a judicial writ, commanding the witness to appear at the trial to testify for the plaintiff or defendant, under pain of forfeiting 100 *l.* in case of disobedience (*p*). One writ cannot contain the names of more than four witnesses (*q*), and must be renewed at every subsequent assizes or sitting, if the cause be made a *remanet* (*r*). But if the subpœna contain more than four witnesses, a witness who is served with a subpœna-ticket in court cannot refuse to give evidence (*s*). A subpœna-ticket, which is a copy of the writ (*t*), should be made out for each witness, and must be served upon him personally (*u*), a reasonable time before the day of trial (*x*). Notice in London, at two in the afternoon, calling upon the witness to attend at the sittings at Westminster the same day, is too short (*y*).

The service of a ticket is sufficient (*z*), but the original should be shown to the witness when the ticket is delivered to him. It is also requisite, in civil cases, to tender to the witness his rea-

(*o*) Commissioners of bankrupt had power to enforce the attendance of witnesses, under the stat. 1 Jac. 1, c. 15, s. 10; and by the 49 Geo. 3, c. 121, s. 13, bankrupts in execution are to be brought before them. And now see the stat. 6 G. 4, c. 16, *infra*, 85. Under the stat. 1 Jac. 1, c. 15, it was not necessary, upon summoning a witness to attend before commissioners of bankrupts, that his expenses should have been tendered (*Buttie* v. *Gressley*, 8 East, 319); and therefore a warrant issued by the commissioners on account of the non-attendance of a witness without lawful impediment, and authorising his arrest, was legal, and proof of excuse lay on the party arrested. Ib.

(*p*) See the form Tidd's P. App. c. 35, s. 16. The stat. 5 Eliz. c. 9, s. 12, gives an additional remedy of 10 *l.* to the party grieved.

(*q*) Cowp. 846.

(*r*) *Sydenham* v. *Rand*, T. 24 G. 3; Tidd, 723, 3d ed.; *Gillett* v. *Muwman*, T. 47 G. 3. C. P.

(*s*) Cowp. 846.

(*t*) It is sufficient if the subpœna-ticket contain the substance of the writ. 5 Mod. 355; Cro. Car. 540.

(*u*) To warrant an attachment, *quære*, whether personal service be necessary in the case of an action. *Smalt* v. *Whitmill*, Str. 1054; *Wakefield's Case*, Cas. Tem. Hardw. 313.

(*x*) 1 Str. 510; 2 Str. 1054.

(*y*) *Hammond* v. *Stewart*, Str. 510.

(*z*) *Goodwin* v. *West*, Cro. Car. 522. 540; *Maddison* v. *Shore*, 5 Mod. 355.

Expenses of witness.

sonable expenses, not only of going to attend the trial, but also of his return; for although he may refuse to be sworn till such expenses be paid, the party may not choose to call him, and he may find it difficult to get home again (*a*). Where the witness lives within the bills of mortality, it is usual to deliver a shilling with the subpœna-ticket for his attendance in London or at Westminster (*b*). In other cases the sum tendered should be proportioned to the circumstances. Where an attachment is moved for, the Court will not enter into any nice calculation as to the expense, but will consider whether the non-attendance originated in obstinacy or not (*c*). If a feme covert be subpœnaed, the tender should be to her, and not to her husband (*d*). In an action under the statute of Elizabeth, it has been held, that the payment of a shilling, with a promise to pay the witness all further reasonable charges upon his appearance, which the witness accepted, was sufficient (*e*). The case of a witness *bonâ fide* brought over from a foreign country, does not differ in principle from a witness resident in this country; and the expenses in each case of his going to and from the place of trial, and of his residence, are allowed on taxation of costs (*f*).

A witness is not in general entitled to remuneration for loss of time (*g*).

A witness in a civil case may maintain an action for his expenses, although he has refused to give evidence at the trial because they have not been paid (*h*), or, as it seems, although the cause has not been called on (*i*); but he cannot recover for loss of time even upon an express *assumpsit* (*k*).

(*a*) *Chapman* v. *Pointon*, 2 Str. 1150; *Fuller* v. *Prentice*, 1 H. B. 49; *Hallett* v. *Mears*, 13 East, 15; *Ex parte Roscoe*, 6 Meriv. 191. The obligation depends on the stat. 5 Eliz. c. 9.

(*b*) 2 Str. 1054; Tidd's Pr. 848; 3 Bl. Com. 369.

(*c*) *Chapman* v. *Pointon*, Str. 1150.

(*d*) Cro. Eliz. 122; Jon. 430.

(*e*) Cro. Car. 522. 540; March, 18.

(*f*) *Tremaine* v. *Faith*, 1 Marsh, 563; 6 Taunt. 88; 4 Taunt. 55. 699.

(*g*) 5 Maule & S. 156; and *Lowry* v. *Doubleday*, there cited; *Willis* v. *Peckham*, 1 B. & B. 515; *Severn* v. *Olive*, 3 B. & B. 72. In some instances, however, such expenses have been allowed to attornies and medical practitioners; 5 M. & S. 159. But see *Collins* v. *Godefroy*, 1 B. & Ad. 950. Where a foreign witness would not attend without being paid for loss of time, the costs were allowed; *Lonergan* v. *Royal Exchange Assurance Company*, 7 Bing. 729; though detained pending an injunction; ib.

(*h*) *Hallett* v. *Mears*, 13 East, 15.

(*i*) *Barrow* v. *Humphries*, 3 B. & A. 598, doubting *Bland* v. *Swafford*, Peake's C. 60. See *Hallett* v. *Mears*, 13 East, 15.

(*k*) *Willis* v. *Peckham*, 1 B. & B. 515. In the late case of *Collins* v. *Godefroy*, 1 B. & Ad. 950, it was held that an attorney, who attended on a subpœna, could maintain no action

A witness who ha. been summoned before commissioners of a bankrupt may recover the expenses allowed by the commissioners, although he was a creditor, and the allowance was by parol (*l*).

If a witness wilfully neglect to attend upon the subpœna, he is guilty of a contempt of Court, for which he is liable to an attachment (*m*). He is also liable to damages at common law, in an action on the case by the party injured (*n*); and lastly, by the stat. 5 Eliz. c. 9, s. 12, he shall forfeit for such offence 10 *l.*, and yield such further recompense to the party grieved as, by the discretion of the Court out of which the process shall issue, shall be awarded (*o*). The most usual mode of proceeding is by attachment, in which case an affidavit of personal service is necessary, and of the payment or tender of reasonable expenses (*p*). Consequence of disobedience.

for compensation for loss of time; and an express promise to remunerate would make no difference, for it would be without a consideration to support it. But expenses of subsistence to a seafaring man, though an Englishman, have been allowed. *Berry* v. *Pratt*, 1 B. & C. 276. The expenses of making scientific experiments, with a view to evidence, are not allowable. *Severn* v. *Olive*, 3 B. & B. 72.

(*l*) *Yarker* v. *Botham*, 1 Esp. C. 65; under the stat. 1 Jac. 1, c. 15, s. 10.

(*m*) 1 Str. 510; 2 Str. 810. 1054. 1150; Cowp. 386; Doug. 561.

(*n*) Doug. 561. It has been said that no action lies unless the cause were called upon, and the jury sworn; *Bland* v. *Swafford*, Peake's C. 60; but *qu.* and see the observations of the Court in the case of *Barrow* v. *Humphries*, 3 B. & A. 598.

(*o*) In an action to recover the ten pounds, the plaintiff must set forth special damages; Cro. Car. 522. 540; *Goodwin* v. *West*, Jon. 430; 5 Mod. 355; for unless there be a party grieved there is no cause of forfeiture. *Aliter*, Cro. Eliz. 130; Leon. 122. An action will not lie for further recompense unless it has been assessed by the Court out of which the process issues; neither the Judge nor the jury at Nisi Prius are competent to do it. *Pearson* v. *Iles*, Doug. 556.

(*p*) *Chapman* v. *Pointon*, 2 Str. 1150. It seems that an attachment will be granted by the Court of C. P. as well as by the Court of K. B.; but that the practice was formerly confined to the Court of K. B. See Str. 1150; Barnes, 33. 497; Ld. Raym. 1528; 1 H. B. 49; 5 Taunt 260. The Court will not grant an attachment unless a clear case of contempt be made out. An attachment has been refused where the whole of the expenses of the journey, and of the necessary stay at the place of trial, were not tendered at the time of serving the subpœna (*Fuller* v. *Prentice*, 1 H. B. 49). So where, the witness living at the distance of thirty-four miles from the assize town, the expenses were not tendered to him till the evening before the trial (*Horne* v. *Smith*, 6 Taunt. 9). So where the witness, in the course of the third day's attendance, left the court to attend to urgent business of his trade, although the consequence was a nonsuit; no notice having been given him, when the subpœna was served, when the trial would come on (*Blandford* v. *De Tastet*, 5 Taunt. 260); even although the witness was induced to leave court by the representations of the defendant's attorney.

Where witness is in custody.

Where the witness is in custody, his testimony is obtained by means of a *habeas corpus ad testificandum*, which was grantable at the discretion of the Courts at common law (*g*); and by the stat. 44 Geo. 3, c. 102, any Judge of the Courts of King's Bench and Common Pleas in England or Ireland, or any Baron of the Court of Exchequer of the degree of the coif in England, or any Baron of the Court of Exchequer in Ireland, or any Justice of Oyer and Terminer, or gaol delivery, being such Judge or Baron, may at his discretion award a writ or writs of habeas corpus for bringing up any *prisoner or prisoners* detained in *any gaol* or prison, before any of the said Courts, or any sitting of Nisi Prius, or before any other court of record in the said parts of the said United Kingdom, to be examined as a witness, &c. in any cause or causes, matter or matters, civil or criminal, depending or to be inquired into or determined in any of the said courts (*r*).

An application for such writ, either to the Court or to a Judge (*s*), must be accompanied by an affidavit of the applicant, stating that the witness is a material one (*t*); and if he be at a great distance, the affidavit should further show the materiality (*u*). It is said (*x*) that the affidavit should also state that

A witness is guilty of a contempt of Court in not attending at the assizes under a subpœna, although the cause be not called on. *Barrow* v. *Humphries*, 3 B. & A. 598, P. C. doubting the case of *Bland* v. *Scafford*, Peake's C. 60.

The affidavit to found an attachment in the P. C. must state that the witness was duly called at the trial. *Malcolm* v. *Kay* 3 Moore, 222. It seems that the name of the witness, inserted in the copy of the subpœna at the time of service, may be inserted in the original writ of subpœna when the witness is called. *Wakefield* v. *Gall*, Holt's C. 526, cor. Gibbs, C. J.

(*q*) See Tidd's Pr. 858; *Ex parte Tillotson*, 1 Starkie's C. 470. The Court of Common Pleas refused to grant an order to commit a prisoner to the custody of the warden of the Fleet, who had been charged in custody of the sheriff upon an extent, and brought up on a habeas corpus for the purpose of being examined as a witness in a civil suit. *Leigh* v. *Sherry*, 2 Moore, 33.

(*r*) Previous to this statute it was the usual practice for the Courts to award this writ upon motion, accompanied with a proper affidavit. By the stat. 43 G. 3, c. 140, a Judge of any of the courts at Westminster may at his discretion amend a writ of habeas corpus for bringing a prisoner detained in any gaol in England before a court-martial, or before commissioners of bankrupt, commissioners for auditing public accounts, or other commissioners acting by virtue of any royal commission or warrant.

(*s*) The application ought, it seems, to be made to a Judge at chambers. *Gordon's Case*, 2 M. & S. 582.

(*t*) Cowp. 672; Peake's Ev. 192, 3, 4th ed.; Fortescue, 396; 4 State Tr. 609.

(*u*) Tidd's Pr. 4th ed. 724.

(*x*) Peake's Ev. 201; Tidd's Pr. 724.

the witness is willing to attend; and this appears to be necessary where the witness is not a prisoner, as in the case of a seaman on board a man of war, for he cannot be brought up as a prisoner without his consent (*y*); and therefore in such case it should appear that the witness has been served with a subpœna, and is willing to attend (*z*).

When granted.

This writ will not be granted to bring up the body of a prisoner of war (*a*); and he cannot be brought up without an order from the Secretary of State; and the writ was refused where it appeared to be a mere contrivance in order to remove a prisoner in execution (*b*). If the Court make a rule, or the Judge grant his fiat, the writ is sued out, signed and sealed, and is left with the sheriff, or other officer in whose custody the witness is, who will bring him up on being paid his reasonable charges (*c*). When the attendance of a material witness cannot be procured, either in a civil or criminal proceeding, the usual course is, either to move to put off the trial (*d*), or to examine him upon interrogatories.

In criminal cases, witnesses for the prosecution.

The compulsory process in criminal cases is, *first*, by means of a subpœna issued in the King's name by the Justices of the court in which the offence is to be tried (*f*); the more usual course is, *secondly*, for the justices or coroners who take the informations, examinations and depositions, to bind the witnesses under the statute of 7 G. 4, c. 64, s. 2, by recognizance, to appear at the next gaol delivery or quarter sessions to give evidence (*g*). The justices (*h*) may take these recognizances at any time before the trial; and if the witness refuse to enter into such recognizance,

(*y*) *Rex* v. *Rodham*, Cowp. 672.

(*z*) Ib; but this seems to be unnecessary where the party is an actual prisoner; for there is no reason why he should not be compelled to attend as well as a person who is at large, or for allowing him, because he is a prisoner, to deprive a party of the benefit of his testimony.

(*a*) *Furley* v. *Newnham*, Doug. 419; 6 T. R. 497; 7 T. R. 745.

(*b*) 3 Burr. 1440.

(*c*) Tidd, 726; 1 Cromp. 248. *Qu.* whether the officer may require an indemnity? He would be liable for an escape if he brought up a prisoner in execution for debt without such a writ. R. v. *Eliz. Cellier*, 3 St. Tr. 97; R. v. *Sir John Friend*, 4 St. Tr. 599.

(*d*) See below, tit. TRIAL.

(*e*) Vid. *infra*, DEPOSITIONS.

(*f*) R. v. *King*, 8 T. R. 585; see ib. as to the form of the affidavit in moving for an attachment. Where the witness resides beyond the jurisdiction of the court, a subpœna may be issued from the crown-office; ib.

(*g*) 2 St. Tr. 580; 4 St. Tr. 37; Dalt, J. 111; 4 Comm. 359; 2 Haw. c. 46, s. 17.

(*h*) Magistrates cannot in general enforce the attendance of witnesses except in cases of felony, where a pri-

In criminal cases.

the justice or coroner may commit him, or bind him to his good behaviour, and to appear at the next gaol delivery or quarter sessions of the peace (*i*). Where a feme covert, having given evidence before a magistrate in a case of felony, refuses to attend at the trial, or to find sureties, the justice may commit her (*k*). If the witness cannot find sureties, the justice ought to take his own recognizance; it would in such case be illegal to commit the witness (*l*). In proceedings before the justices of the peace at their quarter sessions, whose jurisdiction does not extend beyond the county for which they act, in order to procure the attendance of a witness who resides in another county, the process is issued from the crown-office (*m*). Where an offender who has escaped from one part of the united kingdom is tried in another, under the stat. 13 Geo. 3, c. 31, and 44 Geo. 3, c. 92, and in general by virtue of the stat. 45 Geo. 3, c. 92, s. 3, service of a subpœna on a witness in one part of the united kingdom to give evidence in a criminal prosecution in another part, is as effectual as if the witness had been served with the subpœna in that part of the united kingdom where he is required to appear, and upon default, notified by a certificate under the seal of the court whence the subpœna issued, to the Court of King's Bench in England or Ireland respectively, or of the High Court of Justiciary in Scotland, he is liable to be punished as for a contempt of the process of those courts respectively. By the express provision of the latter statute (sec. 4), the witness cannot be punished for a default, unless the reasonable expenses of coming and attending to give evidence, and of returning, have been tendered to him. In other cases the witness is bound to obey the writ, or to perform the condition of his recognizance, although no

s[illegible]er is brought before them on sus-p[illegible]. of felony; for in such cases the [illegible] 2 & 3 of Ph. & M. c. 10, (and now the st. 7 G. 4, c. 64, s. 2), which requires them to take the examinations of those who bring the prisoner, incidentally gives them a power to examine witnesses upon oath, and to enforce the attendance of material witnesses. *Bennett* v. *Watson*, 3 M. & S. 1; Dalt. J. c. 6; Lamb. 517; 12 Rep. 131. See the stat. 15 Geo. 3, c. 39.

By particular statutes courts of various jurisdictions have power given them to enforce the attendance of witnesses. Commissioners of bankrupt, by the stat. 1 Jac. 1, c. 15, s. 10. and see the stat. 5 G. 2, c. 30, s. 6, and 49 G. 3, c. 121, s. 13, and the late st. 6 G. 4, c. 16, s. 33, *infra*, 85. Courts martial, by the stat. 55 G. 3, c. 108, s. 28. Commissioners of inclosure, by stat. 41 G. 3, c. 109, s. 33, 34.

(*i*) 2 Hale, P. C. 52. 282; Dalt, J. 111; *Bennett* v. *Watson*, 3 M. & S. 1; Haw. b. 2, c. 8, s. 58, and c. 16, s. 2.

(*k*) *Bennett* v. *Watson*, 3 M. & S. 1.

(*l*) Per Graham, B. Bodmin Summer Assizes, 1827.

(*m*) See *R.* v. *Ring*, 8 T. R. 585.

expenses have been tendered to him (*n*); for the calls of justice are paramount to all private considerations and claims (*o*). In cases of felony, the Legislature has made provision for the expenses of the prosecution and witnesses (*p*).

In criminal cases.

(*n*) 2 St. Tr. 124; *Rex* v. *Love*, 1 Burn's J. 533.

(*o*) Hawk. b. 2, c. 46, s. 173; 2 Hale, 282. It is the common practice in criminal cases for the Court to direct the witness to give his evidence, notwithstanding his demurrer on the ground that his expenses have not been paid. Some doubt has been expressed on he subject (Chitty's Crim. Law, vol. 1, 612), on ecount of the provision for payment of expenses by the stat. 45 G. 3, c. 92, s. 3. It seems, however, to be without foundation: if, in general, a witness were entitled to his expenses in a criminal as well as in a civil case, the clause in that statute for payment of such expenses would have been unnecessary. A witness subpœnaed to give evidence in a different part of the united kingdom, would usually be placed under greater difficulty, and subject to a greater expense, than in ordinary cases.

(*p*) The stat. 18 Geo. 3, c. 19, s. 8, has directed, that where any person shall appear, on recognizance or subpœna, to give evidence as to any grand or petit larceny, or other felony, whether any bill of indictment be preferred or not, to the grand jury, it shall be in the power of the court, provided the person shall, in the opinion of the court, have *boná fide* attended in obedience to such recognizance or subpœna, to order the treasurer of the county, &c. to pay him such sum as to the court shall seem reasonable, not exceeding the expenses which it shall appear to the court the said person was *boná fide* put unto by reason of such recognizance and subpœna, making a reasonable allowance, in case he shall appear to be in poor circumstances, for trouble and loss of time. See also the statutes 25 Geo. 2, c. 36; 27 Geo. 2, c. 3, s. 3. The latter of these statutes extends to those cases only where the witness was bound by recognizance to appear. These statutes are confined to cases of felony. *R.* v. *Justices of the West Riding of Yorkshire*, 7 T. R. 377.

By the statute 58 Geo. 3, c. 70, s. 4, the court before which any person is prosecuted or tried for any grand or petit larceny or other felony, may order the sheriff or treasurer of the county to pay to the prosecutor, or any other person who shall be bound to prosecute or give evidence, &c. or who shall be subpœnaed to give evidence, and who shall appear to give evidence, or who shall appear to the said court to have been active in the apprehension of any person or persons accused of any of the offences specified in the several Acts recited in the statute*, as well the costs, charges and expenses which the prosecutor shall be put to in preferring the indictment or indictments against the person or persons so accused, as also such sum and sums of money as to the

* The recited Acts are 4 W. & M. c. 8, relating to highway robberies; 6 & 7 W. 3, c. 17, relating to the counterfeiting of coin; 10 & 11 W. 3, c. 23, to burglaries, house-breaking, robbing in shops, &c.; 5 Ann c. 31, to housebreakers; 14 Geo. 2, c. 6, to the stealing and destroying sheep and other cattle; and 15 Geo. 2, c. 18, to the uttering of counterfeit coin.

Witness for defendant in criminal cases.

At common law, a defendant in capital cases had no means of compelling the attendance of witnesses on his behalf without

said court shall seem reasonable, to reimburse such prosecutor and witnesses, person or persons, so concerned in such apprehension as aforesaid, for the expenses they shall have been severally put to in attending before the grand jury to prefer such indictment or indictments, and in otherwise carrying on such prosecution; and also to compensate such prosecutor and witnesses, and person or persons, in such apprehension as aforesaid respectively, for their loss of time and trouble in such apprehension and prosecution as aforesaid.

By the stat. 7 Geo. 4, c. 64, it is enacted, that the court before which any person shall be prosecuted or tried for any felony, is hereby authorized and empowered, at the request of the prosecutor, or of any other person who shall appear on recognizance or subpœna to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money as the court shall deem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate or magistrates or grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein; and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall, in the opinion of the court, *bonâ fide* have attended the court in obedience to any such recognizance or subpœna, to order payment unto such person of such sum of money as to the court shall seem reasonable and sufficient to reimburse such person for the expenses which he or she shall have *bonâ fide* incurred by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpœna, and also to compensate such person for trouble and loss of time; and the amount of the expenses for attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all the other expenses and compensation shall be ascertained by the proper officer of the court, subject nevertheless to the regulations to be established in the manner hereinafter mentioned.

Sec. 23. That where any prosecutor or other person shall appear before any court on recognizance or subpœna to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving any stolen property, knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury, every such court is hereby

a special order from the Court; and if they attended voluntarily they could not be sworn (*q*). But in cases of misdemeanor a defendant might always take out subpœnas as of course (*r*). By the statute 7 Will. 3, c. 3, s. 7, it was provided, that defendants, in case of treason, should have the same process to compel the attendance of witnesses for them as was granted to compel witnesses to appear against them; and ever since the statute 1 Ann. 2, c. 9, s. 3, which provides that witnesses for the prisoner, in cases of treason or felony, shall be sworn in the same manner as the witnesses for the Crown, and be subject to the same punishment for perjury, the process by subpœna is allowed to defendants in cases of felony, as well as in other instances (*s*); and consequently, as the law now stands, a witness who refused, after being subpœnaed to attend, to give evidence for a defendant in a criminal case, would be liable to an attachment for a contempt of court.

For defendants.

By the stat. 6 Geo. 4, c. 16, s. 33, commissioners of bankrupt may summon before them any persons whom they believe to be capable of affording information concerning the trade, dealings or estate of the bankrupt, and in default they may order the party summoned to be apprehended. Every witness is entitled to have his expenses tendered him (*t*).

In bankruptcy.

Where either party cannot safely proceed to trial on account of the absence of a material witness, the proper course is to move the Court in term time, or to apply to a Judge in vacation, or to the Judge at the sittings, on a proper affidavit, to put off the trial (*u*).

Proceeding where the witness cannot be procured.

authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorized and empowered to order the same in cases of felony; and although no bill of indictment be preferred, it shall still be lawful for the Court, where any person shall have *bonâ fide* attended the Court in obedience to any such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony; provided, that in cases of misdemeanor the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate.

(*q*) 2 Haw. c. 46, s. 170; *Rex* v. *Turner*, 2 State Tr. 505; 1 State Tr. 969; 3 State Tr. 1002.

(*r*) 2 Haw. c. 46, s. 170; 1 State Tr. 969; 2 State Tr. 238. 252. 450.

(*s*) 2 Haw. c. 46, s. 172.

(*t*) 6 G. 4, c. 16, s. 35.

(*u*) This is granted by the Court where it appears that injustice would be done by refusing the application, and that the party who applies has conducted himself fairly. In some instances it has been refused even to a defendant, where it appeared that he intended to set up a defence which,

Where a witness is resident abroad, or is going abroad, the proper course is to apply to the Court to have him examined on interrogatories (*x*).

Subpœna duces tecum.

Where an instrument is in the hands of a third person, the production is compelled by means of a writ of *subpœna duces tecum* (*y*).

By this writ the witness is compellable, it seems, to produce all documents in his possession, unless he have a lawful or reasonable excuse to the contrary (*z*). Of the validity of the excuse

though legal, is not favoured, as that the plaintiff is an alien (*Robinson* v. *Smyth*, 1 B. & P. 454); or even to give the defendant an opportunity which he has lost by his neglect of applying to a court of equity for a commission (*Calliard* v. *Vaughan*, 1 B. & P. 212); so, in general, where the applicant has been guilty of improper delay (*Saunders* v. *Pitman*, 1 B. & P. 53). Such a rule will not be granted to a defendant after pleading a sham plea, unless he will pay the money into court. Tidd's Pr. 831.

An application to put off the trial to a future sittings will not be granted at the instance of the plaintiff, because he may withdraw his record; but when, in consequence of some sudden indisposition or accident, a witness is unable to attend, but is likely to be able to do so before the sittings are over, the Judge will usually make an order that the cause shall stand over. *Ansley* v. *Birch*, 3 Camp. C. 333.

Where a defendant makes the application at Nisi Prius, the course is to give notice to the plaintiff's attorney, with a copy of the affidavit, which, where the defendant is abroad or out of the way, may be made by his attorney or a third person. Peake's C. 97. The affidavit should state that the person is a material witness, without whose testimony the defendant cannot safely proceed to trial; that he has endeavoured to procure him to be subpœnaed, and expects to procure his future attendance. See Tidd's App. 312.

(*x*) *Infra*, WRITTEN EVIDENCE.—Index, tit. EXAMINATION ON INTERROGATORIES.

(*y*) From the entries cited in the case of *Amey* v. *Long* (9 East, 473), it appears that this writ has in fact been used from the time of Charles the Second; but so necessary is the power of compelling the production of documents in the possession of third persons, that the means of doing it must have been coeval with the courts of law.

(*z*) *Amey* v. *Long* (9 East, 473), where it was held that an action lay against a sheriff's bailiff for not producing a warrant under which he acted in obedience to a writ of subpœna in a former action, in consequence of which the plaintiff was nonsuited; and it was held that his ability to produce the warrant, and his want of just excuse for not producing it, are sufficiently alleged by stating that he could and might, in obedience to the said writ of subpœna, have produced at the trial the said warrant, and that he had no lawful or reasonable excuse or impediment to the contrary. An attorney in possession of a deed to which he is an attesting witness, and on which he has a lien, will not be compelled by the Court to produce it; the mode of proceeding is by *subpœna duces tecum*, as in any other case. *Buske* v. *Lewis*, 6 Mad. 29.

the Court, and not the witness, is to judge (*a*). As every man is, in furtherance of justice, bound to disclose all the facts within his knowledge which do not tend to his crimination, upon the very same principle he is also bound to produce such documents as are essential to the discovery of truth and the great ends of justice. But as he is protected from answering questions the answers to which may subject him in penal responsibility, so he is not compellable to produce any document in his possession, where the production would be attended with similar consequences (*b*). Subpœna duces tecum.

There seems, however, in one respect, to be a distinction between the compelling a witness to answer a question orally, and the obliging him to produce a written document. He must answer questions, although the answer may render him civilly responsible; but it seems that he is not compellable to produce title-deeds, or any other documents which belong to him, where the production might prejudice his civil rights. And this is, as it seems, a rule of legal policy founded upon a consideration of the great inconvenience and mischief to individuals which might and would result to them from compelling them to disclose their titles, by the production of their title-deeds or other private documents (*c*).

(*a*) *Amey* v. *Long*, 9 East. 473.

(*b*) See *Whitaker* v. *Izod*, 2 Taunt. 115. In the *King* v. *Dixon* (3 Burr. 1687), an attorney had been served with a *subpœna duces tecum* to produce certain vouchers, which his client, Mr. Peach, had produced and relied upon before a master in Chancery, in order to found a prosecution for forgery against his client; and it was held that he was not bound to produce them.

(*c*) In general, a plaintiff has no right to the production of a deed not connected with his own title, and which gives title to the defendant (*Sampson* v. *Swettenham*, 5 Madd. 16); and the Court will not compel an inspection where the parties have an adverse interest. *Threlfal* v. *Webster*, 1 Bing. 161.

In *Miles* v. *Dawson* (1 Esp. C. 405), which was an action of trespass for seizing the plaintiff's ship, Lord Kenyon, in analogy to the practice of the Court of Chancery, would not compel a witness (who was called to prove that he had seized the ship under a written authority from the defendant) to produce the power of attorney under which he had acted.

In *Bateson* v. *Hartsinke* (4 Esp. C. 43), in an action on a bill of exchange, where one of the defendants pleaded his bankruptcy and certificate, and the plaintiff sought to impeach the certificate, Lord Kenyon held that the solicitor under the commission was not bound to produce the proceedings; they were not his papers, but those of his clients.

In the case of *James Laing* v. *Barclay* (3 Starkie's C. 38), Abbott, C. J. held that the solicitor to the assignees under a commission of bankruptcy against George Laing, and who had

Subpœna duces tecum.

The same principle applies where the document is in the hands of an attorney; he will not be compelled to produce it to be read where the disclosure would be prejudicial to his client (*d*).

been served with a *subpœna duces tecum* by the plaintiff to produce the proceedings under the commission, was justified in refusing to produce them, an action being then pending against the same defendants, in which his clients were plaintiffs.

In the case of *Harris* v. *Hill* (3 Starkie's C. 140), his Lordship also ruled, that a solicitor to the Manchester Waterworks Company was not bound to produce a deed of composition between the company and their creditors, the production of which would, he apprehended, be prejudicial to his clients.

So where a witness was called to produce a deed which he held as a security, objected to produce it, as affecting his interest, Abbott, L.C.J. refused to compel him. *Schlenker* v. *Morey*, 3 B. & C. 789; 5 D. & R. 747; and 1 Carr. (N.P.) 178.

Where a defendant had worked coal-mines without interruption, under a special agreement, and on an action on the agreement the defendant called a trustee, who had been served with a *subpœna duces tecum*, to produce the deeds under which he held the legal estate, in order to show that the plaintiff had no longer any legal title, Richards, C.B. held that he could not be compelled to produce them. *Roberts* v. *Simpson*, 2 Starkie's C. 203.

And in general the Court will not in any case compel a party to produce his title-deeds, where the production can occasion any prejudice to him (*Pickering* v. *Noyes*, 1 B. & C. 262); and the Court will not make an order for the production of deeds but where they have been deposited with the holder as a trustee for others only, or as a trustee for others jointly with himself (ibid.); where the Court observed, that parties are never compelled to produce their title deeds; that if a *subpœnâ duces tecum* be served, the party must bring his deeds; but that if he state that they are his title-deeds, no Judge will compel him to produce them. Where in an action of covenant an attorney who held the deed for a third person objected to produce it, held that he was not compellable to do so, but that the party might give secondary evidence of its contents, and the Court would not presume that there was a counterpart. *Ditcher* v. *Kenrick*, 1 Carr. C. 161.

A witness is compellable, on cross-examination by interrogatories, to produce letters relating to the subject interrogate, and not stated by the witness (an attorney) to be relative to confidential matters of any other sort. *Atkinson* v. *Atkinson*, 2 Add. (Arches) 469.

(*d*) *Copeland* v. *Watts*, 1 Starkie's C. 95. If, however, the client would have been compelled to produce the document, it seems that the agent would also be compellable to do so, otherwise by parting with the possession he might exclude the party from the benefit of the evidence. A lease, during a dispute between lessor and lessee, is ordered by a Court of Equity to be deposited with the attorney of the lessor; the attorney is bound to produce it on the trial of an ejectment brought by the lessee against the tenant in possession. *Doe* v. *Thomas*, 9 B. & C. 288.

Where these objections do not apply, it seems that the writings in a man's possession are as much liable to the calls of justice as the faculties of speech and memory are. There can be no difference in principle between obliging a man to state his knowledge of a fact, and compelling him to produce a written entry in his possession which proves the same fact. Not only a man's estate, but even his liberty or life, may depend upon written evidence, which is the exclusive property of a stranger (*e*).

Writings to be produced where the production will not prejudice.

It is in all cases the duty of the witness to bring the document with him, according to the exigency of the writ (*f*); and it is a question of law for the Court, whether, upon principles of justice and equity, the production of the instrument ought to be enforced (*g*).

(*e*) As, for instance, where a man's title depends upon the precise time of his birth, and the executor of an accoucheur is in possession of an entry made by the latter which would be legal evidence to prove the time of birth. In a criminal case, proof that the prisoner at a particular time and place signed an instrument, may be decisive as to his innocence.

(*f*) *Amey* v. *Long*, 9 East, 473. *Cosen* v. *Dubois*, 1 Holt's C. 239. *Field* v. *Beaumont*, 1 Swanst. 209. *Reed* v. *James*, 1 Starkie's C. 132.

(*g*) In the case of *Copeland* v. *Watts* (1 Starkie's C. 95), which was an action by the lessor for breach of covenants in the lease, the plaintiff, to prove the execution of the counterpart, which was missing, called upon the solicitor of a sub-lessee to produce an under-lease by the lessee of the same premises, in which the original lease was recited. The solicitor demurred to the production, conceiving it to be doubtful whether the interest of his client might not be prejudiced by the production of the under-lease. But Gibbs, C.J., after inspecting the under-lease, was of opinion that the reading of it would not prejudice the sub-lessee, and it was accordingly read.

See also *Cosen* v. *Dubois* (1 Holt's C. 239), which was an action on a bill of exchange, to which the defendant pleaded his bankruptcy and certificate. In order to defeat the certificate, the plaintiff called on the defendant's solicitor to produce the proceedings under the first of two commissions against the defendant, which had been left in his custody by the assignees under the first commission. The solicitor demurred to the production; and Gibbs, C.J. said, that if the production were likely to be prejudicial to the assignees, he would intercept them, but as he could not see any prejudice to the persons how had entrusted the solicitor with the proceedings, he could not withhold them, even although the documents might have been procured by other means. (Ibid.) In the case of *Pearson* v. *Fletcher* (5 Esp. C. 90), which was somewhat similar to that of *Corsen* v. *Dubois*, Lord Ellenborough ruled that the solicitor to the commission was bound by public duty to produce the proceedings.

In the case of *Reed* v. *James*, (1 Starkie's C. 132), Lord Ellenborough said that the witness, who was the petitioning creditor, could not, in an action by the assignees, with propriety refuse to produce the promissory note on which the debt was founded.

Notice to produce a deed.

Disobedience of the writ by the witness will not warrant the reception of parol evidence; but where the witness, *in fraud of the subpœna*, transferred the document to the adverse party in the cause, it was held that parol evidence was admissible (*h*). And although an agent may not be compellable to produce the deeds of his principal (a party in the cause), yet he is liable, on declining to produce them, to be examined as to their contents (*i*).

Where insufficient notice has been given to the attorney of a party to produce the deed, the attorney is not bound to produce it, although he has the deed in his pocket at the trial (*k*).

Witness cannot refuse to be sworn and give evidence.

As a witness is bound to attend in court in obedience to the writ, so is he under an obligation to be sworn and give evidence on his appearance.

If a witness for the Crown refuse to be sworn, he is guilty of a contempt of Court, and may be fined, and committed till he has paid the fine (*l*).

A clerk to the commissioners of taxes is bound, when subpœnaed, to produce his books, and answer all questions relevant to the issue, notwithstanding his oath of office (*m*).

Protection of witness.

The law protects a witness, as well as a party to the suit, from arrest, *eundo morando et redeundo* (*n*). And it is not essential to their protection that the witness should have been subpœnaed, if he has consented to attend (*o*). The Courts usually allow ample time for this purpose (*p*).

(*h*) *Leeds* v. *Cook & Ux.*, 4 Esp. C. 256.

(*i*) In covenant by a remainder-man for not repairing, plea, that lessor was only tenant for life; held, that after notice on the plaintiff to produce a specific deed, the steward might be called to prove the existence and nature of it; and although the possession of the steward might be considered as the possession of his principal, so as to protect him from producing it under a *subpœna duces tecum*, his knowledge of the contents was not within the principle of privileged communications, which extends not beyond counsel and attornies. *Earl of Falmouth* v. *Moss*, 11 Pri. 455.

(*k*) *Doe* d. *Wartney* v. *Grey*, 1 Starkie's C. 283.

(*l*) *Lord Preston's Case*, Salk. 278; Vin. Ab. Y. Lord Preston was committed by the court of quarter sessions for refusing to be sworn before the grand jury on an indictment for high treason. But a witness may refuse to be sworn in a civil case, if his expenses have not been paid.

(*m*) *Lee* v *Birrell*, 3 Camp. 337.

(*n*) *Meekins* v. *Smith*, 1 H. B. 636. *Lightfoot* v. *Cameron*, 2 Bl. 1113. *Randall* v. *Gurney*, 3 B. & A. 352.

(*o*) *Spence* v. *Stuart*, 3 East, 89. *Kinder* v. *Williams*, 4 T. R. 377. *Arding* v. *Flower*, 8 T. R. 534. *Ex parte Byne*, 1 Ves. & Beames, 316; 1 H. B. 636.

(*p*) 13 East, 16, n. (a). *Willingham* v. *Matthews*, 2 Marshall, 57; 2 Bl. 1113. *Hatch* v. *Blisset*, Gilb. Cas. 308; 2 Str. 986. In *Randall* v. *Gurney*, 3 B. & A. 252, where

The same indulgence has been extended to a witness attending an arbitrator under a rule of Nisi Prius (*q*); and to a bankrupt or witness attending a meeting of commissioners (*r*); to a witness attending on the execution of a writ of inquiry (*s*); at the Insolvent Debtors' Court (*t*); attending a court martial under the Mutiny Act. Protection of.

But a witness is not protected from being taken by his bail (*u*); for this is not an arrest (*x*), but a retaking.

It has already been seen that a witness may be incompetent, because he is incapable of religious obligation from youth, mental infirmity (*y*), ignorance or unbelief, or from infamy, or because he Objection to competency.

a party in London was required to attend an arbitration at Exeter on a given day, and three days before set off, and went, accompanied by his attorney, to Clifton, where his wife resided, and where were certain papers necessary to be produced before the arbitrator, and was occupied for a great part of two days in selecting and arranging the same, and in the afternoon of the second day was arrested; it was held, that he was not privileged from arrest under these circumstances, having been employed more than a reasonable time for the above purpose, and it not having been sworn that he was occupied during all the time that he was at Clifton in the object for which he went thither.

But in the case of *Ricketts* v. *Gurney* (7 Price, 699), it having been sworn, on an application arising out of the same transaction, that a bail-bond should be given up to be cancelled, that the party was occupied during a part of the evening of the day of his arrival at Clifton, and the whole of the next, in examining and arranging the necessary papers, and that before he had finished he was arrested; the Court of Exchequer (the Chief Baron being absent, and Garrow, B. *dissentiente*) held that the defendant was privileged.

In an anonymous case (Smith's N. P. Rep. 355), it is stated to have been held, that a witness who lived twelve miles from the place of trial was not protected by his subpœna till twelve the next day.

A witness resident in London is not protected from arrest between the time of the service of the subpœna and the day appointed for his examination; but a witness coming to town to be examined is protected during the whole time which he remains in town *bonâ fide* for the purpose of giving his testimony. Held also, that a witness is not protected in going to the solicitor's office to look at the interrogatories, as preparatory to his examination. *Gibbs* v. *Philipson*, 1 Russ. & M. (ch.) 19.

(*q*) *Spence* v. *Stuart*, 3 East, 89. *Moon* v. *Booth*, 3 Ves. 350.

(*r*) *Spence* v. *Stuart*, 3 East, 89. *Arding* v. *Flower*, 8 T. R. 534. *Kender* v. *Williams*, 4 T. R. 377. *Ex parte Byne*, 1 Ves. & B. 316; 5 G. 2, c. 30, s. 6; 6 G. 4, c. 16, s. 117.

(*s*) *Walters* v. *Rees*, 4 Moore, 34.

(*t*) 6 Taunt. 356.

(*u*) *Ex parte Lyne*, 3 Starkie's C. 132.

(*x*) Per Richards, C. B. *Horn* v. *Swinford*, 1 D. & R. 20.

(*y*) One who is born deaf and dumb may, if he have sufficient understanding, give evidence by means of an interpreter. *R.* v. *Ruston*, Leach, C. C. L. 455; or by writing, if able. *Morrison* v. *Lennard*, 3 C. & P. 127. Luna-

is interested in the cause. The objection arising from the ignorance, or unbelief, or turpitude of the witness, ought in its natural course to be taken before the witness is sworn, because it assumes that he is *incapable* of being bound by an oath.

Time of objecting.

In general, an objection to competency ought to be taken in the first instance, and before the witness has been examined in chief; for otherwise it would afford an unfair advantage to the other party, who would avail himself of the testimony of the witness if it were favourable, but would get rid of it by raising the objection if it turned out to be adverse. And therefore, where upon a trial for high treason it appeared, after a witness had been examined without objection on the part of the prisoner, that he had been misdescribed in the list of witnesses, which is required by the statute to be given to the prisoner previous to his trial, the Court would not permit the evidence of that witness to be struck out (*z*). It has, however, even been held, that if it be discovered at any stage of the trial that a witness is interested, his evidence may be struck out (*a*); but this, it seems, is to be understood of those cases only where the objection could not have been taken in the first instance (*b*). Where the incompetency of a witness appeared on the face of his answers to interrogatories, it was held that the objection was waived by putting cross-interrogatories, and could not be insisted on at the trial (*c*). It was formerly the practice, when an objection was made to the competency of a witness, to make it before he was sworn in chief, and to swear and examine him, where his incompetency was supposed to arise from interest, on the *voire dire*; and after a witness had been examined in chief, the objection could no longer be taken (*d*). But the same strictness is not observed in modern practice: where the incompetency arises from interest, the objection may be taken after the witness has been examined in chief, if in the course of the cause it appear that he is interested (*e*); but if the objection on the score of interest be not taken previous to the examination in chief, the witness cannot be cross-examined as to the contents

tics are competent during lucid intervals. Com. Dig. tit. Testmoigne.

(*z*) *R.* v. *Watson*, 2 Starkie's C. 158.

(*a*) *Turner* v. *Pearte*, 1 T. R. 720. *Howell* v. *Lock*, 2 Camp. 14. *Perigal* v. *Nicholson*, 1 Wightwick, 64. *Becchivy* v. *Gower*, Holt's C. 313. *Stone* v. *Blackburn*, 1 Esp. C. 37. *Moorish* v. *Foote*, 2 Moore, 500.

(*b*) *Moorish* v. *Foote*, 2 Moore, 508.

(*c*) *Ogle* v. *Paleski*, Holt's C. 485.

(*d*) *Lord Lovat's Case*, 9 State Tr. 639. 646. 704.

(*e*) *Perigal* v. *Nicholson*, 1 Wightwick, 64. *Turner* v. *Pearte*, 1 T. R. 717. *Stone* v. *Blackburn*, 1 Esp. R. 37.

of a written document not produced, which might have been done had the objection been taken in the first instance (*f*).

Examination as to religious belief.

Before a witness takes the oath, he may be asked whether he believes in the existence of a God, in the obligation of an oath, and in a future state of rewards and punishments; and if he does, he may be admitted to give evidence (*g*). And it seems that he ought to be admitted if he believes in the existence of a God who will reward or punish him in this world, although he does not believe in a future state (*h*).

Want of religious belief.

The most correct and proper time for asking a witness whether the form in which the oath is about to be administered to him is one that will be binding on his conscience, is before that oath is administered. But although a witness shall have taken the oath in the usual form without making any objection, he may nevertheless be afterwards asked whether he considers the oath he has taken to be binding on his conscience. But if the witness answer in the affirmative, that he does consider the oath which he has taken to be binding upon his conscience, he cannot then be further asked whether there be any other mode of swearing that would be more binding upon his conscience than that which has been used (*i*).

A Jew who has never formally renounced the religion of his ancestors, but considers himself to be a member of the established church, may be sworn on the Gospels (*k*).

In criminal cases, where a person of tender years is a material

(*f*) *Howell* v. *Lock*, 2 Camp. 14.

(*g*) *R.* v. *Taylor*, Peake's N. P. R. 11.

(*h*) See the judgment of Willes, C.J. in *Omichund* v. *Barker*, Willes, 550.

(*i*) The *Queen's Case*, 2 B. & B. 284. According to the opinion of the Judges, as delivered by Abbott, C. J., in answer to questions proposed by the Lords. Abbott, C.J., after delivering this opinion, added, "Speaking for myself (not meaning thereby to pledge the other Judges, though I believe their sentiments concur with my own), I conceive, that if a witness says he considers the oath as binding upon his conscience, he does in effect affirm, that in taking that oath he has called God to witness that what he shall say will be the truth, and that he has imprecated the Divine vengeance upon his head if what he shall afterwards say is false; and having done that, it is perfectly unnecessary and irrelevant to ask any further questions." And see *Sells* v. *Hoare*, 7 Moore, 36.

(*k*) *R.* v. *Gilham*, 1 Esp. C. 285. A member of a religious sect which objects to the ceremony of kissing the book, may be sworn without it. *Mee* v. *Reid*, Peake's C. 23. *Mildrone's Case*, Leach's C. C. L. 459. *Colt* v. *Dutton*, 2 Sid. 6.

A witness, being of the Methodist persuasion, refusing to be sworn on the New Testament, permitted to be sworn on the Old, stating he considered it binding to his conscience. *Edmonds* v. *Rowe*, 1 Ry. & M. C. 77.

Infant. witness, it is usual for the Court to examine the witness as to his competency to take an oath, before he goes before the grand jury. And if such a witness be found incompetent for want of proper instruction, the Court will, in its discretion, put off the trial, in order that the party may in the mean time receive such instruction as will qualify him to take an oath. Neither the testimony of the child without oath, nor evidence of any statement which he has made to any other person, is admissible (*l*).

Incompetency from turpitude. In considering the nature and extent of the objection to competency, arising from the alleged turpitude of the witness, it will be proper to inquire, 1st. What crimes or punishment incapacitate a witness; 2dly. How the guilt is to be proved; 3dly. How the objection is answered; 4thly. The effect of incompetency.

Nature of the crime. I. Where a man is convicted of an offence which is inconsistent with the common principles of honesty and humanity, the law considers his oath to be of no weight, and excludes his testimony as of too doubtful and suspicious a nature to be admitted in a court of justice to affect the property or liberty of others (*m*). Formerly the infamy of the punishment, as being characteristic of the crime, and not the nature of the crime itself, was the test of incompetency (*n*); but in modern times immediate reference has been made to the offence itself, since it is the crime, and not the punishment, which renders the offender unworthy of belief (*o*). By the common law the punishment of the pillory indicated the *crimen falsi*, and, consequently, no one who had stood in the pillory could afterwards be a witness (*p*); but now a person is competent, although he has undergone that punishment for a libel, trespass, or riot (*q*); and on the other hand, when convicted of an infamous crime, he is incompetent, although his punishment may have been a mere fine.

The crimes which render a person incompetent are treason (*r*), felony (*s*), all offences founded in fraud, and which come within

(*l*) *Brazier's Case*, Leach's C. C. L. 237. *R.* v. *Tucker*, Phill. on Ev. 19.

(*m*) Gilb. L. E. 256; 2 Bulst. 154; Brac. b. 4, c. 19; Fle. b. 4, c. 8.

(*n*) 2 Haw. c. 46, s. 102. *Pendock* v. *Mackender*, 2 Wils. 18; Fort. 209; 2 Hale, 277; Co. Litt. 6.

(*o*) *Pendock* v. *Mackender*, 2 Wils. 18; Willes, 666; Fortes. 209; 3 Lev. 426, 427; B. N. P. 292. *R.* v. *Davis*, 5 Mod. 75. *R.* v. *Ford*, 2 Salk. 690. *Priddle's Case*, 2 Leach, 496.

(*p*) Gil. Ev. 257.

(*q*) Ibid.; Fort. 209. *R.* v. *Ford*, 2 Salk. 690; B. N. P. 292. *R.* v. *Crosby*, 10 St. Tr. App.

(*r*) 5 Mod. 16. 74; Kel. 33.

(*s*) 2 Buls. 154; Co. Litt. 6; Ray 369. Before the distinction between grand and petit larciny, a party convicted of the latter offence was competent, by the stat. 31 G. 3, c. 35.

the general notion of the *crimen falsi* (*t*) of the Roman law, as perjury and forgery (*u*), piracy (*x*), swindling, cheating (*y*). So also barretry (*z*), conspiracy, at the suit of the King (*a*), præmunire (*b*), the bribing a witness to absent himself from a trial, in order to get rid of his evidence (*c*); so also the judgment on an attaint for a false verdict (*d*) will render the party so convicted incompetent; so also, as it seems, one who has been convicted of winning money by fraud, or ill practice at certain games, would be disabled by the stat. 9 Anne, c. 14, s. 5, from being a witness, since that statute not only imposes a penalty, but directs that the party shall be deemed infamous (*e*). But a conviction for keeping a gambling-house does not disqualify the defendant (*f*). Nature of the crime.

II. In order to incapacitate the party, the judgment must be proved (*g*) as pronounced by a court possessing competent jurisdiction (*h*). Proof of the verdict or conviction without the judgment is insufficient, since it may have been quashed on motion in arrest of judgment (*i*). And the judgment must be proved by the record in the usual way (*k*); but it is not material Proof of the conviction.

(*t*) *R.* v. *Priddle*, Leach, 496.

(*u*) Co. Litt. 6; Fort. 209; and see 5 Eliz. c. 14; 2 Haw. c. 23, c. 43, s. 25; 33 H. 6, 55; 2 Hale, 277; Summ. 263. *Jones* v. *Mason*, Str. 833. *Walker* v. *Kearny*, Str. 1148.

(*x*) 2 Roll. Ab. 886.

(*y*) Fort. 209.

(*z*) *R.* v. *Ford*, 2 Salk. 690.

(*a*) *Rex* v. *Crosley*, Leach, 349; 33 Hen. 6, 55; 24 Ed. 3, 34; 1 Hale, 306; 2 Haw. c. 43, s. 25; 1 Haw. c. 72, s. 9; 2 Hale, 277; Co. Litt. 6; Summ. 263. But this, it has been said, is to be understood of a conspiracy to charge a person with a capitel offence; in which case, upon conviction, he is liable to the villanous judgment, and to lose the freedom of the law. In a late case, it was held in the Ecclesiastical Court, by Sir W. Scott, that a conviction upon an indictment for a conspiracy to commit a fraud, by raising the price of the public funds by means of false rumours, did not render the affidavit of the party inadmissible. And in the case of *Crowther* v. *Hopwood*, 3 Starkie's C. 21, it was held that such a conviction did not render a witness incompetent in a court of law; but in the case of *Bushel* v. *Barrett*, it was held by Gaselee, after consultation with Littledale, J., that judgment for a conspiracy to prevent a witness from appearing to give evidence on an information under the revenue laws, took away competency.

(*b*) Co. Litt. 6.

(*c*) *Clancey's Case*, Fort. 208.

(*d*) Co. Litt. 6; 2 Roll. 684.

(*e*) Fort. 208.

(*f*) *R.* v. *Grant*, 1 Ry. & M. C. 270.

(*g*) *Lee* v. *Gansel*, Cowp. 1; 2 Salk. 688; 2 Ins. 219.

(*h*) 1 Sid. 51; Ray. 52. It must appear from the caption, that the court and jurors had jurisdiction. *Cooke* v. *Maxwell*, 2 Starkie's C. 183.

(*i*) *Rex* v. *Crosby*, 2 Salk. 688; 2 Inst. 219. *Lee* v. *Gansel*, Cowp. 1; Str. 1148.

(*k*) 2 Haw. c. 46, s. 104; 1 St. Tr. 208; 2 St. Tr. 307. 436. 455; 3 St. Tr. 425; 4 St. Tr. 130; 1 Cowp. 1. *Infra*, tit. JUDGMENT.

Proof of the conviction.

to show that judgment has been executed (*l*); so it may be shown that the party has been outlawed for treason or felony, since the effect of outlawry in such case is the same with judgment upon a verdict, or by confession (*m*). An admission by the witness himself that he is still confined in prison under a judgment for felony, or that he has committed perjury, or any other offence, will not incapacitate him, although it may discredit him (*n*).

It seems to be a general rule, that a witness is in no case legally incompetent to allege his own turpitude, or to give evidence which involves his own infamy (*o*), or impeaches his most solemn acts (*p*), unless he be rendered incompetent by a legal interest in the event of the cause, or in the record.

A witness for the Crown, on a charge of conspiracy, who admits that she has on a former occasion, at the instance of the defendant, sworn falsely to the fact which she is called to prove, is still competent (*q*).

Competency, how restored.

III. The objection to competency on the ground of infamy may be answered, 1st, By proof that the party has been admitted to his clergy, and undergone such punishment as is equivalent to clerical purgation at the common law, or that he has undergone the sentence according to the late statutes; 2dly, By proof of pardon; 3dly, By proof of the reversal of the judgment.

By proof of admission to clergy.

1st. In order to illustrate this doctrine, a few previous observations will be necessary. Formerly the benefit of clergy was granted indiscriminately to the clergy, and to such laymen as could read; but by the stat. 4 H. 7, c. 13, clergy was to be allowed but once, without the actual production of letters of orders, and all laymen were to be burnt in the hand (*r*). Until the stat. 18 Eliz. c. 7, a felon who was entitled to the benefit of clergy was delivered over to the ordinary to make purgation, that is, to be purged of his offence upon oath, a proceeding

(*l*) 2 Salk. 689; 3 Inst. 219; 3 Lev. 426. But see Co. Litt. 6; Kel. 37; Summ. 263; 2 Hale, 277; 5 Mod. 75, 76.

(*m*) 2 Haw. c. 48, s. 22; 3 Inst. 212. *Collier's Case*, Sir T. Ray. 369. But outlawry in trespass does not disqualify the party as a witness, although it disqualifies him as a juror. *Withersol's Case*, Cro. Car. 144. 147; W. Jones, 198; 1 Hale, 305.

(*n*) *R.* v. *Watson*, 2 Starkie's C. 116. *Rex* v. *Castel Careinian*, 8 East 78. *R.* v. *Teale*, 11 East, 307.

(*o*) *Burrough* v. *Martin*, 2 Camp. 112. And see *Doe* v. *Perkins*, 3 T. R. 750; *supra*, Vol. I. 129. *Tanner* v. *Taylor*, 3 T. R. 754.

(*p*) *Vaughan* v. *Martin*, 1 Esp. C. 440. See *Doe* v. *Perkins*, 3 T. R. 749.

(*q*) *Catt* v. *Howard*, 3 Starkie's C. 3.

(*r*) This distinction was abolished for a time by the stat. 28 Hen. 8, c. 1, and 32 Hen. 8, c. 3, but was restored virtually by the stat. 1 Edw. 6, c. 12. As to peers and women, vid. *infra*.

which, after a solemn conviction in a court of law, could seldom be accomplished without the aid of deliberate perjury (*s*); and after he had been thus purged or acquitted, the party was in all respects a competent witness (*t*). The stat. 18 Eliz. c. 7, abolished the practice of delivering the convicted clerk to the ordinary, but enacted, that upon the allowance of clergy and burning in the hand, he should be enlarged and delivered out of prison, enabling the Judge in his discretion to imprison him for a year. Since after this statute competency could no longer be restored by purgation, it was held that the disabilities consequent on conviction were removed by burning in the hand, and delivery out of prison (*u*). Clerical purgation.

And as peers and real clerks had before the statute been entitled to the benefit of purgation, without any burning in the hand, under the stat. 4 H. 7, they were held to be competent after the Act of the 18 Eliz. without burning in the hand; peers, after the first conviction, and clerks *toties quoties* (*x*). With respect to laymen, the burning in the hand operated as a statute pardon (*y*). By the stat. 4 Geo. 1, c. 11, in the case of grand or petit larceny, where the convict is entitled to benefit of clergy, and liable only to the penalties of burning in the hand or of whipping, the Court before whom the prisoner is convicted, instead of ordering the offender to be burned in the hand or whipped, may direct that he shall be transported to America for the space of seven years. And on the conviction of an offender for a crime for which he would be excluded from the benefit of clergy, but to whom mercy is extended on condition of transportation, the Court may allow him the benefit of a pardon under the great seal. And it is prescribed by the same Act, s. 2, that where any such offenders shall be transported, and shall have served their respective terms, according to the order of such Court, such services shall, to all intents and purposes, have the

(*s*) See the remarks on this complication of wickedness, Hob. 291; 3 P. Wms. 448.

(*t*) The convicted clerk was sometimes delivered over *absque purgatione faciendâ*, on which he was to remain in prison all his life, without the power of acquiring any personal property, or receiving the profits of lands; and to remedy this abuse the statute 18 Eliz. c. 7, was passed.

(*u*) *R.* v. *Ld. Warwick*, 5 St. Tr. 172; Hob. 252; B. N. P. 292; Kel. 37, 38; Bulst. 155; 2 Haw. c. 33; Sty. 388; Godb. 288. *R.* v. *Ld. Castlemaine*, 2 St. Tr. 46.

(*x*) 1 Hale, 529; Fost. 356; 2 Hale, 388; 3 P. Wms. 487; 5 Rep. 110. *Searle* v. *Williams*, Hob. 288.

(*y*) 2 Haw. c. 46; B. N. P. 292. *Searle* v. *Williams*, Hob. 294; Ld. Raym. 370. 380; Godb. 288; Sty. 388; Kel. 38; Vent. 349; Skin. 578; 5 Mod. 13; 2 Sid. 51; Hob. 81.

effect of a pardon as for the crime for which they were so transported.

Effect of fine, &c. instead of burning in the hand.

By the stat. 19 Geo. 3, c. 74, s. 3, it is directed that fine or whipping may be imposed and inflicted, instead of burning in the hand, in *all clergyable felonies* except *manslaughter*; and that when imposed or inflicted instead of burning, shall have the like effect and consequences to the party, as to capacities and credits, as if he had been burned. The effect, therefore, of these statutes on the common-law doctrine (*z*) of purgation, seems to have been this: If a layman be convicted of a clergyable felony, and be burned in the hand, or suffer any punishment inflicted by the above statutes in lieu of it, his competency is restored by the execution of the sentence. If a peer were convicted of such felony, or indeed of some felonies which are not clergyable (*a*), he is entitled to be discharged for the first offence, and retains his competency; and a real clerk remains competent, although he has committed several clergyable felonies. The mere admission to clergy, where the felon is liable to be burned in the hand, does not restore competency (*b*); and therefore it is not sufficient to produce the record whereby clergy is granted, *without* proof of burning in the hand (*c*), except in the case of a peer, or a clerk; but it must be further proved that the witness has been burned in the hand, or that some other punishment authorized by one of the above statutes, has been awarded by the Court in lieu of such burning in the hand, and has been executed. But the King's pardon for burning in the hand has the same effect as burning in the hand would have had (*d*). With respect to petit larciny, since the offender was not obliged to pray his clergy, it followed that his competency could not be restored by clerical purgation, or by the burning in the hand, or other punishment substituted for it; and the inconvenience of this being felt (*e*), the

(*z*) By the stat. 3 & 4 Will. & Mary, c. 9, s. 5, women are entitled to the benefit of the statute, as men are to the benefit of the clergy. By the stat. 5 Ann. c. 6, the necessity of reading was abolished.

(*a*) By the stat. 1 Edw. 6, c. 12, a peer is to have the benefit of clergy in the same manner as a layman for the first offence, although he cannot read, and without burning, for all offences then clergyable to commoners, and also for housebreaking, highway robbery, horse-stealing, and robbing churches. 2 Hale, 372; Hob. 294. *R.* v. *Duchess of Kingston*, 11 St. Tr. 198.

(*b*) *Per Curiam*, T. Ray. 380.; Ld. *Warwick's case*, 5 St. Tr. 168.

(*c*) *Ld. Warwick's case*, T. Ray. 380; 5 St. Tr. 168. *Burridge's case*, 3 P. Wms. 485. 490. *Searle* v. *Williams*, Hob. 288. *Armstrong* v. *Lisle*, Kel. 93.

(*d*) 4 Comm. 395.

(*e*) See *Pendock* v. *Mackender*, 2 Wils. 18.

stat. 31 Geo. 3, c. 35 (*f*), enacted, that no witness should be deemed to be incompetent by reason of his conviction of petit larciny. By the stat. 9 Geo. 4, c. 32, s. 3, 4 (*g*), the endurance of the punishment, in all cases of misdemeanor except perjury or subornation of perjury, restores the competency of the offender.

Pardon.

2dly. Next it may be shown that the proposed witness has received a pardon for his offence; either, 1st, from the King, under the great seal; or, 2dly, under an act of parliament. It was long since held, notwithstanding doubts upon the subject (*h*), that a pardon, whether by the King, under the great seal, or by act of parliament, removed not only the punishment, but also all disabilities consequent upon conviction, and restored the competency of the party as a witness (*i*). And it is reasonable that it should, for otherwise a person might for one fault be for ever excluded as a witness, even after he had, by a long course of good conduct, in some measure regained the character which he had lost. And although neither the King nor the parliament can by a pardon convert a wicked man into an honest one, and confer credibility upon one who through the infamy of his conduct is not credible, yet such a pardon must be presumed to have been conferred, after inquiry, upon good and sufficient grounds, on an object worthy of the indulgence, and therefore worthy of being heard, but the degree of credit is still to be left to the jury (*k*).

Competency—restoration of.

A pardon will restore competency in all cases where the disability is a consequence of the judgment, and not a part of the judgment (*l*). 'But neither the King's pardon, nor any thing tantamount to it, will, it is said, restore competency where the disability is part of the judgment, and not a consequence of it (*m*). Subject to this limitation, a pardon will restore competency in all

(*f*) The distinction between grand and petit larciny is now abolished by the stat. 7 & 8 Geo. 4, c. 28, s. 13; 9 Geo. 4, c. 32, s. 3.

(*g*) See also the st. 7 & 8 G. 4, c. 28, s. 13; 9 G. 4, c. 32, s. 3; *infra*, 100, as to felonies.

(*h*) Palm. 412; Latch. 81; 2 Bulst 114. *Brown* v. *Crashaw*, 2 Bulst. 154; 4 St. Tr. 269. *Ld. Castlemain's case*, 3 St. Tr. 36; 2 Bro. 17.

(*i*) Gilb. Ev. 26. *R.* v. *Cellier*, T. Ray. 369. *Cuddington* v. *Wilkins*, Hob. 67. 81. *R.* v. *Crosby*, Ld. Raym. 39. *R.* v. *Ld. Castlemain*, T. Ray. 379. *Reilly's case*, Leach, 510; 2 Hale, 278; Brownl. 47; Bulst. 154–156.

(*k*) 2 Hale, 278. *R.* v. *Crosby*, 5 Mod. 15.

(*l*) Per Holt, C. J., 2 Salk. 689; 1 Ld. Ray. 256; 12 Mod. 139; Comb. 459; 2 Salk. 512; Carth. 421; Holt, 535; 5 Mod. 345; 3 Mod. 342; Gilb. Ev. 260. But this was formerly doubted. Brownl. 47; 2 Bulst. 154; 2 Sid. 221; 2 Danv. Ab. 163; Cro. Jac. 662.

(*m*) Per Holt, C. J., Holt's R. 689. 691.

Pardon.

cases and at all times, as in cases of conspiracy, perjury and forgery (*n*), although the party has undergone an infamous punishment, as by standing in the pillory for cheating (*o*), and after attainder for treason or felony (*p*). So where he has been convicted of felony in taking a false oath to obtain probate of a will under the stat. 31 Geo. 2, c. 10; so where the pardon is received after conviction, but before judgment (*q*).

It has been held that a *general* pardon, after a conviction for felony, or after an outlawry for felony, will not restore competency (*r*); but it seems that the burning in the hand may be discharged by the King's pardon (*s*). The pardon must be produced under the great seal (*t*). A pardon under the King's sign manual, or privy seal, was formerly insufficient, since the warrant was countermandable (*u*); but it is now provided by the stat. 7 & 8 Geo. 4, c. 28, s. 13, that where the King shall extend his mercy to any offender convicted of any felony, and by warrant under his sign manual, countersigned by one of his principal secretaries of state, shall grant to such offender either a free or conditional pardon, the discharge of such offender out of custody, in the case of a free pardon, and the performance of the condition, in case of a conditional pardon, shall have the effect of a pardon under the great seal, as to the felony in respect of which such pardon was granted. The stat. 9 Geo. 4, c. 32, s. 3, enacts, that where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal, as to the felony whereof the offender was so convicted: provided that nothing herein contained, nor the enduring such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any other felony. Sec. 4, reciting that there

(*n*) 1 Hale, 306.

(*o*) *R.* v. *Lord Castlemain*, T. Ray. 370. So where a witness, after conviction for a crime, has stood in the pillory, the objection is removed by a general act of pardon. *R.* v. *Crosby*, Lord Ray. 39.

(*p*) 2 Haw. c. 46, s. 110; c. 37, s. 48, 49, 50.

(*q*) *R.* v. *Reilly*, Leach, 512.

(*r*) *R.* v. *Lord Castlemain*, 3 St. Tr. 46, 47. *R.* v. *Lord Warwick*, 5 St. Tr. 166. But see *R.* v. *Rookwood*, 4 St. Tr. 642; 3 Lev. 426.

(*s*) 3 Lev. 426.

(*t*) 2 Haw. c. 37. *R.* v. *Lord Warwick*, 5 St. Tr. 166; Fost. 62; 1 Wils. 217. *Murphy's case*, Leach, 117.

(*u*) *R.* v. *Lord Warwick*, 5 St. Tr. 166. *R.* v. *Miller*, 2 Bl. R. 797. *Gully's case*, Leach, 116.

are certain misdemeanors which render the parties convicted thereof incompetent witnesses, and that it is expedient to restore the competency of such parties after they have undergone their punishment, enacts that where any offender hath been or shall be convicted of any such misdemeanor, except perjury or subornation of perjury, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, such offender shall not after the punishment so endured be deemed to be, by reason of such misdemeanor, an incompetent witness. In case of a conditional pardon, proof must be given that the condition has been performed (*x*).

Reversal of judgment.

3dly. By proof of a reversal of the judgment or outlawry by writ of error, which must be proved by the production of the record. Where it was objected that the witness had been attainted by virtue of an act of parliament, for not having surrendered himself before a particular day, it was answered that the witness had surrendered within the limited time; and the record of the proceeding on the part of the Crown against the witness on that statute, and of the plea on the part of the witness in his defence, that he did surrender within the time, which plea was admitted by the Attorney-general to be true, was held to be conclusive evidence of the surrender within the time (*y*).

Effect of disability.

IV. The judgment for an infamous crime, even for perjury, does not preclude the party from making an affidavit with a view to his own defence (*z*). He may, for instance, make an affidavit in relation to the irregularity of a judgment in a cause to which he is a party (*a*), for otherwise he would be without remedy. But the rule is confined to defence, he cannot be heard upon oath as a complainant (*b*). Where a witness becomes incompetent from infamy of character, the effect is the same as if he were dead; and if he has attested any instrument as a witness, previous to his conviction, evidence may be given of his handwriting (*c*).

(*x*) Gilb. Ev. 259. Hawk. P. C. c. 37, s. 45. But where a party had been sentenced to transportation, and confined to the hulks for a term, and discharged at the end of the term, it was held that his having twice escaped, for a few hours each time, did not destroy the effect of a pardon. *R.* v. *Badcock*, Russ. & Ry. C. C. L. 248.

(*y*) *Lord Lovat's case*, 9 St. Tr. 652. 665.

(*z*) *Davis* v. *Curter*, 2 Salk. 461; 2 Str. 1148.

(*a*) Ibid.

(*b*) Salk. 461; Str. 1148.

(*c*) *Jones* v. *Mason*, Str. 833.

The general principle which operates to the exclusion of an interested witness has already been adverted to; its application in practice will now be more fully considered. It is proposed to consider,

I. The nature and extent of the disqualifying interest, the time and manner of acquiring it, and exceptions from necessity;
II. Its effect upon secondary evidence; and,
III. The mode of enforcing or removing the objection.
IV. The practical effect of the rules on this subject.

Nature of the disqualifying interest.

I. The interest, to disqualify, must be some legal, certain and immediate interest, however minute, in the *result* of the cause, or in the *record*, as an instrument of evidence, acquired without fraud.

Must be a legal interest.

In the first place, it must be a *legal* interest in the event of the suit, or in the record, as contradistinguishod from mere prejudice or bias, arising from the circumstance of relationship, friendship, or any other of the numerous motives by which a witness may be supposed to be influenced.

Thus in a criminal case a witness is competent, although she believes that the conviction of the prisoner will be the means of saving her husband's life (*d*). So an accomplice is competent to give evidence against his confederates, notwithstanding his own expectation of pardon in case of their conviction. So, although the witness has derived his maintenance from the party. And in general the witness is competent, although he wishes that the party may succeed in whose favour he bears testimony.

Apprehension of interest.

If a party be really interested in the event of a cause he is not competent, although he does not apprehend that his interest is a legal one (*e*), for it would be exceedingly dangerous to violate a general rule because the witness does not understand his legal responsibility. If a witness suppose that he is under an *honorary* though not a *legal* engagement, as to indemnify the bail, he is still competent, for he is under no binding engagement, and it would be highly inconvenient to make competency in such cases to depend on the witness's notions of propriety, and would

(*d*) *R.* v. *Rudd*, Leach, 154; but it has been held that a witness who conceives himself to be interested, although he be not so, is incompetent. *Fotheringham* v. *Greenwood*, Str. 129; 1 T. R. 296. *Chapman's case*, Str. 129; *tam qu.* et vid. *infra*, 102.

(*e*) *R.* v. *Walker*, 1 Ford. MSS. 145. *Parker* v. *Whitby*, 1 Turn. & R. 372.

savour of inconsistency to found a suspicion of his veracity upon a just and honourable feeling (*f*). It has indeed been said that a witness who conceives himself to be under a *legal* engagement is incompetent, although he is mistaken (*g*). It would, however, be productive of great inconvenience to substitute a witness's mistaken opinion of his legal liability for the more plain and simple test of actual liability; it might be impossible to render him competent, even by means of a release, for he still might be sceptical as to the operation of a release, and the practice might open a door to fraud. The party who calls the witness has an interest in his testimony, which ought not to be defeated by any thing short of a legal interest in the event; and if the objection were allowed to prevail in this instance, the principle would extend also to the reception of a witness who has a legal interest in the event, but who fancies that he has not.

Must be direct and certain, and not contingent or doubtful.

The interest must be a present, certain, vested interest (*h*), and not uncertain or contingent (*i*). And therefore the heir apparent to an estate is competent to give evidence in support of the claim of the ancestor, although one who has a *vested* interest as a remainder-man is incompetent (*k*). So it was held that a steward was competent to prove that a fine was payable on the death of the lord, although the establishment of the

(*f*) *Pederson* v. *Stoffles*, 1 Camp. 145; 1 Str. 129.

(*g*) *Chapman's case*, cited Str. 129. *Fotheringham* v. *Greenwood*, Str. 129. *R.* v. *Walker*, 1 Ford, 145. By Lord Ellenborough, C. J., and Gould, J. in *Trelawney* v. *Thomas*, 1 H. B. 307; *Rudd's case*, Leach, C. C. J. 154. In the case of the *Amitié Villeneuve*, 5 Robinson's Adm. R. 344, Sir W. Scott rejected the evidence of a witness who stated that he conceived that he would be entitled to share in case his vessel should be deemed joint-captor, although he had signed a release; and the learned Judge decided this on the distinction which he had always understood to prevail between a witness who says only that he expects to share from the bounty of the captors, and one who thinks himself actually entitled in law.

(*h*) As where a witness has a power of attorney from the plaintiff to receive the sum recovered, and pay himself the amount of a debt due to him. *Powel* v. *Gordon*, 2 Esp. C. 735. Or has made an agreement with the plaintiff, that he shall have a lease of the lands recovered. Gilb. Ev. 122. Or is bound to pay a sum of money in case the plaintiff fails. *Forrester* v. *Pigou*, 1 M. & S. 9. *Fotheringham* v. *Greenwood*, 1 Str. 129.

Where a witness who, if the bishop failed to present to a benefice on a lapse, would as tenant by the curtesy be entitled to present, it was held that he was not a competent witness for the defendant in a *quare impedit*. *Gully* v. *Bishop of Exeter*, 5 Bing. 171, and 2 M. & P. 266.

(*i*) Doug. 134; 1 T. R. 163; 1 P. W. 287.

(*k*) Salk. 283; Lord Raym. 724.

Must be direct and certain.

affirmative might render a re-admission necessary, and entitle him to a fee (*l*).

So in an action for acting as an assistant, the clerk of the company of wire-drawers was held to be a competent witness, although h entitled to a crown for swearing in an assistant; for although the suit might cause the defendant to be sworn, that was not the direct object of the suit, nor a necessary consequence of a verdict for the plaintiffs (*m*). So it was held that one who had lands in the parish, but who was not actually rated to the poor, was competent in a case of settlement (*n*).

Where the interest is of a doubtful nature, the objection goes to the credit, not the competency of the witness (*o*). The possibility of an action being brought against the witness, in case his testimony shall not prevail, and the tendency of his testimony to render his liability less probable, will not exclude him. One who has given bond for an administrator's due administration of the intestate's effects, is competent, in an action against the administrator, to prove a tender (*p*). So one who has filled a corporate office is a competent witness for the defendant

(*l*) *Champion* v. *Atkinson*, 3 Keb. 90.

(*m*) *Company of Gold and Silver Wire-drawers* v. *Hammond*, Ford's MSS.

(*n*) *R.* v. *Prosser*, 4 T. R. 17. *R.* v. *Gisburn*, 15 East, 57. *R.* v. *Killerby*, 10 East, 293. *R.* v. *Terrington*, 15 East, 471. *R.* v. *South Lynn*, 5 T. R. 664. *R.* v. *Kirdford*, 2 East, 559. *Deacon* v. *Cock*, Taunt. Spring Assizes, 1789; cor. Buller, J. cited Nolan's P. L. vol. 1, p. 378. But see the forcible observations made upon these cases by Sir D. Evans in his edition of Pothier, vol. 2, p. 306. See *Rhodes* v. *Ainsworth*, 2 Starkie's C. 215. Whether the principle laid down in the case of the *King* v. *Kirdford*, and the previous decisions, was properly applied or not, is a question which the stat. 54 Geo. 3, c. 170, s. 9, has rendered immaterial; the cases themselves are still of importance to show the reliance which the Court placed on the general principle.

(*o*) *R.* v. *Bray*, R. T. Hard. 360; 3 T. R. 32; Co. Litt. 6; 1 Keb. 836. *Bent* v. *Baker*, 3 T. R. *Smith* v. *Prager*, 7 T. R. 60; Gil. Ev. 232. Where the deposition of a witness in a suit for predial tithes described him as of the parish in which the tithes accrued, and were sought to be covered by a township modus, held that it was admissible, for the deponent might be an inhabitant merely and not an owner, or the owner of lands not covered by the modus. *Jackson* v. *Benson*, 2 Y. & J. 49.

(*p*) *Carter* v. *Pearce*, 1 T. R. 163. So an unsatisfied creditor is a competent witness for the administrator under the plea of *plene administravit*. Per Parke, J., notwithstanding the dictum of Ld. Ellenborough in *Craig* v. *Cundell*, 1 Camp. 381, to the contrary; and see *Paull* v. *Brown*, 6 Esp. c. 34. If the intestate were living such evidence would be admissible, and it is difficult to see how his death can make any difference as to the competency of the witness.

Interest in the result.

to prove a custom, which, if established, would be material to show that the witness had exercised a corporate office legally (*q*).

The predicaments in which a witness may be incompetent in respect of the *result* admit of three varieties:

1st. Where actual gain or loss would result simply and immediately from the verdict and judgment.

2dly. Where the witness is so situated that a legal right or liability, or discharge from liability, would immediately result from the verdict and judgment.

3dly. Where such legal right or liability depends not simply on the verdict and judgment, but also on some material fact disputed in the cause, in respect of which the witness would be liable.

In the immediate and legal result.

1st. Where actual gain or loss would result simply and immediately from the verdict and judgment:

As where the proposed witness is a party, though but a nominal party, to the suit (*r*); or is a party in beneficial interest (*s*); or is *quasi* a party, from having entered into a rule of court or contract that another cause in which he is a party shall abide the same result with that in which he proposes to give evidence (*t*); or where the immediate effect of the verdict will be to increase or diminish a fund in which he has a joint interest; as where the the bankrupt, or a creditor on a bankrupt's estate, seeks to in-

(*q*) *R.* v. *Bray*, C. T. H. 358, vol. 2, 698; and see App. 1. 105.

(*r*) As in the case of guardian of a minor, or governor of the poor, who is in the first instance liable to costs. *R.* v. *St. Mary Magdalen*, 3 East, 7. Trustees empowered as a public body to sue and be sued in the name of their treasurer, but to be deemed the plaintiffs, are not it seems competent witnesses for the plaintiff in an action so brought. *Whitmore* v. *Wilks*, 1 M. & M. 214, and 3 C. & P. 364.

(*s*) It will be presumed that the action is brought by the direction of the party beneficially interested. In an action on a policy of insurance, brought in the names of the brokers, it appeared that *A.*, one of the parties for whose benefit the policy was effected, had before the action released to the plaintiffs all actions which he might have under the policy, and also that since the action two persons, to whom the whole interest on the policy had been assigned, had, under an order of the Court of C. P., indemnified the plaintiff against all costs, and *A.* was tendered and examined as a witness for the plaintiffs on the trial; held, on error, that as the action had been brought in the names of the brokers for *A.*'s benefit, it must, until the contrary shown, be presumed that it was brought by him and by his authority, and if so, he became and remained still liable to the attorney employed to bring it, nothing having been done to deprive the attorney of his rights to recover costs from him; he was therefore improperly admitted to give evidence, and a *venire de novo* was awarded. *Bell* v. *Smith*, 5 B. & C. 188.

(*t*) *Forrester* v. *Pigou*, 1 M. & S. 9.

crease the fund (*u*); or to deprive the witness of the enjoyment of an interest in possession (*w*); or place him in the immediate possession of a right (*x*).

Right to share, or liability to contribute.

2dly. Where the witness is so situated that a legal right or liability, or discharge from liability (*y*), would immediately result:

As where the witness has indemnified a party against the result generally (*z*). So where the witness is called for the plaintiff, with whom he is a co-partner; or where the witness is a co-partner with the defendant in the subject-matter of the suit, and would be liable to contribution in case the defendant failed in his defence (*a*). And as a co-partner, by reason of his liability

(*u*) See tit. BANKRUPT, *Competency*. In an action for taking usurious interest on a loan to a bankrupt, it was held that he was not a competent witness for plaintiff, unless he had obtained his certificate; although the defendant had proved the loan under the commission, and although the bankrupt offered to release his claims under the bankruptcy. *Masters* v. *Drayton*, 2 T. R. 496. See tit. WITNESS, *Creditor*. Where the plaintiff sued two on a joint-contract, and one pleaded his bankruptcy and certificate, it was held, that by suing both, the plaintiff had elected not to prove the debt under the separate commission, and that a verdict in that action could not affect the interest of the bankrupt's creditors, one of whom was therefore a competent witness to prove the joint contract. *Blannin* v. *Taylor*, 1 Gow, 199.

(*w*) A tenant in possession is incompetent to support his landlord's title. *Doe* d. *Foster* v. *Williams*, Cowp. 621. But in an action by landlord and tenant, the lessor paramount may prove whether the premises were first demised to the landlord or another. *Bell* v. *Harwood*, 3 T. R. 308. For his possession is not affected by the result.

(*x*) On an indictment on the st. 21 J. 1, c. 15, or 8 H. 6, c. 9, which authorizes justices to give possession of lands entered by force, or held by force, to the tenant; a tenant whose land has been forcibly entered is not a competent witness. *R.* v. *Williams*, 9 B. & C. 549.

(*y*) *Bland* v. *Ansley*, 2 N. R. 331. Where it was held, that in an action against the sheriff for seizing the goods of *A.* under an execution against *B.*, the latter was not a competent witness to show that the goods were not *A.*'s under an assignment from him; for the effect of his testimony would be to pay his own debt with the plaintiff's goods. Note, that the witness had sold the plaintiff a house in which the goods were, and whether the goods were sold or not was in dispute. In replevin by an under-tenant against a landlord, who towards discharging the rent due from his tenant distrained as bailiff of his tenant, for the amount of rent due from the under-tenant to the tenant; it was held, that the tenant was not a competent witness to prove the amount of the rent due from the under-tenant. *Upton* v. *Curtis*, 1 Bing. 210.

(*z*) See note (*k*), p. 108.

(*a*) See the cases which fall within this class, below, tit. JOINT INTEREST. One who admits himself to be a contractor is not a competent witness for the defendant; for although it might be against his interest to admit such liability in respect of contribution, yet he has a more immediate interest to defeat the action or reduce

to contribution, would not be a competent witness for the defendant, to whom, on a verdict against him, he would be liable to contribute, he is, on the other hand, a competent witness for the plaintiff in an action against the co-partner.

Right to share, or liability to contribute.

A co-partner in a company, whether proved to be such by examination on the *voire dire* (*b*) or by independent evidence (*c*), is a competent witness in an action of assumpsit to prove the liability of the defendant as a co-partner; for being a co-partner he is liable for his contributory share of the damages and costs; and if the defendant were not in fact a partner, he would be entitled to recover from the firm the sum recovered from him, as money paid to their use (*d*). Yet if the witness, being a joint co-partner, has let judgment go by default, he would not be a competent witness for the plaintiff; for, being himself liable, he is interested in rendering the co-defendants liable to contribution, of which liability the record would be evidence (*e*) Here, however, the the damages. *Hall* v. *Rex*, 6 Bing. 181, and 3 M. & P. 273; and see *Simons* v. *Smith*, 1 Ry. & M. C. 29; *Cheyne* v. *Koop*, 4 Esp. C. 112.

In an action for goods sold, the defence was, that they were sold to the defendant and another, his partner, in part payment of a debt due from the plaintiff to the partnership; held, that such partner was an incompetent witness, as being liable to contribution in respect of plaintiff's demand. *Evans* v. *Yeatherd*, 2 Bing. 133.

So where a co-defendant in *assumpsit* has let judgment go by default. *Brown* v. *Fox*, cited by Dallas, J., 8 Taunt. 141; and see the observations in *Munt* v. *Mainwaring*, 8 Taunt. 139; *infra*, Vol. II. tit. PARTIES.

Where two partners being sued on a bill as indorsees, one pleaded his discharge by bankruptcy and certificate, and a non-pros was entered as to him; it was held, that as since the 49 Geo. 3, c. 121, s. 8, the solvent partner, after payment of the partnership debt, might prove against his insolvent partner's estate, and that the certificate, therefore, would be a bar to any action for contribution, the bankrupt having released his surplus effects, was an admissible witness for him. *Afflalo* v. *Fourdrinier*, 6 Bing. 306. And see *Moody* v. *King & Porter*, 2 B. & C. 558.

(*b*) *Blackett* v. *Weir*, 5 B. & C. 385; *Yorke* v. *Blott*, 5 M. & S. 71; *Hall* v. *Curzon*, 9 B. & C. 646; *Fawcett* v. *Weathall*, 2 C. & P. 305. Where creditors of a bankrupt agreed to contribute to the expense of watching a commission of bankrupt, in order to prevent fraudulent proofs, rateably in proportion to their respective claims; it was held that one of the contributors, who had paid his own proportion to the solicitor retained, was a competent witness for the latter, in a suit to recover his quota of the expense from another creditor. *Taylor* v. *Cohen*, 12 Moore, 219.

(*c*) *Hall* v. *Curzon*, 9 B. & C. 646. Lord Tenterden, C. J., in giving judgment, assimilated the case to that of a co-trespasser.

(*d*) Per Holroyd, J., in *Blackett* v. *Weir*, 5 B. & C. 386.

(*e*) *Brown* v. *Brown*, 4 Taunt. 752. See the case of *Taylor* v. *Cohen*, 12 Moore, 219; where Best, C. J., distinguished the case of *Brown* v. *Brown* from that of *Hudson* v. *Robinson*, on the ground that in the latter case the

Right to share, or liability to contribute.

record would be evidence for him to prove a *fact*, that is, the joint liability of the defendants (*f*).

In cases falling within this description, it is not sufficient that the party objecting to the testimony should suggest that the witness is interested by reason of his privity with the party; the fact, if not admitted by the party who calls the witness, must be proved either by the examination of the witness on the *voire dire*, or by independent evidence (*g*).

It has been held that where the witness is *primâ facie* liable to the vendor of goods which he has purchased in his own name, he is not a competent witness for the vendor against a third person to prove that the defendant is either solely (*h*) or jointly (*i*) liable for the goods; for in such case the witness has a direct interest in causing another either to pay or contribute to the payment of the debt. So where a witness called by the defendant has undertaken to indemnify him against the whole or part of the damages or costs (*k*). It is immaterial whether the obligation

witness could in no event be interested in the result of the suit.

(*f*) Abbott, C. J., in the case of *Blackett* v. *Weir*, 5 B. & C. 287, observes that this is founded on the rule that no party to the record can be examined.

(*g*) *Birt* v. *Hood*, 2 Esp. C. 20; where, in an action for goods sold and delivered, a witness being called to prove that the trade in respect of which the goods were supplied was carried on not by the defendant but by the witness, the plaintiff admitted that the witness carried on the business, but insisted that the defendant was partner with him: but Eyre, C. J., overruled the objection, saying, that as the plaintiff had chosen to proceed against the defendant solely, he should not be allowed, by merely suggesting the existence of a partnership between the defendant and the witness, to deprive the former of the benefit of his testimony.

(*h*) *Macbrain* v. *Fortune*, 3 Camp. Vol. II. tit. VENDOR & VENDEE, 895.

(*i*) Where *G.*, a party to whom goods were originally sold in his own name, having become insolvent, the action was brought againt the defendants, who were in partnership with *G.*, it was held that he was an incompetent witness on the part of the plaintiff, to show the liability of the defendants, without a release, for he had a direct interest to render others liable as well as himself. *Ripley* v. *Thompson*, 12 Moore, 55. *Supra*, 107 (*e*).

(*k*) Where several parishioners at a vestry signed a resolution, approving of law proceedings against surveyors of the highways, and guaranteeing to the plaintiff the legal expenses, held that it was a personal liability, and rendered them incompetent. *Hendeborak* v. *Langley*, 3 C. & P. 571. One who has jointly with the defendant and by his authority done the act for which or it, consequences damages are claimed, is not an incompetent witness for the defendant, in the absence of an agreement to indemnify. Where, in trespass for taking marl, &c. the defendants justified as under a license from the plaintiff to *B.* one of the defendants, and *J. F.*; in support of which an agreement was proved

to indemnify be express or is implied from the circumstances (*l*). Thus a principal is not a competent witness for his surety (*m*). Liability over.

3dly. Where such legal right or liability depends not simply on the verdict and judgment, but also on some material and disputed fact:

As where the witness has engaged to indemnify a party not simply against the verdict, but against the consequence of some fact essential to the verdict: for where the verdict depends upon the fact, an indemnity against the existence of the fact on which the verdict depends is in effect an indemnity against the verdict. Thus, if on a title turning out to be defective, the witness be bound to indemnify the purchaser against all consequences, he is not a competent witness to prove the title in an action against the purchaser on a similar warranty, where the issue is upon the title; for the agreement to indemnify against any defect in title is, as far as the event is concerned, an agreement to indemnify in the particular cause (*n*).

between the plaintiff and the first defendant, and one *J. F.*, for a surrender to them of "all those brickworks at *S.*" then in the possession of the said plaintiff; upon which the question arose, whether the *locus in quo* were parcel of such brick-works; it was held that, in the absence of any engagement on the part of *J. F.* to indemnify *B.*, he was a competent witness, and that he might be called to explain the agreement by parol evidence, it being ambiguous as to the identity of the brick grounds. *Paddock* v. *Fradley*, 1 J. & C. 90.

(*l*) Where, in an action by the indorsee against the drawer of a bill, it was attempted to be proved by the acceptor that the bill was accepted in discharge in part of a bill due from him to the drawer, and was indorsed by the latter that he might get it discounted; and that he delivered it to the plaintiff, and told him that if he would get cash for it he might retain out of it the sum which the acceptor owed him, but that he never did get cash for it; it was held that the acceptor was an incompetent witness, because although not interested in the amount of the bill, yet, as to the costs, he would be bound to indemnify the defendant if the plaintiff obtained a verdict. *Edmonds* v. *Lowe*, 8 B. & C. 407. See below, tit. INTEREST.—COSTS; and Vol. II. tit. BILLS OF EXCHANGE.

(*m*) *Secus* where the principal is discharged by his bankruptcy and certificate. *A.* and *B.* having been in partnership, dissolved it on the 14th of July; the dissolution was advertised on the 17th; on the 16th a bill was drawn in the names of *A.* and *B.*, which was accepted and paid by *C.* without consideration; *C.* afterwards sued *A.* and *B.* for money lent; *A.* pleaded his bankruptcy and certificate; *B. non assumpsit*; a *nol. pros.* was entered as to *A.*: held that he was a competent witness for *B.* to prove that *C.* accepted the bill for his (*A.*'s) accommodation, and not for that of *B.*, for that *B.* was only a surety, and might have proved under *A.*'s commission. *Moody* v. *King*, 2 B. & C. 559; *supra*, 107. See *Townend* v. *Downing*, 14 East, 565.

(*n*) Where *C.* had enfeoffed the defendant with a covenant that he

Liability over.

It seems that, in general, where the witness is so far interested in a fact upon which the verdict depends, that if his party failed

was seised in fee, and the defendant covenanted with the plaintiff for quiet enjoyment, it was held, that in an action on the latter covenant, *C.* was not competent to negative a prior feoffment to another person, for the effect would be to save him from an action for breach of his own covenant. *Serle* v. *Serle*, on a trial at bar, 2 Roll. Ab. 685. But it is otherwise where a vendor has sold the inheritance without any covenant for good title or warranty. *Busby* v. *Greenslate*, 1 Str. 445. In general the law implies no warranty in the case of a real estate. *Infra*, Vol. II. tit. WARRANTY, 901. It is otherwise in the case of a sale of personal property, in which case any affirmation at the time of sale amounts to a warranty. *Infra*, Vol. II. tit. WARRANTY. And it seems that in general a witness who would be answerable to a vendee, in case the title turned out to be defective, is not a competent witness to prove the title. See tit. VENDOR AND VENDEE, Vol. II. 894; and tit. DECEIT, 267; and *Robinson* v. *Anderton*, Peake's C. 94. In the two following cases it was held that a witness was competent to prove title in himself to the property in dispute, although he had sold it to the defendant. Trover for a horse, the defendant proposed to prove that the horse was delivered to *E. F.* by the plaintiff, to secure a debt which he owed to *E. F.*, with authority to sell the horse to pay the debt, and that under this authority *E. F.* sold the horse to the defendant. *E. F.* was called to prove this case, and having been admitted as a witness for the defendant, notwithstanding an objection taken on the ground that he was incompetent to prove his title to sell, the plaintiff obtained a verdict. The objection having been renewed on a motion for a new trial, the Court of C. P. held that the witness was competent, because the record would not be admissible in any other action either for or against *E. F.* *Nix* v. *Cutting*, 4 Taunt. 18. But although the record would not, in the event of a verdict against the defendant, be evidence to show the fact of title, yet in an action by the defendant against *E. F.* for selling the goods without authority of the owner, it would, it seems, be evidence to prove the measure of damage sustained by the defendant in the former action.

In the case of *Larbalastier* v. *Clarke*, 1 B. & Ad. 899, the action was for goods sold. The plaintiff proved that one Faircloth and the defendant's son came to the London Docks, and said that the defendant wished to purchase a cask of champagne; the price agreed on was 10 *l.*, the wine was afterwards delivered to the defendant. A month afterwards the plaintiffs called on the defendant for payment, when he alleged that he had previously paid Faircloth the money. The proposed defence was, that Faircloth, who was a wine-merchant, had purchased the wine of the plaintiffs, and sold it on his own account to the defendant, and had been paid by the latter; and Faircloth was tendered as a witness to prove these facts. Lord Tenterden was of opinion, that as Faircloth, in order to induce the defendant to pay him, must have falsely represented himself to that party as the owner of the wine, he was guilty of fraud, and would be answerable to the defendant, not only for the price of the wine but for the costs accrued in the action. A verdict having been found for the plaintiffs, the Court of King's Bench held that the circumstances did not warrant the assumption that Faircloth had been guilty of fraud or misrepresentation, and that

and the fact were contrary to his testimony, he would be liable to that party for the debt, damages or costs, he would be incompetent; for in every such case he would lie under an interest to represent the fact one way rather than the other, in favour of his party rather than against him, in order to get rid of his own liability, which, if the fact were otherwise, would be consequent on a verdict against that party. This may happen where the right of action turns upon the question, whether an agent has been guilty of negligence or other breach of duty; for then, if the principal failed in consequence of such negligence or breach of duty, the agent would be answerable over to him, consequently the agent, although guilty of negligence or breach of duty, labours under a temptation to represent the contrary (*o*). Liability over.

In the case of *Rothero* v. *Elton* (*p*), in an action on a policy of insurance on goods on board a ship, the question was, whether the ship was seaworthy; and it was held that the owner of the vessel

he was therefore a competent witness. The Court, in the above case, seem to have considered it to be essential for the purpose of excluding the testimony of the witness, to prove fraud. It may, perhaps, with great deference, be suggested whether another view may not be taken of the case. The question at issue was, sale or no sale by the plaintiff to Faircloth: if there was no sale to him, and the plaintiff recovered against the defendant, the witness would be liable to the latter for the sum recovered and costs; for although he had not warranted the title, he was guilty of a deceit if in fact there had been no sale to him.

In the case of *Baldwin* v. *Dixon*, 2 Mo. & Mal. C. 59, the defendant, in an action on a warranty of a horse, called the party from whom he had bought him under a similar warranty; and on the objection to his competency, but no authority being cited, Lord Tenterden, C. J., said that it would be safer to admit the witness, giving the plaintiff leave to enter a verdict in case the Court should think that he was incompetent. See further, *Briggs* v. *Crick*, 5 Esp. C. 99. Vol. II. tit. VENDOR AND VENDEE.

(*o*) In the case of *Green* v. *The New River Company*, 4 T. R. 589, it was held that the turncock in the employment of the defendants was incompetent to negative a charge of negligence on which the action was founded. Note, that the Court in giving judgment seem to have decided on the ground that the verdict would, in a subsequent action by the defendants against the witness, be evidence to prove the amount of the damages. But *qu.* whether this consideration really affects the question; for the record would at all events be no evidence of the fact of negligence, and until that were established would be immaterial.—Where a pilot was on board who had the control of the ship, it was held that he was not a witness for the owners, in an action on the case against them for an injury by running foul of another vessel, without a release. *Hawkins* v. *Finlayson*, 3 C. & P. 305. See *Gevers* v. *Mainwaring*, Holt's C. 139; *Whitehouse* v. *Atkinson*, 3 C. & P. 344; *Field* v. *Mitchell*, 6 Esp. C. 73; *Clarke* v. *Lucas*, 1 Ry. & M. C. 32, and the cases cited below.

(*p*) Peake's C. 84, cor. Ld. Kenyon.

Liability over.

was not a competent witness for the plaintiff to prove the affirmative, because he was interested in the event of the cause; for, if the plaintiff failed, he would be entitled to recover against the witness, on an implied warranty that the ship was staunch. Again, in an action on a policy of insurance on goods, the captain of the vessel has not in the abstract any interest either in the immediate result of the cause or in the record; and if the question merely be, what was the original destination of the ship, he would be a competent witness for the plaintiff, to show that he acted under his direction. But if the question turned upon a deviation, he would be incompetent to prove that he had not been guilty of a deviation; for if the plaintiff failed, he would be responsible to him for the consequences of such deviation, and he would then labour under an interest in the event of the suit (*q*).

In this and similar cases, it is to be observed that the incompetency does not arise from the general relation of the witness to the parties, or from a direct interest in the immediate event of the suit, or in the record; for he is competent for general purposes. It is the particular question, and the consequent liability of the witness in one event, turning upon that question, which generates the objection.

When the event of the cause depends on the question of the witness's misconduct, the case is the same, as far as regards his competency, as if the sole issue had been joined upon that question.

In the case of *Miller* v. *Falconer* (*r*), in an action on the case for negligence in running against the plaintiff's cart with a dray, the servant who drove the cart was held to be incompetent as a witness for the plaintiff without a release.

In *Morish* v. *Foote* (*s*), in an action for negligently driving

(*q*) *De Symonds* v. *De la Cour*, 2 N. R. 374.

(*r*) 1 Camp. 251.

(*s*) 2 Moore, 508. In the case of *Cuthbert* v. *Gostling*, 3 Camp. 518, issue was taken on a replication of excess, to a plea of license in trespass for breaking a wall of the plaintiff's house. The trespasses complained of had been committed in repairing the defendant's house. The defence was, that the plaintiff having given leave to do what was necessary for repairing, nothing more than was necessary had been done; and to prove this, the evidence of the workmen employed was admitted on behalf of the defendant; Lord Ellenborough observing, that it by no means followed that the witnesses would be liable to the defendant if the plaintiff had a verdict; and that the case was very different from an action for negligence in driving against carriages or running down ships; for there, if the master be liable to the plaintiff, the servants are *necessarily* liable to the master, and they have a direct interest to defeat

a mail-coach against the plaintiff's waggon, the plaintiff's waggoner was held to be incompetent without a release, although he swore that he left sufficient room for the defendant's mail, and although the jury found by their verdict that he was not to blame. Liability over.

Where the party so employed was the actual agent who transacted the business of the principal, he is, as will be seen, competent on the score of necessity (*t*); but although an agent who actually executed the business of the principal is, it seems, in all cases competent to prove that he acted according to the directions of his principal (*u*), on the ground of necessity, and because the principal can never maintain an action against his agent for acting according to his own directions, whatever may be the result of the cause (*x*), yet if the cause depend upon the question whether the agent has been guilty of some tortious act, or some negligence in the course of executing the orders of the principal, and in respect of which he would be liable over to the principal if he failed in the action, the agent is not competent without a release (*y*). Agent.

The objection ceases to operate where the party who would

the action. Here it is to be remarked that there was no evidence to show that the agents had done anything beyond the scope of the master's direction, and consequently it did not appear that in the event of a recovery against him he would be entitled to recover over from them. See also *Green* v. *The New River Company*.

(*t*) Vide *infra*, 120, 121. A journeyman is competent to prove the delivery of goods. *Adams* v. *Davis*, 3 Esp. C. 48. So where a clerk or servant has received money, he is a competent witness for the party who paid it. *Matthews* v. *Haydon*, 2 Esp. C. 509. And per Lord Kenyon (Ibid.), it is the constant course at Nisi Prius, *ex necessitate rei*, to admit the evidence of clerks and porters who were alone privy to the receipt of money or the delivery of goods. And see *Theobald* v. *Treggott*, 11 Mod. 261. So a book-keeper is a good witness without a release. *Spencer* v. *Goulding*, Peake's C. 129. And where a carrier who was directed to deliver money to *A.*, delivered it by mistake to *B.*, it was held, that in an action by the employer against *B.* to recover the money, he was competent without a release. *Barker* v. *Macrae*, 3 Camp. 144; B. N. P. 289. And see *Ilderton* v. *Atkinson*, 7 T. R. 480; *Evans* v. *Williams*, 7 T. R. 481, n.; Vol. II. 894. But a debtor to the plaintiff is not (it has been held) competent to prove that he paid the debt to the defendant, the servant of the plaintiff, for his master; *Theobald* v. *Treggott*, 11 Mod. 261, cor. Holt, C. J.; for he swears in his own discharge.

(*u*) See note (*t*).

(*x*) *Morish* v. *Foote*. See the observations of Mansfield, C. J. in *De Symonds* v. *De la Cour*, 2 N. R. 374.

(*y*) *Infra*, INTEREST—AGENT. See *Rothero* v. *Elton*, Peake's C. 84. *Miller* v. *Falconer*, 1 Camp. 251.

otherwise have been entitled to recover over against the witness, has by any act precluded himself from recovering (*z*).

Interest in the record.

4thly. A witness is incompetent where the record would, if his party succeeded, be evidence of some matter of fact to entitle him to a legal advantage, or repel a legal liability (*a*). It is observable that in most if not all the cases already adverted to, where the witness is excluded by reason of his interest in the result, the record would be evidence where such evidence was necessary to prove the mere fact that such a verdict had been obtained, or to show the measure of damages, but not to prove the truth of any fact disputed in the cause. Thus the verdict and judgment in an action against a principal for the negligence of his agent, would be admissible in an action by the principal after a

(*z*) In an action against a sheriff for a false return of *nulla bona*, after he has taken goods in execution, which have been forcibly taken out of his possession, and carried away by a person claiming property in them, such person is admissible to prove that they were not the property of the debtor against whom the execution had issued; because the sheriff cannot maintain an action against him (the witness) for the rescue, after having made such a return; and as to all other persons claiming the goods, the verdict would be *res inter alios acta*; and therefore could not be used to affect their rights in any proceeding against the witness. *Thomas* v. *Pearce*, 5 Price, 547.

(*a*) See *Bent* v. *Baker*, 3 T. R. 27. *Smith* v. *Pruger*, 7 T. R. 60. *Abraham* v. *Bunn*, 4 Burr. 2251. A copyholder is incompetent to prove a customary right in the manor for copyholders to take timber for repairs without assignment of the lord. *Lady de Fleming* v. *Simpson*, 2 M. & R. 164. One who has acted in violation of a custom is incompetent to disprove it. *Carpenters' Company* v. *Hayward*, Dougl. 374. Where the defendant claimed to be entitled as heir-at-law of his father, and called his mother to prove a seisin in his father, it was held that her being entitled to dower if the seisin were established did not render her incompetent, as the judgment in the action would be no evidence of the seisin, and she would be equally entitled to dower whether the lands were in the hands of the defendant or of the lessor of plaintiff. *Doe* d. *Nightingale* v. *Maisey*, 1 B. & Ad. 439. In trespass for cutting down furze the defendant claimed an exclusive right of possession; held that the issue between the plaintiff and defendant being confined as to the right of possession of the *locus in quo*, and the record not being evidence to affect the rights of parties claiming rights of common over it, they were competent witnesses for the defendant. *Pearce* v. *Lodge*, 12 Moore, 50. Where the verdict in ejectment, by an heir-at-law, would only tend to establish the will as to the real property, and would be no evidence in the Ecclesiastical Court upon a question whether it were good will as to personalty, held that upon the issue of the testator's sanity, the executor (although a creditor of the testator) was a competent witness. *Doe* d. *Wood* v. *Teuge*, 5 B. & C. 335; and 8 D. & Ry. 63.

verdict against him, to prove the measure of damages, though not to prove the fact of negligence. It is proposed within the present division to consider those cases where the record would be evidence for or against the former witness to prove a matter of fact, in order to acquire a benefit or repel a loss.

By interest in the record.

The operation of this rule necessarily and obviously depends upon another very important question, namely, in what cases the record in a former proceeding is admissible in evidence (*b*). In general, in all cases depending on the existence of a particular custom, a record establishing that custom is evidence, although the parties are different. Hence it follows that no one is competent to support a custom who would be benefited by the establishment of it, because the record would be evidence for him in case his own right should subsequently be disputed. Accordingly, upon a trial at bar of an issue, whether by the custom of certain manors in Cumberland the lord was entitled, under particular circumstances, to a fine from his tenant-right tenants, the Court would not permit lords of other tenant-right manors in Cumberland, Westmorland or Northumberland, to give evidence of the right (*c*), nor the tenants of other tenant-right estates there to give evidence against it (*d*).

So where the issue is, whether a custom exists that all the inhabitants of *A.*, or all the tenants of a particular manor, shall have common of pasture in a particular spot, no inhabitant in the one case, or tenant in the other, is competent (*e*) to establish the custom.

Where the question is as to a prescription for a right of common, as appurtenant to the house of *A.*, *B.*, who has a similar house, is a competent witness, since the record would be no evidence in support of his prescriptive claim; but if the right in the

(*b*) See tit. JUDGMENT.

(*c*) *Duke of Somerset* v. *France*, Str. 654.

(*d*) S. C. Fort. 41.

(*e*) *Hockley* v. *Lambe*, Lord Raym. 731; Per Buller, J. 1 T. R. 302; Per Ld. Ken. C. J. 3 T. R. 33; B. N. P. 283; *Anscombe* v. *Shore*, 1 Taunt. 26; and Vol. II. 228. It seems, that in order to exclude a witness, where the verdict depends on a custom which he is interested to support, it is not necessary that the custom should be stated on the record. *Lord Falmouth* v. *George*, 5 Bing. 286; and see App. Vol. I. 115. A case occurred on the Northern Circuit, where the verdict in an action of trover turned entirely on an alleged custom within a manor, for the tenants to cut down wood, and a witness interested in supporting the custom was rejected, although it was insisted that the verdict would not be afterwards evidence for him to support the custom; for it was answered, and the Court of King's Bench afterwards, as I have heard, approved of the decision, that the effect of the verdict to support the custom might be aided by evidence.

In the record.

common were to be claimed as appurtenant by custom to all houses similar to that of *A.*, *B.* would not be a competent witness, because the record would be evidence of his own right (*f*).

It has been held that where the question is, whether several requisites in the aggregate will not confer particular advantages, one who possesses part only of those requisites is still competent, since the decision would not entitle him to a participation in those advantages (*g*). And therefore upon a question, whether to qualify one as a common-council man, it was requisite that he should both be an inhabitant, and also possess a burgage tenure, it was held that one who was an inhabitant, but who had no burgage tenure, was competent to narrow the right, and to confine it to such as had both qualifications (*h*).

Verdict in criminal proceeding.

Where a witness would by the conviction or acquittal of another discharge himself, he is in general incompetent (*i*). But it seems to be a general rule, that no verdict founded either wholly or partially on the testimony of any witness in a criminal proceeding, can be made use of either for or against him in any other proceeding (*k*); and consequently no objection on that ground can be made to his testimony. Accordingly, upon the trial of an inquisition against the warden of the Fleet, for the escape of *A.*, who was in custody along with *B.* on a joint judgment and execution, issue having been joined on the question whether the defendant had voluntarily permitted the escape, it was held that *B.* was a competent witness for the Crown; for although it was urged that the fact, if true, would entitle *B.* to his discharge, it was answered, that the record in that proceeding would be no evidence for *B.* in any action brought by him for false imprisonment (*l*). So upon the trial on an information against the warden

(*f*) B. N. P. 283. *John* v. *Fothergill*, Peake's Ev. Append. 1 T. R. 302. *Harvey* v. *Collison*, 1 Sel. N. P. 449. So a witness is not competent to establish a modus in a parish, or to exempt certain articles from the payment of tithes, where he himself would be liable were the claim to prevail. (*Lord Clanricarde* v. *Lady Denton*, 1 Gwill. 360. *Anscombe* v. *Shore*, 1 Taunt. 261.) So a witness is not competent to prove a custom in a parish to an away-going crop, where he, as tenant of lands within the parish, would be entitled to the same privilege.

(*g*) *Stevenson* v. *Nevinson*, Str. 583. The Court relied also on the ground of necessity, and said, that he was in effect a witness against himself, by showing that he had no right.

(*h*) Ib. For other illustrations of this rule see *Knight* v. *Birch*, 3 Camp. 521; tit. COMMON.—CORPORATION.—CUSTOM.

(*i*) B. N. P. 288, 9. Gil. Ev. 223.

(*k*) See the Cases, tit. JUDGMENT.

(*l*) *R.* v. *Huggins*, Fitzg. 80; 1 Barnard, 350.

for five escapes, one of the prisoners, whose escape had been permitted, but who had returned, was held to be competent, although he had given a bond to the warden to be a true prisoner (*m*). Verdict in criminal case.

A verdict, unless it operate in *rem*, is not admissible against a stranger (*n*), and consequently the probability of a verdict either way does not in other cases exclude his testimony.

In an action of trover a third person is a competent witness to defeat the action, by proving property in himself; for the verdict neither alters his right nor would be evidence for or against him in an action to recover against either of the parties to the suit (*o*). The consideration that the record might, under circumstances not proved but only suggested, show the measure of the witness's liability, if liable at all, does not render him incompetent (*p*). In trover.

If the interest be of the nature above described its magnitude is not material, and the objection must prevail however minute the interest may be (*q*). The reason seems to be this; a plain Magnitude of the interest.

(*m*) *R.* v. *Ford*, 2 Salk. 690. But note, the reason given in Salkeld is, that it was a private matter, of which there could be no other evidence. In another report of this case the witness is stated to have been a bailiff, who had given a bond to the warden for the safe custody of the prisoner.

(*n*) See tit. JUDGMENT. In the case of *The King* v. *Horton*, 4 Price, 150, it is said to have been ruled at *nisi prius* by the Lord Chief Baron, that a person having entered into a bond with sureties to the Crown, is not an admissible witness in a *scire facias* against the surety, to prove that he had not broken the condition, although he had been released by the surety; on the ground that the verdict against the defendant would be evidence against the principal, in a similar proceeding against him. But *quære*, and see tit. JUDGMENT; and *Hart* v. *Macnamara*, 4 Price, 154.

(*o*) *Ward* v. *Wilkinson*, 4 B. & B. 410. Per Abbott, C. J.: If a verdict one way could not be given in evidence against a witness, a verdict the other way would not be evidence for him. See also *Nix* v. *Cutting*, 4 Taunt. 18.

(*p*) *Bunter* v. *Warre*, 1 B. & C. 689.

(*q*) *Burton* v. *Hinde*, 5 T. R. 174; 2 Vern. 217. But see the observations of Best, C. J., *Doe* v. *Tooth*, 3 Y. & J. 19; *Hovill* v. *Stephenson*, 5 Bing. 497. That learned Judge, to whose opinion the greatest deference is due, especially upon questions connected with evidence, intimated that the exclusion of the testimony of the witness, where the amount of interest is minute, is founded on the consideration, that if the interest be insufficient to influence the testimony of the witness he will release it, and therefore that the releasing it or not is the true test for determining whether it ought to exclude the evidence. This, however, is a test applicable in those cases only where the witness himself is capable of releasing the interest; it frequently happens that a release from the party who calls the witness is necessary, and then this test would be inapplicable. The releasing him would not depend on the witness's view of the magnitude of the interest, but on the question whether it was beneficial to the party to purchase his testimony at the expense of releasing the wit-

and simple rule is absolutely necessary, and if a small degree of interest did not disqualify the witness it would be impossible to draw a practicable line of distinction.

Time and manner of acquiring the interest.

A witness cannot by the subsequent voluntary creation of an interest, without the concurrence or assent of the party, deprive him of the benefit of his testimony in any proceeding, whether civil or criminal; for the party had a legal interest in the testimony, of which he ought not to be deprived by the mere wanton act of the witness. Accordingly, one who has been witness to a wager, and who afterwards bets on the same point, is a competent witness for the party for whom he is called (*r*). So where a witness of an assault lays a wager that he will convict the defendant, he is still a competent witness for the Crown. And this seems now to be fully established, although it was once held that the witness was disqualified by a voluntary creation of an interest in the event, provided the party interested in his silence did not concur with him (*s*).

But if a person who is under no legal obligation to become a witness for either party to a suit, engage to pay a debt beforehand upon a condition to be determined by the event of that suit, he becomes interested and therefore incompetent (*t*).

Neutral witness.

Where the witness is reduced to a state of neutrality by an equipoise of interest the objection to his testimony ceases. Where however the witness is subject to two conflicting interests, one of which preponderates over the other, the difference is to be consider; and this would depend wholly on the nature and circumstances of the particular case. Where the party expected to recover 10,000 *l.*, it might be expedient to release a witness from a debt of 1,000 *l.*, in order to obtain the benefit of his testimony.

(*r*) *Barlow* v. *Vowell*, Skinn. 586; B. N. P. 190. *George* v. *Pearce*, cited by Buller, J. 3 T. R. 37. *Bent* v. *Baker*, 3 T. R. 27; Cowp. 736. *R.* v. *Fox*, Str. 652.

(*s*) *Rescous* v. *Williams*, 3 Lev. 152. *Baron* v. *Bury*, 12 Vin. 24; 2 Vern. 699; Ab. Eq. 224.

(*t*) *Forrester* v. *Pigou*, 1 M. & S. 9. Where a witness for the plaintiff married the defendant after the service of the subpœna, it was held that she could not be examined by the plaintiff without the defendant's consent. *Pedley* v. *Wellesley*, 3 Carr. & P. C. 558. See also *Townend* v. *Downing*, 14 East, 565. Where the party himself creates the incapacity, the witness is not competent to prove even an instrument which he has attested, and proof of his hand-writing is inadmissible. Where after the execution of a charter-party, by agreement between the plaintiff and the attesting witness, the latter was admitted to a share of the profits under the instrument, which he refused to release; held, that having become an incompetent witness subsequent to the execution of it by the act of the plaintiff, proof of his hand-writing was inadmisible. *Hovill* v. *Stephenson*, 5 Bing. 493; and see *Forrester* v. *Pigou*, 1 M. & S. 9.

sidered as an absolute interest which is not countervailed (*u*). Accordingly, in an action for money had and received, a witness is competent to prove that it was paid to him as agent for the plaintiff, since he admits that he owes it to one of the parties, and it is indifferent to him which of them is his creditor (*w*). Neutral witness.

So the payee of an accommodation promissory note is competent to show that he indorsed it to the plaintiff before it became due, in payment for goods, for he is liable either to the plaintiff for the goods or to the defendant for amount of the note (*x*).

In an action against the owner of a ship for money lent, the captain is a competent witness to prove that it was advanced to him on account of the ship (*y*).

A pauper in a settlement case is a competent witness; for he must be maintained at all events (*z*), and any local prejudice by which he may be influenced does not constitute a legal disqualifying interest.

In an action of trover for goods, a party who sold them to the plaintiff is a competent witness for him to prove the sale, although he sold them under an agreement that if not paid for they were to be returned; for he is either entitled to the goods or the price (*a*).

Where the opposite interests are unequal, the witness has an interest on one side, measured by the excess of the one interest over the other. And therefore where the interest is equiponderant in other respects, yet if the witness would be liable to costs in one event but not in the other, it seems that he is incompetent to give evidence tending to discharge him from such further liability. Thus the drawer of a bill of exchange which has been accepted for his accommodation, is not a competent witness for the acceptor in an action against the latter by an indorsee, for if the plaintiff succeeded he would be liable to the defendant for the costs (*b*).

(*u*) See Evans's Pothier, tit. *Evidence.*

(*w*) *Ilderton* v. *Atkinson*, 7 T. R. 480.

(*x*) *Shuttleworth* v. *Stephens*, 1 Camp. 408. See *Banks* v. *Kain*, 2 C. & P. 597.

(*y*) *Evans* v. *Williams*, 7 T. R. 481, n.

(*z*) 2 T. R. 267.

(*a*) *Bankes* v. *Kain*, 2 C. & P. 597; and see *Radburn* v. *Morris*, 4 Bing. 649.

(*b*) *Jones* v. *Brookes*, 4 Taunt. 464; *infra*, Vol. II. See also the case of *Maundrell* v. *Kennett*, 1 Camp. 408. In the case of *Ilderton* v. *Atkinson*, 5 T. R. 480, it was held, that a witness to whom the defendant had paid 200 *l.* on account of the plaintiff, was a competent witness for the defendant to prove that he was the agent of the plaintiff when he received the money, although it was objected, that if the plaintiff succeeded

The preponderance must however, in order to disqualify the witness, be certain and definite; for although it has been held that a witness was incompetent because it would in one event be more difficult for him to recover the same sum of money than in the other (*c*), yet the principle of this decision is very dubious, and probably would not now be supported (*d*).

Admission, —ex necessitate.

In some instances the law admits the testimony of one interested, from the extreme necessity of the case; such a necessity arises from the particular nature of the subject of inquiry, which renders it exceedingly improbable that any person who is not interested should possess any knowledge of the facts, whether that improbability arise from the confined nature of the transaction, which makes it likely that no one is privy to it except the interested witness, or from the generality of the interest, which is equally likely to affect all other witnesses (*e*). But it is to be particularly observed, that this necessity must result not from the accidental failure of evidence in a particular and isolated case, for it would be highly impolitic to sacrifice a general rule in order to alleviate a particular hardship, but it must be general in its nature, embracing a large and definite class of cases, and it must arise in the usual and natural course of human affairs (*f*). And it is to be remarked, that the law has justly been jealous of any extension of this rule, and that its operation has consequently been very limited in practice (*g*).

he would be liable to the defendant for the costs of the action. But in this case the Court seems to have relied principally on the ground that the witness was competent as an agent to prove a fact done in the course of his agency; for they observed, that if such an objection were to prevail, it would exclude brokers who had effected policies of insurance. The decision in the case of *Birt* v. *Kershaw*, 2 East, 458, Vol. II. 180, seems to rest upon the same principle; and see Lord Ellenborough's observations in *Hudson* v. *Robinson*, 4 M. & S. 480; Vol. II. 3.

(*c*) *Buckland* v. *Tankard*, 5 T. R. 578.

(*d*) See the observations made in *Birt* v. *Kershaw*, 2 East, 458. The mere preponderance of difficulties is of too uncertain and contingent a nature to afford a practical rule in such cases.

(*e*) 3 Mod. 114; 6 Mod. 211; 1 Salk. 286; Holt, 300; 2 Ld. Raym. 1179; 1 Sid. 211. 237. 431; 2 Keb. 572. 384; 1 Vent. 49. *R.* v. *Moise*, Str. 595. See tit. Inhabitant. In an action against a surety for the collector of rates, held that an inhabitant was a competent witness to prove payments to the collector *ex necessitate*. *Middleton* v. *Frost*, 4 C. & P. 16.

(*f*) See Mr. Evans's observations. Evans's Pothier, 208.

(*g*) See *Green* v. *The New River Company*, 4 T. R. 590; and Lord Kenyon's observations in *Evans* v. *Williams*, 7 T. R. 481, in the note, where he says, that originally the plea of necessity was admitted in cases on the statute of Hue and Cry only.

Upon this ground it is the constant course to admit the servant of a tradesman to prove the delivery of goods, and the payment of money, without any release from the master (*h*), because it is in the usual course of affairs that a servant should transact such business for his master; and it often happens that no other person can prove such transactions, and therefore to exclude his testimony would frequently be to deprive the master of all evidence whatsoever (*i*). Agent.

So it has been held that an apprentice is a competent witness to prove that money has been overpaid by his mistake (*k*). So it was held that a broker, although he was also a joint insurer, was a competent witness for the plaintiff, in an action on a policy of insurance, as to a representation made by him to the defendant when he subscribed the policy, because it was not likely that any other person could prove it (*l*). So in an action against a carrier for not delivering a parcel, his servant was held to be competent to prove the delivery (*m*).

So in an action by the party robbed, against the hundred, he is a competent witness as to the fact of robbery, although he is not only interested, but the plaintiff in the suit (*n*). So interest is no objection to competency, if all persons who are likely to know the fact are equally interested (*o*). And therefore the loser of more than 10*l.* at a sitting is a competent witness upon an information under the statute 5 Ann. c. 14, s. 5, which subjects the winner to the forfeiture of five times the money won, upon conviction, and authorizes *any person* to sue for it, and therefore any person is as much entitled to sue for it as the witness (*p*). So in the case of extortion by duress, and in other similar cases, which from their very nature admit of no proof but by the testimony of the party injured, he is, according to Lord Holt, a competent witness from necessity (*q*); but in such case, where the proceeding is of a criminal nature, the application of this rule is unnecessary, since the party defrauded is not disqualified as a witness (*r*.)

(*h*) 4 T. R. 590.

(*i*) Except indeed through the medium of a release.

(*k*) *Martin* v. *Horrell*, Str. 647.

(*l*) Per Buller, J. *Bent* v. *Baker*, 3 T. R. 27. Vide JOINT INTEREST.

(*m*) *Ross* v. *Rowe*, 3 Ford's MSS. 98. Vide *supra*, tit. AGENT. The rule does not extend to cases where actions are brought against principals for the negligence of their agents; vide *supra*, 112; *infra*, 133.

(*n*) See Vol. II. tit. HUNDRED.

(*o*) *Rock* v. *Layton*, Fort. 246.

(*p*) R. v. *Luckup*, 1 Ford's MSS. 542. Willes, 425 (*c*).

(*q*) 7 Mod. 119, 120.

(*r*) Vide *infra*, COMPETENCY—INTEREST—PROSECUTOR.

Effect of the objection with respect to secondary evidence.

II. Where the witness from interest becomes incapable of giving his testimony, the effect with respect to evidence seems to be the same as if he were naturally dead, since his lips are effectually closed. Accordingly, where a witness to a bond is interested at the time of the execution of the deed, and continues to be so at the time of the trial, the instrument cannot be proved by evidence of his hand-writing, since his attestation, when he was interested, was a mere nullity and of no more effect than if he had not existed (*s*).

In such case, as in the event of the natural death of the witness, the deed may be established by proof of the hand-writing of the obligor (*t*). So in chancery, where a witness becomes interested, his deposition made while he was disinterested may still be read (*u*).

But it has been held, that where a witness becomes interested his deposition cannot afterwards be read upon a trial at common law (*x*).

III. The objection to competency ought to be taken in the first instance, previous to an examination in chief, for otherwise the party objecting might suspend the objection for the purpose of obtaining an unfair advantage (*y*). Unless the interest of the witness be apparent from the record itself or from the admission of the adversary, it lies with the party who makes the objection to support it (*z*) either by the exa-

(*s*) *Swire* v. *Bell*, 3 T. R. 371. See App. Vol. I. 122; 1 Burr. 414. 423. *Doe* v. *Kersey*, 4 Burn's E. L. 97. *Anstey* v. *Dowsing*, 2 Str. 1253.

(*t*) *Godfrey* v. *Norris*, Str. 34. *Goss* v. *Tracy*, 1 P. W. 280. So where he becomes infamous. *Jones* v. *Mason*, 2 Str. 833. *Infra*, tit. INSTRUMENT, PROOF OF.

(*u*) 2 Vern. 699; 1 P. W. 187; Ab. Eq. 224; 2 Atk. 665; 2 Ves. 42; 2 Ld. Raym. 1008; 1 Salk. 286.

(*x*) 2 Vern. 699; Ab. Eq. 324; vide *infra*, tit. DEPOSITION.

(*y*) *R.* v. *Muscot*, 10 Mod. 192.

(*z*) It is not sufficient to suggest, or even to show a probability, or excite a suspicion, that the witness stands under circumstances which tempt him to represent the fact one way rather than the other; it is incumbent upon him to show it with certainty.

Declaration in replevin for taking the growing corn of the plaintiff. Avowry, that plaintiff and one *J. B.* held the *locus in quo*, as tenants to the defendant, at a money-rent, and because it was in arrear defendant took the corn as a distress. Plea in bar, denying the tenancy *modo et forma*, and issue joined thereon. At the trial some evidence was given by the defendant that the plaintiff and *J. B.* were in possession of the premises in question; that a lease had been executed to them by the defendant's ancestor, which plaintiff and *J. B.* had paid for, but which they had refused to execute. It was not proved that *J. B.* was so connected with the plaintiff, as to the premises in question, as to be jointly liable for the rent, nor was it shown that the corn was the joint property of the plaintiff and *J. B.*

mination of the witness on the *voire dire* or by independent evidence (*a*). Examination on voire dire.

Notwithstanding the *primâ facie* appearance of interest on the part of the witness on the face of the record, yet it seems that his evidence ought not to be rejected without examining him on the *voire dire* as to his real situation (*b*). The witness may be examined generally as to his situation, and even as to the contents of written documents which are not produced (*c*); for the party objecting could not know previously that the witness would be called, and consequently might not be prepared with the best evidence to establish his objection; and in like manner his competency may be restored by his parol evidence on the *voire dire* (*d*). If the witness discharge himself on the *voire dire*,

The plaintiff gave evidence to show that the holding was under an agreement for a corn-rent, and in support of that case he tendered *J. B.* as witness. He was rejected without being examined on the *voire dire* as to his liability to the rent or not. Held that he was not an incompetent witness until that fact was established, and therefore that he was improperly rejected. *Bunter* v. *Warre*, 1 B. & C. 689. It will be presumed that the action is brought by the authority of the party beneficially interested. *Bell* v. *Smith*, 5 B. & C. 188.

(*a*) Formerly it was necessary to have the witness sworn on the *voire dire*, and to take the objection before he was sworn in chief, but the rule has been relaxed for the sake of convenience; see 1 T. R. 717. The witness may be examined on the *voire dire* in criminal as well as civil cases. *R.* v. *Muscot*, 10 Mod. 192. See *Ld. Lovat's Case*. In *R.* v. *Wakefield and others*, Lancaster Spring Assizes, 1827, on an indictment for a conspiracy to carry away Miss Turner and marry her to one of the defendants, on an objection taken by the defendants to the competency of Miss T. on the ground that she was married to one of the defendants, Hullock, B. held, that the proper course was first to examine Miss T. on the *voire dire*, and afterwards to adduce collateral evidence.

(*b*) *Bunter* v. *Warre*, 1 B. & C. 689. Replevin; avowry alleging a joint holding by the plaintiff and *T. B.* who was no party to the record; and the testimony of *T. B.* having been rejected, without any examination on the *voire dire*, to enable him to explain his situation, a new trial was granted. Ibid. But see *Goodhay* v. *Hendry*, 1 Moody & M. C. 319; where Best, C. J. held, that in an action by the assignee of a bankrupt, the competency of the bankrupt could not be restored by the examination of the bankrupt on the *voire dire*, and without producing the release and certificate. But in the case of *Wandless* v. *Cawthorne*, Guildh. Dec. 3, 1829, 1 Moody & M. C. 321, Parke, J. said that he should overrule the objection, which had been taken in a similar case.

(*c*) *R.* v. *Gisburn*, 15 East, 57. *Howell* v. *Locke*, 2 Camp. 14. But where the witness, on examination on the *voire dire*, produced the contract which rendered him incompetent, it was held that the contract ought to be read. *Butler* v. *Carver*, 2 Starkie's C. 433, cor. Abbott, C. J.

(*d*) *R.* v. *Gisburn*, 15 East, 57. And therefore, where a witness on an appeal against a removal order, stated on examination on the *voire dire*, that he occupied a house in the appellant's township, but paid no rates, it was held that he was competent. And see

Proof of, by evidence.

the party who objects may still afterwards support his objection by evidence (*e*); but in so doing the objecting party is bound by the usual rules of evidence, and cannot inquire as to the contents of a written instrument without producing it, or proving the usual preparatory steps (*f*). Neither in such case, as it seems, can the objection be removed by the examination of the witness. Where it is discovered incidentally in the course of the cause that the witness is interested, his evidence will be struck out, although no objection has been made to him on the *voire dire* (*g*). Yet it seems that a party who is cognizant of the interest of the witness at the time when he is called is bound to make his objection in the first instance, according to the general principle (*h*), for otherwise he might obtain an unfair advantage, by having it in his power to establish or to

Botham v. *Swingler*, 1 Esp. C. 164; not produced, and the question was overruled.

Butchers' Company v. *Jones*, ib. 160. *Ingram* v. *Dade*, London Sitt. after Mich. 1817. It is not sufficient that a second witness should state that the first witness has been released, without producing the release. *Corking* v. *Jarrard*, 1 Camp. 37. And it is not sufficient that the witness, liable under an instrument not produced, should state *his belief* that he had been released by an instrument not produced. *Woolley* v. *Brownhill*, 1 Maclell.& Y. 324.

(*e*) In the case of *The Queen* v. *Muscot*, 10 Mod. 192, Parker, C. J. is reported to have stated, that a party has his election to prove the interest of the witness, either by examination on the *voire dire*, or by evidence, but that he could not do both. But it would manifestly be unjust to preclude the party from impeaching the competency of a witness by satisfactory evidence, merely because he had taken the objection in the first instance in the proper mode, and the witness had been hardy enough to misrepresent his situation.

(*f*) *Howell* v. *Locke*, 2 Camp. 14, where the witness for the plaintiff was asked on cross-examination what interest he took under a will which was

(*g*) Per Lord Ellenborough, *Howell* v. *Lock*, 2 Camp. 14; *Perigal* v. *Nicholson*, 1 Wightw. 64.

(*h*) The ancient doctrine on this head was so strict, that if a witness were once examined in chief, or even sworn in chief, he could not afterwards be objected to on the ground of interest. The rule has been relaxed for the sake of convenience. In the case of *Turner* v. *Pearte*, 1 T. R. 717, where a new trial was moved for on the ground that it had been discovered since the trial that the witnesses were incompetent, the motion was refused, and it was said by Buller, J. that there was no instance in which a party had been allowed after the trial, to avail himself of an objection which was not made at the time of examination; and Grose, J. laid great stress upon the circumstance, that it did not clearly appear that the party was ignorant of the objection at the time of trial. Such a circumstance might, however, as it seems, operate as an inducement to grant such a motion, where it clearly appeared that the party was ignorant of the objection at the time of trial, and where he had merits. Ibid.

destroy the evidence, just as was most beneficial to himself. This seems to be a matter entirely within the discretion of the Court. Where the witness, having been examined, had left the box, but on being recalled answered a question put by the Court, from which it appeared that he was interested, it was held that his competency could not then be disputed (*l*). And where a witness had been examined and cross-examined or interrogated without objection, it was held that the objection to competency could not be taken at the trial (*m*). The Courts will not, it seems, grant a new trial on the mere ground that it has been discovered, subsequently to the trial, that some of the witnesses were interested (*n*). And where a witness has been improperly received, yet if the Court see clearly that there was sufficient evidence to warrant the verdict without his testimony, a new trial will not be granted (*o*). So the improper rejection of the witness as incompetent, will be no ground for granting a new trial, where it appears that such rejection made no difference in the result. As where another witness was called by the plaintiff, who established the same fact, and the defence and verdict for the defendant turned wholly on a collateral point.

Time of objecting.

The objection to competency on the ground of interest is removed by an extinguishment of that interest, by means of a release, executed either by the witness himself, or by those who would have a claim upon him, or by payment (*p*). Where, however, from the special nature of the case the interest cannot be released, the witness will not be competent *quasi ex necessitate*; and therefore no release will enable a bankrupt to prove his bankruptcy (*q*).

Removal of interest.

(*l*) *Beeching* v. *Gower*, Holt's C. 313.

(*m*) *Ogle* v. *Paleski*, Holt's C. 485.

(*n*) *Turner* v. *Pearte*, 1 T. R. 717; see note (*i*).

(*o*) *Nathan* v. *Buckland*, 2 Moore, 156. And see *Horford* v. *Wilson*, 1 Taunt. 12; and *Edwards* v. *Evans*, 3 East, 451.

(*p*) As to the form and effect of a release, see Vol. II. tit. RELEASE; and Append. Vol. I. 125.

(*q*) *Field* v. *Curtis*, Str. 829. In an action on the 9 Ann. c. 14, brought by the assignee of a bankrupt to recover money lost by the bankrupt at play, the bankrupt, who had obtained his certificate, was called as a witness to prove the loss. Held, that he was incompetent, but that his competency was restored by three releases: first, by the bankrupt to the assignee; second, by all the creditors to the bankrupt; third, by the assignee (who was not a creditor) to the bankrupt: held, secondly, that a year after the commission issued, it might be presumed that all the creditors had proved, and that a release signed by all those who had proved might therefore be considered as a release by all the creditors: thirdly, that such a release did not destroy the assignee's right of action. *Carter* v. *Abbott*, 1 B. & C. 444.

Release. Where the claim from which the witness is to be discharged has not yet arisen, a general release from all claims up to the date of the release will not be sufficient (*r*). On an ejectment brought by a corporation to recover land, it was held that a mere release by a corporation was insufficient to restore his competency where the objection is not founded merely on his liability to costs (*s*). Where the witness is liable, not to the party in the suit, but to an intermediate person, a release by the latter is sufficient (*t*).

Where an interested witness has made a deposition, and being afterwards released, is again examined, his evidence is admissible, although the second deposition be the same with the first (*u*).

A party cannot, by refusing his assent to a release or surrender, tendered by a witness on the other side, exclude his testimony (*x*).

The witness and the defendant having, with other underwriters, filed a bill in equity against the plaintiff for relief, the plaintiff on this ground objected to witness as being interested; the witness and the defendant offered to pay the costs of the bill, and to procure it to be dismissed, and the witness was held to be competent, although the plaintiff still objected that there were other plaintiffs in equity (*y*).

Surrender. So where the lessor, in an ejectment, refused to accept a surrender of an estate devised to the witness, who was called by the defendant, who claimed as devisee, to prove the testator's sanity (*z*). So it seems that a witness cannot, by perversely refusing to accept a release, deprive a litigant party of the benefit of his testimony (*a*).

Payment. A legatee whose legacy has been paid, or any other person

(*r*) Where the witness was entitled to a distributive share of the intestate's effects, of which the sum to be recovered in the action by the plaintiff, as a surviving partner (being also administrator), would form part: held that a general release at the trial of all claims, &c. up to the date of the release, would not render the party a competent witness, such share arising, if at all, after the release. *Matthews* v. *Smith*, 2 Y. & J. 426.

(*s*) *Doe* v. *Tooth*, 3 Y. & J. 19.

(*t*) In trover for a barge by a purchaser from one *B.*, the defendants claiming it under *W.* who was alleged also to have purchased it from *B.*; held that *B.* having been released by *W.* was a competent witness for the defendant, who could never have sued him, and *semble* no release was necessary. *Radburn* v. *Morris*, 4 Bing. 649.

(*u*) *Callow* v. *Mire*, 2 Vern. 472. The bias on his mind to adhere to his former testimony goes to his credit.

(*x*) Per Lord Kenyon, C. J., and Buller, J. 3 T. R. 27.

(*y*) *Bent.* v. *Baker*, 3 T. R. 27.

(*z*) *Goodtitle* v. *Welford*, Doug. 134.

(*a*) Doug. 134.

whose interest is founded upon a claim which has been satisfied, is a competent witness (*b*). Payment.

So although in prosecutions for forgery it was a general rule that the party whose name is forged, and who would be liable upon the instrument, supposing it to be genuine, was not a competent witness, yet where a bill of exchange was forged, purporting to be drawn by *A.* on *B.*, payable at *C.*'s banking-house, which *C.* had paid, supposing the acceptance to be genuine, but afterwards had given credit to *B.* for the amount, it was held that *B.* was a competent witness (*c*).

So where the party whose receipt had been forged had previously recovered the money from the prisoner (*d*).

So where the party whose name had been forged to a receipt, for the amount of articles supplied by him, had been paid the amount of his bill (*e*).

So in the case of the forgery of a bill of exchange, purporting to have been drawn by the witness, if he were released by the holder, and there were no other party whose name was on the note to whom the drawer was liable, he became competent (*f*).

So if the supposed obligor of a bond was released by the supposed obligee, the former was competent (*g*).

In order to render a witness competent by a release, it is not sufficient that another witness should swear that a release has been executed (*h*). And such an instrument, when produced and proved, is, it seems, evidence as a document in the cause for all purposes (*i*). Proof of release.

A release by one of several plaintiffs is sufficient (*k*).

Where several parties entered into a joint undertaking, and an action was brought against one; held that a joint contractor,

(*b*) See *Kingston* v. *Gray*, Lord Raym. 745; where, upon issue taken on the plea of *plene administravit*, it was held that a bond-creditor who had been paid was competent to prove the debt and payment, although, if the bond was not authentic, or the debt not due, he would be liable to refund. But (*semble*) the liability to refund was no objection to his testimony, since in an action to recover the money, the verdict in that cause would not have been evidence, and his legal situation would not have been altered. See below, tit. Interest—Legatee.

(*c*) *R.* v. *Usher*, Leach, C. C. L. 57, 3d ed.; East's P. C. 999. *R.* v. *Testick*, East's P. C. 1000; 12 Mod. 338.

(*d*) *R.* v. *Wells*, B. N. P. 289. *R.* v. *Dean*, 12 Vin. Ab. 23.

(*e*) *R.* v. *Smith*, East's P. C. 1000.

(*f*) *R.* v. *Akehurst*, Leach, 178.

(*g*) *R.* v. *Dodd*, Leach, C. C. L. 87. East's, P. C. 1003.

(*h*) *Corking* v. *Jarrard*, 1 Camp. 17; *supra*,

(*i*) *Gibbons* v. *Wilcox*, 2 Starkie's C. 43, per Holroyd, J.

(*k*) *Hockless* v. *Mitchell*, 4 Esp. C. 86.

Release, effect of.

being released by him, was a competent witness, although the rest did not join in it, as the defendant could only recover against him his rateable share, and each would be liable for no more (*l*).

Where an interested party is released by the plaintiff to make him a competent witness, the defendant cannot take advantage of the release by a plea *puis darrein continuance* (*m*).

Bail.

Where the witness was objected to as being one of the defendant's bail, the Court, upon depositing the sum sworn to, and a further sum for costs, made an order for striking out the witness's name from the bail-piece (*n*).

Indemnity.

It is not sufficient that a witness, liable in event of a verdict against his party, should have been merely indemnified by a third party.

A sheriff's officer who made the levy is not a competent witness to prove the fairness of the sale of goods taken in execution, although indemnified by the execution creditor, for it is his interest to defeat the action, as he might never get repaid on his indemnity (*o*).

Accomplice—Expectation of pardon.

The general competency of an accomplice will be afterwards considered (*p*). Some observations will now be made as to the situation of accomplices and joint wrong-doers in general, as to their competency in respect of *interest*. In criminal proceedings, the motive which usually operates upon the mind of an accomplice as a witness for the Crown, is the expectation of personal security (*q*). This (*r*) does not disqualify the witness; it was formerly held, that even an express promise of pardon would not render him incompetent (*s*). According to the present practice, an accomplice has nothing more than an equitable title to pardon in case he gives his testimony fairly and openly. And although in certain cases an accomplice who discovers other offenders is by the statute law entitled to a pardon (*t*), he is still considered to be a competent witness upon a consideration of the intention and construction of those statutes.

(*l*) *Duke* v. *Pownal*, 1 Mood. & M. 430. And see above, 125, note (*q*).

(*m*) In an action against the sheriff for removing goods under an execution, without first satisfying a year's rent; it was held that the tenant being released, was a competent witness for the landlord, and that the defendant could not avail himself of such release by plea *puis darrein continuance*, nor limit the verdict to nominal damages only. *Thurgood* v. *Richardson*, 4 C. & P. 481.

(*n*) *Baily* v. *Hole*, 3 C. & P. 560.

(*o*) *Whitehouse* v. *Atkinson*, 3 C. & P. 345.

(*p*) Vol. II. tit. ACCOMPLICE.

(*q*) As to the expectation of a reward, vide *infra*, 133.

(*r*) Vol. II. tit. ACCOMPLICE.

(*s*) Ibid.

(*t*) Ibid.

The same principle applies to the case of bribery under the stat. 2 Geo. 2, c. 24; for although the statute enacts, that the discoverer of any other offender shall be indemnified from all the penalties of the Act, it was held that a witness in an action under the statute was competent, although he claimed to be the first discoverer of the defendant's bribery, and although he meant to avail himself of such discovery in an action already brought against himself (*t*); for upon a consideration of the statute the Court held that the Legislature intended to render the discoverer a competent witness, although he would have been incompetent at common law, his own indemnity being the natural and immediate effect of a conviction.

Competency of a co-defendant.

Where an accomplice is to be used as a witness, the usual course, as will be seen, is to leave him out of the indictment (*u*), or for the attorney-general to enter a *nolle prosequi* (*x*). But yet, although he be jointly indicted for an offence which is several in its nature, it may be doubted whether he be not still competent provided he be not put upon his trial at the same time; for though several be indicted jointly for the same offence, yet the indictment, where the nature of the offence is several, is also several as to each, and the case seems to be just the same as if each had been severally indicted, when they would have been witnesses for each other (*y*); they must therefore, as it seems, be also equally competent as witnesses against each other (*z*).

(*t*) *Heward* v. *Shipley*, 4 East, 180. And Vol. II. 189.

(*u*) Vol. II. tit. ACCOMPLICE. Where an accomplice has been inadvertently included in the indictment, if it should be deemed necessary, an acquittal might be taken as to him.

(*x*) *Ward* v. *Man*, 2 Atk. 229, by Lord Hardwicke, who said, that in crown prosecutions no defendant can be examined on behalf even of the King; but the attorney-general enters a *nolle prosequi* against that particular defendant before he can be admitted as a witness; and that this was done in a case by Trevor, when attorney-general. See also the case of *The King* v. *Ellis, Blake and others*, Sitt. after Trin. 1802, Macnally, 55; where on an information by the attorney-general (Law) against several for a conspiracy, he entered a *nolle prosequi* against two, who were examined as witnesses against the others.

(*y*) 2 Hale, 280; 2 Rol. Ab. 685, pl. 3.

(*z*) See Vol. II. tit. ACCOMPLICE. But see B. N. P. 285, where it is said, that the Court would not allow the attorney-general, on the trial of an information for a misdemeanor, to examine a defendant for the King, without entering a *nolle prosequi* as to him. But *qu.* whether in that case the witness had not been put upon his trial at the same time. See *Ward* v. *Man*, 2 Atk. 229; Macnally, 53. In the case of *R.* v. *Lafone*, 5 Esp. C. 154, on an indictment for obstructing excise officers, Ld. Ellenborough would not permit co-defend-

Accomplice.

An accomplice is also a competent witness for his associates, where he is not indicted at all, or where he is separately indicted (*a*); perhaps also where he is jointly indicted, as where he has let judgment go by default (*b*). Where however the offence is of such a nature that an acquittal of his associates would enure to his own acquittal, he is incompetent. Thus an accessory, before or after the fact would be incompetent as a witness for the principal, and a co-conspirator would be incompetent to discharge his associates (*c*).

In civil cases it seems that an accomplice, or joint wrong-doer,

ants who had suffered judgment by default, to be examined as witnesses for the defendant who was tried; saying, that he had never known such evidence admitted on an indictment for a joint offence. The cases on the subject were not, it seems, adverted to on that occasion. In *R.* v. *Fletcher*, Str. 633, one who had suffered judgment by default on a joint indictment for an assault, and had been fined, and had paid a shilling, was admitted as a witness for the other defendant. There indeed the witness had been fined; but it is difficult to say how the circumstance, that the judgment has been pronounced and executed on the witness, can make any difference as to his competency, or how his giving evidence can at all alter or affect his legal situation. It has been held, that upon several indictments against three for perjury in proving a bond, each was a witness for the others. *R.* v. *Bilmore, Gray, and Harbin*, 2 Hale, 280. And see also *Gunston* v. *Downs*, ib. & 2 Rol. Abr. 685, pl. 3. According to the same principle, if each had been separately indicted for a battery or larciny, the others would have been competent witnesses; for the same reason applies which is given by Lord Hale, viz. that they are not immediately concerned in the trial against the third, and therefore they would, it should seem, be also competent, although they were all to be included in one indictment, which in legal effect operates as a several indictment as to each. See *R.* v. *Frederick and Tracy*, Str. 1095, where, upon an indictment against several for an assault, the reason for refusing to admit the wife of one as a witness for another defendant, was, that it was impossible to separate the case of the two defendants. *R.* v. *Sherman*, C. T. H. 303. It has indeed been suggested, that if one who suffered judgment by default were a competent witness, one defendant by so doing might protect the rest, (5 Esp. 155, Phillips on Ev. 79): assuming it to be probable that one of several delinquents would sacrifice himself for the salvation of the rest, it would by no means be a necessary consequence that he would be able to screen them; his credit would be open to the observation of the jury, and be subject to much suspicion. It is also to be observed, that the prosecutor may in general avail himself, if he chooses, of the testimony of a *particeps criminis*, even where the latter has a bias on his mind in favour of conviction; and therefore there seems to be no sufficient reason why a defendant should not avail himself of similar testimony.

(*a*) Vol. II. tit. ACCOMPLICE.

(*b*) *Supra*, 129, note (*z*). So if there be no evidence against one. See the case of the ship Bounty, 1 East, 313, n.

(*c*) Vol. II. tit. CONSPIRACY.

who is not a party to the record, is a competent witness on either side, unless he be in some way answerable over to the defendant for the consequence of his conduct, as an agent is, where the action is brought against the principal in respect of the negligence of the agent (*d*). Accomplice.

It seems to be now settled that a joint trespasser is a competent witness for the plaintiff, although a recovery against the defendant would discharge the action against himself (*e*). This, however, is at all events a fact which tends to lessen his credit (*f*). This rule, which seems to be perfectly established in the case of a joint-trespasser, seems also to extend generally to all cases where a joint trespasser is called as a witness by the plaintiff (*g*).

A co-trespasser, or other joint wrong-doer, who is not a party to the record (*h*), is in general a competent witness for the defendant; for the record would not be evidence for him in another action, and his interest is rather on the other side; since, if the plaintiff failed in obtaining compensation against the present defendant, he might afterwards attempt to recover it from the witness, and if the plaintiff recovered, the witness would not be liable to the defendant for contribution (*i*). The defendant in an action of trespass pleaded, that R. Mawson, who was named in the *simul cum*, had paid the plaintiff a guinea in satisfaction. It was held by Eyre, C. J. that Mawson was a competent witness for the defendant; for what he had to prove could not be given in evidence in another action, and he admitted himself to be a trespasser (*k*). Co-trespasser.

It has been said, that if the plaintiff can prove the persons

(*d*) *Infra*, 135.

(*e*) B. N. P. 286. In the case of *Barnard* v. *Dawson*, Guildhall, Sitt. after Mich. T. 1796, Lord Kenyon rejected the testimony of a co-trespasser when called as a witness for the plaintiff. But in the case of *Chapman* v. *Greaves and others*, 2 Camp. 333, n. Le Blanc, J. admitted a co-trespasser as a witness for the plaintiff. But it has been said, that the learned Judge (Le Blanc) who admitted this evidence, afterwards doubted as to the propriety of the decision See *Lethbridge* v. *Phillips*, 2 Starkie's C. 544. In the case of *Chapman* v. *Graves*, above cited, Le Blanc, J. held that a joint-trespasser who had let judgment go by default, was not a competent witness for the plaintiff. And see *Brown* v. *Brown*, 4 Taunt. 752. In the case of *Hall* v. *Curzon and others*, 9 B. & C. 646, Lord Tenterden said, "In practice the co-trespasser is constantly called to prove that he did the act by the command of the defendant."

(*f*) B. N. P. 286

(*g*) See *Lethbridge* v. *Phillips*, 2 Starkie C. 544.

(*h*) As to the competency of parties which rests upon other considerations, as well as that of an interest in the event, see tit. PARTIES.

(*i*) See *Grylls* v. *Davis*, 2 B. & Ad. 514. See Append.

(*k*) *Poplet* v. *James*, Trin. 5 Geo. 2; B. N. P. 286.

Co-trespasser.

named in the *simul cum* in trespass guilty, and parties to the suit, by producing the process, and prove also an ineffectual endeavour to arrest them, or that the process was lost, the defendant shall not have the benefit of their testimony (*i*). The grounds of this decision are not very obvious; a co-defendant under such circumstances is neither immediately interested in the event of the suit, nor in the record, for the purposes of evidence (*k*), and he is no party to the trial of the issue. In Gilbert's Law of Evidence (*l*) this case is propounded: Trespass against *A.* and *B.* for two horses, evidence against *A.* as to one; and the question is, if he may be a witness for *B.*, in relation to the other; and the learned writer observes thus: It seems that if it were the same fact, and the trespass committed at the same time and place, he may not be a witness, because he swears to discharge himself; but if they were not a single fact, but two distinct trespasses at different times and places, but arbitrarily joined in the same declaration, then they may be witnesses, one for the other, because the oath of one of them has no influence on the crime laid to his charge, but merely goes in discharge of the other. A *quære* is however added to this case, which certainly goes to a great extent. According to modern practice, however, there would be little difficulty in the solution. If the plaintiff could not affect *A.* and *B.* jointly with respect to either of the horses, he would be put to his election against which of them he would proceed, for he could not recover jointly against both for the separate trespass of either. Having made his election to proceed against one, the other would be entitled to his acquittal, and would then be a competent witness for the former.

Where, however, a co-trespasser is made a defendant, he is not in general competent as a witness on either side (*m*); but if he has been made a co-defendant by mistake, the Court will, on motion, give leave to strike his name out of the record, even after issue joined (*n*); for it seems to be a general rule that a plaintiff can in no case examine a defendant, although nothing be proved against him (*o*). But if there be no evidence to charge one co-defendant, he may, after all the evidence for the rest has been closed, be acquitted (*p*), and examined as a witness for the

(*i*) *Reason* v. *Ewbank*, Hil. 1 Geo. 1, *per omnes Just.*; B. N. P. 286. *Lloyd* v. *Williams*, Rep. T. H. 123. *Hill* v. *Fleming*, ibid, 264.

(*k*) His interest is rather the other way.

(*l*) 135, 2d ed.

(*m*) Per Le Blanc, J. 2 Camp. 333 (*n*).

(*n*) B. N. P. 285; 1 Sid. 441.

(*o*) B. N. P. 285.

(*p*) In *Hurly* v. *Berg*, 1 Starkie's C. 98, Lord Ellenborough held, that no evidence having been given to affect Jones, one of the several defendants in trespass, the latter ought not to be acquitted until the *whole case* was ready.

rest (*q*); for otherwise the plaintiff might exclude all the defendant's witnesses, by making them co-defendants.

Where a co-trespasser lets judgment go by default he is a competent witness for a co-defendant (*r*), but he is not a competent witness for the plaintiff (*s*). So a co-defendant in ejectment, who lets judgment go by default, is a competent witness for another defendant (*t*).

Agents.—Where a *servant* acts for his master in the common course of business, he is, as has already been seen, competent from the necessity of the case (*u*); such testimony has been deemed to be admissible upon a penal action against the master for selling coals without a bushel (*x*). Where money has been paid by the servant for his master (*y*); where the son has received money for his father, and paid it over to the defendant (*z*); Agent.

for the jury; but that, after evidence brought by the other defendants, the plaintiff could not, in adducing evidence in reply, give fresh evidence to implicate Jones.—Where three of five joint-contractors had pleaded that after the promises and cause of action they became bankrupts, and the plaintiffs proved their debt under the commission, and elected to take the benefit thereof, and issue joined on the proof under the commission; a question arising whether the other two defendants had continued partners to the time of the contract, though the evidence on the issue on the bankrupt's plea is for them, they are not entitled to a verdict in the midst of the cause, that they may be called as witnesses for the other defendants. *Emmett* v. *Butler*, 7 Taunt. 599; and see 1 Moore, 332. Especially if the other defendants call witnesses; ib. See Vol. II. PARTIES.—TRESPASS, 808.

(*q*) Gilb. L. Ev. 134, 2d ed.; 1 Hale, 307; 1 East, 313.

(*r*) *Ward* v. *Haydon and Ventom*, 2 Esp. C. 552. And the same point was ruled by Wood, B., Lancaster Spring Ass. 1809, cited 2 Camp. 334, in note. And see *Chapman* v. *Greaves*, ibid.

(*s*) Per Le Blanc, J., *Chapman* v. *Greaves*, 2 Camp. 334; who said, that the general rule was, that no person who was a party to the record was admissible as a witness; and he distinguished between that case, where the witness was called to inculpate the defendants, and those (cited in the last note) where he is called to exculpate them; and said, that where there was an innovation he was not disposed to extend it.

(*t*) *Dormer* v. *Fortescue*, Mich., 9 Geo. 2; B. N. P. 285. But if he plead, and by that means admit himself to be a tenant in possession, the Court will not upon motion strike out his name; but *semble*, if he consent to let a verdict pass against him for as much as he is proved to be in possession of, he ought to be admitted as a witness for a co-defendant. B. N. P. 286.

(*u*) *Spencer* v. *Goulding*, Peake, 129. *Duel* v. *Harding*, 1 Str. 595. *Lewis* v. *Fogg*, 2 Str. 944. *Cock* v. *Wharton*, 2 Str. 1054. *Tullidge* v. *Wade*, 3 Wils. 18. *Green* v. *New River Company*, 4 T. R. 590; contra, *Dunsley* v. *Westbrowne*, 1 Str. 414.

(*x*) Per Lee, C. J. *East India Company* v. *Gosling*, B. N. P. 289.

(*y*) *Theobald* v. *Treggot*, 11 Mod. 262.

(*z*) 1 Salk. 289; B. N. P. 289.

where an apprentice has paid his master's money by mistake (*a*); where a porter has delivered goods for his employer (*b*); where a carrier has been employed to convey goods, although he was responsible to the consignor (*c*). In an action against a captain for deserting the vessel, a mariner who was on board was held to be a competent witness to prove that there was a necessity for leaving the ship, although he had given a bond to the captain not to desert (*d*).

Factor. In proof of the sale of goods, the *factor* is competent (*e*) to prove the contract, even where he is to receive a *per-centage* for his own commission (*f*), or although he is to receive the excess of the price beyond a specified sum, for his own use (*g*). So where the payee of a bill of exchange indorsed it in blank, and delivered it to an agent to procure acceptance, in an action of trover by the payee against the drawee, the agent is a competent witness to prove that he left the bill with him for acceptance (*h*). The rule seems to extend to all acts done by the agent, as far as he acts according to the direction of his principal in the usual course of business. But where an action is brought against the principal for the negligence of his agent, and evidence has been given of such negligence, the agent is in general incompetent without a release, for there the verdict against the principal would be evidence in an action brought by him against the agent (*i*), and the exception from necessity does not apply, because culpable acts of negligence and misconduct are not to be considered as arising in the common and ordinary course of dealing; they are not so usually confined as matters of trade and contract are, to the knowledge of the agent alone; and the agent himself stands in a very different situation; where the subject-matter of

(*a*) *Martin* v. *Horrell*, 1 Str. 647.

(*b*) B. N. P. 289.

(*c*) Fort. 247. *Ross* v. *Rowe*, 3 Ford's MSS.

(*d*) *East India Company* v. *Gostling*. B. N. P. 289; 3 F. 89. But (*semble*) this would be evidence without resorting to the exception from necessity.

(*e*) 1 P. Wms. 429. *Bent* v. *Baker*, 3 T. R.; Pr. in Ch. 207.

(*f*) *Dixon* v. *Cooper*, 3 Wils. 307. And see *Lloyd* v. *Archbowle*, 2 Taunt. 324. Where the party employed to do work agrees to give half the commission to a third person, it is a mere sub-contract. *Gibbons* v. *Wilcox and others*, 2 Starkie's C. 45.

(*g*) *Benjamin* v. *Porteus*, 2 H. B. 590.

(*h*) *Lucas* v. *Haynes*, Lord Raym. 871. Where the plaintiff sent goods to the defendant to sell on commission abroad, for which his agent in London had accepted a bill, and which was then lying dishonoured in the hands of plaintiff; held, that such agent was a competent witness to prove the sale of the goods. *Martineau* v. *Woodland*, 2 Carr. & P. 65.

(*i*) Vide *supra*, 111; and see 4 T. R. 590.

his testimony arises in the course of his ordinary employment, there is not so strong a reason to discredit him as there is where his misconduct is made the very ground of the proceeding, and where he would ultimately be responsible for the whole of the damages recovered. Accordingly in an action against the owner of a coach or vessel, for the negligence of the coachman or sailor, the latter are not competent for the defendant (*k*). Agent.

In an action against the master of a ship for running down another, the pilot is not competent (*l*) without a release (*m*). So in an action against the sheriff for the misconduct of the officer, the latter is not competent. (*n*). So in an action against the New River Company, to recover for damages done to a horse by the bursting of a pipe, after evidence that information had been given to a turncock, an agent of the defendant, as to the dangerous state of the pipe, which, had it been attended to would have prevented the mischief, it was held that the agent was incompetent as a witness to disprove the the negligence (*o*).

The rule in favour of admitting the testimony of an agent does not extend to one who is an agent merely in the particular transaction (*p*). One who has undertaken to execute particular work at a fixed price, and who in turn employs sub-agents to do the work, on an action brought by one of the latter against his principal is a competent witness to prove that he and not the defendant employed the plaintiff (*q*), although he has been paid.

Bail.—Neither the bail (*r*) nor the wife of one who is bail (*s*), nor one who has deposited money with the sheriff on the defendant's behalf in lieu of bail (*t*), is a competent witness for the defendant. Where one who is bail is a material witness for the Bail.

(*k*) 4 T. R. 590; *supra*, 111.

(*l*) *Martin* v. *Henrickson*, Ld. Raym. 1007; Salk 287. *Green* v. *New River Company*, 4 T. R. 589.

(*m*) *Jarvis* v. *Hayes*, Str. 1803; *supra*, 112.

(*n*) *Powell* v. *Hart*, Ld. Raym. 1411. The reason given in the report is, that the officer has given a bond to the sheriff for his proper conduct; but he would be incompetent on the general principle, although no bond had been given.

(*o*) *Green* v. *The New River Company*, 4 T. R. 589. See *Mellor* v. *Falconer*, 1 Camp. 251; 15 East, 474; 3 Camp. 516; 2 Lord Raym. 1007.

(*p*) *Edmonds* v. *Lowe*, 8 B. & C. 408.

(*q*) *Wilson* v. *Gellatly*, 2 Carr. & P. C. 467. Note, that the witness had became bankrupt, and had not obtained his certificate, and the money had been paid to his assignees.

(*r*) *Carter* v. *Pearce*, 1 T. R. 164. *Hawkins* v. *Inwood*, 4 Carr. & P. 148.

(*s*) *Cornish* v. *Pugh*, 8 D. & R. 65.

(*t*) *Lacon* v. *Higgins*, 3 Starkie's C. 184.

defendant, the proper course is to apply to the Court to justify and substitute another bail (*u*).

Where the witness for the defendant on the *voire dire* admitted he was bail to the sheriff, but did not justify nor do anything to get his own recognizance discharged, and had heard that bail had justified; held that an examination on the *voire dire* did not let him in to give evidence of what he had heard, and the explanation being insufficient, he was incompetent (*x*).

Corporator.—See Vol. II. tit. CORPORATION.

Witness liable to costs.

Costs.—Any engagement to pay the costs, or any portion of them, on either side, creates an obvious interest on that side, and accordingly disqualifies the witness, but he may be rendered competent by a release by the attorney, or other person to whom he has engaged to pay the costs. And on this ground executors and trustees are in many instances excluded from giving testimony, although they have no private interest in the subject-matter of the suit, for they are still incompetent if they are legally liable to the costs of the suit (*y*). So one who has advanced money in support of a suit, for which security is given, partly on the thing demanded, is not competent, although the remaining security be sufficient to cover his demand (*z*). The prosecutor's claim to costs upon an indictment removed by *certiorari*, will not it seems disqualify him (*a*).

Although the contrary was once held (*b*), it is now fully settled that where a witness stands indifferent as to the sum claimed in a cause, his liability to one party for the costs by way of special damages renders him incompetent (*c*). One who has received money due from a defendant to a plaintiff is not a competent witness for the defendant to prove that he received the money as agent for the plaintiff or in his own right, if he has so conducted himself that he would in the event of a verdict for the plaintiff be liable over to the defendant, not only for the money received, but the costs of the action (*d*).

(*u*) See Tidd's Practice, 282, 7th ed.

(*x*) *Hawkins* v. *Inwood*, 4 Carr. & P. 148.

(*y*) *Infra*, tit. INTEREST—TRUSTEE.

(*z*) Per Holt, C. J. *Norris* v. *Napper*, Ld. Raym. 1007, 8.

(*a*) *Infra*, 139.

(*b*) *Ilderton* v. *Atkinson*, 7 T. R. 480. *Birt* v. *Kershaw*, 2 East. 458, but questioned in *Townend* v. *Downing*, 14 East, 565.

(*c*) *Jones* v. *Brook*, 4 Taunt. 464. *Harman* v. *Lasbrey*, Holt's C. 390. *Edwards* v. *Lowe*, 8 B. & C. 407. *Larbalastier* v. *Clarke*, 1 B. & Ad. 902.

(*d*) Per Littledale J. in *Larbalastier* v. *Clarke*, 1 B. & Ad. 899. Note, that he regretted that such a rule had been established, because in many cases it is difficult to ascertain whether a party so situated will be liable to answer for the costs.

Creditor.

Creditor.—A creditor is in general incompetent to increase the fund out of which he is to be paid. Thus a creditor of a deceased person is not a competent witness for the executor or administrator to increase the estate (*e*). And a creditor of a bankrupt is not competent to increase the fund out of which he may receive a dividend (*f*). But a creditor who has assigned his debt, though but by parol, is a competent witness to increase the fund out of which the debt is to be paid (*g*). Several creditors agree to contribute in *the usual way* to the expense of collecting the proceeds under a commission of bankrupt, that is, to contribute in proportion to their respective claims; an attorney employed by all having sued one, another who has paid his share is competent to prove the defendant's promise (*h*).

In criminal proceedings. The party injured.

Criminal Proceedings.—It seems to be now settled that the party injured is a competent witness for the prosecution in all cases, except that of forgery (*i*), or unless some private compensation is given by a statute to the party injured, in the nature of damages (*k*); for it is not to be presumed that a witness in a public prosecution is actuated by revengeful or improper motives, and he has in general no *legal* interest in the conviction beyond that of any other witness. It was formerly held, very generally, that the party defrauded was not a competent witness upon an indictment for the fraud, except in some instances *ex necessitate* (*l*); and, therefore, that the plaintiff was not competent to prove the perjury of the defendant in his answer (*m*) to a bill of the witness in equity.

Competency of prosecutors.

Such decisions seem to have been founded on the supposition that the verdict would be admissible evidence for the witness in a subsequent proceeding, so as to entitle him to a remedy for the injury, or to protect him against the effects of the fraud. But this doctrine has long been exploded (*n*); and it seems now to be perfectly settled that the record of conviction would not be admissible evidence in any civil proceeding. In the case of the *King* v. *Broughton* (*o*), which was a prosecution for perjury,

(*e*) *Craig* v. *Cundell*, 1 Camp. 381.

(*f*) 2 Camp. 301. And *Shuttleworth* v. *Bravo*, Str. 507. Vol. II. 134.

(*g*) *Heath* v. *Hall*, 4 Taunt. 326. *Granger* v. *Furlong*, 2 Black. 1273.

(*h*) *Taylor* v. *Cohen*, 4 Bing. 53.

(*i*) See tit. FORGERY; and *supra*, 128.

(*k*) *R.* v. *Boston*, 4 East, 572. 182. Gilb. L. Ev. by Loft, 221.

(*l*) Per Holt, C. J., *R.* v. *Macartney & others*, Salk. 286. Per Twisden, J., *R.* v. *Paris*, 1 Vent. 49. 1 Sid. 431.

(*m*) *R.* v. *Nunes*, 2 Str. 1043.

(*n*) See Ld. Mansfield's observations in *Abraham* v. *Bunn*, 4 Burr. 1229. And Ld. Hardwicke's in *R.* v. *Bray*, C. T. Hard. 359.

(*o*) 2 Str. 1229.

Prosecutor in criminal proceeding.

founded on the defendant's answer to a bill in equity, Lee, C. J. notwithstanding the previous decisions (*p*), admitted the testimony of the plaintiff in equity; there, however, it appeared that the equity suit was at an end. But in the case of the *King* v. *Boston* (*q*), where perjury had been assigned on the defendant's answer, the plaintiff was held to be competent although the equity suit was still pending. And this, on the ground that a court of equity would not look at a conviction founded on the testimony of the plaintiff, although it was also founded on other circumstances confirmatory of his testimony. Accordingly, the witness is competent upon an indictment for tearing a promissory note, payable to him (*r*), or for extorting a bond from him (*s*): upon an indictment for usury, although he was the borrower of the money (*t*), and has not repaid it. So where money has been extorted from him under threat of imprisonment, or corporal injury (*u*); for cheating him of money by false pretencss (*x*); so upon an information for fraudulently procuring the witness to execute a *cognovit* (*y*).

Expectation of reward.

A witness is competent notwithstanding an expectation that he shall in the event of conviction obtain a return of his goods, by virtue of the statute (*z*). And so he was in the case of an appeal of robbery, although the object is in part the recovery of his property.

So a witness is competent although he expects a reward in case of conviction, by virtue of particular statutes (*a*), by proclamation, or in consequence of the voluntary offer of a reward which has been held out in order to ensure the apprehension and conviction of offenders (*b*); for these statutes were enacted for the express

(*p*) *R.* v. *Whiting*, 1 Salk. 283. 1 Ld. Raym, 396. See Cas. Temp. Hardw. 359. *R.* v. *Nunez*, Str. 1043. *R.* v. *Ellis*, *R.* v. *Watt*, Hard. 331.

(*q*) 4 East, 572. And see the case of *Bartlett* v. *Pickersgill*, there cited, where the Ld. Keeper dismissed a petition for leave to file a supplemental bill in nature of a bill of review, the defendant having been convicted of perjury, committed in his former answer, on the evidence of the *plaintiff*.

(*r*) *R.* v. *Moise*, Str. 595. 1 Sid. 431. 1 Vent. 49, contrary to the opinion of Twisden.

(*s*) *R.* v. *Brent*, cited Ann. 268.

(*t*) *R.* v. *Sewell*, 7 Mod. 118.

(*u*) Ibid.

(*x*) *R.* v. *Macartney & others*, Salk. 286.

(*y*) *R.* v. *Paris*, 1 Sid. 431. 1 Vent. 49.

(*z*) Hen. 8. At common law the owner was entitled to retake the goods, unless the property had been changed by waver, seizure by the King, or sale in market overt. East's P. C. 759; Gilb. Ev. 222.

(*a*) Vol. II. 10, 11.

(*b*) *R.* v. *Ld. G. Gordon*, Leach, 353. *R.* v. *Dylone*, Ons. N. P. 257. Esp. N. P. 713. *Rookwood's Case*, 4 St. Tr. 684. *Supra*, 128.

purpose of stimulating activity and diligence in the prosecution of offenders, and of rendering their conviction more certain; but the very opposite effect would take place if prosecutors and others were in consequence of their expectation of such rewards to be disqualified as witnesses; whence, it seems, the intention of the Legislature may be inferred that such witnesses should still be deemed competent. In the case of appeals, the objection was never allowed to operate. At all events the admission of such testimony may be referred to the principle of necessity, which does not operate so powerfully in any other class of cases (*c*). Reward.

Where a reward is offered by any private person or body of persons, the witness would nevertheless be competent on another ground, since the public had an interest in his testimony previous to the offer of the reward, which could not be defeated by the voluntary act of any individual.

The principle lately adverted to applies also to cases where an indictment has been removed by *certiorari*; for if the prosecutor's claim to costs took away his competency, the act of parliament (*d*), which was intended to discountenance the removal of suits by *certiorari*, would give the greatest encouragement to such removals (*e*); besides, it seems to be clear that a defendant cannot by his own act cast an interest on the prosecutor so as to disqualify him (*f*). It seems also that the prosecutor of an indictment for not repairing a highway is competent, although he may in the result be liable to costs (*g*).

But in *all cases* the motive which may influence the mind of the witness is a matter for the consideration of the jury; and if they can infer from his situation or conduct that such motive is an improper one, they are at liberty to make deductions from the credit which they give to his testimony accordingly.

Where a statute gives a specific remedy to the party injured he is as much disqualified as a witness in a criminal prosecution as if he sought the remedy by a civil action; and therefore, upon an indictment for perjury upon the statute, the party injured is not a competent witness, since the statute gives him 10*l*., al-

(*c*) See the observations of Parker, C. J. in *The Queen* v. *Muscot*, 10 Mod. 193.

(*d*) 5 & 6 Will. & Mary, c. 11.

(*e*) Per Parker, C. J. 10 Mod. 194.

(*f*) Vid. *supra*, 118. At the York Spring Ass. 1821, the prosecutor of an indictment for not repairing a road, which had been removed into the K. B. by *certiorari*, was examined without objection. See tit. HIGHWAY.

(*g*) See *R.* v. *Inhabitants of Hammersmith*, Starkie's C.

though he would have been a good witness upon an indictment for perjury at common law (*h*).

The former rule still prevailed with respect to indictments for the forgery of *negotiable instruments*, although it had been relaxed in other cases; and it was held (until the late statute) (*i*) that no one could prove the forgery upon whom the instrument, supposing it to be genuine, would have been binding (*j*).

Executor. An acting *executor* is competent to support the will by proof of the sanity of the testator, although he may become liable as an executor *de son tort* (*k*). So one who has acted under the first will is competent to prove a codicil setting up the first (*l*). And it seems that executors and trustees in general may be witnesses as to the trust estate, provided they take no beneficial interest (*m*); it has been decided so long ago as the time of Lord Hale, that an executor having no interest in the surplus is a good witness to prove the will in a cause relating to the estate (*n*), and this has been followed by many other decisions to the same effect.

In an action against an administrator, one of his sureties for the due administration of the effects is a competent witness to defeat the action (*o*); for the bare possibility that an action will be brought is no objection to competency, and in order to disqualify a witness it is necessary to show that he will derive a certain benefit from the result, one way or other (*p*); even a creditor of the administrator's, which is a stronger case, would be a competent witness (*q*).

A creditor is a competent witness for an administrator to prove due administration, by payment of a debt to himself (*r*).

Heir at law. The heir apparent is a competent witness as to the estate, for he

(*h*) B. N. P. 289. 2 Haw. c. 46.

(*i*) See FORGERY.

(*j*) *R.* v. *Dodd*, Leach. 184, 3d edit. Hard. 332, pl. 7. 3 Salk. 172, pl. 4. Co. Litt. 352. 2 Ins. 39. *R.* v. *Russell*, Leach, 8. *R.* v. *Rhodes*, Str. 728. Transfer of stock. Salk. 283. *Shank* v. *Payne*, Str. 633. *Caffy's Case*, E. P. C. 995. Hard. 351. Vol. II. tit. FORGERY.

(*k*) *Goodtitle* v. *Welford*, Doug. 134. See 1 P. Wms. 287. 1 Bl. Rep. 365. Mod. 107. 3 Will. Rep. 181. 1 Burnard, 12.

(*l*) *Baylis* v. *Wilson*, cited Burr. 2254.

(*m*) 1 Mod. 107. 1 P. Wms. 290. *Goodtitle* v. *Welford*, Doug. 134. *Heath* v. *Hall*, 4 Taunt. 328. *Phipps* v. *Pitcher*, 6 Taunt. 220. *Bettison* v. *Bromley*, 12 East, 250.

(*n*) Per Ld. Ellenborough in *Bettison* v. *Bromley*, 12 East, 253. In that case it was held, that the wife of an executor who took no beneficial interest under the will, was a credible witness to the will under the statute. See tit. WILL.

(*o*) *Carter* v. *Pearce*, 1 T. R. 163.

(*p*) Per Buller, J. ibid.

(*q*) Ibid. And see Vol. II. tit. EXECUTOR.

(*r*) Vol. II. tit. EXECUTOR.

has no present legal interest; but a remainder-man or devisee is incompetent (*s*).

Where an informer, upon the conviction of the offender under a penal statute, is entitled to the whole or to any part of the penalty, he is obviously interested, and therefore incompetent (*t*). Informer.

Where the statute gave one half of the penalty to the informer, and the first witness proved the commission of the offence, and also that no other person had given information, he was held to be incompetent (*u*).

An inhabitant of a county or other district upon which any duty is thrown, to which the witness is bound to contribute, is not competent to give evidence in discharge or alleviation of the burthen. Accordingly it was held, that a party who was liable to a county-tax for the support of the suit, was incompetent (*x*). Inhabitant. County.

By the stat. 1 Ann. c. 18, s. 13, inhabitants are competent witnesses upon indictments against private persons for the non-repair of a bridge (*y*)

In an action against the hundred (*z*), an inhabitant was made competent (*a*) by the stat. 8 Geo. 2, c. 16, s. 15.

So in settlement cases, a *rated* inhabitant formerly was incompetent to give evidence for his own parish (*b*) as to the pauper's place of settlement; neither could he give evidence to extend the boundaries of his parish; so before the stat. 27 Geo. 3, c. 29, a rated parishioner was incompetent to give evidence in any proceeding for a penalty given by any statute to the poor of the parish (*d*). For although, in the case of *Townsend* v. *Row* (*e*), it was held that a parishioner was competeut to support the title to an estate, where the remainder, after an estate for life, was limited to the minister and churchwardens for the use

(*s*) *Smith* v. *Blackham*, 1 Salk. 283.

(*t*) *R.* v. *Tilley*, Str. 316. *R.* v. *Stone*, 2 Ld Raym. 1545. *R.* v. *Piercy*, Andr. 18. *R.* v. *Blancy*, Andr. 240. *R.* v. *Cobbold*, Gilb. 111. *R.* v. *Shipley*, Gilb. 113. *Portman* v. *Oakden*, Say. 179.

(*u*) *R.* v. *Blackman*, 1 Esp. C. 96.

(*x*) *County of Salop* v. *County of Stafford*, 1 Sid. 192. 2 Lev. 231.

(*y*) Vol. II. tit. BRIDGE.

(*z*) On stat. of Winton. 13 Edw. 1, st. 2, c. 1. See Vol. II. tit. HUNDRED.

(*a*) He was before the statute held to be incompetent, even although he paid no taxes or parish duties, because he might be liable when the tax came to be levied. 2 Keb. 73. Mod. 73. But see the cases cited below. And now see the late stat. 7 & 8 Geo. 4, c. 31, s. 5.

(*b*) *R.* v. *Prosser*, 4 T. R. 17. *R.* v. *South Lynn*, 5 T. R. 664. *R.* v. *Little Lumley*, 6 T. R. 157.

(*c*) *Deacon* v. *Cooke*, cited 2 East, 559.

(*d*) 1 Sess. Cases, 874, cited Say. 180.

(*e*) 2 Sid. 109.

Inhabitant. of the poor of the parish, yet this was decided upon the untenable ground that the interest was too minute to disqualify the witness (*f*). But by the statute above referred to, it is enacted, that an inhabitant of any place or parish shall be a good witness, although a penalty accrue to the poor, provided such penalty do not exceed 20 *l.* (*g*).

By the stat. 3 & 4 Will. & Mary, c. 11, in all actions brought, either in the Courts at Westminster or at the assizes, for money mis-spent by the churchwardens, the evidence of the parishioners, with the exception of those who receive alms, shall be admissible.

And by the stat. 54 Geo. 3, c. 170, s. 9, it is enacted, that no person rated or liable to be rated to any rates or cesses of any district, parish, township or hamlet, or wholly or in part maintained or supported thereby, or executing or holding any office thereof or therein, shall, before any court or person or persons whatsoever, be deemed and taken to be by reason thereof an incompetent witness for or against such district, &c. in any matter relating to *such rates* (*h*) or *cesses*, or to *the boundary* between such district, &c. and any adjoining district, &c.; or to any *order*

(*f*) But see 2 Vern. 217. See also *Jervis* v. *Hay*, 3 F. 182, 10 Geo. 2, where, in an action under the game-laws, a parishioner was held to be competent. There Lee, C. J. cited *Phillips* v. *Scallard*, 6 Geo. 2, in C. B., where in a similar case a new trial was moved for, and the Court were of opinion that the witness ought to have been admitted. But see 1 Barnes, 435, where it appears that the new trial was moved for on a different ground.

(*g*) *R.* v. *Davis*, 6 T. R. 177.

(*h*) It has been held that a rated inhabitant is a competent witness for the defendants in an action of trespass brought against them as overseers, in respect of land claimed by them as trustees for the benefit of the parish in aid of poor's rates, the pleas being the general issue, and *liberum tenementum*: for the intention of the Legislature was to make rated parishioners competent in all matters relating to rates. *Meredith* v. *Gilpin & others*, 6 Price, 146. And one who occupies rateable property within a chapelry is a competent witness to prove that a certain messuage is situated within the chapelry. *Marsden* v. *Stansfield*, 7 B. & C. 815. So an inhabitant is competent in an action by the surveyor of the highways against his predecessor, for penalties. *Hendebourch* v. *Langston*, 1 Mood. & M. C. 402. The statute, it has been said, extends to render inhabitants competent witnesses in questions as to the repair of highways. *R.* v. *Hayman*, 1 Mood. & M. C. 401. Qu. But in the case of *Oxenden* v. *Palmer*, 2 B. & Ad. 236, the Court of King's Bench doubted as to the correctness of the decision in *Meredith* v. *Gilpin*; and it was held that a question as to the existence of a custom to take shingle from the sea-beach for the purpose of repairing highways within the parish, was one which did not properly and strictly relate to rates or cesses of the parish, within the meaning of the Act.

of removal to or from such district, &c.; or *the settlement* of any pauper in such district, &c.; or touching any *bastards chargeable*, or likely to become chargeable to such district, &c.; or the recovery of any sum or sums for the charges or maintenance of such bastards; or the *election or appointment* of any officer or officers; or the *allowance of the accounts* of any officer or officers of any such district, &c.

Before this statute a rated parishioner was incompetent in settlement cases, but a non-rated inhabitant was competent, although he had been left out of the rate for the express purpose of making him a witness (*i*); and it was competent to him to discharge himself on the *voire dire* without producing the rate-book (*k*). But both before and after the declaratory statute 46 Geo. 3, c. 37 (*k*), a rated inhabitant was considered to be a party to the suit, and consequently he could not be examined by the adverse party without his consent (*l*). But being so far a party, it followed that his declarations were admissible in evidence (*m*), although he had not refused to be examined (*n*).

The statute 54 Geo. 3, c. 170, having rendered a rated inhabitant a competent witness for his own parish, it becomes a question whether his declarations can be proved by the adverse parish, without calling him as a witness (*o*).

(*i*) *R.* v. *Kirdford*, 2 East, 559. But see *Rhodes* v. *Ainsworth*, 6 B. & A. 87; 2 Starkie's C. 215.

(*k*) See the Act below. *R.* v. *Prosser*, 4 T. R. 17. *R.* v. *Little Lumley*, 6 T. R. 157.

(*l*) *R.* v. *Woburn*, 10 East, 394. *R.* v. *Inhabitants of Hardwicke*, 11 East, 579. Note, in *R.* v. *Kirdford*, Ld. Kenyon distinguished the case of a nonrated inhabitant in a settlement case, from that of a hundredor under the stat. of Hue and Cry, on the ground that the latter was a party.

(*m*) *R.* v. *Inhabitants of Hardwicke*, 11 East, 579.

(*n*) *R.* v. *Whitley Lower*, 1 M. & S. 636. In *R.* v. *The Inhabitants of Hardwicke* the rated inhabitant refused to be examined, but the refusal does not appear to constitute a material ingredient in the case; for where in general the declaration of a party is evidence by way of admission, it is unnecessary as a preparatory step to call the party as a witness.

(*o*) Doubts have been entertained on the question, and I am not aware that the point has been decided. Before the stat. 54 Geo. 3, c. 170, such a declaration was admissible, on the ground that the declarant was a *party to the suit*, and the effect of that statute seems to be merely that of conferring competency, notwithstanding *interest*, without further interfering with the rules of evidence on the particular subject. And it seems to be going a great length to contend, that, because a party may be a witness in his own cause, notwithstanding his interest, that therefore the adversary shall be deprived of the benefit of his declarations. The main argument which was urged against the reception of the evidence, viz. that it

Parishioner.

The inhabitants of a parish are in general incompetent witnesses to discharge the parish from the burthen of repairing a highway (*p*); and it is said to have been held by Lord Kenyon, that a mere inhabitant, although he occupied no land within the parish, was incompetent on the trial of an issue, on a plea by the inhabitants that one Robinson was bound to repair the road in question *ratione tenuræ*; because if there should be a verdict against the defendants the witness would be liable to the payment of the fine, and also because every inhabitant is liable to do statute duty (*q*).

On an issue to try whether the inhabitants of the chapelry of Milne Row had immemorially repaired the chapel at their own expense, it was held that the owner of an estate within the chapelry was an incompetent witness to negative the liability, although the tenement was then in the hands of a tenant under a lease for years, many of which were then unexpired, and who had been rated and paid rent for the same, and was bound to pay the rates without deduction, for he had an interest in removing from the estate a permanent burthen, which would diminish the actual value; and the case was distinguished from that of a mere occupier who has no permanent interest (*r*). But in all these cases the mere inhabitancy of the party is not sufficient to disqualify him, unless he would be individually liable to a portion of the burthen. Accordingly, in a settlement case it was held, that the mere liability of the witness to be rated to the relief of the poor did not render him incompetent (*s*), although the name of the witness was omitted out of the rate for the express purpose of using his testimony (*t*). And so it was held where the penalty upon an information was directed to be given to the poor of the parish (*u*). So the Court refused to quash a conviction in a similar

was not the best evidence, appears to be a very fallacious one, for the whole doctrine of receiving admissions of parties in evidence, is built on the ground that such admissions and declarations are better evidence of the truth than the testimony of the party himself examined upon oath. The case most analogous to the present is that of a plaintiff in an action against the hundred, on the stat. of Winton; he is a competent witness notwithstanding his interest, and yet his declaration would surely be admissible in evidence for the hundred.

(*p*) 4 Mod. 48, 49; vide *supra*, 142(*h*).

(*q*) *R.* v. *Inhabitants of Wheaton Aston*, cor. Ld. Kenyon, Stafford Summer Ass. 1797, cited as from the MSS. of Serj. Williams, in Chetwynd's Burn's J. tit. EVIDENCE, 792. S. C. not S. P. 2 Saund. 159 (*a*).

(*r*) *Rhodes* v. *Ainsworth*, 1 B. & A. 17; 2 Starkie's C. 215.

(*s*) *R.* v. *Prosser* 4 T. R. 17. *R.* v. *South Lynn*, 5 T. R. 664.

(*t*) See *R.* v. *Inhabitants of Kirdford*, 2 East, 559, and the case cited by Buller, J. 4 T. R. 36.

(*u*) 4 T. R. 36. 2 East, 559.

case, although it appeared to have been obtained on the oath of an inhabitant, because it did not appear that he was rated (*x*).

Insolvent.—An insolvent is not a competent witness for his assignees, for his future property is liable to his creditors (*y*). And where a party had assigned his property to trustees for the benefit of his creditors, and it was doubtful whether the estate would pay 20*s.* in the pound, it was held that a creditor was not a competent witness for the insolvent in an action against him defended by the assignees (*z*). Insolvent.

Joint Interest.—A party to the transaction out of which the action arises, and possessing a community of interest in the subject-matter, is nevertheless competent, unless he be either a partner, or be immediately responsible over for the whole or part of the damages in case the plaintiff recover, or unless he be interested in the record. Joint interest in the subject-matter.

Formerly the distinction between an interest in a particular *fact* or question abstractedly, and an interest in the *event* of the particular cause then pending, was not sufficiently attended to; witnesses who were interested in the transaction or question abstractedly, but who had no interest in the immediate event of the action, were held to be incompetent. Thus it was held, that the master of a vessel, who had insured goods on board, was not competent for the plaintiff in an action by the owner of other goods on a policy effected on them (*a*); that is, he was held to be incompetent as a witness for the plaintiff, because he had an interest in the question whether an insurance on goods could under the circumstances be enforced, although he had no interest in the particular goods insured in that action, and although the result of that action would be in point of law perfectly irrelevant in proceeding to recover on his own insurance. Such a decision would no longer be supported, the proper test of competency being the interest which the witness has in the immediate event of the particular suit, or in the record, for the purposes of evidence (*b*), and any collateral or incidental connection of the wit-

(*x*) 1 Sess. Cas. 874, cited Say. 180.

(*y*) *Delafield* v. *Freeman*, 6 Bing. 294. *Wilkins* v. *Ford*, 2 C. & P. 344. Where the assignee of an insolvent filed a bill to set aside a sale made by an assignee who had been removed, held that the insolvent, although he had released all interest in the surplus, could not be examined as a witness. *Waldron* v. *Howell*, 3 Russ. 381.

(*z*) *Crerer* v. *Sodo*, 3 C. & P. 10.

(*a*) *Rock* v. *Layton*, Fort. 246. And see Skinner, 174, where, in an action brought by a master of a ship against custom-house officers for refusing to clear the ship, it was held that the owner of goods on board was not competent.

(*b*) *Bent* v. *Baker*, 3 T. R. 27. *Ridout* v. *Johnson*, B. N. P. 283.

Joint interest.

ness with the transaction, although it might tend to influence or prejudice his mind, is immaterial. Consequently a co-underwriter is a competent witness for the defendant in an action upon the policy (*c*). So one mariner may prove wages to be due to another for the same voyage in respect of which he himself has a claim (*d*).

A joint purchaser of an annuity, as tenant in common with the plaintiff, is competent in an action against a conveyancer for negligence and fraud in the negotiation of the annuity (*e*). So it seems to be clear, that any person who has received any distinct injury from the act of the defendant complained of in the action, is a competent witness to prove the plaintiff's case, since the recovery by the plaintiff would not tend to establish his own case.

So one who has purchased a share in the plaintiff's work, which he is printing, is competent to prove a contract by the defendant to insure it from fire (*f*).

One of three joint obligors is competent to prove the execution of the bond, although he is interested in increasing the number of obligors who are liable to contribute to the payment, since the recovery by the plaintiff would not be evidence to show his obligation (*g*).

So a co-contractor with the defendant is a competent witness for the plaintiff (*h*), even on issue taken on a plea in abatement, that the witness ought to have been joined as a co-defendant (*i*), and the point has been expressly decided in other cases (*k*). But where the witness being a co-partner, would be liable, not only to a moiety of the debt, but also of the costs, in case the plaintiff recovered, he is incompetent to defeat the action (*l*).

(*c*) *Bent* v. *Baker*, 3 T. R. 27.

(*d*) Skinner, 174.

(*e*) *Rothery* v. *Howard*, 2 Starkie's C. 68.

(*f*) *Mawman* v. *Gillett*, 2 Taunt. 325. *Lloyd* v. *Archbowle*, Ib. 324.

(*g*) *Lockhart* v. *Graham*, Str. 35; see *Brown* v. *Brown*, 4 Taunt. 752. *Supra*, 107.

(*h*) *Supra*, 107.

(*i*) *Robinson* v. *Hudson*, 4 M. & S. 475.

(*k*) Ibid. *Supra*, 107. See also *Birt* v. *Hood*, 1 Esp. C. 20, where, in an action for goods sold and delivered, and the general issue pleaded, a witness was admitted to prove that the credit was given to her alone; and she was admitted by Eyre, C. J. to prove this, notwithstanding a *suggestion* by the plaintiff, that the defendant and witness were partners.

(*l*) 4 M. & S. 475. And see *Young* v. *Bairner*, 1 Esp. 103, where, in an action against a part-owner of a ship for work done to the ship, and issue taken on a replication to a plea in abatement, that the defendant had undertaken *solely* to pay, Ld. Kenyon

In an action of covenant against Backhouse, the part owner of a ship, jointly with Foulstone, to reimburse the ship's husband for sums paid for insurance, the plaintiff having brought a similar action against Foulstone, the plaintiff adduced evidence to show that Foulstone ordered the insurance, and that the defendant approved of it; the Court held that Foulstone was incompetent to prove that the defendant never knew of the insurance, because on the plaintiff recovering against the defendant, Foulstone would be liable for half the sum recovered (*m*). The ground of decision there was, that had the plaintiff recovered, the witness would have been liable to half the damages. This, however, would not, it seems, have been the consequence; in the subsequent case of *Walton* v. *Shelley* (*n*), it was observed by Mr. Justice Buller, that the witness, in the event of a recovery by the plaintiff, would have been liable to no part of the damages. But wherever the witness has a joint interest with the plaintiff in the subject-matter to be recovered, or would be responsible to the defendant for the damages recovered, he is no longer competent. Accordingly, upon an information in the Exchequer, upon a seizure of goods by a custom-house officer, it was held that another officer was not competent, because he had made an agreement with the former that they should share in all seizures, although he conceived that the agreement was illegal, and did not expect any benefit from the seizure in question (*o*). So in general those who have a joint interest in the subject-matter of the suit, such as commoners, in a question as to a right of common (*p*), held that Whytock, a joint-owner, was not a competent witness to prove that he gave the order, because he would be liable in contribution to the defendant in case the plaintiff recovered. As a partner, however, it seems that he stood indifferent, since according to the principle laid down in *Hudson* v. *Robinson*, 4 M. & S., he would ultimately be liable to his own share only. The question seems to have been whether he would not by his testimony get rid of a share of the costs. The Court of King's Bench held that he was at all events rendered competent by a release.

In *Goodacre* v. *Breame*, Peake's C. 174, the plaintiff having proved the sale of the goods to the defendant, and to *J. S.* his partner in trade, Ld. Kenyon held that *J. S.* was not competent to defeat the action, by evidence that the goods were sold to himself, and that the defendant was merely his servant, since he would by his evidence discharge himself from a moiety of the costs. See also *Baker* v. *Tyrwhitt*, 4 Camp. 47. *Hall* v. *Rex*, 6 Bing. 181. *Evans* v. *Yeatherd*, 2 Bing. 133. *Simons* v. *Smith*, 1 Ry. & M. C. 29. *Cheyne* v. *Koop*, 4 Esp. C. 112. *Supra*, 106. And tit. PARTNERS, and VENDOR AND VENDEE.

Joint interest.

(*m*) *French* v. *Backhouse*, Burr. 2727.

(*n*) 1 T. R. 296. 303.

(*o*) *R.* v. *Walker*, 1 Ford's MS. 145.

(*p*) See Vol. II. tit. COMMON.

or corporators, who possess any private interest in the event, are incompetent (*q*). An interest arising out of an illegal agreement, will not render the witness incompetent, for it is void (*r*).

As to the interest of *landlords and tenants*, see tit. EJECTMENT.

Legatee. A legatee is not a competent witness to support a will (*s*), nor is he a competent witness for the executor in an action by the latter to increase the estate (*t*), nor in one against the executor, for the judgment would afterwards be evidence against him (*u*). A legatee who has been paid the amount of his legacy before the trial, is a competent witness to increase the estate (*x*). But in an action by the executor, it is not sufficient that he should release the debt in question; for the plaintiff, though not liable to pay the defendant's costs in case of failure, is liable to pay costs to his own attorney, the effect of which would be to diminish the residue (*y*). With respect to the competency of a legatee, as an attesting witness to a will, see tit. WILL.

Party. *Parties* (*z*).—*Partners.*—*Policy of Insurance.* See those titles.

Prochein ami. *Prochein ami.*—A father or guardian who supports the expense of an action by his infant son, for an assault, is not competent, because he is liable to costs (*a*); and for the same reason, any other who sues as *prochein ami* is incompetent (*b*).

Prosecutor.—See tit. PARTY INJURED, *supra*, 137.

Sheriff.—See tit. SHERIFF.

Surety. *Surety.*—Where a surety would be immediately liable in case of a verdict against the principal, his interest is obvious; and therefore one who is bail is incompetent in an action against his principal (*c*). So where *A.* gave a bond to indemnify *B.*, a candi-

(*q*) Vol. II. tit. COMMON—CORPORATION.

(*r*) A member of a society undertaking to contribute towards all law expenses respecting it, was held a competent witness in an action brought against the secretary for a libel: if the agreement were to contribute towards bearing each other harmless in doing wrong, it would be void. *Humphrey* v. *Miller*, 4 C. & P. 7.

(*s*) Hardr. 331. 2 Salk. 691.

(*t*) *Baker* v. *Tyrwhitt*, 4 Camp. 27.

(*u*) See 2 Starkie's C 546.

(*x*) *Clarke* v. *Gannon*, 1 Ry. & M. C. 31. *Sewell* v. *Stubbs*, 1 Carr. & P. C. 73.

(*y*) *Baker* v. *Tyrwhitt*, 4 Camp. C. 27.

(*z*) Their competency will be separately considered, since it depends upon other considerations besides that of interest.

(*a*) *Hopkins* v. *Neale*, Ann. 202. 2 Str. 1026. *James* v. *Hatfield*, 1 Str. 548. 1 Cox's Cases in Chan. 286.

(*b*) Ibid. *Clutterbuck* v. *Lord Huntingtower*, 1 Str. 506.

(*c*) See *Goss* v. *Tracy*, P. Wms. 288. *Supra*, tit. BAIL.

date, against the expenses of an election, to a certain extent, and *C.* brought an action against *D.* for money expended at the election on *B.*'s account, it was held that *A.* was not competent to defeat the action by showing that the defendant was an agent only; since if the defence failed, the defendant would recover against the candidate, and the candidate against *A.*; and it was held to be no answer, that in case the defendant succeeded the witness would still be liable to the candidate, because in that event he would be liable for a portion of the bill only, and not for the costs of the action (*d*). But the co-obligor of a bond to the ordinary, under the stat. 22 & 23 Ch. 2, is competent to prove a tender by the administrator, because there is but a bare possibility that an action will be brought against the witness, and therefore the case of the witness differs from that of bail, who are directly and immediately interested (*e*). Surety.

Trustee.—A mere trustee is competent without a release, and it is no objection that he may be sued as an executor *de son tort* (*f*). Trustee.

Vendor and Vendee.—The vendor of an estate has no interest in the title of the vendee, unless he covenanted for or warranted the title (*g*). Vendor.

Upon the examination of a witness in chief, the principal rule to be observed is, that *leading questions* are not to be asked; that is, questions which suggest to a witness the answer which he is to make. Where a witness is too ready to serve the cause of his party, and willing to adopt and to assert what may be suggested for his benefit, objections to questions of this nature are of the highest importance; but where the matter to which the witness is examined is merely introductory of that which is material, it is frequently desirable to lead the mind of the witness directly to the subject; and where the witness is examined as to material Examination in chief. Leading questions.

(*d*) *Trelawney* v. *Thomas*, 1 H. B. 303.

(*e*) *Carter* v. *Pearce*, 1 T. R. 163.

(*f*) *Holt* v. *Tyrrell*, 1 Bl. 365. 1 Barnard, 12. *Goodtitle* v. *Welford*, Doug. 139. 4 Burr. 2254. 1 P. Wms. 287. *Lowe* v. *Jolliffe*, 1 Bl. 366. An executor is competent to support a will where he takes nothing, nor is interested in the surplus. *Betteson* v. *Bromley*, 12 East, 250. *Phipps* v. *Pitcher*, 2 Mars. 20; 6 Taunt. 220. *Lowe* v. *Jolliffe*, 1 Blk. 365. *Goodtitle* v. *Welford*, Dougl. 139. An executor of the grantor of a term is a competent witness to prove the trust of the term. *Cook* v. *Fountain*, 3 Swanst. 585. App. So an executor without assets; for although liable to be sued, he is not to pay. Ib. The personal representative of a partner is a competent witness against the survivor. *Burton* v. *Burchell*, 1 Smith, 197.

(*g*) *Busby* v. *Greendate*, Str. 445. See tit. VENDOR AND VENDEE.

Leading questions.

facts, it is in general necessary, to some extent, to lead his mind to the subject of inquiry. Questions to which the answer yes or no would be conclusive, would certainly be objectionable; and so would any question which plainly suggested to the witness the answer which the party, or his counsel, hoped to extract(*h*). Where a witness betrays a forwardness to serve the party for whom he is called, but does not know how best to effect his object, it is most essential to justice that he should not be prompted. And it is to be observed, that answers extracted by such improper means are of little advantage in general to the party in whose favour they are given, since evidence obtained from a partial witness by unfair means must necessarily be viewed with the utmost jealousy.

When necessary.

On the other hand, objections of this nature ought not to be wantonly or captiously made(*i*), since it is, to some extent, cumstances of each individual case. Upon the trial of De Berenger and others, before Lord Ellenborough, at Guildhall, for a conspiracy, it became necessary for a witness (a postboy, who had been employed to drive one of the actors in the fraud) to identify De Berenger with that person; and Lord Ellenborough held that, for this purpose, the counsel for the prosecution might point out De Berenger to the witness, and ask him whether he was the person. The same was done in Watson's case, upon a trial at bar, 2 Starkie's C. 128. In these cases, the question was as to a mere fact to be determined by *inspection*; and in all such cases, it seems that the mind of the witness may be led directly to the very point, although a more general question might have been proposed, as, whether the witness saw the person, whom he had described, in court. So where a witness is called to prove the hand-writing of another, it is the common practice to show him the document, and to ask, directly, whether that is the hand-writing of *A. B.* But where a witness is examined as to any *conversation*, *admission*, or *agreement*, where the particular terms of the admission or contract are important, this

(*h*) The objection in principle applies to those cases only where the question propounded involves an answer immediately concluding the merits of the case, and indicating to the witness an answer which will best accord with the interests of the party. See 2 Pothier by Evans, 265.

(*i*) *Nicholls* v. *Dowding*, 1 Starkie's C. 81. In order to prove that Dowding and Kemp were partners, the witness was asked whether Kemp had interfered in the business of Dowding; and upon the objection being taken that this was a leading question, Lord Ellenborough, C. J. held that it was a proper question, and intimated that objections of this nature were frequently made without consideration. It is not a very easy thing to lay down any precise general rule as to leading questions: on the one hand, it is clear that the mind of the witness must be brought into contact with the subject of inquiry; and, on the other, that he ought not to be prompted to give a particular answer, or to be asked any question to which the answer yes or no would be conclusive. But how far it may be necessary to particularize in framing the question, must depend upon the cir-

always necessary to lead the mind of the witness to the subject of inquiry. In some instances the Court will allow leading questions to be put upon an examination in chief, as where it evidently appears that the witness wishes to conceal the truth, or to favour the opposite party (*k*). So where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it, as where he is called to contradict another as to the contents of a particular letter which is lost, and cannot, without suggestion,

When allowed.

objection chiefly becomes material, since there is danger lest the witness should by design or mistake be guilty of some variance, and give a false colouring to the transaction. In such cases there seems to be no objection to directing the mind of the witness fully to the subject, by asking him whether he was present when any conversation took place between the parties, or relating to the particular subject; and when the mind of the witness has been thus directed to the subject-matter, to request him to state what passed. It is obvious that observations like these are intended for the use of mere students; to such it may not be improper to suggest, that when the time and place of the scene of action have once been fixed, it is generally the easiest course to desire the witness to give his own account of the matter; making him omit as he goes along an account of what he has heard from others, which he always supposes to be quite as material as that which he himself has seen. If a vulgar ignorant witness be not allowed to tell his story in his own way, he becomes embarrassed and confused, and mixes up distinct branches of his testimony. He always takes it for granted that the Court and jury know as much of the matter as he does himself, because it has been the common topic of conversation in his own neighbourhood; and therefore his attention cannot easily be drawn so as to answer particular questions, without putting them in the most direct form. It is difficult, therefore, to extract the important parts of his evidence piecemeal; but if his attention be first drawn to the transaction by asking him when and where it happened, and he be told to describe it from the beginning, he will generally proceed in his own way to detail all the facts in the order of time.

(*k*) It seems that in each particular case it is in the discretion of the Court to regulate the mode in which a witness in chief shall be examined in order best to answer the purpose of justice, and there is no fixed rule which binds counsel to a particular mode of examining him: if a witness by his conduct shows himself decidedly adverse, it is in the discretion of the Court to allow cross-examination. The situation of the witness, and the inducements under which he may labour to give an unfair account, are material considerations in this respect. A son will not be very forward in stating the misconduct of his father, of which he has been the only witness. A servant will not, in an action against the master, readily admit his own negligence. See 2 Evans's Pothier, 267. If a witness called stands in a situation which of necessity makes him adverse to the party calling him, counsel may as matter of right cross-examine him. Per Best, C. J., *Clarke* v. *Saffery*, 1 Ry. & M. C. 126.

Leading questions, when allowed.

recollect the contents, the particular passage may be suggested to him (*l*). So where a witness is called in order to contradict the testimony of a former witness, who has stated that such and such expressions were used, or such and such things were said, it is the usual practice to ask whether those particular expressions were used, or those things were said, without putting the question in a general form by inquiring what was said (*m*). If this were not to be allowed, it is obvious that much irrelevant and even inadmissible matter would frequently be detailed by the witness. So where a witness is called to prove a co-partnership between a number of persons whose names he cannot recollect, the list of names may be read to him, and he may be asked whether those persons are members of the firm (*n*).

As to what examinable.

A witness is examined either as to facts, simply, which he himself knows, or in some instances as to his own inferences from facts, or as to facts which he has heard from others. In ordinary cases the witness ought to be examined as to facts only, and not as to any opinion or conclusion which he may have drawn from facts, for those are to be formed by a jury, except indeed where the conclusion is an inference of skill and judgment (*o*).

Examination of witness as to his actual knowledge.

A witness examined as to facts ought to state those only of which he has had personal knowledge; and such knowledge is supposed, if not expressly stated upon the examination in chief; and upon cross-examination, his means of knowledge may be fully investigated, and if he has not had sufficient and adequate

(*l*) *Courteen* v. *Touse*, 1 Camp. 43. The plaintiff's son, in an action on a policy on goods, being asked, whether the plaintiff had not written a letter to him saying "that he had disposed of all his goods at a profit," swore that he did not, but only said that "he might have disposed of the goods at a great profit, as he had been offered 8*d.* a pair," &c. To contradict this a witness was called by the defendant, and after having stated all he recollected about the letter, he was asked if it contained anything about the plaintiff having been offered 8*d.* a pair, &c. Ld. Ellenborough held that after exhausting the witness's memory as to the contents of the letter, he might be asked if it contained the passage recited; for otherwise it would be impossible to come to a direct contradiction. Where a witness was called to contradict a former witness, as to a conversation which he had denied, it was held that the terms might be suggested to him in the first instance. *Edmonds* v. *Walker*, cor. Abbott, C. J. Westm. Sitt. after Mich. Term, 1820.

(*m*) Where an issue has been directed with a power to examine one of the parties, it is competent for the counsel of the opposite party to cross-examine him: being a party he is presumed to be an adverse witness *Clarke* v. *Saffery*, 1 Ry. & M. C. 126.

(*n*) *Accrro* v. *Petroni*, 1 Starkie's C. 100.

(*o*) 4 T. R. 497.

means of knowledge, his evidence will be struck out. It has been said, that a witness must not be examined in chief as to his *belief* or *persuasion*, but only as to his knowledge of the fact, since judgment must be given *secundum allegata et probata*; and a man cannot be indicted for perjury who falsely swears as to his persuasion or belief (*p*). As far as regards mere belief or persuasion, which does not rest upon a sufficient and legal foundation, this position is *correct*; as where a man believes a fact to be true merely because he has *heard* it said to be so; but with respect to persuasion or belief, as founded on facts within the actual knowledge of the witness, the position is not true. On questions of identity of persons, and of handwriting, it is every day's practice for witnesses to swear that they believe the person to be the same, or the hand-writing to be that of a particular individual, although they will not swear positively; and the degree of credit to be attached to the evidence is a question for the jury.

His belief.

With regard to the second objection, it has been decided that a man who falsely swears that he thinks or believes, may be indicted for perjury (*q*). So where professional men and others give evidence on matters of skill and judgment, their evidence frequently does not, and often cannot, from the nature of the case, extend beyond opinion and belief.

The opinion of a witness as to the effect of a clause in a policy is not admissible (*r*); neither, it has been held, is the opinion of a broker, whether particular facts ought to have been disclosed to the underwriter, admissible (*s*).

But in general, wherever the inference is one of skill and judgment, the opinion of experienced persons is admissible, for by such means only can the jury be enabled to form a correct conclusion.

Questions of skill.

An engineer may be examined as to his judgment on the effect of an embankment on a harbour, as collected from experiment (*t*).

Upon the question whether a seal has been forged, the

(*p*) *Adams* v. *Canon*, Dyer, 53; Note to *Rolfe* v. *Hampden*, 2 Haw. c. 46, s. 167.

(*q*) *Millar's Case*, 3 Wils. 427; 2 Bl. 881; *Pedley's Case*, Leach, 270.

(*r*) *Syers* v. *Bridge*, Dougl. 509. But the *practice* under similar circumstances would be legal evidence. Ibid.

(*s*) *Carter* v. *Boehm*, Burr. 1905. But see Vol. II. 648.

(*t*) *Folkes* v. *Chad*, Mich. 23 G. 3, cited in *Goodtitle* v. *Graham*, 4 T. R. 498. Vol. II. tit. HANDWRITING.

Questions of skill.

testimony of a seal-engraver as to the difference between the impression in question and a genuine one, is also admissible (*u*).

A ship-builder may be examined to state his opinion as to the sea-worthiness of a ship, from a survey made by others (*x*).

So the testimony of medical men is constantly admitted with respect to the cause of disease, or of death, in order to connect them with particular acts, and as to the general sane or insane state of the mind of the patient, as collected from a number of circumstances. Such opinions are admissible in evidence, although the professional witnesses found them entirely on the facts, circumstances and symptoms established in evidence by others, and without being personally acquainted with the facts (*y*). But in such a case evidence is not admissible that a particular act for which a prisoner is tried was an act of insanity (*z*).

In general, scientific men ought to be examined only as to the opinions on the facts proved, and not as to the merits of the case (*a*).

Although a witness cannot be examined as to the contents of a written document not produced, yet he may in some instances be examined as to the general result from a great number of documents too voluminous to be read in court (*b*).

May refresh his memory.

If a witness has made a memorandum of facts he may refresh his memory by referring to it; and if by that means he obtains a recollection of the facts themselves, as distinct from the memorandum, his statement is evidence; but if he has no knowledge or recollection of the fact, except that he perused it in a book or paper, the original book or paper must be produced (*c*), and he

(*u*) By Lord Mansfield, in *Folkes* v. *Chad*, cited 4 T. R. 498; and vide *supra*, tit. HANDWRITING.

(*x*) *Thornton* v. *Royal Exchange Assurance Company*, Peake's C. 25. *Charraud* v. *Angerstein*, Ib. *Beckwith* v. *Sydebotham*, 1 Camp. 117.

(*y*) *Wright's Case*, Russ. & Ry. C. C. L. 456.

(*z*) Ibid.

(*a*) *Jewson* v. *Drinkald*, 12 Moore, 148.

(*b*) *Meyer's Assignees* v. *Sefton*, 2 Starkie's C. 276; *Roberts* v. *Dixon*, Peake's C. 83.

(*c*) *Doe* v. *Perkins*, 3 T. R. 749. The question was, at what time the annual holdings of several tenants expired. Aldridge had gone round with the receiver of the rents to the different tenants, whose declarations as to their times of entry were noted down in a book, some by Aldridge and some by the receiver. Aldridge was examined as to these declarations, the original book not being in court; he admitted that he had no recollection on the subject, except from extracts made by him from the book; and the evidence was afterwards held by the Court of K. B. to have been inadmissible.

In the above case, that of *Tanner* v. *Taylor* was cited, which had been

cannot give evidence of the facts. It is not essential that the memorandum should have been contemporary with the fact; it seems to be sufficient if it has been made by the witness, or by another with his privity, at a time when the facts were fresh in the recollection of the witness, and that the reading such memorandum restores the recollection of the fact which had faded in the memory (*d*).

Examination with reference to written documents.

A deposition formerly made by an aged witness was allowed to be read to him at the trial, in order to refresh his memory (*e*). And where a witness who had received money, and given a receipt for it, which could not be read in evidence for want of a proper stamp, had become blind, the receipt was read to him in court for a similar purpose (*f*).

decided by Legge, B., Hereford Spring Assizes, 1758; where in an action for goods sold and delivered, the witness who proved the delivery took it from an account which he had in his hand; being a copy, as he said, of the day-book which he had left at home: and Mr. Baron Legge held, that if he could swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make oath of it; but if he could not from recollection swear to the deliveries any further than as finding them entered in his book, then the original should have been produced; and the witness saying he could not swear from recollection, the plaintiff was nonsuited. And see a case cited from Lord Ashburton's notes, 3 T. R. 752; *Rex* v. *Duchess of Kingston*, 11 St. Tr. 255; 8 East, 284. 289. And see *Remington* v. *Inglis*, 8 East, 273. *Hodge's Case*, 28 Howell's St. Tr. 1367. It is not necessary that the witness should have made the entry himself. *Burrough* v. *Martin*, 2 Camp. 112.

(*d*) *Tanner* v. *Taylor*, 3 T. R. 754; 8 East, 284. *Doe* v. *Perkins*, 3 T.R. 752. *Sandwell* v. *Sandwell*, Comb. 445. *Rambert* v. *Cohen*, 4 Esp. C. 213. So a person who has from time to time examined entries in a log-book whilst the events were fresh in his recollection, may refer to the book to refresh his memory, when examined as to a fact recorded there, and which he remembers to have seen there when he had a clear recollection of the circumstances. *Burrough* v. *Martin*, 2 Camp. 112.

A witness is not allowed to refresh his memory by a copy taken from a shop-book, neither of the entries having been written by himself. *Solomons* v. *Campbell*, cor. Abbott, J. sitt. after Mich. 1822. A witness was not allowed to refresh his memory from a paper which he admitted to be a copy made six months after the transaction, from a memorandum made about the time. *Jones* v. *Stroud*, 2 C. & P. 196.

(*e*) *Vaughan* v. *Martin*, 1 Esp. C. 440. See *Doe* v. *Perkins*, 3 T. R. 749.

(*f*) *Catt* v. *Howard*, 3 Starkie's C. 3. Where a witness to prove the receipt of money, after having denied all recollection of it, was shown a written entry with his initials, and then said he had no doubt of his having received the money; held that it was not necessary such paper she be stamped, after being looked at to refresh his memory; the parol evidence to prove the payment was sufficient. *Maugham* v. *Hubbard*, 8 B. & C. 14; 2 M. & Ry. 5.

May refresh his memory.

And where the plaintiff had entered an account in writing of goods and money from time to time forwarded to the defendant, and the defendant had by his signature at the foot of each page admitted the truth of the items, but the writing itself could not be given in evidence for want of receipt-stamps, as the cash items in each page exceeded 40*s*., yet it was held that the plaintiff might prove, that upon calling over each article to the defendant, he admitted the receipt, and that the witness who heard him might refresh his memory by referring to the account (*g*).

Where a witness refreshes his memory from memorandums, it is usual and reasonable that the adverse counsel should have an opportunity of inspecting them for the purpose of cross-examining the witness (*h*); and the witness may be cross-examined as to other parts of the entry (*i*).

Hearsay.

A witness may also in some instances, on principles which have been already adverted to, be examined as to what he has *heard* from others; and evidence of this nature is either *original evidence*, which is admissible without previous proof to warrant it, or is merely *secondary*, and admissible only in failure of some other and superior evidence, which is no longer attainable. Of the first description is evidence of reputation, and of declarations which accompany and explain material facts and declarations made by the adverse party in the cause (*k*).

Reputation.

Evidence of reputation, subject to the limitations already stated (*l*), is admissible upon questions as to the boundaries of parishes, manors, or other districts in which many persons possess an interest (*m*); upon questions relating to rights of

(*g*) *Jacob* v. *Lindsey*, 1 East, 460; *Supra*, tit. STAMP.

(*h*) Per Eyre, C. J. *Hardy's Case*, 24 Howell's St. Tr. 824. In *R. v. Rennesden*, 2 C. & P. 603, and *Sinclair* v. *Stevenson*, 1 C. & P. 582, it was held that the opposite counsel had in such a case a right to see the memorandum and examine upon it.

(*i*) *Lloyd* v. *Freshfield*, 2 C. & P. 335.

(*k*) See tit. ADMISSIONS.

(*l*) *Supra*, 62.

(*m*) Hearsay evidence is admissible on a question of parochial or manorial boundary, although the persons who have been heard to speak of the boundary were parishioners, and claimed rights of common on the very wastes which their declarations have a tendency to enlarge. *Nichols* v. *Parker*, 14 East, 331.

Where in trespass for levying a distress for rates claimed to be due on lands in the parish *A*., the question was whether they were situate in that or the adjoining parish *B*.; it was held, that being a question of boundary, in which reputation was admissible, leases granted by the deceased ancestors of the plaintiff's landlord, describing the land to be situated in *B*., were properly received in evidence; held also, that the accounts of deceased overseers of *B*., to which the tenants of the lands were successively assessed, and

common (*n*), or other customary rights (*o*) or obligations, of

against whose names crosses were made, were admissible in evidence of payment of such rates by them, as a common mode of denoting payment. *Plarton* v. *Dare*, 10 B. & C. 17. A book of leases of the Dean and Chapter, kept in the chapter-house, is evidence as reputation on a question of boundary. *Coombs* v. *Wether*, 1 M. & M. 398. Upon the question whether a particular place be parcel of a parish, old entries made by a churchwarden, not charging himself, relating to the repairs of a chapel alleged to belong to the place in question, are not admissible. *Cooke* v. *Bankes*, 2 C. & P. 478.

(*n*) See Vol. II. tit. COMMON. A paper signed by many deceased copyholders of a manor, importing what was the general right of common in each copyholder, and agreeing to restrict it, is evidence of reputation, even against other copyholders not claiming under those who signed it. *Chapman* v. *Cowland*, 13 East, 10. In an action for a trespass on a close, parcel of a common, the defendant justified for a prescriptive right of common at all times over the place in which, &c. and the plaintiff in his replication prescribed to use the place for tillage, &c., qualifying the defendant's general right: held, that reputation was admissible to support such prescriptive right of tillage, which affected a large number of occupiers within the district. *Weeks* v. *Sparke*, 1 M. & S. 679.

(*o*) Reputation is evidence on questions respecting general customs concerning parishes or manors, or the inhabitants of towns and other places. *Morewood* v. *Wood*, 14 East, 327, n.

Where it is contended that, by the custom of a manor, land shall descend to the eldest female heir, general reputation of such custom, and instances of its having so descended on some occasions, is evidence proper to be left to a jury, though the descent contended for in the particular instance is not exactly similar to any of those that are adduced in evidence; as where the estate is claimed by the grandson of an eldest sister, and the instances proved are only of descents to eldest daughters and eldest sisters. *Doe, ex dem. Foster* v. *Sisson*, 12 East, 62.

In a suit between a copyholder and his lord, the copyholder resisted a lease upon an immemorial custom of the manor, the existence of which the lord denied. At the trial the lord produced the record of a suit by bill in the Exchequer, 4 W. & M., wherein the parties litigant were described as lord and copyholder (of the same manor), and the parties deposing for the copyholder were so described, that if the description were true, they were legally competent to give evidence touching the customs of the manor. Their depositions went to prove a custom inconsistent with that relied upon by the now plaintiff; and to disprove the existence of such last-mentioned custom, the lord offered them as evidence. It was objected: 1. That the present parties were not privies to the record of the former suit, and therefore could not be affected by any matter therein contained; it was *res inter alia acta*. 2. Or supposing that the depositions were admissible as evidence of reputation, still that it must be shown that the parties were invested with the characters described in the depositions, and not having which, they were incompetent to depose. 3. Or even waiving the two former objections, that the depositions were inadmissible in evidence, being declarations made *post litem motam*. The objections were overruled, because: 1. The depositions were not offered as a record estopping the plaintiff, but as declarations of deceased persons, touching a reputation

public highways, on question of pedigree (*p*), questions as to rights of toll (*q*).

Matter of hearsay.

In other cases a witness may be examined as to matter of hearsay, where the evidence is admissible as secondary evidence (*r*). Such evidence is in some instances admissible to prove the testimony given by a witness in a former suit between the same parties, who is since deceased (*s*); but in this, as well as in all other cases where such secondary testimony is admitted, it is necessary to lay the foundation by previous proof that the superior evidence, in place of which the secondary evidence is offered, is no longer attainable. In order to warrant the reception of evidence of what a deceased witness swore on a former trial between the same parties, it is necessary to prove, not only the death of that witness, but also that the testimony was given in a cause legally depending between the same parties (*t*). After such evidence has been given, parol evidence of what the deceased witness swore upon the former trial is admissible (*u*).

Previous also to the admission of evidence of traditionary declarations which the witness has heard made by others, it is

or received opinion: their simple assertions would have been evidence; *à fortiori* those made under the sanction of an oath. 2. That at the distance of time, the fact that the witnesses were clothed with the character in which they deposed must be taken for granted; else it would be requiring a proof which, in all probability, it were impossible to adduce. 3. The two customs,—the one litigated in the former, the other in the present suit,—are different; the declarations therefore, though made after the first custom was questioned, were made before the controversy touching the present was raised. *Freeman* v. *Phillips*, 4 M. & S. 486.

In a question upon the custom of tithing in the parish of *A.*, evidence that such a custom exists in the adjacent parishes is not admissible. *Secus*, if the custom be laid as the general custom of the whole country. *Furneaux* v. *Hutchins*, Cowp. 807.

Where a right is claimed by custom in a particular manor or parish, proof of a similar custom in an adjoining parish or manor is not admissible evidence. *Furneaux* v. *Hutchins*, Cowp. 807; Dougl. 512. *Doe, d. Foster* v. *Sisson*, 12 East, 63.

(*p*) See PEDIGREE.

(*q*) A deed under the seal of the University of Cambridge, between them and the town of Cambridge, relating to the tolls in question, held admissible as evidence of reputation respecting them. *Brett* v. *Beales*, 1 M. & M. 417. See Vol. II. tit. PRESCRIPTION.

(*r*) *Supra*, 43.

(*s*) *Lord Palmerston's Case*, cited 4 T. R. 290. *Mayor of Doncaster* v. *Day*, 3 Taunt. 262.

(*t*) See below, tit. JUDICIAL PROCEEDINGS.—DEPOSITION.

(*u*) Where a witness on a former trial of an issue out of Chancery died, and a new trial was granted, parol evidence of what such witness had sworn held admissible, notwithstanding an order for reading the depositions of such witnesses as had died since the first trial. *Tod* v. *Winchelsea, Earl of*, 3 C. & P. 387.

necessary to prove the deaths of the parties who made them. And where the declarations of deceased persons are admissible on special grounds, the circumstances which warrant the reception of the evidence require collateral proof (*x*).

Political or professional confidence.

It has already been seen that the law, upon grounds of policy (*y*), in some instances precludes a witness from revealing matters of political or professional confidence. And therefore, although upon a trial for high treason, it was held that a witness who had made communications in order to their transmission to the Government, might be properly asked whether he had made such communication to any magistrate, and that he could be further asked to whom he made such communication (*z*); and a majority of the Judges (*a*) were of opinion that on the witness having admitted that he had communicated what he knew to a friend, which friend had advised him to make the same communication to another; and having stated that such friend was not a magistrate, he could not be asked who that friend was, on the ground that the person by whose advice the information was given to a person standing in the situation of a magistrate, was in effect the informer. So a witness who has been employed by an officer to collect evidence as to the proceedings of suspected persons, is not allowed to disclose the name of his employer, or the nature of the connection that subsisted between them (*b*).

In some other instances also, witnesses, on grounds of general policy, are not allowed to be examined.

A member of parliament cannot be cross-examined as to what

(*x*) For instances where such evidence is admissible, and the nature of the proof previously requisite to warrant its admission, see below, tit. ENTRIES BY THIRD PERSONS.

(*y*) Where a commander-in-chief directed the defendant (a major-general), with six other officers, to inquire into the conduct of the plaintiff, and to report the opinion of those officers, which was done accordingly, and the plaintiff brought an action for an alleged libel contained in that report, and the secretary of the commander-in-chief attended with the minutes of the report, the Court refused to allow it to be read (*Home* v. *Bentinck*, 2 B. & B. 130). So official communications between the governor and law-officer of a colony as to the state of the colony (*Wyatt* v. *Gore*, Holt's C. 299), or between an agent of government and a secretary of state (*Anderson* v. *Sir W. Hamilton*, 2 B. & B. 156), are privileged.

(*z*) *Hardy's Case*, 24 Howell's St. Tr. 808.

(*a*) The Lord Chief Baron Macdonald and Buller, J. were of opinion that the question was proper; Lord C. J. Eyre, Mr. Baron Hotham and Mr. J. Grose, were of a different opinion.

(*b*) *R.* v. *Hardy*, 24 Howell's St. Tr. 753.

Matter of confidence.

has passed in parliament (*c*). And upon the same principle it would no doubt be held that a privy councillor could not be examined as to disclosures made before the King in council (*d*).

Lord Kenyon is in one instance reported to have held that it was competent to the plaintiff's counsel, in an action for a malicious prosecution, to inquire of a grand juror whether the defendant was prosecutor of an indictment (*e*), being of opinion that an answer to such an inquiry would not infringe upon the witness's official oath (*f*); but doubts have since been entertained by a high authority as to the propriety of admitting such evidence (*g*).

So it has been seen that the law, on grounds of extrinsic policy, prohibits the disclosure of confidential communications between a counsel or an attorney and his client (*h*); and also usually prohibits a husband or wife from giving testimony prejudicial to the other (*i*).

Cross-examination.

When the witness has been examined in chief, the adverse party is at liberty to cross-examine him. The power and opportunity to cross-examine, it will be recollected, is one of the principal tests which the law has devised for the ascertainment of truth, and this is certainly a most efficacious test. By this mean the situation of the witness with respect to the parties and the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discerning facts in the first

(*c*) Evidence was permitted to be given by a privy councillor against Ld. Strafford, of confidential advice given by the latter to the King at the council-table; 4 Ins. 54; a proceeding justly reprobat d by Lord Clarendon.

(*d*) *Plunkett* v. *Cobbett*, 29 Howell's St. Tr. 71. The action was for a libel; and on the defendant's inquiring on cross-examination as to expressions used by the plaintiff in parliament, Lord Ellenborough observed that it would be a breach of duty in the witness, as a member of (the Irish) parliament, and a breach of his oath, to reveal the councils of the nation.

(*e*) *Sykes* v. *Dunbar*, 2 Sel. N. P.

(*f*) "The King's counsel, your own, and your fellows', you shall keep secret."

(*g*) Lord Ellenborough, in *Watson's Case*, 24 Howell's St. Tr. 107, said that he had doubts upon the point, and that many very eminent men at the bar had entertained doubts upon it.

(*h*) See Vol. II. tit. CONFIDENTIAL COMMUNICATIONS. In the case of *Curry* v. *Walter*, 1 Esp. C. 456, Eyre, C. J. held that it is at the option of a barrister, whether he will give evidence of what he stated to the Court upon making a motion. *Qu.*

(*i*) See Vol. II. tit. HUSBAND AND WIFE.

instance, and his capacity for retaining and describing them, are fully investigated and ascertained, and submitted to the consideration of the jury, who have an opportunity of observing the manner and demeanour of the witness; circumstances which are often of as high importance as the answers themselves (*k*). It is not easy for a witness who is subjected to this test, to impose upon the Court; for however artful the fabrication of the falsehood may be, it cannot embrace all the circumstances to which the cross-examination may be extended; the fraud is therefore open to detection for want of consistency between that which has been invented, and that which the witness must either represent according to the truth, for want of previous preparation, or misrepresent according to his own immediate invention. In the latter case, the imposition must obviously be very liable to detection; so difficult is it to invent extemporaneously, and with a rapidity equal to that with which a series of questions is proposed, in the face of a court of justice, and in the hearing of a listening and attentive multitude, a fiction consistent with itself and the other evidence in the cause.

Witness called, but not examined in chief.

A witness when once called, sworn and examined, although merely as to the formal proof of a document, may be cross-examined, although he be the real party in the cause (*l*). And it has been held, that if a witness has once been called into the box and sworn, he may be cross-examined by the opposite side, although he has not been examined in chief (*m*). But it has since been ruled, that where a witness, though sworn, is merely called to produce a writing in his possession, and no question is asked, the adverse party is not entitled to cross-examine (*n*). And where, in an action by the assignees of a bankrupt, the petitioning creditor was called, for the purpose of producing the bill of exchange on which the debt was founded, the Court would

(*k*) Bac. Ab. Ev. E. Hob. 325; Hale, P. C. 253. 259; Pref. to Fortes. Rep. 2 to 4; Vaugh. Rep. 143.

(*l*) *Morgan* v. *Brydges*, 2 Starkie's C. 314. So in a criminal case. *R.* v. *Brooke*, 2 Starkie's C. 473.

(*m*) *Phillips* v. *Eamer*, 1 Esp. C. 357; *R.* v. *Brooke*, 2 Starkie's C. 473.

(*n*) *Simpson* v. *Smith*, cor. Holroyd, J., Nottingham Summer Ass. 1822. In an action for a malicious prosecution, the magistrate who committed the plaintiff was called to produce the information, but was asked no question, and the learned Judge held that the defendant's counsel were not entitled to cross-examine him. *Davis* v. *Dale*, 1 Mood. & Mal. C. 514; 4 Carr. & P. C. 335. So in criminal cases. *R.* v. *Murlis*, ib. n.

not permit him to be cross-examined by the defendant, since he could not have been examined by the plaintiffs (*o*).

Practice as to cross-examination.

It has been said, that where a witness has been examined by one party, he may afterwards be cross-examined as an adverse witness, when he is called by the adversary as one of his own witnesses (*p*). Yet if a party omit, from prudential motives, to examine his adversary's witness as to any branch of his own case, there seems to be no reason why, when he afterwards adopts him as his own witness, he should not be so considered to all purposes, and why the adversary should not then be entitled to cross-examine him. The same witness may know distinct parts of the transaction, one branch of which makes for the plaintiff, and the other for the defendant; and if each party call him as his own witness, there seems to be no reason why each should not be in turn bound by the same principle; why each, in examining into his own case, should not be precluded from putting leading questions, and be entitled to cross-examine as to his adversary's case.

The mode of examination is, in truth, regulated by the discretion of the Court, according to the disposition and temper of the witnesses; the Court frequently permits an adverse witness to be cross-examined by the party who calls him.

Leading questions.

The Courts do not usually exclude a party, on cross-examination of a witness, from putting leading questions, although the witness betray an anxiety to serve that party; it is however obvious that evidence so obtained is very unsatisfactory, and is open to much observation (*q*).

Although upon cross-examination a counsel may put leading

(*o*) *Read* v. *James*, 1 Starkie's C. 132.

(*p*) *Dickinson* v. *Shee*, 4 Esp. 67.

(*q*) I have heard Ld. Tenterden, C. J., express himself to that effect more than once. In *Hardy's case*, 24 Howell's State Tr., Phillips, 284, upon a trial for high treason, a witness having been called for the prosecution, who was favourable to the prisoner, and who had been a member of the Corresponding Society, was asked, whether particular expressions, which were suggested to him, had not been used by the members of that society; and L. C. Justice Eyre informed the counsel that he could not put words into the mouth of the witness, and that this was contrary to the practice of the court, and to his opinion. And Buller, J. upon the same trial, said, "You may lead a witness, upon cross-examination, to bring him directly to the point as to the answer; but not go the length, as was attempted yesterday, of putting into the witness's mouth the very words which he is to echo back again."

Leading questions.

questions, those questions must not assume facts to have been proved which have not been proved, or that particular answers have been given contrary to the fact (*q*). The witness cannot be cross-examined as to the contents of a written document which is not produced (*r*); nor as to the contents of a written document which is in the hands of the adversary, and which he has had notice to produce; for this is part of the case of the party who cross-examines, which cannot be gone into until that of his adversary has been concluded.

Witnesses may be examined apart from each other.

For the purpose of furthering the object of cross-examination, the Court will in general, at the instance of either party, direct that the witnesses shall be examined each separately, apart from the hearing of the rest (*s*); a strong test to try the consistency of their account (*t*); and the same indulgence may be granted to a prisoner, but not as a matter of right (*u*).

It has been held, that an order of exclusion does not extend to an attorney in the cause (*x*).

Where a witness remains in court after an order for their exclusion, the rejection or admission of his testimony is a question for the discretion of the Judge under all the circumstances of the case; but in the Court of Exchequer the rule for the rejection of such witnesses is known, and inflexible (*y*).

(*q*) *Hill* v. *Coombe*, cor. Abbott, J. Exeter Spring Assizes 1818; *Handley* v. *Ward*, cor. Abbott, L. C. J., Lancaster Spring Assizes 1818.

(*r*) *Sainthill* v. *Bound*, 4 Esp. 74.

(*s*) *Attorney General* v. *Bulpit*, 9 Price, 4. This is a general rule by the law of Scotland in all criminal prosecutions. Hume's Comm. on Crim. Law of Scotland, vol. 2, 365; Burnet's Treatise, 467; Phillips on Ev. vol. 1, 258. The same rule prevails in the Exchequer in revenue cases, as to witnesses for the defendant.

(*t*) No falsehoods are so difficult to be detected as those which are mixed up with a great portion of truth; the greater the proportion of true facts is which are combined with the false ones; the less opportunity will there be to detect the false by comparison with facts ascertained to be true. An ingenious mode of proving an *alibi* with consistency has long been known and practised by roguish adepts. The intended witnesses meet and pass the afternoon or evening together in convivial entertainment: when they are afterwards examined, they are all consistent as to the circumstances which attended their meeting, for so far they relate nothing more than the truth; they misrepresent nothing but the time when the transaction took place, and which, for the purpose of the *alibi*, is of course represented to be that of the robbery.

(*u*) 4 St. Tr. 9.

(*x*) *Pomeroy* v. *Baddeley*, 1 Ry. & M. C. 430; *R.* v. *Webb*, Sarum Summer Ass. 1819, cor. Best, J. contra.

(*y*) *Parker* v. *M'William*, 6 Bing. 683.

Where the witness remained from mistake, and from no undue motive, his testimony was received (*z*).

Where, after witnesses had been ordered out of court, one had returned, and heard another give his evidence, the Judge allowed him to be examined as to facts not sworn to by any previous witness, but with liberty to move to enter a nonsuit (*a*).

Cross examination as to collateral facts.

It is here to be observed, that a witness is not to be cross-examined as to any distinct collateral fact, for the purpose of afterwards impeaching his testimony by contradicting him; for this would render an inquiry, which ought to be simple, and confined to the matter in issue, intolerably complicated and prolix, by causing it to branch out into an indefinite number of collateral issues. In the case of *Spencely* v. *Willot* (*b*), which was a penal action for usury, the defendant's counsel were not permitted to cross-examine as to other contracts made on the same days with other persons, in order to show that the contracts in question were of the same nature, and not usurious, if the witness answered one way, or to contradict him if he answered the other way. And should such questions be answered, evidence cannot afterwards be adduced for the purpose of contradiction (*c*). The same rule obtains, if a question as to a collateral fact be put to a witness for the purpose of discrediting his testimony; his answer must be taken as conclusive, and no evidence can be afterwards admitted to contradict it (*d*). This rule does not exclude the contradiction of the witness as to any facts immediately connected with the subject of inquiry. A witness may be asked whether, in consequence of his having been charged with robbing

(*z*) *R.* v. *Cully*, 1 Mood & Mal. C. 329.

(*a*) *Beanton* v. *Ellice*, 4 C. & P. 585.

(*b*) 7 East, 108. See Mr. J. Holroyd's observations on the case, 2 Starkie's C. 156; *Harris* v. *Tippett*, 2 Camp. 638.

(*c*) *Harris* v. *Tippett*, 2 Camp. 638; *R.* v. *Watson*, 2 Starkie's C. 149.

(*d*) *R.* v. *Watson*, 2 Starkie's C. 149; *R.* v. *Teale and others*, cor. Lawrence, J. at York. It is said to have been held, that the question, whether a witness for one party had not attempted to deprive a witness for the adversary from attending to give evidence at the trial, was so immaterial, that if the witness answered in the negative, he could not be contradicted. *Harris* v. *Tippett*, 2 Camp. 637, cor. Lawrence, J. It cannot however be doubted, that the fact, if proved, would show a very strong and improper bias on the mind of the witness, and in a doubtful case afford a fair ground for suspecting his sincerity. In *Ld. Stafford's case*, 7 Howell's St. Tr. 1400, the prisoner was allowed to prove that Dugdale, a witness for the prosecution, had endeavoured to suborn witnesses to give false evidence against the prisoner.

the prisoner, he has not said that he would be revenged upon him; and in case of denial he may be contradicted (*e*). In such a case the inquiry is not collateral, but most important, in order to show the motives and temper of the witness in the particular transaction.

How far the witness is bound to answer.

It is now settled by the authority of the Legislature (*f*), that a witness cannot refuse to answer questions because he may subject himself to a civil liability or charge; but he is not bound to answer any question, either in a court of law or of equity, if his answer will expose him to any criminal punishment or penal liability, agreeably to the wise and humane principle that no man is bound to criminate himself (*g*). Accordingly a witness is not compellable to say whether he published a particular paper, if the contents be libellous (*h*). Upon an appeal against an order

(*e*) *Yewin's case*, 2 Camp. 638, n.; cor. Lawrence, J.

(*f*) The statute 46 G. 3, c. 37, declares and enacts, that a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no *tendency* to expose him to a penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his Majesty, or of any other person or persons. This statute does not affect the right of a party as a rated inhabitant of a parish, to withhold his evidence upon an appeal. *R.* v. *Woburn*, 10 East, 395.

Before the passing the above Act, it was *vexata quæstio*, whether a witness was bound to answer when the answer might subject him to civil liabilities. On the question being proposed by the House of Lords to the Judges, Mansfield, C. J. of C. B., Grose and Rooke, Js., and Thompson, B., were of opinion that he was not; but the Lord Chancellor and the other Judges were of a contrary opinion. They were all of opinion that a promise to a witness that he should be excused from certain debts, provided he made a full and fair disclosure, did not render him incompetent on the score of interest. Cobbett's P. D. 6 vol. p. 167.

(*g*) *R.* v. *Barber*, Str. 444; *Cates* v. *Hardacre*, 3 Taunt. 424; *Sir J. Friend's case*, 4 St. Tr. 6; *Lord Macclesfield's case*, 6 St. Tr. 649; 16 Ves. jun. 242; *Title* v. *Grevet*, 2 Lord Raym. 1088; *R.* v. *Oates*, 4 St. Tr. 9, 10. 2 Haw. c. 46. Mitford's Ch. Pl. p. 157. But it seems that a stock-broker, who, under the st. 7 G. 2, c. 8, s. 29, is required under a penalty to keep a book, would be bound to produce it.

A banker is not privileged from stating the amount of his customer's balances. *Lloyd* v. *Freshfield*, 2 C. & P. C. 329.

Where a witness declined on cross-examination stating where he lived, as he believed that a bailable writ was out against him at the suit of the defendant, the Court would not compel him to answer. *Watson* v. *Bevern*, 1 Carr. C. 363.

(*h*) *R.* v. *Barber*, Str. 444; *Maloney* v. *Bartley*, 3 Camp. C. 210, where, in an action for a libel published in an affidavit sworn before a magistrate, it was held that

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of bastardy, he is not bound to declare whether he is the father of a bastard child (*i*). In an action against the acceptor of a bill of exchange a witness is not bound to answer whether the bill was not given for differences on stock-jobbing transactions for time (*k*). The prosecutrix on an indictment for a rape is not bound to answer whether she has had criminal intercourse with any other person (*l*). And it has even been held, that a witness is protected from admitting his commission of an offence, although he has received a pardon (*m*). But where a witness has been guilty of an infamous crime, and has been punished for it, he may, it is said, be asked whether he has not undergone the punishment, because his answer cannot subject him to further punishment (*n*). And where the questions might subject the witness to penalties, but the time for proceeding against him is passed, he is bound to answer (*o*). If the witness answer questions improperly put, his answers may afterwards be used as evidence against him (*p*). Where a witness, after having been cautioned that he is not compelled to answer a question which may criminate him, chooses to answer, he is bound to answer everything relative to that transaction (*q*).

A witness although he might refuse to answer at all, on the ground that his answers might subject him to an indictment, yet if he answers at all is bound to disclose the whole (*r*).

Cross-examination in order to discredit a witness.

The protection has been carried much further. It has been held, that a witness is not bound to answer any question which tends to render him infamous, or even to disgrace him. Upon an indictment for rape, it is said to have been held by a majority of

the magistrate's clerk was not bound to state whether he wrote the affidavit and delivered it to the magistrate: a bill of exceptions was tendered, but not proceeded in.

(*i*) *R.* v. *St. Mary's Nottingham*, 13 East, 58, n.

(*k*) *Thomas* v. *Tucker*, cor. Ld. Tenterden, C. J. sitt. after Easter 1827.

(*l*) *R.* v. *Hodgson*, 1 Russ. & Ry. C. C. 211.

(*m*) *R.* v. *Reading*, 2 St. Tr. 822; *R.* v. *Earl of Shaftesbury*, 3 St. Tr. 439. In such case the answer may place him in jeopardy, and he would have to set up the pardon in bar to the prosecution.

(*n*) *R.* v. *Edwards*, 4 T. R. 440, where a bail was asked whether he had not stood in the pillory for perjury. But see below.

(*o*) *Roberts* v. *Allatt*, 1 Mood. & Mal. C. 192.

(*p*) *Stockfleth* v. *De Tastet*, 4 Camp. 10; *Smith* v. *Beadnall*, 1 Camp. 30. *R.* v. *Mercerom*, 2 Starkie's C. 366.

(*q*) *Dixon* v. *Vale*, 1 Carr. C. 278.

(*r*) *East* v. *Chapman*, 2 C. & P. 570. So in the case of a witness interrogated in equity. *Austin* v. *Power*, 1 Sim. 348.

the Judges, that the prosecutrix was not bound say whether she had not had a criminal connection with other men (*r*), and that such evidence was inadmissible. In *Cooke's case* (*s*), Treby, C. J. said, "*if it be an infamous thing, that is enough to preserve a man from being bound to answer*;" and he therefore held, that persons convicted and pardoned, or convicted and punished for crimes, could not be obliged to answer, since it was matter of reproach; and that it should not be put upon a man to answer a question wherein he would be forced to forswear or disgrace himself (*t*). It is, however, to be observed, that the case of *The King* v. *Edwards* (*u*) is inconsistent with the above *dictum*; since it was there held that a witness might be asked whether he had stood in the pillory for perjury.

Whether a witness must answer a question tending to disgrace him.

The question, whether a witness may be asked questions which tend to disgrace him (*x*), is, like many other difficult questions on the subject of evidence, one of policy and convenience. On the one hand, it is highly desirable that the jury should thoroughly understand the character of the persons on whose credit they are to decide upon the property and lives of others; and neither life nor property ought to be placed in competition with a doubtful and contingent injury to the feelings of individual witnesses. On the other hand, it may be said that it is hard that a witness should be obliged upon oath to accuse himself of a crime, or even to disgrace himself in the eyes of the public; that it is a harsh alternative to compel a man to destroy his own character, or to commit perjury; that it is impolitic to expose a witness to so great a temptation; and that it must operate as a great discouragement to witnesses, to oblige them to give an account of the most secret transactions of their lives before a public tribunal. That a collateral fact tending merely to disgrace the witness, is not one which is properly relevant to the issue, since it could not be proved by any other witness; and that there would be, perhaps,

(*r*) *R.* v. *Hodgson*, York Summer Ass. 1810, cor. Wood, B. MS. Phillips's Evidence, 222. The answer here, however, might have subjected the witness to spiritual censure and punishment.

(*s*) 4 St. Tr. 748. 1 Salk. 153.

(*t*) The question in that case was, whether a juryman who had been challenged could be asked whether he had not before the trial asserted the guilt of the prisoner.

(*u*) 4 T. R. 440. See *Rex* v. *Lewis and others*, 4 Esp. C. 225; where it is said to have been ruled, that a witness could not be asked whether he had been in the House of Correction; and *Macbride* v. *Macbride*, 4 Esp. 242, where it was held that a witness could not be asked questions which tended directly to disgrace him.

(*x*) See tit. RAPE—SEDUCTION.

Whether bound to answer questions tending to *disgrace* a witness.

some inconsistency in protecting a witness against any question, the answer to which would subject him to a pecuniary penalty, and yet to leave his character exposed. In the first place, it seems to be quite settled, that a man is not bound to criminate himself, or to answer any question which may incur a penalty (*y*). It may be observed further, that the principle extends not only to questions where the answer would immediately criminate the witness, but to all questions which tend collaterally to his conviction (*z*), or to supply any link in proof of a charge against him. As to questions which tend *merely* to disgrace the witness, there is some difficulty.

In *Cooke's Case* (*a*), the prisoner, on an indictment for high treason, asked the jurors, in order to challenge them, whether they had not said that he was guilty, and would be hanged? and the question was overruled; and the Court said, you shall not ask a *witness* or juryman whether he hath been whipped for larciny, or convicted of felony; or whether he was ever committed to Bridewell for a pilferer, or to Newgate for clipping and coining; or whether he is a villain or outlawed; because that would make a man discover that of himself which tends to shame, crime, infamy or misdemeanor. In this case it is to be recollected that the object was to exclude the juryman entirely by raising an objection to his competency. The same observation applies also to *Layer's Case* (*b*), where the Court overruled the attempt of the prisoner to ask a witness, on the *voire dire*, whether he had been promised a pardon, or some reward, for swearing against the prisoner; and in that case L. C. J. Pratt said, if the objection

(*y*) *Supra*; and see *R.* v. *De Berenger and others*, reported by Gurney, 195; *Parkhurst* v. *Lowton*, 2 Swanst. 216; *Title* v. *Grevet*, 2 Ld. Ray. 1088; *Cates* v. *Hardacre*, 3 Taunt. 424; 16 Ves. 242; *Hardy's case*, 24 Howell's St. Tr. 720. In some instances it has been found necessary to protect witnesses from penalties to which their evidence has rendered them liable, by an Act of Parliament. See 45 G. 3, c. 126; 1 & 2 G. 4, c. 21.

(*z*) *Cates* v. *Hardacre*, 3 Taunt. 424; *Macullum* v. *Turton*, 2 Y. & J. 183. In strictness, however, it is no ground of legal objection by the party in the cause, that the answer to a proposed question may place the witness in jeopardy; it is peculiarly the objection of the witness himself, who is under the protection of the law, and is always apprised of his situation by the presiding Judge.

(*a*) 1 Salk. 153; 4 St. Tr. 748; and see the observations of Treby, J. above.

(*b*) 6 St. Tr. 259. The Chief J. (Pratt) did not deny that the question might be put after the witness had been sworn. The cases of a witness and juror differ very materially: with respect to jurors, no question is properly allowable, except for the purpose of showing total incompetency.

goes to his credit, must he not be sworn, and his credit left to the jury? No person is to discredit himself, but is always taken to be innocent till it appear otherwise. In *Sir J. Friend's Case* (*c*) it was ruled, that the witness could not be asked whether he was a Roman-catholic, since he might thereby subject himself to penalties. The question, whether a witness was bound to answer a question upon a collateral fact tending to disgrace him, did not arise in any of the foregoing cases (*d*), and therefore the *dicta* thrown out by the Court were, in some measure, extra-judicial, as far as regards the present question. In the case of *R.* v. *Lewis* (*e*), which was an indictment for an assault, a witness, who is stated in the report of the case to be a common informer, and a man of suspicious character, was asked upon cross-examination, if he had not been in the house of correction in Sussex? And Lord Ellenborough is stated to have interposed, and to have said, that the question should not be asked, since it had formerly been settled by the Judges, among whom were C. J. Treby and Mr. J. Powell, both very great lawyers, that a witness was not bound to answer any question the object of which was to degrade or render him infamous. It is to be observed, however, that his Lordship did not afterwards strictly adhere to this rule (*f*). In the case of *Macbride* v. *Macbride*, a witness for the plaintiff, in an action of assumpsit, was questioned as to her cohabiting with the plaintiff; Lord Alvanley interposed, and excluded the question; but his Lordship added, "I do not go so far as others may; I will not say that a witness shall not be asked to what may tend to disparage him; that would prevent an investigation into the character of the witness, which it may be of importance to ascertain. I think those questions only should not be asked which have a direct and immediate effect to disparage." In the case of *Harris* v. *Tippett* (*g*), the witness was asked in cross-examination, whether he had not attempted to dissuade a witness for the plaintiff from attending the trial; he swore that he had not; and

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(*c*) 4 St. Tr. 259.

(*d*) There are many instances in which a man may be a witness who cannot be a juror. 2 Hale, 278, 11 H. 4. One attainted and pardoned cannot be a juror. Per Holt, C. J., *Rookwood's case*, 4 St. Tr. 642; but he may be a witness: the reason is, that a juror cannot be examined and sifted as to the grounds of his verdict, as a witness may as to his testimony. The ancient rule of law was otherwise.

(*e*) 4 Esp. C. 224.

(*f*) At the sittings of Westminster after Hil. Term 1818, a witness was compelled by his Lordship to answer the question, whether he had not been confined in a particular gaol. *Infra*, 171 (*l*).

(*g*) 2 Camp. 637; cited in *R.* v. *Watson*, 2 Starkie's C. 116.

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on its being proposed to bring evidence to contradict the witness on this point, Mr. J. Lawrence would not allow it, the fact being collateral to the issue; but he added, "I will permit questions to be put to a witness as to any improper conduct of which he may have been guilty, for the purpose of trying his credit; but when those questions are irrelevant to the issue upon record, you cannot call other witnesses to contradict the answers he gives." And in *Yewin's Case* (*h*) the same learned Judge allowed the prisoner's counsel to ask a witness in cross-examination, whether he had not been charged with robbing his master. Where a man's liberty, or even life, depends upon the testimony of another, it is of infinite importance that those who are to decide upon that testimony should know, to the greatest extent, how far the witness is to be trusted; they cannot look into his breast and see what passes there, but must form their opinion on collateral indications of his good faith and sincerity. Whatever, therefore, may materially assist them in their inquiry, is most essential to the investigation of truth; and it cannot but be material for the jury to understand the character of the witness whom they are called upon to believe; and to know, whether, although he has not been actually convicted of any crime, he has not in some measure rendered himself less credible by his disgraceful conduct. In the case of *The King* v. *Edwards* (*i*), on an application to bail the prisoner, who was charged with felony, one of the bail was asked, whether he had not stood in the pillory for perjury? and upon objection being made that it tended to criminate the party, the Court held that there was no impropriety in the question, since his answer could not subject him to any punishment. The great question, therefore, whether a witness is *bound* to answer a question to his own disgrace, has not yet undergone any direct and solemn decision, and appears to be still open for consideration. The truth or falsehood of testimony frequently cannot be ascertained by mere analysis of the evidence itself; the investigation requires collateral and extrinsic aids, the principal of which consists in a knowledge of the source or depositary from which such testimony is derived: the whole question resolves itself into one of policy and convenience, that is, whether it would be a greater evil that an important test of truth should be sacrificed, or that by subjecting witnesses to the operation of this test, their feelings should be wounded, and their attendance for the purposes of justice discouraged? The latter point seems to deserve the more

(*h*) 3 Camp. 638, n. (*i*) 4 T. R. 440.

serious consideration, since the mere offence to the private feelings of a witness who has misconducted himself cannot well be put in competition with the mischief which might otherwise result to the liberties and lives of others. No great injustice is done to any individual upon whose oath the property or personal security of others is to depend, in exhibiting him to the jury such as he is (*k*). As to the other consideration, it does not seem to be very clear that by permitting such examinations any serious evil would result; the law possesses ample means for compelling the attendance of witnesses, however unwilling they may be. The evil on this side of the question is at all events doubtful and contingent; on the other side it is plain and certain.

Whether bound to answer questions tending to his disgrace.

The principle on which such evidence is admissible is clear and obvious; the reason for excluding it is extrinsic and artificial, and it may be added, but theoretical; for Courts are in the constant habit of permitting such questions to be put (*l*), and answers to be given and received as evidence for the consideration of the jury.

The decision of this question is of less practical importance than might have been expected, since, whether a witness be or be not bound to answer such questions as tend to his disgrace, it

A witness may be asked questions tending to disgrace him.

(*k*) Where the witness has been convicted of an infamous crime, he is absolutely disqualified, but the fact of conviction cannot be proved except by the record; and it is in many instances impossible to be prepared with such evidence where it is not previously known that the witness will be examined; in such cases there is the greater reason for allowing the question to be put in another shape.

(*l*) In the case of *Frost* v. *Holloway*, K. B. sitt. after Hil. Term 1818, Ld. Ellenborough, C. J., compelled a witness to answer whether he had not been confined for theft in gaol; and on the witness's appealing to the Court said, "if you do not answer I will send you there." *Ex relatione Gurney.* Upon the trial of *O'Coigly* and *O'Connor* (24 Howell's St. Tr. 1353), the witness having, upon a question being put which threw an imputation on him, appealed to the Court for protection in the first instance, the Court would not permit the question to be repeated.

In the case of *Cundell* v. *Pratt*, 1 Mood. & Mal. C. 108, the witness was asked, on cross-examination, whether she was not cohabiting in a state of incest with a particular individual; Best, C. J. interfered to prohibit the question; it was urged by Spankie, serj., that he had a right to put questions tending to degrade a witness, for the purpose of trying his character.

Best, C. J.: I do not forbid the question on that ground; I for one will never go that length. Until I am told by the House of Lords I am wrong, the rule I shall always act upon is, to protect witnesses from questions, the answers to which may expose them to punishment; if they are protected beyond this, from questions that tend to degrade them, many an innocent man would unjustly suffer. This question may subject her to punishment; I think therefore it ought not to be put.

Questions tending to disgrace the witness may be put.

seems to be allowed that the questions may be put (*m*); and it is obviously of little consequence whether the witness admits that which is insinuated against him, or refuses to answer the question; for though in strictness no inference ought to be made as to the truth of a fact where the witness has refused to answer (*n*), yet the refusal must make an unfavourable impression upon the jury, since an honest man would naturally be eager to deny the fact, and rescue his character from suspicion, and would not refuse to answer merely because he had a strict legal right to refuse (*o*).

Must be put to warrant evidence in contradiction.

Where the question is so connected with the point in issue that the witness may be contradicted by other evidence if he deny the fact, the law itself requires that the question should be put to the witness, in order to afford him an opportunity for explanation, although the answer may involve him in consequences highly penal (*p*).

It was lately held by all the Judges, not only that a question, as to an act done by the witness, the answer to which might criminate him, might be put, in order to afford a foundation for contradicting him, if he denied the fact, but even that the adverse party could not without asking the question adduce such evidence to impeach the credit of the witness (*q*).

If a witness voluntarily answer questions tending to criminate him on his examination in chief, he is bound to answer on cross-examination, however penal the consequence may be (*r*).

If a witness choose to answer a question to which he might have demurred, his answer may afterwards be used in evidence against him for all purposes (*s*). If a witness should admit that he had been guilty of a crime, his admission would not render him incompetent without proof of his conviction.

Fact extracted by cross-examination is evidence, although the question could not have been asked on the examination in chief.

If by an unfortunate or unskilful question put on cross-examination, a fact be extracted which would not have been evidence upon an examination in chief, it then becomes evidence against the party so cross-examining (*t*).

(*m*) *Harris* v. *Tippett*, 2 Camp. 638; *R.* v. *Yewin*, 2 Camp. 638. n.; *R.* v. *Watson*, 2 Starkie's C. 116.

(*n*) *Rose* v. *Blakeman*, 1 Ry. & M. C. 384.

(*o*) See the observations of the Judges in *R.* v. *Watson*, 2 Starkie's C. 116.

(*p*) *The Queen's case*, 2 B. & B. 311.

(*q*) Ib.

(*r*) Per Dampier, J. Winchester Summer Ass. 1815, Mann. Ind. Witness, 222.

(*s*) *Smith* v. *Beadnall*, 1 Camp. 30; *Stockdeth* v. *De Tastet*, 4 Camp. 10.

(*t*) *Wright dem. Clymer* v. *Littler*, Burr. 1244; 1 Bl. 346. The lessor of the plaintiff claimed under a will dated in 1743. The defendant relied

As to writings.

A witness cannot properly be asked, upon cross-examination, whether he has written such a thing; the correct course is to put the paper into his hands, and to ask him whether it be his writing. And if a witness be asked whether he has represented such a thing, the Court will direct the counsel to ask whether the representation has been made in writing or in words (*u*).

In the course of the late proceedings in the House of Lords in the *Queen's Case*, Louisa Dumont, a witness in support of the charge, having been asked, upon cross-examination, whether she did not use certain expressions which the counsel read from a supposed letter from the witness to her sister, it was objected by the Attorney-general that the letter itself ought to be put in before any use could be made of its contents.

The following questions were in consequence proposed to the Judges (*x*):—

First, Whether, in the courts below, a party, on cross-examination, would be allowed to represent, in the statement of a question, the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked that witness whether the witness wrote that letter, and his admitting that he wrote such letter?

Secondly, Whether, when a letter is produced in the courts below, the Court would allow a witness to be asked, upon showing a witness only a part of, or one or more lines of such letter, and not the whole of it, whether he wrote such part, or such one or more lines; and in case the witness shall not admit that he did or did not write the same, the witness can be examined to the contents of such letter?

on a will bearing date, 1745. The plaintiff, in answer, called Mary Victor, the sister of William Medlicott, deceased, whose name appeared as an attesting witness to the will of 1745, to prove that her brother, in his last illness, and three weeks before his death, pulled out of his bosom the will of 1743, and said it was the true will of *J. C.* Upon cross-examination by the counsel for the defendants, the witness further stated, that her brother, when he produced the will of 1743, acknowledged and declared tha the will of 1745 was forged by himself. After a verdict for the plaintiff, upon a motion for a new trial, upon the ground, *inter alia*, that the declaration by Medlicott of his having forged the will of 1745, ought not to have been left to the jury, it was answered by the Court, that the fact came out upon the defendant's own cross-examination.

(*u*) *The Queen's case*, 2 B. & B. 286.

(*x*) *The Queen's case*, ibid.

Cross-examination as to writings.

The first question was answered in the negative, for the following reasons:—"The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence. The proper course, therefore, is to ask the witness whether or no that letter is of the handwriting of the witness? If the witness admits that it is of his or her handwriting, the cross-examining counsel may, at his proper season, read that letter as evidence and when the letter is produced, then the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments is, in order that the Court may be possessed of the whole. If the course which is here proposed should be followed, the cross-examining counsel may put the Court in possession only of a part of the contents of the written paper; and thus the Court may never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part."

To the second question, the Judges returned the following answer: "In answer to the first part, 'Whether, when a letter is produced in the courts below, the Court would allow a witness to be asked, upon showing the witness only a part, or one or more lines of such letter, and not the whole of it, whether he wrote such part?' the Judges are of opinion, that that question should be answered by them in the affirmative in that form; but in answer to the latter part, which is this, 'And in case the witness shall not admit that he did or did not write such part, whether he can be examined as to the contents of such letter?' the learned Judges answer in the negative, for the reason already given, namely, that the paper itself is to be produced, in order that the whole may be seen, and the one part explained by the other."

Upon the further question proposed, "Whether, when a witness is cross-examined, and upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the courts below, whether he did or did not make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are not contained in the letter?" the Judges were of opinion, that the counsel cannot, by questions addressed to the witness, inquire whether or no such statements are contained in the letter, but that the letter itself must be read to manifest whether such statements are or

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are not contained in that letter. They found their opinion upon what, in their opinion, is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by any parol evidence.

To another question, viz. "In what stage of the proceedings, according to the practice of the courts below, such letter could be required by counsel to be read, or be permitted by the Court below to be read," the learned Judges answered, that according to the ordinary rule of proceedings in the courts below, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case: that that is the ordinary course; but that, if the counsel who is cross-examining suggests to the Court that he wishes to have the letter read immediately, in order that he may, after the contents of that letter shall have been made known to the Court, found certain questions upon the contents of that letter, which could not well or effectually be done without reading the letter itself, that becomes an excepted case in the courts below; and for the convenient administration of justice the letter is permitted to be read at the suggestion of the counsel; but considering it, however, as part of the evidence of the counsel proposing it, and subject to all the consequences of having such letter considered as part of his evidence.

It seems to be perfectly clear, that if it appear from the cross-examination of the witness, or from any antecedent evidence, that the writing in question has been destroyed, the objection founded on the reasons alleged by the learned Judges ceases; and as the defendant may at all events, in his turn, adduce secondary evidence of the contents, there is no objection to his proving the contents in the first instance by means of the adversary's witness.

It is to be observed, that the opinions delivered by the learned Judges upon the preceding questions, were founded wholly on the application of the principle, that the best evidence must be adduced which the case admits of, and on the supposition that the object of the cross-examination is to establish in evidence the contents of a written document as material to the cause. Where that is the case the objection is invincible.

But it frequently happens that the cross-examination of a witness as to what he has before said or written on the subject of inquiry is material only as a test to try his memory and his credit.

As the decisions of the Judges have, according to the opinion

Cross-examination as to writings.

of a cotemporary writer of great ability, left the question, whether a witness may not be cross-examined as to the contents of a written document for the purpose of impeaching his credit, still open, it may not perhaps be deemed presumptuous to offer a very few remarks upon this subject.

Upon every question of this nature two considerations arise; in the first place, whether the practice be advantageous and desirable with reference to some particular object; and if so, still whether, on the other hand, it may not be politic to exclude it, in order to avoid some inconvenience which would result from its reception greater than that which would accrue from its rejection.

That the permitting such a cross-examination may frequently afford a desirable test for trying the memory and the credit of the witness, admits of little doubt. If, for example, a witness profess to give a minute and detailed account of a transaction long past, such as the particulars of a conversation, or the contents of a written document, and consequently where much depends upon the strength of his memory, it is most desirable to put that memory to the test by every fair and competent means. His inability under those circumstances to state whether he afterwards committed the details of the transaction to writing, or if he admitted that he did so, his inability to state whether he then gave the same or a different account, or his admission that he gave a different account, without being able to explain why he did so, must necessarily operate to a greater or less extent to show the imperfection of his memory.

If a witness be called to prove the contents of a document written by another, which, it may be, he has seen but once, and that at a distant time, must it not be of the highest importance to ascertain whether his powers of memory are sufficiently strong to enable him to swear to the contents of a document written by himself at a later period relating to the same subject-matter? If he either deny that he has made any representation on the subject, or be unable to recollect what statement he has made, the circumstance tends to impeach the faithfulness of his memory, even to a greater extent than if the representation had been merely oral, inasmuch as the act of writing is more deliberate, and more likely to remain impressed on the memory, than a mere oral communication; and the contradiction which the witness receives from the writing itself is also more important and more complete than that which results from the testimony of another, whose memory may be as liable to imperfection as that of the witness.

Cross-examination as to writings.

A cross-examination of this nature affords also no mean test for trying the integrity of the witness. An insincere witness, who is not aware that his adversary has it in his power to contradict him, will frequently deny having made declarations and used expressions which he is, on cross-examination, ultimately forced to avow; and it often happens, that by his palpable and disingenuous attempts to conceal the truth, he betrays his real character; and thus his denials, his manner and conduct, become of far greater importance, and much more strongly impeach his credit, than the answer itself does which he is at last reluctantly constrained to give.

Where the party is confined to the mere production and reading of the paper, without previous cross-examination, all inferences of this nature are obviously excluded, and the opportunity of contradicting him by the production of the document in opposition to his statement on oath, cannot occur.

These observations apply even although the writing containing the contradiction be in the possession of the party who cross-examines; but it may frequently happen that the document may have been lost, but that proof of the loss, and of the contents of the document, are in the power of the party cross-examining.

In such a case, if the rule were strictly adhered to, a dilemma would occur, the effect of which might be to exclude the contradicting evidence altogether. The adverse party would not be able to go into evidence of the contradictory document before he had, upon cross-examination, given an opportunity of explanation to the witness, and he could not, according to the rule, examine as to the contents of the writing before he had proved the contents. At all events he would labour under a difficulty in securing the attendance of an adverse witness until such time as he had established the necessary proof(*y*).

(*y*) It has been suggested, that for the purpose of warranting the cross-examination of a witness as to the contents of a writing, which has in fact been destroyed, it is fit that the party proposing to cross-examine should be allowed to interpose evidence out of his turn to prove the fact of destruction, or, that if any inconvenience should result from pursuing this course, the Court should, in the exercise of its discretion, either admit the witness's statement in the first instance, or defer the cross-examination until the adversary shall have entered on his case. Without presuming to anticipate what course the Court might in its discretion adopt when the case occurred, it may be observed, that either to allow a party to break in upon the adversary's case by adducing proof to sanction the admission of secondary evidence, or to allow him to enter upon secondary evidence, as it were, *de bene esse*, and subject to be established or defeated by the subse-

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Such a cross examination would also frequently afford a test of credit where the writing could not be produced, or its loss proved; for if the witness has in fact made statements in writing which, if produced, would impeach his credit, and either out of regard to his oath, or for fear of consequences, be induced to admit the fact, his answer, subject to the explanation which he may be able to give, must produce the same effect.

The objections on the score of policy are, on the contrary, of a limited nature, it being admitted on all hands that the answers given cannot be received as any evidence of the writing itself for the purposes of the cause. It is possible that the witness having written what was true, may not recollect what he has written, or, to go to the greatest extent, may, even mistakingly, and from defect of memory, admit (even contrary to the truth) that he has given a description of the transaction inconsistent with his present testimony; but even this would operate as a test to try his memory, and the result would show that his recollection was imperfect: a consideration of the highest importance where the witness is called to detail conversations or the contents of a written document; a task to which few memories are adequate under ordinary circumstances.

And instances may be cited where evidence is admitted for one purpose and object to which it is applicable, although with reference to other purposes and objects to which the evidence relates it is inadmissible and wholly inoperative. Thus, in the ordinary case where a witness is cross-examined as to oral declarations made by him and connected with the cause, evidence is constantly offered to prove those declarations, where he denies them, not with a view to prove the truth of a declaration, but in order to impeach his credit. If, for instance, in an action for goods sold

quent proof or failure of proof, would be going farther than any existing precedent seems to warrant. It has, indeed, been not unusual, after proof of a document by a witness under cross-examination, for the party cross-examining to have it read in that stage of the proceedings, by way of anticipation, as part of his own evidence; but there the proof is complete, and nothing remains but to read the instrument. On the contrary, in the case proposed the proof is incomplete, and the party may with much more reason object to the admitting secondary evidence, which may in the result turn out to have been wholly inadmissible, nay, which perhaps his opponent might render inadmissible, if it served his purpose, by afterwards omitting to support it by legal evidence *.

* It has been frequently ruled, that a defendant having given the plaintiff notice to produce writings in his possession, cannot cross-examine the plaintiff's witnesses as to their contents. *Graham* v. *Dyster*, 2 Starkie's C. 23; *Sideways* v. *Dyson*, ibid. 49.

and delivered, a witness called to prove the delivery of the goods were to deny that he said to *A. B.* that the defendant in fact never had the goods, it would be competent to the defendant to call *A. B.* to prove that the witness did in fact make that declaration, not with a view to affect the plaintiff by making the declaration evidence of the non-delivery, (for it is no evidence of the fact,) but to impeach the credit of the witness.

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Here the question is allowed for the purpose of impeaching the testimony of the witness, although it involves a fact of which the answer would be no evidence. If so, why, if the very same statement were in writing, might not the question also be allowable for the very same limited purpose, that is, to impeach the witness's credit, although to establish the truth of the written statement, viz. that the goods had not been delivered, it would afford no evidence whatsoever?

Again, upon the ordinary examination of a witness on the *voire dire*, he may, with a view to show that he is wholly incompetent, be examined as to the contents of a written document not produced; and the reason is, that it is not probable that the writing which creates his incompetency would be in the possession or within the knowledge of the adversary: a reason which would frequently apply in full force in the present instance (*z*).

If a witness be called merely to produce a document which can be proved by another, and be not sworn, he is not subject to cross-examination (*a*).

Re-examination of witness.

A witness may be re-examined by the party who called him upon all the topics on which he has been cross-examined: this gives an opportunity of explaining any new facts which have come out upon cross-examination; but as the object of re-examining a witness is to explain the facts stated by the witness upon cross-examination, the re-examination is of course to be confined to the subject-matter of cross-examination.

Where the witness has been cross-examined as to declarations made by him, a counsel has a right, on re-examination, to ask all questions which may be proper to draw forth an explanation of

(*z*) It is true, that if the witness upon examination on the *voire dire* has the instrument with him, it must be produced; for the reason for dispensing with its actual production, viz. the difficulty of procuring it, has ceased. *Butler* v. *Carver*, 2 Starkie's C. 433.

But where a witness is cross-examined in relation to a writing, to try his credit, the reasons for permitting such cross-examination do not cease, although the party cross-examining be in possession of that instrument.

(*a*) *Simpson* v. *Smith*. Not. Summ. Ass. 1822, cor. Holroyd, J. Phill. L. E. 260, and per Bayley, J. Lancaster Spring Ass. 1824.

Re examination.

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 he has no right to go farther, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness (*b*).

Where a witness has been cross-examined as to a conversation with the adverse party in the suit, whether criminal or civil, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving him at the same time the benefit of the entire residue of what he said on the same occasion (*c*).

But in the *Queen's case* eleven of the Judges were of opinion that the conversation of a witness with a third person stood upon a different footing, and was distinguishable from the case of a conversation with a party, on the following grounds, viz. "The conversation of a witness with a third person is not in itself evidence in the suit against any party in the suit. It becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations, and by the motive under which he made them; but when once all which had constituted the motive and inducement, and all which may show the meaning of the words and declarations, has been laid before the Court, the Court becomes possessed of all which can affect the character or credit of the witness, and all beyond this is irrelevant and incompetent (*d*)."

(*b*) *The Queen's case*, 2 B. & B. 297.

(*c*) Ibid. 298.

(*d*) Upon these grounds, eight of the Judges (Best, J. *dissentiente*) were of opinion, that if on the trial of an action or indictment, a witness examined on behalf of the plaintiff or prosecutor, upon cross-examination by the defendant's counsel, states that at a time specified he told *A.* that he was one of the witnesses to be examined against the defendant, and being re-examined by the plaintiff's or prosecutor's counsel, states what induced him to mention this to *A.*, the plaintiff or prosecutor's counsel cannot further re-examine the witness as to such conversation, even so far only as it relates to his being one of the witnesses.

Abbott, C. J., in delivering the opinion of the Judges, observed, "The question as proposed by the House contains these words, 'and being re-examined, had stated what induced him to mention to *A.* what he had so told him;' by which I understand

It seems that the Court will after a case is closed allow a witness to be called back, or receive fresh evidence, to get rid of objections which are beside the justice of the case and little more than mere form, but not to get rid of any difficulty on the merits. Where the question was as to the petitioning creditor's debt on a bill of which the bankrupt was the drawer, and no proof of any default by the acceptor had been shown, the Court allowed a witness to be called after the case had been closed, to prove the dishonour and notice to the bankrupt (*e*).

Recalling witness.

The credit of a witness may be impeached either by cross-examination subject to the rules already mentioned, or by general evidence affecting his credit, or by evidence that he has before done or said that which is inconsistent with his evidence on the trial, or, lastly, by contrary evidence as to the facts themselves.

Credit witness, how impeached.

It is perfectly well settled that the credit of a witness can be impeached by general evidence only, and not by evidence as to particular facts (*f*); for this would cause the inquiry, which ought to be simple and confined to the matters in issue,

that the witness had fully explained *his whole motive and inducement* to inform *A.* that he was to be one of the witnesses; and so understanding the matter, and there being *no ambiguity in the words*, 'I am to be one of the witnesses,' I think there is no distinction between the previous and subsequent parts of the conversation, and I think myself bound to answer your Lordships' question in the negative."

His Lordship then gave the reasons of the eight Judges for distinguishing between a conversation between the witness and a party, and one between the witness and a third person, to the effect above stated.

Best, J. was of opinion that the rule which was acknowledged to have been settled as to conversations of a party to the suit, applied with equal reason and force to the statements and conversations of a witness; and held, that if one part of the conversation of a witness has been drawn from him by cross-examination with a view of disparaging his testimony, the whole of what passed in that cross-examination ought to be admitted on re-examination. That this is justly due to the character of the witness, who is entitled, in vindication of his character, to have the entire conversation fairly and fully detailed in evidence; it was due to him also as a security against proceedings which might otherwise be instituted against him on statements partially extracted on cross-examination.

The Lord Chancellor and Lord Redesdale also differed from the majority of the Judges. As the learned Judges were pleased to guard their opinion by stating that they understood the question to assume that the witness had fully explained his whole motive and inducement to inform *A.*, the decision in the particular instance thus presented to them cannot be drawn into precedent as a very general rule, inasmuch as in many instances the cotemporary statement made by the witness would be the best exposition of his real motives.

(*e*) *Giles* v. *Powell*, 1 Carr. & P. 259. S. P. *Walls* v. *Atcheson*, ibid. 269.

(*f*) See Vol. II. tit. CHARACTER.

Character of witness, how impeached.

to branch out into an indefinite number of issues. The characters, not only of the witnesses in the principal cause, but of every one of the impeaching collateral witnesses, might be impeached by separate charges, and loaded with such an accumulated burthen of collateral proof, that the administration of justice would become impracticable. Besides this, no man could come prepared to defend himself against charges which might thus be brought against him, without previous notice; and though every man may be supposed to be capable of defending his general character, he cannot be prepared to defend himself against particular charges of which he has had no previous notice (*g*). Questions put to a witness himself upon cross-examination are not, it may be observed, open to this objection, since his answer is conclusive as to all collateral matters. The proper question to be put to a witness for the purpose of impeaching the general character of another witness is, whether he could believe him upon his oath? When general evidence of this nature has been given to impeach the credit of a witness, the opposite party may cross-examine as to the grounds upon which that belief is founded (*h*).

By proof of declarations, &c. by the witness.

In the next place, the witness may be contradicted by others who represent the fact differently, or by proof that he has said or written that which is inconsistent with his present testimony; for this purpose a letter may be read in which he has given a different account of the matter (*i*).

(*g*) *R.* v. *Watson*, 2 Starkie's Cas. 151. *Layer's case*, 6 State Tr. 298. 316. *Rookwood's case*, 4 State Tr. 693. B. N. P. 296. See also *Sharp* v. *Scoging*, Holt's C. 541. *De la Motte's case*, Howell's St. Tr. 811. *Mawson* v. *Harsink*, 4 Esp. C. 102.

(*h*) Where a party states that he would not believe a witness on his oath, it is no objection that he has never heard him examined on his oath, if he have, from previous knowledge of his character, reasonable ground of belief that his word cannot be trusted on oath. *R.* v. *Bipsham*, 4 Carr. & P. C. 392.

(*i*) *De Sailly* v. *Morgan*, 2 Esp. C. 691. The action was by a schoolmaster, for the board and education of the defendant's sons: the defence was, his neglect of the scholars, &c. A witness for the plaintiff, the usher of the school, swore that the treatment of the scholars was proper: and to contradict him, a letter written by him to a former scholar, containing immoral matter, was read in evidence.—So a prosecutor, in a criminal case, may contradict a witness by means of his deposition before the magistrate. *Oldroyd's case*, Vol. II. 277.—In a civil action, in order to contradict a witness who had sworn differently in an answer to a bill in equity; held, that the identity of the person and answer being ascertained, an examined copy of the answer was sufficient, although it might go to affect the character of the witness. *Ewer* v. *Ambrose*, 6 D. & R. 127; 4 B. & C. 25. So is an examined

By proof of declaration, &c.

It is a general rule, that whenever the credit of a witness is to be impeached by proof of anything that he has said or declared, or done in relation to the cause, he is first to be asked, upon cross-examination, whether he has said or declared (*k*), or done that which is intended to be proved. If the witness admit the words, declaration or act, proof on the other side becomes unnecessary, and an opportunity is afforded to the witness of giving such reasons, explanations or exculpations of his conduct, if any there be, as the circumstances may furnish; and thus the whole matter is brought before the Court at once, which is the most convenient course (*l*).

Inquiry previous to contradiction.

It is not enough to ask a witness (in order to found a contradiction) the general question whether he has ever said so and so, but he must be asked as to the time, place and person involved in the supposed contradiction (*m*).

If the witness deny the words, declaration or act imputed to him, then if it be not a matter collateral to the cause, witnesses may be called to contradict him (*n*).

The witness having been asked, on cross-examination, if he has not used particular expressions, in order to lay a foundation for contradicting him, upon his denial, the witness called to prove that he did use them, may be asked as to the particular words read from the brief (*o*).

If the witness decline to answer on account of the tendency of the question to criminate him, the adverse party is still at liberty to adduce the same proof (*p*). And the possibility that the witness may on that ground decline to answer affords no sufficient reason for not giving him the opportunity of answering with a view to explain the circumstances, and to exculpate himself (*q*). And it is of great importance that this opportunity should be thus afforded, not only for the reasons already suggested, but because such explanation, if not given in the first

office-copy of his deposition. *Highfield* v. *Peake*, 1 Mood. & Mal. C. 109. But a conviction before a magistrate, purporting to set out the deposition of a witness, is not sufficient evidence of his having made that deposition, for the purpose of contradicting him. *R.* v. *Howe*, 1 Camp. 461; 6 Esp. C. 125.

(*k*) The *Queen's case*, (2 B. & B. 300), on a question proposed to the Judges.

(*l*) By the Judges, in the *Queen's case*, 2 B. & B. 313.

(*m*) *Angus* v. *Smith*, 1 Mood. & Malk. C. 474.

(*n*) 2 B. & B. 313; and *supra*.

(*o*) *Edmonds* v. *Walter*, 3 Starkie's C. 8.

(*p*) The *Queen's case*, 2 B. & B 314.

(*q*) Ibid.

Inquiry from witness previous to contradiction.

instance, may be rendered impossible; for a witness who has been examined, and has no reason to suppose that his further attendance is requisite, often departs the Court, and may not be found or brought back until the trial be at end (*r*).

There is no distinction for these purposes between declarations made by the witness, and acts done by him which relate to the cause (*s*); in the one case as well as the other, an opportunity must be afforded the witness of explaining his conduct before evidence is adduced to impeach his credit by proof of the fact.

If the adverse counsel has omitted to lay such a foundation by previously interrogating the witness on the subject of those declarations, the Court will, of its own authority, call back the witness in order that the requisite previous questions may be put (*t*).

And even although the fact to be adduced in order to impeach the witness's testimony be not discovered until after the conclusion of the cross-examination, the rule still holds; and evidence cannot be given for the purpose of thus impeaching his testimony without previous examination of the witness, even although the witness should have departed the court, and cannot be brought back after the discovery has been made (*u*).

In order to impeach the credit of a witness for a defendant upon an information for assaulting revenue officers, by proving his previous testimony on an information before two magistrates against the same defendant for having smuggled goods in his possession, proof of the conviction containing the testimony of the witness is insufficient; it is necessary to prove it by the testimony of those who heard what was said (*x*).

The record of conviction is conclusive for the purpose for which it is intended, that is, to prove the condemnation; but it is no evidence to prove the testimony of the witnesses.

After proof in a criminal proceeding that the prosecutor has employed *A. B.*, an agent, to procure and examine witnesses in support of the charge, it is not competent to the defendant to examine a witness to prove that *A. B.*, who is not examined as a witness, had offered a bribe to give evidence upon the trial, or to bring papers with him belonging to the defendant; for the mere employment of an agent for the purpose of procuring and

(*r*) By the Judges, in the *Queen's case*, 2 B. & B. 314.

(*s*) The *Queen's case*, ibid.

(*t*) By the Judges, in the *Queen's case*, 2 B. & B. 314.

(*u*) The *Queen's case*, 2 B. & B. 212.

(*x*) *R.* v. *Howe*, 1 Camp. 491, cor. Lord Ellenborough.

examining witnesses is in itself an innocent, and in many cases a necessary act, and it is not to be presumed that the prosecutor directed the agent to use any unlawful means for the purpose; neither can any legitimate inference or conclusion be drawn from this fact against the credit and veracity of the witnesses who are examined; for it is not to be presumed, in the absence of all proof, that they were either parties to the illegal act, or privy to it, or to any act of the like nature (*y*).

Inquiry from witness previous to evidence to contradict him.

As upon an indictment for a conspiracy it is competent to the prosecutor to prove, in the first instance, the existence of a conspiracy by general evidence, without proving participation by the defendant (*z*), so it is competent to a defendant on a criminal charge, first to prove a conspiracy to suborn witnesses for the destruction of his defence, and afterwards to affect the prosecutor by proof of his participation (*a*), provided proof of such a conspiracy would afford a legitimate ground of defence (*b*).

A party cannot discredit the testimony of his own witness, or show his incompetency; for it would be unfair that he should have the benefit of the testimony if favourable, and be able to reject it if the contrary (*c*). Where, however, a party is under the necessity of calling a witness for the purpose of satisfying the formal proof which the law requires, he is not precluded from calling other witnesses who give contradictory testimony (*d*). And even where a witness by surprise gives evidence against the party who called him, that party will not be precluded from proving his case by other witnesses; for it would be contrary to justice that the treachery of a witness should exclude a party from establishing the truth by the aid of other testimony. Accordingly, where a plaintiff had called the servant of the defendant to prove a warranty of a horse upon which the action was founded, and the witness denied that he warranted the horse, the plaintiff was allowed to prove the fact by means of other witnesses (*e*).

A party not allowed to discredit his own witness.

(*y*) By the Judges, in the *Queen's case*, 2 B. & B. 302.

(*z*) Vol. II.; 2 B. & B. 303.

(*a*) The *Queen's case*, 2 B. & B. 303. 309.

(*b*) 2 B. & P. 311. But *qu.* in what cases proof of a crime committed by a prosecutor in so conspiring can afford any legal defence to a defendant.

(*c*) See also *Hastings's trial*, 2 Hawk. c. 46, s. 208, Leard's edition. B. N. P. 297. Nor can he object to the admissibility of evidence, after having allowed it to be given. *Webb* v. *Smith*, 1 Ry. & M. 206.

(*d*) As in the remarkable case of Mr. Jolliffe's will. See tit. WILL; and see *Alexander* v. *Gibson*, 2 Camp. 556.

(*e*) *Alexander* v. *Gibson*, 2 Camp. 556; and see *Richardson* v. *Allan*, 2 Starkie's C. 556. *Ewer* v. *Ambrose*, 3 B. & C. 746.

In the case of *Ewer* v. *Ambrose* (*f*) it was held, that where a witness called for the defendant, to prove a partnership between him and the defendant, denied the fact, an answer made by the witness in Chancery, in which he had stated the contrary, was not admissible, because its only effect would be to impeach the credibility of the witness; but it was held that it was competent to the defendant to prove the fact of partnership by other means.

Evidence in confirmation of witness.

A party cannot bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross-examination, or by the testimony of other witnesses (*g*); but if the character of a witness has been impeached, although upon cross-examination only, evidence on the other side may be given to support the character of the witness (*h*) by general evidence of good conduct.

Where the character of a witness is impeached by general evidence, the party who calls him is at liberty to examine the witnesses as to the grounds of their belief; and in all cases where the credit of a witness has been attacked, whether by general evidence, or by particular questions put upon cross-examination, it seems that the party who called him is at liberty to support his testimony by general evidence of good character (*i*). So if the character of the attesting witness to a deed or will, be impeached on the ground of fraud, evidence of his general good character is admissible (*k*). But mere contrariety between the testimonies of adverse witnesses, without any direct imputation of fraud on the part of either, supplies no ground for admitting general evidence as to character (*l*).

Where an attested document is disputed on the ground of fraud, and one of the attesting witnesses impeaches the credit of the other attesting witnesses, general evidence may be given of the good character of the latter, for the credit due to their attestation is put in issue by the evidence on the other side (*m*).

(*f*) 3 B. & C. 746.

(*g*) *Bishop of Durham* v. *Beaumont*, 1 Camp. 207. There the witnesses simply contradicted each other, and no fraud was imputed to either.

(*h*) *R.* v. *Clarke*, 2 Starkie's C. 241. Where the prosecutrix, upon an indictment for an attempt to commit a rape, having been cross-examined as to her having been sent to the house of correction on a charge of theft, evidence of her subsequent good conduct was admitted in support of the prosecution.

(*i*) See *R.* v. *Clarke*, 2 Starkie's C. 241.

(*k*) *Doe* d. *Walker* v. *Stephenson*, 3 Esp. C. 284; 1 Camp. C. 210; 4 Esp. C. 50.

(*l*) *Bishop of Durham* v. *Beaumont*, 1 Camp. 207.

(*m*) *Doe* v. *Stephenson*, 3 Esp. C. 284; 4 Esp. C. 50; 1 Camp. 210.

Evidence in confirmation.

It seems to be the better opinion that a witness cannot be confirmed by proof that he has given the same account before, even although it has been proved that he has given a different account, in order to impeach his veracity; for his mere declaration of the fact is not evidence. His having given a contrary account, although not upon oath, necessarily impeaches either his veracity or his memory; but his having asserted the same thing does not in general carry his credibility further than, nor so far as, his oath (*n*). But although such evidence be not generally admissible in confirmation of a witness, there may be many cases where under special circumstances it possibly might be admissible; as, for instance, in contradiction of evidence tending to show that the account was a fabrication of late date, and where consequently it becomes material to show that the same account had been given before its ultimate effect and operation, arising from a change of circumstances, could have been foreseen. So where an immediate account is given, or complaint made, by an individual, of a personal injury committed against him, the fact of making the complaint immediately, and before it is likely that anything should have been contrived and devised for the private advantage of the party, is admissible in evidence; as upon an indictment for a rape (*o*), or upon an action for a trespass and assault committed on the wife (*p*).

Where a register of baptism stated the child to be seven years of age at the time of baptism, it was held that the entry was no evidence to prove the age, on an issue to try whether the party was of age when he was arrested. But Bayley, J. expressed an opinion, that if it could have been shown that the entry had been made upon the representation of the mother, who was called as a witness for her son, in order to prove his minority, the fact would have been admissible to support her testimony upon its being impeached (*q*).

(*n*) B. N. P. 294. Buller, J. was clearly of opinion that such evidence was not admissible to support an unimpeached witness, and doubted whether it was evidence in reply. In the case of the Berkeley Peerage, Lord Redesdale held that, in general, declarations made by a witness at another time could not be examined into for the purpose of supporting his testimony; and he referred to a case where Lord C. J. Eyre rejected such evidence when offered for the prisoner in a case of forgery. See Phillips on Evidence, 230. On the other hand, see Gilb. Ev. 135; *Lutterel* v. *Raynell*, 1 Mod. 282; *Friend's case*, 4 St. Tr. 613.

(*o*) *R.* v. *Clarke*, 2 Starkie's R. 242; *Brazier's case*, East's P. C. 444.

(*p*) *Thompson and his Wife* v. *Trevanion*, Skinn. 402; 6 East, 193.

(*q*) *Wihen* v. *Law*, 3 Starkie's C. 63.

On appeal.

Unless there be some legislative provision to the contrary, it is no objection that a witness called to support the appellant's case before a court of appeal was not examined before the original court (*s*), even although the party who obtained the conviction is liable to double costs on a reversal of the conviction (*t*).

Proof of public documents in general.

WRITTEN INSTRUMENTS are, *first*, of a public nature; *secondly*, of a private nature; *thirdly*, of a mixed nature, partly public and partly private; *public* documents, again, are either judicial, or, *secondly*, not judicial; and with a view to their means of proof, they are either, *first*, of record; or, *secondly*, not of record. Before the admissibility and effect of public documents are considered, it will be convenient to consider *generally* the means by which public documents are to be procured and proved.

How procured.*

If the question be as to the existence or contents of a *record* in the same court, the trial is by inspection of the record itself. Where the disputed record is one of another court, the tenor may be obtained by means of a *certiorari* and *mittimus* out of Chancery (*u*); for it would be inconvenient to remove the original. Where the record of an inferior court is disputed in a superior court, the record itself, where it is necessary, and in other cases the tenor, may be removed by *certiorari* from the higher court (*x*). In criminal cases, where a prisoner pleads *auterfoits acquit*, he may remove the record by *certiorari*, if he be arraigned in the King's Bench (*y*). In other cases, he may remove the tenor of the record of acquittal into Chancery by *certiorari*, and either produce it in court with his own hands (*en poigne*), or procure it to be sent to the Justices *sub pede sigilli* (*z*). But the record in such case must be removed by writ, although the Justices may receive a record without writ, where it is to be proceeded on for the King (*a*).

(*s*) *R.* v. *Commissioners of Appeals*, 3 M. & S. 133. *Breedon* v. *Gill*, 1 Ld. Raym. 219; S. C. Salk. 555; 5 Mod. 271. The stat. 48 Geo. 3, c. 74, s. 15, upon convictions relating to malt, enacts that the same witnesses, and no other, shall be examined upon appeal. On a writ of attaint no other evidence can be given before the grand jury than that which was before given before the petit jury. But there the question is, whether the jury gave a false verdict on the evidence before them.

(*t*) Ibid.

(*u*) *Pitt* v. *Knight*, 1 Saund. 98; *Hewson* v. *Brown*, 2 Burr. 1034.

(*x*) 2 Atk. 317. *Guillium* v. *Hardy*, 1 Ld. Raym. 216.

(*y*) 20 Ed. 2, Coron. 232; Starkie's Crim. Pl. 300.

(*z*) 2 Hale, 242. 2 E. 3. 26, Coron. 150.

(*a*) 2 Hale, 242; 8 Ed. 4, 18; B. Coron. 218.

* See tit. INSPECTION and PUBLIC DOCUMENTS.

Proof of public documents by exemplification.

A record may be proved either, first, by *mere production*, without more; or secondly, by *copy*.

Copies of records are either *exemplifications*, or, *secondly*, copies made by an authorized officer; or, *thirdly*, sworn copies.

First, Exemplifications. These are, *first*, exemplifications under the great seal; or, *secondly*, under the seal of a particular court (*b*). The reason of admitting a copy to be evidence in such cases, is the inconvenience to the public of removing such documents, which may be wanted in two places at the same time (*c*). A record to be exemplified under the great seal must either be a record of the court of Chancery, which is the centre of all the courts, or must be removed thither by *certiorari* (*d*). Nothing but records can be given in evidence exemplified under the great seal, for these are presumed to be preserved by the Court free from erasure or interlineation, to which private deeds are subject (*e*), which are in the hands of private persons. Where any record is exemplified, the whole must be exemplified, for the construction must be gathered from the whole taken together (*f*). An exemplification under the broad seal is of itself a record of the greatest authenticity (*g*).

Exemplification under the seal of the court.

Secondly, Under the seal of the Court. The seals of the King's courts of justice are of public credit, and are part of the constitution of the courts, and supposed to be known to all (*h*); and this, whether the court has existed from time beyond memory, or has been recently created by act of parliament (*i*). But the seals of private courts and persons are not receivable in evidence, unless proved to be the seals of the respective courts or persons (*k*). In general the exemplification of any record under the seal of one of the King's courts of justice is sufficient (*l*). So is an exemplification of a commission and return under the seal of the

(*b*) Gil. Ev. 12.

(*c*) Bac. Ab. Ev. 620.

(*d*) Bac. Ab. Ev. F. B. N. P. 226. 3 Ins. 173. 10 Co. 93. a.

(*e*) B. N. P. 227. Bac. Ab. Ev. F. 3 Ins. 173. Gil. Ev. 12.

(*f*) 2 Ins. 273. Gil. Law Evid. 17. But this rule is to be taken with some restriction. Vide B. N. P. 217.

(*g*) Gil. L. E. 14. Bac. Ab. Ev. 610. Sid. 145. Hard. 118. Plowd. Comm. 411. (n).

(*h*) Gil. L. E. 17. 20. 10 Co. 93. a.

(*i*) Sid. 146. Gil. L. E. 20.

(*k*) Gil. L. E. 20; and therefore, formerly, it seems to have been the practice to deliver an exemplification under the seal of a court to a jury, but not to deliver a document under a private seal, because the authenticity of the latter depended upon a collateral oath. Gil. L. E. 17, 18, 19. The common seal of the city of London proves itself. *Doe* d. *Woodmas* v. *Mason*, 1 Esp. 53. *Olive* v. *Gwyn*, 2 Siderf. 145. S. C. Hardres, 118. Anon. 9 Mod. 66. Sed vide *Moises* v. *Thornton*, 8 T. R. 303.

(*l*) 10 Co. 93, a.

Exemplification under the seal of the court.

Exchequer (*m*), of a record of the great sessions in Wales, or in a county palatine, under the seal of the Court (*n*). Of the proceedings of the ecclesiastical courts (*o*). So is an exemplification of the pope's bull, under the seal of a bishop (*p*). Of the grant of administration with the will annexed, under the seal of the archbishop (*q*). So the exemplications of the enrolment of a fine or recovery in Wales, and in the counties palatine, under the appropriate judicial seals, are evidence of such fines and recoveries (*r*).

But the mere production of an exemplification under the seal of an university is not evidence, without further proof that a party is entitled to his degree (*s*); neither is the exemplification of the judgment or decree of any foreign court admissible without proof of the seal of the court (*t*). But if a foreign court has an official seal, it ought to be used for the purpose of authenticating its judgments; and no copy by any officer of the court will be considered as of authority in this country (*u*).

Copies by authorized officers.

Where the law entrusts a particular officer with the making of copies, it also gives credit to them in evidence without further proof, although a mere office copy by a person not so licensed is inadmissible (*x*). The chirograph of a fine is evidence of a fine itself, because the chirographer is an officer appointed by the law to make out such copies; but the chirograph is not evidence of the levying of a fine with proclamations, since the officer is not appointed to make copies of them (*y*). So a copy of a judgment made out, examined and indorsed by the clerk of the court, is not in itself evidence, for he is entrusted as to the keeping only of records, and not with the making out copies of them (*z*). So where a deed enrolled is lost, a copy of the enrolment by the clerk of assizes is not admissible in evidence, for he is empowered merely to authenticate the deed itself by enrolment, and not to make out copies of the enrolment (*a*).

(*m*) *Tooker* v. *the Duke of Beaufort*, Say. 297.

(*n*) Semb. Hard. 120.

(*o*) 1 Ford's MSS. 166.

(*p*) Hard. 118.

(*q*) *Kempton* v. *Cross*, 8 G. 2, B. R. H. 108, although it merely recite the fact.

(*r*) By the stat. 27 Eliz. c. 9, s. 8, they are of as great force as the record. *Olive* v. *Gwyn*, 2 Sid. 145.

(*s*) *Henry* v. *Adey*, 3 East. 221. Vide *infra*, JUDGMENTS, PROOF OF.

(*t*) *Moises* v. *Thornton*, 8 T. R. 303.

(*u*) *Black* v. *Lord Braybrooke*, 2 Starkie's C. 7; and *Appleton* v. *Lord Braybrooke*, ibid.

(*x*) Bac. Ab. Ev. F. B. N. P. 229.

(*y*) B. N. P. 229, 230. Com. 409, b. Com. Dig. Ev. A. (2). *Chettle* v. *Pound*, Trin. Ass. 1700. Bac. Ab. Ev. F.

(*z*) Bac. Ab. Ev. 612, F.

(*a*) Bac. Ab. Ev. F.; and see *Appleton* v. *Lord Braybrooke*, 2 Starkie's

Proof by office copy.

Office copies of judicial proceedings, that is, copies made by the known officers of the court, seem to be admissible for particular purposes in the same but not in other courts (*b*). With respect to causes depending in Chancery, it is said that office copies are the very records of the court, and prove themselves, and that no other copy can be produced therein (*c*); but such copies are not admissible in other courts (*d*).

Proof of public document by a sworn copy.

Thirdly, Not only records, but all public documents which cannot be removed from one place to another, may be proved by means of a copy proved on oath to have been examined with the original. This is to be considered as a deviation from the general rule, that the best evidence must always be produced, for the sake of public convenience. All judicial proceedings, whether in British or in foreign courts (*e*), may be proved by means of a sworn copy, although it be not an office copy (*f*); and whether the court be a court of record (*g*), or otherwise. The proceedings by English bill in Chancery are not records, and may themselves be given in evidence (*h*), or may be proved by means of examined copies (*i*).

But upon an indictment for perjury, assigned upon an answer

R. 6; and *Black* v. *Lord Braybrooke*, 2 Starkie's C. 7.

(*b*) In general, an office-copy is admissible in evidence in the same court and in the same cause, but not in a different cause, though in the same court. Per Lord Mansfield in *Denn* v. *Fulford*, Burr. 1177.

(*c*) *Denn* v. *Fulford*, Burr. 1177.

(*d*) Bl. 289. *Black* v. *Lord Braybrooke*, 2 Starkie's C. 7.

(*e*) *Appleton* v. *Lord Braybrooke*, 2 Starkie's C. 6. 6 M. & S. 34. In an action on judgments recovered in the supreme court of Jamaica, the plaintiff produced merely paper writings, purporting to be copies of the judgments, subscribed "true copy," and signed "*F. S.* clerk;" to which were annexed several certificates: first, of *F. S.* under his hand and seal of office, certifying that the above were true copies of the original judgments of record in his office, and that the same were still unsatisfied; secondly, a certificate of *R. R.*, described as secretary and notary public, certifying that *F. S.* was an accredited clerk, &c; the third, from the Governor-general, under the seal of the island, certifying that *R. R.* was secretary, &c., and that to all acts, &c. signed by him, credit was to be given: the evidence was held to be insufficient, without proving the copies to have been actually examined; the seal of the island not being affixed to the copy to give it the force of an exemplification, but only to authenticate the person certifying to be a person to whom credit was to be given. So, where the copy was proved to be in the hand-writing of one who acted and signed official documents for the principal clerk. *Black* v. *Lord Braybrooke*, 6 M. & S. 39. 2 Starkie's C. 7.

(*f*) *Denn* v. *Fulford*, Burr. 1177. Hard. 119. Gil. L. Ev. 9.

(*g*) B. N. B. 226.

(*h*) Bac. Ab. Ev. 620.

(*i*) Bac. Ab. Ev. F. 623. 3 Mod. 116.

Sworn copy.

in Chancery, the original must be produced (*k*). And also, where a voluntary affidavit has been made by a party, which has no relation to a proceeding in a court of justice, to make it evidence against the party the original must be produced (*l*). Where a will remains in Chancery by order of the court, a copy of it is evidence, because it becomes a roll of the court (*m*).

The copy must be one of a complete record, for until it become a permanent record it is transferable, and the reason for admitting a copy to be evidence does not apply (*n*). Consequently a sworn copy of a judgment in paper, although signed by the master, upon which judgment might be taken out, is not admissible (*o*). And the copy should be of the whole record, or of so much at least as concerns the matter in question (*p*).

A book published by authority in a foreign country as a regular copy of treaties concluded by the State, is not evidence without proving it to have been compared with the original archives (*q*).

Sworn copy when admissible.

It is a general rule, that whenever the original is of a public nature, a sworn copy is admissible in evidence. And that whenever the thing to be proved would require no collateral proof upon its production, it is proveable by a copy (*r*). And that, conversely, where the document when produced would require support from collateral proof, a copy of it is not admissible. And therefore, where an application was made that an examination before a magistrate might be produced upon the trial of a cause, it was ordered, because the examination itself, if produced, would not in itself be evidence, without proof of the hand-writing of the party (*s*).

Sworn copies of the following documents have been received in evidence:

Of a bank-note filed at the Bank (*t*).

(*k*) Ibid.; for the identity of the defendant must be proved.

(*l*) *Chambers* v. *Robinson*, Trin. 12 Geo. 1. B. N. P. 238. Bac. Ab. Ev. 623.

(*m*) Keb. 40. 117. Gil. L. E. 276. Bac. Ab. Ev. F. 632.

(*n*) Bac. Ab. Ev. F. 610.

(*o*) Ibid. So to prove a bill of indictment to have been found, it is necessary to show a record with a complete caption. *R.* v. *Smith*, 8 B. & C. 341.

(*p*) Tri. P. P. 166. 3 Inst. 173.

(*q*) *Richardson* v. *Anderson*, 1 Camp. C. 65.

(*r*) Ld. Raym. 154; Str. 126; 3 Salk. 153.

(*s*) *R.* v. *Smith*, Str. 126.

(*t*) *Man* v. *Cary*, 3 Salk. 155; 12 Vin. Ab. 97. 99. To prove a transfer of stock, a copy from the Bank books must be produced; the testimony of the broker who effected the transfer, is insufficient. *Breton* v. *Cope*, *executor*, Peake, 30; and see Douglas,

Of transfer-books of the East India Company (*u*). Copy when admissible.
Of the books of the city of London (*x*).
Of court-rolls (*y*) under the hand of the steward.
Of the journals of both Houses of Parliament (*z*).
Of the minute-books of the House of Lords (*a*).
Of an agreement, from a book in the Bodleian library, from which books cannot be removed (*b*).
Of the probate of a will relating to personalty (*c*).
Of a parish-register (*d*).
Of a poll-book at an election (*e*).
Of a public book in one of the universities (*f*).
Of entries in the council-book in the secretary of state's office (*g*).
Of the enrolment-book in which leases are registered in the bishopric of Durham (*h*).

Although for the sake of public convenience, the copy of a public document is admitted in evidence as an original, a copy of a copy is of no weight whatsoever, since it is one step farther removed from the original (*i*).

The copy must be proved by one who swears that he has compared it with the original (*k*), taken from the proper place of deposit. Before a document can be read as a copy of a record, it must be proved that the original either came out of the hands of the officer of the court, or from the proper place of depositing the

572, n. 3. 593, n. Such copies are direct evidence; and the Court, for the sake of example, would not allow the books themselves to be read. *Marsh* v. *Collnett*, 2 Esp. 665.

(*a*) Doug. 572; 1 Str. 646. So have books of assessments by the commissioners of land-tax, 2 T. R. 234; and of excise, ib. and Carth. 346.

(*x*) 2 Str. 954, 955.

(*y*) Doug. 572. 163; Com. 337; 12 Mod. 24.

(*z*) Doug. 593; Cowp. 17; Str. 126.

(*a*) 1 Cowp. 17.

(*b*) Bun. 191. *Doumes* v. *Moreman*, 2 Gwill. 659; this, however, was considered as an indulgence under the particular circumstances of the case.

(*c*) 3 Salk. 154. *Hoe* v. *Nettlethorpe*, 1 L. Raym. 154.

(*d*) *May* v. *May*, 3 Salk. 154; ib. 281; 10 State Tr. 250; Str. 1073.

(*e*) Qu. 1 Str. 307.

(*f*) *Semble*, 8 T. R. 307.

(*g*) *Eyre* v. *Palsgrave*, 2 Camp. 606.

(*h*) *Humble* v. *Hunt*, Holt's C. 601.

(*i*) Gil. L. E. 9; and see Locke's Essay on the Understanding, 2d vol. 283.

(*k*) Bac. Ab. Ev. F.; Str. 401; L. Ev. 104; Mod. 4. 94. 144. 266; 2 Keb. 31. 546; 3 Keb. 1, 2. 477; 5 Mod. 211. 386; 6 Mod. 225. 248; 10 Co. 92.

records of the court of which it purports to be a record, and the contents of the document itself cannot be referred to in support of such proof (*l*).

Copy not admissible where the original is produced.

A copy is never admissible where the original is produced (*m*). A copy of an entry in a *customal* being offered in evidence against a corporation, was rejected on production of the original (*n*).

Record, &c. how proved when lost.

Where a record has been lost, a copy may in some instances be read in evidence without proof upon oath that it is a true copy (*o*). But to warrant such evidence the document must be according to the rule of civil law, *vetustate temporis aut judiciariâ cognitione roborata* (*p*). A copy of a decree of tithes has, it is said, been often given in evidence in London, without proving it to be a true copy, the original having been lost (*q*). So the exemplification of a recovery of lands in ancient demesne, where the original was lost, and possession had gone a long time with the recovery, was admitted in evidence (*r*). So where it appeared that the records of the city of Bristol had been burned, an exemplification of a recovery, under the town-seal, of houses in Bristol, was allowed in evidence (*s*).

Upon an ejectment brought for the recovery of a rectory, to which a recusant had presented, it was held, that the record of the conviction, which had been burned, might be proved by estreats in the Exchequer (*t*) and an inquisition of the recusant's lands returned there. So in trover, if a *fieri facias* or *venditioni exponas* be lost (*u*), other evidence is admissible; so also if a recovery in ancient demesne be lost, and the roll cannot be found, it may be proved by the oral testimony of witnesses, where the possession has gone accordingly (*x*). So where the question of

(*l*) *Adamthwaite* v. *Singe*, 1 Starkie's C. 183.

(*m*) 10 St. Tr. App. 137.

(*n*) Ibid.

(*o*) Vent. 257; Sty. Pr. Reg. 205; 1 Mod. 117; Salk. 285; Gilb. L. E. 89, pl. 18. Bac. Ab. Ev. F.

(*p*) Dig. 292; 1 Mod. 117.

(*q*) 1 Vent. 257.

(*r*) In *Green* v. *Proud*, 1 Mod. 117, the exemplification of a recovery of lands in the Marquis of Winchester's court, in ancient demesne, was admitted in evidence, although it was not proved that it was a true copy. And the reason given was, because it was ancient; and Lord Hale said, that he recollected a case where one had got a presentation to the parsonage of Gosnall in Lincolnshire, and brought a *quare impedit*, and the defendant pleaded an appropriation; there was no license of appropriation produced, but the Court said they would intend it.

(*s*) 1 Mod. 117.

(*t*) *Knight* v. *Dauler*, Hard. 323; 1 Salk. 285.

(*u*) Hard. 323; Al. 18.

(*x*) 1 Vent. 257; 2 Str. 1129; 2 Burr. 1072; 4 T. R. 514.

appropriation is in issue, and the king's license has been lost, the issue may be proved by other evidence (*y*).

Public documents not judicial. Admissibility of.

Documents of a public nature, and of public authority, are generally admissible in evidence although their authenticity is not confirmed by the usual and ordinary tests of truth, the obligation of an oath, and the power of cross-examining the parties on whose authority the truth of the document depends. The extraordinary degree of confidence thus reposed in such documents is founded principally upon the circumstance that they have been made by authorized and accredited agents appointed for the purpose, and also partly on the publicity of the subject-matter to which they relate, and in some instances upon their antiquity. Where particular facts are inquired into and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials, are in fact the agents of all the individuals who compose the Public; and every member of the community may be supposed to be privy to the investigation. On the ground, therefore, of the credit due to the agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence, and it is not requisite that they should be confirmed and sanctioned by the ordinary tests of truth; in addition to this, it would not only be difficult, but often utterly impossible to prove facts of a public nature by means of actual witnesses examined upon oath; such, for example, as the passing of particular Acts of Parliament, and the making of public surveys (*z*).

Acts of Parliament—public.

The Acts of the Legislature are records written on the rolls of Parliament, and are of the highest and most absolute proof. They are either *public* or *private*. They are public or general Acts when they do or may concern the kingdom at large; they are private when they relate to a particular class of men, or to individuals only: of the former class, are Acts which concern the king, all lords of manors, or all officers generally, or all spiritual persons, all traders (*a*); of the latter, are Acts relating to the nobility only, or to particular persons or trades (*b*).

(*y*) Hard. 323.

(*z*) See further as to the principles on which public documents are admissible, *supra*.

(*a*) It seems that the distinction between public and private Acts was not observed before the reign of Richard 3d. See preface to the new edition of the statutes at large.

(*b*) If a private statute be recognized by a public Act, it will afterwards be judicially noticed; as the statute of bail-bonds, 23 H. 6, c. 9; which, at all events, became a public

Public Act of Parliament.

A *public* statute requires no proof; and where it is necessary to refer to one, a copy is not given in evidence, but merely referred to, as it were, to refresh the memory (*d*). Where a statute is not in express terms made a public statute, it is still such with a view to evidence, if it be of a general and public nature, affecting all the king's subjects; and therefore it has been ruled at the assizes, that a statute, as far as it related to a public highway, was to be considered as a public statute (*e*). So it is said that the Act of Bedford Levels, and that for rebuilding Tiverton, are, from the publicity of the subject-matter, public Acts; and that a printed copy may be given in evidence (*f*). On the other hand, an Act of Parliament, private in its nature, is not made admissible in evidence against strangers, by the general clause declaring it a public Act, which only applies to the forms of pleading, and not to vary the general nature and operation of the Act. A power in an Act to levy tolls on all persons using a particular navigation, is not sufficient to make it a public Act as against strangers (*g*).

Private Act of Parliament.

Where an Act of Parliament is of a *private* nature, proof of it is necessary; for although every man is bound to take notice of all

statute when the statute 4 & 5 Ann. c. 16, s. 20, made the bond assignable. *Samuel* v. *Evans*, 2 T. R. 575. *Sarby* v. *Kirkus*, B. N. P. 224.

(*d*) A printed statute-book is evidence of a public statute, not as an authentic copy of the record itself, but as hints of that which is supposed to be lodged in every man's mind already. Gil. L. E. 12; 2 Salk. 566; 10 Mod. 126. 216; Bac. Ab. Ev. F. The Courts take notice of all public Acts of Parliament, and it is unnecessary to plead them; but private Acts must be specially pleaded. Bul. Ni. Pri. 152. *Lord Bernard* v. *Saul*, 1 Str. 498; Ld. Raym. 89. But although public Acts will be noticed by the Court when the party insists upon them by way of defence, the defence itself must be pleaded. As, where a defendant means to insist upon the statute of limitations, or the statute of usury; unless he plead the defence specially, he cannot rely upon the statute of limitations in evidence under the plea of the general issue in *assumpsit*, nor upon the statute of usury upon the plea of *non est factum* to a declaration upon a bond. B. N. P. 232. See tit. DEBT—DEED—PENAL ACTION—USURY—HIGHWAY.

(*e*) By Chambre, J. MS. C. But a private Act that concerned Rochester Bridge, though printed by Rastal, was not allowed in evidence. L. E. 89, pl. 14, tam. qu. A private inclosure Act, containing clauses respecting public highways, is, as to those cluses, a public Act. *R.* v. *Utterby*, Lincoln Sp. Ass. 1828. Lord C. B. Parker permitted the printed statute concerning the College of Physicians to be read from the printed statute-book, printed by the king's printer. Gil. Law Ev. 10. 13.

(*f*) B. N. P. 225, per Holt, C. J.; 12 Mod. 216. See Pothier by Evans, vol. 2, p. 152.

(*g*) *Brett* v. *Beales*, 1 M. & M. 417.

Acts which concern the kingdom at large, he is not presumed to be cognizant of those which merely concern the private rights of another (*h*). The usual proof is by means of a copy proved upon oath to have been examined with the parliament roll. It may also be proved by means of an exemplification under the great seal (*i*).

Act of Parliament, how proved.

In some cases it is directed, that a copy printed by the king's printer shall be admitted in evidence; and then it seems that the production of a copy purporting to have been so printed is sufficient (*k*).

Where a party appealed against the act done by another under a private statute, it was held that the appellant was not bound to prove an examined copy of the roll, and that a printed copy was sufficient (*l*).

Irish statutes.

By the statute 41 Geo. 3, c. 90, s. 9, copies of the statutes of Great Britain and Ireland prior to the Union, printed by the printer duly authorized, shall be received (mutually) as conclusive evidence of the several statutes in the courts of either kingdom.

Recitals in Acts of Parliament.

The recital in the preamble of a public Act of Parliament of a public fact, is evidence to prove the existence of that fact. Where an information for a libel alleged that outrages had been committed in particular parts of the kingdom, the preamble of a public Act reciting the fact was held to be admissible evidence to support the averment: for every subject is, in contemplation of law, privy to the making of such an Act (*m*).

Acts of state—Gazette.

Acts of state may be proved by a production of the official printed document authorized by Government. The Gazette (*n*) is evidence of all acts of state, and of everything done by the

(*h*) Bac. Ab. Ev. F.; Gil. L. Ev. 13; In the case of *The College of Physicians* v. *West*, 10 Mod. 353, L. C. J. Parker is said to have admitted the printed statute to be evidence of a private Act of Parliament touching the interests of the college. But see Lord Raym. 472.

(*i*) See tit. EXEMPLIFICATION.

(*k*) Upon *nul tiel* record, pleaded to the Composition Act, Holt, C. J. held, that a copy printed by the king's printer was not sufficient, and that an exemplification was necessary; but said, that an Act printed by the king's printer was always good evidence before a jury. Anon. 2 Salk. 566. Where an indictment sets out the title of an old statute (5 Eliz. cap. 4), agreeably to Ruffhead, which differs from a copy of the Act lately printed by the King's printer, the Court refused to direct an acquittal without proof of an examination of the parliament roll. *Rex* v. *Barnitt*, 3 Camp. 344. Ellenborough, C. J. 1813.

(*l*) *R.* v. *Shaw*, 12 East, 479.

(*m*) *R.* v. *Sutton*, 4 M. & S. 532.

(*n*) A gazette purporting to be printed by the King's printer, must be taken to be the London Gazette. *R.* v. *Holt*, 5 T. R. 439.

Gazette.

king in his regal capacity, as to prove an averment that divers addresses had been presented to the king (*o*); for having been received by the king in his public capacity, they become acts of state. So the Gazette is evidence to prove the king's *proclamation*, as for performance of quarantine. So the printed proclamation of peace is evidence, without examination with the parliament roll (*p*). And it was held, that a proclamation for the discovery of certain offenders, which recited that outrages had been committed in certain districts, was evidence to satisfy an averment, in an information for a libel, that such outrages had been so committed (*q*). So the articles of war, published by the king's printer, are evidence of such articles (*r*). The proclamation for reprisals in the Gazette is evidence of an existing war (*s*).

But the Gazette is not evidence to prove a particular military appointment (*t*), nor to prove particular facts between individuals, and therefore it is not evidence in an action to prove the appointment of one of the parties to a commission in the army, unless (at least) the adversary refuse to produce the commission, which is the best evidence (*u*). But it is evidence, as a medium to prove *notices*; as of the dissolution of a partnership, which is a fact usually notified in that manner (*x*). But without proof that the

(*o*) *R.* v. *Holt*, 5 T. R. 436. The king's proclamation is not noticed by the Court without the production of the Gazette. *Van Omeron* v. *Dowick*, 2 Camp. 44; 12 Vin. Ab. 129; *Dupays* v. *Shepherd*, 12 Mod. 216. In a prosecution for murder, the articles of war ought to be produced to show how far the prisoner was bound to obedience to the deceased, who was his serjeant. Ibid. In the case of the *Attorney-General* v. *Theakstone*, 8 Price 89, it was held that the Gazette was sufficient evidence of a proclamation issued by the council, because it is a public act regarding the Crown and the government, and must pass the great seal before it can be admitted into the Gazette. In *General Picton's case*, Howell's St. Tr. 493, the Gazette was admitted to prove the articles of capitulation for the surrender of an island.

(*p*) Bac. Ab. Ev. F. Doug. 594, in n. B. N. P. 226. Ca. K. B. 216. *Quelch's case*, 8 State Tr. 212.

(*q*) *R.* v. *Sutton*, 4 M. & S. 540.

(*r*) *R.* v. *Withers*, cited by Buller, J. 5 T. R. 546, as the opinion of the Judges. See above, note (*o*).

(*s*) Fost. C. L. c. 2, s. 12. Public notoriety is, it is said, sufficient evidence of the existence of a war; ib. and 11 Ves. 292; and a declaration of war by a foreign government, transmitted by the English ambassador, and produced from the secretary of state's office, is evidence of the commencement of war with a foreign state. *Thellusson* v. *Gosling*, 4 Esp. C. 266; and see 1 Dodson Ad. R. 244. Documents transmitted by British consuls, stating the arrival of vessels at particular ports, are not evidence. *Roberts, et alt.* v. *Eddington*, 4 Esp. C. 88. And see *Waldron* v. *Coombe*, 3 Taunt. 162.

(*t*) *R.* v. *Gardner*, 2 Camp. 513.

(*u*) *Kirwan* v. *Cockburn*, 5 Esp. 233. S. P. *R.* v. *Gardner*, 2 Camp. 513.

(*x*) *Leeson* v. *Holt*, 1 Starkie's C. 186. *Graham* v. *Hope*, Peake's C. 154. *Godfrey* v. *Macauley*, Peake's

party to be affected by the notice read the particular Gazette in which it is contained, such evidence is very weak (*y*). And it seems to be incumbent on those who dissolve partnership to give special notice of it to those with whom they have had dealings (*z*). Notices of bankruptcies in Gazettes are made sufficient by express legislative provisions.

Journals of the Lords and Commons.

The journals of the House of Lords have always been admitted as evidence of their proceedings even in criminal cases (*a*); and the journals of the House of Commons are also admissible for the same purpose, but this was once doubted, because they are not records (*b*). An unstamped copy of the minutes of the reversal of a judgment in the House of Lords, without more of the proceedings, is evidence of the reversal (*c*). The journals of the House of Lords are evidence to prove an address of the house to the king, and his answer (*d*), in order to support an averment in an information, that certain differences had existed between the king of England and the king of Spain. But the journals are not evidence of particular facts stated in the resolutions, which are not a part of the *proceedings*, of the house. Upon the indictment of Oates for perjury, a resolution of the House of Commons of the existence of a popish plot was rejected as evidence of the fact (*e*). In Knollys's case it was held, that, upon a plea in abatement that the party was a peer, a replication was bad, which alleged that the peerage had been disallowed by the Lords (*f*).

Public Acts of the Crown.

All public acts done by the Crown affecting the possessions and revenues of the Crown, are to be considered as public Acts, and are admissible in evidence as such. An enrolment of a lease of lands belonging to the Crown in right of the duchy of Lancaster is admissible (*g*), on account of the interest of the Crown in the duchy of Cornwall and its revenues.

A caption of seisin taken to the use of the first duke by persons assigned by his letters patent for that purpose, was held

C. 155, n. *Gorham* v. *Thompson*, Peake's C. 42.

(*y*) 1 Starkie's C. 186. See PARTNERSHIP.

(*z*) 1 Esp. N. P. C. 171. *Gorham* v. *Thompson*, Peake's N. P. C. 42. *Jenkins* v. *Blizard*, 1 Starkie's C. 418.

(*a*) See *Jones* v. *Randall*, Cowp. 17.

(*b*) Ibid.

(*c*) Ibid.

(*d*) *Franklin's case*, 9 State Tr. 259, cited by Buller, J. 5 T. R. 465. And see 4 State Tr. 376. 445. Doug. 572.

(*e*) *R.* v. *Oates*, 4 State Tr. 39.

(*f*) 2 Salk, 509.

(*g*) *Kinnersley* v. *Orpe*, Doug. 56.

Public Acts of the Crown.

admissible as a public Act in evidence to show the rights of the duchy (*h*).

A book in which leases were enrolled and kept in the custody of the auditor of the bishop of Durham, (who is a patent officer within the county palatine), is a public muniment. And therefore where search had been ineffectually made for an original lease and the counterpart to a lessee under the bishop, it was held that such book was admissible as secondary evidence of such lease (*i*).

Ancient surveys under authority.

Ancient surveys, taken under authority, are also evidence. *Domesday-book* was a survey made of the king's lands in the time of William the Conqueror; and when a question arises whether a particular manor be of ancient demesne or not, that is, of the socage tenures which were in the hands of Edward the Confessor, the trial is by inspection of Domesday-book, which is preserved in the Exchequer (*k*). In the Exchequer also is another ancient survey, which ascertains the extent of the king's ports (*l*). The *valor beneficiorum*, a valuation of the profits of spiritual preferment, made under a commission from pope Nicholas III. A. D. 1292, is still preserved in the Exchequer, in the office of the king's remembrancer. In applying the restrictive clause in the statute 21 Hen. 8, concerning pluralities, and the exemptions from it, to college livings, their value is ascertained by this survey (*m*). When the first-fruits and tenths, on the abolition of the papal power, were annexed to the Crown, a new *valor beneficiorum* was made, by which the clergy are at present rated (*n*). A survey, dated 1563, from the First-

(*h*) *Rowe* v. *Brenton*, 8 B. & C. 743. And the same rules are applicable whether the lands and revenues are at any particular time vested in the duke of Cornwall or the King. Held therefore, that as the enrolment of a lease in the duchy office would be good evidence of a lease if the Crown alone were interested, it was equally so in the case of a lease by the Duke. Ibid. 756.

(*i*) *Humble* v. *Hunt*, Holt's C. 601. A book produced from the chapter-house of the dean, &c. of S., kept by the chapter clerk, and purporting to contain copies of leases, &c. granted by the dean, &c. held to be in the nature of a public document, and admitted in evidence to prove reputation as to boundary of a parish. *Coombs* v. *Wether*, 1 M. & M. 398. And see *Humble* v. *Hunt*, Holt's C. 601.

(*k*) Hob. 188; Gil. Ev. 78, 2d ed. Trial per Pais, 342; Bac. Ab. Ev. 633. A very faithful copy of this document has lately been printed by Government.

(*l*) Gil. Ev. 78; Bac. Ab. Ev. F.

(*m*) 2 Lut. 1305; 1 Cro. Car. 445; 2 Gwill. 536. First Report of the House of Commons on Public Records.

(*n*) 1 Comm. 285. This *valor beneficiorum* is commonly called the king's books, a transcript of which is given in Bacon's Liber Regis, and in Ecton's Thesaurus.

fruits office, of the possessions of the nunnery of St. Mary without the walls of York, was admitted to prove a vicar's right to certain tithes, although the original commission was lost (*o*). Parliamentary surveys under the Commonwealth are also admissible (*p*); and where the originals have been lost, as many were at the time of the great fire of London, copies of them, taken from unsuspected repositories, have also been admitted (*q*). So great is the reputed accuracy of these surveys, that their silence as to an alleged modus has been considered to be strong evidence against its existence (*r*). On the same ground an inquisition taken in 1730, by the direction of the House of Commons, has been received as conclusive evidence of the tenure and fees of the different offices to which it relates (*s*). And, as it seems, upon the same principle, inquisitions under public commissions, but of limited extent, have also been received, as in the case of *Tooker* v. *The Duke of Beaufort* (*t*), where it was held that a return to a commission out of the Exchequer, in the reign of Elizabeth, to inquire whether the prior of St. Swithin, or the Crown, after the dissolution of the priory, were seised of certain lands, was evidence. So in the case of *Doe* v. *Harcourt* (*u*), it was held that a survey of lands, belonging to the prebend of the Moor of St. Paul's, was admissible evidence against the lessees of the prebendary.

Ancient surveys under authority.

An ancient extent of crown lands, produced from the proper place of deposit (the lord treasurer's remembrancer's office), purporting to have been taken by the steward of the king's lands, and following in its construction the stat. 4 Edw. 1, was held to be admissible, on the presumption that it had been taken under proper authority, although the commission could not be found (*v*).

Similar to these in their nature, but differing in point of authority, are old terriers, or surveys, whether ecclesiastical or temporal, which are admissible to prove old tenures or boundaries (*w*).

Terriers.

(*o*) *Kellington* v. *Master, &c. of Trinity College, Cambridge*, 1 Wils. 170. *Underhill* v. *Durham*, 2 Gwill. 542.

(*p*) *Blundell* v. *Thompson*, 1 M. & S. 292; 11 East, 284.

(*q*) *Underhill* v. *Durham*, 2 Gwill. 542; 4 Dow. 325. *Green* v. *Proude*, 1 Mod. 117.

(*r*) 1 M. & S. 292; 11 East, 284.

(*s*) *Green* v. *Hewitt*, Peake's N. P. C. 182; Peake's Ev. 87, 3d ed.

(*t*) Burr. 148.

(*u*) Peake's Ev. 84.

(*v*) *Rowe* v. *Brenton*, 8 B. & C. 747.

(*w*) B. N. P. 248; Bac. Ab. Ev. F. Gil. Ev. 78, 79. *Chapman* v. *Cowlan*, 13 East, 10. An unsigned map, or terrier, is not evidence. *Earl, clerk,*

Terriers.

Such boundaries are artificial and arbitrary, and cannot be established by the testimony of eye-witnesses; in such cases, therefore, unless surveys of antiquity and of authority were admissible, all evidence would frequently be excluded. It is however necessary to clothe such evidence with *some authority*, in order to distinguish it from the mere inaccurate description made by a stranger (*x*) for purposes unknown. Ecclesiastical terriers, which contain a detail of the temporal possessions of the church in every parish, are made by virtue of an ecclesiastical canon (*y*), which directs them to be kept in the bishop's registry, and it is not unusual to deposit a copy in the chest of the parish church. These being made under authority are admissible evidence as a species of ecclesiastical memorials or records of the possessions of the church, and are as strong in their nature as any that can be adduced for such purposes (*z*).

Proof as to place of deposit.

It is, in general, essential to the reception of ancient instruments of this kind, and indeed of all others, whether they be of a public or private nature, such as public surveys, inquisitions, or ancient deeds, that the authority of the document should be established by the only kind of proof of which it is in general capable; that is, by proof that it came out of the proper repository. A document, purporting to be an endowment by a bishop, but without his seal, and an *inspeximus* of the bishop under his seal, were rejected, because they came out of the hands of a mere private person (*a*). In the case of *Michell* v. *Rabbetts* (*b*), it was held that an ancient grant to an abbey, in a manuscript, intitled, "*Secretum Abbatis*," kept in the Bodleian library at Oxford, was inadmissible, for want of proof of proper custody. On this authority also, it was held, by Lawrence, J. that an ancient grant to a priory, found amongst the Cottonian Manuscripts in the British Museum, without proof of connection between the possession of the grant, and an interest in the estate (*c*), could not be received in evidence.

Papers delivered by the son of a deceased rector to the suc-

v. *Lewis*, 4 Esp. C. 1. Though it purport to have been taken by competent authority, and have been generally received as authentic. *Pollard* v. *Scott*, Peake, 18, cor. Lord Kenyon. And see *Atkins* v. *Watson*, 2 Anst. 386. *Lygon* v. *Strutt*, ib. 601.

(*x*) See the principle, *supra*.

(*y*) 87th.

(*z*) 3 Price, 380.

(*a*) *Potts* v. *Durant*, 4 Gwill. 1453.

(*b*) Cited 3 Taunt. 91.

(*c*) *Swinnerton* v. *Marquis of Stafford*, 3 Taunt. 91. *Earl* v. *Lewis*, 4 Esp. C. 1. So it must be proved that records, when produced, came out of the proper custody. 1 Starkie's C. 183.

cessor's attorney, as old parish documents, are sufficiently identified by the attorney without calling the son (*d*). Proof as to place of deposit.

An ancient extent of crown lands found in the proper office, and purporting to have been taken by a steward of the king's lands, and following in its construction the directions of the stat. 4 Ed. 1, will be presumed to have been taken under proper authority, although the original commission cannot be found (*e*).

To show the authenticity of ecclesiastical terriers, it must be proved that they were found in the proper repository, the bishop's registry, or that of the archdeacon of the diocese (*f*). As against a prebendary of Lichfield, a terrier found in the registry of the dean and chapter of Lichfield was held to be admissible (*g*), on the ground that the terrier was sufficiently connected with the place in which it was found, and because it was found annexed to an old and nearly cotemporary lease (*h*). But one found in the charter-chest of Trinity College, Cambridge, which had property in the parish, was held to be inadmissible (*i*). A terrier is *always* strong evidence *against* the parson, but not for him, unless it has been signed by the churchwardens also, or (if they be nominated by him) by some of the substantial inhabitants, without which it deserves (it is said) little credit (*k*). A terrier imperfect, because it has not been signed by the vicar, is still admissible (*l*). Upon a question of title between the vicar and rector, a terrier, signed by the churchwardens, but not by the vicar, was held to be not only admissible, but to be even stronger evidence for the successor than if it had been signed by the vicar for the time being; and it was held to be no objection, that it was not signed by any one who claimed under the rector (*m*). Old terriers, signed by the rector, churchwardens, overseers and some of the resident parishioners, were held to be good evidence for the rector, to rebut the presumption of a *farm-modus* which was attempted to be established, although such terriers were not proved to have been signed by any person interested in the farm (*n*).

(*d*) *Earl* v. *Lewis*, 4 Esp. C. 1.

(*e*) *Rowe* v. *Brenton*, 8 B. & C. 737.

(*f*) *Atkins* v. *Hutton*, 2 Anstr. 386. *Miller* v. *Foster*, ibid. 387, in not. 4 Gwill. 1406. 1593.

(*g*) *Miller* v. *Foster*, 2 Anstr. 287, in note.

(*h*) 4 Gwill. 1453.

(*i*) *Miller* v. *Foster*, 2 Anstr. 416, in note. 4 Gwill. 1406.

(*k*) B. N. P. 248. *Earl* v. *Lewis*, 4 Esp. c. 1.

(*l*) 4 Gwill. 1615.

(*m*) *Illingworth* v. *Leigh*, 4 Gwill. 1615.

(*n*) *Mytton* v. *Harris*, 3 Price, 19. Wood, B. *dissentiente*. He agreed that, as to such terriers as affected the parish generally, it would be sufficient if they were signed by any of the parishioners; but held that their signing a terrier would not make it admissible to affect a farm-modus.

Public licenses—grants and certificates.

The king's sign-manual, authorizing the release of a prisoner, is evidence to prove the legality of his being at large (*o*).

The license of the pope, during his supremacy in this kingdom, is evidence of an impropriation (*p*). So his bull has been admitted to show that lands belonging to a monastery were discharged of tithes at the time of the dissolution (*q*). But it is said that a copy of a bull is not evidence (*r*). So an endowment by a bishop, under his seal (*s*), would be evidence if derived from the proper custody.

Certificates.

Certificates, and other documents made by persons entrusted with authority for the purpose, may also be considered as public documents, and they are evidence against all, to the extent of the officer's authority, of the facts which he is directed to certify. For where the law has appointed a person to act for a specific purpose, the law must trust him as far as he acts under its authority (*t*). Therefore the indorsement of the officer upon a deed of bargain and sale is evidence of its enrolment (*u*). The chirograph of a fine is evidence of the fine, because the officer is appointed to give out copies of the agreements between the parties that are lodged of record. Wherever it is an essential part of the officer's duty to deliver out copies of a record, such copies are evidence (*x*). Where a Court has for its own convenience appointed officers to make out copies, such copies are evidence in that court, without further proof, but not elsewhere. An office copy of depositions is admissible in equity, without examination with the roll, but is not receivable in a court of law (*y*). By the 7 & 8 Will. 3, c. 7, s. 5, the entry in the book kept by the clerk of the Crown for entering returns, alterations and amendments, or a copy of so much as relates to the return, is made evidence in an action for a false or double return. So by many other statutes, authorized entries and documents, which will be noticed in their proper places, are made evidence (*z*).

(*o*) *Miller's case*, Leach, C. C. L. 3d ed. 69.

(*p*) Palm. 427; Gil. Ev. 6; Bac. Ab. Ev. F.

(*q*) *Lord Clanricarde's case*, Pal. 38.

(*r*) *Brett* v. *Ward*, Winch. 70. But qu.

(*s*) *Potts* v. *Durant*, 4 Gwill. 1453.

(*t*) B. N. P. 229.

(*u*) *Kinnersley* v. *Orpe*, Doug. 57.

(*x*) See *Black* v. *Lord Braybrooke*, 2 Starkie's C. 7. 13; and see below, tit. JUDGMENTS—JUDICIAL DOCUMENTS.

(*y*) B. N. P. 229. *Black* v. *Lord Braybrooke*, 2 Starkie's C. 6. *Barnard* v. *Newt*, 1 Carr. & P. C. 578.

(*z*) See 3 W. & M. c. 9, s. 7, as to examination under Mutiny Act. Where upon a question as to the delivery of a cask of whiskey, the Court below had decided upon the effect of extracts from the excise books, and the certificate of a commissioner of excise as to the accuracy of the books

Public registers of a parish.

Public registers, although not originally intended for the purposes of evidence, are generally admissible in support of the facts to which they relate, for they are made by persons in an official situation, whose duty it is to make the entries accurately of the facts immediately within their knowledge. These are, the *registers* (*a*) kept in churches, of *baptisms*, *marriages*, and *burials* (*b*). Although the entries are first made in a day-book, such day-book is not evidence when the entry has been made in the register (*c*). And therefore, where in the day-book the letters B B were added, which were explained to mean base-born, but were not added in the subsequent entry in the register, the Court held that the entry in the register could not be controlled or altered by the entry in the day-book, for there could not be two registers in the same parish (*d*). An entry in the register of baptism

from which such extracts were taken, the House of Lords reversed the judgment as having been decided upon inadmissible evidence. Excise books, as public documents, might be received; or if on account of public convenience the originals could not be produced, examined copies on oath might be produced. *Dunbar* v. *Harvie*, 2 Bli. 351.

(*a*) These were originally instituted at the instigation of Lord Cromwell, who (temp. H. 8.) was Vicar-general to the King, and before whom all wills to the value of 200*l.* were to be proved. This appointment was afterwards confirmed by the injunction of Edward 6th, who directed that the registering should be in the presence of the parson and churchwardens, on a Sunday, and that the book should be kept locked in the church, the vicar and churchwardens having keys. See Salk 281; Gil. Ev. 76. See also the Marriage Act, 26 Geo. 2, c. 33, s. 14, which directs that immediately after the celebration of every marriage an entry thereof shall be made in such register, in which it shall be expressed that the marriage was celebrated by banns or license; and if both or either of the parties married by license be under age, with consent of parents or guardians, as the case shall be; and shall be signed by the minister with his proper addition, and also by the parties married, and attested by two credible witnesses. By the stat. 52 Geo. 3, c. 146, s. 7, copies of registers verified by the officiating minister of the parish shall be transmitted annually by the churchwardens, after they, or one of them, shall have signed the same, to the registrars of the diocese. Provisions of a similar nature had been made by the canons of 1603, but these prescriptions had fallen into disuse. See Burn's Ecc. Law, 295; Gibson's Codex, 204; and Vol. II. tit. MARRIAGE.

(*b*) Sid. 71; Godb. 145.

(*c*) *May* v. *May*, Str. 1073; per Probyn and Lee, Js., Page, J. *dissentiente*.

(*d*) *May* v. *May*, Str. 1073. *Lee* v. *Meecock*, 5 Esp. C. 177. If the entry in the day-book, which represented the plaintiff to be illegitimate, had been made under the direction of the reputed father and mother, the evidence would, it seems, have been admissible as the declaration of a deceased parent. In the absence of such evidence, it appeared to be nothing more than a private memorandum, made for the purpose of assisting the clerk to make up the register.

Public registers of a parish,

by a minister, of the baptism of a child which had taken place before he became minister, and made on the information of the clerk, is inadmissible evidence, neither is the private memorandum of the clerk, who was present at the baptism (*e*).

The books of the Fleet prison are not, it is said, admissible in evidence to prove a marriage, for they are not made under public authority (*f*). Nor is the copy of a register of a foreign chapel admissible here to prove a marriage abroad (*g*). Neither is the copy of a register of baptism in Guernsey (*h*); nor the register of a dissenting chapel (*i*).

An entry in a register, like any other public document, may be proved by means of an examined copy (*k*); and it is of course unnecessary to give any proof by means of the subscribing witnesses, or to prove their hand-writing (*l*). The register is no proof of the identity of the parties (*m*); nor is it evidence that a party was of the particular age stated in the register (*n*).

(*e*) *Doe* v. *Bray*, 8 B. &. C. 813.

(*f*) *Reed* v. *Passer*, Peake's C. 231. *Doe d. Orrell* v. *Madox*; *Haywood* v. *Firmin*, Peake's C. 233. *Howard* v. *Burtonwood*, ib. (n). *Cooke* v. *Loyd*, ib. But semble, that on a question of *pedigree*, the books of the Fleet are evidence to show the name by which a woman passed when she was married there. *Lawrence and others* v. *Dixon*, Peake, 136; 1 Esp. 213. And in *Doe* v. *Lloyd*, Shrewsb. Summer Ass., Heath, J., admitted them in evidence. See Peake's Ev. 87.

(*g*) *Leader* v. *Barry*, 1 Esp. 353. *Whitehead* v. *Wynn*, 1 Jac. & Walk. 483.

(*h*) *Huet* v. *Le Mesurier*, 1 Cox. Cas. 175.

(*i*) For it is not a public document. Phillimore, 315. A register of baptism of the child of a dissenter (twenty-five years after the alleged birth), containing the words "said to be born," &c., being mere hearsay and information, and therefore of no assistance in establishing the fact, was refused to be allowed to remain as a part of the proceedings. *Duins* v. *Donovan*, 3 Hagg. 301.—An entry of the birth of a dissenter's child, in a book kept at Dr. Williams's Library in Redcross-street, was held to be inadmissible evidence. *Ex parte Taylor*, 1 J. & W. 483.—In order to establish the determination of a life estate, hearsay evidence of the death of the *cestui qui vies* is not, as in a case of pedigree, sufficient; nor are the register of a dissenting chapel, or inscriptions on the tombstones in the adjacent burial-ground, receivable. *Whittuck* v. *Waters*, 4 C. & P. 375.

(*k*) *Birt* v. *Barlow*, 1 Doug. 173. "They are in the nature of words, and need not be produced or proved by subscribing witnesses." Per Ld. Mansfield, ib.

(*l*) *Birt* v. *Barlow*, Doug. 173. See *Drake* v. *Smyth*, 5 Price, 369; tit. TITHES.

(*m*) Ib. Doug. 162. See tit. POLYGAMY—MARRIAGE.

(*n*) *Wihen* v. *Law*, 3 Starkie's C. 63. *R.* v. *Clapham*, 4 Carr. & P. C. 29. Nor without evidence to show that the party was young when christened, is it evidence that he was born within the parish. *R.* v. *North Pellerton*, 5 B. & C. 508.

The bishop's register was held to be admissible to establish a custom as to the nominating a curate (*o*).

Parish books.

In an action for the disturbance of the plaintiff in the use of his pew at church, an old entry made in the vestry-book by the churchwardens, stating that the pew had been repaired by the owner of a messuage under whom the plaintiff claimed, was admitted as evidence of the right, having been made as to a fact within the scope of the churchwarden's office, and being evidence of the reputation in the parish as to the right (*p*). An entry in a vestry-book has also been admitted to prove an averment in an indictment for a libel, that the prosecutor had been elected treasurer at a vestry duly held in pursuance of notice (*q*).

On an appeal, the respondents, in order to prove the fact of the delivery to them of a certificate given by the appellants, acknowledging the pauper to be their settled inhabitant, produced an old book from their own parish chest, in which was an entry of that fact in the handwriting of a former parish officer. It was held that such evidence was inadmissible (*r*).

By the 17 Geo. 2, c. 38, s. 14, copies of all rates and assessments for the relief of the poor are to be kept in a book by the churchwardens and overseers of every parish, which is to be kept in a public place in the parish, and to be produced at the sessions, when any appeal is to be heard.

By the 42 Geo. 3, c. 46, the churchwardens and overseers are to keep a book containing the names of all parish apprentices, and of the other particulars required by the Act; the entries are to be signed by the justices who assent to the indentures; and when the latter are proved to have been destroyed or lost, such register is to be deemed sufficient evidence in all courts of law in proof of the existence of such indentures, and of the other particulars specified in the register; and each entry, if approved, is to be signed by the justices, and such book may be inspected at all seasonable hours, and a copy taken, if the indentures are lost or destroyed.

(*o*) *Arnold* v. *Bishop of Bath and Wells*, 5 Bing. 306.

(*p*) *Price* v. *Littlewood*, 3 Camp. 388. See Vol. II. tit. PEW.

(*q*) *R.* v. *Martin*, 2 Camp. C. 100. So corporation books concerning the public government of a city or town, where they have been publicly kept, and the entries have been made by a proper officer, are admissible evidence of the facts witnessed in them. *R.* v. *Mothersall*, 1 Str. 93. *Thetford Case*, 12 Vin. Ab. 90, pl. 16. *R.* v. *Mayor, &c. of Liverpool*, 4 Burr. 2244. See also *Button* v. *Cope*, Peake's C. 30.

(*r*) *R.* v. *Debenham*, 2 B. & A. 185.

Books of public offices.

The register of the Navy-office, made up from the captains' returns, with proof of the method there used to enter all persons dead with the letters D d, is evidence of such death (*s*). And so is the muster-book transmitted by the officers of the ship to the Navy-office (*t*). So the log-book of a man-of-war which convoyed a fleet, is evidence to prove the time of sailing (*u*). Where a statute required that every vessel engaged in the whale fishery should carry out an apprentice for every 50 tons, and that the same should be verified by the master, mate and two of the mariners, it was held that an affidavit verifying a muster-roll, upon which it appeared that a certain number of apprentices was on board when the vessel *cleared out*, is *primâ facie* evidence that such apprentices were on board when the vessel *sailed* (*x*).

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

(*s*) B. N. P. 249; Bac. Ab. Ev. 635. *R.* v. *Rhodes*, Leach's C. C. L. 3d ed. 29. *R.* v. *Fitzgerald & Lee*, ib. 24. The book kept at the Sick and Hurt Office, in which are copied the different returns, made by officers of the navy, of persons dying on board, is evidence to show the time of a seaman's death. *Wallace, administrator*, v. *Cook*, 5 Esp. C. 117. But where the wife of *A. B.* obtains goods after stating that her husband is dead, it is not a sufficient answer to an action for the amount, to show by the muster of a ship from the Admiralty, that a person of the name of *A. B.* was living at the time. *Barber* v. *Holmes*, 3 Esp. C. 190; Kenyon, C. J. 1800.

(*t*) *R.* v. *Fitzgerald & Lee*, Leach, C. C. L. 24.

(*u*) *D'Israeli* v. *Jowett*, 1 Esp. C. 427. Such log-book and the official letter of the commander to the Admiralty were read without objection, as proof that the fleet encountered a storm, and that a particular vessel parted company. *Watson and another, Administrators of Maxwell*, v. *King*, 4 Campb. 272; Ellenborough, C. J. 1815.

And the log-book of a merchantman may be used by a witness to refresh his memory, with respect to a fact which he remembers to have seen there at a time when he had a clear recollection of the circumstance. *Burrough* v. *Martin*, 2 Camp. C. 112.

(*x*) *Lacon* v. *Hooper*, 1 Esp. C. 246.

(*y*) *Johnson* v. *Ward*, 6 Esp. C. 47. Note, that the paper was proved to have gone with the ship. So a copy of an official document made in pursuance of an Act of Parliament, containing the names, capacities and descriptions of passengers, was held to be good proof of such persons being on board. *Richardson* v. *Mellish*, 2 Bing. 229. In *R.* v. *Grimwood*, 1 Price, 369, it was held that excise books transcribed from the maltster's specimen paper were admissible evidence against him without calling the officers to substantiate them, even although they were charged to be fraudulent and collusive, without proof given that they were so. But a shipping entry at the Custom-house, although for some purposes a public document, is not evidence to affect the person whose duty it was to cause the

The poll-books at an election for members in parliament are evidence in a penal action for bribery (*z*). So the daily book kept by the keeper of Newgate, and the books of the King's Bench and Fleet prisons, are evidence to prove the dates of the commitments and discharges of prisoners (*a*), although the entries are sometimes made from the information of the turnkeys, and the indorsements upon the warrants (*b*). But they are not evidence of the cause of commitment, the commitment itself being the best evidence (*c*). And it seems that they are not strictly public documents, so as to warrant the reception of a copy in evidence, since the gaoler is not required to make such entries, but does it for his own information and security (*d*). The books of the bank of England are evidence to prove the transfer of stock (*e*). The book kept in the master's office in the court of King's Bench is evidence to prove that a particular person is an attorney of the court (*f*).

Poll-books.

Prison books.

An entry in the public books of a corporation is not evidence for the corporation, unless it be an entry of a public nature (*g*).

A book kept by order of the Chancellor was held to be good secondary evidence of the allowance of a certificate of bankruptcy; but a book kept in the office of the secretary of bankrupts, without such order, is not admissible (*h*). Books in the office of clerks of the peace of enrolments of deputations of gamekeepers for a manor, are admissible to prove the exercise

Chancellor's book.

Books of Clerk of the Peace.

entry to be made criminally, the note from which the entry had been made by the officer having been accidentally destroyed. *Hughes* v. *Watson*, 1 Starkie's C. 179. The entry of the contract in the book of the clerk of the coal market in London is not evidence of the sale under 47 Geo. 3, sess. 2, c. 68, s. 29, unless the buyer be proved *aliunde* to have signed the contract; although the Act directs that all contracts for the sale of coals shall be signed by the buyer and the factor, that the factor shall deliver a copy to the clerk, who shall enter it in a book, and although the 32d section makes such entries evidence in all cases, suits and actions, touching anything done in pursuance of the Act. *Brown* v. *Capel*, 1 M. & M. 374.

(*z*) *Mead* v. *Robinson*, Willes, 422. *R.* v. *Hughes*, cited ib. *R.* v. *Duins*, 2 Str. 1048.

(*a*) *R.* v. *Aickles*, Leach. C. C. L. 2d ed. 435; 3 Bos. & Pull. 188.

(*b*) 3 Bos. & Pull. 188. On the ground that it had been the constant and established practice of the keepers of public prisons to register the discharge of prisoners in such books.

(*c*) Ib. This case, therefore, and some others of a similar nature, do not rest upon the ground that the entry was made by an authorized officer. *Salte* v. *Thomas*, 3 B. & P. 188.

(*d*) Ibid.

(*e*) *Marsh* v. *Colnet*, 2 Esp. C. 665. *Breton* v. *Cope*, Peake's C. 30.

(*f*) *R.* v. *Crossley*, 2 Esp. C. 526.

(*g*) *Marriage* v. *Lawrence*, 3 B. & A. 142.

(*h*) *Henry* v. *Leigh*, 3 Camp. C. 499.

of manorial rights, without proof of the loss of the original deputations, and that the gamekeepers acted under them (*i*).

Ships registers.

The registry of a ship is evidence to negative ownership, since no one can be an owner who is not registered as such (*k*); but the registry is not necessarily proof of ownership, without showing the privity of the party, since the entry may have been made by a stranger for the purpose of fraud (*l*). For the same reason, the mere fact of an entry of a stage-coach at the licensing office is no evidence of ownership (*m*). On the same principle, a register is not evidence for the defendant to prove a joint ownership on a plea in abatement (*n*); nor (without possession) to prove an interest of another person in the ship, in an action brought by an agent on a policy of insurance, describing the interest in that other person (*o*); nor to prove that a ship is British built, as described in the register (*p*).

Heralds' books.

The books in the Heralds'-office, containing the pedigrees of the nobility and gentry of the realm, are evidence on a question of pedigree (*q*); and so are the minute-books of a visitation (*r*), from which the entries are afterwards made in the books of the heralds' college (*s*). In the case of *Pitton* v.

(*i*) *Hunt* v. *Andrews*, 3 B. & A. 348.

(*k*) *Camden* v. *Anderson*, 5 T. R. 709; 14 East, 229. *Marsh* v. *Robinson*, 4 Esp. C. 98. *Infra*, Vol. II. tit. POLICY.

(*l*) *Tinkler* v. *Walpole*, 14 East, 226. *Smith* v. *Fuge*, 3 Camp. 456. *Fraser* v. *Hopkins*, 2 Taunt. 5. *Teed* v. *Martin*, 2 Camp. 170. *Cooper* v. *South*, 4 Taunt. 102. *Ditchburn* v. *Spuchling*, 5 Esp. C. 11. In an action for stores furnished for a ship by the captain's order, the register purporting to have been obtained by all the defendants, on the oath of one of them, was held to be *primâ facie* evidence to charge them as owners. *Stokes* v. *Carne and others*, 2 Campb. 339.

(*m*) *Strother* v. *Willan*, 4 Camp. C. 24. *Ellis* v. *Watson*, 2 Starkie's C. 453.

(*n*) *Flower* v. *Young*, 3 Camp. C. 240.

(*o*) *Pirie* v. *Anderson*, 4 Taunt. 652.

(*p*) *Rouse* v. *Meyers*, 4 Camp. C. 375. See further, as to proof of property in a ship, Vol. II. tit. POLICY.

(*q*) *Pitton* v. *Walter*, Str. 162; Salk. 281; Skin. 623; Yelv. 34. *King* v. *Foster*, 2 Jon. 164—224. A book found therein, purporting to be an account of the possession of property by a monastery, is not evidence of that fact. *Lygon* v. *Strutt*, 2 Anst. 601. In trover for a ship, if the plaintiff produce the original register, and attempt, unsuccessfully, to deduce a title under it, he cannot afterwards rely upon his possession. *Sherriff* v. *Cadell*, 2 Esp. C. 617; Kenyon, C. J. 1798.

(*r*) Ibid. 2 Jones, 224; B. N. P. 248.

(*s*) The visitation-books were compiled by the provincial kings at arms, who were usually authorized, soon after their investiture in office, by a commission under the great seal, to visit the several counties within their respective provinces, to take survey and view all manner of arms, &c. with the notes of the descents, pedigrees and marriages of all the nobility and

Walter (*t*), a minute-book of a visitation, signed by the heads of several families, and found in the library of Lord Oxford, was received in evidence.

But an extract from a pedigree proved to be taken out of the records is not evidence (*u*), because a copy of the record might be had, and therefore it is not the best evidence.

Public histories and chronicles.

Books and chronicles of public history are not admissible in order to prove particular facts or customs (*x*), but they are evidence to prove a matter relating to the kingdom at large, as being the best of which the subject-matter is capable (*y*). Camden's Britannia was rejected on the question, whether, by the custom of Droitwich, salt-pits could be sunk in any part of the town, or in a certain place only (*z*). And so was Dugdale's Monasticon, on the question, whether the Abbey de Sentibus was an inferior abbey, or not, because the original records might be had at the Augmentation-office (*a*). It was held that Dugdale's Baronage was not evidence to prove a descent (*b*). But in the case of *Neale* v. *Fay* (*c*), in order to show that a deed was forged which bore date 1 Ph. & M., in which all the titles were given to Philip which he used after the surrender of Charles the Fifth, chronicles were admitted to show that he did not take those titles upon him till six months after the date of the deed. And in the case of St. Katherine's Hospital, Lord Hale admitted a chronicle to prove a particular point of history, in the reign of Edward the Third (*d*). The year-books are evidence to prove the course of the court (*e*).

It is a general rule, that whenever the original document is of

gentry, &c. They occupy the interval between the 21 H. 8, and the end of the reign of Jac. 2. See the first report of the House of Commons on the public records, p. 82.

(*t*) Str. 162.

(*u*) B. N. P. 248.

(*x*) B. N. P. 248. *Cockman* v. *Mather*, 1 Barnardist. 14.

(*y*) Ibid. 249; Salk. 281. On the impeachment of Warren Hastings, the History of the growth and decay of the Ottoman Empire, by Prince Demetrius Cantemir, was received in evidence to prove the customs in Hindostan respecting the treatment of women of rank: and after argument as to the admissiblility of the evidence, it was held that the managers were entitled to read it, on the ground that it went to prove an universal custom of the Mohammedan religion. See Phillips on Evidence, vol. 1, 424, citing a report of the proceedings on the impeachment, in the possession of T. Jones Howell, the editor of the State Trials. The point was referred to by Lord Ellenborough, on the trial of General Picton, 30 Howell's St. Tr. 492.

(*z*) *Stainer* v. *The Burgesses of Droitwich*, Salk. 281; Skinner, 623; 1 Vent. 151.

(*a*) Cited Salk. 281.

(*b*) *Piercy's Case*, 2 Jon. 164.

(*c*) Ibid. 282, and B. N. P. 249, and *Neale* v. *Jay*.

(*d*) Salk. 282.

(*e*) Ibid.

Public documents how proved.

a public nature, an exemplification of it (if it be a record), or a sworn copy, is admissible in evidence (*f*), because documents of a public nature cannot be removed without inconvenience, and danger of being lost or damaged (*g*); and the same document may be wanted in two places at the same time. The document must always be proved to be that which it purports to be, and for which it is offered, by some extrinsic proof; as in the case of records, terriers, &c., by showing that they came from the legal custody or repository (*h*). And this is in general sufficient, where the original is produced, for a record proves itself; and terriers and other ancient writings do not usually admit of further authentication (*i*).

Judgments, &c. general principles of admissibility.

Judicial documents may be divided into, *First*, judgments, decrees and verdicts. *Secondly*, depositions, examinations and inquisitions, taken in the course of a legal process. *Thirdly*, writs, warrants, pleadings, bills and answers, &c. which are incident to judicial proceedings. With respect to judgments, decrees and verdicts, may be considered: *first*, their admissibility and effect; *secondly*, the means of proof; *thirdly*, the mode of answering such evidence. It is important to consider, in the *first* place, for what purpose a verdict or judgment is offered in evidence; whether with a view to establish the mere fact, that such a verdict was given, or judgment pronounced, and those legal consequences which result from that fact; or it is offered with a view to a collateral purpose; that is, not to prove the mere fact that such a judgment has been pronounced, and so to let in all the necessary legal consequences of that judgment, but as a medium of proving some fact, as found by the verdict, or upon the supposed existence of which the judgment is founded.

For the first of these purposes, that is, for establishing the fact that such a verdict has been given, or such a judgment pronounced, and all the legal consequences of such a judgment, the judgment itself is invariably not only admissible as the proper legal evidence to prove the fact, but usually conclusive evidence for that purpose; for it must be presumed that the court has made a faithful record of its own proceedings. And in the next place, the mere fact that such a judgment was given can

(*f*) B. N. P. 294; Gil. Ev. 4, 5. But though a *copy* of a contract with the land-tax commissioners is made evidence by 42 Geo. 3, c. 116, s. 165, the original contract is not evidence by implication. *Burdon* v. *Rickets*, 2 Camp. 121. And see Sav. 46, pl. 98. Vol. II. tit. PENAL ACTION.

(*g*) Gil. L. E. 8; Bac. Ab. Ev. F.

(*h*) See tit. RECORDS, JUDGMENTS, &c. See also Terriers, *supra*, 201.

(*i*) For the mode of procuring access to public documents, see tit. INSPECTION.

Judgments, &c.

never be considered as *res inter alios acta*, being a thing done by public authority; neither can the legal consequences of such a judgment be ever so considered; for where the law gives to a judgment a particular operation, that operation is properly shown and demonstrated by means of the judgment, which is no more *res inter alios* than the law which gives it force. But with reference to any fact upon whose supposed existence the judgment is founded, the proceeding may or may not be *res inter alios*, according to circumstances. For instance, if *B.*, *being indicted*, be convicted of beating *A.*, the record of the judgment would be incontrovertible evidence of the fact that *B.* had been so convicted; it would be conclusively presumed that the Court had kept a faithful record of its own proceedings. It would in like manner be conclusive as to all the legal consequences of such conviction. For instance, one of such consequences is, that *B.* shall not be punished a second time for the same offence; and consequently the record would be conclusive, when shown to the Court, to protect him from a second prosecution for the same offence. So if *B.* had been acquitted, and had brought an action against *A.* for a malicious prosecution, it would have been necessary to prove the fact of acquittal; and here again the record would have been conclusive evidence to show that fact. But next suppose, that upon *B.*'s conviction *A.* brought an action to recover damages for the assault, and offered to prove the assault by the record of conviction, he would then be offering the judgment, not with a view to prove the mere fact of conviction, or to establish any legal consequence to be derived from it, but for a collateral purpose, that is, to prove the fact upon whose supposed existence the judgment was founded. With respect to such facts, that is, the facts upon which a judgment professes to be founded, the judgment may or may not be evidence, according to circumstances, considering the nature of the facts themselves, and the parties.

Conclusive, when.

A record is in no case direct and positive evidence of any fact which it recites, as having been found by a jury, or otherwise ascertained; it is in the nature of presumptive evidence only, for even the jury who found the fact may have acted upon mere presumptions, without the aid of any direct evidence. If, therefore, no rule of policy intervened, no verdict could ever establish any fact conclusively, for it never could prove more than that the jury, in the particular case, presumed, from some evidence or other, that the fact was true. But public policy requires that limits should be opposed to the continuance of litigation upon

Judgment conclusive, when.

the same subject-matter, and therefore the law will not permit a matter which has once been solemnly decided by a court of competent jurisdiction to be again brought into litigation between the same parties or their representatives (*h*); consequently a decree or judgment between the *same parties* upon the *same subject-matter* is usually conclusive as to private rights. On the other hand, it is an elementary rule and principle of justice, that no man shall be bound by the act or admission of another to which he was a stranger; and consequently no one ought to be bound, as to a matter of private right, by a judgment or verdict (*l*) to which he was not a party, where he could make no defence, from which he could not appeal, and which may have resulted from the negligence of another, or may even have been obtained by means of fraud and collusion. Neither ought any one in justice to be bound by a verdict, although he was privy to it, but where his adversary was not also a party, and consequently where the verdict may have been founded upon the evidence of that adversary himself, who had an interest in obtaining a verdict for the purposes of evidence; for as he cannot give direct evidence upon the subject, he ought not to make use of his own evidence by circuitous means (*m*). Another principle which (as it is frequently said) operates to the exclusion of a verdict, as evidence, on a matter of private right, is this, that a person who could have received no prejudice from the verdict, had it been given the contrary way, shall not derive any benefit from it when it turns out to be in his favour (*n*), and because a judgment operates by way of estoppel, and estoppels must be founded on mutuality (*o*).

Another ground of objection, even where the evidence is offered against a party to the former proceeding, arises when, from the nature of the former proceeding, the party is not entitled to the same means of disproving the fact, or the same means of redress, of which he might avail himself in the second suit; for this would be virtually, although circuitously, to deprive him of those advantages. For example, to admit upon the trial of a civil action, a conviction on an indictment for felony (except for the purpose of establishing a legal consequence of the con-

(*k*) According to the legal maxims, "nemo vexari debet bis pro eadem causa," and "reipublicæ interest ut sit finis litium." See 3 Wilson, 304, *Kitchen* v. *Campbell*.

(*l*) See the judgment of C. J. De Grey, in the *Duchess of Kingston's Case*, 11 St. Tr. 261.

(*m*) Gil. L. Ev. 31.

(*n*) Ibid.

(*o*) Per Lord Ellenborough, 4 M. & S. 479; *infra*, 220.

viction), would be indirectly to deprive the party, against whom the evidence was offered, of the power of repelling the proof by means of a full defence by counsel, and of his attaint of the jury for finding a false verdict.

Judgment in rem.

These objections are however applicable to those cases only where a matter of private right or liability is concerned; for in matters of a public nature, where the proceeding is, as it is usually termed, *in rem*, public convenience requires that the sentence, decree, or judgment, should be binding upon all (*p*). In cases also where the matter is of a public nature, and where reputation would be admissible evidence, a verdict or judgment is frequently evidence, as falling within the scope of general reputation.

Judgment evidence as a fact, and as to all legal consequences.

Such are the general considerations by which the reception of evidence of this nature is governed, depending mainly on the elementary principles already announced; viz. that no one ought to be bound by any testimony where he has not had the power of cross-examining the witness, and controverting the evidence by opposite testimony (*q*), nor by any evidence which comes within the description of *res inter alios*.

The admissibility and effect of a verdict or judgment may be considered, 1st, with a view to the proof of the judgment itself as a fact, and its legal consequences; or 2dly, with a view to the proof of the matters on which it is founded.—1st. With a view to the proof of the judgment itself *as a fact*, and its *legal consequences*.—It seems to be an incontrovertible rule, that every judgment is evidence for such purposes. An attainder of felony or treason is, in general, evidence as to all the consequences of the attainder (*r*). A conviction of the principal for felony is evidence (although not conclusive) against the accessory (*s*). A conviction of an infamous crime is evidence against all, to show the incompetency of the party as a witness (*t*). So the judgment by a person of competent authority is evidence to protect him against actions for any matter judicially done within the scope of that authority (*u*). For his immunity is a legal consequence of his acting in that situation; and the judgment is offered, not to prove the truth of the facts upon which it is founded, since, with a view to such a defence, the truth of those facts is not material, but in order to prove the fact of a judgment pronounced by competent

(*p*) Vide *supra*, 62.
(*q*) *Supra*, 25.
(*r*) Vide *infra*, tit Accessory.
(*s*) Ibid.
(*t*) *Supra*, tit. Witness.
(*u*) Vide *infra*, 221.

authority, and so to establish the immunity of the judge, which is a legal consequence of the judgment (*w*). In these, and a number of other instances, where a judgment is admitted to prove the fact itself, and with a view to its legal consequences, every such judgment may be considered as operating *in rem* (*x*).

Judgment always evidence as a fact.

In an action by *A.* against a sheriff, for trespass to his goods, the defendant may give in evidence a judgment against *B.*, and that he seized the goods by virtue of a *fieri facias* upon that judgment, and thereupon seized the goods in question, being the goods of *B.* So where the title to particular goods is litigated between *A.* and *B.*, it is competent to *A.* to show a judgment against *C.*, and that the sheriff sold the goods to him, being the goods of *C.*, under a *fieri facias*. A judgment in *assumpsit* against three defendants as partners, is *primâ facie* evidence for one against the others, to prove their liability to contribution (*y*).

So where *A.* has obtained a verdict against *B.* for the negligence of his agent *C.*, in an action by *B.* against *C.* the recovery in the former action is evidence, not to prove the fact on which it was founded, viz. the negligence of *C.*, but to show how far *B.* has been damnified (*z*); the judgment here is the best evidence to show the amount of *B.*'s liability to *A.*, but it is no evidence to show that such liability was the consequence of *C.*'s negligence, a fact which must be proved *aliunde*. So a verdict in a former cause *inter alios* is admissible for the purpose of introducing evidence to show that a witness on the former trial gave evidence directly contrary to that which he gives on the latter (*a*).

So in an action for a malicious prosecution, an indictment against the plaintiff is evidence to show the act done by the defendant in the prosecution of his malicious intention, and also to show the plaintiff's acquittal (*b*). So a record is frequently evidence by way of inducement, as upon an indictment for perjury (*c*).

Judgment in matters of private litigation.

Secondly, With a view to the proof of those matters on which the judgment is founded. It will for this purpose be convenient to divide all adjudications into, *First*, Those which relate to *matters of private litigation* between party and party; *Secondly*, those of a criminal and penal nature; *Thirdly*, those which relate to proceedings *in rem*; *Fourthly*, those which relate to

(*w*) *Infra*, 221.
(*x*) *Supra*, 62.
(*y*) 2 N. R. 371.
(*z*) *Green* v. *The New River Company*, 4 T. R. 590.
(*a*) *Clarges* v. *Sherwin*, 12 Mod. 343. B. N. P.
(*b*) See Vol. II. tit. MALICIOUS PROSECUTION.
(*c*) See Vol. II. tit. PERJURY.

matters usually proved by reputation. *First*, as to the admissibility of a verdict or judgment relating to a matter litigated between parties.—It has been laid down by great authority, that the judgment of a Court of concurrent jurisdiction directly upon the point, is as a plea or bar, and as evidence conclusive between the same parties upon the same matter directly in question in another court; and that the judgment of a Court of exclusive jurisdiction is, in like manner, conclusive upon the same matter coming incidentally in question in another court, between the same parties for a different purpose. But that neither the judgment of a Court of concurrent or exclusive jurisdiction is evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter to be inferred by argument from the judgment (*d*).

Judgments between private persons.

This was part of the judgment of C. J. De Grey, in the case of *The Duchess of Kingston*. The principal position amounts to this, that no matter once litigated and determined by proper authority shall a second time be brought into controversy between the same parties.

It is then essential to consider, *First*, The identity of the parties. *Secondly*, Of the matter litigated. *Thirdly*, The nature and manner of the adjudication. *Fourthly*, The application of the adjudication to the fact to be proved. *Fifthly*, The effect of the judgment.

Identity of parties.

No one, in general, can be bound by a verdict or judgment unless he be a party to the suit, or be in privity with the party, or possess the power of making himself a party. For otherwise he has no power of cross-examining the witnesses, of adducing evidence in furtherance of his rights; he can have no attaint, nor can he challenge the inquest, or appeal; in short, he is deprived of the means provided by the law for ascertaining the truth, and consequently it would be repugnant to the first principles of justice that he should be bound by the result of an inquiry to which he was altogether a stranger (*e*).

Must be against a party, or privy.

Hence, if one bring several ejectments against several, upon the same title, a verdict against one is not evidence against the

(*d*) By De Grey, C. J., in giving judgment in the *Duchess of Kingston's case*, 11 St. Tr. 261. A verdict is conclusive between the same parties on the same facts, unless it has been reversed by attaint. Co. Litt. 227. b. A defendant who has omitted to plead his certificate under a commission of bankrupt in a former action, by plea *puis darrein continuance*, cannot plead it to an action on the judgment. *Todd* v. *Maxfield*, 6 E. & C. 105.

(*e*) 11 H. 4. 30; Tr. per Pais, 29, 30; 44 Ass. 5. *Kinnersley* v. *Orpe*, Dougl. 57.

rest, because the party against whom the verdict was had might be relieved against, if it was not good, but the rest could not (*f*).

So a verdict against a tenant for life will not bind a reversioner (*g*). For the tenant for life is seised in his own right, and that possession is properly his own. He is at liberty to pray in aid of the reversioner or not, and the reversioner cannot possibly controvert the matter where no aid is prayed. But if the reversioner were to come in upon an aid prayer, he might then have an attaint, and consequently the verdict would then be evidence against him (*h*).

Those claiming in privity.

But one who claims *in privity* with another, is in the same situation with the latter as to any verdict or judgment, either for or against him, whether he claim as privy in blood or estate, or as privy in law (*i*). Accordingly the heir may give in evidence a verdict for his ancestor (*k*). And a verdict against the ancestor binds the heir (*l*). So a verdict against an intestate or testator binds his representative (*m*). So in ejectment between *Doe* on the demise of *A.* and *B.*, *A.* is bound by a verdict for the defendant. For the Courts take notice that in ejectment the lessor of the nominal plaintiff is the party really interested, and upon the trial *A.* had the opportunity to cross-examine the witnesses for *B.*, and to controvert their testimony (*n*).

If several remainders be limited by the same deed, a verdict for one in remainder will be evidence for the next in remainder against the same party (*o*). But a verdict against a particular tenant for life does not bind the reversioner unless he come in to defend upon aid prayer (*p*): and consequently, for want of mutuality, a verdict for the tenant for life would not be evidence for the reversioner unless called in aid against the same party (*q*).

(*f*) 3 Mod. 142. *Bell* v. *Harwood*, 3 T. R. 308; Lord Ray. 1292; Vern. 415; Ch. Pr. 212; 12 Mod. 319. 339; 10 Mod. 292; Carth. 77. 181. 5 Mod. 386; 2 Jones, 221.

(*g*) B. N. P. 232; Hardr. 462; Yelv. 32.

(*h*) Ibid.

(*i*) Such verdict and judgment operate as an estoppel, when pleaded in bar. Com. Dig. Estoppel, B.; Co. Litt. 352. *Vooght* v. *Winch*, 2 B. & A. *Outram* v. *Morewood*, 3 East, 316; 16 East, 334.

(*k*) *Locke* v. *Norborne*, 3 Mad. 141.

(*l*) *Locke* v. *Norborne*, 3 Mod. 141; and *R.* v. *Hebden*, And. 389.

(*m*) *R.* v. *Hebden*, And. 389.

(*n*) Bac. Ab. tit. Ev. F. 616; B.N.P. 232; Hardr. 472; Gil. L. Ev. 33. *Aslin* v. *Parkin*, 2 Burr. 668.

(*o*) 1 Ray. 730; B. N. P. 232. Hardr. 462.

(*p*) B. N. P. 232; Hardr. 436; Bac. Ab. Ev. 617: but see Phillips, 317; Hardr. 472; Gil. L. Ev. 35. 36. *Bishop of Lincoln* v. *Sir W. Ellis*, 2 Gwill. 632.

(*q*) B. N. P. 232, 233; Ca. K. B. 319.

Those claiming in privity.

Partly upon the same principle, judgment of ouster against a mayor is evidence upon a *quo warranto* against one admitted by him (*r*).

If a party, after a verdict and judgment against him, assign his interest, the assignee is bound by the verdict. After a verdict against *J. S.* and judgment, *J. S.* aliened to *J. N.*, and it was held that the verdict was evidence against *J. N.*; for it would have been evidence against *J. S.* at the time of the transfer, and the substitute cannot be in a better condition than the principal (*s*).

Form of action.

It is not essential that either the parties or the form of action should be precisely the same, if they are substantially the same. Thus in ejectment, as has been seen, the law recognizes the real parties (*t*). Where an action of trover was brought against a creditor and the sheriff, for goods levied under an execution, and the defendants had a verdict, the judgment was held to be a bar to a subsequent action of *assumpsit* against the creditor alone (*u*).

In an action for a trespass in the plaintiff's fishery, a verdict for the plaintiff in a former action, against one who justified as the servant of *J. S.*, was admitted in evidence against the defendant in the second action, upon its appearing that the defendant in that action had acted by the command of *J. S.*, for it was considered that *J. S.* was the real party in both actions (*w*). But the evidence is not conclusive.

So a verdict in an action by the vicar against the occupier of land, for tithes, is evidence against another occupier of the same land (*x*). A judgment against the schoolmaster of a hospital, as to rights claimed in respect of his office, is evidence against his successors (*y*). So a decree in favour of a vicar as to his right to small tithes, against an impropriator, is evidence for his successors (*z*). A verdict against one defendant was held to be

(*r*) B. N. P. 231; 2 Barnard. 370. *R.* v. *Lisle*, And. 163. *R.* v. *Grimes*, Burr. 2968; 5 T. R. 72; 11 St. Tr. 216. See tit. QUO WARRANTO.

(*s*) 2 Roll. Ab. 680; Bac. Ab. Ev. F. 617.

(*t*) *Supra*, 216.

(*u*) *Kitchen* v. *Campbell*, 2 Bl. 827; 3 Wils. 304. See below, p. 221, and the cases there cited.

(*w*) *Kinnersley* v. *Orpe*, Dougl. 56. At the trial it was held to be conclusive evidence; but the Court of King's Bench held that it was admissible, but not conclusive.

(*x*) *Brown* v. *Olive*, 2 Gwill. 701. *Travis* v. *Chaloner*, 3 Gwill. 1237.

(*y*) *Lord Brownker* v. *Sir R. Atkins*, Skinn. 15.

(*z*) *Carr* v. *Heaton*, 3 Gwill. 1261; but, as it is said, not conclusive evidence, unless the Ordinary be a party to the first suit.

evidence of the plaintiff's right on a second action against the defendant and two others, who justified under the former defendant for a subsequent injury affecting the same right (*a*).

Against one who might have been a party.

A record is evidence against one who might have been a party to it, for he cannot complain of the want of those advantages which he has voluntarily renounced (*b*).

Want of mutuality.

It is a general rule, that a verdict shall not be used as evidence against a man where the opposite verdict would not have been evidence for him; in other words, the benefit to be derived from the verdict must be *mutual* (*c*). This seems to be no more than a branch of the former rule, that to make the judgment conclusive evidence the parties must be the same, for then the benefit and prejudice would be mutual and reciprocal. Where the parties are not the same, one who would not have been prejudiced by the verdict cannot afterwards make use of it, for as between him and a party to such verdict the matter is *res nova*, although his title turn upon the same point (*d*). And the verdict ought not to be admitted to prejudice the jury against the former litigant (*e*). Besides, the former verdict may have been

(*a*) *Strutt* v. *Bovingdon*, 5 Esp. 56. In Buller's N. P. 40, it is said that a verdict on an issue out of Chancery, to which only one of the defendants was party, may be read against all the defendants, to prove the time of the act of bankruptcy.

(*b*) Bac. Ab. Ev. F. 616.

(*c*) B. N. P. 232, 3; Ca. K. B. 319; Hardr. 472; Bac. Ab. Ev. F.; 4 Maul. & Sel. 479; Co. Litt. 352; 1 T. R. 86; Com. Dig. Estoppel, D. *R.* v. *The Warden of the Fleet*, B. N. P. 233; 12 Mod. 337. In the case of *Whately* v. *Manheim and Levy*, 2 Esp. C. 608, Lord Kenyon is said to have held, that a verdict on an issue out of Chancery, to try the question, whether *A.* and *B.* were partners, was evidence for a third person, in an action against them to prove the partnership. *Sed qu.*, for there was no mutuality; and the verdict might have been obtained on the evidence of the party who afterwards took advantage of it.

(*d*) B. N. P. 232; 3 Mod. 141; Hardr. 472.

(*e*) In Gil. L. Ev. the principle is thus expounded:—But a person that hath no prejudice by the verdict can never give it in evidence, though his title turn upon the same point, because if he be an utter stranger to the fact it is perfectly *res nova* between him and the defendant; and if it be no prejudice to the plaintiff had the fate of the verdict been as it would, he cannot be entitled to reap a benefit; for it would be unequal, since the cause is a new matter between the parties, that the jury should be swayed by any prejudice; for the letting in of pre-judgments supposes that the case has been already decided, and that it is not tried and debated as a new matter, but as the effect of some litigious cross in the defendant, that holds out the possession when the cause has been decided against him; and this ought not to be thrown out upon him on a new inquiry.—The same principle applies to depositions. Hardr. 472.

obtained upon the evidence of the party who afterwards seeks to take advantage of it; and this is one reason why a conviction upon an indictment at the suit of the king is not evidence in a civil action (*f*).

Verdict in civil proceeding, whether evidence in a criminal case.

From the principles announced, it seems to be a general consequence that a *verdict in a civil proceeding* will not be evidence either against or for a party *in a criminal proceeding*. The *acquittal* in an action ought not to be admitted as evidence in bar of an indictment, because the parties are not the same, and the king or the public ought not to be prejudiced by the default of a private person in seeking his remedy for an injury to himself; especially since upon the trial of the indictment the testimony of the former plaintiff is admissible, which was before excluded by his being a party to the cause. By such additional evidence the jury may be induced to come to a contrary conclusion (*g*). Neither, as it seems, is a *verdict for the plaintiff* in a civil action evidence upon an indictment (*h*); for although the defendant has had the opportunity to cross-examine the witnesses and controvert the testimony of his opponent, yet it would be hard that upon a criminal charge, which concerns his liberty, or even his life, he should be bound by any default of his in defending his property.

In addition to this, there is a want of mutuality; the parties are not the same, and the party would lose the privilege of proceeding against the jury in case of a false verdict, by attaint. It is also to be observed, that the adjudication in the civil case would seldom be commensurate with the matter intended to be proved in the criminal case, since evidence sufficient to render a man responsible in damages may be insufficient to prove that he acted with a criminal intention.

Verdict between private parties. Identity of the fact.

Secondly, it is essential not only that the parties should be the same, but that the *same fact* should have been in issue in the former cause; for if it was not in issue, the jury could not have been attainted for a false verdict (*i*).

A verdict for the *same cause* of action between the same parties is absolutely conclusive. And the *cause of action* is the same, when the same evidence will support both actions, although the actions may happen to be founded on different writs (*k*).

(*f*) B. N. P. 233; Str. 68. *Gibson* v. *Macarty*, Ann. 311. *Bartlett* v. *Pickersgill*, Burr. 2255.

(g) Ca. Tem. Hardw. 312; 11 St. Tr. 222.

(*h*) 11 St. Tr. 222.

(*i*) B. N. P. 233; Hob. 53.

(*k*) Thus a judgment in trespass will be a bar to an action of trover for the same taking. Bl. R. 831; Com.

Same cause of action.

This is the test to know whether a final determination in a former action is a bar, or not, to the subsequent action; and it runs through all the cases in the books, both in real and personal actions. It was resolved in *Ferrer's case* (*l*), that where one is barred in any action, real or personal, by judgment, upon confession, demurrer, verdict, &c., he is barred as to that, or the like action of the like nature for the same thing, for ever; for *expedit reipublicæ ut sit finis litium.* By actions of the like nature are meant actions of the same degree, and where a writ cannot be had of a higher nature (*m*). All personal actions are of the same degree (*n*); but a verdict in a personal action will not be a bar to a real action brought by the same right (*o*).

Where, however, the real merits of the present action have not been at all inquired into in a former proceeding, issue may be taken on the fact, the judgment being pleaded in bar (*p*). Thus a recovery in one action cannot be pleaded in bar of a second, where no evidence on the trial of the first action was given in support of the claim on which the second is founded (*g*). Where

Dig. Action, K. 3. And a verdict in trover will be a bar to an action for money had and received for the sale of the same goods. *Hitchen* v. *Campbell*, 2 Bl. 827; 3 Wils. 308. See also *Lechmere* v. *Toplady*, 2 Vent. 169; 1 Show. 146. A recovery in trespass at common law will bar a writ of ravishment of ward. Hob. 94; 2 Inst. 200. Per Lord Hardwicke, in *Smith* v. *Gibson*, R. T. H. 319, there are several cases where a recovery in one action will be a bar to another action of the same nature; but that is where the first recovery is a satisfaction for the very thing demanded by the second action. In an action of trover the plaintiff recovers damages for the thing, and it is as a sale of the thing to the defendant, which vests the property in him, and therefore it is a bar to an action of trespass for the same thing: and therefore it was held, that damages, on a contempt in prohibition, which are recoverable only from the time of the prohibition granted, were no bar to an action for suing the plaintiff in the Admiralty Court, where the Court had no jurisdiction. See *Spurry's case*, 5 Co. 61; Preface to 8 Co., and 6 Co. 7 a.; and see Vol. II. tit. Record.

(*l*) 6 Rep. 7.

(*m*) A bar in a writ of aiel, is a bar in a writ of Besael; and in a collateral action, as cosenage; for these are ancestral, and of the same nature: but will not bar a writ of right. 3 Wils. 308; 6 Rep. 7.

(*n*) And therefore, in an action for taking a mare, it is a good plea to the writ, that a replevin is pending for the same taking. 3 Wils. 308; 5 Rep. 61, b.

(*o*) See *Outram* v. *Morewood*, 3 East, 359.

(*p*) *Kitchen* v. *Campbell*, 2 Bl. R. 827; 3 Wils. 304.

(*q*) *Seddon* v. *Tutop*, 6 T. R. 107. So in the cases of *Ravee* v. *Farmer*, 4 T. R. 146, and *Golightly* v. *Jellicoe*, ib. in note, it was held that an award made of all matters in difference between the parties, was no bar to any cause of action that the plaintiff had against the defendant at the time of the reference, if the plaintiff could prove that the subject-matter of the action was not inquired into before the arbitrator.

issue is taken on the fact, whether the second action is brought for the same cause of action as the first, evidence is admissible of what passed at the trial (*r*). Identity of the fact.

It is not, however, necessary that the fact to be proved by the record, should have been solely and specifically put in issue on the former trial; it is sufficient if it was a fact essential to the finding of that verdict. A verdict against a division of a parish, for not repairing a road, is afterwards (in the absence of fraud) conclusive as to the obligation to repair, although the verdict also involves another fact; viz. that the road is out of repair (*s*). So a verdict in an action for diverting water from the plaintiff's mill, is evidence in a subsequent action for a similar injury at a subsequent time (*t*), as to the right to the water (*u*). In such case, however, the record would operate as evidence only, and not as an *estoppel*.

It is not necessary that the former verdict should have been founded upon the same precise subject-matter, provided the question be the same, and between the same parties. It is laid down that "it is not necessary that the verdict should be in relation to the same land, for the verdict is only set up to prove the point in question; and every matter is *evidence* that amounts to a proof of the point in question" (*x*).

Where the same party sues, or is sued, in a different capacity, and in a different right, he will not be concluded by the former record. Thus, if a party sue as administrator, and fail, he will not be estopped from maintaining an action against the same defendant as executor (*y*). So if one claim as heir to his father, he will not be estopped from afterwards claiming as heir to his mother (*z*).

Thirdly, as to the nature and manner of the adjudication; the judgment, decree, or sentence, must be direct upon the precise Must be direct.

(*r*) *Seddon* v. *Tutop*, 6 T. R. 607. *Martin* v. *Thornton*, 4 Esp. C. 180, where an arbitrator was examined as to the evidence laid before him.

(*s*) *R.* v. *St. Pancras*, Peake's C. 219; 2 Saund. 159; 2 Camp. C. 494. See tit. HIGHWAY.

(*t*) *Strutt* v. *Bovingdon and others*, 5 Esp. 56, although other defendants be joined in the second action to the sole defendant in the first, but who justify under that defendant; ibid.

(*u*) Lord Ellenborough said, that although the former recovery could not be deemed to be a legal estoppel, so as to conclude the rights of the parties by its production, he should think himself bound to tell the jury to consider it as conclusive. 5 Esp. C. 59.

(*x*) B. N. P. 232. *Lewis* v. *Clarges*, 1700. It seems, however, that in such a case the verdict would not be conclusive. In Gil. L. Ev. 29, the case is put as one of *persuading evidence* to a jury.

(*y*) *Robinson's case*, 5 Rep. 32.

(*z*) Com. Dig. Estoppel, C.

Manner of the adjudication.

point, and is not evidence of any matter which came *collaterally* in question, although it was within the jurisdiction of the court, nor of any matter *incidentally* cognizable, nor of any matter to be inferred by argument from the judgment, as having constituted one of the grounds of that judgment (*a*). For it is obvious, that although the matter expressly adjudicated upon is certain, the grounds of the adjudication are often uncertain; and that a particular ground cannot be safely inferred and relied upon, especially where its effect is to be conclusive. To permit this would induce the necessity of unravelling the materials of the former decision; for it would be manifestly unjust to admit a presumption that a particular fact was established upon the former inquiry, and yet not to allow that presumption to be rebutted by proof that it is unfounded. In *Blackham's case* (*b*), which was an action of trover, the defendant proved that the goods were Jane Blackham's in her life-time, and that he had administered to her effects. The plaintiff proved that Jane Blackham was married to him a few days before her death. The defendant contended that the plaintiff was concluded by the letters of administration granted to himself, since the letters of administration must have been founded upon

(*a*) See the opinion of De Grey, C J. in the *Duchess of Kingston's case*, 11 St. Tr. 261; Harg. Law Tracts, 456; Pothier by Evans, 357. *Lewick* v. *Lucas*, 1 Esp. C. 43. Action on the case for unskilfully varnishing engravings: the defendant proposed to give in evidence the record in an action in which he recovered against the present plaintiff for work and labour, and to show by parol evidence that the two actions related to the same work. Lord Kenyon rejected the evidence, because the record was general; and in order to render a record evidence to conclude any matter, it should appear that that matter was in issue, which should appear from the record itself; nor should evidence be admitted that under such a record any particular matter came in question. The record in the former action was general; and to inquire whether the object of it was to recover for the work done in varnishing the prints, and whether the defendant in that action had availed himself of the circumstance of their being unskilfully done, would be to try that same case again.—In some instances, however, it is necessary to show by parol evidence to what particular subject-matter a record, general in its terms, was applied; as, for instance, where a defendant pleads a recovery by the plaintiff in a former action for the same subject-matter, and where issue is taken on the question, whether the former verdict embraced the present claim. *Supra*, 222, and see tit. PAROL EVIDENCE; and see *R.* v. *Knaptoft*, Vol. II. tit. SETTLEMENT, 734. Where the appellant parish, on a second order, shows that the former order was quashed upon appeal, it is competent to the respondents to show that it was quashed on the preliminary objection that the pauper was not chargeable. *R.* v. *Wheeldon*, 5 B. & C. 511.

(*b*) 1 Salk. 290; see 7 Bro. P. C. 319; Ibid. 414.

the presumption that there was no such marriage. But Holt, C. J. said, a matter which has been directly determined by their sentence cannot be gainsaid; their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary: but that is to be intended only in the point *directly tried*; otherwise it is, if a *collateral* matter be collected or inferred from their sentence, as in this case, because the administration is granted to the defendant, therefore they infer that the plaintiff was not the intestate's husband, as he could not have been taken to be if the point there tried had been married or unmarried, and their sentence had been, not married. So, although it was once held that the production of the probate by a prisoner indicted for the forging of a will, was conclusive evidence for him (*c*), the contrary has since been frequently adjudged, and is now settled law (*d*). So the refusal of letters of administration, on the ground that the applicant was not married to the deceased, is not evidence to disprove the marriage in a court of law (*e*). And a sentence of excommunication against the father and mother for fornication is not evidence to disprove the legitimacy of the son (*f*). Letters of administration granted to the plaintiff as administrator of the goods of *A. B.*, are not evidence of the death of *A. B.* (*g*). And the judgment is not evidence, if the point arose *collaterally* in the original suit, although it appear from the pleadings that it was expressly in issue. Where a suit was instituted in the Ecclesiastical Court by *B.* against *C.* for a divorce, *causâ adulterii*, with *D.*, and she pleaded that she was married to *D.*, and upon proof made, the Court so pronounced, and accordingly dismissed *B.*'s libel, it was held that the judgment was not evidence in an ejectment, in which the marriage between *C.* and *D.* came in dispute (*h*). The principle of this case must, however, be limited to cases where the question arises between *different parties*; for if issue be joined upon a particular point, the verdict upon that point would (in civil courts at least) be evidence upon the *same point* between the *same parties* (*i*). So if in an ejectment between a

Must be direct.

(*c*) *R.* v. *Vincent*, Str. 481. *R.* v. *Rhodes*, ibid. 703; 1 Wils. 75.

(*d*) See 11 St. Tr. 221. *R.* v. *Sterling*, Leach, 117. *R.* v. *Buttery and another*, O. B. Dec. 1817, and afterwards before the Judges, Hil. 1818; and *R.* v. *Gibson*, Lancaster, 1802, cor. Lord Ellenborough. Evans's Pothier, 356.

(*e*) Ann. 12.

(*f*) *Hilliard* v. *Phaley*, 8 Mod. 180.

(*g*) *Thompson* v. *Donaldson*, 3 Esp. C. 63.

(*h*) B. N. P. 244, cites *Robins's case*, C. B. 1760. In this case, however, the evidence was offered with a view to affect other parties.

(*i*) *Da Costa* v. *Villa Real*, Str. 961.

Manner of the adjudication.

devisee and the heir at-law, the defendant should obtain a verdict, on proof that the will was not duly executed, he could not give the verdict in evidence on another ejectment brought by another devisee (*k*). If in an information against *A.* issue were taken on the fact whether *J. S.* was mayor of such a borough in such a year, and it were to be found that he was not, such finding and judgment would not be evidence on the like information against *B.* (*l*).

It seems, also, that the former judgment or sentence must not only be direct, but also final and *conclusive* (*m*) in the court of which it is a judgment upon the subject-matter; for if it does not decide the fact there, it cannot have a greater effect in any other court. Hence, although a sentence in a jactitation suit has been admitted in evidence as to the fact of marriage in a temporal court, it seems in principle to be wholly inadmissible, at least as against those who were not parties to the suit (*n*). A colonial judgment cannot be pleaded in bar of an action in this country, unless it would have been conclusive in the colony, although the judgment has been pronounced by a court of error in the colony, and by the King in Council (*o*).

Application of the judgment in proof.

Fourthly and fifthly, assuming then, that a Court of competent jurisdiction has adjudicated directly upon a particular matter, the next question is as to the application and effect of that judgment in proof of the same disputed fact. The adjudication is offered to prove either, First, the same fact for the same purpose, that is, where the same matter is again litigated (*p*) in a court of concurrent jurisdiction; or, secondly, to prove the same fact for a different

(*k*) B. N. P. 244.

(*l*) This instance is given in Buller's N. P. 244, in illustration of the rule, that a determination is not evidence, unless it be *ex directo*; but it is to be observed, that had the decision been *directly* against *J. S.*, it would not have been evidence against one not claiming in privity with him.

(*m*) See the judgment of C. J. De Grey, 11 St. Tr. 261.

(*n*) See the *Duchess of Kingston's case*, 11 St. Tr. 198.

(*o*) *Plumtree* v. *Woodhouse*, 4 B. & C. 625.

(*p*) A judgment by default is not evidence by way of admission, where the same cause is removed to a higher court. Upon the removal, by *habeas corpus*, of the cause from the inferior court, the defendant having suffered judgment by default, it was held that it was not receivable in evidence against him as an admission of a cause of action; by the removal, both parties were to be considered as in the same situation, as if no such judgment had been given. *Bottings* v. *Firby*, 9 B. & C. 762. So a verdict on a former trial is not evidence on a new trial. 2 Show. 255. But it has been seen that if a party omit to plead that which would have been a bar to the former action, he cannot plead that matter to an action on the judgment. *Todd* v. *Maxfield*, 6 B. & C. 105. After a complaint against the sheriff

ferent or collateral purpose. In the first case, according to the judgment of Ch. J. De Grey, already cited (*q*), the judgment is as a plea at bar, and as evidence conclusive between the same parties (*r*). In order, however, to make such a judgment operate as a conclusive bar in a civil action merely as an *estoppel*, it is necessary to plead it as an estoppel (*s*). If a party will not rely on an estoppel when he may, but takes issue on the fact, the jury will not be bound by the estoppel, for they are to find the truth of the fact (*t*). They cannot, indeed, find anything against that which the parties have affirmed, and admitted on record, although such admission be contrary to the truth; but in other cases, though the parties be estopped to say the truth, the jury are not, as in *Goddard's case* (*u*), where, in an action upon a bond to a deceased intestate, the defendant pleaded the death of the intestate before the date of the bond, as alleged in the declaration, and so concluded that the writing was not his deed; on which issue was joined, and it was held that the jury were not estopped from finding that the bond was executed nine months before it bore date, and in the lifetime of the intestate (*x*).

Effect of a judgment.

In an action on the case for diverting water from the plaintiff's mill, the defendant gave in evidence the record of a judgment in a former action between the same parties for the same cause of action, in which the defendant had pleaded not guilty, and obtained a verdict. It was contended, both at the trial and afterwards in bank, that the plaintiff ought to be nonsuited; but it was held that it was not conclusive, upon the plea of not guilty, although it would have been so had it been pleaded by way of estoppel, for the defendant had *elected* that the matter should be considered by a jury upon *evidence*, and it was left open to them

by action, and special relief given, an action is not maintainable against him. *Cameron* v. *Reynolds*, Cowp. 403. A *cessio bonorum* in Scotland does not discharge the party from a contract in England. *Phillips* v. *Allen*, 8 B. & C. 477. *Secus*, if the plaintiff be entitled to a distributive share. Ib.

(*q*) Vide *supra*, 217. 11 St. Tr. 201; Hargr. Law Tracts, 456; Pothier by Evans, 357; 3 Wils.

(*r*) B. N. P. 244; Stra. 901; 4 Co. 29; 11 St. Tr. 213, 214; Cowp. 322; 8 T. R. 130; Burr. 1005.

(*s*) See the cases cited below, and Com. Dig. tit. *Estoppel*, A. *Outram* v. *Morewood*, 3 East 354; 16 East, 334. A plaintiff is estopped by livery of seisin, unless he show by the deed that the delivery was conditional. Co. Litt. 225; Litt. 363. But the jury are not estopped under the general issue. Co. Litt. 226; Litt. 366; see further Vol. II. tit. Record. See the Digest, De Exceptione rei Judicatæ, 44; tit. 1, 2.

(*t*) *Vooght* v. *Winch*, 2 B. & A. 662. *Trevivan* v. *Lawrence*, Salk. 276; B. N. P. 298. *Hunnaford* v. *Hunn*, 2 Carr. & P. C. 148.

(*u*) B. N. P. 298.

(*x*) 2 Rep. 4.

Effect of a Judgment.

to inquire into the same upon evidence, and to give their verdict upon the whole of the evidence submitted to them. And the case of *Bird* v. *Randall* (*y*), where Lord Mansfield was reported to have said that a former recovery need not be pleaded, but will be a bar when given in evidence, was denied; and it was said that the judgment in a former action for the same cause did not necessarily show that the plaintiff had no cause of action. If the matter had been pleaded it would have operated as an estoppel; but having put it to the jury to find what the fact was, it was inconsistent with the issue which the defendant had joined, to say that the jury were *estopped* from going into the inquiry. He might, however use the former verdict as evidence, and pregnant evidence, to guide the jury, who were to try the second cause, to a verdict in his favour; but if, notwithstanding the prior verdict and judgment, the jury thought the case was with the plaintiff, they were not estopped from finding the verdict accordingly (*z*).

When conclusive.

The above general rule, that a judgment by a court of competent jurisdiction upon the same matter, between the same parties, and for the same purpose, is conclusive, appears to comprehend not only all adjudications by the courts of this country, whether of record or not, but also those of foreign courts (*a*). It has, indeed, been suggested that the judgments of the courts in this country, which are not of record, afford mere *primâ facie* evidence of the subject-matter to which they relate, and are liable to be controverted by opposite evidence. This position does not, however, seem to be warranted by any decision, or to be tenable upon principle.

Between parties; foreign judgments whether conclusive.

The question, also, whether the judgments of foreign courts, when actions are brought upon them here, are conclusive, or merely *primâ facie* evidence of the debt, has been subject to some doubt, but the former position seems to be best supported, both by principle, and by analogy to decided cases. That the evidence in these cases is merely *primâ facie*, is a position which rests chiefly on these authorities: the case of *Walker* v. *Witter* (*b*), which was an action on a judgment in Jamaica, in which it was

(*y*) 3 Burr. 1853.

(*z*) *Vooght* v. *Winch*, 2 B. & A. 662. See the remarks, Vol. II. 706.

(*a*) As to the effect of a foreign judgment in discharging a debt contracted in this country, see *Sidaway* v. *Hay*, 3 B. & C. 12; where it was held that a debt contracted in England was discharged under a sequestration in Scotland, issued under 54 G. 3, c. 137. But that was on the construction of the particular statute. See further, *Smith* v. *Buchanan*, 1 East, 6. *Potter* v. *Brown*, 5 East, 124. *Pedder* v. *M'Master*, 8 T. R. 609. *Quin* v. *Shea*, 2 H. B. 553. *Jeffery* v. *M'Tuggart*, cited 3 B. & C. 22.

(*b*) Doug. 1.

observed *incidentally* (*c*) that courts not of record, or foreign courts, or courts in Wales, have not the privilege of not having their judgments controverted. The case of *Sinclair* v. *Fraser* (*d*), which was an action in Scotland upon a judgment in Jamaica, in which the Court required evidence of the original debt, and in which, upon appeal to the House of Lords, it was resolved, that the judgment of a court in Jamaica ought to be received as *primâ facie* evidence of the debt. Also a *dictum* of Eyre, C. J. in giving judgment in the case of *Phillips* v. *Hunter* (*e*), in which he considered foreign judgments as matters *in pais*, and *primâ facie* sufficient to raise a promise. It is to be observed, in the first place, that these authorities are all, with a view to this question, *extra-judicial*. In *Walker* v. *Witter*, and *Sinclair* v. *Fraser*, the only question necessary to be determined was, whether on proof of a foreign judgment in his favour the plaintiff was entitled to recover against the defendant, without entering into the original consideration on which the judgment was founded; and the question how far such evidence was controvertible did not arise; and the case of *Phillips* v. *Hunter* was decided against the opinion of Eyre, C. J., by the three other Judges. Secondly, the position in *Walker* v. *Witter*, and the observation of Buller, J. in support of it, in a subsequent case (*f*), proceed upon the supposition that no judgments are conclusive except those of record in this country; and that the judgment of a foreign court could not be entitled to greater credit than the judgment of a court not of record in this country. But this seems to be doubtful at the least. In the case of *Moses* v. *Macfarlane* (*g*), Foreign judgment.

(*c*) See Mr. Evans's Observations, 2 Pothier, 349.

(*d*) Cited 1 Doug. 5.

(*e*) 2 H. B. 402.

(*f*) *Galbraith* v. *Neville*, 1 Doug. R. 5, n. 2; and 5 East, n. b.

(*g*) Burr. 1005. *Macfarlane* sued *Moses* in the Court of Conscience, as the indorser of a small bill of exchange, and recovered against him, in breach of an agreement in writing between them (which the commissioners of the court refused to notice,) that *Moses* should not be liable nor prejudiced by reason of his indorsement. *Moses* paid the money, and brought an action in the King's Bench to recover it back, as money had and received to his use, and did recover it. The principal question was, whether the money thus paid according to the sentence of the court could be recovered in opposition to that sentence, as money had and received to the plaintiff's use; and whether he ought not to have declared for breach of the special agreement. It was held that the plaintiff was entitled to recover, for that the commissioners had properly refused to take notice of the agreement in bar of the suit; and, therefore, that the permitting the plaintiff to recover money so paid, was no impeachment of their decision; and as it was money which, under all the circumstances, was justly due to the plaintiff, it might be recovered in that form of action. This decision has created great dissatisfaction, and the objections to it were stated with great force and perspicuity by Ld. C. J. Eyre, in giving his opinion in *Phillips* v. *Hunter*, 2 H. B. 402. who

Foreign judgment.

which has been the subject of strong animadversion on account of its tendency to unsettle foundations (*h*), the Court fully admitted the general doctrine, that the judgment of a competent tribunal could not be overhaled in an original suit; and although the judgment, which was there insisted upon as final, was one by the commissioners in a court of conscience, it was never contended that it was not equally conclusive with the judgment of a court of record. So in *Moody* v. *Thurstan* (*i*), where, under an Act for stating the debts of the army, the commissioners had power to call the officers and agents before them, and in case they found money due from one to the other, to give a certificate upon which an action might be brought, as upon a stated account; in an action for money so due, the plaintiff produced his certificate; the defendant tendered his accounts, offering to show that no money was due; and he complained that the commissioners had refused to hear him, and made their certificate upon the first summons, without giving him time to produce his accounts: but the Chief Justice upon the trial, and the whole Court afterwards, were of opinion that the certificate was conclusive. So the allowance of a debt by the commissioners of bankrupts is conclusive evidence (*k*). It is true, that in the case of *Henshaw* v. *Pleasance* (*l*), it was doubted whether a condemnation by commissioners of excise was conclusive evidence in justification of the officer who seized the goods, because it was not a judgment of a court of record. But in the case of *Roberts* v. *Fortune* (*m*), it was held by Lee, C. J. that such an adjudication, although not of record, was final. So the judgments of the Ecclesiastical Courts (*n*) and Admiralty Courts (*o*), although not of record, are frequently conclusive. So the decision of a private arbitrator, to whom the parties have referred themselves, is binding upon the subject-matter (*p*). These are instances in which the adjudication though not of record is final. A matter is not less *res adjudicata* because it is not of record, that is, because it is not preserved and authenticated in a particular manner; and when it has been established as a legal judgment by a court of competent jurisdiction, it seems to be equally entitled to consideration. The principle

observed, that it was beyond his comprehension how the same judgment could create a duty for the recoveror, upon which he might have debt, and a duty against him upon which money had and received would lie.

(*h*) See the observations of Eyre, C. J. 2 H. Bl. 416. See also *Brown* v. *M'Kinnally*, 1 Esp. C. 279. *Marriott* v. *Hampton*, 7 T. R. 269.

(*i*) Str. 481.

(*k*) Doug. 392.

(*l*) 2 Bl. 1174.

(*m*) 1 Hargr. Law Tracts, 446.

(*n*) *Da Costa* v. *Villa Real*, Str. 961.

(*o*) Vide *infra*, 241. 243.

(*p*) *Doe* v. *Rosser*, 3 East, 15; 16 East, 208; see tit. Award.

on which the conclusive quality of judgments, decrees or sentences, depends, applies just as much to foreign judgments attempted to be enforced here, as to any other. Judgments of inferior courts in this country do not differ in that respect from recorded judgments; and if the mere circumstance of their being foreign made any difference, the objection would equally apply to all foreign judgments, and consequently the sentences of foreign courts of Admiralty would not be, as they are, conclusive here. The principle upon which a judgment is admissible at all is, that the point has already been decided in a suit between parties or their privies, by a competent authority, which renders future litigation useless and vexatious. If this principle extends to foreign as well as domestic judgments, as it plainly does, why is to be less operative in the former than in the latter case? If it does not embrace foreign judgments how can they be evidence at all? By admitting that such judgments are evidence at all, the application of the principle is conceded: Why, then, is its operation to be limited as if the foreign tribunal had heard nothing more than *ex parte* statement and proof? Lord C. J. Eyre lays stress on the circumstance, that the judgment is voluntarily submitted by the party who claims the benefit of it, to the jurisdiction of the court; but so it is in every case where a party claims the benefit of such a judgment, for no one is compelled to avail himself of a judgment; and it can make no difference whether he attempts to enforce it as plaintiff, or as matter of defence; for it could scarcely be contended, that a judgment was merely *primâ facie* evidence for a plaintiff who endeavoured to recover the debt, but that it was conclusive in his favour when he used it by way of set-off. In the case of *Galbraith* v. *Neville*, Lord Kenyon expressed strong doubts as to the doctrine advanced in *Walker* v. *Witter*; and it appears that ultimately (*q*) the Court refused a new trial, being of opinion that the judgment was at all events *primâ facie* evidence of the debt, without entering into the question how far it was impeachable. Foreign judgment.

In a late case (*r*), upon an action of covenant, for not indemnifying the plaintiff against partnership debts due from a dissolved firm in which the plaintiff and defendant were partners, the plaintiff proved a decree in the court of Grenada against himself and the defendant, for a partnership debt, on which a sequestration issued against the plaintiff's property, by which he was compelled to pay the debt. Upon the trial the defendant offered to prove that the account had been incorrectly taken; but Lord Ellenborough rejected the evidence, on the ground that the foreign court,

(*q*) 5 East, 475 (n.) b.
(*r*) *Tarleton* v. *Tarleton*, 4 M. & S. 502. See *Malony* v. *Gibbons*, 2 Camp. 20.

being a court of competent jurisdiction, must be taken to have decided rightly, and the Court of King's Bench afterwards refused a rule *nisi* for a new trial. The case of *Burrows* v. *Jemino* (*s*) is most direct to show that foreign judgments are conclusive. In that case, the acceptor of a bill, residing at Leghorn, having been discharged of his acceptance, according to the laws there, by the failure of the drawer, instituted a suit there, and had his acceptance vacated by a decree of the court; and being afterwards sued in England upon the same bill, he applied to the Court of Chancery for an injunction, which was granted on the broad ground that the sentence of a court of competent jurisdiction is conclusive.

Foreign judgments, how far examinable.

The proceedings, however, upon which a foreign judgment has been obtained, are to a certain extent open to examination, for the purpose of ascertaining whether the judgment has been fairly obtained, and pronounced by proper authority, in a case within the jurisdiction of the court.

Thus, where the plaintiff declared in *assumpsit* on a foreign judgment in the island of Tobago (*t*), and upon the trial a copy of the proceedings and judgment was produced, from which it appeared that the defendant had been summoned by nailing up a copy of the declaration at the court-house door, upon which judgment was afterwards given by default, and no evidence was given that the defendant had ever been present in the colony, or subject to the jurisdiction of the colonial court, Lord Ellenborough nonsuited the plaintiff, and a rule *nisi* for a new trial was afterwards refused (*u*). So in the case of *Cavan* v. *Stewart* (*v*), Lord Ellenborough held that a party here was not bound by a colonial judgment, unless it appeared that he had been summoned, or was proved that he had been once resident upon the island; and that it was not sufficient that he was described as an absentee on the face of the proceedings.

(*s*) Str. 733. In the case of *Plummer* v. *Woodhouse*, 4 B. & C. 625, it was held that a plea alleging a judgment in a colonial court for the same cause of action, was a bad plea, for not showing that such a judgment would have been conclusive in the colony; but it seems to have been assumed that the judgment, if shown to be conclusive in the colony, would also be conclusive here.

(*t*) *Buchanan* v. *Rucker*, 9 East, 192.

(*u*) It appeared that, by a law of the colony, if a defendant be absent from the island, and have no attorney, manager or overseer there, such mode of summoning should be deemed good service. But the Court held, 1st, That the law applied to those only who had once been present upon the island; and, 2dly, That if its terms could be construed to extend to those who had never been present, the law could not be operative upon them. And see the case of *Cavan* v. *Stewart*, 1 Starkie's C. 525.

(*v*) 1 Starkie's C. 525.

Judgments of inferior courts, how far examinable.

And the rule appears to be the same with respect to the judgments of inferior courts in this country. In *Fisher* v. *Lane* (*w*), the plaintiff, an administrator, brought *assumpsit* for goods sold and delivered by the intestate; the defendant pleaded the general issue, and gave in evidence the payment of a sum of money in consequence of a judgment upon a foreign attachment in London. From the minutes of the judgment, it appeared that Henry Janson had by this process attached the sum of 92 *l.* 18 *s.* in the hands of the defendant, for a debt due from the intestate, and for default of the present plaintiff in not appearing, had had execution; but it did not appear from the proceedings that the plaintiff had received any notice of the process, and the serjeant at mace stated that such was the custom of the city court. The Court of Common Pleas held that the judgment was erroneous, since the plaintiff, who never had been summoned, had made no default (*x*).

In private matters, conclusive effect of.

Secondly, where a judgment is offered to prove the same fact, but for a different or collateral purpose, then if the judgment was by a court of exclusive jurisdiction, it is *conclusive* evidence upon the question so incidentally arising (*y*). In an action upon a contract of marriage, *per verba de futuro*, the defendant gave in evidence a sentence of the Spiritual Court in a cause of contract, where the Judge had pronounced against a suit for the solemnization in the face of the church, and declared the defendant free from all contract, and this was held to be conclusive evidence although the proceedings were *diverso intuitu*; that in the Spiritual Court being for a specific performance, and that in the action for damages (*z*).

(*w*) 3 Wils. 297. In *Herbert* v. *Cooke*, Willes, 36, note (*a*), it was held that in an action of debt, on a judgment of an inferior court, not of record, the defendant might plead that the cause of action arose beyond the jurisdiction of the court. In *Huxham* v. *Smith*, 2 Camp. C. 19, Lord Ellenborough held that the judgment against the defendant as garnishee in the Lord Mayor's court was *primâ facie* evidence of a debt due to the plaintiff from the defendant on a cause of action, within the city of London; but he admitted evidence to prove the contrary. See *Palmer* v. *Hooker*, 1 Ld. Ray. 727. But he seems to have held that the judgment was conclusive as to the debt.

(*x*) See also *Williams* v. *Lord Bagot*, in error, 3 B. & C. 772; where it was held that a custom in an inferior court to declare against a defendant before an appearance entered by him, or by some person for him, was bad in law: and it seems also that a custom to issue a summons and attachment at the same time, is also bad. See also *Doe* d. *Lord Thanet* v. *Gartham*, 1 Bing. 357. *R.* v. *Dr. Gaskin*, 8 T. R. 209.

(*y*) According to the judgment of De Grey, C. J. *antea*, 216. And see *Da Costa* v. *Villa Real*, Str. 961.

(*z*) *Da Costa* v. *Villa Real*, Str. 961.

In the next place, although the judgment or decree be not pronounced by a court of exclusive jurisdiction upon the subject-matter, yet, if the same point once determined between the same parties again arise, although for a different purpose, the judgment it seems, would be admissible but not conclusive evidence (*a*).

Verdicts and judgments in criminal cases, admissibility of.

An adjudication of a criminal nature seems to have little operation as evidence, except with a view to proof of the mere fact of adjudication, or to establish its own legal consequences.

The principles adverted to seem to exclude a verdict in a criminal proceeding from being evidence in one of a civil nature. For, independently of other objections in such cases, the parties are not the same; and therefore there is not such a mutuality as is essential to an estoppel (*b*).

In an action brought by a private person, the *acquittal* of the defendant upon an indictment is not evidence, because the plaintiff was no party to the criminal proceeding, and therefore his private remedy ought not to be concluded by the result (*c*). In addition to which it may be observed, that an acquittal, however well founded, would seldom, if ever, show conclusively that the defendant had not committed an injury for which he is responsible in damages; for he may be liable in damages without having acted criminally; *è converso*, *a conviction* upon an indictment is not evidence for the plaintiff in an action for the same wrong: *first*, because the defendant upon the indictment could not attaint the jury for a false verdict; and, *secondly*, because there is no mutuality; *thirdly*, because it does not appear that the verdict was not procured by means of the testimony of the *interested* party (*d*). Accordingly, a conviction upon an indictment for trespass is not evidence upon an action brought for the same trespass (*e*); and a conviction upon an indictment for a conspiracy is not binding upon a writ of conspiracy by the same party (*f*). But where, upon an indictment, the defendant *confesses* his guilt, the confession, it seems, is evidence in a civil

(*a*) *Lewis* v. *Clarges*, Gil. Law. Ev. 29.

(*b*) B. N. P. 232; Gil. Law. Ev. 30. *Hudson* v. *Robinson*, per Lord Ellenborough, 4 M. & S. 476.

(*c*) *Supra*, p. 221.

(*d*) In Gil. L. Ev 31, it is urged, that where the verdict is founded on other evidence besides the party's own oath, it is admissible; but how are the jury to know what weight the oath of the party had, and how is it to be known without going into extrinsic evidence, by what witnesses, or upon what evidence, the former verdict was obtained?

(*e*) P. C. *Sampson* v. *Toothil*, 1 Sid. 324; B. N. P. 233; Hob. 53. *Jones* v. *White*, Str. 68.

(*f*) 27 Ass. 13; Tr. per Pais, 30.

proceeding (*g*), since those objections do not apply; for the record does not rest upon the testimony of any interested witness, and an attaint is out of the question. It has been laid down, that a conviction in a court of criminal jurisdiction is conclusive evidence, if the same fact afterwards come collaterally in controversy in a court of civil jurisdiction (*h*). And, therefore, that the conviction of the father upon an indictment for bigamy would be conclusive in ejectment as to the validity of the second marriage, although an acquittal would be no proof of the reverse. In support of this position no authority is cited except that of *Boyle* v. *Boyle* (*i*); but the question there was, whether a prohibition should not be awarded in a jactitation suit, the complainant in that suit having been convicted of bigamy in marrying a second wife, whilst his first wife, the defendant in the jactitation suit, was living; and a prohibition was granted. Admitting this decision to be law, it can scarcely be inferred that the conviction would have been equally conclusive of civil rights in a temporal court. An action was brought for words which charged the plaintiff with being accessory to felony; and though the party charged as principal in the felony had been acquitted, it was held that the defendant was at liberty to go into evidence to prove his guilt, because what had passed between others could not affect him (*k*).

Verdict in criminal case not evidence in civil action.

As a general rule, it seems that a verdict or judgment in a criminal case is not evidence of the fact upon which the judgment was founded, in a civil proceeding.

The case of *The King* against *The Warden of the Fleet* (*l*) is a strong authority for this position. The defendant was tried at bar for permitting the escape of prisoners from the Fleet prison. To prove the escape a witness was offered who had been a prisoner.

(*g*) Tr. per Pais, 30; 27 Ass. 7. The reason given by Sharde is, that a confession is stronger than a verdict. In such a case, the objection, that the verdict may have been obtained on the evidence of the party who now seeks to take advantage of it, ceases; and the case seems to stand upon the same footing with that of any other admission; and so ruled by Wood, B., Leicester Lent Assizes, 1808.

(*h*) B. N. P. 245.

(*i*) 3 Mod. 164; Comb. 72. S. C.

(*k*) *England* v. *Bourke*, 3 Esp. C. 80. An acquittal of a party by the judgment of a court-martial from the charge on which he was arrested, does not deprive the defendant, in an action of trespass for the arrest, of his right to justify, on the ground that there was reasonable and probable cause for the imprisonment. *Bayley* v. *Beurden*, 4 M. & S. 400.

(*l*) 12 Mod. 337. See also the cases of *R.* v. *Boston*, 4 East, 581; and *Bartlett* v. *Pickersgill*, ib. 377, in which the principle is fully established, that a conviction obtained on the oath of an interested party is of no effect. See also *Hathaway* v. *Barrow*, 1 Camp.

Verdict in a criminal case not evidence in a civil action.

It was objected that he was incompetent, since he had given a bond for his being a true prisoner, which he had forfeited by his escape; and besides that, he had been retaken; and that if the defendant should be convicted upon his evidence, and debt should afterwards be brought by him upon the bond, the conviction would be evidence to make it void, as taken for ease and favour; and that, in an action of false imprisonment for the re-taking, the conviction would also be evidence. But it was answered, and resolved by the Court, that the conviction would be no evidence against the warden upon debt on the bond, nor for the prisoner in false imprisonment against the warden; because it would not be between the *same parties.* For a conviction at suit of the King for battery, &c. cannot be given in evidence in an action of trespass for the same battery, nor *vice versâ,* the like law of an usurious contract. In the case of *Hillyar* v. *Grantham* (*m*), upon a trial at bar, the Court of King's Bench were of opinion that a sentence of excommunication against the father and mother for fornication was not admissible in evidence upon an ejectment to bastardize the issue, because it was a *criminal matter,* and therefore could not be admitted in a civil cause; and also because it was *res inter alios acta.* And in the case of *Gibson* v. *Macarty* (*n*), where the question was whether certain promissory notes were genuine, the defendant offered in evidence the record of the plaintiff's conviction for the forgery of one of the notes; but Lord Hardwicke refused to admit the evidence, on the ground suggested by the plaintiff's counsel, viz. that no record of a conviction could be evidence in a civil suit, because it might have been obtained by the evidence of a party interested. And the same doctrine is reported to have been expounded by the Court in the case of *Richardson* v. *Williams* (*o*). In the case of the *King* v.

151, where Sir J. Mansfield held, that in an action on the case for a conspiracy, a conviction of the defendants upon an indictment, where the plaintiff was a witness, was not evidence. A conviction is not evidence for the informer, though his name do not appear on the face of the proceedings. *Smith* v. *Rummens,* 1 Campb. 9. S. P. ruled in *Hathaway* v. *Barrow and others,* 1 Campb. 151. See also *Burden* v. *Browning,* 1 Taunt. 520. *Richardson* v. *Williams,* 12 Mod. 319. *Gibson* v. *M'Carty,* Cas. temp. Hardw. 311. *Hillyard* v. *Grantham,* 2 Ves. 246.

(*m*) Cited Ca. temp. Hard. 311.

(*n*) Ibid.

(*o*) 12 Mod. 319; and see *Jones* v. *White,* Str. 68, where the question was, whether upon the issue *devisavit vel non,* the coroner's inquest, finding the deceased a lunatic, was admissible in evidence; and the Judges were divided upon the question of admissibility. But Eyre and Pratt, Js. were for excluding the evidence, because the proceeding was of a criminal na-

Boston (*p*) it was held, on an indictment for perjury, assigned upon an answer to a bill of injunction, that the prosecutor, against whom the defendant had brought the action at law, was a competent witness, on the express ground that the conviction could not be used by him for the purpose of obtaining relief in equity.

It is also to be observed, that in a case of this nature there would be no mutuality; for an acquittal of a party on a criminal proceeding would not be available in a civil action (*q*). Where the father was acquitted on an indictment for having two wives, it was held that the record was not evidence in a civil case, where the validity of the second marriage was controverted (*r*). On this ground it is asserted in Buller's *Nisi Prius* (*s*), that a conviction at the suit of the King for a battery, cannot be given in evidence in trespass for the same battery.

Judgment in criminal cases, effect of in evidence.

The record of an acquittal or conviction upon a criminal charge, is in general pleadable in bar, or conclusive evidence upon another indictment or other proceeding for the same offence. The parties are the same in both, and no one ought to be brought into jeopardy twice for the same charge (*t*). Upon this ground it has been held, that a person who had killed another in Spain, and had been tried and acquitted by a competent tribunal there, could not be tried again here for the same offence (*u*).

An *acquittal* upon an indictment for the non-repair of a road, is not evidence upon a subsequent indictment as to any point, since it concludes nothing as to the general liability, but only shows that the defendant was not liable at the particular time

ture, and therefore was not admissible in a civil proceeding. And the Chief Justice, and Powys, J., thought it admissible, on the special ground, that since the plaintiff was executrix, the inquest, which saved the personal estate, was to her advantage. And see *R.* v. *Bowler*, Vol. II. tit. WILL.

(*p*) 4 East, 581. See also *Bartlett* v. *Pickersgill*, 4 East, 377. *Burdon* v. *Browning*, 1 Taunt. 520.

(*q*) Gil. L. Ev. 35; B. N. P. 232, 3. See Lord Ellenborough's observations, *Hudson* v. *Robinson*, 4 M. & S. 479; 12 Mad. 339; Hardr. 472; 11 St. Tr. 462. Bac. Ab. Ev. F. 216.

(*r*) The reason assigned for this is, that less evidence is necessary to maintain the action than to attaint the criminal, and therefore his acquittal was no argument that the fact was true. Gil. L. Ev. 33.

(*s*) 233. So a conviction of an assault before a magistrate, on the information of the party assaulted, is not evidence in an action for the assault. *Smith* v. *Rummens*, 1 Camp. 9. See also *Hathaway* v. *Barrow*, 1 Camp. 151; 1 Taunt. 520.

(*t*) 4 Co. 40; 2 Haw. c. 35, s. 1, whether upon appeal or indictment; but see B. N. P. 243; 1 Sid. 325.

(*u*) *Hutchinson's case*, 1 Show. 6; B. N. P 245.

laid in the former indictment (*x*). But a *conviction* in such case is conclusive as to the liability, unless fraud can be shown. The record of a conviction is conclusive evidence against the inhabitants of a particular district of their obligation to repair a road, unless they can show that it was obtained by fraud (*y*). Fraud is put by way of example (*z*), for as against the parish at large the judgment is inconclusive, if the defence was conducted by the inhabitants of a particular district in which the indicted road lay, without any notice to the rest of the parish (*a*). So upon an indictment against a parish consisting of several districts, one of which pleaded a custom for the inhabitants of each of the three districts to repair their own roads, independently of each other, which custom was traversed, the prosecutor having upon the trial proved records of conviction of the parish at large (upon not guilty pleaded), for not repairing roads lying in the particular districts; the defendants were permitted to adduce evidence that such pleas were pleaded without their knowledge (*b*).

A penal judgment is conclusive as to all legal consequences.

The record of a judgment in a criminal case, (as in all other cases), is in general conclusive evidence as to the fact of the conviction and judgment, and as to all legal consequences resulting from it.

A judgment in a criminal proceeding is in the nature of a judgment *in rem*; such a judgment standing unreversed is, with some exceptions, conclusive evidence as to all its consequences. Thus an accessory to a felony, notwithstanding the judgment against his principal, is entitled to controvert his guilt in evidence. In this case, although the conviction of the principal may be alleged in the indictment against the accessory, or may be given in evidence, it is in effect but *primâ facie* evidence (*c*). But this is perhaps the only case in which a judgment founded on a verdict is not conclusive as to the attainder of the principal (*d*). For

(*x*) And therefore a new trial will not be granted after an acquittal on an indictment for not repairing a road. *R.* v. *Burbon Inh.* 5 M. & S. 392.

(*y*) *R.* v. *St. Pancras*, Peake's C. 219.

(*z*) See the note, 2 Saund. 159, a. See also *R.* v. *Eardisland*, 2 Camp. 494.

(*a*) Doug. 421, 3d edit. *R.* v. *Townsend*. *R.* v. *Leominster*; see 2 Will. Saund. note 159, a.

(*b*) *R.* v. *Eardisland*, 2 Camp. 494.

(*c*) Fost. 364, 5. *R.* v. *Smith*, Leach, 288. See tit. ACCESSORY. One reason for this is, that the witnesses against the principal may be dead, or cannot be procured; but the main reason appears to be, that as to the attaint of the principal, the proceeding is *in rem*, and in general conclusive against all the world as to all the consequences of the attaint.

(*d*) *Qu.* whether this is not admitted in *favorem vitæ*, for it is not necessary that the indictment should aver

a judgment in a criminal matter, as far as regards all the consequences of the judgment, is binding upon all; the attainder of a criminal is, as long as it remains in force, conclusive upon all claiming from or through the party attainted (*e*). And a conviction of a crime which deprives the party of competency, is conclusive against one who had an interest in his testimony (*f*).

Judgments and convictions in inferior courts.

Upon the same grounds, decisions in the inferior courts of justice, convictions by magistrates, and indeed all other legal and authorized adjudications, as, for instance, sentences of expulsion by colleges, or of deprivation by visitors, are evidence to establish the fact that such an adjudication has taken place, and with a view to establish all the legal consequences that may be derived from it, one of which is the protection of the party who acted in a judicial capacity within the limits of his judicial authority.

Convictions by justices.

Where actions are brought against magistrates and others, in consequence of what has been done under a conviction for any offence within their jurisdiction, the proceedings themselves, it regular, are evidence of the fact on which the judgment was founded; and the plaintiff is not at liberty to controvert and disprove it by evidence (*g*). In an action for trespass and false imprisonment, the defendant gave in evidence a conviction by him, as a magistrate, of the plaintiff, for unlawfully returning to a parish after removal from it, and a warrant, reciting the conviction, requiring the keeper of the house of correction to keep him to hard labour for twenty-six days; and Yates, J. held that the conviction could not be controverted in evidence, and the plaintiff

the guilt of the principal. Foster, 365. It is sufficient to allege the conviction simply. See Fost. Disc. 3, c. 2.

(*e*) Where it is founded upon a *verdict*, an alienee cannot falsify the attainder by suggesting that there was no felony committed. 1 Hale, 361; 2 Hawk. c. 50, s. 2.

(*f*) See WITNESS.

(*g*) *Fuller* v. *Fotch*, Holt, 287. In *Wilson* v. *Weller*, 1 B. & B. 57, it was held, that a magistrate's order for the payment of wages to a servant, stating a complaint upon oath, and an examination on oath, precluded the plaintiff, in replevin, from pleading, in bar of a plea of cognizance, that the complaint was not made upon oath. What Judges of the matter have adjudged is not traversable. Per Holt, C. J., in *Groenvelt* v. *Burrell*, Salk. 396. But if a constable commit a man for a breach of the peace his power is traversable, for he is not a Judge; he acts not for punishment, but for safe custody. Ibid. If a justice of peace record that upon his view, as a force, which is not a force, he cannot be drawn in question either by action or indictment. 12 Co. 23; 27 Ass. 19; Salk. 397. Neither an indictment nor an action lies against a Judge for what he does judicially, and for what he has jurisdiction to do if the circumstances warrant it. *Hammond* v. *Howell*, 1 Mod. 184; 2 Mod. 218. *Bushell's case*, Vaugh. 146; 1 H. 6, 64; 47 E. 3, 50. See Vol. II. tit. JUSTICES—TRESPASS.

Convictions by Justices.

was nonsuited (*h*). For although the magistrate may have formed an erroneous judgment upon the facts, that is properly the subject of an appeal; and therefore, where an appeal lies no action can be maintained till the merits have been heard, and the conviction quashed (*i*). Whenever a magistrate assumes a more extensive jurisdiction than belongs to him (*k*) he is liable in an action; and if the excess of jurisdiction appear on the face of the proceedings, the conviction cannot be set up as a defence to the action, although it has never been formally quashed (*l*). But where the proceedings are regular and formal, and the conviction still subsists, it seems that the plaintiff cannot go into any evidence in order to show that in the particular case the defendant had no jurisdiction (*m*). Upon trespass brought against the defendants, who were justices, they proved a conviction by them of the plaintiff, for a misdemeanor in his service as an apprentice. The plaintiff, in order to rebut this, offered to prove that the indentures had previously been avoided, and this proof being rejected, he was nonsuited; and upon a motion to set aside the nonsuit, the Court were of opinion that upon the point of jurisdiction the plaintiff was confined to such objections as appeared on the face of the conviction (*n*).

Sentences by colleges and visitors.

Upon the same principle, it has been held, that upon an indictment for an assault in turning the prosecutor out of a college, the sentence of expulsion was conclusive evidence of the fact of expulsion (*o*). And that a sentence of deprivation by a visitor of a college, is conclusive evidence of the fact of deprivation, in an action of ejectment for one of the college estates (*p*).

(*h*) *Strickland* v. *Ward*, 7 T. R. 633. And see *Fuller* v. *Fotch*, Holt, 287; Carth. 346; Hardr. 478; Cro. Car. 395; 1 Vent. 273.

(*i*) *Fuller* v. *Fotch*, Holt, 287; 7 T. R. 631; 2 B. & P. 391; 12 East, 81; 16 East, 21.

(*k*) *Cripps* v. *Durden*, Cowp. 240. *Gray* v. *Cookson*, 16 East, 21. *Hill* v. *Bateman*, 2 Str. 710. *Morgan* v. *Hughes*, 2 T. R. 225.

(*l*) For instances in which magistrates have been considered to exceed their jurisdiction, see *Hill* v. *Bateman*, 2 Str. 710, where the magistrate committed the party to prison, although he had effects which might have been distrained upon. Where an overseer under the st. 17 G. 2, c. 38, s. 2, was committed to the common gaol until he had given up *all and every the books* concerning his said office of overseer, belonging to the said parish, the information mentioning one specific book only, it was held that the commitment and adjudication which it pursued were an excess of jurisdiction. *Groome* v. *Forrester*, 5 M. & S. 314. Vol. II. 431.

(*m*) *Gray* v. *Cookson*, 16 East, 21. See also *Mann* v. *Davers*, 3 B. & A. 603. Vol. II. tit. JUSTICES.

(*n*) Ibid.

(*o*) *R.* v. *Grundon*, Cowp. 315.

(*p*) *Phillips* v. *Bury*, Skinn. 447; 2 T. R. 346; 1 Ld. Raym. 5.

Judgments in rem.

Thirdly, the admissibility of a judgment, decree or verdict, is to be considered, where it is allowed to operate as evidence against strangers to the original suit, where the proceeding is, as it is technically called, *in rem*: for there it may be evidence against one who was not a party to the suit, and who does not claim in privity with a party. This happens where a court exercises a peculiar jurisdiction, which enables it to pronounce on the nature and qualities of particular subject-matter of a public nature and interest, independently of any private party (*q*).

This class comprehends cases relating to marriage and bastardy, where the Ordinary has certified; to sentences relating to marriage and testamentary matters in the Spiritual Court; decisions of courts of Admiralty, judgments of condemnation in the Exchequer, and adjudications upon questions of settlement. Here the general rule is, that such a judgment, sentence or decree, provided it be final in the court in which it was pronounced, is evidence against all the world, unless it can be impeached on the ground of fraud or collusion (*r*). This seems to be built upon one or both of the following considerations: First, Because it is essential to the practical efficacy of such a jurisdiction that its judgments should be binding in all courts; Secondly, Because all who are interested in the result may usually become parties to the proceeding. First, The jurisdictions which operate *in rem*, without reference to the litigant parties, are principally those of the Ordinary, to whom the courts of common law must refer the questions of marriage and bastardy (and formerly also the question of the profession of some order of religious), when issue is taken upon them (*s*) in real actions, and which cannot be tried by the country; those of the Spiritual Court, upon marriages, matters testamentary, and other questions of spiritual cognizance; of courts of Admiralty, in questions of prize; of the court of Exchequer, upon the forfeiture of goods; and orders of justices, upon questions of settlement.

In the first place, it is evidently essential to the exercise of a jurisdiction of this nature that its adjudications upon the subject-matter should be final, not only in the courts in which they are pronounced, but in all other courts where the same question arises. It would not only be inconsistent that the decision *in rem* should not be final in the court in which it is pronounced, but,

(*q*) A commission of bankruptcy is a proceeding to which all the world are parties. Per Lord Ellenborough in *Gervis* v. *Westminster Canal Company*, 5 M. & S. 78.

(*r*) B. N. P. 244; 11 St. Tr. 262.

(*s*) See 2 Wils. 12.

General principles.

from the nature of the subject-matter, mischievous and inconvenient. Although the parties who are in a greater or less degree affected by the consequences of the judgment may change, the subject-matter is immutable, and therefore the decision upon it ought not to be liable to be disturbed. And it ought to be binding in other courts, in order to prevent inconsistency, and to support the jurisdiction of the court in which that sentence has been pronounced; for it would be in vain for a court of exclusive jurisdiction to decide, if its decisions upon the subject-matter were to be wholly disregarded.

Secondly, In general all parties really interested in the proceeding *in rem* may usually be heard in assertion of their rights. Where a question of marriage or bastardy arises in the courts of common law, the certificate of the bishop, when returned and entered of record, is binding, not only upon the parties to that suit, but upon all other litigating parties between whom the same point arises (*t*). But in cases of bastardy, the stat. 9 H. 6, c. 11, specially provides that before any writ of certificate shall pass out of the court to the Ordinary, a remembrance, reciting the issue joined, shall be certified to the Chancellor, and that thereupon proclamation shall be made in Chancery by three months, once in every month, to the intent that all persons, pretending any interest to object against the party which pretendeth himself to be mulier, be before the Ordinary, to make their allegations and objections, as the law of the holy church requireth (*u*). Now, although the immediate object of this statute was to ensure a greater degree of publicity and notoriety to the proceeding in the particular case of bastardy, yet it is to be observed, that it does not at all affect the nature of the proceeding before the Ordinary, but assumes that all who are interested will be allowed to offer their allegations and proofs before him. Whence, perhaps, it may be inferred, that in all such cases any party interested is entitled to insist upon his objections before the Ordinary. With respect to the proceedings upon an original suit in the Exchequer, relating to the seizure and condemnation of goods, and also to suits in the Spiritual Courts and Courts of Admiralty, it must be presumed that, before they proceed to pass a final decree or sentence, such reasonable notice has been given as the justice of the case requires.

(*t*) B. N. P. 245; 11 St. Tr. 261; 2 Wils. 128.

(*u*) The statute also provides, that in default of making such proclamation as it requires, the writ of certificate, and the certificate of the Ordinary upon it, shall be void.

Of the Ordinary and Spiritual Court.

In conformity with these principles, it has been held that the certificate of the Ordinary, when returned to the Temporal Court, is conclusive upon all parties (*x*) upon questions of bastardy and marriage. So the grant of a probate in the Spiritual Court is conclusive evidence against all as to the title of personalty, and to all rights incident to the character of an executor or administrator (*y*). So is a sentence in the Spiritual Court of nullity of marriage (*z*), when the decision in the court itself is *direct* and *final*. Accordingly, where the wife, *de facto*, of *T.* was libelled in the Spiritual Court by *J. S.* for a divorce on the ground of a pre-contract with him, upon which the Court dissolved the marriage, although *T.*, the husband, *de facto*, was no party to the suit, it was held that he was bound by the sentence, and that the issue of the second marriage of the wife with *J. S.* was legitimate (*a*). So where *C. K.* had issue *M. K.* by *C. S.* his wife, *de facto*, and after a sentence of nullity of marriage, *C. K.* married *F.*, and they had issue *E. K.*, it was held, upon the death of *C. K.*, that so long as the sentence of nullity stood unreversed, *M. K.*, the issue of the first marriage, was a bastard (*b*). Although neither the sentence of a Spiritual Court, nor of any other court, can be evidence upon a subject beyond its jurisdiction (*c*), yet if the matter be within its jurisdiction, it is evidence to all purposes, although not within the jurisdiction. Therefore, in an action of trespass, a sentence of deprivation in the Spiritual Court, on the ground of simony, was allowed to be read, notwithstanding the objection taken that a freehold interest of the plaintiff ought not to be concluded by what was done in the Spiritual Court. For the Court said that the Spiritual Court did not oust him of his freehold, but the ouster was the consequence of the sentence (*d*).

(*x*) B. N. P. 245; 2 Wils. 128; 11 St. Tr. 261; Fitz. Estopp. 282. *R.* v. *Rhodes*, Leach. 29.

(*y*) Roll. Ab. 638; 4 T. R. 258; 11 St. 218; 3 T. R. 130; Roll. Ab. 678. *Noel* v. *Wells*, 1 Lev. 235; 1 Ld. Ray. 262. Payment of money to an executor who has obtained probate of a forged will, is a discharge to the debtor of an intestate. *Allen* v. *Dundas*, 3 T. R. 125.

(*z*) *Bunting's case*, 4 Co. 29. *Kenn's case*, 7 Co. 41. *Hatfield* v. *Hatfield*, Str. 961. *Da Costa* v. *Villa Real*, ibid. *Jones* v. *Bow*, Carth. 225. *Harvey's case*, 11 St. Tr. 235.

(*a*) *Bunting and Lepingwell's case*, 4 Co. 29.

(*b*) *Kenn's case*, 7 Co. 41. Note, It was also there resolved that no sentence of divorce could be after the death of the parties, because that would bastardize their issue.

(*c*) Sty. 10. *Betsworth* v. *Betsworth*, 12 Vin. Ab. 128.

(*d*) *Phillips* v. *Crawley*, Freem. 84, pl. 103; 12 Vin. Ab. 128. Note, the Court would not allow the proofs in the Spiritual Court to be read, because it was not a court of record.

Sentence of Spiritual Court in a jactitation suit.

Sentence in a jactitation suit, as it seems, is not admissible evidence of marriage in a temporal court, unless it be between the same parties (*e*); at all events it is not conclusive. In *Jones* v. *Bow* (*f*), where the plaintiff in ejectment claimed through the issue of Robert Carr and Isabella Jones, it was held that a sentence in the Arches in a jactitation suit, by which it was decreed that there was no marriage between them, was a conclusive bar to the plaintiff, and estopped him from going into any proof of marriage, unless he could show that the sentence had been repealed. This decision, however, is open to the objection, that in a jactitation suit the question of marriage arises *collaterally*, and not *directly*, and that it is not *final*. In the case of *Hilliard* v. *Phaley* (*g*), it was held, that proceedings in the Spiritual Court against the father for incontinency with the mother could not be given in evidence against a child of the marriage claiming by descent from the father (*h*). And certainly such evidence could not be considered as conclusive, because the marriage was not directly in issue. In *Blachham's case* (*i*), it was expressly neld, that although a matter *directly* decided by the Spiritual Court could not be controverted, yet that the rule did not extend to any *collateral* matter to be inferred from their sentence.

A jactitation suit is founded merely on a supposed defamation, and involves no matrimonial question, unless the defendant plead a marriage; and whether it continues a matrimonial cause throughout, or ceases to be so on failure of proving a marriage, still the sentence has only a negative and qualified effect, viz. that the party has failed in his proof, and that the libellant is free from all matrimonial contract, as far as yet appears, leaving it open to new proofs of the same marriage in the same cause, or to any other proofs of that or any other marriage in another cause. And if such sentence is no plea to a new suit in the Ecclesiastical Court, and is not conclusive there, it cannot conclude another court which receives the sentence from going into new proofs to make out that or any other marriage (*k*). The sentence in a

(*e*) *Infra*, 245, note (*o*). 250.

(*f*) Carth. 225, 226; 12 Vin. Ab. 128.

(*g*) 8 Mod. 180.

(*h*) The reason which is assigned is, that such proceedings could not affect the title to lands. King, Lord Chancellor, thought that the sentence in the Spiritual Court carried on in a regular suit, and in the life-time of the parties, that they were guilty of fornication, and the payment of commutation money by the father, was strong evidence to show that there was no marriage, and he thought it hard that it should be excluded.

(*i*) 1 Salk. 290.

(*k*) 11 St. Tr. 261.

jactitation suit is, therefore, neither a direct nor a conclusive sentence as to any marriage: consequently, as it is not a proceeding *in rem*, it appears on general principles to be inadmissible evidence to prove or disprove a marriage in a proceeding in any other court. In the *Duchess of Kingston's case*, where such a sentence was offered by the defendant on a charge of polygamy to disprove the first marriage, the Judges held that such a sentence, even admitting it to be evidence at all in a criminal proceeding, was not *conclusive* evidence, and that at all events its effects might be avoided by proof of fraud or *collusion* (*l*). In the case of *Robins* v. *Cruchley*, the plaintiff having brought a writ of dower, the defendants pleaded *ne unque accouplè*; the replication alleged that Sir W. Wolseley libelled the plaintiff in the Spiritual Court, as his wife, charging her with adultery with Robins (as whose widow she claimed), and praying a divorce; and that she pleaded that she was the wife of Robins, and then set forth the sentence of the court that she was the wife of Robins. The defendants demurred; and after two arguments, the Court held the plea to be bad; and this judgment seems to have been founded not merely on the consideration that the bishop could not be ousted of his jurisdiction by this plea, but also on the ground that such a decree could not be pleaded in bar at all against a stranger. Willes, C. J. said (*m*), no determinations in the high courts touching lands shall bind strangers; much less ought a sentence in the Spiritual Court, to which Mr. Robins was no party, to bind his heirs. And Clive, J. said (*n*), Robins was no party to the suit; and why the sentence should bind his heirs I cannot conceive; it is mere matter of evidence (*o*). So upon an indictment for forging a will, it may be now proved that the will was a forgery, notwithstanding the probate (*p*), although the contrary was once held (*q*).

Sentence of a Spiritual Court.

So a judgment of condemnation in the Exchequer is conclusive

Of condemnations in the Exchequer.

(*l*) *R.* v. *Duchess of Kingston*, 11 St. Tr. 261. As to the construction of stat. 1 Jac. 1, c. 11, see POLYGAMY.

(*m*) 2 Wils. 124.

(*n*) Ibid.

(*o*) It was intimated by Willes, C. J., and Bathurst, J., that the sentence was not conclusive, because it was not final even between the parties, who might (according to Oughton) at any time apply to have it reversed; and that the Court would not be bound by the sentence of a spiritual court, which was not binding even in that court. Note also, the Court said, that the sentence might possibly be evidence before the bishop.

(*p*) *R.* v. *Buttery and another*, Old Bailey, May 6, 1818. *R.* v. *Gibson*, Lanc. Summer Ass. 1802, cor. Lord Ellenborough; 2 Pothier, by Evans, 356.

(*q*) *R.* v. *Vincent*, Str. 481.

Sentence of condemnation in the Exchequer.

upon all (*r*), not only as to the right of the Crown to the condemned property, but also in justification of the officer who seized it, where the only question is, whether it was forfeited or not (*s*). In one case, indeed (*t*), it was doubted whether the same doctrine applied to a condemnation by commissioners of Excise.

A conviction in a penalty for adulterating spirits, which does not operate *in rem*, is not evidence between other parties. Such a conviction is not evidence for the defendant in an action for the price of spirits sold, in proof of their adulteration (*u*), and is not evidence of the facts stated on another charge in respect of the same goods, founded on a different statute (*v*). In the case of *Cooke* v. *Sholl* (*w*), Lord Kenyon was of opinion, that an acquittal in the Court of Exchequer, upon a seizure made for want of a permit, was conclusive evidence in an action for the seizure, that the permit was regular (*x*), and precluded all question upon the construction of the permit.

Inquisitions of lunacy are admissible but not conclusive evidence, when the question is as to the state of the party's mind (*y*).

Admiralty decisions.

Upon the same principles, adjudications in the courts of Admiralty, whether domestic (*z*), or foreign (*a*), upon prize ques-

(*r*) *Scott* v. *Shearman*, Bl. 977. 11 State Tr. 218. See Evans's Observations, 2 Pothier, 354. So the judgment of commissioners of taxes on an appeal, is final in an action of trespass against the officer for levying; and a warrant of distress for several duties imposed by different Acts of Parliament, each giving a separate power of distress, is legal. *Patchett* v. *Bancroft and others*, 7 T. R. 367.

(*s*) Ibid.

(*t*) *Henshaw* v. *Pleasance*, 2 Bl. 1174.

(*u*) *Hart* v. *Macnamara*, cor. Gibbs, C. J. See also 4 Price, 154; 5 Price, 195.

(*v*) *Attorney-gen.* v. *King*, 5 Price, 195.

(*w*) The question reserved upon the trial being upon the construction of the permit, and not on the point whether the determination in the Exchequer was conclusive, a verdict was entered for the defendant. 1 T. R. 255.

(*x*) 1 T. R. 255.

(*y*) In debt on bond against executors of obligor, an inquisition finding that the testator was a lunatic, without lucid intervals, at the period of the execution of the bond, is admissible, though not conclusive evidence. *Faulder* v. *Silk and another, executors of Jervoise*, 3 Camp. 126; 1 Collinson, 390. See also *Sergeson* v. *Sealy*, 2 Atk. 412. See also Vol. II. tit. WILLS.

(*z*) 2 East, 473. *Geyer* v. *Aguilar*, 7 T. R. 681. *Garrells* v. *Kensington*, 8 T. R. 230. *Beering* v. *Royal Exchange Assurance*, 5 East, 99; 1 Sid. 320. *Le Caux* v. *Eden*, 2 Doug. 600. *Kindersley* v. *Chase*, Park. Ins. 490.

(*a*) *Hughes* v. *Cornelius*, 2 Show. 232; 2 Doug. 575. *Burrows* v. *Jemino*, Str. *Roach* v. *Garvan*, 1 Ves. 159. Eyre, C. J. Observations, 2 H.

tions, being decisions of an exclusive jurisdiction operating *in rem*, are conclusive evidence upon the matters which they decide (*b*), when the same points arise incidentally in other courts; whether they involve questions as to the right of property, as in actions of trover (*c*); or the questions of compliance or non-compliance with warranties in actions on policies of assurance; and even although it appear that the court has acted on peculiar rules of evidence and presumptions which are not consistent with general principles (*d*). Admiralty decisions.

Accordingly (*e*) it has been held that a sentence of condemnation by a French court of admiralty, during a war between England and France, is conclusive evidence to show that the ship was not Swedish (*f*). So a sentence of condemnation is conclusive evidence to show that a ship was not neutral, if that appear to have been the ground of condemnation (*g*). So a condemnation of a ship at Malaga, on the ground, *inter alia*, that the ship was English, was held to be conclusive evidence that she was not neutral (*h*). And whenever the sentence states the facts upon which the condemnation was grounded, it is conclusive as to those facts (*i*); as where the ship is condemned on the ground that she was enemy's property (*k*). And where the ground of condemnation is doubtful, the Court will look into the proceedings to ascertain the grounds of the sentence (*l*), and will act upon the grounds of that decision, provided they can be distinctly

B. 410. But the sentence must be given either in the belligerent courts, or in that of a co-belligerent, or ally, by a court constituted according to the law of nations. 8 T. R. 270. *Hanlock* v. *Rockwood*, 8 T. R. 268. *Donaldson* v. *Thompson*, Camp. 429.

(*b*) *Barzillay* v. *Lewis*, Park. Ins. 469. *Baring* v. *Claggett*, 3 B. & P. 201. *Saloucci* v. *Woodmas*, 8 T. R. 444; Park. Ins. 471.

(*c*) Ibid. Per Chambre, J. in *Lotheard* v. *Henderson*, 3 B. & P. 513. *Baring* v. *Claggett*, 3 B. & P. 214.

(*d*) *Bolton* v. *Gladstone*, 5 East, 155; 5 East, 99. 155; 2 Taunt. 85.

(*e*) *Burrows* v. *Jemino*. *Roach* v. *Garvan*, 1 Ves. 159. Eyre, C. J.'s observations, 2 H. B. 410. Contra, *Walker* v. *Whitter*, Doug. 1.

(*f*) B. N. P. 244; 2 Show. 232.

(*g*) *Bernardi* v. *Motteux*, Doug. 554. *Calvert* v. *Dovill*, 7 T. R. 523.

(*h*) *Oddy* v. *Bovill*, 2 East, 473.

(*i*) *Christie* v. *Secretan*, 8 T. R. 192.

(*k*) 3 Bos. & Pul. 525.

(*l*) 3 Bos. & Pul. 525. The sentence is binding, if it can be collected from the whole of the proceedings that the sentence was founded on the fact that the property was enemy's property. *Bolton* v. *Gladstone*, 5 East, 155. *Baring* v. *Royal Exchange Assurance Company*, 5 East, 99. If a ship be condemned generally as lawful prize, no special ground being stated, it is to be presumed that it proceeded on the ground that the property was that of enemies. *Saloucci* v. *Woodmas*, 8 T. R. 444. *Kinderley* v. *Chase*, Park. Ins. 490.

Admiralty decisions.

ascertained (*m*). But such a judgment must decide the point distinctly: in order to affect a warranty or representation in a policy of insurance, the intention of the Court to decide the point is not to be collected by inference or argument, but by specific affirmation (*n*); and even to this extent such decisions have not without considerable reluctance been held to be conclusive (*o*). If the facts disclosed do not warrant the sentence, it will not, as to them, be conclusive (*p*).

Such a sentence is binding, not only on the parties to the foreign suit, but in all courts and on all persons (*q*). The admissibility of such evidence seems to extend to all decisions of foreign courts of competent jurisdiction which operate *in rem* (*r*).

Proof of foreign law.

The existence of a foreign law is to be proved as a matter of fact (*s*). The written law of a foreign state must be proved by documents properly authenticated (*t*). The unwritten law, on proof that it is unwritten, may be proved by the parol testimony of witnesses possessing competent skill (*u*). Upon a question

(*m*) *Kinderley* v. *Chase*, Cockpit, 1801; Park on Ins. 544; Sir Will. Scott's observations on the case of *Pollard* v. *Bell*, ib.

(*n*) Per Ld. Ellenborough, C. J. in *Fisher* v. *Ogle*, Park on Ins. 554; 1 Camp C. 418.

(*o*) See Ld. Ellenborough's observations, ibid.

(*p*) *Calvert* v. *Bovill*, 7 T. R. 523. *Pollard* v. *Bell*, 8 T. R. 444. See also *Bird* v. *Appleton*, 8 T. R. 562. *Bolton* v. *Gladstone*, 2 Taunt. 85; 2 Camp. 154.

(*q*) See *Kinderley* v. *Chase*, Park on Ins. 490; where it was held to be conclusive on the fact that the property was enemy's property.

(*r*) As in case of marriage. *Roach* v. *Garvan*, 1 Ves. 159. See Ld. Hardwicke's observations, ibid. So on criminal charges. *Hutchinson's case*, 2 Str. 733; 1 Show. 6. *Roche's case*, 1 Leach, C. C. L. 160; *supra*, 237.

(*s*) See tit. Foreign Law, Vol. II. 331.

(*t*) Ib. In *Lacon* v. *Higgin*, 3 Starkie's C. 178, a book was produced by the French vice-consul, which he said contained the French code of laws, upon which he acted at his office. He said that there was in France an office for the printing of the laws of France, called the Royal Printing-office, where the laws were published by the authority of the French government. The book itself, which contained not only a body of French laws, but a commentary upon them, purported to have been printed at that office, and to contain a copy of the constitutional charter of France: the witness also stated that the book would have been acted on in any of the French courts. Abbott, L. C. J. admitted the evidence on the authority of the case of *The King* v. *Picton*, Howell's St. Tr. 514. Note, that the objection in that case seems to have been waived.

(*u*) *Miller* v. *Heinrick*, 1 Camp. C. 155. In the case of *Dalrymple* v. *Dalrymple*, 2 Haggard's Rep. 81, Sir Wm. Scott, speaking of the authorities for the law on which the validity of a Scotch marriage was to be determined, observes, "The authorities to which I shall have occasion to refer, are of three classes: first, the opinion of learned professors, given in the present or similar cases; secondly, the opinions of

whether the law of the mother country be the law of a colony, the statement of text writers is admissible (*x*). Acts of state in a foreign country must be proved by authenticated copies of such acts (*y*); commercial regulations by copies of such regulations (*z*).

Proof of foreign law.

So orders of justices on questions of settlement, when confirmed at sessions, are conclusive against all (*a*), as to all the facts stated in the order (*b*), and as to all derivative settlements (*c*). So an order of removal executed without appeal, is also conclusive (*d*) as to the settlement of the pauper up to that time, against all the world; but where the justices wanted jurisdiction, the order is a nullity (*e*), and may be objected against, even after a lapse of twenty years.

Judgment in quo warranto.

The proceeding by *quo warranto* is analogous to a proceeding *in rem*, so that a judgment of ouster against a mayor upon a *quo warranto* is evidence upon a similar proceeding against a burgess who claims to have been admitted by that mayor (*f*); and is conclusive evidence, unless fraud can be shown (*g*). So also a conviction of felony is, for many purposes, a proceeding *in rem*; and is in general binding against all as to the consequences of the attainder. It is still, however, as has been seen, competent to an accessory to controvert the guilt of the alleged principal,

eminent writers, as delivered in books of great legal credit and weight; and, thirdly, the certified adjudications of the tribunals of Scotland on these subjects. I need not say that the last class stands highest in point of authority. Where private opinions, whether in books or writings, incline on one side and public opinion on the other, it will be the undoubted duty of the Court which has to weigh them *stare decisis*." The practice of a court of justice in a foreign country may be proved by witnesses professionally acquainted with the practice. *Buchanan* v. *Rucker*, 1 Camp. 66.

(*x*) *R.* v. *Picton*, 30 Howell's St. Tr. 492. On the same principle (according to Lord Ellenborough) which renders histories admissible.

(*y*) *Richardson* v. *Anderson*, 1 Camp. 65 n.

(*z*) 30 Howell's St. Tr. 49.

(*a*) *R.* v. *Northfeatherston*, 1 Sess. C. 154; 4 Burn. 602. So an order of filiation is conclusive to show that the party is the putative father. *R.* v. *Best and others*, 6 Mod. 185. See Vol. II. tit. SETTLEMENT.

(*b*) Ibid. And *R.* v. *Woodchester*, 2 Str. 1172; B. S. C. 191; 2 Bott. 685.

(*c*) *R.* v. *St. Mary, Lambeth*, 6 T. R. 616. *R.* v. *Silchester*, B. S. C. 551; 2 Bott. 686.

(*d*) 2 T. R. 598; 11 East, 388. *R.* v. *Corsham*; and see 2 Salk. 488. *Sutton St. Nicholas* v. *Leverington*, B. S. C. 276.

(*e*) 8 T. R. 178. *Semble*, the quashing of an order upon an appeal, concludes nothing as to the place of settlement; for it may have been quashed because the party was not chargeable.

(*f*) B. N. P. 231. *R.* v. *Lisle*, Andr. 163. 336. 389. *R.* v. *Hebden*, 2 Str. 1109; 2 Barnard, 70; 5 T. R. 72.

(*g*) *R.* v. *The Mayor of York*, 5 T. R. 72.

although the record of conviction is *primâ facie* evidence against the accessory as to the guilt of the principal. In Buller's Nisi Prius, a conviction for bigamy seems to be considered to be in the nature of a proceeding *in rem*; and therefore, as conclusive in an action of ejectment upon a question of legitimacy: this, however, seems to be very doubtful in principle (*h*).

Conclusive, unless fraud be shown.

Where the judgment is admissible evidence against one who was neither a party nor privy to it, being a direct, final and conclusive determination of a court of competent jurisdiction upon the particular subject-matter, the rule seems to be, that the judgment is conclusive in any other, unless it can be impeached on the ground of fraud or collusion (*i*). Fraud, however, does not merely lower the evidence to mere *primâ facie* evidence of the fact, capable of being rebutted by adverse evidence, but destroys its effect altogether. For it seems that a record of a judgment *in rem* is usually either *conclusive*, or wholly *inoperative*; except, indeed, in cases of felony, where the guilt of the accused depends partly upon the guilt of another, as the guilt of an accessory depends upon that of the principal; for there the record of the conviction of the principal is but *primâ facie* evidence to affect the accessory, who may controvert the guilt of the principal, notwithstanding the record (*k*). A judgment upon a *quo warranto* against a mayor, is evidence upon a *quo warranto* against one claiming to be a burgess by virtue of his admission; it is not indeed absolutely conclusive (*l*), but it cannot be impeached except upon the ground of fraud (*m*). So in the *Duchess of Kingston's case*, upon the trial of the defendant, on an indictment for bigamy, one of the points resolved by all the Judges was, that admitting a sentence of the Spiritual Court in a jactitation suit to be conclusive evidence for a defendant, yet, that still the counsel for the Crown might avoid the effect of it, by proving it to have been obtained by fraud and collusion (*n*).

Although it is a general rule that a stranger may be admitted to impeach a proceeding to which he was not a party, on the

(*h*) B. N. P. 245; *supra*, 217 *et scq.*

(*i*) Ibid. 244; 11 St. Tr. 262. Fraud (according to Lord Coke,) avoids all judicial acts, ecclesiastical or temporal.

(*k*) Fost. 365, 6, 7; 9 Co. 118, 119; *supra*, *England* v. *Bourk*, 3 Esp. C. 80.

(*l*) *R.* v. *Grimes*, Burr. 2598. B. N. P. 231. 2 Barnard, 370. *R.* v. *Lisle*, Andr. 163. 5 T. R. 72. *R.* v. *Hebden*, Str. 2109. 11 State Tr. 1261.

(*m*) 5 T. R. 72; and see the cases last cited.

(*n*) 11 St. Tr. 261. *Cross* v. *Salter*, 3 T. R. 639.

ground of fraud or collusion, the reason ceases where the judgment or sentence is offered against one who was a party to it. In the case of *Prudham* v. *Phillips*, the defendant proved her marriage with *A. B.*; this was answered by a sentence in the Ecclesiastical Court (to which she was a party), which showed that she was then married to another person; and, after much consideration, Willes, C. J. refused to permit the defendant to show that the sentence had been fraudulently obtained (*o*). Judgments of courts of competent jurisdiction in foreign countries, upon the subject of marriage, and all other matters where the adjudication can be considered as *in rem*, seem to be equally binding with the decisions of our own courts (*p*).

Conclusive against parties—when.

Fourthly (*q*), in cases of custom, prescription and pedigree, or where general reputation is evidence, a judgment, decree or sentence is evidence, not only as between the same parties (where it would be conclusive upon the same point), but also against all others; for such evidence is of the same nature, but much stronger, than mere evidence of reputation (*r*). Accordingly, to prove a custom, not only an ancient verdict in prohibition has been held to be evidence (*s*), but also a recent verdict (*t*).

To prove custom, &c.

So is a decree in the Exchequer, on a commission to try the question of custom (*u*).

So in the case of a prescription for a public right of way, a verdict against one defendant, negativing such a right, is evidence against another defendant who justifies under the same right (*v*). So upon a question as to the liability to repair a public highway (*w*), or upon the public right of election to a parochial office (*x*).

So a special verdict between other parties is evidence to prove a pedigree (*y*).

Such evidence is not conclusive (*z*), unless both the parties be the same.

(*o*) Ambler, 763.

(*p*) See Ld. Hardwicke's *dictum*, *Roach* v. *Garvan*, 1 Ves. 159; *supra*, 228.

(*q*) See p. 190. 216.

(*r*) 1 East, 157.

(*s*) Bac. Ab. 617.

(*t*) B. N. P. 283; Carth. 281.

(*u*) *Cort* v. *Birkbeck*, Doug. 218.

(*v*) *Read* v. *Jackson*, 1 East, 355.

(*w*) Ibid. and *R.* v. *St. Pancras*, Peake's C. 219.

(*x*) *Berry* v. *Banner*, Peake's C. 156.

(*y*) 1 Burr. 146. B. N. P. 233. Carth. 79. 181. 5 Mod. 386. Sir T. Jones, 221. 2 Mod. 142, contra. *Neale* v. *Wilding*, 2 Str. 1151. Mr. J. Wright was of opinion in that case that the verdict was admissible; the other Judges differed from him, because it was *res inter alios acta*, and the evidence laid before the former jury might, for anything they knew to the contrary, still be produced.

(*z*) See the cases referred to, and also *Biddulph* v. *Ather*, 2 Wils. 23. *Mayor of Hull* v. *Horner*, Cowp. 111.

When such evidence is adduced to prove a custom or prescription, where general reputation would be evidence, a judgment or verdict would be evidence against strangers to the record, as falling within the general description of evidence capable of supporting such an issue, being in fact a solemn adjudication, founded upon satisfactory testimony, and therefore certainly as binding upon a stranger as much as mere hearsay upon the subject; but it is not, it seems, *conclusive*, where the party was in fact a stranger to the record, because he had not an opportunity to cross-examine the witnesses, or to disprove the fact by opposite testimony, and ought not to be concluded by the *laches* of another.

Proof of judgments, verdicts, &c.

The *proofs* of verdicts, decrees and judgments, whether of record or not of record, have already been considered in common with the proofs of public documents in general (*a*). At present, such matters only will be noticed as are peculiar to this branch of the subject. They are either of record or not of record. If of record, they are to be proved either by actual production from the proper repository, by an exemplification (*b*), or by a sworn copy (*c*). Records are complete as soon as they are delivered into court ingrossed upon parchment, and become permanent rolls of the court; then, and not before, a copy becomes evidence (*d*). A judgment of the House of Lords may be proved by means of a copy of the minute-book of the House of Lords, for the minutes of the judgment are the solemn judgment itself (*e*). An aver-

(*a*) See PUBLIC DOCUMENTS, PROOF OF, 189.

(*b*) See above, 189; Bac. Ab. Ev. F. Str. 162.

(*c*) For these proofs, see tit. PUBLIC DOCUMENTS, &c.

(*d*) Gil. L. Ev. 22; *supra*, 156; B. N. P. 283. An allegation in an indictment for conspiracy, &c. that at the quarter sessions, &c. a bill of indictment was preferred against *A. B.* and found by the grand jury, can only be proved by a caption formally drawn up of record at such sessions, and by the production of the original or an examined copy; held therefore that the minutes of the clerk of the peace were inadmissible, although no record had in fact been drawn up. *R.* v. *Smith*, 8 B. & C. 341. To prove the time of signing final judgment, the day-book at the judgment-office, from which the judgments are entered into the docket-books is not evidence. *Lee* v. *Meecock*, 5 Esp. C. 177. Minutes of proceedings at sessions, from which the record is afterwards to be drawn up, are not evidence on a subsequent prosecution for perjury, alleged to have been committed by a witness on a former trial. *R.* v. *Bellamy*, 1 Ry. & M. C. 171. But in the case of *The King* v. *Tooke*, it was held that the indictment, with the officer's notes, was evidence of an acquittal of one charged as a conspirator, without having the record formally drawn up. See Vol. II. 237. Proof of a writ of execution is not evidence of a judgment, except as against a party to the cause. *Ackworth* v. *Kemp*, Doug. 40, and see Vol. II. tit. SHERIFF.

(*e*) Per Lord Mansfield. *Jones* v. *Randall*, Cowp. 17; Bac. Ab. Ev. 619.

ment that a commission has been duly superseded, ought to be proved by a writ of supersedeas under the great seal (*f*). Proof of judgments, verdicts, &c.

A verdict is not evidence without producing the judgment, or an examined copy, for perhaps the judgment was arrested, or a new trial granted (*g*); but the rule does not hold where the trial was upon an issue out of Chancery, for there the decree is evidence that the verdict was satisfactory (*h*). But the production of the *postea* without the judgment is evidence to show the fact that there was a trial between the parties (*i*), and the amount of the damages.

(*f*) *Poynton* v. *Forster*, 3 Camp. 60. The Chancellor's order for the *supersedeas* is insufficient.

(*g*) *Pitton* v. *Walker*, 1 Stra. 161; Willes, 367; B. N. P. 234; Hard. 118.

(*h*) *Montgomery* v. *Clarke*, Bac. Ab. Ev. F.; B. N. P. 234; 2 Esp. C. 649.

(*i*) Str. 162; Barnard, 243. *R.* v. *Mimms*, Esp. N. P. 750. See *Harrop* v. *Bradshaw*, 9 Price, 359; Willes, 367. In *Farmer* v. *Hitchingman*, Willes, 367, it was held that the *postea* and indorsement on it were admissible to prove allegations that a cause (which was proved *aliunde* to have existed) was brought to trial on an issue joined, when a juror was withdrawn and the cause referred. See Barnes, 449; 7 Mod. 451. But the *postea* is not, it seems, evidence to establish the fact proved by the verdict. *Pitton* v. *Walker*, 1 Str. 162. In *Garland* v. *Schoones*, 2 Esp. C. 647, Ld. Kenyon is reported to have held that the mere production of the *postea* was sufficient to establish a set-off for the defendant, to the extent of the sum indorsed as the verdict in the cause; and added, that in the case of issues out of Chancery, the Chancellor always admitted the production of the *postea* as conclusive evidence of the extent of the demand. But there it is not usual to enter up judgment in such a case, and the decree of the Court is proof that the judgment stands in force. *Montgomery* v. *Clarke*, B. N. P. 234. *Hopkins* v. *Jones*, 1 Barnard, 243. In the case of *Baskerville* v. *Brown*, 2 Burr. 1229, which was cited by the party offering the *postea* in *Garland* v. *Schoones*, the objection was, that the defendant having recovered a verdict for 30*l.* against the plaintiff at the same sittings, could not set-off against the plaintiff's claim in the latter action for 11 *l.*, part of the sum for which he had obtained a verdict, without deducting the 11 *l.* There the *postea* was offered, not by the defendant in the latter action to establish his set-off, but by the plaintiff in the latter action, to show that the plaintiff in the former action had taken a verdict for his whole debt. The *postea* is admissible as introductory to prove what a witness, since dead, swore upon the former trial. *Pitton* v. *Walker*, 1 Str. 162; B. N. P. 243. *R.* v. *Iles*, and *R.* v. *Robinson*, there cited.—To prove the day on which the Court sat for the trial at Nisi Prius, the record itself must be produced. *Thomas* v. *Ansley and Smith, Sheriffs of London*, 6 Esp. C. 80. Where, however, there are proper materials, the *postea* may be indorsed in court, *nunc pro tunc*. *R.* v. *Hammond Page*, 2 Esp. C. 650, and 6 Esp. C. 83. But where a juror has been withdrawn and the cause referred, such special circumstances will not be allowed to be indorsed in court at the second trial. Ibid. It was also held that the *postea* could not be read without a stamp. Ibid.

The judgment of a Court is proved by a copy examined with the judgment entered on the roll; proof by the judgment book of the court is not sufficient, although the record may not have been made up, and although the party interested in the judgment is a stranger (*k*).

An office copy of a rule of court is admissible in the same court and in the same cause, but not in a different cause, though in the same court (*l*). An office copy of a will received in the course of office, need not be proved to be an examined copy (*m*).

A Judge's order is sufficiently proved by the rule of court thereon (*n*).

Proof of a decree in Chancery.

Proceedings in Chancery by bill and answer are not records, because they are not precedents of justice, being decided according to the justice and equity of each particular case (*o*); and therefore they may themselves be given in evidence (*p*).

But regularly, in order to prove the facts on which a decree professes to be founded, the proceedings on which it is founded ought to be read in evidence (*q*). A decretal order in paper may be read on proof of the bill and answer (*r*), or without such proof, if they be recited in the order (*s*).

Sentences of Spiritual Courts.

A sentence of the Spiritual Court of a divorce *a mensâ et thoro* has been received as evidence, without proving the libel and other proceedings (*t*). The probate of a will consists of a copy of the will ingrossed upon parchment, under the seal of the Ordinary,

(*k*) *Ayres* v. *Davenport*, 2 N. R. 474; *supra*, 192.

(*l*) *Denn* v. *Fulford*, Burr. 1177.

(*m*) *Duncan* v. *Scott*, 1 Camp. C. 100.

(*n*) *Still* v. *Halford*, 4 Camp. C. 17.

(*o*) Co. Litt. 260.

(*p*) Bac. Ab. Ev. 620.

(*q*) Com. Dig. tit. Ev. A. 4.

(*r*) See 1 Keb. 21. Com. Dig. Ev. C.

(*s*) Com. Dig. Ev. C. 1; but see 1 Keb. 21. It has been said, that if a party wish to avail himself of the decree only, and not of the answer, he may give the decree in evidence under the seal of the court, and enrolled, without producing the answer; and the opposite party will be at liberty to show that the point in issue was not the same as the present issue. B. N. P. 235. But as a general rule the whole record ought to be produced. Com. Dig. Ev. A. 4. So in proof of a sentence in the Admiralty Court on a libel and answer, or the judgment of a court baron, the proceedings ought to be produced. Com. Dig. tit. *Evidence*, C. 1. Where the mere object is to prove the fact that a decree was made, or made and reversed, and not to prove the contents, proof of the previous proceedings is not necessary. *Jones* v. *Randall*, Cowp. 17. And in the case of an ancient decree, where the bill and answer have been lost, the decree alone is admissible.

(*t*) *Stedman* v. *Gooch*, 1 Esp. C. 4. Ld. Kenyon, C. J., and afterwards in K. B.

with a certificate of its having been duly proved (*u*). A probate is therefore good evidence of the will, as to the personal estate, being a copy of it under the seal of the court, which preserves the original will in its own custody (*x*). Sentences of Spiritual Courts.

When administration is granted by the Ecclesiastical Court, it does not grant an exemplification, but only a certificate that administration was granted (*y*). And therefore, when a lessee pleads an assignment of a term from an administrator, such certificate is good evidence (*z*). So would the book of the Ecclesiastical Court, wherein was entered the order for granting administration (*a*). So the original book of acts, directing letters of administration to be granted with the Surrogate's fiat, is evidence of the title of the party to whom administration is directed to be granted, without producing the letters of administration themselves, notwithstanding subsequent letters of administration granted to another, the first not being recalled (*b*). So an examined copy of the act-book, stating that administration was granted to the defendant, is proof that he was administrator, in an action against him, as such, without notice to produce the letters of administration (*c*). So the act of the court indorsed upon the will is as good evidence with respect to the title to personalty as the probate itself (*d*). But although the probate of the will has been produced, the will itself cannot be read in evidence upon the mere production of it by the officer of the Ecclesiastical Court (*e*), without some indorsement upon it for the purpose of authentication. In an action against an executor for money had and received, after notice had been proved to produce the probate, it was held, that the original will produced by the officer of the Ecclesiastical Court, and bearing the seal of that court, and indorsed as the instrument on which the probate was granted, with the value of the effects sworn to, was admis-

(*u*) 3 Bac. Ab. tit. *Executor*, B. N. P. 244.

(*x*) B. N. P. 246.

(*y*) B. N. P. 246. *Knapton* v. *Cross*, 8 G. 2, K. B.; Bac. Ab. Ev. F.; 1 Lev. 25.

(*z*) B. N. P. 446.

(*a*) Ibid. and *Elden* v. *Keddell*, 8 East, 187. Bac. Ab. Ev. F. 631. *Polhill* v. *Polhill*, 1701

(*b*) *Elden* v. *Keddell*, 8 East, 189.

(*c*) *Davis* v. *Williams*, 13 East, 232. *Kay* v. *Clarke*, ib. 238.

(*d*) *Doe* v. *Barnard*, Cowp. 295.

(*e*) *R.* v. *Barnes*, Starkie's C. 243. Per Raymond, C. J., in *Coe* v. *Westcrnham*, Norfolk Summ. Ass. 1725, Sel. N. P. 793: "I cannot allow the original will to prove property in the executor; the probate must be produced, or perhaps the Ecclesiastical Court will not allow this to be the testator's will. Besides, until probate, a man dies intestate; and if his executor die before probate, his executor shall not be executor to the first testator."

Sentences of Spiritual Courts.

sible as secondary evidence (*f*). Where a probate has been lost, an examined copy is evidence to prove the party to be the executor, for the probate is an original document of a public nature (*g*). In such case it is the practice of the Ecclesiastical Court to grant, not a second probate, but an exemplification only (*h*).

Although it be a general rule that the probate or ledger-book be no evidence, except in relation to the personal estate, yet the ledger may in some instances be secondary evidence as to a devise of a real estate; as where, in an avowry for a rent-charge, the avowant could not produce the will under which he claimed that belonging to the devisee of the land, but producing the Ordinary's register of the will, and proving former payments, it was holden to be sufficient evidence against the plaintiff, who was devisee of the land charged (*i*). Since the ledger-book is a roll of court, it seems that a copy is admissible evidence (*k*). Although a probate be no evidence to prove the contents in a will, in order to establish a pedigree, since it is but a copy, and the seal of the court does not prove it to be a true copy, unless the suit relate only to the personal estate, yet the ledger-book, it seems, in such cases is admissible evidence, as being a roll of court, and made under the authority of the Spiritual Court, to prove such a relation (*l*).

To prove that the probate has been revoked, an entry of the revocation in the book of the Prerogative Court, which is the record of the proceedings of the court, is good evidence (*m*).

Judgment of an inferior court.

A judgment of an inferior court, not of record, is usually established by the production of the book containing the minutes of the proceedings of the court from the proper place of deposit, proved to be such by oral testimony. Copies of court-rolls, and of proceedings in the Ecclesiastical and inferior civil courts, are also evidence, since the originals are public documents (*n*). And

(*f*) *Gorton* v. *Dyson*, 1 B. 219: and *qu.* whether it would not be good original evidence. The probate-act book, containing an entry that the will was proved and probate granted, was held to be the original, and primary evidence; and therefore, to be sufficient proof that the parties were executors, although the probate was not produced, nor any excuse offered for its non-production. *Cox* v. *Allingham*, 1 Jac. 515. And see *Garrell* v. *Lister*, 1 Lev. 25.

(*g*) *Hoe* v. *Nelthorpe*, 1 Salk. 154. *R.* v. *Haynes*, Skinn. 584.

(*h*) *Shepherd* v. *Shorthouse*, 1 Str. 412.

(*i*) Ca. K. B. 375; B. N. P. 246.

(*k*) B. N. P. 246, where it is said that the contrary had been often ruled, on the mistaken ground that the ledger was a copy.

(*l*) *R.* v. *Ramsbottom*, 1 Leach, C. C. L. 30, in note.

(*m*) B. N. P. 246.

(*n*) 12 Vin. Ab. A. b. 26, pl. 49.

it is said, that as it is not usual for inferior courts to draw up their records in form, but only short notes, copies of those short notes are good evidence (*o*). It appears also, that in the case of an inferior court, such as a court-baron, hundred, or county-court, evidence should be given of the proceedings previous to the judgment, as well as of the judgment itself (*p*), in order to show that the proceedings were regular (*q*). In an action for a malicious arrest, on process out of the Sheriff's Court in London, it was held that, in order to prove the averment that the former suit was wholly ended, &c. it was sufficient to show an entry in the minute-book of "withdrawn by the plaintiff's order," opposite to the entry of the plaint, and to prove that it was the course of the court to make such an entry upon an abandonment of the suit by a plaintiff (*r*).

Proof of convictions by justices of the peace.

It is said that when actions are brought against justices of the peace they must show the regularity of their convictions, and that the informations upon which their convictions were founded must be produced and proved in court (*s*). But it seems that the conviction itself, when proved under the hand and seal (if necessary) of the magistrate, is sufficient evidence that the judgment which it recites was given (*t*). In the case of *Massey* v. *Johnson* (*u*), it was held that a magistrate might justify, by virtue of a conviction of the plaintiff as a vagrant, although the warrant of commitment alleged that the plaintiff had been charged on the oath of *T. S.*, and in fact no charge had been made by *T. S.*, but the defendant had been convicted upon the information of another person, and although the conviction itself was informal. But it was observed, that the case would have assumed a very different shape if there had been no information to ground the

(*o*) Per Hale, in *R.* v. *Hains*, 12 Vin. Ab. A. b. 26, pl. 49; Comb. 337. But see *Pitcher* v. *Rinter*, 12 Vin. Ab. A. b 48, *contra*. If they are not entered in the books they may be proved by the officer of the court, or other person cognizant of the fact. 3 B. & C. 451.

(*p*) Com. Dig. tit. *Evidence*, C. 3. *Fisher* v. *Lane*, 2 Bl. 836. *Arundel* v. *White*, 14 East, 216.

(*q*) Vide *supra*, 233. In an action on a judgment of an inferior court, the defendant may plead that the cause of action did not arise within the jurisdiction of the court. *Herbert* v. *Cooke*, Willes, 36, in note; or may take advantage of it on evidence at the trial. See 2 Mod. 272.

(*r*) *Arundel* v. *White*, 14 East, 216. See *Macally's case*, 9 Co. 69, where the brief note of the plaint was as follows: "ss. *J. M.* & *R. R.* Debt 500 *l.* pledges *C. D.* by *R. F.* serjeant," and was held to be sufficient to warrant the arrest.

(*s*) Str. 710; but see Vol. II. tit. JUSTICES, 429, note (*e*).

(*t*) Per Holt, C. J. *Fuller* v. *Fotch*, Holt, 287; Carth. 346; Hardr. 478. Vol. II. 430.

(*u*) 12 East, 67.

conviction (*v*). In the case of *Gray* v. *Coohson and others* (*w*), it was held that the defendants, having jurisdiction over the subject-matter, were protected by a conviction drawn up after the commencement of the action.

Proof of an award.

Where the parties have submitted themselves to the jurisdiction of an arbitrator appointed by themselves, his decision, as has been observed, will be conclusive upon the subject-matter to the extent of his authority (*x*). In order to establish his award or judgment, it will be necessary to prove his authority by proof of the submission bonds, or other written or parol authority, and to prove the due making of the award (*y*).

Of a foreign judgment.

A foreign judgment should be authenticated by an exemplification or copy under the seal of the court. In such case it is not sufficient to prove the hand-writing of the Judge, without also proving that the seal affixed to it is the seal of the court (*z*). It is not sufficient to produce what purports to be a copy under the seal of one who is proved to be clerk of the court (*a*). A divorce under the seal of a foreign court is not evidence without calling persons to prove the law of the country (*b*).

How rebutted.

A judgment, decree or sentence, may be impeached by proof, first, that such judgment never existed, or was void *ab initio* (*c*); secondly, that it was fraudulent and covinous; thirdly, that it has been revoked.—First, that it never existed, as by showing that the alleged probate was forged (*d*); that the testator had *bona notabilia* in another diocese (*e*); that the testator is still living; but not that the will was forged (*f*), or that the testator was *non compos*, or that another is executor (*g*), for this would be

(*v*) Per Le Blanc, C. J. ib.

(*w*) 16 East, 13.

(*x*) *Supra*, 230. And see *Doe* v. *Rosser*, 3 East, 11.

(*y*) See Vol. II. tit. AWARD.

(*z*) *Henry* v. *Adey*, 3 East, 221. *Black* v. *Lord Braybrooke*, 2 Starkie's C. 7. *Appleton* v. *Lord Braybrooke*, 2 Starkie's C. 6; 9 Mod. 66. *Alves* v. *Bunbury*, 4 Camp. 28.

(*a*) Ibid.

(*b*) *Ganer* v. *Lady Lanesborough*, Peake's C. 17. See *Fremoult* v. *Dedire*, 1 P. Wms. 431.

(*c*) No appeal need be made against an order where the justices wanted jurisdiction; see Vol. II. tit. SETTLEMENT; or against the proceedings of commissioners, in respect to matters as to which they had no authority. *Attorney-general* v. *Lord Hotham*, 1 Taunt. 219.

(*d*) T. Raym. 404-6; 2 Sid. 359.

(*e*) B. N. P. 247; 1 Sid. 359. *Noel* v. *Wells*, 1 Lev. 135, per Buller, J.; 3 T. R. 131; 5 Rep. 30.

(*f*) But upon an indictment for forging a will it may be proved that the will was a forgery, notwithstanding the probate. *R.* v. *Buttery and Macnamara*, Vol. I. p. 236; 1 Burn, by Chetwynd, 771. In the case of an inferior court not of record, the party may show that the cause of action did not arise within the jurisdiction. *Herbert* v. *Cooke*, Willes, 36, note (*a*).

(*g*) *Stirling's case*, 11 St. Tr. 223.

to falsify the judgment (*h*). In trespass, where the plaintiff had been convicted upon four convictions for carrying on his trade upon the same day, it was held to be a sufficient answer to three of such convictions, that the justices had no jurisdiction, although the convictions had not been quashed (*i*). An Ecclesiastical Judge is not liable to an action, though he excommunicate a party erroneously, but it is otherwise if he excommunicate not having jurisdiction (*k*). So it may be shown that a person is not within the scope of the bankrupt laws, although the commissioners have declared him to be a bankrupt (*l*). But nothing which might have been insisted upon by way of appeal against a sentence can be urged in answer to the evidence supplied by the sentence (*m*); and therefore, where upon an indictment for insulting a gentleman commoner, and expelling him from the gardens of a college, the defendant relied upon a sentence of expulsion, it was held to be no answer, that a sufficient number of members had not concurred in the sentence. Secondly, That it was fraudulent or covinous, for strangers ought not to be bound by such a proceeding. Accordingly, in the *Duchess of Kingston's case*, it was resolved that, even admitting the sentence in the Spiritual Court to be conclusive, still the effect might be removed by showing collusion (*n*). And in a much later case, it was held, that a sentence of divorce from the first marriage, obtained in Scotland by fraud on the part of the husband, would be no bar to a prosecution for bigamy (*o*). In an action for assault and wounding the plaintiff, it may be shown that an acquittal upon an indictment

How rebutted.

(*h*) 1 Lev. 235; 2 Keb. 237.

(*i*) *Durden* v. *Cripps*, Cowp. 640. So as to an order of removal. Vid. *infra*.

(*k*) *Ackerley* v. *Parkinson*, 3 M. & S. 411. See also *Moody* v. *Thurston*, 1 Str. 481; Vol. II. tit. JUSTICES. *Brown* v. *Bullen*, 1 Doug. 407. *Ld. Radnor* v. *Reeve*, 2 B. & P. 391.

(*l*) In strictness, the reason why the adjudication of the commissioners in such cases is not obligatory, is, that it is merely an *ex parte* proceeding, and partakes no more of the nature of a judgment than the finding a bill of indictment by a grand jury.

(*m*) *R.* v. *Grundon*, Cowp. 315. The case was put on the same footing with a decree in the Admiralty Court, which must stand till reversed. Note, the Court doubted whether Mr. Crawford, the prosecutor, was a member of Queen's College; but held, that even if he were, the sentence was not examinable but by appeal to the visitor, and that the King's Courts could not interfere. As to the general principle that a sentence by the members of a college, or by the visitor on appeal, is conclusive, see *Phillips* v. *Bury*, Skinn. 447; 2 T. R. 346. *Dr. Patrick's case*, 1 Lev. 65. *Dr. Widrington's case*, 1 Lev. 23. *Case of New Coll.* 2 Lev. 14.

(*n*) 11 St. Tr. 230. 262. 1 Ves. 159; And. 392.

(*o*) *Martin Lolly's case*, Russ. & Ry. C. C. L. 237.

How rebutted.

charging the injury as a felonious wounding, was fraudulent and collusive (*p*). So where an executor pleads judgments recovered, the plainitff may reply that they are covinous (*q*). So a stranger to a fine or recovery may avoid it by showing collusion (*r*). So if it appear on the face of the proceedings that the party to be affected by a foreign judgment, or by process of foreign attachment, was never summoned, or never had notice of the proceeding (*s*). But it is a general rule, that a person who was a party to the proceeding (*t*), or who might have been a party (*u*) to it, cannot show collusion in order to repel the judgment. Thirdly, That the judgment has been reversed, as that letters of administration have been revoked (*w*), or the probate repealed (*x*). But an appeal against a sentence is no answer to the sentence (*y*); and an attainder standing unreversed, although founded upon an insufficient indictment, is valid and pleadable in bar (*z*). Other evidence to impeach the truth of a record is inadmissible; it is not competent to a party to prove that a verdict was improperly entered by mistake (*a*).

Inquisitions.

Secondly, inquisitions, depositions and evidence, taken in the course of a judicial proceeding. Inquisitions which are of a public nature, and taken under competent authority, to ascertain a matter of public interest, are, upon principles already announced, admissible in evidence against all the world. They are very analogous to adjudications *in rem*, being made on behalf of the public; no one is properly a stranger to them; and all who

(*p*) *Crosby* v. *Leng*, 12 East, 409.

(*q*) *Lloyd* v. *Maddox*, Moore, 917.

(*r*) 11 Str. 262.

(*s*) *Buchanan* v. *Rucker*, 9 East, 192; *Supra*, 232. *Cavan* v. *Stewart*, 1 Starkie's C. 525. It is against natural justice to convict a man without a summons. *R.* v. *Cotton*, 1 Sess. C. 179; 1 Bott, 486; 1 Burn's J. 254, 23d ed. *Doe* v. *Gartham*, *R.* v. *Gaskin*, 8 T. R. *Williams* v. *Ld. Bagot*, in error. The husband need not be summoned in case of a criminal proceeding against the wife. *R.* v. *Ellen Taylor*, 3 Burr. 1681. In *R.* v. *Clegg*, Str. 475, an order of bastardy made at sessions set out no summons, but the Court said they could presume one.

(*t*) *Prudham* v. *Phillips*, Str. 2; Ambler, 763.

(*u*) *Mayo* v. *Browne*, 11 St. Tr.

(*w*) 2 Sid. 359.

(*x*) 3 Lev. 135; but note, such repeal would not invalidate a payment to the executor. 3 T. R. 125. *Allen* v. *Dundas*.

(*y*) *Hervey's case*, 11 St. Tr. 207. 212. Ann. 11.

(*z*) 4 Co. 45; 2 Hale, 251. *Price* v. *Oldfield*, And. 222; 2 Sid. 359. An execution on an erroneous judgment is good till reversed. 1 Ld. Ray. 546. An accessory cannot take advantage of error in the judgment against the principal. 1 Hale, 625. *R.* v. *Baldwin*, 3 Camp. 265; and see *Holmes* v. *Walsh*, 7 T. R. 465. Judgment against the husband for treason, not reversed, sufficient to deprive the wife of her dower; per Lawrence, J. ib.

(*a*) *Reed* v. *Jackson*, 1 East, 355.

Inquisitions.

can be affected by them usually have the power of contesting them. In general, where property is vested in the Crown upon an inquest of office, by a coroner, escheator (*b*), or other officer of the Crown, the parties affected by the inquest have a right of traverse reserved to them, or they may proceed by *monstrans de droit*. Upon a finding of *felo de se*, the executor or administrator may remove it into the Court of King's Bench, and traverse it (*c*); for it would be hard that he should be concluded by an inquisition, which is nothing more than an inquest of office, taken behind his back (*d*). By the express provisions of many statutes, inquests of office before escheators are required to be held in a public open place, and every one is to be heard in evidence (*e*). And by the provisions of these statutes the remedy by traverse and *monstrans de droit* has been much enlarged (*f*). Upon the same principle, upon the execution of a writ of extent, one who claims property in the goods which are in possession of the defendant may assert his claim before the sheriff, and cross-examine the witnesses adduced by the prosecutor (*g*). But still it seems that the finding of a *fugam fecit* by the coroner's inquisition against one who occasioned the death of another, is conclusive (*h*), although a jury upon the trial find otherwise (*i*); yet, upon principle, a traverse ought to be admitted in that case as well as upon the finding a party *felo de se* (*k*).

Since then the usual effect of such inquest of office is to vest the property in the Crown, reserving to the party affected, in most instances, a right of traverse, the consequence seems to be, that such inquisition, standing undisputed and unreversed, would be conclusive as to the right of property, not only as between any claimant and the Crown, but also, as in the case of *Toomes* v. *Etherington* (*l*), between any other parties.

The plaintiff in that case sued as administrator of Toomes, upon a judgment recovered by the intestate against the defen-

(*b*) See as to the writ of escheat, the st. 1 H. 8, c. 8. The inquisition on such a writ is evidence to show, according to the finding of the jury, that the party died without heirs.

(*c*) 1 Hale, P. C. 416-17. *Barclay's case*, Easter, 45 Ed. 3; but Ld. Coke held otherwise, 3 Inst. 55.

(*d*) According to Ld. Hale, 1 P. C. 416, 417. East's P. C. 389.

(*e*) 34 Ed. 3, c. 13; 36 Ed. 3, c. 13; 1. H. 8, c. 8; 2 & 3 Ed. 6, c. 8; 3 Comm. 260.

(*f*) 3 Comm. 360.

(*g*) *R.* v. *Bickley*, 3 Price, 454; and the sheriff having refused to permit such interrogatories to be put, the Court set aside the inquisition

(*h*) 1 Will. Saund. 362, n. 1.

(*i*) Ibid.

(*k*) See 1 Saund. 362, n. 1.

(*l*) 1 Saund. 361.

Inquisitions.

dant; the defendant pleaded that the intestate was *felo de se*, whereby the judgment was forfeited; the plaintiff replied a subsequent statute of pardon, to which the defendant demurred, and the judgment was given for the defendant; because by the finding of the inquest the debt and damages were vested in the king, and the statute contained no words of restitution.

Upon an issue *devisavit vel non*, the question was, whether the inquest of the coroner, *super visum corporis*, finding the testator lunatic, was admissible: and the Court was divided upon the point (*m*); two of the Judges deeming it to be inadmissible, because the parties were not the same, the one being a civil and the other a criminal proceeding. But in that case the dissentient Judges expressed their opinion that an *inquisitio post mortem* would be admissible, because it was a civil proceeding, and because of the antiquity of it, to prove a pedigree (*n*); and the Chief Justice cited *Lord Derby's case*, where an *inquisitio post mortem* had been admitted (*o*).

In *Sergeason* v. *Sealy* (*p*), Lord Hardwicke said that inquisitions of lunacy, inquisitions *post mortem*, and others, were always admissible, though not conclusive. In the case of *Burridge* v. *The Earl of Essex* (*q*), an inquisition *post mortem*, setting out the tenor of a deed, was held to be evidence of the deed.

Inquisition of lunacy.

An inquisition of lunacy may be considered to be in the nature of a proceeding *in rem*, since it is instituted by the direction of the Lord Chancellor, to whom, by special authority from the king, the custody of idiots and lunatics is entrusted (*r*), to inquire into the state of the party's mind. In the case of *Faulder* v. *Silk* (*s*), Lord Ellenborough, upon a plea of *non est factum* to a declaration on a bond, admitted proof of an inquisition taken on a commission of lunacy, against the obligor (to whom the defendant was executor), upon which he had been found to be a lunatic; but held that it was by no means conclusive. So such an inquisition has

(*m*) The inquest was read at the instance of Pratt, J., although he was of opinion that it was not, in strictness, admissible; because it was an issue out of Chancery, and merely to inform the conscience of the Chancellor. Str. 68.

(*n*) *Jones* v. *White*, Str. 68.

(*o*) And see B. N. P. 228; and per Hardw. C. in *Sir Hugh Smithson's case*.

(*p*) 2 Atkins, 412. *Faulder* v. *Silk*, 1 Collinson, 396; 2 Madd. Ch. 576.

(*q*) 2 Lord Raym. 1292. An *inquisitio post mortem*, and traverse thereon, is evidence, although it be voidable. *Leighton* v. *Leighton*, Str. 308; ib. 1151.

(*r*) 3 P. Wms. 108.

(*s*) 3 Camp. 126.

been received as evidence in a criminal case, to show the insanity of the prisoner (*u*). Inquisitions.

In the case of *Tooker* v. *Duke of Beaufort* (*x*), a commission from the Exchequer in the 33d of Eliz., to inquire whether the prior, &c. of Saint Swithin was seised of certain lands as parcel of a manor; or whether, upon the dissolution of the priory, the Crown was seised of them; the depositions taken under the commission and the return were held to be admissible, but not conclusive evidence against the duke.

On what authority founded.

It is not essential to the reception of evidence of this nature that the inquiry should have been made by virtue of some judicial authority, and by means of witnesses examined upon oath; it is sufficient if it was made by virtue of competent authority on behalf of the public, and on a subject-matter of public interest (*y*).

In *Doe* v. *Harcourt* (*z*) an inquisition by order of the government, in the time of the Commonwealth, to ascertain the extent of lands belonging to a prebend of the manor of St. Paul's, was held to be evidence against one claiming under the prebendary.

It is, however, of the very essence of evidence of this nature that the inquiry should have been made under proper authority; in general, therefore, unless the authority be in its nature notorious, it must be proved by the production of the commission, as in the case of an inquisition *post mortem*, and such private offices (*a*). And in other cases, where it may be presumed that the commission under which the depositions were taken has been lost, they may be read without its production (*b*). And in cases of general concern, such as the ministers' return to the commission in Henry the

(*u*) *R.* v. *Bowler*, O. B. June 1812; cor. Le Blanc and Gibbs, Js. See Vol. II. tit. WILL.

(*x*) Burr. 146.

(*y*) As in the case of the *valor beneficiorum*, *supra*, 168; B. N. P. 228. The inquisition taken under the authority of the House of Commons, as to the fees of offices, *supra*, p. 200; and see *Green* v. *Hewitt*, Peake, C. 182, where this inquisition was held to be conclusive. See also the case of the *Vicar of Killington* v. *Trin. Coll. Cam.*, 1 Wilson, 170, *supra*, 201, where the survey from the First-fruits Office was admitted to prove the vicar's right to tithes, although the authority under which it was taken did not appear. See also 2 Gwill. 542. See also as to Domesday Book, and the Survey of the Ports, *supra*, p. 200. Where an ancient extent of crown lands was found in the proper office, and pursued the directions of the statute 4 Edw. 1, the Court held that it was to be presumed to have been taken under proper authority. *Rowe* v. *Brenton*, 8 B. & C. 748.

(*z*) Peake's Ev. App. 75.

(*a*) B. N. P. 228.

(*b*) *Bayley* v. *Wylie*, 6 Esp. C. 85.

Eighth's time, to inquire into the value of livings, the party is not bound to give proof the commission (*c*); and it would be attended with great inconvenience and expense to oblige parties to take copies of the whole record. Where an inquisition has been taken without legal authority it is inadmissible; as in *Lathow* v. *Eamer* (*d*), where it was held, that an inquisition by the sheriff to ascertain to whom the goods seized under an execution against *A.* belonged, was not evidence for *A.* in an action brought by *A.* against the sheriff.

Depositions when admissible.

Depositions (*e*) of witnesses (*f*), although made under the sanction of an oath, are not in general evidence as to the facts which they contain, unless the party to be affected by them has cross-examined the deponents, or has been legally called upon, and had the opportunity to do so; for otherwise one of the great and ordinary tests of truth would be wanting (*g*). Since evidence of this kind is of a weak and secondary nature, it is not admissible, unless it be, first, the best evidence, and also unless the party against whom it is offered has had the power of cross-examination, and has been legally called on so to do; which must be proved by showing, secondly, that he was a party to the proceeding; thirdly, that it was a judicial proceeding; fourthly, that he cross-examined, or might have done so. There are some exceptions where the proceeding is of a public nature, or the evidence falls within the general scope of the rule as to reputation.

Witness must be dead or absent.

It is an incontrovertible rule, that when the witness himself may be produced his deposition cannot be read, for it is not the best evidence (*h*). But the deposition of a witness may be read not only where it appears that the witness is actually dead, but in all cases where he is dead for all purposes of evidence; as where diligent search has been made for the witness and he cannot

(*c*) *Bayley v. Wylie*, 6 Esp. C. 85. *Vicar of Killington* v. *Trin. Coll.*, 1 Wils. 170.

(*d*) 2 H. B. 437. *Glossop* v. *Poole*, 3 M. & S. 175.

(*e*) As to depositions taken before Justices, see Vol. II. tit. DEPOSITIONS.

(*f*) The oral testimony of a witness on a former trial stands upon the same grounds. B. N. P. 242. *Sherwin* v. *Clarges*, 12 Wil. 3; 1 Ld. Raym. 730. A deposition by an interested witness is not admissible any more than his own testimony would be. *Supra*, tit. WITNESS. Depositions of parishioners tending to charge the defendant with costs, on an information for money received by him for the use of the parish, are admissible in evidence, where the witnesses are not relators mentioned by name in the information. *Att.-gen.* v. *Griffiths*, 1 Kenyon, 126.

(*g*) *Supra*, 25.

(*h*) Str. 920; Godb. 193. 320; Salk. 278. 281. 286; 4 Mod. 146; Hob 112; Hardr. 232; 5 Mod. 9. 163. 277; T. Raym. 170. 335. 336. *Fry* v. *Wood*, 1 Atk. 45. *Coker* v. *Farewell*, 2 P. W. 563; B. N. P. 239.

be found (*i*), where he resides in a place beyond the jurisdiction of the court (*k*), where he has become lunatic or attainted.

It has even been said, that if a witness, having been subpœnaed, falls sick by the way, his deposition may be read (*l*). So if the witness has been kept out of the way by the adversary (*m*), or labour under any infirmity which incapacitates him as a witness (*n*). So the deposition of a party absent in Ireland has been admitted (*o*). According to the practice of the Court of Chancery in directing an issue at law, an order is made that the depositions of witnesses shall be read on the trial, on satisfactory proof that they are unable to attend in person (*p*). The principal object of the order is convenience in dispensing with the ordinary preparatory proof (*q*). Where depositions have been taken in *perpetuam rei memoriam*, and a witness afterwards becomes a party to the suit, his deposition cannot be read, for the intent of the deposition was to perpetuate testimony in case of the death of the witness (*r*). And so it was held, where a deponent became interested after his examination in a court of equity, but was

(*i*) Godb. 326; L. Ev. 106; 2 Str. 920. *Benson* v. *Olive*, 2 Str. 920. If the party cannot find a witness, then he is as it were dead to him; and his deposition may be read, so as the party make oath he did his endeavour to find him, but that he could not see him, nor *hear* of him. Godb. 326; 12 Vin. Ab. A. b. 36. To entitle a party to read a deposition taken upon interrogatories, it is not sufficient to show that the witness is a seafaring man, and that he lately belonged to a vessel in the Thames, without proving for what port the vessel was bound, or that any inquiry had been made for the witness.

(*k*) *Lord Altham* v. *Earl of Anglesey*, Gil. Eq. Cas. 16. 18; Rep. temp. Holt, 736.

(*l*) Mod. 283, 284; Ld. Raym. 729; P. Will. 288, 289; 12 Mod. 215. 231; Bac. Ab. Ev. 625; Vin. Ab. A. b. 31, pl. 10; 1 Ves. & Beames, 22. *Jones* v. *Jones*, 1 Cox's Cas. 184. But see *Harrison* v. *Blades*, 3 Camp. C. 445. Vol. II. tit. DEPOSITIONS, 276.

(*m*) *Green* v. *Gatewick*, B. N. P. 243.

(*n*) B. N. P. 239; Ld. Raym. 1166. *Fry* v. *Wood*, 1 Atk. 145. So it has been said, if the witness be unable to travel. But see the case of *Harrison* v. *Blades*, 3 Camp. 445. And see Vol. II. tit. DEPOSITIONS.

(*o*) 11 Mod. 210; 2 East, 251. *Hodnett* v. *Forman*, 1 Starkie, 90. Gil. Eq. R. 16. 18; but see Tr. p. Pais, 7th ed. 385, 386, where a distinction is taken between Ireland and a place out of the King's dominions.

(*p*) *Corbet* v. *Corbet*, 1 Ves. & Beames, 340.

(*q*) *Palmer* v. *Lord Aylesbury*, 15 Ves. 176.

(*r*) *Tilley's Case*, Lord Raym. 1009; 1 Salk. 286. Depositions having been taken in *perpetuam rei memoriam*, the inheritance afterwards descended to the person who was sworn as a witness; and the Judges of the C. P. and of the Court of K. B. held, that the depositions could not be read; and Holt, C. J. said, that such depositions could not be read in any case until the death of the witness, much less in a case where the witness was himself a party; see *Holcroft* v. *Smith*, Eq. Cas. Ab. 224; Trin. 1702; Vin. Ab. Ev. A. b.

no party to the suit (*s*); and yet if the witness become interested by operation of law, the case seems, with respect to the question of evidence, to be just the same as if he had become blind or lunatic; and in equity depositions have been admitted under such circumstances (*t*). Where a witness has been examined on interrogatories by consent, on account of his expected absence, yet if he be not absent at the time of the trial his deposition cannot be read (*u*); but it is not necessary that he should be actually on his voyage when the trial comes on; if he be on board and ready to sail, or if the ship has been compelled to put back (*x*) upon a temporary exigency, the deposition is still evidence. Reasonable proof must be adduced by the party who offers the deposition in evidence, to show the necessity of resorting to it (*y*) Upon an application by the defendant, a trial for a misdemeanor has been postponed, upon his consenting, by writing under his own hand, to the examination of a witness for the Crown upon interrogatories (*z*).

Identity of parties.

Secondly, a deposition is not admissible unless the parties be the same; for a stranger to the former suit had no opportunity to cross-examine, and therefore cannot be affected by the depositions (*a*); and he cannot use them against one who was a party, because he could not have been prejudiced by them, and therefore, for want of mutuality, ought not to take advantage of them (*b*).

Accordingly on an appeal of murder an appellant could not give in evidence an indictment for the same murder, and what a

31, pl. 42. *Baker* v. *Lord Fairfax*, Str. 101; B. N. P. 242.

(*s*) *Baker* v. *Lord Fairfax*, Str. 101.

(*t*) 2 Ves. 42. *Glyn* v. *Bank of England*, *Holcroft* v. *Smith*, Eq. Cas. Ab. 224. *Goss* v. *Tracy*, 2 Vernon, 699; 1 P. Wms. 287; 2 Vernon, 472. *Hass* v. *Hand*, 2 Atk. 615. In *Glyn* v. *Bank of England*, 2 Ves. 42, Lord Hardwicke said such evidence was allowable on good reason, for the evidence was to be taken as it stood at the time of the witness's examination, which should not be set aside unless it could be supplied by other evidence.

(*u*) 2 Salk 691; 2 Tidd's Pr. 854. For it is an implied condition that the attendance of the witness is not practicable.

(*x*) *Fonsick* v. *Agar*, 6 Esp. 92. *Ward* v. *Wells*, 1 Taunt. 462.

(*y*) It has been held to be insufficient to show that the witness was a seafaring man, and that several months ago he belonged to a vessel lying in the River Thames, without showing the nature of the vessel, or whither she was bound. *Falconer* v. *Hanson*, 1 Camp. 171.

(*z*) *R.* v. *Morphew*, 2 M. & S. 602. The same thing was done upon the trial of Mr. Hastings; see 2 M. & S. 603.

(*a*) B. N. P. 242. *Cooke* v. *Fountain*, 1 Vern. 413; 2 Rol. Ab. 679; Hob. 155.

(*b*) Bac. Ab. Ev. 626. *Rushworth* v. *Countess of Pembroke*, Hardr. 472; Gil. Ev. 55; but see Vin. Ab. Ev. A. b. 31; pl. 47.

witness had sworn upon the trial (*c*); and as the evidence on the indictment was not evidence for the appellant, neither was it for the appellee (*d*). *A.* preferred his bill against *B.*, and *B.* exhibited his bill touching the matter against *A.* and *C.*; on a trial at law it was held, that *C.* could not use the depositions in the same cause between *A.* and *B.*, but that the whole must be tried as *res nova* (*e*). The depositions or evidence of a witness in one cause cannot be evidence in another, where the verdict would be inadmissible; for the oath cannot be given in evidence without first giving the verdict in evidence (*f*); for otherwise it would not appear that the oath was more than a voluntary affidavit. But it is not necessary that the depositions should have been made, or the evidence given in the same proceeding, provided the parties be the same; in the court of Chancery depositions in one cause are frequently read in another; and in courts of law the evidence which the witness gave on a former trial may be read after his death in a subsequent one (*g*). But although the parties are the same, yet if the same matters were not in issue in the former cause the depositions are not evidence (*h*); this rule, however, at all events, does not apply to cases where depositions are offered against those who were not parties to the former suit, as matter of reputation, for there the very circumstance that the same matter was litigated, has been urged as an objection to the evidence (*i*).

Identity of parties.

(*c*) 1 Sid. 235; 2 Haw. 430; 2 Roll's Rep. 460; 2 Keb. 384; Bac. Ab. Ev. 629. The reason assigned is, that an indictment is not evidence on an appeal, and that appeal is a new cause, and therefore it is necessary to have the parties face to face.

(*d*) B. N. P. 243; 1 Sid. 325.

(*e*) Law of Evid. 108; Hard. 472; 12 Vin. Ab. 109, pl. 24.

(*f*) B. N. P. 242; 1 Sid. 325; but see 253, n. (*i*). It seems to be sufficient to give the *postea* in evidence.

(*g*) Per Lord Kenyon, 4 T. R. 290. *Pyke* v. *Crouch*, Lord Raym. 730. *Pitton* v. *Walter*, Str. 162. *Green* v. *Gatewicke*, B. N. P. 243; 12 Mod. 319; Barnard, 213. 243. *Lord Palmerston's case*, cited by Lord Kenyon, 4 T. R. 290, where upon a trial at bar it was held, on all hands, that what Lord Palmerston swore upon a former trial was evidence, the witness having died in the interim; but the evidence was ultimately rejected, because the witness could not give the words, but only the fact. In Chancery, depositions taken thirty years ago have been admitted to be read, although the parties were not the same; because they related to the same land, and the tenants were parties to it, and the plaintiff's title did not then appear. B. N. P. 240; Chan. Cas. 73; Bac. Ab. Ev. 627; Eq. Ab. 627. Formerly depositions *in perpetuam rei memoriam* were not published till after the death of the witnesses, which was attended with inconvenience, because they swore with impunity. Bac. Ab. Ev. 627.

(*h*) *Allibone* v. *the Attorney-general*, Vin. Ab. Ev. A. b. 31, pl. 45.

(*i*) *Infra*, 272.

Depositions in a former cause cannot in general be read against one who does not claim under the party with whom such depositions were taken; but in equity, if a legatee bring a bill against the executor, and prove assets, it is said that another legatee, although no party, may have the benefit of those depositions (*k*); at law they may be read where the defendant claims in privity with the defendant in the former suit (*l*).

In a legal proceeding.

Thirdly, in order to admit a deposition, or the oral testimony of a witness in a former cause, it is necessary to show that such a cause or proceeding legally existed, for otherwise it would not appear that the deposition was anything more than a mere voluntary affidavit of a stranger (*m*). It seems to be a general rule, that the depositions or evidence in a former cause are never admissible in evidence unless the verdict or judgment would in itself be evidence (*n*).

Extra-judicial not admissible.

It is also a rule, that no extra-judicial deposition can be used in evidence; for the party was not bound to take any notice of the proceeding. Accordingly, upon an indictment for a libel, depositions before a magistrate were not admitted in evidence, as they would have been under the statutes of Ph. & Mary, in cases of felony (*o*). Nor are they so in any case, where the proceeding is *coram non judice* (*p*); as, where a voluntary affidavit is made before the Master (*q*), such an affidavit would not be evidence, unless the admission of the party who made it would be evidence (*r*). So if the bill has been dismissed on account of the irregularity of the complaint (*s*), as if the depositions are taken in a revived suit, where a bill of revivor does not lie (*t*), for in such a case there is no complaint before the court in which depositions can regularly be taken. But if the bill be dismissed merely because

(*k*) *Coke* v. *Fountain*, Vern. 415; 12 Vin. Ab. 160, pl. 27.

(*l*) *Earl of Bath* v. *Battersea*, 5 Mod. 9; 12 Vin. Ab. 111, pl. 31.

(*m*) B. N. B. 242. *Sherwin* v. *Clarges*, 12 Will. 3; Ld. Raym. 730.

(*n*) B. N. P. 242. Because the giving the verdict, &c. in evidence is a preparatory step; but it seems that the production of the *postea* would be sufficient to warrant the reception of such evidence, since it would show the fact that a trial was had between the same parties. It should seem, however, that where a new trial is granted, and one of the witnesses dies in the mean time, his evidence on the former trial would be admissible, although the verdict itself would be inadmissible. 4 T. R. 290.

(*o*) *R.* v. *Paine*, 5 Mod.; 12 Vin. Ab. Ev. A. b. 31.

(*p*) *Stock* v. *Denew*, Vin. Ab. Ev. A. b. 31, pl. 16.

(*q*) Sty. 446; *May* v. *May*, K. B. at Bar.; Bac. Ab. Ev. 628.

(*r*) Ibid.

(*s*) 1 Ch. Ca. 175. *Backhouse* v. *Middleton*, Gil. Ev. 56.

(*t*) 1 Ch. C. 175.

the matter is not proper for a decree in equity, although within the jurisdiction of the court, the depositions may be read in another cause between the same parties (*u*). Where the proceeding is merely voidable, it seems that the depositions may be read; but it is otherwise where it is absolutely void (*w*). But in some instances where depositions have been irregularly taken, a Court of Equity will order that they shall stand (*x*). Depositions before justices cannot be read on an indictment for treason, or for a misdemeanor, or upon the trial of an appeal, or in a civil action (*y*), for they are extra-judicial. It was held, that depositions in the Court of Wards were not evidence in the King's Bench to prove the same title (*z*).

Extra-judicial not admissible.

It has frequently been held, that depositions taken in a Spiritual Court cannot be used, even by consent (*a*), in a Court of Common Law (*b*), because it is not a court of record. Yet the same objection applies to depositions in Chancery. In *Breedon v. Gill* (*c*), Lord Holt expressed an opinion that depositions before commissioners of excise might, if the witnesses died, be afterwards read before the commissioners of appeals. And depositions under the statutes of Philip & Mary, and 7 Geo. 4, c. 64, are read upon trials for felony, although they are not of record (*d*). And it is to be observed, that these statutes do not expressly direct that these depositions shall be evidence; they were, indeed, originally intended for a different purpose, and they become evidence as authorized proceedings in the course of the same prosecution. In *Welsh's case* (*e*), Lord Hale assigns two reasons why, upon an indictment for a forcible marriage with Mrs. Puckring, the deposition of Mrs. Puckring before commissioners appointed to dissolve the marriage, if they thought fit, should not be read: First, because it was a proceeding according to the civil law, in a civil cause; secondly, because she was interested; and does not hint that it was an objection that the court was not a court of record. With respect to depositions in the Ecclesiastical Court, C. B. Gilbert lays it down that they may be read when taken in a cause over

(*u*) *Smith* v. *Veale*, Ld. Raym. 735; Ch. C. 175; 3 Ch. Rep. 72; 12 Vin. Ab. 109, pl. 15. *Noyder* v. *Peacock*, ib. 112, pl. 41.

(*w*) Str. 308.

(*x*) *Murry* v. *Wise*, cited Str. 308.

(*y*) 2 Hale H. P. C. 286; Ld. Raym. 730.

(*z*) 2 Roll. R. 212.

(*a*) March, 120.

(*b*) Litt. R. 167; B. N. P. 242; 2 Roll. Ab. 679; Bac. Ab. Ev. 628; 2 Hale, 285; March, 120; 1 Haw. c. 42; Vin. Ab. Ev. A. b. 31.

(*c*) Lord Raym. 222.

(*d*) See 2 Hale, 284.

(*e*) 2 Hale, 285.

which they have jurisdiction, as far as relates to that cause, since they are lawful oaths, and a man may be indicted for violation of them (*f*). When, indeed, they are taken in a cause over which they have no authority, as where the realty is concerned, they clearly are not admissible (*g*). Where depositions have been taken in an ancient suit to perpetuate testimony, it cannot be objected that the answers were given to leading interrogatories, since the party to the proceeding might have objected to them, and have had them expunged, instead of which he allowed publication to pass, and the evidence to be exemplified (*h*).

Neither, whe interrogatories and cross-interrogatories have been exhibited by the parties, can the answers of the deponent be objected to on the ground that the witness was interested (*i*).

Power to cross-examine.

Fourthly, a deposition is not evidence against one who had not the power or liberty to cross-examine the witness, and does not claim under one who had that power (*k*). Accordingly, depositions taken before commissioners of bankrupt, being *ex parte*, were not evidence previous to the statutes (*l*) by which they are made evidence in particular cases (*m*). In Chancery, the witness

(*f*) Gil. Ev. 60.

(*g*) Gil. Ev. 60; 2 Roll. Ab. 679; Litt. R. 167; March, 120.

(*h*) *Williams* v. *Williams*, 4 M. & S. 497. See Examination in Equity, p. iv. There was a presumption, in the above case, that publication passed in the life-time of the witnesses. See the observations of Bayley, J. 4 M. & S. 503.

(*i*) *Ogle* v. *Paleski*, Holt's C. 485.

(*k*) Hardr. 472. 215; 2 Jones, 164; Wils. 214, 215; Hob. 155; 2 Roll. Ab. 679; 1 Vern. 413. Where barrack commissioners, acting under 47 Geo. 3, c. 1, in taking public accounts, examined witnesses, and put their depositions in writing; and an information having been filed against the defendant relative to certain contracts, the matters were referred to arbitration; held, that the arbitrators could not receive such depositions, having been taken without the defendant having had an opportunity of being present, or of cross-examining the witnesses. *Att.-gen.* v. *Davison*, 1 M. & Y. 160. The examination of a witness taken before commissioners on an inquiry, cannot be read as evidence on a petition to expunge the proof of a creditor who was not a party to that inquiry. *Ex parte Coles*, Buck, 242; Cooke, B. L. 552, 8th ed. *Ex parte Campbell*, 2 Moore, 51.

(*l*) 5 G. 2, c. 30, s. 41, which directs that the proceedings under a commission may, upon petition, be entered of record, and that true copies, signed and attested as therein directed, shall be evidence in case of the death of the witnesses. And the stat. 49 G. 3, c. 121, s. 10; and now under the stat. 6 G. 4, c. 16. For the decisions under the latter statute, see tit. BANKRUPT.

(*m*) 1 Lev. 180; Ld. Raym. 220; T. Jones, 53. *Janson* v. *Wilson*, Doug. 244. *Bowles* v. *Langworthy*, 1 T. R. 366; 2 Roll. Ab. 679; B N. P. 242.

was examined *de bene esse*; an answer was put in; but the witness was so ill, that he could not be cross-examined, and before the end of three weeks he died, and all the Judges held that the deposition was not evidence (*n*). So if before the coming in of the answer, the defendant not being in contempt, the witness die (*o*). Where, however, the defendant is in contempt for refusing to answer, the objection ceases, for it was his own fault that he did not cross-examine the witnesses (*p*). And in general, where the party has had an opportunity to cross-examine in the course of a regular legal proceeding, and has neglected to do so, the case is the same in effect as if he had cross-examined (*q*). Power to cross-examine.

Depositions taken *de bene esse*, before the answer of the defendant, are not admissible in a Court of Law, since they are taken before issue joined (*r*). But a Court of Equity will sometimes direct them to be read (*s*); such an order, however, is not binding in a Court of Law (*t*). Where, upon a bill to perpetuate testimony, the defendant was in contempt, and would not answer, and the plaintiff had a commission, and examined witnesses *de bene esse*, and the defendant joined in the commission, and cross-examined some of the witnesses produced for the plaintiff, and before the coming in of the answer the witnesses died, it was held, after much debate, that the depositions were admissible between the parties on a trial at law, for otherwise a bill to perpetuate

(*n*) Hardr. 315. But see Ch. R. 90. Vin. Ab. Ev. A. b. 31, pl. 8. A deposition is not admissible before answer put in, or party is in contempt, unless he had the opportunity of cross-examining. *Cazenove* v. *Vaughan*, 1 M. & S. 4.

(*o*) Hardr. 215; 2 Jon. 164; 2 Wils. 563; for there the defendant had not an opportunity of cross-examining. In such case, the party, it is said, may apply to the Court of Chancery that the deposition may be read; and if the Court see cause, they will order it; and this order, it is said, will bind the parties to assent, but will not bind the Court of Nisi Prius. Gil. Ev. 57; B. N. P. 240.

(*p*) Gil. Ev. 56.

(*q*) *Cazenove* v. *Vaughan*, 1 M. & S. 4. The plaintiffs filed a bill in Chancery for the examination of a witness *de bene esse*, and the defendant did not put in any answer. The plaintiffs gave notice to the defendants of an order obtained from the Court for the examination, and of the questions intended to be put, and examined the witness the same evening, who set off the next day, and never returned. The plaintiffs obtained a further order for publication of the deposition, in order that it might be read at the trial, and the deposition was admitted in evidence. See Gil. Ev. 62. 64, 4th ed.; 4 Mod. 146. *Howard* v. *Tremaine*, Hardr. 315, semb. *contra*. 1 P. Wms. 414. *Copeland* v. *Stanton*, B. N. P. 240; Com. Dig. Ev. C. 4.

(*r*) 2 Jones, 164; Vin. Ab. A. b. 31, pl. 12. 22. *Dutton's case*, Lord Raym. 335; Hardr. 315; 2 P. W. 162. *Hall* v. *Hoddesdon*, 12 Vin. Ab. 108.

(*s*) 2 Jones, 164.

(*t*) Ibid.

testimony would be of no use (*u*). There the defendant joined in commission, and cross-examined, but the principle seems to extend to all cases where the defendant refuses to answer (*w*), for otherwise he might wait till all the witnesses were dead, having in the mean time prevented his antagonist from perpetuating their testimony (*x*). Where the adverse party has had liberty to cross-examine, and has not chosen to exercise it, the case is the same in effect as if he had cross-examined (*y*).

Depositions when evidence to prove reputation.

Depositions relating to a custom, or prescription, or pedigree, where reputation would be evidence, are admissible against strangers; for as the traditionary declarations of persons dead would be admissible, *a fortiori*, their declarations on oath are so (*z*). Where, however, depositions relate precisely to the same issue (*a*), or are made *post litem motam*, they cannot be received (*b*). On the trial of a question between the lord of a manor and a copyholder, as to a custom insisted upon by the lord in respect of copyholds granted for two lives, that the surviving

(*u*) Show. 363, 364; Carth. 265; 4 Mod. 147; Salk. 278; 12 Vin. Ab. 110.

(*w*) But great stress was laid upon that fact by Grey, J., Carth. 265.

(*x*) See *Brown's case*, Hardr. 315; Vin. Ab. Ev. A. b. 31, pl. 23. *Dutton's case*, T. Raym. 335; Law of Evid. 114; Vin. Ab. Ev. A. b. 31, pl. 12; and the observations in *Cazenove* v. *Vaughan*, 1 M. & S. 4.

(*y*) *Cazenove* v. *Vaughan*, 1 M. & S. 4. The defendant not having put in any answer to the bill, the plaintiffs obtained an order for the examination of the witness, and gave notice to the defendant, and of the interrogatories intended to be put; and on the same evening examined the witness, who left London the next day for a foreign country, and never returned. The plaintiffs obtained a further order, that the deposition of the witness should be published; and, upon the trial, it was held that the deposition might be read, since the defendant might have cross-examined, if he had been so inclined.

(*z*) B. N. P. 230. *Cort* v. *Birkbeck*, Doug. 219; 4 M. & S. 491, where Ld. Ellenborough said, "These depositions, made by persons standing in *pari jure* or in *eodem jure*, I consider to be evidence, and so they have been considered in all times. The depositions furnish evidence not only against the parties making them, but against all persons who stand in the same relation, in the same manner, in all cases of customs, such as the custom to grind at mills, as in the case of the *Settle Mill** Depositions of this kind have ever been received. I have heard them read twenty or thirty times on the Circuit which I used to go, without objection; and I remember particularly, that in the case of the *Leeds Mill* they were admitted as the depositions of persons standing in *pari jure*."

(*a*) Case of the *Berkeley Peerage*, 4 Camp. 401. Case of the *Banbury Peerage*, *infra*, 287. *R.* v. *Cotton*, 3 Camp. 444; 4 M. & S. 486.

(*b*) 4 M. & S. 486.

* See Cort *v.* Birkbeck, Doug. 219.

life should renew, paying to the lord such fine as should be set by the homage to be equal to two years improved value, it was held, that depositions in an ancient suit, instituted against a former lord of the manor by a person who claimed to be admitted to a copyhold for lives, upon a custom for any copyhold tenant for life or lives to change or fill up his lives, paying to the lord a reasonable fine, to be set by the lord or his steward, and which depositions were made by witnesses on behalf of the copyholder, were admissible evidence for the lord, as depositions of persons standing in *pari jure* with the new copyholders; it was not proved that the persons making such depositions were copyholders, but it appeared from the depositions themselves that they were such, or that they were persons acquainted with the custom of the manor. And it was held that their depositions, supposing them to be admissible only as declarations of persons deceased, were not inadmissible on account of their having been made *post litem motam*, because the same custom was not in controversy in the former suit as in the latter (*c*). Where, however, the *lis mota* was on the very point, the depositions and declarations of persons in respect of it would not be evidence, since it is doubtful whether the deposition of witnesses selected and brought forward to support one side of the question, and who partake of the feelings and prejudices belonging to that side, can be depended upon as those of fair and impartial witnesses (*d*). Depositions, when admissible.

In the case of *Tooker* v. *the Duke of Beaufort*, the depositions as well as the return to the Exchequer under a commission to inquire whether the Prior of St. Swithin or the Crown was seised of certain lands upon the dissolution of the priory, were held to be admissible in evidence, and the depositions seem to have been considered as on the same footing with the return itself (*e*).

A deposition between any parties is evidence to contradict a witness (*f*), but it is not evidence to support the testimony of a witness (*g*).

(*c*) *Freeman* v. *Phillips*, 4 M. & S. 486.

(*d*) See the observations of Bayley, J., 4 M. & S. 495.

(*e*) Burr. 148.

(*f*) 12 Mod. 318; 4 St. Tr. 265; 2 Haw. 430, s. 9, 12; 2 Keb. 384; Bac. Ab. Ev. 629. See *R.* v. *Buckworth*, Raym. 170.

(*g*) What a man himself who is living has sworn at one trial can never be given in evidence at another to support him, because it is no evidence of the truth; for if a man be of that ill mind to swear falsely at one trial, he may do the same at another, on the same inducements. B. N. P. 242. It is added that what a man says in discourse, without premeditation or expectation of the cause in question, is

Depositions of witnesses resident abroad.

Where a witness is likely to be abroad at the time of the trial, the party who requires his testimony may move the Court in term time, or apply to a Judge in vacation, for a rule or order to have him examined on interrogatories *de bene esse*, before one of the Judges of the court, if he reside in town, or if in the country, or abroad, before commissioners specially appointed, and approved of by the opposite party, whose consent is essential. The Court, in furtherance of the application, where it is necessary, will put off the trial (*h*) at the instance of the defendant, if the plaintiff will not consent; and if the defendant refuse, the Court will not give him judgment as in case of a nonsuit (*i*). Where a witness

good evidence to support him, because that shows that what he swears is not from any undue influence. But if a man has sworn at one trial different from what he has sworn at another, this is good evidence to his discredit.

Note.—For the mode of proceeding as to depositions *in perpetuam rei memoriam*, see p. .

(*h*) *Furley* v. *Newnham*, Doug. 419.

(*i*) Tidd's Prac. 852. The application, in the first instance, is for a rule or summons to show cause, upon an affidavit, stating that the witness is material, and that he resides or is going abroad. If the adversary consent, the Court will make the rule absolute, or the Judge will make an order upon the summons. The interrogatories are then prepared, and are signed by counsel, and ought not to contain leading questions. A copy of the interrogatories is then given to the opposite attorney, with notice of the time when the witness is to be examined, in order that he may file cross interrogatories if he think proper. At the time appointed, the witness is taken, together with the interrogatories, to the Judge's chambers, or before the commissioners appointed by the rule or order, where he is examined; and his depositions being sworn to, copies are made out, and delivered to the party requiring them. And as the depositions are only taken *de bene esse*, they cannot be made use of, if the witness should happen to be in this country at the time of the trial. The party succeeding is not entitled to the costs of examining witnesses on interrogatories, or taking office-copies of the depositions, but each party pays his own expenses, unless it be otherwise expressed in the rule. (2 East. 259.) And this holds with regard to witnesses examined abroad, as well as in this country. (8 East, 392; 3 B. & P. 556). The reason is, that by the practice of the Court of Chancery, a party applying for a commission to examine witnesses in his behalf must pay the expenses; and unless the other Courts adopted the same rule with respect to the party applying for leave to examine witnesses abroad on depositions, which cannot be done without the other party's consent, such consent would never be given, but the applicant would be driven to the expense of applying for a commission. A commission for the examination of witnesses in a foreign country, directed the commissioners to examine the witnesses on interrogatories, and to reduce the examinations into writing in the English language, and send the same to England; and to swear and interpret the depositions of such witnesses as did not understand the English language. It appeared by the return, that the depositions in the first instance were reduced into writing in the foreign language, and translated by

was unable from illness to attend the trial, and was not likely to recover, leave was refused to examine him upon interrogatories as to his attestation of a deed, although it was sworn that the defendant had at one time admitted the execution of the deed; and the Court also refused to dispense with the attendance of the witness upon the trial on such grounds (*h*).

India. Examination of witnesses in.

The stat. 13 Geo. 3, c. 63, s. 40 & 44, directs, that where an action is brought in any of the courts at Westminster, upon a cause of action arising in India, the Court may award a *mandamus* to the Judges of the courts of India for the examination of witnesses; and that the depositions, duly taken and returned, shall be deemed as good and competent evidence as if the witnesses had been sworn and examined *vivâ voce* (*l*).

the interpreter into the English language, within an interval of six weeks. Held, that the commission was well executed by the commissioners returning the depositions so translated into the English language. *Atkins* v. *Palmer*, 4 B. & A. 377. The costs of examining witnesses, whether at home or abroad, are usually to be paid by the party who obtains the rule. *Stephens* v. *Crichton*, 2 East, 259. *Taylor* v. *Exchange Assurance*, 8 East, 393. *Muller* v. *Hartshorne*, 3 B. & P. 556.

(*k*) *Jones* v. *Brewer*, 4 Taunt. 46.

(*l*) See *Francisco* v. *Gilmore*, 1 B. & P. 177. See the case of *Atkins* v. *Palmer*, 4 B. & A. 377. *Supra*, note (*i*), and see the provisions of the late stat. 1 W. 4, c. 22, by which the provisions of the stat. 13 Geo. 3, c. 63, s. 40 & 44, are extended to all actions depending in any of his Majesty's courts of law at Westminster, wherever the cause of action may have arisen. Where *A.*, the captain of an Indian country trader, contracted in India with *B.* for a crew, according to the custom of the country, and *A.* arrived in England with the crew, and then made a voyage with them to the West Indies and back again, on an action being brought by one of the crew for wages due on the West India voyage, it was held, on a motion for a *mandamus* under the stat. 13 Geo. 3, c. 68, s. 44, that the cause of action did not arise in India. *Francisco* v. *Gilmore*, 1 B. & P. 177. Where the witnesses for a defendant indicted for a misdemeanor resided in Scotland, the Court obliged the prosecutor to consent to the examination of the witnesses before one of the Courts there. Per Lord Mansfield, *Mostyn* v. *Fabrigas*, Cowp. 174. It has been seen, that the objection which may be taken to depositions made in a cause then pending at the trial, that the questions were leading ones, is not applicable where the adverse party might have had them expunged, but has not done so, but has allowed the evidence to be exemplified. *Williams* v. *Williams*, 4 M. & S. 497. By the stat. 1 G. 4, c. 101, provision is made for obtaining the evidence of witnesses in India, to support a bill of divorce. Where prosecutions are founded on offences committed abroad by persons employed in the public service, the evidence of witnesses may be obtained under the provision of the stat. 42 G. 3, c. 85. See *R* v. *Jones*, 5 East, 31. See also the stat. 54 G. 3, c. 15, made for the purpose of facilitating the recovery of debts in the courts of law in New South Wales.

Bill to perpetuate.

Where a subject-matter is likely to be litigated in future, but cannot be made the subject of immediate investigation, a bill in equity lies to perpetuate the testimony of witnesses, in order to prevent the hardship which might accrue to a party from an investigation at a remote period, when death had deprived him of his witnesses (*m*).

Where an old witness has been examined, it is sometimes made part of the rule for a new trial that the Judge's note of his evidence shall be read upon the new trial (*n*).

A bill for a commission to examine witnesses abroad in aid of a trial at law, where a present action may be brought, is demurrable, unless it aver that an action is pending (*o*).

The Court will not grant a mandamus to justices of the peace to produce depositions taken on a charge of felony, in order to ground a prosecution for perjury (*p*). But the magistrate may be subpœnaed before the grand jury, who may found a presentment on his evidence (*q*).

General provisions of the st. 1 W. 4, c. 22.

By the stat. 1 Will. 4, c. 22, reciting that it is expedient to extend the powers and provisions of the stat. 13 Geo. 3, c. 63, it is enacted, sec. 1, that the powers of that Act shall be extended to all colonies, islands, plantations and places under the dominion of his Majesty in foreign parts, and to the Judges of the courts therein, and to all actions depending in any of his Majesty's courts of law at Westminster, wherever the cause of action may have arisen, whether within the jurisdiction of the court, &c. or elsewhere, when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority thereby given, will be necessary or conducive to the due administration of justice.

By sec. 2, the Judge or Judges to whom any such writ or commission shall issue, shall have like power to compel and enforce the attendance and examination of witnesses, as the court whereof they are Judges does for that purpose, in causes depending in that court.

Sec. 3. Costs of every such writ or commission are to be in the discretion of the court issuing the same.

(*m*) See *Angell* v. *Angell*, 1 Sim. & St. 89. The bill will be defective unless it state that the matter in question cannot be made the subject of immediate investigation. Ibid. See also *Dew* v. *Clarke*, 1 Sim. and St. 114.

(*n*) *Shillito* v. *Claridge*, 2 Ch. 426.

(*o*) *Angell* v. *Angell*, 1 Sim. & St. 91. But see *Moodalay* v. *Morton*, 2 Dick. 652; 1 Bro. P. C. 469; Dub. *Phillips* v. *Carew*, 1 P. Wms. 117.

(*p*) 1 Chitty, 627.

(*q*) Ibid.

Sec. 4. Witnesses may be ordered by the courts and the Judges thereof, upon application of the parties to the suit, to be examined upon interrogatories before any of the officers of the court, if within the jurisdiction, otherwise by commissioners. Examination under the stat. 1 W. 4, c. 22.

Sec. 5. The court making any such order may compel the attendance of witnesses and production of documents; disobedience of order to be deemed a contempt of court. Witnesses entitled to expenses. No document to be produced but such as would be produceable on trial.

Sec. 6. The court may issue a *habeas corpus* for the examination of prisoners.

Sec. 7. Examinations to be taken on oath. Persons giving false evidence to be guilty of perjury.

Sec. 8. A special report to be made by commissioners as to the conduct or absence of witnesses, if necessary.

Sec. 9. Costs of every order and proceedings thereupon (except as before provided for) to be costs in the cause, unless otherwise directed by the Judge or court.

Sec. 10. No examination to be read without consent of the party against whom the same may be offered, unless the witness be beyond the jurisdiction of the court, dead, or unable to attend; in which cases the examination, certified by the commissioner, shall be read in evidence, saving all just exceptions.

Sec. 11. No order shall be made by a single Judge of county palatine of Durham who shall not also be a Judge of one of the courts at Westminster.

How proved.

The preparatory facts must first be proved which warrant the reception of the evidence, as that the witness is dead, insane, or absent, unless lapse of time negative his existence (*s*). Where a deposition, 39 years old, represented the witness to be 60, it was held that it could not be read without proof of his death (*t*).

Existence of cause.

Next it must be proved that such a cause existed, and between the same parties, in order to show the admissibility of the oath of the witness; for if no legal cause existed, the oath was nothing more than a voluntary affidavit (*u*). Although the bare production of the *postea*, without proof of final judgment, be no evidence of the verdict, for judgment may have been arrested, or a new trial granted, yet it is good evidence that a trial was had between

(*s*) *Benson* v. *Olive*, in Scacc. Str. 920, where the deposition was 60 years old.

(*t*) 1 Ford's MSS. 146; Str. 920; *tamen qu.*

(*u*) B. N. P. 242; 1 Ray. 730.

Existence of lawful cause.

the same parties, so as to introduce the evidence of a witness (who is since dead) at the trial (*x*). And so it is on an indictment for perjury (*y*).

Where the deposition has been taken in Chancery it is necessary to prove the bill and answer (*z*), in order to show the existence of a lawful cause, and that the deppositions relate to the same matter. And therefore, exemplified depositions in the Duchy Court were held to be inadmissible, because the answer was not exemplified (*a*). But where the Court of Chancery makes an order, on directing an issue at law, that the depositions shall be read, proof of the bill and answer are unnecessary (*b*). And, where the bill and answer have been lost, they may be supplied by other memorials (*c*). And ancient depositions have been admitted without proof of the bill and answer, because they were not enrolled and were liable to be lost (*d*). Depositions taken by order of Queen Elizabeth, on petition, without bill and answer, were allowed to be read (*e*). In ordinary cases, it seems to be sufficient to prove that the deposition was signed by the Master; but upon an indictment for perjury the identity of the deponent must be strictly proved (*f*). A deposition is proved by an examined copy (*g*); office copies, though admissible in equity, are not admissible in a court of law. Upon the trial of an issue

Identity of deponent.

(*x*) B. N. P. 243; 1 Str. 162.

(*y*) B. N. P. 243. *R.* v. *Iles*, M. 14 G. 2, cor. Raymond.

(*z*) *Dutton's case*, Trial at Bar, Ray. 335; Vin. Ab. Ev. A. b. 31, pl. 12; Gilb. Ev. 56. *Illingworth* v. *Leigh*, 4 Gwill. 1619. *Byam* v. *Booth*, 2 Price, 234, n. *Baker* v. *Sweet*, Bunb. 91. If the bill is dismissed for informality, see 2 P. Wms. 162.

(*a*) Clay. 9; Vin. Ab. Ev. A. b. 31.

(*b*) But the order is not made for the purpose of making that evidence in a court of law, which would not otherwise be admissible. *Palmer* v. *Lord Aylesbury*, 15 Ves. 176. *Corbet* v. *Corbet*, 1 Ves. & Beames, 340; and therefore proof that the witnesses themselves cannot attend is necessary. Where there is no such order the bill and answer must be proved, as in ordinary cases.

(*c*) *Barly's case*, 5 Mod. 210; Vin. Ab. Ev. A. b. 31, pl. 33.

(*d*) 2 Keb. 31; Law. Ev. 113. 65, 2d ed. *Byam* v. *Booth*, 2 Price, 231. *Illingworth* v. *Leigh*, 4 Gwill. 1615. *R.* v. *Countess of Arundel*, Hob. 112, Depositions taken under a commission issuing out of the Exchequer, cannot be read without producing the commission, unless they are of so long standing as to afford a presumption that the commission is lost. *Bailey* v. *Wylie*, 6 Esp. 85. But per Lord Ellenborough, if the *commission* be produced, it is not necessary to produce the bill and answer upon which the commission was granted. Ibid.

(*e*) Hob. 112.

(*f*) 3 Mod. 116, 117. See tit. PERJURY. Ld. Holt, in one case (Ld. Raym. 734), held that it should be proved by the examiner that the depositions were taken on the day of their date.

(*g*) Gilb. Ev. 21; B. N. P. 229; Starkie's C. 13.

directed by the Court of Chancery to try the validity of an alleged deed of gift, it was held that an office copy of a deposition made by the plaintiff's brother in the suit in equity, and which was proved to have been examined with the original, was admissible to contradict the witness (*h*). Where the evidence of a witness upon a former trial is adduced, the evidence itself must be proved on oath (*i*). And in *Lord Palmerston's case* the evidence was rejected, because the witness could give the effect only of the evidence, and not the words (*k*). The copy of the deposition of a person examined upon interrogatories at the Chief Justice's chambers, signed by the Chief Justice, and received from his clerk, must be taken *primâ facie* to be a correct copy of what has been sworn by such witness; and the original examination need not be produced until some suspicion of forgery is thrown upon the signature of the deponent (*l*). Where the deposition has been taken under the statute 7 Geo. 4, c. 64, it must be shown that the requisites of the statute have been complied with (*m*).

Proof by copy, &c.

It is no objection that the interrogatories were leading ones, where the party might have objected (*n*).

Where the interrogatories to certain tenants at assize session courts, upon proper search could not be found, it was held that the answers might be read, subject to the consideration, whether their effect would not be destroyed by any ambiguity which might arise from the want of those questions (*o*).

Thirdly, as to writs, warrants, pleadings, and bills and answers in Chancery, and other documents incidental to judicial proceedings.

Writs, warrants, &c. when evidence.

(*h*) *Highfield* v. *Peake*, 1 Mood. & Malk. C. 109, cor. Littledale, J., who said, that this being an issue out of Chancery might be considered as a proceeding in that court, and therefore that the office copy, according to the case of *Dunn* v. *Fulford*, 2 Burr. 1179, might be considered to be good evidence. In the case of *Rees d. Howell* v. *Brown*, 1 M. & Y. 383, the Court of Exchequer is reported to have held that an examined copy of an affidavit, made for the purpose of obtaining an injunction, was not admissible; but see 1 Mood. & Mal. C. 111. *Ewer* v. *Ambrose*, 4 B. & C. 25; *Hennel* v. *Lyon*, 1 B. & A. 182.

(*i*) 1 Sid. 325; Law of Ev. 31; Bac. Ab. Ev. 629. The evidence of a witness upon the former trial may be proved either by the Judge's notes, or on oath, by the notes or recollection of any person who heard it. *Mayor of Doncaster* v. *Day*, 3 Taunt. 262.

(*k*) But *qu.* whether so great exactness is necessary; even an indictment for perjury sets out the substance only. See Appx. VI. 279; and *Rowley's case*, 1 Ry. & M. 111.

(*l*) *Duncan* v. *Scott*, 1 Camp. 160.

(*m*) See tit. ADMISSIONS.

(*n*) *Williams* v. *Williams*, 4 M. & S. 497.

(*o*) *Rowe* v. *Brenton*, 8 B. & C. 765.

For what purposes admissible.

Writs and warrants are in general evidence to show the mere fact of their existence, whenever it becomes material, against all the world; for the issuing or existence of a writ is a mere fact. A writ is evidence to prove the commencement of the action, in opposition to the memorandum or title of the record. Thus where the proceeding is by original, or in the Common Pleas, the writ is evidence to show that the action was commenced earlier than it appears to have been by the record, which is intitled of the term in which issue is joined (*q*). Accordingly, where in an action on an attorney's bill in that court, it appeared that the bill had been delivered September 30th, 1797, and the record was entitled of Hilary, 1798, it was held to be incumbent on the defendant to show by the writ that the action had been in fact commenced before the expiration of the month (*r*). So the plaintiff, in order to save the statute of limitations, or a tender, may give in evidence a bill of Middlesex, or *latitat* (*s*). Where the cause of action appears in evidence to have arisen after the first day of the term, and there is no special memorandum, the plaintiff may show by the production of the writ that it was issued after the cause of action had in fact accrued (*t*); for in general a *latitat* may be considered by the plaintiff either as the commencement of the action or as process (*u*). In the Common Pleas the production of the *capias ad respondendum* proves the commencement of a penal or of any other action (*x*). If to a plea of tender, or the statute of limitations, the plaintiff reply an original sued out within the time, the production of the *capias ad respondendum* will be evidence of it, for the Court, it is said, will presume it (*y*).

Effect of the writ in evidence.

Where goods are seized under a *fieri facias*, if the defendant himself bring an action, it will be sufficient for the bailiff to prove the writ; but if the action be brought by a person claiming by virtue of a prior execution, or a sale which was fraudulent, the bailiff must prove the judgment as well as the writ; for, in the first case, by proving that he took the goods in obedience to a writ

(*q*) 3 B. & P. 263.

(*r*) *Webb* v. *Pritchett*, ibid.

(*s*) 1 Sid. 53. *Dacy* v. *Church*, ibid. 60. *Welden* v. *Grey*, 1 Str. 550. *Hollister* v. *Coulson*, 2 Str. 736. *Crokatt* v. *Jones*, 2 Burr. 961. *Johnson* v. *Smith*, 2 Burr. 1243. *Morris* v *Pugh*, Cowp. 454. And see Vol. II. tit. LIMITATIONS—TIME.

(*t*) 3 Burr. 1241; 1 Bl. 312.

(*u*) *Wood* v. *Newton*, 1 Wils. 141.

(*x*) 2 Bl. R. 924, 925. *Leader* v. *Moron*, 3 Wils. 461; 1 Ld. Raym. 434; Willes' R. 255. *Karver* v. *James*, *contra*. 1 Ld. Raym. 553. *Mors* v. *Benerton*, 2 Ld. Raym. 880. *Gosling* v. *Witherspoon*, Sitt. after Mich. 1788.

(*y*) *Gosling* v. *Witherspoon*, per Lord Kenyon, Sitt. after Mich. 1788.

issued against the plaintiff, he shows that he has committed no trespass; but in the latter cases, they are not the goods of the party against whom the writ issued, and the officer is not justified in taking them unless he can bring the case within the stat. 13 Eliz., for which purpose it is necessary to show a judgment (*z*). Accordingly, where *A.* brought an action of trespass against the sheriffs, who proved a *fieri facias* against the goods of *B.*, but did not prove a copy of the judgment; after a verdict for the plaintiff upon the point reserved, the Court held that the judgment ought to have been proved; but because it appeared that the goods were in fact the goods of *B.*, and that his conveyance of them to *A.*, *B.* himself remaining in possession of them, was fraudulent, the Court granted a new trial (*a*). Effect of the writ in evidence.

Where in ejectment the lessor of the plaintiff claimed under a sale upon a *fieri facias*, in an action by himself against the defendant in ejectment, the Court held that he was bound to prove the judgment as well as the writ (*b*). In order to prove the crime of murder against a party who kills an officer in the execution of civil mesne process, it is necessary to prove the writ of *latitat* or *capias*, as well as the warrant from the sheriff (*c*). And so it is in case of a justification by an officer in the execution of such process (*d*). Upon issue taken on a plea of *plene administravit*, proof of the execution is not evidence without the judgment, for without it there appears to be no authority for the execution (*e*).

As the sheriff is a public officer and minister of the Court, credit is given to the statement upon his return, as to his official acts. Thus in the case of *Gyfford* v. *Woodgate* (*f*), in an action for maliciously suing out an *alias fieri facias*, after a sufficient levy under the first, it was held, that the sheriff's return upon the two writs which had been produced in evidence by the plaintiff, as part of his case, in which the sheriff stated that he had forborne to sell under the first, and had sold under Sheriff's return on a writ.

(*z*) B. N. P. 234. The writ itself is a justification for seizing the goods of the *defendant*; but if those goods be claimed by another under a colourable title, the officer must show that the act of transfer was fraudulent, and therefore void as against a judgment-creditor; and therefore must show that a judgment existed.

(*a*) *Martyn* v. *Podger*, Burr. 2631; and see *Lake* v. *Billers*, Ld. Raym. 733. See also *Ackworth* v. *Kemp*, Doug. 40.

(*b*) *Doe on dem. Bland* v. *Smith*, 2 Starkie's C. 199. For the effect of *writs* and *warrants*, &c. in evidence, as a justification of the officer, &c., see OFFICER, HOMICIDE, &c.

(*c*) *R.* v. *Mead*, cor. Wood, B. 2 Starkie's C. 205.

(*d*) 3 Lev. 63.

(*e*) Per Holt, J., Tri. per Pais, 227.

(*f*) 11 East, 296.

the second writ, by the request and with the consent of the plaintiff himself, were *primâ facie* evidence of the facts so returned. So if the sheriff return a rescue, the Court will so far give credence to such return as to issue an attachment in the first instance; though upon an indictment for a rescue it would be open for the defendant to show that the return was false (*g*). The sheriff's return is no proof that he has paid over the money levied to the execution creditor (*h*); his indorsement on the writ is evidence against himself (*i*).

Writs, proof of.

The writ either has been returned, or it has not; if it has been returned, it is a record, and should be proved in the same manner as any other record (*k*). If the writ has not been returned the original should be produced.

A writ, if not returned, is proved by the mere production; when it has been returned, it may be proved by an examined copy (*l*). The judgment-roll is incontrovertible evidence of all the proceedings which it sets forth, therefore it is evidence of the issuing an *elegit*, and of the return to the writ, in an action for use and occupation, by the plaintiff claiming under an *elegit* (*m*). When the writ is mere matter of inducement, it may be proved by the production of the writ itself (*n*), without a copy of the record; for possibly it may not have been returned, and then it is no record; but where a record is the gist of the action a copy from the record is necessary, because that is the best evidence. To prove an allegation, that the defendant issued a writ against *A. B.*, it is not sufficient for the plaintiff to show the entry of a *præcipe* in the filazer's book, and after proving notice to the defendant to produce it, to give in evidence a copy; it should be shown that search was made for it in the Treasury, and that after the return of the writ, it was in the hands of the defendant (*o*).

Bill in equity, when evidence.

A bill in equity is always evidence for the purpose of proving as a fact, that such a bill has been filed. But a bill in equity is not admissible, as it seems, in any case, even against the plaintiff himself, or those who claim through him, as to any facts alleged in the bill, even although they relate to matters of pedigree (*p*). In the case of the *Banbury Peerage*, all the

(*g*) R. v. *Elkins*, 4 Burr. 2129.

(*h*) *Cutor* v. *Stokes*, 1 M. & S. 599.

(*i*) See tit. SHERIFF, and *Martin* v. *Bell*, 1 Starkie's C. 413.

(*k*) Vide p. 189, *et seq.*

(*l*) *Supra*, 189.

(*m*) *Ramsbottom* v. *Buckhurst*, 2 M. & S. 567.

(*n*) B. N. P. 234, Gil. Law Ev. 34.

(*o*) *Edmonstone* v. *Plaisted*, 4 Esp. C. 160.

(*p*) Case of the Banbury Peerage, 23 Feb. 1809, 2 Sel. N. P. 712. *Doe*

Judges held that, generally speaking, a bill in Chancery cannot be received as evidence in a court of law to prove any fact, either alleged or denied in such bill, although it relate to matter of pedigree, and be of considerable antiquity, whether the object of the bill be to perpetuate testimony or to obtain relief (*q*). Admissible, when.

v. *Sybourn*, 7 T. R. 3; see *Taylor* v. *Cole*, 7 T. R. 3, n., where Ld. Kenyon, at the sittings after Hil. Term, 1799, is stated to have held, that a bill in Chancery, filed by an ancestor, was evidence to prove a family pedigree, in the same manner as an inscription on a tombstone, or in a Bible. But see Com. Dig. Ev. C. 2. *Devon* v. *Jones*, 2 Anst. 505. It was formerly held, that a bill in equity was admissible evidence against the plaintiff in equity where his privity could be proved, although the bill had not been acted on, and without proof of privity if the bill has been acted on. Ch. C. 64, 65. *Snow* v. *Philips*, 1 Sid. 221; Eq. Ca. Ab. 227, pl. 1; B. N. P. 235; Fitzg. 196. *Bowerman* v. *Sybourn*, 7 T. R. 3.

(*q*) In the case of the Banbury claim of Peerage, D. P. 23d Feb. 7, 1809 (cited 2 Sel. N. P. 712), the counsel for the petitioner stated, that he would offer in evidence certain depositions taken upon a bill (seeking relief), filed in the court of Chancery on the 9th February 1640, by Edward, the eldest son of the first Earl of Banbury, an infant, by his next friend. This evidence having been objected to, and the point argued, the following questions were proposed to the Judges:

Upon the trial of an ejectment brought by *E. F.* against *G. H.* to recover the possession of an estate, *E. F.*, to prove that *C. D.*, from whom *E. F.* was descended, was the legitimate son of *A. B.*, offered in evidence a bill in Chancery, purporting to have been filed by *C. D.* 150 years before that time, by his next friend, such next friend therein styling himself the uncle of the infant, for the purpose of petunting testimony of the fact that *C. D.* was the legitimate son of *A. B.*, and which bill stated him to be such legitimate son (but no persons claiming to be heirs at law of *A. B.*, if *C. D.* was illegitimate, were parties to the suit, the only defendant being a person alleged to have held lands under a lease from *A. B.*, reserving rent to *A. B.* and his heirs); and also offered in evidence depositions taken in the said cause, some of them purporting to be made by persons styling themselves relations of *A. B.*, others styling themselves servants in his family, others styling themselves to be medical persons attendant upon the family; and in their respective depositions stating facts, and declaring that *C. D.* was the legitimate son of *A. B.*, and that he was in the family, of which they were respectively relations, servants, and medical attendants, or reputed so to be.

First question: Are the bill in equity, and the depositions respectively, or any, and which of them, to be received in the courts below upon the trial of such ejectment (*G. H.* not claiming, or deriving in any manner, under either the plaintiff or defendant in the said Chancery suits), either as evidence of facts therein (alleged, denied, or) deposed to, or as declarations respecting pedigree; and are they, or any, and which of them, evidence to be received in the said cause, that the parties filing the bill and making the depositions, respectively sustained the characters of uncle, relations, servants and medical persons, which they describe themselves therein sustaining?

Answer: Neither the bill in equity,

Answer in Chancery, when evidence.

An answer in Chancery is evidence as an admission upon oath (*r*), but it is not evidence except against the party who made it, or to contradict his testimony in another cause (*s*); for with respect to others, it is *res inter alios* (*t*). If a man make an answer in Chancery which is prejudicial to his estate, it is not evidence against his alienee (*u*); unless, indeed, the plaintiff make it evidence by producing it first (*x*). As where in an issue out of Chancery to try the terms of an agreement which was proved by one witness, but denied by the defendant, the witness being dead before the trial, the plaintiff was under the necessity of producing the bill and answer in order to read his deposition, and by

nor the depositions, are to be received in evidence in the courts below, on the trial of the ejectment, either as evidence of the facts therein (alleged, denied, or) deposed to, or as declarations respecting pedigree; neither are any of them evidence that the parties filing the bill, or making the depositions respectively, sustained the characters of uncle, relations, servants and medical persons, which they describe themselves therein sustaining.—The Judges further added, that it would not make any difference in their opinion, if the bill, stated to have been filed by *C. D.*, by his next friend, had been a bill seeking relief.

Second question: Whether any bill in Chancery can ever be received as evidence in a court of law, to prove any facts either alleged or denied in such bill?

Answer: Generally speaking, a bill in Chancery cannot be received as evidence in a court of law, to prove any fact, either alleged or denied in such bill. But whether any possible case might be put which would from an exception to such general rule, the Judges could not undertake to say.

Third question: Whether depositions taken in the Court of Chancery, in consequence of a bill to perpetuate the testimony of witnesses, or otherwise, would be received in evidence to prove the facts sworn to, in the same way and to the same extent as if the same were sworn to at the trial of an ejectment by witnesses then produced?

Answer: Such depositions would not be received in evidence in a court of law, in any cause in which the parties were not the same as in the cause in the Court of Chancery; or did not claim under some or one of such parties. From 2 Sel. N. P. 712.

(*r*) Gil. L. E. 106.; Godb. 326.

(*s*) *Ewer* v. *Ambrose*, 6 D. & R. 127. An examined copy of the evidence is in such case sufficient. Ibid.

(*t*) *Goodright* v. *Moss*, Cowp. 591.

(*u*) Salk. 286; B. N. P. 238; although it be made before alienation. *Ford* v. *Lord Grey*, 6 Mod. 44. But see *Countess of Dartmouth* v. *Roberts*, 16 East, 344, *infra*, 286. An answer in Chancery relating to an advowson, filed by a person formerly seised of it, and through whom the party against whom it was sought to be used, but made 20 years after the former had conveyed away his interest, held inadmissible. *Gully* v. *Bishop of Exeter*, 5 Bing. 171, and 2 M. & P. 266. See *Deady* v. *Harrison*, 1 Starkie's C. 60. The distinction seems to be between mere collateral representations and those which possess a legal effect and operate in law, or are acts accompanying the possession, for such, as in the case of tenants, &c. seem to be always admissible.

(*x*) B. N. P. 238.

that means made the whole answer evidence, and it was read for the defendant (*y*). So the answer of an infant by guardian cannot be read against him on a trial at law (*z*), for the law out of tenderness to infants will not permit them to be prejudiced by the oath of a guardian (*a*); but it seems that the answer of the guardian for the infant may afterwards be used as evidence against himself, for it is the answer of the guardian and not of the infant (*b*). The same objection does not seem to apply to an answer made by a woman during coverture, if offered in evidence after the death of the husband. In the case of *Wrottesly* v. *Bendish* (*c*), the Lord Chancellor said that he would give no opinion on the point, whether such an answer would be evidence or not (*d*). But in the case of *Hodson* v. *Merest* (*e*), it was held that the joint answer of the husband and wife could not be read against the wife. The ground of objection to admitting such an answer seems to be, that the wife was at the time under the dominion of the husband, and not a free agent; but if the answer was adverse to the interest of the husband, a presumption of duress cannot arise. An answer by one defendant is not evidence against another, for no one is bound by the acts or declarations of another without his privity (*f*). But an answer by one partner is evidence against another as to partnership liabilities, since there is a privity and community of interest, and each, for such purposes, is the agent of the other; since, however, this depends on the privity of interest, the partnership must be proved *aliunde* (*g*). So the answer of a party is evidence against one who claims under him. Thus, in an action for not setting out tithe, copies of a bill and answer, in a suit by the vicar for tithe-

When admissible.

(*y*) *Bourne* v. *Sir T. Whitmore*, Salop, 1747.

(*z*) 2 Vent. 72; 3 Mod. 259. *Eccleston* v. *Petty*, Carth. 79. As to an admission by guardian, see *Cowling* v. *Ely*, 2 Starkie's C. 366; but see Str. 548. But an answer purporting to be the answer of a minor by his mother and guardian, may be read against the mother in a cause which she defends in a different capacity. *Beasley* v. *Magrath*, Schoales and Lefroy's Rep. 34.

(*a*) Gil. L. Ev. 51; 2 Vent. 72; 3 Mod. 259; Carth. 79; Saik. 350; Vern. 60. 109, 110.

(*b*) 3 P. Will. 237; Carth. 7. 9. *Beasley* v. *Magrath*, *supra*, note (*z*).

(*c*) 3 P. Wms. 235.

(*d*) It was objected, that an answer by the wife, whilst under the power of the husband, would be of no more use than the answer of an infant.

(*e*) 9 Price, 556. See *Barrow* v. *Guillard*, 3 Ves. & Beames, 166.

(*f*) Vide tit. ADMISSIONS—PARTNERS. *Wych* v. *Meal*, 3 P. Wms. 311; 12 Ves. 361.

(*g*) See tit. ADMISSIONS—PARTNERS; and *Wood* v. *Braddicke*, 1 Taunt. 104. *Lucas* v. *De la Cour*, 1 M. & S. 250. *Grant* v. *Jackson*, Peake's C. 203.

hay against *S. L.*, then owner and occupier of the close, and from whom the defendant purchased, denying the vicar's right, and setting up a right in the ancestor of the plaintiff, were held to be evidence against the defendant (*h*).

The *whole* of an answer is evidence.

It is a general rule, that the party who reads an answer makes the whole of it evidence (*i*); for it is read as the sense of the party himself, which must be taken entire and unbroken. Hence, if upon exceptions taken, a second answer has been put in, the defendant may insist upon having that read to explain what he swore in his first answer (*k*). But where the evidence of a witness is read merely in order to show that he is incompetent, the whole is not evidence, but only so much as will show that he is incompetent (*l*). Although the whole of an answer must in general be read, the rule decides nothing as to the credibility of any fact which it contains, and this must depend upon circumstances. Where the answer charges the defendant by the admission of one fact, and also discharges him by the statement of a distinct and further fact, the rule has been said to be, that what is admitted need not be proved by the plaintiff, but the defendant must make out his fact in discharge (*m*); and therefore, where the executor, in an answer to a bill by creditors for an

(*h*) *Countess of Dartmouth* v. *Roberts*, 16 East, 334; although the vicar abandoned the suit, and no decree was made. Ld. Ellenborough in that case observed, "This appears to me not to be *res inter alios*, but *inter eosdem acta*, and was not only evidence, but strong evidence against the defendant, who stood in the same place by derivation of title and legal obligation as the former occupier of the same land; and that former owner, on his oath, in a suit against him by the vicar, has declared that the tithe is due to the rector and not to the vicar; and now that same person *in effect*, (that is, the present owner, who purchased of the former owner the very lands over which tithes are now claimed), is decrying the title of the rector in favour of the vicar." Seealso *Benson* v. *Olive*, 2 Gwill. 701. *Earl of Sussex* v. *Temple*, 1 Ld. Ray. 310. *Travis* v. *Chaloner*, 3 Gwill. 1237. *Ashby* v. *Power*, ib. 1259, and tit. DEPOSITIONS.

(*i*) *Barne* v. *Whitmore*, Bac. Ab. Ev. 622. *Earl of Bath* v. *Buttersea*, 5 Mod. 9. *Lynch* v. *Clarke*, 3 Salk. 153. See *Bermon* v. *Woodbridge*, Doug. 757, *supra*. And *Partington* v. *Butcher*, 6 Esp. C: 66, and tit. LIMITATIONS. *Earl of Montague* v. *Lord Preston*, 2 Vent. 170. *Randle* v. *Blackburn*, 5 Taunt. 245. Where the plaintiff *in equity* reads a passage in the answer as evidence of a particular fact, the defendant cannot read subsequent matter, although connected by conjunctive particles, unless it be explanatory of the passage read by the plaintiff. *Davis* v. *Spurling*, 1 Russ. & M. 68. See also B. N. P. 238; 2 Vent. 194; 1 Ch. Ca. 194; Gil. Ev. 44.

(*k*) B. N. P. 237. *R.* v. *Carr*, 1 Sid. 418.

(*l*) *Sparing* v. *Drax*, 27, c. 2, C. B. Trial at Bar, Bac. Ab. Ev. 622.

(*m*) In Equity, B. N. P. 237.

account of the personal estate, admitted the receipt of 100 *l.*, but alleged that it had been given to him by the testator, for his trouble in the testator's business, it was held, that the defendant was bound to make out, by proof, that which he insisted upon by way of avoidance; since it was probable that he admitted the fact out of apprehension that it might be proved, and therefore it ought not so far to profit the party as to give credit to the statement in avoidance. But the distinction was taken, that if the admission and discharge had been one entire fact, as, if the defendant had said that the testator had given him 100 *l.*, it ought to have been admitted, unless disproved, because nothing of the fact charged was admitted (*n*). In courts of law, however, the rule is, that if one party read the defendant's answer, the effect is to waive the objection which might otherwise have been made on the score of competency, and to submit the credibility of all the facts stated to the consideration of the jury (*o*); but it will not, it seems, operate to make a statement evidence which is in itself inadmissible; as, where it rests upon mere hearsay by the party who made the answer (*p*).

The *whole* of an answer is evidence.

A copy of a letter written by the plaintiff's agent, and referred to in an answer by the plaintiff to a bill of discovery filed by another party, in which suit the original letter was not filed, but the copy in question was delivered by the plaintiff's solicitor to the plaintiff's solicitor in the suit for discovery, may be read in evidence without reading the plaintiff's answer (*q*).

An answer is proved by producing the bill and answer (*r*),

Proof of bill and answer.

(*n*) B. N. P. 237. Per Cowper, C. Hil. Vac. 1707.

(*o*) *Roe d. Pellatt* v. *Ferrars*, 2 B. & P. 542.

(*p*) See *Roe d. Pellatt* v. *Ferrars*, 2 B. & P. 542, and the observations of Chambre, J. 2 B. & P. 548; Gil. Ev. 44.

(*q*) *B.*, an underwriter, filed a bill of discovery against *A.*, an assured, and *W.*, his agent, who had effected the insurance; *A.* and *W.* put in their answers, in which they referred to a letter written by *W.* on the subject of the insurance. The original was not produced, but to save time and expense it was agreed that a copy should be inspected, which was done, and a copy taken by the underwriter. On an action brought by *A.* against another underwriter, it was held that the latter was entitled to read the copy in evidence without reading *A.*'s answer. For whether it be or be not necessary to read an answer in Chancery for the purpose of making documents evidence which may be annexed to it, the rule would not apply to the case in question, for the letter was not before the Court of Chancery. And Lord Tenterden observed, "I should at present think it a very strong proposition to say that the answer must at all events be read, though having no connexion with the case in which the documents are produced; but here, at least, we think the copy in question was admissible without the answer." *Long* v. *Champion*, 2 B. & Ad. 284.

(*r*) Bac. Ab. Ev. 623.

Proof of bill and answer.

or by proof of examined copies; and the answer should be proved to be that of the party, by proof of his hand-writing, or by some acknowledgment by him. In civil cases (it is said) it will be presumed that the answer was upon oath (*s*); but since the answer in civil cases operates merely by way of admission, it is sufficient to prove it to be the answer of the party. The bill and answer may be proved by means of examined copies, although the answer be offered in evidence in a cause between different parties, and it is not necessary in civil cases to produce the original answer, and to prove it to have been signed by the defendant (*t*). If on proof of the copies, the names and characters of the parties correspond, that is sufficient *primâ facie* proof of the identity of the parties, and the burthen of repelling the presumption lies on the objecting party (*u*); but it is otherwise in a criminal proceeding on an indictment for perjury, or an action for a malicious prosecution, which is in the nature of a criminal proceeding (*x*).

But it is sufficient to produce the examined copy of the answer of the witness in equity, in order to contradict his testimony, for it cannot be regarded as a criminal proceeding (*y*). On proof of search for the bill in the proper office, and that it cannot be found, the answer has been allowed in evidence without proof of the bill (*z*).

Voluntary affidavits.

A man's voluntary affidavit is admissible against himself, and if offered as an affidavit, must be proved to have been sworn (*a*); but proof of the party's signature makes it admissible as a note

(*s*) Bac. Ab. Ev. 623. See 1 Lord Raym. 154; 2 Bl. 1190.

(*t*) *Lady Dartmouth* v. *Roberts*, 16 East, 334. *Hodgkinson* v. *Willis*, 3 Camp. 401. *Ewer* v. *Ambrose*. *Highfield* v. *Peake*, 1 Mood. & Mal. C. 109; *supra*. *Studdy* v. *Saunders*, 2 D. & R. 147. In the case of *Dartnall* v. *Howard*, 1 Ry. & M. C. 169, it was held that for the purpose of identifying the original answer, of which an examined copy was produced, as the answer of the defendant, a witness who had seen the original was allowed to prove that it was in the handwriting of the defendant, though it was not produced. Although the bill be lost, the answer will still be evidence, as an admission under the defendant's hand. 1 Ford's MSS. 145.

(*u*) *Hennel* v. *Lyon*, 1 B. & A. 182. Note, that the defendant in *Hennel* v. *Lyon* was *Charles Lyon*, sued as the administrator of *Mary Lyon*, and by his plea he had admitted himself to be such administrator, and the copy of the answer showed that the bill was filed against *Charles Lyon* as administrator of *Mary Lyon*. The Judges relied on the coincidence of description, and Lord Ellenborough seems to have considered it as a matter of public convenience to receive such evidence in civil cases without further proof.

(*x*) 16 East, 348; tit. PERJURY. *R.* v. *Morris*, 1 B. & A. 182. *R.* v. *Benson*, 2 Camp. C. 508.

(*y*) *Ewer* v. *Ambrose*, 4 B. & C. 25.

(*z*) Gilb. Ev. 49.

(*a*) B. N. P. 238.

or letter, without further proof (*b*). Where an affidavit has been made in the course of a cause, proof that such a cause was depending, and that such affidavit was used by the party, would be sufficient evidence to prove the affidavit in a civil suit (*c*). A copy of a voluntary affidavit is not admissible in evidence, for it has no relation to a court of justice (*d*). In order to prove an affidavit of the defendant in the same court in which the action is tried, it is sufficient to prove an examined copy, without proving the hand-writing of the party, or that he was sworn (*e*). Affidavit.

Next as to pleadings in an action at law. Where there are several counts in the same declaration, or several distinct pleas, an allegation in one count or plea cannot be insisted upon by the adversary as an admission of a fact, for a purpose distinct from the proof of that count, or of the issue upon the plea; for every issue is to be distinctly tried. Thus upon a declaration in *assumpsit*, by a landlord against a tenant for breach of good husbandry, where there is one count which professes to be founded on a special written agreement, and a second upon an implied contract, the defendant cannot insist upon the first count as evidence that a written contract exists, so as to impose upon the plaintiff the necessity of producing it (*f*); and besides, every different count professes to be founded upon a distinct ground of action. So in trespass, a plea of justification does not supersede the necessity of proving the trespass, where the general issue is pleaded (*g*). Pleadings in an action at law.

(*b*) B. N. P. 238.

(*c*) Ibid. and Show. 397; and perhaps in a criminal proceeding.

(*d*) B. N. P. 338. And therefore a copy of an affidavit made by the defendant in Chancery, of his being worth 30*l.*, was rejected by Lord Raymond, when offered for the purpose of increasing the expenses; and the plaintiff was obliged to send for the original. *Chambers* v. *Robinson*, B. N. P. 238.

(*e*) *Cameron* v. *Lightfoot*, 2 Bl. R. 1190.

(*f*) By Le Blanc, J. Lancaster Sp. Ass. MSS. C. The plaintiff cannot use one plea of the defendant for the purpose of proving a fact which the defendant denies in another plea, nor can he use a notice of set-off as evidence of the debt on the issue of *non assumpsit*. *Harrington* v. *Macmorris*, 5 Taunt. 228; 1 Marsh, 53. Vol. II. tit. PARTICULARS.

(*g*) In trespass for throwing down and carrying away stalls, as to all the trespass but the throwing them down, the defendant pleaded not guilty; and as to the throwing them down, a special justification; and therein justified both the throwing down and carrying away; and on the issue joined, the Judge at the assizes would not try whether the defendants were guilty or not of carrying away the stalls, because they had confessed that by their justification; and on motion for a new trial it was denied, because the jury could never find the defendants not guilty, contrary to their own confession upon the record, though in another issue. B. N. P. 298. Note,

Protestations.

Protestations in pleading, though still retained as matter of form, are but of little use in practice. A protestation is defined to be a saving to the party who takes it, from being concluded by any matter alleged or objected against him on the other side, on which he cannot take issue (*h*). According to Lord Coke (*i*) it is an *exclusion* of a *conclusion* that a party may by pleading incur; it is a safeguard to the party, which keepeth him from being concluded by the plea he is to make, if the issue be found for him.

A protestation is of no use to the party who takes it, unless either the issue be found for him (*k*), or unless the matter could not have been pleaded (*l*).

A demurrer to a plea in equity is not such an admission of the facts charged, as to be evidence of those facts against the party demurring, in a subsequent action between the same parties (*m*).

Mixed documents.

Secondly, documents which are partly of a public and partly of a private nature, are court rolls, corporation books, and perhaps also within the same class may be included the books of some private companies. These, with respect to a particular class of society, may be considered as public documents, because they proceed from an authority which it recognizes; but, with respect to the rest of the community, they may be nothing more than mere private documents, resulting from no acknowledged authority.

Court rolls.

Court rolls and customaries of manors are evidence between the lord and the tenants, for they are the public rolls by which the inheritance of every tenant is preserved; and they are the rolls of the Manor Court, which was formerly a court of justice (*n*). Such documents, handed down from remote times, and

that in the margin it is observed, that this case was before the stat. enabling the defendants to plead double.

(*h*) Plowd. 276, b. *Graysbrook* v. *Fox*, Finch, 359. 361; 2 Will. Saund. 103, a.

(*i*) Co. Litt. 124.

(*k*) Bro. Prot. 14; Co. Litt. 124; Plowd. 276, b.

(*l*) Ibid. and 2 Will. Saund. 103, a.

(*m*) *Tomkins* v. *Ashby*, 1 Mood. & Mal. C. 32.

(*n*) Gil. L. Ev. 235; 4 T. R. 670. See tit. JUDGMENTS. Ancient presentments are not evidence for the lord, unless signed by a party in privity of estate with the person against whom they are produced. *Benett* v. *Coster*, Burrough, J., Wilts Sum. Ass. 1817. Presentments by homage, restricting the lord's right, in respect of parcel of his demesne land, to turn so many cattle only on the waste, not acted on, have no weight against an uniform contrary usage. *Arundell* v. *Lord Falmouth*, 2 M. & S. 440. Where the plaintiff claimed a right in the soil of land adjoining his farm, it being contended that he had only a commonable right, held that an ancient instrument in the

kept in the muniments of the manor, are not, as far as regards the tenants of the manor, to be regarded as *res inter alios actæ*; they are documents to which all are privy. Custom is of the very essence of a copyhold tenure; and as reputation is evidence to prove a custom (*o*), so are those documents which contain the solemn adjudications or opinions of the homagers or tenants themselves, as to customary rights, or which have been handed down from one generation to another, and reputed to contain a true account of the manorial customs (*p*). Hence entries upon the court rolls are evidence to prove the mode of descent, although no instances of persons having taken according to that mode be proved (*q*); so they are to prove that proclamations have been made (*r*). A customary of a manor, which has been handed down from steward to steward with the court rolls, is evidence of the mode of descent within the manor, although not signed by any one (*s*). Court rolls.

The examined copy of a court roll (*t*) is admissible in evidence. So a copy of a court roll under the hand of the steward is good evidence to prove the copyholder's estate (*u*).

An examined copy of a particular entry in the court rolls of a manor, is evidence without producing the original, even where it may be presumed that the books themselves contain other entries connected with the point in issue (*x*).

nature of a presentment at the manor court by the freeholders, finding that the then owner of the farm, and those claiming the right of the soil, had no separate right, but only a right thereon, as the other freeholders, for commonable cattle, was inadmissible in evidence, either as a presentment, the homage having no right to decide upon a claim made by an individual to the freehold, or as an award, the party not appearing to have submitted himself, or as evidence of reputation, being *post litem motem*; and *semble* reputation could not affect a question of private right. *Richards* v. *Bassett*, 10 B. & C. 657.

(*o*) Vid. Vol. II. tit. CUSTOM.

(*p*) See Ld. Kenyon's observations, *Roe* v. *Parker*, 5 T. R. 26; 2 M. & S. 92; and *Chapman* v. *Cowlan*, 13 East, 10. *Doe* v. *Mason*, 3 Wils. 63.

(*q*) 5 T. R. 26; 2 M. & S. 92.

(*r*) *Doe* v. *Hellier*, 3 T. R. 162.

(*s*) *Denn* v. *Spray*, 1 T. R. 466. See tit. COPYHOLD.

(*t*) *Doe d. Bennington* v. *Hall*, 16 East, 208; 5 Esp. C. 221; Comb. 157. *R.* v. *Haines*, ib. 137. The originals are evidence, although unstamped. 16 East, 208.

(*u*) B. N. P. 247; 16 East, 208.

(*x*) *Doe d. Churchwardens of Croydon* v. *Cook*, 5 Esp. C. 221. And see Style, 450. *R.* v. *Shelley*, 3 T. R. 141. *R.* v. *Allgood*, 7 T. R. 746. *R.* v. *Lucas*, 10 East, 235. *Bateman* v. *Phillips*, 4 Taunt. 162. Court rolls, containing licences to fish, granted in the 17th century at certain rents, are admissible to prove a prescriptive right to a several fishery, claimed as appurtenant to a manor, without showing the actual payment of those rents, where it appears that during the last century, leases have been granted of

Corporation books.

The books of a corporation, containing a register of their public acts, are evidence as between the members of the body, or against the body, for they contain the rules and regulations to which they are all subject, and to which all are privy (*y*). But they are not evidence for the corporation against a stranger (*z*).

In the case of *Marriage* v. *Lawrence* (*a*), where in an action for trespass the issue was upon the right of the corporation of Malden to take certain tolls, it was held that an entry from the books of the corporation, dated 18th H. 8, purporting to contain the proceedings of the corporation against the masters of two ships who had refused to pay tolls, the seizure of the ships, and the submission of the masters to the payment of a fine, and to have been signed by the corporation clerk, was inadmissible, because the entry was not of a public nature. But it was said that if the subject of the entry had been of a public nature, the case would have been different.

A customary, found in a book amongst the records of a corporation, was held to be evidence against the corporation. But in general, unless papers relate to the proceedings of the corporation as a corporate body, they are not evidence; and there-

the fishery, and that for the last 40 years the rents under the leases have been regularly paid, or that other acts of ownership have been acquiesced in. *Rogers and others* v. *Allen*, 1 Camp. C. 109. As to the right of inspecting court rolls, see Vol. II. tit. INSPECTION. The right to inspect does not depend on the pendency of a suit. *R.* v. *Lucas*, 10 East, 235; but see *R.* v. *Allgood*, 7 T. R. 746, *contra*. An inspection will be granted on a *primâ facie* title, 10 East, 235; as to ascertain a right (to cut timber, *e. gr.*) which the lord disputes. *R.* v. *Tower*, 4 M. & S. 162. Where a lord of a manor is indicted for a nuisance in not repairing the bank of a river, the Court will not compel him to allow the prosecutor, even though he is a tenant of the manor, to inspect the court rolls for the purpose of obtaining evidence in support of the prosecution. *R.* v. *Earl of Cadogan*, 5 B. & A. 902.

(*y*) See the case of *Thelford*, 12 Vin. Ab. 90, pl. 16; and *R.* v. *Mothersell*, Str. 93.

(*z*) *Mayor of London* v. *Lynn*, H. Bl. 214, in n. *Mayor of Kingston-upon-Hull* v. *Horner*, Cowp. 102. Entries in corporation books in order to show that the curate had been appointed by the corporation, held inadmissible as evidence to establish their right against the vicar. *Attorney-gen.* v. *Warwick Corp.*, 4 Russ. 222

(*a*) 3 B. & A. 142. See the *Mayor of Kingston-upon-Hull* v. *Horner*, Cowp. 103, where, in an action by the corporation for tolls, entries from the corporation books of the particulars of the tolls receivable to the use of the mayor, &c. were read. Copies of an ancient schedule produced from the muniments of the corporation, delivered to the toll-collectors, and by which they collected, held admissible for the corporation, although it would have been otherwise if not shown to have been so delivered from the corporation, however accurately corresponding. *Brett* v. *Beales*, 1 Mood. & Mal. C. 417.

fore, a letter found in a corporation-chest, in which *A. B.* was described to be of another place, was held to be inadmissible on a question whether *A. B.*, at the time he did a corporate act, was an out-burgess or not (*b*).

Books of public companies, &c.

Upon the same principle, the books of public companies, or copies of them, are evidence between those who are interested in them, as against each other, or against the company; as the books of the East India Company, in a cause between the parties having stock there (*c*). So the Bank books, or copies from them, are evidence to prove a transfer of stock in the public funds (*d*).

Proof of corporation books.

To establish the book of a corporation in evidence, it should be shown to have been publicly kept as such, and that the entries were made by the proper officer (*e*). But an entry made by one who acts for the officer, *pro tempore*, as during the illness of the town-clerk, is evidence, if the fact be proved (*f*). On this ground, the books and papers wherein the swearing in of the freemen, burgesses, or other members or officers of such corporation, shall be copied, and to have copies or minutes of the admission, or the entry of swearing in of any one or more of such freemen, burgesses or other members or officers, on paying 6*d.* for every 100 words, for writing the same, under a penalty, in case of refusal, of 100*l.*, payable to the informant. If two are bailiffs, both are sunble jointly. *Shuldam* v. *Bunniss*, Cowp. 192. The stat. does not oblige him to grant inspection of books containing the orders for, and memoranda of, admissions and swearing in. *Davis* v. *Humphreys*, 3 M. & S. 223. By the st. 3 Geo. 3, c. 15, s. 4, candidates on elections of members to serve in Parliament for corporations, &c. and their agents, are entitled to inspect the books and papers of the corporation, &c. wherein the admissions of freemen shall be entered, and to have copies on payment, &c. This statute extends to all books, papers, &c. containing entries of admissions of freemen. *Schuldam* v. *Bunniss*, Cowp. 192. See Vol. II. tit. INSPECTION.

(*b*) *R.* v. *Gwyn*, Str. 401.

(*c*) *Geary* v. *Hoskins*, 7 Mod. 129. See 2 Str. 1005; 1 Wils. 240; 1 Bl. R. 40; 1 T. R. 689; Doug. 593; 3 Salk 154.

(*d*) *Bretton* v. *Cope*, Peake's C. 30; *supra*, 192.

(*e*) *R.* v. *Mothersell*, Str. 92; 12 Vin. Ab. 90, pl. 16. The usual mode of procuring an inspection of corporation books is by rule, where an action is pending; by *mandamus* in other cases. A rule can only be granted where a cause is pending, and only then of a *limited* inspection. For an unlimited inspection, the course is by *mandamus*. *R.* v. *Babb*, 3 T. R. 579. *Lynn Corporation* v. *Denton*, 1 T. R. 689. *Barnstaple Corporation* v. *Lathey*, 3 T. R. 303. See Vol. II. tit. INSPECTION. By the stat. 12 Geo. 3, c. 21, s. 2, freemen and burgesses of corporations are entitled to inspect the records of any city, corporation, borough or cinque port, and to take copies and extracts from them. By the stat. 32 Geo. 3, c. 58, s. 4, every mayor, &c. or other officer of any corporation having the custody of or power over the records, shall, upon the demand of any person, being a member of the corporation, permit such person (except on particular excepted days) to inspect

(*f*) *R* v. *Mothersell*, Str. 92; 12 Vin. Ab. 90, pl. 16.

Corporation books, proof of.

upon a *quo warranto*, it was held that minutes of the proceedings of a corporation, taken several years before by the prosecutor's clerk, and not kept as a public book, had been properly rejected at the trial (*g*).

The seal of a public corporate body need not be proved, as the seal of an individual, by means of a witness who saw the seal affixed, &c. to the instrument; it is sufficient to show that the seal is the official seal of the corporate body (*h*). The documents must be proved to have come from the proper place of deposit. But in an action for a false return to a *mandamus* (*i*), it was held that a corporator was capable, as a depositary of the muniments, of being brought forward for the purpose of producing them, subject to cross-examination by the adversary, as to the custody of the document (*k*). And it seems that if the party objecting wish to inquire as to the custody, the corporator may be examined on the subject (*l*).

Private writings.

Private writings and entries may, with a view to their operation in evidence, be distinguished into those, First, to which the person against whom they are offered was party or privy. Secondly, Entries made by third persons (*m*). And they may be considered, first, with respect to their nature, admissibility and effect in evidence; and, secondly, with respect to the means of proof. Documents offered in evidence against one who was a party or privy to them, are either, 1st, under seal, or 2dly, not under seal. All documents to which a person was party or privy are in general admissible in evidence against him, since they operate as acknowledgments or admissions on his part, or that of another through whom he claims, that the facts contained in them are true, particularly if the admission was against the interest of the party so making it (*n*). All written contracts are made for the express purpose of being afterwards

(*g*) Str. 92; 12 Vin. Ab. 90, pl. 16.

(*h*) *Moises* v. *Thornton*, 8 T. R. 307. It has been held that the seal of the city of London proves itself, by Lord Kenyon. *Woodmass* v. *Mason*, 1 Esp. R. 53.

(*i*) *R.* v. *Netherthong*, 2 M. & S. 238.

(*k*) As to the means of procuring an inspection of such documents, see tit. INSPECTION.

(*l*) Per Lord Ellenborough, *R.* v. *Netherthong*, 2 M. & S. 337, citing a case in which Ld. Kenyon had so acted in an action for a false return to a *mandamus*. In the principal case it was held that a certificate produced by a rated inhabitant overseer, by which the appellant parish admitted the settlement of the pauper in the latter parish, was admissible.

(*m*) And the declarations made by third persons frequently stand upon the same foundation. It seems that in one instance, *Serle* v. *Lord Barrington*, Str. 826, Vol. II. 118, an entry has been admitted as evidence for the party who made it.

(*n*) See Vol. II. tit. ADMISSIONS.

used as evidence of the contract, the only difference between sealed and parol contracts in this respect being this, that the former are more solemnly authenticated, and not so easily revoked. So essential is it that the rights of men should be evidenced by documents of this nature, that the law itself requires, in many instances, the evidence of a deed to notify and establish the particular facts, and in many others renders a contract, or memorandum in writing, essential for the same purpose. Thus incorporeal rights, as to fairs, markets, and advowsons, cannot be transferred except by grant (*o*), and the provisions of the statute of frauds in many instances render a note or memorandum in writing necessary to the proof of the contract (*p*).

Express admissions by a party.

In general, an admission under seal is conclusive upon the obligor, and estops him from asserting or proving the contrary. Thus, if a condition in a bond recite that a particular suit is depending in the court of King's Bench, the obligor is estopped from saying that there is no such suit there (*q*). So if the condition of a bond be to perform the covenants in a particular indenture, he is estopped from saying that there is no such indenture (*r*). So a grantor is estopped by his deed from saying that he had no interest in the thing granted (*s*). But a deed-poll does not estop a lessee or grantee, for it is the deed of the lessor or grantor only (*t*).

In general, however, in order to conclude the party by his deed by way of estoppel, it should be pleaded, for if his adversary does not rely upon the estoppel, the Court and jury are not bound by it; but the jury may find the matter at large according to the fact, and the Court will give judgment accordingly. Where, however, the title of the party is by estoppel, and he has no opportunity of pleading it, the jury cannot find against the estoppel. Thus in debt for rent on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence that the plaintiff had nothing in the tenements, because if he had pleaded

(*o*) See Gil. L. Ev. 88; Vol. II. 342. 538.

(*p*) 29 Car. 2, c. 3.

(*q*) Cro. Eliz. 750.; Com. Dig. Estoppel, A. 2.

(*r*) 1 Rol. 872, l. 30. Com. Dig. Estoppel, A. 2. For other instances, see tit. ADMISSIONS.

(*s*) 2 T. R. 171. But the principle does not apply where the grantor is a trustee for the public, and grants that which he was not authorized by the Act from which he derives his authority. Ibid.

(*t*) Co. Litt. 363, b. A lessee by indenture, in an action of covenant for ploughing up Laines Meadows, without paying at a certain sum per acre, was held not be estopped from averring that Laines Meadows were not meadow ground, although they were described as meadows in the lease. *Skipwith* v. *Green*, Str. 610.

Estoppel to be pleaded when.

that specially, the plaintiff might have replied the indenture, and estopped him; but if the defendant plead *nihil habuit*, &c., and the plaintiff, instead of relying on the estoppel, reply *habuit*, &c. he waives the estoppel, and leaves the matter at large, and the jury are to find the truth, notwithstanding the indenture (*u*).

But when an estoppel creates an interest in lands, the Court will adjudge accordingly upon the facts found by the jury. As if *A.* lease land to *B.* for six years, in which he has no interest, and then purchase a lease of the same lands for twenty-one years, and afterwards lease to *C.* for ten years, and these facts are found by verdict, the Court will adjudge the lease in *B.* to be good, though it was so only by the conclusion (*x*).

So in other cases, where the party who might have relied upon the estoppel, in pleading, waives it, and gives the deed in evidence, although the jury are not bound by the estoppel from finding according to the truth of the fact, yet it seems they would not be warranted in finding a verdict contrary to the solemn admission of the party, without the strongest evidence of fraud. As for instance, in an action of *assumpsit*, where the defendant pleads the general issue, and gives in evidence a release which he might have relied upon as an estoppel; although he has waived the estoppel, still the release seems to be conclusive evidence for the defendant, in the absence of fraud. There are also numerous instances in which a party, by his admissions and representations, is concluded from showing the contrary in evidence, although the fact could not have been pleaded by way of estoppel. For instance, where a man has represented a woman to be his wife, in an action for necessaries supplied to her, he would in general be concluded by that representation, which would operate as a kind of estoppel *in pais* (*y*).

It is a general rule that all privies, whether in blood as the heir (*z*), in estate as the vendee (*a*), or in law as the lord by escheat (*b*), or one who claims under another by act of law, or in

(*u*) P. C. Salkeld, 277; Com. Dig. Estoppel, C.; Ibid. Pleader, S. 5. So in general, although the parties are estopped to say the truth, the jury are not. B. N. P. 298.

(*x*) Com. Dig. Estoppel, E. 10. See also Pol. 68. So if the plaintiff in ejectment make title by a judgment in a *scire facias*, on a judgment in Trinity term, where the judgment was in fact of Michaelmas term, the jury cannot find that the original judgment was of Michaelmas term. *Trevivan* v. *Lawrence*, Salk 276. So if a woman sue or be sued as sole, and judgment be against her as such, though she was covert, the sheriff shall take advantage of the estoppel. 1 Rol. 869, l. 50; 1 Salk. 310; Com. Dig. Estoppel, B. D.

(*y*) See Vol. II. tit. ADMISSION.

(*z*) Co. Litt. 352, a.; Pol. 61. 66. Com. Dig. Estoppel, B. 3 T. R. 365.

(*a*) 1 Salk. 276.

(*b*) Co. Litt. 352, a.

the post (*c*), tenant in dower, or by the courtesy (*d*), are bound by an estoppel.

The sense of contracts not to be altered by parol evidence.

The effect of deeds and written contracts, not under seal, will be hereafter more fully considered under the several heads to which they belong, as bonds, covenants, agreements, bills of exchange, policies of insurance, &c. It may be observed here, that since in all these cases these documents have been framed by the parties themselves as the authentic evidence of the facts which they contain, and of their own intentions, no other evidence can in general be admitted to alter the obvious sense and meaning of the terms which they have used; to admit this would be to deprive them of all effect as permanent memorials for the purposes of evidence, for they could no longer be so considered if their meaning could be altered and subverted by extrinsic and collateral evidence. Since this is a fundamental rule, applicable to written evidence in general, its nature and application will be more fully discussed hereafter (*e*).

Entries by third persons.

Secondly, Entries and declarations made by third persons (for the latter stand upon the same footing with the former) are not in ordinary cases admissible; they usually fall within the description of *res inter alios acta* (*f*).

Whether the declaration by a third person be oral or written, the general objection applies, that it was not made under the sanction of an oath, and that the party against whom it is offered had no opportunity to cross-examine. Such a declaration or entry is therefore, on principles already adverted to, inadmissible, unless its admissibility be warranted by some special rule of law applicable to the particular circumstances (*g*).

(*c*) Co. Litt. 352. b.

(*d*) Pol. 61; Co. Litt. 352.

(*e*) See tit. PAROL EVIDENCE.

(*f*) *Supra*, 60. As to those which operate by way of admission, see Vol. II. tit. ADMISSION.

(*g*) In trover for taking goods by defendant under colour of distress, the question being whether the defendant or *J. B.* was the plaintiff's landlord, the latter having been shown by the plaintiff to have been the party to whom he and his father had always paid the rent; held, that the defendant, in order to show that he received it merely as agent, could not give in evidence accounts rendered by that party in which he described himself as agent, as the party being alive might have been called, and that they were therefore properly rejected. *Spurgo* v. *Brown*, 9 B. & C. 935. In assumpsit for two-fifths of a loss recovered by the defendants as agents for *S.*, an invoice sent by *S.* to the defendants, to enable them to recover from the underwriters, was held to be evidence of the plaintiff's interest. *Mendham and another* v. *Thompson and another*, 1 Stark. 316; Ellenborough, C. J. 1816. But an invoice made out by *S.* and not shewn to have been so sent, was rejected as merely *S.*'s declaration. In an action against un-

Entry by third person, admissible when.

The entry or declaration of a mere third person may be admissible as original evidence, where it *accompanies* and is *explanatory* of the nature and quality of a material fact, or as secondary evidence, where it is admissible on a principle of necessity, warranted by particular circumstances, which afford a reasonable assurance that the party whose testimony is no longer attainable *knew* the fact, and *communicated* it faithfully.

The considerations which warrant the reception of such evidence are principally these:

That the entry or declaration should have been made in the course of office duty or business, and that it was against the interest of the party to make it.

It seems to be clear that such an entry, when made in the ordinary course of profession or business, and when it might operate against the interest of the party making it, is sufficient to warrant the admission of the evidence.

And it seems that some connexion between the entry with some fact to which it relates, such as the possession of land, or with the performance of some ordinary duty or course of business, is essential to its admissibility; but whether that alone would be sufficient, or whether it is also essential that the entry should be such as might operate against the interest of the party making it, is not clearly settled.

It may however be observed, that the consideration that the entry was made in the course of discharging a professional or official duty, or even in the ordinary course of business in which the party was engaged, seems both in reason and upon the authorities, to afford a much safer warrant for giving credit to such evidence, than is supplied by the consideration that the entry or declaration might possibly have been used to the prejudice of the party; and in many instances the doctrine of admissibility on that ground has been pushed to an extraordinary, if not untenable extent.

derwriters, the bill of lading, signed by the captain, is not evidence of the shipment of the goods. *Dickson* v. *Lodge*, 1 Starkie's C. 226. A banker's ledger is admissible to show that a customer had no funds in the banker's hands. *Furness* v. *Cope*, 5 Bing. 114. *Semble*, more properly to show that no entry was made in that ledger.—Note, that one of the clerks stated that it was the book to which all the clerks referred to see whether they should pay the cheques presented to the house; and Best, C. J. held that it was admissible in order to obviate the necessity for calling a multitude of checks, and that it was evidence merely to negative the fact of the trader having money in the house.

Entry by third person, admissible when.

Lord Ellenborough, in the case of *Doe* v. *Robson* (*a*), in giving judgment as to the admissibility of entries of charges made by an attorney in his books, lays no stress on the fact that it appeared that such charges had been paid; he says expressly, "the ground upon which their evidence has been received is, that there is a total absence of interest in the persons making the entries to pervert the fact, and at the same time a competency in them to know it." And in the case of *Higham* v. *Ridgway* (*b*), Le Blanc, J. observed, "I do not mean to give any opinion as to the mere declarations or written entries of a midwife who is dead, respecting the time of a person's birth, being made of a matter peculiarly within the knowledge of such a person; it is not necessary now to determine that question; but I would not be bound at present to say that they are not evidence."

Lord Eldon, in the case of *Barker* v. *Ray*, observes, "the cases satisfy me that evidence is admissible of declarations made by persons who have a complete knowledge of the subject to which such declarations refer, and where their interest is concerned; and the only doubt I have entertained was, as to the position that you are to receive evidence of declarations where there is *no interest*. At a certain period of my professional life, I should have said that the doctrine was quite new to me; I do not mean to say more than that I still doubt concerning it."

It is observable, that the great object of the rule is, to guard not against *fraud*, but negligence and carelessness; the slightest suspicion of fraud would be sufficient at once to exclude such evidence; and the imposing the limitation, that the entry, to be admissible, should be apparently against the interest of the party making it, would afford no security against fraud; the forger of a false entry would take care to obviate any objection of this description, by admitting payment or some other fact apparently against the interest of the supposed author of the document. The consideration that the entry is against the interest of the party is therefore principally material, as it affords reason for supposing that a person would not be likely to commit any error or mistake which might afterwards turn to his prejudice. When, however, it is considered that in many instances such entries remain in the private custody of the parties who make them, it is not probable that the consideration that the document might be published by accident or mistake, and might, in some possible state of circumstances, be turned to the prejudice of the party, would cause him to exercise a degree of exactness and caution, so far beyond that

(*a*) 15 East, 31. (*b*) 10 East, 109.

Admissible when.

which he would have used in the common course of professional or official duty, or ordi habits of business, as to supply a sound and useful test, operati the admission of the former, the rejection of the latter. In the absence of all suspicion of any motive to the contrary, it is fairly presumable that all entries made in the ordinary routine of business are truly made: the same motive which induced a party to use the pains and trouble of making an entry at all, would usually induce him to make a true entry; a false one would be of no value, and the making it would frequently be more troublesome than to make a true one; it would require the additional trouble of invention; and although the sparing of trouble might, in many instances, induce a party to state particulars without sufficient accuracy, it would seldom cause him to invent and state a transaction which never happened.

Whatever weight therefore be due to the consideration, that in a particular case the entry of a fact contained an admission by the party making it, which, if untrue, was against his interest; it may be doubted whether that circumstance be of so strong and decisive a nature as to afford a sufficient test for the admission of such entries, and the rejection of all others which do not contain an admission against the interest of the maker. Upon a question like this, the rule of law, unless some collateral inconvenience would follow, ought to depend on the intrinsic weight of the evidence admitted or excluded; and it would be advisable, for the sake of adherence to principle, as well as on grounds of convenience, to avoid an arbitrary rule, founded on a casual circumstance, which affects at most the weight of the evidence, not its value or quality, and which would, in many instances, operate to exclude the stronger and admit the weaker evidence.

Let it, by way of illustration, be supposed, that an attorney has in the same book two accounts, in one of which are contained the items in detail relating to the marriage settlement of *A.*, in the other a similar detail relating to the marriage settlement of *B.*; that the first appears to have been paid, the other does not; it may be asked, is any man's mind so constituted, that whilst he believed the former entries to be all true, he could withhold his belief as to the latter: could any one, in the absence of all suspicion of fraud, believe that a professional man would mis-spend his time by inventing a string of falsities, asserting that he took such and such instructions, and prepared this or that conveyance; without aim or object? If any one could conceive to himself, in the absence of any evidence to justify such a supposition, that the latter account was invented for some sinister purpose or other, would it not occur, that the admission of pay-

ment, tacked to the other, could not repel a similar suspicion as to its truth? What warrant could the admission of payment afford to obviate such a suspicion? How could the party be prejudiced by admitting that he was paid for business never done? On the same ground, therefore, that credit was given to the former, viz. the improbability of invention for some unknown sinister purpose, some, if not the same, degree of credit would also be given to the other.

Entries by third persons, admissible when.

A presumption arises from the usual course of affairs, that an entry made by a professional man was made at the time, or nearly so, of the date; such an entry is certainly not to be considered as equal in force to direct evidence of the fact, the tests of an oath, and of cross-examination, being wanting; but it is impossible to say that it is not evidence which in itself affords a reasonable presumption as to the truth of the fact to which it relates, because it would be contrary to the usual course of human affairs, and to the experience of mankind, that a person who must have known whether the fact which he recorded was true or false, should have wantonly, and long before the importance of such a document could have been foreseen, and therefore without any conceivable motive, have stated that which was false rather than that which was true. If, indeed, such evidence could not be admitted without breaking down a strong and necessary bulwark for the protection of truth, and letting in hearsay evidence in general, it might be worth while to sacrifice such evidence to principles of general policy; this however would not be the consequence, since the limitation of such evidence to entries made by a person possessing peculiar means of knowledge, and unaffected by any temptation to deceive, in the usual course of his business or profession, would be, as it seems, sufficiently definite to distinguish those entries from the mere unauthorized entries or declarations of strangers.

Entry or declaration accompanying an act.

In the first place, an entry or declaration accompanying an act seems, on principles already announced, to be admissible evidence in all cases where a question arises as to the nature and quality of that act. Thus where the question is, whether a promissory note was originally void for usury, letters written by the payee to the maker, and which are contemporary with the note, are admissible to prove that the consideration was usurious (*h*).

Such evidence is also admissible on the same principle, to show

(*h*) *Kent* v. *Lowen*, 1. Camp. 177. *Walsh* v. *Stockdale*, Vol. II. 181. A letter inclosing a promissory note, may be read as evidence, by the writer, to show the purpose for which the note was sent. *Bruce and others* v. *Hurley*, 1 Starkie's C. 23.

Entries, &c. connected with acts.

the *intention* with which an act was done, where the intention is material (*i*). Thus, on questions of bankruptcy, declarations made by a trader, contemporary with the fact of absenting himself from his place of residence or business, are constantly admitted in proof of the real nature and quality of the act (*k*).

In the case of *Aveson* v. *Lord Kinnaird* (*l*), on an insurrance effected on the life of the wife, the question was whether she was in an insurable state at the time; and declarations by her, as to the state of her health, made a few days after the certificate of her health had been obtained, as to the state of her health at the time when the certificate was obtained, and down to the time of the conversation, were held to be admissible in evidence, both to show her own opinion as to the state of her health, as well as with a view to contradict the evidence of the surgeon who had been called as a witness for the plaintiff. In an action of trespass, what the wife said immediately on receiving the injury, and before she had time to devise anything for her own advantage, is also evidence (*m*). So is the complaint made by a person in case of rape, or an attempt to commit a rape, immediately after the injury (*n*).

To this head also the admissibility of declarations by tenants has sometimes been referred, and it seems that such declarations are clearly referable to this principle in all cases where the nature and quality of an act of ownership or dominion, or of the possession, is questioned and requires explanation, or when the nature and quality of the possession are questioned, and the contemporary declaration of the party doing the act or of the party in possession serves to elucidate and explain the nature and quality of such act or possession.

The application of the general principle already announced stands thus: In the absence of direct documentary proof of the title to lands, or to an easement or right arising out of lands, acts of possession and enjoyment must be resorted to as indirect evidence of the right (*o*). Where such possession and enjoyment have been

(*i*) *Supra*, 62; Vol. II. tit. INTENTION—MALICE.

(*k*) *Supra*, 36. 63; Vol. II. tit. BANKRUPTCY. When an act has been done to which it is necessary to ascribe a motive, what the person has said at the time is admissible, for the purpose of explaining the act. *Bateman* v. *Bailey*, 5 T. R. 512.

(*l*) 6 East, 293.

(*m*) *Thompson and his Wife* v. *Trevanion*, Skinn. 402.

(*n*) *Brazier's Case*, 1 East, P. C. 444. *R.* v. *Clarke*, 2 Starkie's C. 243. *Trelawny* v. *Colman*, ibid. 191.

(*o*) Acts of ownership can only prove that which would be better proved by title-deeds or possession. Acts of ownership, where submitted to, are analogous to admissions or declarations,

Entries, &c. connected with acts.

of long continuance, the law in many instances makes that possession and enjoyment conclusive as to the right, and in all cases renders such evidence admissible, on the reasonable presumption that unless those acts and possession had been founded in right, they would have been resisted by him whose right was violated. But the admission of such acts of possession and enjoyment in evidence, frequently introduces a question as to their nature and quality, for on this must depend the question, whether they furnish any inference of acquiescence in an adverse enjoyment. This again must be decided by the mode and circumstances of enjoyment, and for this purpose the contemporary declarations of the parties concerned are necessary and essential evidence. If, for instance, the question be whether *A.* has a right of way to his house over the close of *B.*, and evidence be given that on a particular occasion the occupier of *A.*'s house used the close as a way, the whole force and efficacy of the evidence may depend on what was said at the time. If, on the one hand, it were proved that at that time the occupier of *A.*'s house asked the permission of the owner or occupier of the close to use the way, the fact, instead of affording evidence of an adverse right, would be strong to negative the right; if, on the other hand, the right to use was asserted and acquiesced in, the fact would afford evidence of acquiescence on the one hand, and of right on the other. The case of *Doe d. Human* v. *Pettit* (*p*) may be cited in illustration of these remarks.

by the party submitting to them, that the party exercising them has a right to do so, and that he is therefore the owner of the property upon which they are exercised. Per Best, J. in *Hollis* v. *Goldfinch*, 1 B. & C. 220.

(*p*) *Doe d. Human* v. *Pettit*, 5 B. & A. 223. In the case of *Doe* v. *Rickarby*, 5 Esp. C. 4, which was an action of ejectment on an alleged forfeiture of a lease for breach of a covenant not to injure or underlet, by *underletting*; it appeared, that after the house had been for some time empty, Mrs. Luthman was found in possession; and it was held, that the plaintiff was at liberty to prove that a witness on his behalf had inquired of Mrs. Luthman in what way she occupied it, and to give her answer in evidence. This case, however, goes to a great length: it is difficult to say that such an answer can be admissible as original evidence during the life of the declarant, except on the ground that she was the agent of the party to be affected, or that the declaration was evidence, as accompanying the fact of possession. But there was no sufficient proof of agency to let in such declarations, and the declaration was not adverted to as explanatory evidence of a contemporaneous act, as to prove a bygone fact, the notice and terms of the original entry. In some instances, the admissibility of declarations by former occupiers, on the ground that they were against the interest of the declarants at the time, have been carried to a great length. See *Walker* v. *Bradstock*, 1 Esp. C. 458.

Entries, &c. connected with acts.

Human was the purchaser of lands; after his death, which was 30 years ago, his widow continued in possession for more than 20 years, and died; the question between the heir-at-law of the husband and the heir-at-law of the wife was, whether the possession by the wife was an adverse possession; and it was held, that her declarations during her possession that she held for her life only, and that after her death the premises would go to her husband's heir-at-law, were admissible to rebut the statute of limitations. They were not used to shew the quantum of her estate, but only to explain the nature of her possession.

Upon similar grounds title-deeds and testaments are admissible evidence of the rights of property (*q*).

Title-deeds.

Even modern deeds are also evidence to show the title of a party to a particular estate, when a sufficient ground has been laid by proof of the ownership of the party from whom the title is derived. Thus it is every day's practice to prove the title of *A. B.* to an estate, by proof of the execution of a conveyance by *C. D.* a former owner in possession of the estate. In such cases the evidence does not come within the objection of "*res inter alios*;" the deeds are nothing more than solemn declarations and admissions of the parties, accompanying and evidencing the nature of the act of transfer, and do not effect or conclude the rights of any stranger, any more than the mere fact of delivering the possession would conclude him. It is evidence of the same nature, as if a plaintiff in trover were to prove his ownership of a horse, or other chattel, by showing that he bought him for a particular sum at a fair. Such evidence, as a mere fact, and part of the *res gestæ*, is admissible against all the world; it operates to the conclusion of no one without his assent, but merely so far as in its own nature it affects the transaction itself. For its force and effect, the evidence depends entirely upon its connection with the acts of ownership and possession; proof of the execution of deeds by parties wholly unconnected with the estate would avail nothing to prove a title.

Surveys and maps.

Maps and surveys of estates are also evidence to show the extent of a man's estate, when it appears that they have been made with the privity and consent of the owners of the adjoining lands. *A.* being seised of the manors *B.* and *C.*, during his seisin caused a survey to be taken of *B.*, which was afterwards conveyed to *E.*; and upon a dispute between the lords of *B.* and *C.*, it was held that the survey was admissible in evidence (*r*).

(*q*) *Supra*, p. 62. 156; and see the cases there cited.

(*r*) *Bridgman* v. *Jennings*, 1 Lord Raym. 734.

Maps and surveys.

But it is clear that no entry or survey taken by an owner would be evidence either for himself, or for one who claimed through him, against a party who did not claim in privity, since it might encourage persons to include in surveys more than belonged to them (*s*); and therefore, survey-books of a manor, although ancient, unless signed by the tenants, or unless they appear to have been made at a court of survey, are not evidence; they are mere private memorials (*t*).

Ancient deeds, maps, &c.

So it has been said, that an old map of lands has been allowed in evidence, where it came along with the writings, and agreed with the boundaries adjusted in an ancient purchase (*u*). It does not clearly appear under what circumstances this old map was held to be evidence, but it seems that one ingredient essential to its admissibility was its agreement with boundaries as adjusted in an ancient purchase, that is with some other instrument; and the term *adjusted* seems to imply some privity on the part of the owners of adjoining property, if the vendor was not himself the owner. A map annexed to a deed seems to stand on the same footing as the description contained in the deed itself.

Entries made against the interest of the party.

'It is an established principle of evidence, that if a party who has peculiar knowledge of the fact, by his written entry, or even declaration concerning it, charges himself, or discharges another upon whom he would otherwise have a claim, such entry is admissible evidence of the fact after the death of the party (*x*).

Where *A.* a tenant for life, with a limited power of leasing, reserving the ancient rent, received a letter from his confidential agent, containing an account of the tenants and rents, on which the tenant for life indorsed the words, "a particular of my estate," and handed it down to *B.*, the succeeding tenant for life, who had a like limited power of leasing, by whom it was preserved, and handed down, amongst the muniments of the estate, to the first tenant in tail, it was held, that the document was evidence for the first tenant in tail against the lessee of *B.*,

(*s*) Str. 95. 1 Lord Raym. 734. *Outram* v. *Morewood*, 5 T. R. 123.

(*t*) 12 Vin. Ab. 90, pl. 12; per Bacon. Exon Summ. 1719.

(*u*) Gil. Ev. 78.

(*x*) *Higham* v. *Ridgway*, 10 East, 135; *infra*, 312. It has been said that an additional circumstance is necessary, viz. that the party who made the entry might have been examined as to it, had he been living. Per Bayley, J., in *Higham* v. *Ridgway*. It is however observable, that in that case three of the Judges lay down the rule without this qualification; and in the case of *Short* v. *Lee*, 2 Jac. & Walker, 489, the Master of the Rolls held, that an entry by a deceased person was admissible, although he could not, in his life-time, have been examined to the fact.

Entries made by persons since deceased, against their interest.

in order to show that the rent reserved by *B.*, the tenant for life, was less than the ancient rent which was reserved at the time to which the paper referred, the paper having been accredited by the then owner of the estate, who had the means of knowing the fact, and who had an interest the other way; viz. to diminish the rent, in order to increase his fine upon a renewal under the power (*y*).

In the case of *Searle* v. *Lord Barrington* (*z*), the Court is said to have extended this principle so far as to hold, that in an action upon a bond, a receipt for interest indorsed upon it by the obligee himself, is evidence to go to a jury to rebut the presumption of payment arising from lapse of time. If this case is to be taken as an authority for the general position, that an indorsement of the receipt of interest on a bond bearing date within the space of twenty years from the date of the bond, shall in itself, and without any proof that it was actually made within that space of time, or with the privity of the obligor, be evidence to rebut the presumption of payment, it seems to be difficult to support it upon principle; for it amounts to this, that in this particular case the party shall have an opportunity of making evidence in his own closet, in order to rebut a presumption which would otherwise arise against him. If this be so, the case must be regarded as anomalous, and as an exception to the plain fundamental rule,

(*y*) *Roe dem. Brune* v. *Rawlings*, 7 East, 279.

(*z*) Str. 826. The bond was dated June 24, 1697; the indorsement of interest on the bond, under the hand of the *obligee*, was dated in 1707, being three years before the death of the obligor; and the cause was first tried Trin. 1724. Pratt, C. J. was of opinion that this indorsement was not evidence; but the three other Judges were of opinion that it ought to have been left to the jury, for they might have reason to believe that it was done with the privity of the obligor; because it was the constant practice for the obligee to indorse the payment of interest, and that for the sake of the obligor, who is safer by such an indorsement than by taking a loose receipt. Upon a second trial, Lord Raymond. C. J. admitted the evidence, and a bill of exceptions was tendered, and after judgment in the King's Bench for the plaintiff, a writ of error was brought in the Exchequer Chamber; and upon argument, five of the Judges were of opinion to affirm, and two to reverse, the judgment. The judgment was afterwards affirmed in the House of Lords. In *Barnes* v. *Ranson*, 1 Barnard, 432, a similar indorsement seems to have been admitted, though made after the presumption of payment had taken place. See Mr. Nolan's note to the former case, in his ed. of Strange, 826. In a copy of select cases of evidence, there referred to, it is stated, that at the sittings after Michaelmas term at Westminster, 6 Geo. 3, Lord Camden said that he was never much pleased with the determination of *Searle* v. *Lord Barrington*; however, he said, it was law. See Vol. II. tit. Bond.

that a man shall not be permitted to make evidence for himself(*a*). If, on the other hand, this further limitation is to be applied to the reception of such evidence, that reasonable proof shall be adduced to show that the indorsement existed before the presumption of satisfaction had arisen, the doctrine seems to be consonant with the principle above stated; a presumption arises that the obligee would not falsely and wantonly make an indorsement prejudicial to his own interest at the time (*b*), from which he could derive no benefit.

Entries by persons, since deceased, against their interest.

It seems to be clear, at all events, that such evidence would be inadmissible, if the indorsement appeared to have been made after the presumption had arisen (*c*).

Where the question was as to the property in a horse seized by the defendant under a heriot custom, a declaration by *A. B.*, a third person, that he had given up his farm and all his stock to the plaintiff, was held to be admissible for the purpose of proving that the horses belonged to the plaintiff before the death of *A. B.* (*d*).

Entries by which receivers, stewards, bailiffs and other agents, charge themselves with the receipt of money, are in general admissible in evidence to prove the fact after they are dead, for (as it is said) it is reasonably to be presumed that a man would not wantonly charge himself with any responsibility (*e*).

Entries by receivers, stewards, &c. charging themselves.

(*a*) See Lord Hardwicke's observations in the case of *Glyn* v. *the Bank of England*, 2 Ves. 43, and Lord Kenyon's, 5 T. R. 123; and Lord Ellenborough's in *Rose* v. *Bryant*, Camp. 323.

(*b*) In the case of *Glyn* v. *the Bank of England*, 2 Ves. 42, Lord Hardwicke said (of this case) he took it that the indorsements were *made* and bore date within twenty years. And in *Turner* v. *Crisp* (2 Str. 827), it was said, the indorsement appeared to have been made before it could be thought necessary to make evidence to encounter the presumption. It does not appear, however, from the report that any such evidence was given.

(*c*) *Turner* v. *Crisp*, Str. 827. 2 Ves. 43. Lord Raym. 1370.

(*d*) *Ivatt* v. *Finch*, 1 Taunt. 141. The evidence was rejected at the trial; but the Court of C. P., on a motion for a new trial, held that the evidence ought to have been admitted. Note, that in this case the defendant claimed through *A. B.*, upon whose death he became entitled to a particular portion of his personal property as a heriot.—*A.* had taken the goods of *B.* in execution, and the sheriff having executed a bill of sale to him, *B.* was permitted to remain in possession, and the sheriff afterwards took the same goods in execution at the suit of another creditor of *B.*; in an action by *A.* against the sheriff for the goods, it was held, that the declarations of *B.* as to the property of the goods, and that *A.*'s execution was merely colourable, were admissible for the sheriff. *Wilkes* v. *Farley*, 3 Carr & P. C. 395. See *Gully* v. *Bishop of Exeter*, 5 Bing. 171.

(*e*) In an action by the lord for copyhold fines, the book kept by the steward of all fines assessed, whether paid or not, was offered in evidence to prove the payment of fines by remainder-men as it was accessible to

By persons since deceased, against their interest.

Accordingly it has been held (*f*), that an entry in the parish books, made by the officers of one township, of the receipt of a proportion of the church-rates from the officers of another township, was evidence to charge the latter with the payment of the same sums in future; and that the title at the head of the page, stating the customary proportion to be so paid, was also evidence.

In an action of trespass, entries by the steward of a former owner of the *locus in quo*, in his day-book, of sums received from different persons in satisfaction of trespasses, are evidence; for it was held, that whatever would have charged the steward would be admissible evidence (*g*). A private book kept by a deceased collector of taxes, containing entries by him, acknowledging the receipt of sums in his character of collector, was also held to be admissible evidence in an action against his surety, although the parties who had paid them were alive, and might have been called (*h*).

So old rentals, by which bailiffs have acknowledged the receipt of monies, are evidence of the payment of such rents, and of the right to receive them if the bailiff or receiver be dead (*i*). But although the account of a bailiff or steward, who by marking particular items of receipt appears to have collected them, be evidence, it must appear from the subscription of his name or otherwise that it was part of the account of the steward or bailiff; for in the absence of such evidence it may be nothing

all the copyholders, and had been received by the steward from his predecessor; but it appeared that the steward made up a second book at the end of each year, in which he entered all fines which had been paid; and it was held that the evidence was inadmissible. *Ely, Dean, &c.* v. *Caldecott*, 7 Bing. 433.

(*f*) *Stead* v. *Heaton*, 4 T. R. 669. 2 Ves. 42. Lill. Pr. R. 552. Bunb. 184. *Outram* v. *Morewood*, 3 Wood 332. Old rates made by the parish officers of *B.* on the occupiers of land as parcel of *B.*, and an account containing an overseer's account, in which against the sum for which the occupier had been assessed crosses were made, were held to be evidence that the sum assessed had been paid by the occupiers. *Plarton* v. *Dare*, 10 B. & C. 17.

(*g*) *Barry* v. *Bebbington*, 4 T. R. 514.

(*h*) *Middleton* v. *Milton*, 10 B. & C. 317. In the case of *Whitnash* v. *George*, 8 B. & C. 556, it was held that entries made by a clerk to bankers, in books kept by him in his capacity as clerk, were admissible in evidence after his death, in an action by the bankers against his surety, on a bond conditioned for the faithful discharge of his duty as such clerk. And it was held that such entries were admissible, *not altogether* (according to Lord Tenterden) as declarations made by him against his interest, but because the entries were made by him in those very books which it was his duty as such clerk to keep: and per Bayley, J. the case of *Goss* v. *Watlington* was decided on the same principle.

(*i*) *Manning* v. *Lechmere*, 1 Atk. 458.

more than a leaf drawn out of a book by the lord of the manor himself (*k*).

By persons since deceased, against their interest.

Upon a question, whether certain ancient rentals, preserved in the archives of the dean and chapter of Exeter, were entries made by their receivers, charging themselves with the receipt of rents, it was held, that the books of modern receivers were not evidence for the purpose of laying a foundation by comparison, and of showing that the ancient books kept in the same manner, and containing similar entries of receipts and payments, were also receivers' books, and entitled to be read in evidence as such (*l*). But if from the inspection of such ancient books, and the language of the entries, it appear probable that they were in fact receivers' books, it seems that they are admissible in evidence (*m*).

So the book of a bursar of a college is said to be evidence as to money paid by him or received to the use of a stranger (*n*).

Where a bill of lading had been signed by a master of a vessel, since deceased, for goods to be delivered to a consignee or his assigns, on his paying freight, the document was held to be evidence to show that the consignee had an insurable interest in the goods (*o*); but if in such case the master should guard his acknowledgment by saying, "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading, it is said, would not be evidence either of the quantity of the goods, or of property in the consignee (*p*).

By agents in the course of trade.

In *Lord Torrington's case* (*q*), the evidence was, that according to the usual course of the plaintiff's dealings, the draymen came every night to the clerk of the brewhouse, and gave him an account of the beer delivered out, which he set down in a book to

(*k*) *Frankes* v. *Cary*, 1 Atk. 140. A book in the hand-writing of *A. B.*, purporting to contain accounts of tithes collected by him 70 years ago, cannot be read in evidence without proof that *A. B.* was collector of tithes at the time. *Short* v. *Lee*, 2 Jac. & W. 464. The statutes of an ecclesiastical corporation aggregate enjoying the appointment of collectors, together with the internal evidence of the documents and their coming out of the proper custody, amounts to sufficient proof that the parties were really collectors. Ib.

(*l*) *Doe* v. *Thynne*, 10 East, 206.

(*m*) In the case of *Doe* v. *Thynne*, 10 East, 206, the language of several entries imported that *N. W.* was therein accounting to the Dean and Chapter for money paid to himself, with the receipt of which he debited himself by the words *solvit mihi*, and *solvit per me*; and the Court of K. B. were of opinion that the books which had been rejected at the former trial ought again to be submitted to the consideration of the Judge.

(*n*) Anon. Lord Raym, 745. *Qu.* under what circumstances. The report is a very loose one.

(*o*) Per Lawrence, J., *Huddow* v. *Parry*, 3 Taunt. 303.

(*p*) Ibid.

(*q*) B. N. P. 282.

By agents in the course of business.

which the draymen set their hands, and that the draymen were dead, and that the entry was in his hand-writing; and it was held to be good evidence of a delivery.

In the case of *Clerk* v. *Bedford* (*r*), where the plaintiff, to prove a delivery, produced a book which belonged to his cooper, who was dead, but his name set to several articles as wine delivered to the defendant, the evidence was rejected by Ld. Raymond, who distinguished it from *Lord Torrington's case*, because there the witness saw the draymen sign the book every night.

In the case of *Pitman* v. *Maddox* (*s*), in an action upon a taylor's bill, a shop-book was produced, written by one of the plaintiff's servants, who was dead; and upon proof of the death of the servant, and that he *used to make such entries*, it was allowed to be good evidence of the delivery of the goods (*t*). From these cases it may be inferred that some evidence ought to be given to show that such entries were made in the usual routine of business; but perhaps it may not be necessary, as in *Lord Torrington's case*, to prove the signature by one who saw it written.

In *Chambers* v. *Bernasconi* (*u*), the action was brought by the plaintiff to try the validity of a commission of bankruptcy issued against him. He had been arrested on the 9th of Nov. 1825, and it was a question material to the act of bankruptcy, whether he had been arrested in South Molton-street, or at his cottage, Maida-hill, Paddington. In order to establish an act of bankruptcy by keeping house, &c. at Paddington, the officer who arrested the plaintiff being dead, his follower was called, who swore that the arrest took place at Paddington. The plaintiff, to establish an arrest in South Molton-street, offered in evidence, from the files of the office of the under-sheriff of Middlesex, a paper annexed to the writ, signed by the deceased officer, and addressed to the under-sheriff of Middlesex, as follows:

"9th Nov. 1825. I arrested H. Chambers in South Moulton-street, at the suit of *W. B.*"

By the course of office the officer was required, immediately after the arrest, and before taking a bail-bond, to transmit to the sheriff's office a memorandum or certificate of the arrest; and for the last few years (but according to one report of the case (*w*), not, as it seems, at the time of arrest) an account of the *place of arrest* had also been required from them. On such returns the officer and his sureties are charged by the sheriff, and returns are made upon them; the evidence was admitted, and the plaintiff

(*r*) 1 Salk. 285. Ld. Raym. 875.
(*s*) Lord Raym. 732. 2 Salk. 690.
(*t*) See B. N. P. 242.
(*u*) 1 Tyrw. 335. (*w*) 1 Cr. & J. 451.

had a verdict. Upon a motion for a new trial it was contended on the part of the plaintiff, that the document was admissible, as being a written declaration of a fact made by a person peculiarly cognizant of the fact, and against his interest. The Court of Exchequer held, that the evidence was inadmissible. Lord Lyndhurst, C. B. was of opinion that the principle contended for went beyond the former cases. Bayley, B. was of opinion that the instrument was not admissible in evidence at all, inasmuch as the entry could not be said to militate against the interest of the officer: and he also intimated his further opinion, that although the instrument was admissible, it would not be admissible to prove the circumstance of the place where the arrest occurred, as it was no part of the officer's duty to state the *place* where the caption took place.

By agents in the course of business.

In the case of *Digby* v. *Stedman* (*x*), an entry made by a defendant himself in the course of business, and contemporary with the fact, was received as confirmatory evidence to prove the delivery of a watch. Again, in *Hagedorn* v. *Reed* (*y*), the entry by a deceased clerk of a merchant, in the letter-book, of a letter, with a memorandum, stating that the original had been sent to a particular person, was held to be evidence of the fact; proof having been given that it was the invariable course of that merchant's office, that the clerk who copied any license sent it off by the post, and made a memorandum on the copy that he had done so.

In the following case the principle seems to have been carried much farther. Upon an issue out of Chancery, to try whether eight shares of Hudson's Bay stock, bought in the name of Mr. Lake, were bought in trust for Sir S. Evans, his assigns (the plaintiffs) showed, first, that there was no entry in the books of Mr. Lake relating to this transaction; secondly, that six of the receipts were in the hand-writing of Sir S. Evans, and there was a reference on the back of them by Jeremy Thomas, Sir S. Evans's book-keeper, to the book B. B. of Sir S. Evans; J. Thomas was

(*x*) 1 Esp. C. 129.

(*y*) 3 Camp. 379. See also *Pritt* v. *Fairclough* (3 Camp. 305), where similar evidence was received. *Champneys* v. *Peck*, 1 Starkie's C. 404, *infra*.

In the case of *Calvert* v. *The Archbishop of Canterbury*, 2 Esp. C. 645, Lord Kenyon held, that an entry made in the plaintiff's books, by a servant since deceased, of a contract made with the defendant, was not admissible in evidence to prove the terms of the contract; because the entry did not, as in the case of *Price* v. *Lord Torrington*, charge the clerk. It does not appear that in this case, the clerk, in making the memorandum, professed to have made it personally with the defendant, or his agent; and he might, for anything that appeared to the contrary, have made it on hearsay from the plaintiff himself.

proved to be dead, and the Court of K. B., on a trial at bar, admitted the book so referred to, not only as to the six, but likewise as to the other two in the hands of Sir Biby Lake, the son of Mr. Lake (*z*).

Entry in the usual course of professional business.

In the case of *Smartle* v. *Williams*, where the question was whether certain mortgage-money had really been paid, a scrivener's book of accounts (the scrivener being dead) was held to be good evidence of payment (*a*).

Upon a trial at bar, where the question was, whether a surrender of the mother's estate for life had been made when the son suffered a common recovery, the Court admitted in evidence the debt book of an attorney (deceased), in which he had made charges for suffering the recovery, and for drawing and ingrossing a surrender of the mother, which had been *paid*; and the Court held, that this was a material circumstance upon the inquiry into the reasonableness of presuming a surrender, and could not be suspected to be done for that purpose; and that since the attorney was dead, this was the best evidence (*b*). So in the case of *Higham* v. *Ridgway* (*c*), it was held, that an entry made by a man-midwife in his book, of having delivered a woman of a child on a particular day, referring to his ledger in which he had made a charge for his attendance, which was marked as *paid*, was evi-

(*z*) B. N. P. 282. And here it may be remarked, that although the statute 7 Jac. 1, c. 12, enacts that a shop-book shall not be evidence after the expiration of a year, it does not therefore make it evidence within the year, except under special circumstances (2 Salk. 690); and that in some cases it is evidence after the expiration of the year.

(*a*) B. N. P. 283. In this case it does not appear that the attorney, by the entry in his book, had admitted the payment of the money. Where the house of the party in whose custody marriage articles ought to have been, was proved to have been occupied and pillaged by rebels, and that after diligent search amongst his other papers, they could not be found, it was held that a recital of them in a case submitted to counsel at the time, and charged for and entered as paid by the family attorney, was admissible as secondary evidence. *Lord Lorton* v. *Gore*, 1 Dow, N. S. 190.

(*b*) *Warren* v. *Grenville*, Str. 1128. Note, this was forty years after the time of the surrender, and the Court said that they would have *presumed* a surrender after such a length of time, without this additional evidence. In *Goodtitle* v. *Duke of Chandos*, 2 Burr. 1072, Lord Mansfield says, that the Court did rely upon the entry; but he also states from his own note, that the Court said, that after forty years they would, without any other circumstances, presume a conditional surrender. See also the last preceding note.

(*c*) 10 East, 109. The evidence seems to have been received in this case principally upon the ground, that the entry was made of a fact within the peculiar knowledge of the party, against his interest; and Le Blanc, J. seems to have founded his assent,

dence upon the trial of an issue as to the age of such child at the time of his afterwards suffering a recovery.

Entry in the usual course of professional business.

It was held, in the case of *Doe* v. *Robson* that entries of charges, made by an attorney in his books, showing the time when a lease prepared for a client of his was executed, which charges, it appeared, had been paid, were evidence after the attorney's death to show the time of the execution, which was a material fact in issue. And in this case it is observable, that the ground of receiving the evidence was expressly stated by Lord Ellenborough to be the total absence of interest in the person making the entry to pervert the fact, and at the same time a competency in him to know it, without laying stress upon the fact that the charges had been paid (*e*).

In the case of *Skipwith* v. *Shirley* (*f*), a decree was made for raising money under a deed of appointment, although the only copy produced did not appear to be executed, upon recitals of it in a deed of settlement as a subsisting effectual deed, and evidence from the books of a deceased solicitor of charges for the preparation and execution of it, although there was no evidence that these has been paid.

So in *Champneys* v. *Peck* (*g*), the plaintiff, in order to prove the delivery of his bill as an attorney, proved the death of Dawling, who had been his clerk, and produced the bill, with an indorsement on it in the hand-writing of the deceased clerk, "March 4th, 1815, delivered a copy to Mr. Peck." The plaintiff further proved that the indorsement existed at the time when, according to its purport, the bill had been delivered; that it was the business of Dawling to deliver the bill; and that such an indorsement was usually made in the common course of business upon the copy kept. Lord Ellenborough held this to be *primâ facie* evidence of the delivery of the bill, and the plaintiff had a verdict (*h*).

In the case of *Pyke* v. *Crouch* (*i*), it was held, that a letter written by a stranger to a testator, acknowledging the receipt of a will, was evidence to show that such a will had been sent by the testator.

partly at least, on the particular nature of the fact, as being matter of pedigree.

(*d*) 16 East, 32.

(*e*) Bayley, J. adverted to that fact; see the observations of Le Blanc, J. in *Higham* v. *Ridgway*, 10 East, 109.

(*f*) 11 Ves. 64.

(*g*) 1 Starkie's C. 404.

(*h*) The cause was undefended. The ruling of Lord Ellenborough in this case has been questioned more than once, but I am not aware that it has ever been expressly overruled.

(*i*) Ld. Raym. 730.

Entry by a rector.

An entry by a rector of his receipt of tithes is evidence for his successor; for the entry could not have been of any benefit to himself (*j*). Lord Kenyon, however, considered this as an excepted case, since, in general, a man's private entry cannot affect the rights of third persons (*k*); and therefore, in *Outram* v. *Morewood* (*l*), where the question was, whether a particular close was part of an estate which formerly belonged to Sir J. Zouch, it was held, that entries of the receipt of rents, made by one from whom the defendant derived his title to the rent of this close, but nothing more, was not evidence for the defendant in order to prove the identity of the close, and to establish his title to the coals, on the ground that the entries were no more than the private memorandum of the party, not upon oath, which ought not to bind third persons; and that it was distinguishable from the case of *Barry* v. *Bebbington*, since there the steward charged himself with the receipt of the money. It appears, therefore, to be clear, that a man's own private entry, as to his own rights, which admits no liability to another, is not evidence either for himself or those who claim under him. The case of an entry of the receipt of tithes by the rector stands upon very peculiar grounds; he has no personal interest in making the entry with a view to any claim made by himself, since the entry would not be evidence for him; and the incumbent for the time being, and not his heir or personal representative, would afterwards derive benefit from such entry.

Lord Hardwicke observed, that it was going a great way to admit the books of a deceased rector as evidence for his successor (*m*), but that it had been allowed, because the rector knew that the entry could not benefit either himself or his representative, who had nothing to do with the living (*n*). The admis-

(*j*) 5 T. R. 123. Bunb. 46. 2 Ves. 43. So in a suit for tithes by the lessee of an ecclesiastical corporation aggregate, to whom the rectory belonged, ancient documents in their possession, and purporting to be accounts furnished by some of their members employed to collect the tithes, and appearing to be offered and settled, are admissible in evidence. *Short* v. *Lee*, 2 Jac. & W. 464. The admissibility in this case seems to rest on the principle just adverted to. An entry by a deceased rector is also evidence by way of admission against a successor. An ancient document signed by the rector, and headed "notification of the tithes of the parish," although not coming out of the proper repository of a terrier, was held to be admissible evidence against a succeeding rector, as the admission of one of his predecessors, and upon the same principle as a receipt. *Maddison* v. *Nuttall*, 6 Bing. 226.

(*k*) 5 T. R. 123.

(*l*) Ibid.

(*m*) 2 Ves. 43; and see *Illingworth* v. *Leigh*, 4 Gwill. 1618; *Woodnoth* v. *Lord Cobham*, 2 Gwill. 653.

(*n*) Such evidence has, however, been received in favour of his succes-

sibility of such evidence seems to rest upon the principles (*o*) lately announced.

Declarations by tenants since deceased.

The declarations of (*p*) deceased tenants have in some instances been admitted in evidence, on matters connected with their tenancies, principally, as it seems, upon the ground that their declarations were made against their own interest.

In *Doe* v. *Williams* (*q*), the question was, whether Mrs. Galton (from whom the defendant claimed) was in possession of the premises at the time when she levied a fine; and evidence was admitted by Lord Mansfield of a conversation between Mrs. Galton and Mrs. Pearce (who was living, but interested as being the present tenant), in which the one admitted that she had paid rent to the other as her landlord, and the other admitted that she had received the rent (*r*). In *Davies* v. *Pearce* (*s*), which was an action of replevin, the question was, whether the *locus in quo* was parcel of the tenement *B.*; evidence was offered by the plaintiff of declarations by deceased tenants of the *locus in quo*, which was part of *L.*, that they rented *L.* of Mr. Evans, who was never the owner of *B.*; that one tenant had said, that he paid Mr. Evans five shillings yearly, and a quarter of mutton, for *L.*, and that he was *then going* to pay the said rent to the said J. Evans for the said *L.*; and that he had ordered his servant to herd some cattle at *L.*, saying, that otherwise he could not afford to pay Mr. Evans

sor, where the entries have been made by an impropriate rector, although there the party who made the entries might benefit his own inheritance. Burr. 46; 4 Gwill. 1618; 2 Gwill. 653; Bunb. 180; but see *Le Gross* v. *Lovemoor*, 2 Gwill. 527; *Perigal* v. *Nicholson*, 1 Wightw. 63. Lord Kenyon's observations, *Outram* v. *Morewood*, 5 T. R. 123.

(*o*) *Supra*, 298; and see Ld. Ellenborough's observations in *Doe* v. *Rawlins*, 7 East, 282, n.

(*p*) Oral declarations depend partly upon the same principles with written entries, but are far weaker in degree; they are usually made with less deliberation, are more likely to be loosely and wantonly made, and are usually unconnected with any regular course and routine of business.

(*q*) Cowp. 621.

(*r*) It is observable that the verdict, notwithstanding the admission of the evidence, was for the plaintiff, consequently no question was afterwards made before the Court as to the admissibility of this evidence. The evidence itself appears to have been extremely loose, the witness not stating either the occasion or the terms of the conversation, but merely that he remembered a conversation in which the one admitted that she had paid the other rent as her landlord, and the other that she had received rent from her as tenant. Much in such a case would depend on the object of the conversation, as well as the terms: a settlement of account between the parties as landlord and tenant, as it would bind both, would weigh in evidence as an act done, in the same manner as payment and rent.

(*s*) 2 T. R. 53.

By tenants since deceased.

his rent. And that another tenant had prevented a person from cutting rushes on *L.*, and threatened that he would tell Mr. Evans, his landlord, of his cutting the said rushes; and once took the said rushes from that person, and told him that they belonged to Mr. Evans. And that forty years ago *T. H.* rented *L.* for one year, and said that he paid rent either to Mr. Evans or his mother; this evidence was rejected at the trial, and a bill of exceptions was therefore tendered; and the Court of K. B. was of opinion that the evidence was admissible (*t*). Ashurst, J. observing that the fact of cutting rushes was decisive, and Buller, J. adding, that the other question, relating to the tenant's declaration that he had paid rent for the premises, had been decided in the cases of *Holloway* v. *Rakes*, and *Doe* v. *Williams* (*u*).

In the case of *Holloway* v. *Rakes* (*w*), cited by Mr. J. Buller, the question was, whether the devisor of an estate twenty-seven years ago, of which there had been no possession, was seised; and a declaration of a tenant in possession at that time, that he held as tenant to the devisor, was admitted. And the Court afterwards held that it had been properly admitted (*x*).

In the case of *Peaceable* v. *Watson* (*y*), it was held, that the declaration of a deceased tenant, of his holding the land of a particular person, was evidence to prove the seisin of the latter, upon the ground (as it seems) that the declaration was against his own interest, since it might have been made use of as evidence against him.

(*t*) It was not essential, in this case, that the Court should give a decided opinion on the mere declarations of the tenants, since other evidence had been rejected; viz. of the fact of cutting down the rushes, and the accompanying declaration which rendered it incumbent to award *a venire de novo*.

Mr. J. Ashurst seems to have founded himself upon that point only; Mr. J. Buller indeed went farther, and intimated his opinion upon the bare declarations. It is, however, to be observed, that the case of *Doe* v. *Williams* does not support that opinion to the full extent; for there the evidence did not rest as a mere declaration to a stranger, but occurred in the course of conversation between the parties, as to a supposed account between them as landlord and tenant; it was of the same nature, though weaker, with evidence of an actual payment; and if the letting was by parol, it would have been difficult to have given other evidence of the relation between the parties than their actual dealings and communications on the subject.

(*u*) *Supra*, 315.

(*w*) 2 T. R. 55.

(*x*) It is, however, to be remarked, that the Court seem to have doubted upon the propriety of admitting such evidence in general, since they resorted to another principle to support the admission in that case, namely, the probability that the defendant derived title from the tenant who made the admission, and was therefore bound by it.

(*y*) 4 Taunt. 16.

In the case of *Walker* v. *Bradstock*(*z*), where the plaintiff claimed a prescriptive right of common, pur cause of vicinage, as appurtenant to his messuage, it was held that a declaration by a former occupier of the plaintiff's messuage, forty years ago, since dead, that his cattle had been impounded on Corfe Lown (where common was claimed), was admissible; and also that declarations by another occupier, though still living, of his opinion that he had no such right of common appurtenant to the messuage, were admissible, on the general ground that the declarations of tenants against their own rights are evidence. It cannot but be remarked that such evidence, to say the least, is exceedingly weak: the declarations were not used as explanatory of any fact, and seem to be scarcely warranted on the ground of being against interest. By tenants since deceased.

In the case of *Barker* v. *Ray*, upon the trial of an issue directed by the Court of Chancery, whether Edmund Barker the elder, by his will (since his death succeeded, &c. by Edmund Barker, his nephew), devised certain estates, &c.; upon the trial evidence was offered of declarations made by Elizabeth Barker, the widow of Edmund the nephew, both before and after the death of Edmund the nephew, tending to show that her husband and the other nephews were only tenants for life. The evidence was rejected, and the jury having found for the defendants, the Lord Chancellor, on an application made by the plaintiff for a new trial, on the ground (amongst others) that the evidence ought to have been received, refused it, without deeming it to be necessary to give any opinion as to the admissibility of the evidence. Here it is observable, that the declarations offered in evidence were neither coupled with any act, nor made in the discharge of any office or duty, but were the mere voluntary declarations of the wife on her husband's affairs.

Next, as to the proof of private instruments. The proof of a deed, agreement or other instrument, is either, *First*, by witnesses; *Secondly*, by admission; or, *Thirdly* by enrolment. If by witnesses, the instrument must be produced (*a*), or be proved to have been *lost*, or to be in the possession (*b*) of the adversary (*c*), or in the custody of the Court of Chancery, &c. If *Proof of* private instruments.

(*z*) 6 Esp. C. 458.

(*a*) See p. 318.

(*b*) If the instrument be in the custody of a third person, its production is usually enforced by means of a writ of *subpœna duces tecum*. For the proceedings upon this writ, see the title SUBPŒNA DUCES TECUM.

(*c*) In many instances the Court will assist a party in obtaining an inspection or copy of the instrument, on motion. See tit. INSPECTION.

Proof of private instruments.

produced, it is either attested or not attested (*d*). If attested, the attesting witness must be called (*e*), or his absence must be accounted for (*f*), and his hand-writing proved (*g*); or it must appear that the instrument is thirty years old (*h*), and came out of the proper custody (*i*). If it be not attested, the hand-writing of the obligor should be proved (*k*). If it has been *lost*, proof must be given of the loss (*l*), and that it was regularly stamped and executed (*m*), and then secondary evidence must be given of its contents (*n*). If it be in the adversary's possession, proof must be given of such possession (*o*), and of notice (*p*) to produce it, and of its regular execution (except in some particular instances), and of its contents (*q*).

Production.

In order to prove a deed, agreement, or other private instrument, it is necessary first to *produce* the deed, or to excuse the omission by proof that it has been lost or destroyed, or is in the hands of the adversary, who has had notice to produce it. For the best evidence of the contents of a written instrument consists in the actual production of the instrument; and secondary evidence of it cannot be admitted, until the impossibility of producing it has been manifested to the Court (*r*). Where the deed has been pleaded with a profert, the production cannot be supplied by proof of the party's inability to produce the deed (*s*).

If, upon production of a deed, any rasure or blemish appear upon the face of the instrument, the party producing it ought to explain how the defect arose (*t*), and to show that it was made before the execution of the deed, or that it was made after the

(*d*) *Infra*, p. 318.
(*e*) *Infra*, p. 320.
(*f*) *Infra*, p. 325.
(*g*) *Infra*, p. 328.
(*h*) *Infra*, p. 330.
(*i*) *Infra*, p. 332.
(*k*) *Infra*, p. 335.
(*l*) *Infra*, p. 336.
(*m*) *Infra*, p. 340.
(*n*) *Infra*, p. 341.
(*o*) *Infra*, p. 345.
(*p*) *Infra*, p. 347.
(*q*) *Infra*, p. 341. 352, 353.

(*r*) In some cases, however, where the deed has been enrolled, an examined copy of the enrolment is evidence. See ENROLMENT. And a duplicate original is evidence, as in the case of an attorney's bill. *Anderson* v. *May*, 2 B. & P. 237. See also Vol. II. tit. NOTICE. *Jory* v. *Orchard*, 2 B. & P. 39. An acknowledgment of the execution of a deed by the obligor is insufficient. *Abbott* v. *Plumb*, Dougl. 216. Though made in an answer in Chancery. *Call* v. *Dunning*, 4 East, 53.

(*s*) *Smith* v. *Woodward*, 2 East, 585. In such case the party who has made the profert should move to amend before the trial. 2 East, 585. It will be too late to make the application at the time of the trial. 1 Starkie's C. 74.

(*t*) *Henman* v. *Dickenson*, 5 Bing. 183; B. N. P. 255; Gil. L. Ev. 89. See Vol. II. tit. BILL OF EXCHANGE—DEED—POLICY—WILL.

delivery, by a stranger, if the rasure or interlineation has been made in an immaterial point (*u*). If the deed appear to be mutilated, it is *primâ facie* evidence of cancellation (*x*); but proof may be given that the cancelling was by accident (*y*), or that it was effected by fraud and improper practice (*z*). If in the course of the inquiry the time of the delivery should become material, it should be proved by the attesting witness, if there be one, and if not, the date of the deed will be evidence of the time of delivery. If the erasure existed previously, the fact may be proved by any person who saw it; but the state of the deed at the time of its execution is best proved by an attesting witness, if he recollects it. Where a deed operates as to different parties from the time of execution by each, it will be binding on one who conveys by that deed, if complete as to him at the time, although it has been executed by another party at a time when blanks were left which were immaterial to that party (*a*).

It should appear, on the production of the instrument, that it is properly stamped (*b*). And where a stamp is required, the Stamp.

(*u*) *Perrott* v. *Perrott*, 14 East, 423.

(*x*) See as to the effect of cancellation, Vol. II. tit. DEED. *Doe* v. *Bingham*, 4 B. & A. 672. The insertion by a stranger of "hundred" between "one" and "pounds" in the condition of a bond, consistent with the obvious sense, is immaterial. *Waugh* v. *Russell*, 1 Mars. 311; 5 Taunt. 707. *Semble*, that a letter, a considerable part of which appears obliterated, is not evidence. 1 Anst. 227.

(*y*) Latch. 226; Palm. 403; 1 Mod. 11.

(*z*) Hetl. 138, *Bucknow's case*.

(*a*) A mortgagee conveyed to the mortgagor the legal estate, on being paid the mortgage-money, and the latter re-conveyed to trustees to secure the payment of an annuity: at the time of execution by the mortgagee, the deed contained blanks for sums to be received by the mortgagee from the grantees of the annuity, and these were all filled up before the execution of the deed by the mortgagor, but several interlineations were made in that part of the deed after the execution by the mortgagee. It was held that the whole might be considered as one transaction, operating as to the different parties from the time of execution by each, but not perfect till the execution by all the conveying parties; and that the deed operated as a good conveyance of the estate from the mortgagor to the trustees. *Doe* v. *Bingham*, 4 B. & A. 672. Where a blank was left in a composition deed at the time of execution, in order to ascertain the amount, but filled up the next day and signed, a re-execution was presumed. *Hudson* v. *Revett*, 5 Bing. 368.

(*b*) See tit. STAMPS, and tit. BILLS OF EXCHANGE, &c. As to compelling the production of documents for the purpose of inspection, or of procuring them to be stamped, see Vol. II. tit. INSPECTION. The general rule is that the Court will not make such an order unless the applicant be either an actual party to the instrument, or a party in interest. Ib. *Osborne* v. *Taylor*, 4 Taunt. 159. 162. *Brown* v. *Rose*, 6 Taunt. 283. *Bateman* v. *Phillips*,

objection for the want of one ought to be taken in that stage, and before the document is read (*c*). Although inrolment of the deed be essential, it is not incumbent on the party who relies on the deed to prove the inrolment; it lies on the party objecting to prove the negative (*d*).

Proof by subscribing witness.

The next step is to prove the legal requisites essential to the existence of the document, as a deed, simple contract, bill of exchange (*e*), will (*f*), or other instrument (*g*).

If the deed or instrument produced purport to have been attested by one or more witnesses, whose names are subscribed, the party must call at least one of the witnesses; and in cases where the instrument labours under any doubt or suspicion, he ought to call them all. The law requires the testimony of the subscribing witness, because the parties themselves, by selecting him as the witness, have mutually agreed to rest upon his testimony in proof of the execution of the instrument, and of the circumstances which then took place, and because he knows those facts which are probably unknown to others (*h*). So rigid is this rule (*i*), that it is not superseded, in the case of a deed, by proof of any admission or acknowledgment of the execution by the party himself (*k*), whether the action be brought against the obligor himself, or

4 Taunt. 157. *Johnson* v. *Lewellyn*, 6 Esp. C. 101; 1 Taunt. 386. Nor then where each has his own part. *Ratcliffe* v. *Bleasby*, 3 Bing. 148. *Pickering* v. *Noyes*, 1 B. & C. 262. *Street* v. *Brown*, 6 Taunt. 302. In an action between *A.* and *B.*, the Court refused a rule to compel *B.* to produce, for the purpose of being stamped, an agreement between *B.* and *C.*, although it appeared by an affidavit of *C.*'s that the act complained of by *A.* arose out of this agreement. *Lawrence* v. *Hooker*, 5 Bingh. 6.

(*c*) And the objecting party ought to be prepared to support his objection, by producing the Act, &c.

(*d*) *Doe* v. *Bingham*, 4 B. & A. 672.

(*e*) See BILL OF EXCHANGE.

(*f*) See WILL.

(*g*) In general, for the particular proof, see the title of the instrument itself.

(*h*) *Doe* v. *Durnford*, 2 M. & S. 62. *R.* v. *Jones*, E. P. C. 822; 1 Leach, 238, 3d edit. *R.* v. *Harringworth*, 4 M. & S. 350; Burr. 2275; Peake's C. 30; 2 Esp. C. 697. The defendant would otherwise be deprived of the opportunity of cross-examining the witness as to the time of execution; per Ashurst, J. in *Abbott* v. *Plumbe*, Doug. 205.

(*i*) Formerly (as has already been observed, *supra*) it was the practice to try the existence of a disputed deed, *per patriam et testes*; that is, the witnesses to the deed were sworn as part of the jury.

(*k*) *Abbott* v. *Plumbe*, Doug. 205; 2 East, 187; 7 T. R. 267. Although the acknowledgment be made in court. *Johnson* v. *Mason*, 1 Esp. C. 89. *Absalon* v. *Anderton*, 3 Leon, 84, note (*n*); vide etiam, *Laing* v. *Raine*, 2 B. & P. 85. *Jones* v. *Brewer*, 4 Taunt. 56. The attesting witness must be called, although he be the real party in the cause. *Honeywood*

against his assignees after his bankruptcy (*l*); nor by proof of an admission of the execution, made by the defendant in his answer to a bill in equity (*m*). The rule applies, whether the question be between the parties to the deed, or strangers (*n*); whether the deed be the foundation of the action, or but collateral (*o*); or whether it still exist as a deed, or has been cancelled (*p*); and although the issue be directed by a Court of Equity to try the date, and not the existence of a deed (*q*). Upon an indictment against an apprentice for a fraudulent enlistment, it was held that the indentures must be proved in the regular way (*r*). And the same rule applies to all written agreements and other instruments attested by a witness, as for instance, a notice to quit in ejectment (*s*), in which case it was held, that proof of the service of the notice upon the tenant, and that it was read over to him without his making any objection, was not sufficient. Who must be called.

Where the plaintiff avers that the defendant was bound by an indenture, the fact may be proved by the production and proof of the execution of the part executed by the defendant (*t*).

Where the subscribing witness is called to prove the execution of the deed, the proof consists, First, of the sealing; Secondly, the delivery. First, the sealing need not be with the seal of the obligor, and need not have been actually made at the time; it is sufficient if the obligor acknowledge any impression already Proof of the sealing of a deed.

v. *Peacock*, 3 Camp. 196. But payment of money into court on one of the brenches of covenant assigned, amounts to an admission of the deed, although *non est factum* has been pleaded. *Randall* v. *Lynch*, 2 Camp. 357. And admissions are binding which are made by a party or his attorney, with a view to the trial of the cause. *Infra.*

(*l*) *Abbott* v. *Plumbe*, Doug. 205.

(*m*) *Call* v. *Dunning*, 4 East, 53. *Bowles* v. *Langworthy*, 5 T. R. 366.

(*n*) 4 East, 53.

(*o*) *Manners* v. *Postan*, 4 Esp. C. 239.

(*p*) *Breton* v. *Cope*, Peake's C. 30.

(*q*) *Edinburgh* v. *Crudell*, 2 Starkie's C. 284.

(*r*) *R.* v. *Jones*, E. P. C. 822. *R.* v. *Harringworth*, 4 M. & S. 350.

(*s*) *Doe* v. *Durnford*, 2 M. & S. 62. *Stone* v. *Metcalf*, 1 Starkie's C. 53. See also *Higgs* v. *Dixon*, 2 Starkie's C. 180.

(*t*) *Burleigh* v. *Stibbs*, 5 T. R. 465. In an action by the lessor against the assignee of lessee, the plaintiff having proved the execution of the counterpart, and that the original had been delivered over to the defendant; held that he was not bound to prove the execution of the original, which was produced by the defendant out of the hands of a third person, to whom he had assigned it over by a deed reciting the original lease. *Burnett* v. *Lynch*, 5 B. & C. 589; and 8 D. & R. 368. It is not competent to a party, who has taken under a deed all the interest which it gives, to dispute its due execution. Ibid.

Deed, proof of sealing.

made to be his seal (*u*); and it seems that one piece of wax will suffice for several obligors, if they make distinct and several prints upon it (*x*). In *Lord Lovelace's case* (*y*), it was said that if one of the officers of the forest put one seal to the rolls by the assent of all the verderers and other officers, it is as good as if every one had put his several seal; as in case divers men enter into an obligation, and they all consent, and set but one seal to it, it is a good obligation of them all. And if one partner, in the presence of the other, seal and deliver a deed of sale for both, it is binding upon both (*z*). Where a deed is executed under some special authority, which prescribes the mode and form of execution, the execution will not be valid unless those requisites be observed. Where a certificate under the statute 8 & 9 W. 3, c. 30 (which requires certificates to be under the hands and seals of the churchwardens and overseers, or the major part of them, or under the hands and seals of the overseers, where there are no churchwardens), was signed by two churchwardens and one overseer, but bore two seals only, the Court held that it was not a valid certificate. They said that it was the case of an execution of a power, and that in the execution of powers all the circumstances required by the creators of the power, however unessential and otherwise unimportant, must be observed, and can only be satisfied by a strictly literal and precise performance (*a*).

In the case of *Adam* v. *Ker*, on an action on a bond alleged to have been sealed, evidence was admitted to prove a custom in Jamaica (where the bond in question had been executed), by substituting a mark with a pen for a seal. The Court of Common Pleas, after a verdict for the plaintiff, subject to the opinion of the Court, granted a rule *nisi* to set aside the verdict and enter a nonsuit, but no decision was given (*b*).

Proof of delivery.

No particular form of delivery is requisite; it is sufficient if the obligor, by any act, indicate his intention to put the deed into the possession of the other party, as by throwing it down upon the table for the other to take it up. So if a stranger deliver it with the assent of a party to the deed (*c*). If the deed be made

(*u*) Com Dig. tit. *Fait.*

(*x*) Sheph. Touchst. 55; Perkins, c. 2, s. 134.

(*y*) Sir W. Jones, 268.

(*z*) *Ball* v. *Dunsterville*, 4 T. R. 313.

(*a*) *R.* v. *Austrey*, Easter Term, 1817. *Hawkins* v. *Kemp*, 3 East, 440. See tit. POWER, and Sir E. Sugden's Treatise on Powers, where the whole subject of Powers is most skilfully treated.

(*b*) 1 B. & P. 360.

(*c*) Com. Dig. Ev. A.; Co. Litt. 36, n. *Thoroughgood's case*, 9 Rep. 137, n. *Murray* v. *Earl of Stair*, 2 B. & C. 82.

by a corporate body, it is sufficient to prove that it was sealed by the corporate or any other seal which was used for the occasion, without proving a delivery of the deed (*d*). But if the corporation, by their letter of attorney, have appointed an agent to deliver the deed, it is not their deed till delivery (*e*). Where a deed is executed by virtue of a power of attorney from the obligor, the power of attorney must be proved (*f*). Proof of the delivery of a sealed instrument will be evidence that the party adopts and acknowledges the seal to be his; and proof that he wrote his name opposite to the seal affords presumptive evidence of the sealing and delivery of a deed in which it was affirmed that he sealed it (*g*).

Proof of delivery.

Where there are several attesting witnesses, it is sufficient in point of law to call one only (*h*), and that even in the case of a will, provided he can prove the execution of the will by the testator, and that he and the rest of the witnesses subscribed their names in the presence of the testator (*i*). But if any suspicion attach to the execution, it is prudent to call all the witnesses (*k*).

Proof by one of several attesting witnesses.

It is not necessary that the witness who proves the sealing and delivery should also be able to prove the state of the instrument at the time of execution, and that all the blanks were then filled up. In practice, indeed, it seldom happens that a witness can prove more than the sealing and delivery of the deed, and the identity of the parties (*l*). Where the subscribing witness to a bond stated that he saw it executed by a person who was introduced by the name of Hawkshaw (the name of the defendant), but was unable to identify him with the defendant in the action, the plaintiff was nonsuited (*m*). Where a bond had been executed and attested by a witness in one room, and was then taken into an adjoining room, and at the request of the defendant's attorney, and in the hearing of the defendant, was attested by another witness, who knew the defendant's hand-writing, it was held that the execution of the deed was sufficiently proved by the latter witness, since the whole might be considered as one entire transaction (*n*).

State of the instrument.

(*d*) Perk. c. 2, s. 132.

(*e*) Co. Litt. 36, a.

(*f*) *Johnson* v. *Mason*, 1 Esp. C. 89.

(*g*) *Talbot* v. *Hodson*, 7 Taunt. 251.

(*h*) Str. 1254.

(*i*) B. N. P. 264; 1 P. Wms. 471.

(*k*) 4 Burr. 2224.

(*l*) *England* v. *Roper*, 1 Starkie's C. 304; and see *Talbot* v. *Hodson*, 7 Taunt. 251.

(*m*) *Parkins* v. *Hawkshaw*, 2 Starkie's C. 239; B. N. P. 271. *Nelson* v. *Whittal*, 1 B. & A. 20. *Middleton* v. *Sandford*, 4 Camp. 34.

(*n*) *Parke* v. *Mears*, 2 B. & P. 217. See also *Powell* v. *Blackett*, 1 Esp. C. 97. *A.* informs *B.* that he has exe-

Proof on denial by subscribing witness.

Although a party is under the necessity of calling the subscribing witness (*o*), he is not concluded by the testimony of that witness, if he cannot or will not declare the truth. If the witness refuse to testify (*p*) the attestation may be proved by another witness (*q*). Where one of the witnesses to a will would not swear to the sealing and publication, Holt, C. J., held that it was sufficient to prove the attestation of the witness (*r*). If the witness admit his signature as attesting witness, but prove that he did not in fact see the instrument executed, proof of the handwriting of the obligor will be sufficient (*s*). If the witness actually deny the due execution of the instrument, other witnesses may be called to contradict him; and circumstantial evidence is admissible to prove the contrary (*t*). So a will may be proved by the evidence of one witness, although two of the attesting witnesses swear that the testator was incompetent (*u*). And where two witnesses to a will of lands swore that the testator did not publish the will, and was incapable of doing so, the Court, upon a trial at bar, admitted witnesses to contradict them (*x*).

cuted a bond, and desires him to attest it; *B.* is a good attesting witness; ibid. *Secus*, if there be another attesting witness, who actually saw the deed executed. *M'Craw* v. *Gentry*, 3 Camp. 232. *Wright* v. *Wakeford*, 4 Taunt. 220. Where it was agreed at a meeting of creditors that a composition-deed, when executed by the creditors present, should be void unless all the creditors executed it; and the deed was delivered to one of the creditors to get it executed by the rest, it was held that the conversation was part of the act of delivery, and that the delivery was but conditional as an escrow. *Johnson* v. *Baker*, 4 B. & A. 440. Where the attesting witness stated that a bond was delivered by the obligor as his deed, but that both before and after the delivery it was agreed that it should continue in the witness's hands until the death of *A.*, *B.* and *C.*, and that it was given to him on that condition, it was held to be a question for the jury whether it was delivered to take effect from the time of delivery, or upon a condition that it was not to operate till the death of *A.*, *B.* and *C.* *Murray* v. *Earl of Stair*, 2 B. & C. 82.

(*o*) *Jones* v. *Brewer*, 4 Taunt. 46.

(*p*) *R.* v. *Harringworth*, 4 M. & S. 353. *Talbot* v. *Hodgson*, 7 Taunt. 251.

(*q*) Per Lord Mansfield, Burr. 2224, 2225, where two of the witnesses to a will denied their handwriting, and it was proved by the third.

(*r*) *Dagwell* v. *Glasscock*, Skinn. 413.

(*s*) *Grellier* v. *Neale*, Peake's C. 47, *i. e.* if no other attesting witness appear on the instrument; and see *Talbot* v. *Hodson*, 7 Taunt. 251; *Burrows* v. *Lock*, 10 Ves. 474; *Lemon* v. *Dean*, 2 Camp. C. 636; *Fitzgerald* v. *Elsee*, 2 Camp. C. 635; *Ley* v. *Ballard*, 3 Esp. C. 173, n.; *contra*, *Phipps* v. *Parker*, 1 Camp. 412.

(*t*) And. 224, per Lord Mansfield, Doug. 206.

(*u*) *Diggs's case*, Skinn. 79.

(*x*) And committed the two witnesses for perjury, taking security from the plaintiff to prosecute them. *Hudson's case*, Skinn. 49.

In the celebrated case of *Lowe* v. *Jolliffe* (*y*), the three subscribing witnesses to the testator's will, and the two surviving ones to a codicil made four years subsequent to the will, all swore that he was incapable of making a will at the time of making the will and codicil, or at any intermediate time; and yet the will was established upon the testimony of other witnesses.

Excuse for the absence of the subscribing witness.

Where the instrument purports to have been attested by a witness, the party on whom the proof of the instrument lies must, unless the instrument appear to be thirty years old (when it is to be inferred that the witnesses are dead), either call an attesting witness, or show that the usual proof by means of the attesting witness has become impossible. For this purpose he may prove that the attesting witness is dead (*z*), has become blind (*a*), insane (*b*): That he has since the attestation been convicted of an offence, such as forgery, which renders him incompetent as a witness (*c*), which should be proved by the production of the record of conviction, or by means of an examined copy of it (*d*); and then if the conviction took place after the attestation, the handwriting of the witness should be proved (*e*); but if the witness was rendered infamous by a conviction previous to the attestation, it is the same as if he had not attested the deed at all: That the witness was interested at the time of the attestation, which is therefore a nullity (*f*): That he has since the attestation become interested (*g*), as where he has become the administrator of the obligee (*h*), even though he disqualified himself voluntarily by taking out administration (*i*): That the witness is abroad and beyond the process of the Court, whether he

(*y*) 1 Bl. 365; and see *Pike* v. *Badmering*, Str. 1096, And. 224.

(*z*) *Barnes* v. *Trompowski*, 7 T. R. 265.

(*a*) *Wood* v. *Drury*, Ld. Raym. 734. 12 Vin. Ab. T. b. 48, pl. 12.

(*b*) Per Buller, J. 3 T. R. 712; per Ld. Kenyon, *R.* v. *Eriswell*, 3 T. R. 74; *Burnett* v. *Taylor*, 8 Ves. 381; *Currie* v. *Child*, 3 Camp. 283.

(*c*) *Jones* v. *Mason*, Str. 833.

(*d*) Ibid.

(*e*) Ibid.

(*f*) 5 T. R. 371. But if a party, knowing that a witness is interested, request him to attest the instrument, he cannot afterwards insist upon the objection. *Honeywood* v. *Peacock*, 3 Camp. C. 196.

(*g*) *Swire* v. *Bell*, 5 T. R. 371. See also *Goss* v. *Tracy*, 2 P. W. 280; *Buckles* v. *Smith*, 2 Esp. C. 697; *Godfrey* v. *Norris*, 1 Str. 34; *Honeywood* v. *Peacock*, 3 Camp. 196. Where the plaintiff in an action on a charter-party had communicated an interest to a witness to the charter-party after the execution of the instrument, it was held that evidence of his handwriting was inadmissible. *Hovill* v. *Stephenson*, 5 Bing. 493.

(*h*) *Godfrey* v. *Norris*, Str. 34; 2 Ves. 112.

(*i*) Str. 34; 5 T. R. 371.

Proof in excuse of absence.

be domiciled there or not (*k*), as in Ireland (*l*): That he has been kept out the way at the instance of the adversary or party charged in the suit (*m*): That the witness cannot be found after diligent inquiry made (*n*). The nature of this inquiry may be collected from the following cases. There were two witnesses to a bond which had been executed in America: it was proved that Rivington, one of the witnesses, was in America; and to show that William Moreton, the other witness, was also abroad, it was proved that a man of the name of Moreton had lived with Rivington, but it could not be proved that his name was William, or that at the time of trial he was not in England; the handwriting of the other witness was proved, and Lord Kenyon held that it was reasonable evidence to go to a jury (*o*). The clerk of the defendant was the subscribing witness to a bond, and when he was subpœnaed, said that he would not attend, and the trial had been put off twice in consequence of his absence: search had also been made at the defendant's house and in the neighbourhood, and upon receiving information at the defendant's that the witness was gone to Margate, inquiry was there made without success; it was held, that under these circumstances, evidence of his hand-writing was admissible (*p*). After inquiry at

(*k*) *Prince* v. *Blackburn*, 2 East, 250; *Coghlan* v. *Williamson*, Doug. 93; *Holmes* v. *Ponten*, Peake's C. 99. *Adams* v. *Kerr*, 1 B. & P. 360; *Wallis* v. *Delancy*, 7 T. R. 266; *Ward* v. *Wells*, 1 Taunt. 161; *Hodnett* v. *Forman*, 1 Starkie's C. 80. That he went abroad two years ago, and had not been heard of since; *Doe* v. *Paul*, 3 Carr & P. C. 13. One of two subscribing witnesses was dead, and the other had gone abroad twenty years before the trial, and the witness who proved the latter fact, stated that he had not heard anything of him since, but that he had applied to his brother, who informed him that he did not know where he was, whether in England or abroad. The Court held, that proof of his handwriting ought to have been admitted; and Ld. Ellenborough observed, that proof of the fact of the subscribing witness's going abroad twenty years ago (so large a portion of a man's life), and never having been heard of since, was of itself sufficient. *Doe d. Johnson* v. *Johnson*, K. B. Trin. T. 1818; cited 1 Phillips on Ev. 474.

(*l*) *Hodnett* v. *Forman*, 1 Starkie's C. 90; S. P. per Grose, J., Aylesbury Lent Ass. 1806; 1 Burn by Chetw. 780; see also *Burt* v. *Walker*, 4 B. & A. 697.

(*m*) *Pytt* v. *Griffith*, 6 Moore, 64. See *Doe* v. *Johnson*, *supra*, note (*k*).

(*n*) *Cunliffe* v. *Sefton*, 2 East, 183. In the case of a warrant of attorney, to dispense with the deposition of the attesting witness, the nature of the search, where he had been last seen or known to reside, and when he was last heard of, must be stated. *Waring* v. *Bowles*, 4 Taunt. 132; and see *Crosby* v. *Percy*, 1 Taunt. 365; *Parker* v. *Hoskins*, 2 Taunt. 223; *Burt* v. *Walker*, 4 B. & A. 697; *Wardel* v. *Fermor*, 2 Camp. C. 282.

(*o*) *Wallis* v. *Delancy*, Sittings at Westminster, Feb. 1809, 7 T. R. 266, n. c.

(*p*) *Burt* v. *Walker*, 4 B. & A. 697.

Proof in excuse of absence.

the several places of residence of the obligor and obligee, where no intelligence could be procured as to the witness, whom nobody knew, secondary evidence was held to be admissible (*q*). And it was held that it was unnecessary in such a case to advertise for the witness in the public newspapers (*r*), inquiry having been made at the only places where it was likely that the witness would be met with or heard of. Where the attesting witness had left his office of business in London twelve months before, but no inquiry had been made at the house at Sydenham, where he had resided with his family, the evidence was held to be insufficient (*s*); but on proof being given that a commission of bankrupt had been sued out against the witness a year before, to which he had not appeared, Lord Ellenborough said that he would presume that he was out of the kingdom, and that if he had been at Sydenham he would have surrendered to save himself from a capital felony (*t*). Where inquiry had been made after the witness at the Admiralty, and it appeared from the last report that he was serving on board some ship, but it did not appear what ship, it was held to be sufficient (*u*). So it was where inquiry had been made at the last place of residence of the witness, and the answer from his father was that he had absconded to avoid his creditors, and was not to be found (*x*). If an attesting witness has set out to leave the kingdom, his absence is sufficiently accounted for, although in fact the vessel may have been unexpectedly beaten back into an English port by contrary winds at the time of trial (*y*).

It seems that the temporary illness of an instrumentary witness would not be a sufficient ground for admitting secondary evidence (*z*).

Where the plaintiff, in order to prove his possession of a house,

(*q*) *Cunliffe* v. *Sefton*, 2 East, 183.

(*r*) 2 East, 183.

(*s*) *Wardell* v. *Fermor*, 2 Camp. 282. Where it was proved that the attesting witness to an agreement had been inquired after by a person who knew him, but who had not seen him for eighteen months, at coffee-houses and other places where he thought he might hear of him, at the request of the plaintiff's attorney, and without success, it was held that proof of the handwriting was admissible, without proof that inquiry had been made of the parties to the suit, who had executed the agreement. *Evans* v. *Curtis*, 2 Carr & P. C. 296.

(*t*) 2 Camp. C. 282; and see 12 Mod. 607.

(*u*) *Parker* v. *Hoskins*, 2 Taunt. 223.

(*x*) *Crosby* v. *Percy*, 1 Taunt. 365. *Semble*, where grounds are shown for suspecting that he is purposely kept out of the way, proof of stricter search is requisite. Ibid.

(*y*) *Ward* v. *Wells*, 1 Taunt. 461.

(*z*) I have known a trial at the assizes put off on an affidavit stating the illness of such a witness.

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proposed to prove receipts for taxes give by the tax-gatherer, who had attended under a *subpœna* to give evidence, but had been seized with an apoplectic fit, and taken home dangerously ill before the trial came on, and it was proved that he was *in extremis*, the secondary evidence was rejected (*b*).

The party may also prove that the name of a person as attesting witness was introduced as such without the knowledge or assent of the parties; for in that case he is not an attesting witness (*c*). But it is no excuse to show that the witness has denied his attestation, without calling him (*d*).

Where there is more than one attesting witness, and the absence of all but one is accounted for, the case seems to be the same as if the latter had been the only attesting witness, and he must be called to prove the execution, and no other evidence can supply the place of his testimony.

Secondary proof in the absence of the attesting witness.

Where there have been sufficient attesting witnesses, whose absence is satisfactorily accounted for, the proper proof is by giving evidence of the hand-writing of the attesting witnesses; and it is usual in such cases to give evidence also of the hand-writing of the obligor (*e*). The signature of an attesting witness, when proved, is evidence of every thing upon the face of the instrument, for it is to be presumed that the witness would not have subscribed his name in attestation of that which did not take place; and where there are several attesting witnesses, all of whom are accounted for, proof of the hand-writing of any one is sufficient, without proving that of the rest (*f*). It has been held, indeed, in some instances, that where the testimony of the attesting witnesses cannot be had, owing to their death, absence, interest, or any other disqualification accruing subsequently to the

(*b*) By Ld. Ellenborough, *Harrison* v. *Blades*, 3 Camp. C. 457.

(*c*) 4 Taunt. 220; *M'Craw* v. *Gentry*, 3 Camp. 232.

(*d*) *Jones* v. *Brewer*, 4 Taunt. 46; And. 235.

(*e*) 1 B. & P. 360; 2 East, 183. 250; 2 Str. 833; 1 Str. 34. An entry made by a clerk in a trader's book, can only be proved by the clerk himself. *Cooper* v. *Marsden*, 1 Esp. C. 1. Such an entry is not made evidence by proving the hand-writing of the clerk, and that he is abroad, Ibid. But *semble* that a person who saw the entry soon after it was made, may prove that fact it corrobomtion of more direct evidence. *Digby* v. *Stedman*, 1 Esp. C. 328.

(*f*) 1 B. & P. 360. *Gough* v. *Cecil*, 1 Sel. 516, n. *Cunliffe* v. *Sefton*, 2 East, 183. *Prince* v. *Blackburne*, ib. 240. But in *Hill* v. *Unett*, 3 Madd. 370, it is said, that if the witness be alive, proof must be given of the hand-writing of the obligor. In such case, a parol acknowledgment will not be sufficient to dispense with evidence of the hand-writing. Ibid.

attestation, the signature of the party, as well as the witness (*g*), must be proved; and in many instances, an admission by the obligor (*h*) of the debt, or of the execution of the deed, has been given in evidence. It seems, however, to be now perfectly settled, for the reason already given, that evidence of the signature of one of the attesting witnesses alone is sufficient (*i*); as in the case of *Adams* v. *Kerr* (*k*), where it was proved, that one witness was dead, and that the other was in Jamaica, and proof of the hand-writing of the deceased witness was held to be sufficient, without proof of the hand-writing of the other witness, or of the obligor. And it seems that proof of the hand-writing of the subscribing witness to a deed is sufficient, he being dead, without any further proof of the identity of the parties, except that of name and description (*l*). So, where one of the attesting witnesses, after diligent inquiry made, could not be found, and the other had become interested since the attestation, it was held, that evidence of the hand-writing of the latter witness was sufficient proof (*m*). So where the witness since the attestation had been

Secondary proof in the absence of the attesting witness.

(*g*) 7 T. R. 260. *Wallis* v. *Delancy*, 7 T. R. 266, n. *Coghlan* v. *Williamson*, Doug. 89. 93.

(*h*) Doug. 89. 93; 2 East, 183. In an action on a promissory note, the subscribing witness being dead, proof of his hand-writing, and that the defendant was present when the note was prepared, is sufficient, without proving the hand-writing of the defendant. *Nelson* v. *Whittall*, 1 B. & A. 19. But see *Page* v. *Mann*, 1 Mood. & M. C. 79.

(*i*) *Adams* v. *Kerr*, 1 B. & P. 360. *Prince* v. *Blackburne*, 2 East, 250. *Milward* v. *Temple*, 1 Camp. 375. *Gough* v. *Cecil*, 1 Sel. N. P. 516. It is however frequently desirable to give evidence of the hand-writing of the obligor, for the purpose of proving his identity, some evidence of which seems to be in all cases necessary. See *Parkins* v. *Hawkshaw*, Starkie's C. *supra*, 223. And see *Nelson* v. *Whittall*, 1 B. & A. 19. *Middleton* v. *Sandford*, 4 Camp. 24. *Mancot* v. *Bates*, B. N. P. 171.

(*k*) 1 B. & P. 360. *Prince* v. *Blackburne*, 2 East, 250. But see *Hill* v. *Unett*, 3 Maddox, 370, where the distinction is taken between the case where a witness is dead, and that where he is still living; in the latter case it was held, that proof of the hand-writing of the obligor was necessary.

(*l*) *Page* v. *Mann*, 1 Mood. & M. C. 79. Notwithstanding the doubt expressed by Bayley, J., in *Nelson* v. *Whittall*, 1 B. & A. 21, referring to the opinion of Ld. Kenyon, in *Wallis* v. *Delancy*, 7 Tr. 266, n., that the hand-writing of the obligor of a bond in such case ought to be proved. See also *Doe d. Wheeldon* v. *Paul*, 3 Carr. & P. C. 13. *Kay* v. *Brookman*, 1 Mood. & M. C. 286, 3 Carr & P. C. 555. *Mitchell* v. *Johnson*, 1 Mood. & M. C. 176.

(*m*) *Cunliffe* v. *Sefton*, 2 East, 183. In this case there was also proof of the acknowledgment of the debt. See also 1 Str. 34; 1 P. W. 289. *Swire* v. *Bell*, 5 T. R. 372.

Secondary proof in the absence of the attesting witness.

convicted of forgery (*n*). Where one of two witnesses was dead, and the other denied his signature, Lord Holt admitted evidence of the hand-writing of the former (*o*). By the 20 Geo. 3, c. 57, s. 38, as to deeds executed in the East Indies, and attested by witnesses resident there, it is sufficient to prove by one witness the hand-writing of the parties and of the witnesses, and that the latter are resident in India. These provisions seem to have been superseded by the rules of evidence already stated.

Where it appears that one or more of those whose names appear on the face of the instrument to be attesting witnesses, never were so in fact; as where, upon being called, they prove that they never did attest the execution of the instrument; or where they were incompetent at the time of its execution to attest it, either from being interested, or from infamy of character, the effect seems to be the same as if their names had not appeared at all on the face of the instrument (*p*). In such case, if there be other attesting witnesses they must be called, or their absence accounted for, and their hand-writing proved in the manner already stated.

Proof of, when thirty years old.

If the deed, or other instrument, when produced, appear to be *thirty years* old, no further proof is required; since after that time it is to be presumed that the attesting witnesses are all dead (*q*). And it seems to be clearly established, that this is not

(*n*) *Jones* v. *Mason*, Str. 833.

(*o*) *Burton* v. *Toon*, Skinn. 639.

(*p*) Vid. *supra*, 325.

(*q*) B. N. P. 255. Bac. Ab. Ev. F. 647. Tri. P. P. 339. 346. Co. Litt. 6. So in case of a will thirty years old, reckoning from the time of execution. See WILL, and *Doe* v. *Wolley*, 8 B. & C. 22; and Vol. II. tit. WILL. The rule applies generally to deeds concerning lands, bonds, and other specialties. *Governor of Chelsea Waterworks* v. *Cowper*, 1 Esp. C. 275. Entries in stewards' books. *Wynne* v. *Tyrwhitt*, 4 B. & A. 376. Letters and other written documents. Ib. For the rule is founded on the antiquity of the instrument, and the great difficulty, nay the impossibility, of proving the hand-writing after such a lapse of time. See *R.* v. *Ryton*, 5 T. R. 229; *Fry* v. *Wood*, Sel. N. P. 535; *Dean and Chapter of Ely* v. *Stewart*, 2 Atk. 44; *Manley* v. *Curtis*, 1 Price, 232; *Bertie* v. *Beaumont*, 2 Price, 308.—Where a letter dated in 1748, was found in the possession of the representative of the defendant's attorney, it was held to be *primâ facie* evidence to prove that the letter had been written to him, although it was without address, the envelope having been lost. *Fenwick* v. *Reed*, 6 Mad. 8. It was also held, in the same case, that a letter found among his papers, and appearing from its contents to have been written by the attorney's London agent, was admissible in evidence. Ibid. In *Beer* v. *Ward*, on the trial of an issue as to the legitimacy of a particular person, a very old letter, purporting to bear the signature of the

a mere *primâ facie* presumption that the witnesses are dead, which is liable to be rebutted by proof that the attesting witnesses are still alive, so as to render it necessary to call them; but that it is a peremptory rule of law, founded upon general convenience, that such proof, after a lapse of thirty years, shall be unnecessary (*r*). Where, however, the deed labours under any suspicion, arising from any rasure or interlineation, it is a matter of prudence and discretion to prove it in the usual way by means of an attesting witness, if any be still living, or by proof of the hand-writing of an attesting witness, where they are all dead (*s*), in order to rebut the unfavourable presumption arising from an inspection of the deed; and this ought more especially to be done if the deed import fraud; as where a man conveys a reversion to one, and afterwards conveys it to another, and the second

Proof of, when thirty years old.

head of the family, and brought from among the title-deeds kept at the family seat, was admitted without proof of the handwriting, by Dallas, C. J., Mich. 1821, and by Lord Tenterden, 1823. In favour of an ancient certificate, recognised by the certifying parish, it will be presumed that the churchwarden who executed the certificate, was duly sworn. *R.* v. *Whitchurch Inh.*, 7 B. & C. 573. *Marsh* v. *Colnett*, 2 Esp. C. 665. And see *R.* v. *Farringdon*, 2 T. R. 466. *Mackey* v. *Newbolt*, 4 T. R. 709. In the case of *The King* v. *Netherthong*, 2 M. & S. 337, it was held, that a certificate by the appellant parish (60 years old), might be read in evidence when produced by a rated inhabitant of the respondent parish, without any account given of its custody; and the Court intimated, that he might, if necessary, be examined by the appellants as to the custody. A bond 30 years old, found amongst the papers of a corporation, who were the obligees, is admissible without proof of the hand-writing of the obligor or attesting witness. *The Governor and Company of the Chelsea Water-works* v. *Cowper*, 1 Esp. C. 275. *Rees* v. *Mansell*, Selw. N. P. 517. On a question, whether certain lands, which had been approved from a waste, were subject to a right of common, several counterparts of old leases, kept among the muniments of the lord of the manor, by which the land appeared to have been demised by the lord free from any such charge, were allowed to be evidence for the plaintiff claiming under the lord of the manor, though possession under the leases was not shown. *Clarkson* v. *Woodhouse*, 5 T. R. 412, n.

(*r*) B. N. P. 255. *Marsh* v. *Colnett*, 2 Esp. C. 665. In *Rees* v. *Maxwell*, Sel. N. P. 402, Baron Perrott is stated to have ruled to the contrary, on the ground that the lapse of time afforded mere presumptive evidence of the death of witnesses. But another case was cited to Mr. B. Perrott upon that occasion, in which Mr. J. Yates, for the sake of the practice, would not allow a witness to prove an old deed, although he attended for the purpose. In the law of evidence, 2d ed. 105, 40 years is stated as the age when a deed becomes admissible without the usual proof.

(*s*) *Chettle* v. *Pound*, B. N. P. 255. Bac. Ab. Ev. F. 648.

Proof of instrument thirty years old.

purchaser proves his title; because in such case, the presumption arising from the antiquity of the deed is destroyed by an opposite presumption; for no man shall be supposed guilty of so manifest a fraud (*t*). The same rule applies to other old writings, such as receipts (*u*). Where an indenture of apprenticeship had been executed thirty years ago, and the parish in which the pauper had resided had treated him as a parishioner for twelve years, it was presumed that the indenture had been lost, and that it had been properly stamped, although it was proved by the deputy registrar and comptroller of the apprentice duties, that it did not appear to have been stamped with a premium-stamp from 1773 to 1805 (*x*).

It has been said, that where an old deed is given in evidence, without proof of its execution, some account ought to be given of the place where it has been kept (*y*); or evidence should be given that the party has been in possession under the deed (*z*). In ordinary cases, however, where the instrument is produced by one who has an interest in it, it is not necessary to show where the instrument has been kept; it is sufficient to produce a parish certificate thirty years old, without showing whence it came (*a*). So it was held to be sufficient for a rated inhabitant of a respondent parish, to produce a certificate above thirty years old, by the appellant parish (*b*).

Proof as to custody of ancient documents.

It has already been observed, that in order to give authenticity to an ancient instrument which does not admit of proof by the ordinary tests (*c*), it is essential to show that it has been brought from the natural and legitimate repository (*d*); as in the

(*t*) B. N. P. 255; Bac. Ab. Ev. 648.

(*u*) *Bertie* v. *Beaumont*, 2 Price, 308. *Buller* v. *Michell*, 2 Price, 399. 4 Dow. 297.

(*x*) *R.* v. *Long Buckby*, 7 East, 45. The binding being in the year 1774 or 1775.

(*y*) B. N. P. 255. 648.

(*z*) Bac. Ab. Ev. F. 644. B. N. P. 254.

(*a*) *R.* v. *Ryton*, 2 T. R. 259. See also *Dean and Chapter of Ely* v. *Stewart*, 2 Atk. 44. *Fry* v. *Wood*, Sel. N.P. 535.

(*b*) *R.* v. *Netherthong*, 2 M. & S. 337. Ld. Ellenborough, C. J. intimated that the rated inhabitant being brought forward as the mere depositary of the instrument, if the party objecting wished to inquire into the custody, he might. This was before the stat. 54 Geo. 3, c. 170, which made rated inhabitants competent.

(*c*) *Supra*, 202, 203; and see 1 Esp. C. 278. *Forbes* v. *Wale*, 1 Bl. 532, and Vin. Ab. Ev. A. b. 5.

(*d*) *Supra*, 291; as to ancient licenses by a lord of a manor to fish, 292; to prove a right in the lord to places within the manor cleared of turbary, ibid.; and *Clarkson* v. *Woodhouse*, 5 T. R. 412.

case of terriers (*e*), ancient grants (*f*), an inspeximus (*g*), an endowment by a bishop (*h*). Custody of ancient documents.

Upon the trial of an issue to ascertain the boundary between two parishes, where a box containing old terriers and other parish documents was produced, proof that they had been received from the son of the last rector of the parish, and had been transferred to the plaintiff, the present incumbent, was held to be sufficient evidence as to their custody (*i*). Where, however, a book which purported to be the book of a former rector, came out of the hands of the defendant, being the grandson of the former rector, the proof of custody was held to be insufficient (*k*). In the case of *Michell* v. *Robbetts* (*l*), a grant to an abbey, contained in a manuscript entitled "*Secretum Abbatis*," in the Bodleian Library at Oxford, was rejected as not coming from the proper custody; and for the same reason an old grant of a priory, brought from the Cottonian Manuscripts in the British Museum, was also rejected, for want of showing that the possession of the grant was connected with any person who had an interest in the estate (*m*). Where a writing, purporting to be an endowment of a vicarage, and another purporting to be an inspeximus of the former, under the seal of the Bishop of Norwich, had been purchased at a sale, as part of a private collection of manuscripts, it was held, that coming out of the custody of a private person, unconnected with the matters contained in them, they were inadmissible (*n*). But in a tithe-suit, a book which purported to be the book of a former collector of tithes, and seventy years old, in the hands of the successor to such collector, was admitted (*o*).

Where the defendant, in a suit by the rector for tithe, offered in evidence a paper purporting to be a receipt given by a former rector, to a person of the same name with the defendant, forty-five years ago, it was held to be admissible, without proof of the hand-writing of the rector, and without any proof as to the custody

(*e*) *Supra*, 201, 202.

(*f*) *Supra*, 199, 200, 201. Grants of abbey lands should be shown to be in the possession of those connected with the estate. *Lygon* v. *Strutt*, 2 Anst. 601; and see *Buller* v. *Mitchell*, 2 Price, 405.

(*g*) *Supra*, 202.

(*h*) *Supra*, 202, 203.

(*i*) *Earl* v. *Lewis*, 4 Esp. C. 1.

(*k*) *Randolph* v. *Gordon*, 5 Price, 512.

(*l*) 3 Taunt. 91.

(*m*) *Swinnerton* v. *Marquis of Stafford*, 3 Taunt. 71.

(*n*) *Potts* v. *Durant*, 3 Ans. 789.

(*o*) *Jones* v. *Walker*, 3 Gwill. 117.

Custody of ancient documents.

further than that it came out of the hands of the defendant; for none but an occupier could have acquired such a receipt (*q*). But where Curtis, the defendant in a similar suit, produced a paper purporting to be a receipt from Smith to one Curtis fifty years ago, but there was no evidence to show who Smith was, or where the paper had been kept, the evidence was rejected (*r*).

In the case of *Bullen* v. *Michell* (*s*), the question was between a vicar and occupier, whether a farm modus had existed immemorially; and after proof that search had been made in the proper registries for the original endowment of the vicarage by the abbey of Glastonbury, it was held, that a book purporting to be the ledger-book and chartulary of that abbey, and preserved amongst the muniments of the Marquis of Bath, the owner of some estates which formerly belonged to the abbey, although not of the farm in question, was sufficiently connected with the abbey as to be admissible in evidence as a genuine document which had belonged to the abbey (*t*). It was also held, that two documents contained in the book were evidence; the one being in the form of an appropriation, dated 1269, made by the Bishop of Salisbury to the abbey of Glastonbury, of the profits of a rectory, reserving to the bishop a power of ordaining a vicarage in the same church, of a specified yearly value, and the other containing a list of different articles of endowment of the said vicarage (*u*). It was

(*q*) *Bertie* v. *Beaumont*, 2 Price, 303.

(*r*) *Manby* v. *Curtis*, 1 Price, 225. Wood, B. dissent.

(*s*) In D.P., 2 Price, 299, *supra*, 303.

(*t*) It was observed by Gibbs, C. B. 2 Price, 410, that such a book as this purports to be, usually contains a description of all the estates of the abbey, and all the transactions relating to them. When the abbey was dissolved, those estates went to the Crown, and the Crown afterwards granted them to different persons. The book, when the abbey was dissolved, would go to the officers of the Crown, and when the Crown portioned out and made over the possessions of the abbey to other persons, the book could go to one only of those grantees; and the only possible way of connecting it with the abbey is by showing a connection between the possessor and the Crown, and by raising a probability that the Crown may have handed over the book to its present possessor.

(*u*) Wood, B. dissented from the other Judges of the Court upon this point: he admitted that the book had been sufficiently connected with the abbey to make it evidence as a copy of the endowment, supposing such evidence to be relevant; but he was of opinion that it was not relevant evidence upon that point, since the endowment was not disputed; and that for any other purpose these entries were *res inter alios*, and mere memorandums of an executory project. See his observations at length, 2 Price, 425.

also held, that the accounts of the rents of the abbey, also found among the same muniments, and containing the allowances and acquittances of the abbey, were admissible. Copies from an ancient schedule, produced from the muniments of a corporation, and delivered to the toll collectors, by which they collected the tolls, are admissible for the corporation, although it would have been otherwise if not shown to have been delivered to the collectors by the corporation, however accurately corresponding (*x*).

Custody of ancient documents.

In some instances the party who offers the instrument in evidence is the proper depositary, and then no proof of custody is necessary; as where, in a settlement case, a litigant parish produces a certificate, above thirty years old, granted to them (*y*).

Where no name of any attesting witness is subscribed, or where there are names subscribed which are proved to be fictitious (*z*), or of real persons who either did not actually witness the execution of the deed or other instrument (*a*), or who were in point of law incompetent to attest it (*b*), the execution may be proved by the testimony of any witness who was present when the deed was executed (*c*); or it will be sufficient to prove the hand-writing of the obligor, from which the sealing and delivery may be presumed (*d*), or his acknowledgment of the instrument.

Proof where there is no attesting witness.

(*x*) *Brett* v. *Beales*, 1 Mood. & M. C. 417.

(*y*) *R.* v. *Ryton*, 5 T. R. 259. In such a case it is sufficient if the certificate is produced by a rated inhabitant of the parish. *R.* v. *Netherthong*, 2 M. & S. 337. So it is sufficient that a corporation produce corporation documents. 2 M. & S. 338.

(*z*) *Fassett* v. *Browne*, Peake's C. 23.

(*a*) *Grellier* v. *Neale*, Peake's C. 146. *M'Craw* v. *Gentry*, 3 Camp. 232; 4 Taunt. 220. In the case of *Phipps* v. *Parker*, 1 Camp. 412, where the party whose name appeared as the attesting witness negatived the attestation by him, Lord Ellenborough held, that the deed could not be proved by evidence of the hand-writing of the supposed obligee, or of an acknowledgment by him: but this case is overruled by subsequent authorities. *Fitzgerald* v. *Elsee*, 2 Camp. 635, cor. Lawrence, J.; *Lemon* v. *Dean*, ib. 636, cor. Le Blanc, J.

(*b*) Com. Dig. Ev. B. 3.

(*c*) Ibid. *Fitzgerald* v. *Elsee*, 2 Camp. 635. *Lemon* v. *Dean*, 2 Camp. 636.

(*d*) Com. Dig. Fait, B. 4. 1 Lev. 25. *Fassett* v. *Browne*, Peake's C. 23. 2 T. R. 41. *Lee* v. *Ballard*, 3 Esp. C. *Grellier* v. *Neale*, Peake's C. 146. *Talbot* v. *Hodgson*, 7 Taunt. 251; the subscribing witness having denied that he saw the execution, a co-obligor having been released, swore that there was a seal on the bond when the defendant wrote his name opposite, but that the defendant did not seal it, nor put his hand to the seal, or deliver it in the witness's presence. The jury, on the evidence being left to them, found for the plaintiff; and the Court afterwards held that this had been properly left to the jury. For proof of hand-writing, see tit. HAND-WRITING, Vol. II.

Proof in case of loss.

Where the deed has been lost (*e*) or destroyed, the fact must be proved; if positive proof of the destruction cannot be had, it must be shown that a *bonâ fide* and diligent search has been made for it in vain where it was likely to be found (*f*). If two or more parts of the deed have been executed, the destruction or loss of *all* must be proved previous to the admission of parol evidence of the deed (*g*).

Inquiry was made after an indenture of apprenticeship at the house of the deceased master ten years after his death, in which house his son and widow still resided, and his goods and effects remained, and the son said that he could not find it, and some parol evidence was given to show that a deed of apprenticeship existed; the Court held, that the proof of binding was not sufficient (*h*). Where there were two parts of an indenture of apprenticeship, one which was proved to have been destroyed, and the other had been delivered to Miss Taylor, of Bomford, to whom the apprentice had been assigned; evidence was given that application had been made to Miss Taylor, who had ceased to reside at Bomford, for the part delivered to her, and that she had said that she could not find it, and did not know where it was, but Miss Taylor, though still living, was not called as a witness, the Court held, that the part so delivered had not been sufficiently accounted for; it had been traced into the hands of Miss Taylor, but no further evidence had been given to show what had become of it (*i*). But where one part only of an indenture of apprenticeship had been executed, and both the pauper and master were dead at the time of the trial, and it appeared on the evidence, that on inquiry made from the pauper shortly before his death,

(*e*) A document sent abroad and negotiated by the defendant on the plaintiff's account, may be considered as a lost bill. *Hunt* v. *Alewyn*, 1 M. & R. 433.

(*f*) *Goodier* v. *Lake*, 1 Atk. 446. *Lord Peterborough* v. *Mordaunt*, 1 Mod. 94. Where after a lapse of thirty-six years since the indentures were executed, and which had been long since *functi officio*, it was shown that every person had been applied to and called, in whose possession they might reasonably be expected to be found; held, that it was such due diligence as entitled the secondary evidence to be let in. *R.* v. *Earl Farleigh*, 6 D. & R. 146.

(*g*) *Pritchard* v. *Symonds*, B. N. P. 254. *R.* v. *Castleton*, 6 T. R. 236.

(*h*) *R.* v. *St. Helens in Abingdon*, B. S. C. 292. 375. 2 Bott. 449; but in this case the evidence seems to have been insufficient to prove a binding, independently of the objection, that the proof of loss was insufficient for the purpose of admitting secondary evidence; and the circumstances of the case rather negatived the existence of a valid indenture.

(*i*) *R.* v. *Castleton*, 6 T. R. 236; see also *Williams* v. *Younghusband*, 1 Starkie's C. 139.

he said that the indenture had been given up to him after the expiration of the apprenticeship, and that he had burnt it; and inquiry had also been made of the daughter and executrix of the master, who said that she knew nothing about it, and no further search was made, the Court held the proof to be sufficient, since here, if the declaration of the pauper was admissible so as to show a possession by him, it also showed that further search was unnecessary; and on this ground it was distinguished from the case of *The King* v. *Castleton*, for there the evidence showed that a further search was necessary (*k*). Evidence of search.

In the case of a parish apprentice, after reasonable proof has been given of a delivery of the indenture to the parish officers, proof should be given of a search in the parish chest, which is the proper place of deposit (*l*).

(*k*) *R.* v. *Morton*, 4 M. & S. 48. The Court of King's Bench held that in such a case it was sufficient for the parties to show that they had used reasonable diligence; that these were terms applicable to some known or probable place or person in respect of which diligence may be used; that what the pauper said was admissible, and although it might not amount to proof of the fact that the indenture had been destroyed by him, it was so far evidence as to afford a reason why further search was not made with him. That if such an inquiry had been made of a merchant for some commercial purpose, and he had given a similar answer, it would have been sufficient. It was like a non-production on request, and the party accounts for it; and that this was distinguishable from the case of *R.* v. *Castleton*, for there the answer given was a reason for making further search.—Where a person to whom letters had been written which were required to be produced, said that he had searched for them in a particular box in which *he had put them*, without being able to find them, but added that he thought they were somewhere in his possession, but that he had not searched in any other place, it was held that enough had not been done to let in secondary evidence. *Bligh* v. *Wellesley*, 2 Carr & P. C. 400.

(*l*) Where the mother of a parish pauper stated that she had received money from the officers of *B.* to put her son out as an apprentice; that she accordingly put him out, and delivered the indenture to the wife of a market gardener, who was dead, having survived her husband, to be delivered to the overseers of *B.*, and that search had been made in the parish chest of *B.* for the indenture without success; it was held that parol evidence was admissible, the parish chest being the proper place of deposit. *R.* v. *Stourbridge*, 8 B. & C. 96. So where search had been made in the parish chest of the binding parish for the indenture, which had been proved to have been delivered to N. Badger, the mother of the apprentice, to be delivered to the overseer, and the husband being dead, his executor was called to negative the existence of any such instrument among his papers. *R.* v. *Bromsgrove*, East. T. 1828.—Where the indentures were proved to have been delivered by a parish apprentice to his master, who was still living, it was held that the master's declaration, on application by the apprentice at the

Evidence of search.

An agreement for a lease had been deposited in the hands of the landlord, who upon application to him by the lessee refused to produce it; ten years after this, and three after the death of the lessor; the tenant, upon an appeal, swore that he did not know in whose possession the agreement was, and no inquiry had been made after it; and yet it appears that parol evidence was held to be admissible (*m*); and Buller, J. observed, that if it had been in proof that the executor of the lessor had been in possession of the instrument, it might have varied the case. After the expiration of the lease, the lessee, the pauper, was entitled to it in strictness, but he neither had it, nor knew whether it existed; and it was then nine years after its expiration (*n*). But in general it must be shown that inquiry has been made after the deed (*o*), and the loss of it must be proved by the person in whose hands it was at the time of the loss, or to whose custody it is traced (*p*), if that person be living; and if he be dead, application should be made to his representative, and search should be made amongst the documents of the deceased.

Where the appointment of overseers for the year 1802 could not be found in the parish chest, and search had been made among the papers of *B.* deceased, who had acted as executor of the party who acted as overseer for that year; it was held to be sufficient to let in parol evidence of the contents of that appointment, as being of a single overseer for that year (*q*).

Where the publisher of a weekly paper, upon an indictment for a libel, swore that he believed that the original had been destroyed, it was held to be sufficient proof to let in secondary evidence of the contents. *R.* v. *Watson*, 2 T. R. 199.

end of the term, that he had delivered the indenture to the parish officer, was not admissible to let in parol evidence of the contents; and proof that a fruitless search had been made among the papers of the parish for the indenture, was held to be insufficient to let in parol evidence. *R.* v. *Denio Inh.* 7 B. & C. 620. *R.* v. *Castleton*, 6 T. R. 236, cited by Bayley, J. as directly in point.

(*m*) *R.* v. *North Bedburn*, Caldecot, 452.

(*n*) *Qu.* whether, inasmuch as the document had been proved to be once in the possession of the lessor, who had refused to deliver it up, a presumption did not arise that it was in the hands of the representative? In fact no inquiry had been made after the deed, and there was no proof that it was not still in existence.

(*o*) *R.* v. *St. Sepulchre*, 2 Bott. 362. Nolan, P. L. 465.

(*p*) *R.* v. *Castleton*, 6 T. R. 236 Where policies of insurance had been delivered to the assignees of a bankrupt, one of whom was since dead, proof of an application to the solicitor under the commission, who answered, that he did not know what was become of them, was held to be insufficient. *Williams* v. *Younghusband*, 1 Starkie's C. 139.

(*q*) *R.* v. *Witherby*, 4 M. & Ry. 725.

dary evidence (*r*). Where a licence to trade with an enemy, granted by a governor of a colony, had been returned, after being used, to the secretary of the governor, who swore that it was his custom to put aside such licences amongst the waste papers in the office, as being of no further use; that he supposed that he had disposed of the licence in question in this manner; and that he had searched for it, but did not recollect whether he had found it or not, though he did not think that he had found it; the Court were of opinion that the evidence satisfied what the law required in respect of search, and established, with reasonable certainty, the fact of the licence being lost. It was not, the Court observed, to be expected that the witness should be able to speak with more confident certainty to a fact to which his attention was not particularly drawn at the time, on account of any importance being supposed to belong to it (*s*). Where a loss had been settled upon a policy of insurance against fire, in the year 1813, and upon a trial in 1819, the plaintiff, in an action for libel, charging him with having made fraudulent claims upon the insurance company with respect to such loss, called their agent, who stated that the policy was returned to him after the fire, and that he had it in possession then, and afterwards, when the plaintiff made a larger insurance with the company, that upon the loss having been settled, the old policy became an useless paper, that he did not know what had become of it, but he believed he had returned it to the plaintiff; the clerk to the plaintiff's attorney then proved, that within a few days of the trial he went to the plaintiff's house to search for the policy, when the plaintiff showed every drawer where he usually kept his papers, that he examined such drawers, and every other place he thought it likely to find such a paper, without finding it. Held, that this was sufficient to entitle the plaintiff to give secondary evidence of the contents of the policy (*t*). Evidence of search.

Where it appeared that the magistrate who took the informations had returned them to the clerk of the peace, and the clerk to the latter stated that it was the practice where bills had been ignored to throw away the papers as useless, and that after searching, the informations could not be found; it was held, in an action for a malicious prosecution, that this was sufficient to let in secondary evidence of their contents, without calling the clerk of the peace to show they were not in his possession: for if the

(*r*) *R. v. Johnson*, 7 East, 65.

(*s*) *Kensington v. Inglis*, 8 East 273.

(*t*) *Brewster v. Sewell*, 3 B. & A. 296. See also *R. v. Earl Farleigh*, 6 D. & R. 146.

Evidence of search.

information was delivered to the deputy, it was delivered to him as the agent of the clerk of the peace, and not for his own purposes; it was therefore to be presumed that the document was not among his private papers, but rather among those in the custody of the clerk of the peace (*u*). The legal custody of a document appointing a particular person to an office, such as overseer, is in that person; for he is the party most interested in the instrument, and requires its production as a sanction for what he does under its authority (*x*). A presumption therefore arises that such an officer has the custody of his appointment, consequently parol evidence cannot be given of such an appointment without proof of application to him (*y*).

When sufficient evidence has been given of the loss of the deed or other instrument, of which it seems that the Court is to judge (*z*), it must be shown that the instrument existed as a genuine instrument (*a*); that it was written on stamped (*b*) paper or parchment; and in case of apprentice deeds, what sum was paid with the apprentice, and that the deed bore an *ad valorem* stamp (*c*); for the consciousness of a defect of this nature may have been a motive for concealing or destroying the instrument. Its execution must be proved according to the nature of the instrument (*d*); if a deed, by means of an attesting witness, or by proof of his hand-writing if he be dead, or that of the obligor, if the deed be not attested, in the manner already stated.

But where proof of the execution would have been dispensed with in case the original had been produced, proof of execution is unnecessary (*e*) where the deed is lost. So where the want of

(*u*) *Freeman* v. *Arkell*, 2 B. & C. 494. 3 D. & R. 669.

(*x*) Per Lord Ellenborough, *R.* v. *Stoke Golding*, 1 B. & A. 173.

(*y*) 1 B. & A. 173; and as to the custody of a sheriff's warrant, see 1 Starkie's C. 413.

(*z*) As also upon questions of the admissibility of dying declarations, see 1 Starkie's C. 522.

(*a*) *Goodier* v. *Lake*, 1 Atk. 246. *R.* v. *Sir T. Culpepper*, Skinner, 677. But where the terms of a licence require that the time of sailing should be indorsed thereon, and the licence was burnt at the Custom-house, a proper indorsement was presumed. *Butler* v. *Allnutt*, 1 Starkie's C. 222.

(*b*) Where the plaintiff had lost his part of an agreement under seal, after it had been duly stamped, and the defendant upon notice produced his part unstamped, it was held that it might be read in evidence. *Munn* v. *Godbold*, 3 Bing. 292.

(*c*) See *Goodier* v. *Lake*, 1 Atk. 446. Burn, J. tit. Poor, p. 366.

(*d*) *R.* v. *Culpepper*, Skinner, 673, by Lord Hardwicke, C. J. *Goodier* v. *Lake*, 1 Atk. 246. Where a note has been lost, a copy is not evidance unless the note be proved to be genuine.

(*e*) *Goodier* v. *Lake*, 1 Atk. 246.

the original is occasioned by the default or misconduct of the adversary.

Proof by secondary evidence.

After proof of the due execution of the original, the contents should be proved by means of a counterpart (*f*), if there be one, for this is the next best evidence; and it seems that no evidence of a mere copy is admissible until proof has been given that the counterpart cannot be produced (*g*), even although such counterpart was not stamped (*h*). If there be no counterpart, a copy may be proved in evidence by any witness who knows that it is a copy, from having compared it with the original (*i*). If there be no copy, the party may produce an abstract, or give in evidence a deed executed by the adversary, in which the instrument to be proved is cited (*k*); or even give parol evidence of

(*f*) The counterpart of a lease purporting to have been executed by the lessee of a lease granted by the mortgagor in conjunction with the mortgagee of certain premises, cannot be read in evidence against one who claims under the mortgagee, without some evidence that the original lease which has been lost was executed by the mortgagee. *Doe* v. *Trapaud*, 1 Starkie's C. 281. But it was held, that proof that the original lease was signed by the mortgagee, the attesting witness not being known, would be sufficient to warrant the reading of the counterpart. Ib.

(*g*) *R.* v. *Castleton*, 6 T. R. 236. *Thurston* v. *Delahay*, Hereford Ass. 1744. B. N. P. 254, *semble*. *R.* v. *Kirby Stephen*, B. S. C. 664. *Villiers* v. *Villiers*, 2 Atk. 71. 1 Camp. 192. 501. *Liebman* v. *Pooley*, 1 Starkie's C. 176. *Doron* v. *Haigh*, 1 Esp. C. 109.

(*h*) Where it was proved that there were two parts of a deed on which the action was founded, that executed by the defendant being lost, it was held, that the counterpart executed by the plaintiff, and not the draft, was the next best evidence, and admissible in evidence as an authenticated copy, although not stamped. *Munn* v. *Godbold*, 3 Bing. 292. And see *Villiers* v. *Villiers*, 2 Atk. 71; and B. N. P. 254.

(*i*) B. N. P. 254. 1 Keb. 117. *R.* v. *Kirby Stephen*, B. S. C. 664; *supra*, note (*g*). An entry in the register book at the Custom-house, stating that a certificate of register was granted on an affidavit by *A.* that he was an owner, is not admissible as secondary evidence of the contents of the affidavit. Some person who has seen the affidavit, and knows it was made by *A.*, must be called. *Teed* v. *Martin*, 4 Camp. C. 90. Where one writing is offered as secondary evidence of the contents of another, it is not necessary to prove that one was taken from the other, or that they have been collated; it is sufficient if both were copied from the same draft, by a person who believes them to be correct. *Medlicott* v. *Joyner*, 1 Mod. 4. Where there are several parts of a deed, of which one is in the hands of the defendant, who has notice to produce it, and the others are inaccessible to the plaintiff, he may give a copy in evidence. *Doron* v. *Haigh*, 1 Esp. C. 409.

(*k*) See *Burnett* v. *Lynch*, 5 B. & C. 601. Com. Dig. tit. Ev. B. 5. *Skipwith* v. *Shirley*, 11 Ves. 64.

Secondary evidence.

the contents of a deed (*m*). It has been said, that where possession has gone along with a deed for many years, the original of which is lost or destroyed, an old copy may be given in evidence without proof that it is a true copy, because it may be impossible to give better evidence (*n*). The registry of a conveyance in a register county is not evidence, unless the defendant has had notice to produce the conveyance (*o*).

After proof of ineffectual search for the deed of endowment of a vicarage, a chartulary of an abbey to which the rectory formerly belonged, stating the particulars of endowment, and found in the possession of the owner of the abbey lands, is admissible as secondary evidence (*p*).

(*m*) *Sir E. Seymour's case*, 10 Mod. 8. *R.* v. *Motheringham*, 6 T. R. 556.

(*n*) B. N. P. 254. Stile, 205. The reason that it may be impossible to give better evidence is by no means a satisfactory one; and in general the contingent impossibility of procuring better evidence will not warrant the admission of evidence which is in itself otherwise defective. The reception of evidence from necessity must be founded on a general necessity, or probability of the failure of all other and superior evidence arising out of the nature of the case; as in the instance of servants and agents (see tit. INTEREST). *Qu.* whether in the above case such a copy would be evidence, without some proof of its being a true copy of a lost original. See Bac. Ab. Ev. F. 646.

(*o*) *Molton* v. *Harris*, 2 Esp. C. 549. An examined copy of the registry of a deed in a register county, is admissible as secondary evidence. *Doe* v. *Kilner*, 2 Carr & P. C. 289.

(*p*) Upon the trial of an issue, whether a particular farm in the parish of *S. N.* was discharged of tithes on payment of a modus, after proof of ineffectual search for the original endowment and appropriation, a book was produced, said to be an old ledger or chartulary of the abbey of Glastonbury, from the muniment-room of the Marquis of Bath (the owner of the abbey lands), containing entries showing that at the time of those entries the small tithes were assigned to the vicar, no mention being made of any money modus; the book contained also other entries relating to the appropriation of the rectory and endowment of the vicarage. This book having been rejected on the trial, on a motion for a new trial its admissibility was objected to on two grounds: 1st. that it had not been shown to have belonged to the abbey of Glastonbury; and 2d, that the evidence did not bear upon the facts in issue. But upon the first objection, the Court was of opinion, that search having been made, as was admitted, in every place where the endowment itself might be expected to be found, and none being found, a copy was evidence. That such a book, containing a description of the estates of an abbey, and the transactions concerning them, would, on the dissolution of the abbey, go to the officers of the Crown, and from them to the grantees under the Crown; and consequently, that the only possible way of showing the connection between the book and the abbey was by proving a connection between the possessor and the Crown, by showing him to be in possession of lands which passed from the abbey to the Crown, and from the Crown to the grantee-

Of a letter copied by a clerk.

After notice to the plaintiff to produce a letter, which he admitted to have received from the defendant, it was held, that an entry by a deceased clerk, in a letter-book, professing to be a copy of a letter from the defendant to the plaintiff, of the same date, was admissible evidence of the contents, proof having been given, that according to the course of business, letters of business written by the plaintiff were copied by this clerk, and then sent off by the post (*q*); and Lord Ellenborough observed, that if such evidence were not to be admitted, the most careful merchant would be unable to prove the contents of a letter after the death of his entering clerk.

In proving the contents of a letter, it is not necessary to call the clerk who wrote the letter, although his testimony may be had. It is sufficient to prove it by any other witness who recollects the contents; for it is merely contingent whether the clerk who wrote the document would recollect its contents better than another person (*r*). Where a secretary had made entries of the licences granted by the governor of a colony, in a memorandum-book, on proof of loss of the licence, it was held that parol evidence might be given of the contents without producing the

That supposing the book to have been traced to the custody of the abbot, the account it contained of the particular matters of endowment was admissible, the endowment itself not having been found after search in the natural places of deposit. *Bullen* v. *Michel*, 2 Price, 399. Judgment was affirmed in the House of Lords, 4 Dow, 298. Lord Redesdale, in giving his judgment, observed, that as the original instruments would, if they could have been produced, have been admissible in evidence, the only question was, whether the entries in the book were evidence of the licence of appropriation and endowment. That they were admissible as the next best evidence that could be produced. The two instruments seemed, he said, to have been copied by a person employed for the purpose, probably one of the monks, and deposited among the muniments of the abbey, that the instruments might be preserved. And for the same reason it might be presumed that they were faithful copies; at least there appeared to have existed no motive to make them otherwise, and they were found in a situation where they were likely to be kept.

(*q*) *Pritt* v. *Fairclough*, 3 Camp. 305. In this case Lord Ellenborough laid stress upon the circumstance that the defendant had admitted the receipt of the letter, and might rebut the evidence by producing the original; but even if there had been no such admission, it seems that the evidence would have been admissible. So the copy of a letter, accompanied with a memorandum, in the hand-writing of a deceased clerk, purporting that the original had been forwarded by him, was admitted as evidence, upon proof that this was his usual mode of transacting business. *Hagedorn* v. *Reid*, 3 Camp. C. 377-9. See also *Roberts* v. *Bradshe*[illegible] Starkie's C. 28.

(*r*) *Lichman* v. *Pooley*, 1 Starkie's C. 187.

Secondary evidence.

book, and that if the book were to be produced it could not be read in evidence, and would be of no use except to refresh the memory of the witness (*s*).

Where a licence from the Crown has been lost, the contents should be proved by the registry at the Secretary of State's office (*t*).

Where it was proved that the house of a party in whose custody marriage articles ought to have been, had been occupied and pillaged by rebels and foreign troops, and that after diligent search amongst his papers they could not be found, it was held that a recital of them, in a case submitted to counsel at the time, and charged for and entered as paid by the family attorney, was admissible as secondary evidence (*u*).

(*s*) *Kensington* v. *Inglis*, 8 East, 273. In this case the entry in the memorandum-book does not appear to have been a copy of the document which the witness could have sworn to as such, but merely a memorandum of the fact that such a licence had been granted.

(*t*) *Rhind* v. *Williamson*, 2 Taunt. 237. Upon the impeachment of Ld. Melville, 29 Howell's St. Tr. 714, it was proposed to prove the contents of a letter of attorney, under which it was alleged that Mr. Douglas had been directed by Lord Melville to apply to the Treasury for monies from time to time as his paymaster; and for this purpose the Managers offered in evidence an entry in a book kept in the Exchequer, which book contained copies of all the letters of attorney for the receipt of money at the Exchequer. No such letter had been found after diligent search among Mr. Douglas's papers shortly after his death, but it was proved that an official order had been made out for Mr. Douglas to receive the money under a letter of attorney; and the fact of Mr. Douglas's appointment as paymaster was proved by a letter in Lord Melville's hand-writing, and the clerk of the office proved that he had made the entry from an official letter of attorney. After argument, the entry was rejected: There is no legal proof (said the Ld. Chancellor) of Lord Melville's hand-writing, and it does not appear whether the attesting witnesses are living or dead; nor does it appear that Mr. Douglas ever received any money under that appointment. For these reasons, it was determined that the Managers had not entitled themselves to read the paper: upon this the Managers proceeded further, and tendered in evidence, a certificate signed by Mr. Douglas as paymaster, and given by him to the Navy-office, acknowledging the receipt of money by him at the Exchequer. The Managers then produced entries in the Bank books, signed by Lord Melville and Mr. Douglas, in the common form of opening an account; and afterwards called a witness, whose name and description corresponded with the name and description of one of the attesting witnesses in the proposed entry; and this witness stated that he had some recollection, though very slight (for the entry bore date about 24 years before this time), of providing a stamp for the power of attorney from Lord Melville to Mr. Douglas, and of attesting it at the Navy Pay-office. Upon this evidence the Lord Chancellor declared his opinion that the entry was admissible, and the Lords allowed it to be read.

(*u*) *Ld. Lorton* v. *Gore*, 1 Dow, N. S. 190.

Where the plaintiff, on being called upon to produce a grant, produced an ancient parchment, without either signatures or seals, it was held to have been rightly received, as a document coming out of the hands of the opposite party, and not as a deed, nor as evidence of one (*x*).

In proving an examined copy, it is sufficient to prove that whilst one read the original, the other read the copy.

When in the possession of the adversary.

If the deed or other instrument be in the possession of the adversary in a civil, or of the defendant in a criminal case, proof must be given of that fact; and it must next be shown that the adverse party, or his attorney, has had notice to produce it (*z*). Proof of the delivery of a paper to the servant of the defendant, without calling the servant, was in a criminal case held to be insufficient proof of the possession of the paper by the defendant (*a*). But proof that a deed came into the hands of the defendant's brother, under whom the defendant claimed, was held to warrant the reading of a copy (*b*), even although the defendant had sworn, in an answer in Chancery, that he had not got the original. Proof of this kind must depend much upon the circumstances of the particular case (*c*). The fact of the adversary's possession may be proved by circumstances, and for this purpose the particular course of duty and office is admissible to raise a presumption of such possession (*d*). Presumptive evidence having been given that the defendant had obtained his

(*x*) *Tyrwhitt* v. *Wynne*, 2 B. & A. 554. It was held to be entitled to but little credit, since the acts of enjoyment had been inconsistent with it.

(*y*) *Rolfe* v. *Dart*, 2 Taunt. 52.

(*z*) Even in penal actions and criminal proceedings, notice to the defendant's attorney is sufficient. *Cater* v. *Winter*, 3 T. R. 306. 2 T. R. 201. *R.* v. *Watson*, Leach, 214.

(*a*) *R.* v. *Pearce*, Peake's C. 75. *Gordon's case*, Leach, 244.

(*b*) *Pritchard* v. *Symonds*, Hereford As. 1744. B. N. P. 254.

(*c*) *Baldney* v. *Ritchie*, 1 Starkie's C. 338.

(*d*) See *Hetherington* v. *Kemp*, 4 Camp. C. 193; Starkie's C. *Hugedorn* v. *Reid*, 3 Camp. 377. *Toosey* v. *Williams*, 1 Mood. & M. C. 129. The defendant's clerk produced a letter-book, containing the copy of a letter in his hand-writing: the course was, for the clerk to copy all such letters (to India), which, when copied, were delivered to the defendant to be sealed, and then carried by the witness or another clerk to the India-house; there was no particular place of deposit for such letters in the office, for the letters to be so carried; both the clerks swore that they always carried the letters delivered to them for that purpose, but neither of them had any recollection of the particular letter. Lord Tenterden, with great reluctance, rejected the evidence, observing, that the practice differed from that in most counting-houses; and that, if the duty of the clerks had been to see the letters so copied carried to the post-office, it might have done, but that there was something else to be done, and that by the defendant.

Possession by the adversary.

certificate under a commission of bankrupt, it was presumed that it was in the defendant's possession (*e*).

An appointment of an officer as an overseer is presumed to be in the possession of the officer (*f*).

Proof that a letter was sent purporting to enclose a bill, and that a bill answering the description in the letter was shortly after in the possession of the party, was held to be presumptive evidence that he received both letter and bill (*g*).

Where an apprentice deed is cancelled by the master on payment of money, he is bound to deliver the indenture up to the apprentice (*h*). Documents relating to an estate are presumed to have been delivered to an assignee (*i*). The fact of a letter having been sent to a deceased party several years before her death, was held to be insufficient to found a presumption that it was in the possession of her administratrix (*k*).

A party, after notice to produce a document, cannot get rid of it by transferring the possession of the instrument to another person before the trial, for this is *in fraudem legis* (*l*).

In some instances it is sufficient to show that the instrument is in the actual possession of one who is in privity with a party, for then the possession of the one is in law the possession of the

(*e*) *Henry* v. *Leigh*, 3 Camp. C. 502.

(*f*) An indenture of apprenticeship, made 1797, having been signed only by one overseer of the appellant parish, the respondent parish, to show that only one had been appointed in that year, called upon the appellants to produce the original appointment (having given them notice to produce all books and writings relating thereto); one book only was produced, and that was not for the year 1797. Held, that the respondents not having taken any means to procure the testimony of the overseer himself (who must be presumed to have the custody of the original appointment), were not entitled to give secondary evidence of its contents. *Rex* v. *Leicester*, 1 B. & A. 173.

(*g*) *Kieran* v. *Johnson*, 1 Starkie's C. 109.

(*h*) *R.* v. *Harberton* 1 T. R. 141.

(*i*) *Goodtitle* v. *Saville*, 16 East, 91, n.

(*k*) *Drew* v. *Dennborough*, 2 Carr, & P. C. 198.

(*l*) *Knight* v. *Martin*, 1 Gow. 26; and see *Leeds* v. *Cook*, 4 Esp. C. 256, and *infra*, 349. But where notice had been given to the party, and upon a second trial was served upon the attorney, who informed the party serving it that the instrument had been assigned to some one whom he did not know, without his privity or knowledge, it was held that the service was insufficient without further inquiry from the defendant. Ibid. Where it was sworn that the original lease had been stolen from the plaintiff by a party at the instigation of the defendant, who either had it or knew where it was, and there was no denial on the part of the defendant, the Court made a rule absolute for giving secondary evidence of its contents. *Doe d. Pearson* v. *Ries*, 7 Bing. 725.

other. Where the action was brought against the owner for goods supplied for the use of the vessel, and proof was given that the order for the goods was in possession of the captain, it was held that the proof of possession was sufficient (*i*). So for this purpose possession by the under-sheriff is possession by the sheriff (*k*). Possession by the banker of the party is possession by the latter (*l*).

Notice to produce the deed, &c.

The instrument having been proved to be in the possession of the adversary, the next step is to prove the notice to produce it. It is sufficient to prove service of notice to produce a deed or other instrument, either on the party or his attorney, in criminal as well as civil cases (*m*). This must appear to be a reasonable notice (*n*). A notice to produce a written instrument is usually in writing, but it may, it seems, be by parol (*o*); and then it may be proved by any witness who heard the notice given (*p*). The usual course is, as well in the case of notices to produce documents upon the trial, as in giving notice to quit, or notice of the dishonour of a bill of exchange, to make out duplicate notices, and the witness who serves one compares them with each other, and upon the trial proves their correspondence, and the delivery of one of them to the attorney of the opposite party (*q*).

(*i*) *Baldney* v. *Ritchie*, 1 Starkie's C. 338.

(*k*) *Taplin* v. *Atty*, 1 Ry. & Mo. C. 164.

(*l*) *Partridge* v. *Coates*, 1 Ry. & Mood. C. 156.

(*m*) *Attorney-general* v. *Le Marchand*, 2 T. R. 201. *R.* v. *Watson*, ib. 199.

(*n*) In a town cause, service of notice upon the wife of the attorney of the defendant, late in the evening of the night before the trial, was held to be insufficient. *Doe* v. *Guy*, 1 Starkie's C. 283. So was service at seven in the evening of the day before the trial, at the office of the attorney, who had then left his office. *Sims* v. *Kitchen*, 5 Esp. C. 46; S. P. *Atkinson*, v. *Carter*, 2 Ch. 403. Notice to produce a paper, given to the attorney on the evening of the 2d day before the trial, the party being then abroad, was held to be sufficient. *Bryan* v. *Wagstall*, 1 Ry. & Moo. C. 128.

(*o*) *Smith* v. *Young*, 1 Camp. 440. If both a written and oral notice has been given, proof of either will suffice. Ibid.

(*p*) 4 Esp. C. 203. 1 Esp. C. 445.

(*q*) *Jory* v. *Orchard*, 2 B. & P. 41. Where, however, in cases of bills of exchange, &c. the notice served is a sole original, notice must be given to produce it. See Vol. II. tit. NOTICE. Where a great number of impressions are printed at the same time, they are in the nature of duplicate originals. See *R.* v. *Watson*, 2 Starkie's C. 140, where it was held that a number of copies of a placard having been printed by order of the prisoner, who had taken away twenty-five of them from the printers, one of the remainder might be read without giving notice to the prisoner to produce the twenty-five. And see *R.* v. *Pearce*, Peake's C. 75.

Proof of notice to produce.

It is a general rule that proof of notice to produce a notice is not requisite; if it were, the necessity would extend in *infinitum*, as each additional notice to produce the preceding would require the same proof(*r*).

The notice will be insufficient if it be intitled in a wrong cause. In an action by the plaintiffs *A.* and *B.*, assignees of *C.* (a bankrupt) v. *E.*, a notice to produce a document was intitled *A.* and *B.* assignees of *C. and D.* v. *E.*, and this was held to be insufficient, although *A.* and *B.* were in fact the assignees of *C.* and *D.* under a joint commission (*s*).

Where a document is produced in consequence of notice, and part is read, the party who produces it is, in general, entitled to have the whole read (*t*); but where notice was given to produce a letter which expressed that it covered several enclosures, but without referring to them particularly, it was held that the party producing the letter was not entitled to have the enclosures read (*u*).

It is to be observed, that notice to produce a document in the hands of an adversary does not make it evidence for him unless the instrument be called for (*x*), although the omission to call for it after notice may raise a presumption unfavourable to the party who gave the notice (*y*). But if the party giving notice call for

(*r*) See Vol. II. tit. NOTICE.

(*s*) *Harvey and others* v. *Morgan*, 2 Starkie's C. 17, cor. Lord Ellenborough, and afterwards by the Court of King's Bench, on motion for a new trial, on the ground that the notice was sufficient, and that secondary evidence ought to have been admitted. In an action for work and labour done as a singer, notice had been given to the defendant to produce all letters, papers, books, receipts, vouchers, memorandums, and all other documents written by the plaintiff to the defendant, or by the defendant to the plaintiff or otherwise; and it was held to be sufficient to warrant parol evidence of a memorandum, signed by the defendant, and delivered to a witness, and afterwards re-delivered to the defendant, stating the terms of engagement. *Jones* v. *Hilton*, Lancaster Sp. Ass. 1825, cor. Holroyd, J. Notice to produce "letters and copies of letters, also all books relating to this cause," was held to be too general, and insufficient to let in secondary evidence of the contents of letters. *Jones* v. *Edwards*, 1 M. & Y. 139. A notice to produce a letter, which letter expresses that it covers several papers, without particularly referring to them, does not entitle the party to have the enclosures read. *Johnson* v. *Gilson*, 4 Esp. C. 21.

(*t*) *Infra*, 359. Vol. II. 27.

(*u*) *Johnson* v. *Gilson*, 4 Esp. C. 21. And where a shop-book was produced, in pursuance of notice, it was held that the party who produced it was not entitled to read other entries in the book, which had no reference to those which had been read by the adversary.

(*x*) *Sayer* v. *Kitchen*, 1 Esp. G. 210,

(*y*) Per Lord Kenyon, ib. In general, however, there is little to pre-

Notice to produce, &c.

it and inspect it, he makes it evidence, although he does not read it (*z*).

It is also a general rule that a defendant, although he has given notice to his adversary to produce a particular document, cannot insist upon the production, or give parol evidence of the contents, until the plaintiff's case has been closed (*a*).

When unnecessary.

The reason for giving notice, and the necessity for giving it, cease when, from the very nature of the suit or prosecution, the party must know that he is charged with the possession of the instrument. Consequently, in an action of trover for a bond or note, parol evidence of the instrument may be given although no previous notice be proved (*b*); and in a prosecution for stealing such an instrument, the same rule applies (*c*). So also in trials for treason, where the prisoner has been proved to be in possession of the original (*d*). In an action for breach of promise of marriage, it appeared that a witness who had been served with a *subpœnâ duces tecum* to produce a letter written by the plaintiff to the witness, had, since the commencement of the action, deli-

sume in such a case; it is usual in practice to give a general notice to produce books, &c. but it would be impolitic to call for them unless something were known as to their contents.

(*z*) *Wharam* v. *Routledge*, 5 Esp. C. 210.

(*a*) *Graham* v. *Dyster*, 2 Starkie's C. 23. *Sideways* v. *Dyson*, ibid. 49. On the cross-examination of one of the plaintiff's witnesses, the defendant's counsel required the production of the plaintiff's books, notice having been given for that purpose. The plaintiff refused to produce them in that stage of the business, before the defendant had gone into his case. The defendant's counsel then proposed to give parol evidence of the entries; but Lord Ellenborough said, that, in strictness, the evidence could not be anticipated, although it was rigorous to insist upon the rule, and a close adherence to it might be productive of inconvenience.

(*b*) *Scott* v. *Jones*, 4 Taunt. 865. *How* v. *Hall*, 14 East, 274. *Jolley* v. *Taylor*, 1 Camp. 143. *Butcher* v. *Jarratt*, 3 Bos. & Pull. 143. *Wood* v. *Strickland*, 2 Mer. 461. In equity, each party knows previously what evidence has been given, and therefore there is not the same necessity for notice. Where usury is stated to have been committed in discounting the bill upon which the action is brought, and another bill, in one undivided transaction, no parol evidence is admissible as to the contents of the latter, unless notice has been given to produce it. *Hattam* v. *Withers*, 1 Esp. C. 259. Kenyon, C. J. 1795.

(*c*) *R.* v. *Aickles*, 1 Leach's C. 436. So on an indictment for forging a bill of exchange, which the prisoner had swallowed. *R.* v. *Spragge*, cor. Buller, J. on the Northern circuit, cited by Lord Ellenborough in *How* v. *Hall*, 14 East, 276. *Butler's case*, 13 Howell's St. Tr. 1254.

(*d*) *R.* v. *Moore*, 6 East, 421, n. *R.* v. *Layer*, 6 St. Tr. 263. *R.* v. *De la Motte*, East. P. C. 124. The letters in the latter case had been opened at the post-office.

Notice to produce, when unnecessary.

vered it to the plaintiff; and although no notice had been given to the plaintiff to produce it, Lord Ellenborough admitted evidence of the contents, since the document belonged to the witness, and had been subtracted in fraud of the subpœna; it was therefore admissible as in *odium spoliatoris* (*h*). Where proof had been given that a conspirator in a case of high treason, had procured the possession of certain printed placards, it was held that they were duplicate originals, and that one might be read in evidence without notice to produce the original (*i*). Where a party at a public meeting delivered to a person present a written paper as a copy of the resolutions about to be read, and which corresponded with the resolutions so read, it was held to be good evidence to prove the resolutions, without previous notice to produce the paper from which the resolutions were read (*k*). Notice is in general unnecessary, where a duplicate original can be proved (*l*). Proof that the adversary or his attorney has the deed or other instrument in court, does not, it seems, supersede the necessity of notice; for the object of the notice is not merely to enable the party to bring the instrument itself into court, but also to provide such evidence as the exigency of the case may require to support or impeach the instrument (*m*).

A counterpart, which is not a duplicate original, having been executed by one party only, is admissible against the party who executes it, to prove the execution of the other part which it

(*h*) *Leeds* v. *Cook*, 4 Esp. C. 256.

(*i*) *R.* v. *Watson*, 2 Starkie's C. 138. A copy of a letter taken by a copying machine, is not evidence without notice to produce the original. *Nodin* v. *Murray*, 3 Campb. 228.

(*k*) *R.* v. *Hunt*, 3 B. & A. 572.

(*l*) See Vol. II. tit. NOTICE. The copy of a bill delivered by an attorney to his client, is evidence, without notice to produce the original. *Anderson, administrator* v. *May*, 3 Esp. C. 167. And the Court of C. P. refused a rule for a new trial; 2 Bos. & Pul. 237. But where no such counterpart has been kept, and no notice has been given, the plaintiff cannot state the items of the bill from his books. *Philipson* v. *Chase*, 2 Camp. C. 110.

(*m*) See *Doe* v. *Grey*, 2 Starkie's C. 283, and see 4 Burr. 2484. In ejectment on the separate demises of Haldane and of Urry, Haldane proved her title under a will, but a witness stated on cross-examination, that she had conveyed the premises to Urry before the time of the demise laid in the declaration, and that the deed of conveyance was in court. Mr. J. Aston nonsuited the plaintiff, being of opinion that he ought to bring better evidence; and afterwards, Lord Mansfield, and Willes and Aston, Js., were of opinion that the plaintiff had not proved his title. Yates, J. dissent. It would probably be now held, that the evidence was sufficient, since it seems to be clear that the statement on cross-examination was not admissible evidence to prove a conveyance and consequently that the title under the will remained undisturbed.

recites, although no notice has been given to produce the original (*n*). But as against a third person, unless he claim in privity (*o*), a counterpart cannot be read in evidence without accounting for the want of the original, or proving it to be in the possession of the party, and that he has had notice to produce it (*p*).

Proof of deed coming from the adversary's possession.

After proof of notice, the adversary either produces the instrument or he does not. If he does produce it, the execution must be proved in the usual way, by means of the attesting witness. This seems to be now settled (*q*), although it was formerly held, that where the deed or other instrument came out of the adversary's possession, no proof of execution was requisite (*r*). In *Gordon* v. *Secretan* (*s*), where the plaintiff in an action on a policy of insurance produced an agreement between himself and a stranger to the defendant, in pursuance of notice from the defendant, in order to show that the plaintiff had no interest in the subject-matter insured, it was held that the defendant was bound to prove the execution of the agreement by means of the subscribing witness. In the subsequent case of *Pearce* v. *Hooper* (*t*), it was held that if the party producing a deed upon

(*n*) *Burleigh* v. *Stibbs*, 5 T. R. 465. The declaration alleged that *A. B.* put himself apprentice to the defendant by a certain indenture executed, &c.; and it was held that this was proved by the proof of that part of the indenture executed by the defendant, and in which it was recited that *A. B.* had bound himself apprentice to him. So on ejectment, on a clause of re-entry for a forfeiture for non-payment of rent, against an assignee of the lease, proof of the counterpart, executed by the original tenant, is sufficient evidence of his holding on the same terms. *Roe* v. *Davis*, 7 East, 363. *Mayor, &c. of Carlisle* v. *Blamire*, 8 East, 487.

(*o*) 7 East, 363. 8 East, 487.

(*p*) Salk. 287. 6 Mod. 225. 12 Vin. Ab. 27, pl. 4, per Grose, J. *R.* v. *Middlezoy*, 2 T. R. 41. *Supra*, 341.

(*q*) *Gordon* v. *Secretan*, 8 East, 548. An instrument produced by the adverse party, under a notice, cannot be given in evidence as an agreement between such party and a stranger, unless it be stamped. *Doe d. St. John* v. *Hore*, 2 Esp. C. 724. Where ship's articles come out of the hands of the adverse party upon notice, the subscribing witness must be called, except in the case of an action by a seaman for wages, for which occasion the articles are made evidence of themselves, by 2 Geo. 2, cap. 26; 2 Geo. 2, cap. 36, s. 2 & 8. *Johnson* v. *Lewellin*, 6 Esp. C. 101. And the rule extends to agreements *not under seal*. *Wetherston* v. *Edgington*, 2 Campb. 95. And see *Cooke* v. *Stocks*, Tidd, 505, 6. *Batcman* v. *Philips*, ibid. 505. 620, and 4 Taunt. 157. *Taylor* v. *Osborne*, cited 4 Taunt. 159. 161, 162.

(*r*) *R.* v. *Middlezoy*, 2 T. R. 41. 1 Esp. C. 109. Peake's L. Ev. 109.

(*s*) 8 East, 548.

(*t*) 3 Taunt. 60. So where the defendants, assignees of a bankrupt, produced, under a notice from the plaintiff (in an action for use and

Proof of a deed coming from the adversary's possession.

notice was possessed of a beneficial interest under it, proof of the execution of the deed by his adversary was not necessary. In that case the defendant in trespass called for the deed which conveyed an estate to the plaintiff, and which by its description of the extent excluded the *locus in quo*; and the Court held, that since the plaintiff would have no interest in the estate if the deed did not convey it, the production of the deed was, against himself, good evidence of its execution. The Court, however, in this case admitted the general doctrine expounded in *Gordon* v. *Secretan*, and assented to the case put there by way of illustration, of an heir at law who produces a will upon notice given by a devisee named in the will. So where both parties claim an interest under the instrument so produced, such proof is unnecessary. As where the plaintiff claims under the original lessee, and the defendant under the assignment (*u*). It does not appear that a party has in any case been entitled to read a deed in evidence without the usual proof, on the ground of its coming out of the possession of the adversary, except where the deed is produced by the adversary upon the trial of the cause (*v*). Where a deed had been received from the possession

occupation), the deed of assignment of the bankrupt's effects; it was held, that the deed was admissible in evidence, though not proved by the attesting witness, it having been shown that the defendants occupied under the deed. *Mant* v. *Mainwaring*, 3 B. & B. 139. In an action for work and labour, the defendant produced an agreement, signed by the plaintiff only, and attested, and Bayley, J. held, that proof by the attesting witness was unnecessary. *Mann* v. *Musgrave*, York Sp. Ass. 1828. In an action for use and occupation, where the defendant holds under a deed in his possession, proof of execution by the plaintiff is unnecessary. *Orr* v. *Morrice*, 3 B. & B. 139. And in *Cooke* v. *Tunswell*, 2 Moore, 513, it was held, that after notice to produce a deed in the defendant's possession, *and an omission to produce it*, parol evidence of its contents was admissible without proof of execution. In an action by a lessee against his assignee of a lease, the plaintiff having proved the execution of the counterpart, the original being in the defendant's possession, it was held, that it was unnecessary for the plaintiff to prove the execution of the original on its production by the defendant. *Burnett* v. *Lynch*, 5 B. & C. 589. Where the lessor of the plaintiff's attorney obtained from a lessee and defendant, the lease to the latter, in order to prevent the lease from being set up as a defence, and afterwards obtained an authority from that lessee to detain the lease; it was held, that on the lease being produced at the instance of the defendant, no proof was necessary. For the lessors of the plaintiff were to derive a benefit from the possession of the lease, and the conduct of their attorney amounted to a recognition of the lease as a valid instrument. *Doe* v. *Heming*, 6 B. & C. 28.

(*u*) *Knight* v. *Martin*, 1 Gow. 26.

(*v*) *Vacher* v. *Cocks*, 1 B. & Ad. 144.

of the adversary, and remained in the possession of the party producing it for some months previous to the trial, it was held that it could not be read without the ordinary proof(*w*). A parchment coming out of the adversary's possession without either signature or seal, may be read as a document coming out of the adversary's possession, but not as a deed(*x*). If the adversary does not produce it, proof must then be given, as in case of the loss of the deed. But it has been said that slighter evidence will suffice where the deed is in the hands of the adversary than where it is proved to have been lost or destroyed (*y*). Another exception to the general rule is that of a public officer, such as a sheriff, who produces an instrument the execution of which he was bound to procure; as against him, it is presumed to have been duly executed(*z*). Where a party, after notice, refuses to produce an agreement, it is to be presumed, as against him, that it is properly stamped (*a*). Where the declaration in covenant alleged that the deed was in the possession of the defendant, and on *non est factum* pleaded, it was proved that the deed was in the hands of the defendant, to whom notice had been given to produce the deed, and the plaintiff gave parol evidence of the deed, the attesting witness being in court; it was held that the parol evidence was well received (*b*). Where two parts of an agreement are signed by both parties, one of which is stamped and is in the possession of the defendant; if he refuse to produce it upon notice, the unstamped part is receivable as secondary evidence of the contents of the other (*c*). So, although the unstamped counter-

Proof of deed, &c. in the adversary's possession.

(*w*) 1 B. & Ad. 144.

(*x*) *Roe* v. *Rawlins*, 7 East, 279; *Tyrwhitt* v. *Wynne*, 2 B. & A. 554.

(*y*) 10 Mod. 8. 12 Vin. Ab. T. b. 65, pl. 22. Carth. 80. Str. 70. See *Pritt* v. *Fairclough*, *supra*, 342. In covenant by a remainder-man for not repairing, plea, that lessor was only tenant for life; held, that after notice on the plaintiff to produce a specific deed, the steward might be called to prove the existence and nature of it; and although the possession of the steward might be considered as the possession of his principal, so as to protect him from producing it under a *spa. duces tecum*, his knowledge of the contents was not within the principle of privileged communications, which extends not beyond counsel and attornies. *Earl of Falmouth* v. *Moss*, 11 Pri. 455.

(*z*) *Scott* v. *Waithman*, 3 Starkie's C. 168. *Barnes* v. *Lucas*, 1 Ry. & Mood. C. 264.

(*a*) *Crisp* v. *Anderson*, 1 Starkie's C. 35.

(*b*) *Cooke* v. *Tanswell*, 8 Taunt. 450.

(*c*) *Waller* v. *Horsfall*, 1 Camp. C. 501. It seems, that where the instrument, if produced by the adversary on notice, would have been admissible in evidence without proof of execution, a copy is also admissible in evidence without proof of execution. *Doron* v. *Haigh*, 1 Esp. C. 409. In an action of covenant on an indenture of appren-

Proof of deed, &c. in adversary's possession.

part were not signed by the parties (*d*). If a party after notice does not produce a document in his custody, and obliges his adversary to give secondary proof, he cannot, by retracting or producing the original, compel him to give the ordinary proof (*e*). Where a party is proved to have destroyed a document which would have been evidence against him, slight evidence will usually be sufficient to supply it (*f*). The same principle applies where the party for sinister purposes withholds the instrument. Where the instrument is out of the power of the party, secondary evidence is admissible. As where a will remains in Chancery by the order of the Court (*g*).

Proof of admission.

A deed or other instrument may be read without proof of execution, by virtue of a rule of court to that effect (*h*); or where the party or his attorney makes the admission deliberately for the purposes of the cause (*i*). If the *admission* be proved to be signed by the attorney on the record, it may be read; but if he be not the attorney on the record, further proof must be given to show that he was the authorized agent of the party (*j*). So if the attorney agree that the other party should act on the instrument, as if the witness had been produced (*k*); or even merely agree to admit the hand-writing (*l*). But notwithstanding an agreement by the attorney to admit the due execution of the specialty mentioned in the declaration, the defendant may still object on the ground of variance (*m*). So the deed may be read where it is admitted by the pleadings. In all these cases the consent of parties supersedes the necessity of the usual proof (*n*), since it is

ticeship, where the defendant did not produce it after proof of possession by him and notice, it was held, that the plaintiff might give parol evidence of the contents, without calling the subscribing witness. *Cooke* v. *Tunswell*, 8 Taunt. 450.

(*d*) *Garnons* v. *Smith*, 1 Taunt. 507.

(*e*) *Jackson* v. *Allen*, 1 Starkie's C. 74.

(*f*) A small matter will supply it. Per Holt, J., Lord Raym. 731.

(*g*) B. N. P. 254. 11 Co. 92.

(*h*) 1 Sid. 269. Gilb. Ev. 91. Tr. per Pais, 347.

(*i*) *Griffiths* v. *Williams*, 1 T. R. 610. 1 East, 568. *Young* v. *Wright*, 1 Camp. 140. But mere statements made by an attorney in the course of conversation are not admissible. *Parkins* v. *Hawkshaw*, 2 Starkie's C. 239. 1 Camp. 140. *Wilson* v. *Turner*, 1 Taunt. 398. And a mere agreement to produce a particular instrument, does not dispense with the necessity of proof when produced. *Wetherston* v. *Edgington*, 2 Camp. 94.

(*j*) 2 Sid. 269.

(*k*) *Laing* v. *Raine*, 2 B. & P. 85.

(*l*) *Milward* v. *Temple*, 1 Camp. C. 375. See B. N. P. 254.

(*m*) *Goldie* v. *Shuttleworth*, 1 Camp. 70.

(*n*) An admission signed by the obligor's attorney, acknowledging the signature of his client and of the attesting witness, is presumptive evidence of delivery. *Milward* v. *Temple*, 1 Camp. 375.

the office of the jury to decide upon those facts only which are in controversy. It has been already seen that a mere parol admission, or even an admission in Chancery (*o*), by a party of his execution of a deed, is not sufficient (*p*). Admission.

By the stat. 27 H. 8, c. 16, a bargain and sale of an estate of inheritance or of freehold, must be enrolled (*q*). And since the law requires such enrolment, it has been held in many cases that the enrolment is sufficient evidence of the lawful execution of the deed (*r*), as against all parties. Proof of by enrolment.

(*o*) 4 East, 53. 5 T. R. 366.

(*p*) *Supra*, 320. In one case, where the subscribing witness did not appear, an indorsement by the obligor on the deed was read, reciting a proviso within the deed, that it should be void on payment of a sum of money. and acknowledging the non-payment, and admitting the deed; and this was held to be proof (B. N. P. 254); but note that in this case the witness did not appear, and *qu.* whether his absence was not accounted for.

(*q*) Deeds were also enrolled at common law *pro salvâ custodiâ*. 1 Salk. 389. The enrolment of a deed under this statute, is a record. *R.* v. *Hopper*, 3 Price, 495. And therefore is not traversable in any material part, such as the date of the enrolment. 3 Price 495. Hence an examined copy of a memorial of a deed required to be enrolled by an Act of Parliament, is evidence of the instrument. Thus it has been held, that an examined copy of the memorial of an assignment of a judgment, which was required to be enrolled, was evidence of the fact of assignment. See *Hobhouse* v. *Hamilton* 1 Schoales & Lefroy, 207. In the case of *Baikie* v. *Chandless*, 3 Camp. C. 17, in an action against an attorney for negligence in the purchase of an annuity, which was void for want of a sufficient memorial, in order to prove the memorial a copy was offered in evidence, which had been examined with the instrument at the Rolls; upon the objection taken, that a copy of the original memorial which the defendant had carried in should be produced, Lord Ellenborough held, that the copy proposed was admissible. The Act required the memorial carried in to be enrolled correctly; and it was to be presumed that those concerned had done their duty under the Act. The enrolment was a sort of statutable record, and an examined copy of it admissible. In the case of *Tinkler* v. *Walpole*, 14 East, 226, the case of a ship's register was distinguished from that of an enrolment under a statute; Lord Ellenborough observed, "The case of enrolments stands on a particular statute: the statute of Anne provides, that copies of the instrument of indentures of bargain and sale, examined with the enrolment, signed by the proper officer, and proved on oath, shall have the same force and effect as the original indentures. But the Register Acts have not attributed to the registers the same effect as if the persons named therein were proved to be the owners."

(*r*) 5 Co. 54. Stile. 455. 1 Keb. 117. Salk. 280. B. N. P. 255, 256. An enrolment of a deed is not a record, because it is not the act of the Court, but only a private act of the party, authenticated in court. Gil. Law. Ev. 92. 5 Co. 74, b. But see *R.* v. *Hopper*, 3 Price, 485. All acknowledgments of deeds in K. B. are to be made on the plea side, in open court (1 Salk. 389), and the enrolment is made either upon the acknowledgment or proof of the delivery of the deed by the party. Com. Dig. Bargain and

Enrolment of deed.

The practice is admitted, but the principle doubted, in Buller's Law of Nisi Prius (*s*), both because the authority relied upon in support of such practice is the case of *Smartle* v. *Williams*, where the acknowledgment was by the bargainor, against whom the enrolment was offered in evidence, and not by the bargainee, as stated in the report in Salkeld (*t*); and besides, that the bargain and sale in that case was of a mere term, and therefore was not within the statute. But it seems that the enrolment of any deed upon the acknowledgment of a party is evidence against himself, whether the deed does or does not need enrolment, as in the case of *Smartle* v. *Williams* (*u*), of a release, and this has been the practice (*x*). The register of a conveyance in a register county, is not evidence, except as secondary evidence, where the adversary has had notice to produce the conveyance (*y*). When the deed is enrolled, the indorsement of the enrolment is evidence without further proof, because the officer is entrusted to authenticate such a deed by enrolment (*z*). But where a copy is used as secondary evidence, it must be proved to have been examined with the enrolment (*a*).

A deed purporting to be the deed of several, may be enrolled on the acknowledgment of one alone (*b*), and is sometimes enrolled

Sale, B. 6. Godb. 270. 1 Salk. 389. 3 Leon. 84; for the bargainor might die before acknowledgment. After a deed had been enrolled, it seems that a party could not plead *non est factum*, but that he might avoid the effect of it by pleading *riens passa par le fait*. (Gil. L. Ev. 93. 1 Leon. 184, 5.) And infants, feme coverts (Com. Dig. Bargain and Sale, R. 10), and strangers (ib. and Sav. 91), are not concluded by the enrolment. The indorsement of a registration in Ireland, on a deed executed there, need not be proved. *Pyne* v. *Dor*, 1 T. R. 55. See also *Smartle* v. *Williams*, 1 Salk. 281. *Garrick* v. *Williams*, 3 Taunt. 544. *Taylor* v. *Jones*, 1 Lord Raym. 746. *Baikie* v. *Chandless*, 3 Camp. C. 17.

(*s*) B. N. P. 259. 3 Lev. 387.

(*t*) 1 Salk. 281.

(*u*) It was observed by Bayley, J., in the case of *Tinkler* v. *Walpole*, 14 East, 230, that in the case of *Smartle* v. *Williams*, the deed was thirty years old; and see B. N. P 255, where it is said that if the deed need no enrolment, the enrolment will not be evidence. 5 Co. 54. Stile, 445. 1 Keb. 117. Salk. 280.

(*x*) B. N. P. 256. In *Lady Holcroft* v. *Smith*, 2 Freeman, 259, a distinction was made between deeds of bargain and sale, enrolled in pursuance of the statute, and other deeds enrolled; and the Court held, that a copy of a deed enrolled for safe custody, would not be evidence otherwise than against the party who sealed it, and all claiming under him.

(*y*) *Molton* v. *Harris*, 2 Esp. C. 549. An examined copy is evidence. *White* v. *Kilner*, 2 C. & P. 289.

(*z*) The production of a deed with the memorial indorsed, is sufficient proof of the enrolment. *Compton* v. *Chandless*, 4 Esp. C. 18. B. N. P. 229.

(*a*) B. N. P. 220. Peake's Ev. 33.

(*b*) B. N. P. 260. Sty. 462.

upon the acknowledgment of a mere nominal party, whose name is introduced for the very purpose, the parties themselves residing abroad (*c*). It would, therefore, be manifestly inconsistent with the plainest principles of justice to admit such enrolments to be evidence against those who have not acknowledged them, without proof of the execution of the deeds; as, for instance, to receive a deed acknowledged by a bare trustee, without proof of execution by the owner of the inheritance (*d*). And although it appears that an opinion once prevailed to this effect, yet it seems to be so destitute of principle, that it is not probable that it would now be acted upon.

Enrolment of, when evidence.

By the stat. 10 Ann. c. 18, s. 3 (*e*), where in any pleading any indenture of *bargain and sale* enrolled shall be pleaded with a *profert in curiâ*, the person so pleading may produce a copy of the enrolment of such bargain and sale; and such copy, examined and signed by the proper officer, and proved upon oath to be a true copy, shall be of the same force as the indentures of bargain and sale would be.

It is sufficient for a party in ejectment on an annuity deed to prove the deed without proving the enrolment, and it lies on the party who insists on the want of enrolment to prove the negative (*f*). It seems that a bargain and sale and enrolment of lands conveyed to a charity, will not be presumed from long enjoyment (*g*).

Although it has been held that a deed to lead the uses of a fine requires no proof (*h*), on account of the strong presumption that the parties meant to convey the lands to some uses or other; yet in a subsequent case all the Judges were of opinion that such a deed must be proved (*i*). So it seems that the counterpart of

Deed to lead the uses of a fine.

(*c*) Salk. 389.

(*d*) B. N. P. 256.

(*e*) This provision was made for supplying a failure in pleading or deriving title to lands, conveyed by such deeds of bargain and sale, where the original indentures are wanting, which often happens, especially where divers lands, &c. are comprised in the same indenture, and afterwards devised to different persons. See 14 East, 231, 1 Schoales & Lefroy, 207. Before this statute an enrolment could not have been pleaded, although a deed had been exemplified under the great seal; it was necessary to make a *profert* of the deed itself under seal. Co. Litt. 225, b.; and see *Oliver* v. *Gwyn*, Hard. 119.

(*f*) *Doe* v. *Bingham*, 4 B. & A. 672. *Doe* v. *Wilde*, 3 Camp. 7. As in the case of a proviso in an Act of Parliament.

(*g*) *Doe* v. *Waterton*, 3 B. & A. 149.

(*h*) B. N. P. 255. *Glasscock* v. *Warren*, B. N. P. 255.

(*i*) *Griffith* v. *Moore*, B. N. P. 255.

such a deed is not admissible in evidence without the usual proof (*k*).

Recital in a deed.

It has been held that a recital of a deed in a subsequent deed is evidence of the former against a party to the latter. The recital of a lease in a deed of release is evidence of the lease against the releasor, and those who claim under him (*l*); for it operates by way of admission; and therefore such a recital is not evidence against a stranger to the second deed (*m*).

An intrinsic objection will not preclude the reading.

No objection arising intrinsically from the contents of an instrument can preclude the reading of it, for till it has been read the Court cannot judge of the objection (*n*). The deposition of one Cowden was offered in evidence, and proof was given of the death of one Cowden who lived at Bow; and Reynolds, C. B. allowed the deposition to be read upon this evidence, because it

(*k*) B. N. P. 255; Salk. 287, *contra*.

(*l*) *Ford* v. *Lord Grey*, 6 Mod. 44. S. C. Salk. 285. *Cragg* v. *Norfolk*, 2 Lev. 108, 109. *Fitzgerald* v. *Eustace*, Gilb. L. Ev. 100; Hardr. 123. Mr. Peake, in his Law of Evidence, p. 109, 5th ed., states, that although in the above cases it is laid down, that as against a party to the reciting deed, such deed is evidence of the deed recited in it; yet there are others in which this seems to be considered as secondary evidence, and admissible only when the first deed was shown to be lost, or some reason given for not producing the regular and best evidence of it; and he adds, "such is now the general received opinion of the Profession." See Vol. II. tit. ADMISSIONS.—NOTICE.—RECITAL. Com. Dig. Ev. B. 5. In *Ford* v. *Grey*, 1 Salk. 285, it was ruled, that the recital of a lease in a deed of release, is good evidence of the lease, against the releasor, and those who claim under him. It seems that a recital is always evidence as against the party in a reciting lease, where it operates by way of estoppel, although not against another party where it cannot so operate. See *Cragg* v. *Norfolk*, 2 Lev. 108. 2 Vent. 171, 172. Roll. 678, l. 40. And therefore the recital, in a grant of an office, of a former grant, on the determination of which the present grant was to commence, is no evidence in favour of the grantee of the former grant. Ib. But if one relies on a patent to prove a former grant which it recites, it is also evidence to prove a surrender which it also recites. 2 Vent. 171. Com. Dig. Ev. B. 5. An averment, in a declaration against a master for not inserting the true consideration in an apprentice deed, that *A. B.*, by a certain indenture, put himself apprentice to the defendant, is proved by the production of the part executed by the defendant, in which it is recited that *A. B.* put himself apprentice, &c. *Burleigh* v. *Stibbs*, 5 T. R. 465.

(*m*) Ibid.

(*n*) Where an objection was taken to the reading of an entry from a corporation-book, on the ground that it contained many things not relating to the corporation, Lord Hardwicke said that as the objection was derived from the book itself, it was impossible to say that it should not be read; but that if any material objection should appear to the book on reading, he would mention it to the jury on summing up. *Moore* v. *Mayor of Hastings*, 10 St. Tr. App. 142.

did not appear, otherwise than by the deposition, that Cowden lived elsewhere than at Bow, and therefore the objection, that the Cowden whose death was proved was not the Cowden who made the deposition, was incomplete unless it was coupled with the deposition (*o*). But he said he would leave it to a jury to determine whether the man whose death was proved was the man who made the deposition (*p*). If upon the reading it appear that some part is not properly admissible in evidence, as if it rest upon mere hearsay, or if an accomplice in his confession charge a confederate, the Court will, upon summing up, advise the jury to leave the objectionable part out of their consideration (*q*).

It is also a rule that no intrinsic matter will obviate an extrinsic objection to the reading of the document (*r*).

The whole of an entire document to be read.

It is an universal rule, that where any document is produced and read by one party, the whole is to be read, if the adversary require it (*s*); for unless the whole be read there can be no certainty as to the real sense and meaning of the entire document. Upon the same principle, where one document refers to another, the latter is, for the purpose of such reference, incorporated with the former, and may be read to explain it; as where the deposition of the captain of a ship refers to the log-book (*t*); or a letter produced upon notice refers to other letters (*u*); or an interrogatory upon the examination of a witness refers to a letter (*x*). A written answer made by a party to a question proposed to him,

(*o*) *Benson* v. *Olive*, 1 Ford's MS. 146.

(*p*) Ibid.

(*q*) See Lord Hardwicke's observations, 10 St. Tr. App. 142. *Moore* v. *The Mayor of Hastings*; and of Wood, B. in *Bullen* v. *Mitchell*, 2 Price, 405.

(*r*) 1 Ford's MS. 146. *Adamthwaite* v. *Singe*, 1 Starkie's C. 183.

(*s*) *Earl of Bath* v. *Battersea*, 5 Mod. 9. 3 Salk. 153. 1 Ford's MS. 146. Doug. 757. Andr. 258. *Supra*, 291. In equity, when a passage is read from the defendant's answer, all the facts stated in that passage must be read; and if it refer to facts stated in any other passage, that must be read for the purpose of explanation; but if new facts be contained in such other passage, they are to be read for the purpose of explanation only. *Bartlett* v. *Gillard*, 3 Russ. 157.

(*t*) *Falconer* v. *Hanson*, 1 Camp. 171. *Johnson* v. *Gilson*, 4 Esp. C. 21. *Wheeler* v. *Atkins*, 5 Esp. C. 246.

(*u*) *Johnson* v. *Gilson*, 4 Esp. 21; *secus*, if the letter merely state that others are enclosed under its cover.

(*x*) *Wheeler* v. *Atkins*, 5 Esp. C. 246; and note, if the interrogating party refuse to produce the letter, he must abandon the whole of the interrogatories. Where, however, a book of accounts, or shop-book, is produced in evidence at the request of one of the parties, the reading an entry from it does not entitle the other party to read all the other entries in the book, but only such as relate to the same particular subject-matter. By Abbott, L. C. J., *Catt* v. *Howard*, 3 Starkie's C. 6; but see *Wharham* v. *Routledge*, 5 Esp. C. 235.

The whole is to be read.

cannot be read without showing the question to which it relates (*y*), not as evidence of the fact, but to explain the answer.

It is also a general rule, that whenever a party makes a statement or admission, whether it be oral or written, which is afterwards used against him as evidence of the stated or admitted fact, the whole of the contemporaneous statement or declaration must be received; the part which operates for him, as well as that which makes against him, is admissible evidence to prove the existence of the fact. Thus where the defendant stated an account, in which he admitted the plaintiff's claim to a certain extent, but stated also a counterclaim for a sum specified, it was admitted that the plaintiff on this evidence was entitled to recover no more than the balance (*z*).

The principle does not apply where another entry happens to be made upon the same paper or parchment, wholly distinct from that which the party reads in evidence (*a*).

The case where a document is read in order to show the incapacity of a witness furnishes an exception to this rule; for the testimony of the witness contained in an instrument which disqualifies him as a witness altogether, is obviously inadmissible (*b*).

Where a party is under the necessity of producing and proving a writing in order to connect a defendant with the act of an agent, the recital of the authority under which the principal assumes to act will not relieve the latter from the necessity of proving that authority in his own justification by the proper evidence (*c*).

(*y*) *Rex* v. *Picton*, Howell's St. Tr. vol. 30, p. 466. But an answer in Chancery is evidence as an admission under the defendant's hand, where the bill is proved to have been lost. *Hart* v. *Harrison*, Mich. 3 G. 2, 1 Ford's MS. 145.

(*z*) *Randle* v. *Blackburn*, 5 Taunt. 245. So where, in order to prove a sufficient memorandum of an order for goods, within the 17th section of the Statute of Frauds, a letter of the alleged purchaser was read in evidence which admitted the order, but which also asserted that the goods had not been delivered in time; it was held that parol testimony was inadmissible to prove that no time was mentioned. *Cooper* v. *Smith*, 15 East, 103.

(*a*) See *Adey* v. *Bridges*, 2 Starkie's C. 189, where, in an action against a sheriff for a false return, it was held by Holroyd, J., that the plaintiff having given in evidence a copy of the writ, the defendant was not entitled to have his return read, which formed no part of the document which the plaintiff gave in evidence.

(*b*) Bac. Ab. Ev. 622.

(*c*) *Grey* v. *Smith*, 1 Camp. 387. Vol. II. 809. *Stanley* v. *Fielden*, 5 B. & A. 425. So a plaintiff in a tithe suit in the Exchequer, who reads part of the defendant's answer to show what the issues are, is not concluded by the depositions contained in such answer. *Kempson* v. *Yorke*, 8 Price, 13.

It is a rule equally general with the former, that in a court of law it is for the jury to consider what credit is to be attached to the whole or part of any particular statement, whether oral or written (*d*), although a rule less flexible seems to have been adopted in equity (*e*). It has also been seen that this rule does not make that evidence which has an insufficient legal foundation; as for instance, where that which is stated in the document professes to be the mere belief or opinion of the party, or nothing more than hearsay.

Jury to judge of the credit due to the whole or part.

OF PROOFS.

HAVING thus touched upon the general principles which regulate the admissibility of evidence, and also upon the nature and qualities of the different instruments of evidence, a more interesting branch of the subject, the application of these principles and instruments to the proof of issues generally and particularly, is now to be considered.

General division.

It is to be recollected that every verdict is compounded of law and fact: of the facts, as ascertained by the finding of the jury; of the law, as expounded by the Judges, with relation to the evidence, and applied by the jury to the facts; and the trial is the process by which the facts are thus ascertained and the law applied.

In this proceeding it is the business of the parties to supply the necessary evidence; it is the province of the Court to pronounce on the legal effect of the evidence; and it is the duty of the jury to decide upon the facts, and to apply the law (*f*). Hence naturally result three distinct subjects for consideration: and first, as to the evidence to be supplied by the parties.

Onus probandi.

This branch of the division suggests two principal questions

(*d*) In the case of *Bernon* v. *Woodbridge*, Doug. 757, the whole of the plaintiff's case rested on the testimony of one witness. Lord Mansfield said that the jury might credit what the witness said for the plaintiff, although they disbelieved what he stated for the defendant; but that if they did not believe his testimony for the plaintiff, the rest of his testimony was clearly immaterial, for he was not to be believed at all, and so there was no case proved by the plaintiff. Vide *supra*, 286, and *Partington* v. *Butcher*, Vol. II. 480.

(*e*) *Supra*, 286. Doug. 757.

(*f*) Or by a special verdict to find the facts, so as to enable the Court afterwards to apply the law.

Onus probandi.

for inquiry: first, upon whom the proof of an issue or fact is incumbent; secondly, as to the nature, quality and quantity of the evidence to be adduced, in general and in particular.

1st. Upon whom the proof is incumbent.

The general rule upon the subject is that which natural reason and obvious convenience dictate; that the party who alleges the affirmative of any proposition shall prove it(*g*); for a negative does not admit of the simple and direct proof of which an affirmative is capable. And this is conformable with the maxim of the civil law, " *ei incumbit probatio qui dicit, non qui negat.*" And therefore upon a penal action for sporting without a qualification, it is incumbent on the defendant to prove his qualification (*h*).

Upon a plea of set-off on a bond conditioned for the payment by the plaintiff of an annuity to a third person, the *onus probandi* is on the plaintiff (*i*).

On the plea of *plene administravit*, on which issue is joined, it is for the plaintiff to prove assets (*j*). So where all the issues were whether *A. B.* was of sound memory, the soundness of memory being alleged by the defendant, it was held that he was entitled to begin (*k*).

In an action on a policy of insurance on goods, the plaintiff having proved a barratrous act on the part of the master, it was

(*g*) B. N. P. 297. Vin. Ab. Ev. (S. a.) Litt. R. 36. Gilb. L. E. 148. *Probatio incumbit ei qui allegat negantis autem per rerum naturam nulla est probatio.* Dig. Lib. 22, tit. Probat. See *Catherwood* v. *Chabaud*, 1 B. & C. 150; where it was held, that a defendant, who pleaded an agreement between the plaintiffs and defendant, conditional on its being assented to by all the creditors of the defendant, was bound to prove the assent of all the creditors. On an agreement by defendant to pay 100 *l.* if the plaintiff would not send herrings for one twelvemonth to the London market, and in particular to the house of *J.* and *A. M.*; the plaintiff proved he had sent no herrings during the twelvemonth to the house of *J.* and *A. M.*; held sufficient to entitle him to recover; no proof being given that he had sent herrings within that time to the London market. *Calder* v. *Rutherford*, 3 B. & B. 302.

(*h*) See *R.* v. *Stone*, 1 East. 150, per Lord Mansfield; *Spiers* v. *Parker*, 1 T. Rep. 144; 1 Bos. & Pul. 468; 1 Burr. 148. 153; and it makes no difference whether the proceeding be by action, or by information before a magistrate. *R.* v. *Turner*, 5 M. & S. 206. See 1 East, 653; 1 Burr. 148. 153; 3 B. & P. 307. Where a party before a justice admits the trading as a hawker and pedlar, it is incumbent on him to prove that he had a licence. *R.* v. *Smith*, Burr. 1475.

(*i*) *Penny* v. *Foy*, 8 B. & C. 11.

(*j*) Vol. II. 321. But see *The Dean and Chapter of Exeter* v. *Treeinnard*, Dyer, 80, pl. 53; Vin. Ab. tit. Ev. (S. a.) 1.

(*k*) *Tyrrell* v. *Holt*, 1 Barnard, 13 G. 1 Vin. Ab. Ev. 2, (S. a.) 7.

objected that it was incumbent on him also to prove that he was not the owner or freighter; but it was held that proof of the affirmative, if it were true, lay on the defendant (*l*). Onus probandi.

The proof of an allegation of deficiency lies on the party who alleges it, although it imply a negative, for this is not to prove a mere negative, but to prove an actual relation in point of magnitude or value. Thus upon an issue, whether land assigned for payment of a legacy was deficient in value, it was held that the party who alleged that it was deficient was forced to prove it (*m*).

It is a general rule that the *onus probandi* lies upon the party who seeks to support his case by a particular fact of which he is supposed to be cognizant (*n*). A defendant cannot set off cash-notes of the bankrupt in an action by the assignees, without proof that they came into his possession before the bankruptcy (*o*). A party who pleads his infancy must prove it (*p*). And where to a plea of infancy the plaintiff replies a promise after the defendant had attained his age, it is sufficient for the plaintiff to prove the promise, and it lies on the defendant to show that he was not of age at the time (*q*).

It is sufficient to prove a fact from which the rest of the affirmative allegation, in the absence of any other evidence, is a presumable consequence. Thus, upon an allegation that the plaintiff's goods were unlawfully seized, it is sufficient to prove a seizure of the goods, which, until the contrary appear, must be taken to be unlawful (*r*).

But where the negative involves a criminal omission by the party, and consequently where the law, by virtue of the general principle, presumes his innocence, the affirmative of the fact is also presumed. Where the negative involves a criminal omission.

And therefore, upon an information against Lord Halifax for refusing to deliver up the rolls of the Auditor of the Exchequer,

(*l*) *Ro* v. *Hunter*, 4 T. R. 33.

(*m*) *Berty* v. *Dormer*, 12 Mod. 526. Where issue is upon the life or death of a person, the proof lies upon the party who asserts the death. *Wilson* v. *Hodges*, 2 East, 312. But where *A.* gave to *B.* a policy to receive 100 *l.* if Saragossa were not in the hands of king Charles on such a day, Parker, C. J. held, that it lay on the defendant to prove that Saragossa was in the hands of king Charles on that day. See *Calder* v. *Rutherford*, 3 B. & B. 302.

(*n*) *Per* v. *Ashurst*, J. 6 T. R. 57.

(*o*) *Dickson* v. *Evans*, 6 T. R. 57.

(*p*) *Berty* v. *Dormer*, 12 Mod. 526.

(*q*) *Borthwick* v. *Carruthers*, 1 T. R. 648; and so ruled by Holroyd, J. in *Bates* v. *Wells*, Lanc. Sp. Ass. 1822.

(*r*) *Aitcheran* v. *Maddock*, Peake's C. 162. And see *Evans* v. *Birch*, 3 Camp. 10; Vol. II. tit. PAYMENT.

Where the negative involves a criminal omission.

the Court of Exchequer put the plaintiff upon proof of the negative (*s*). In an action for putting combustible matter on board the plaintiff's ship, without giving notice of its contents, whereby the ship was destroyed, it was held that the plaintiff was bound to prove a negative which was essential to his case, viz. the want of notice (*t*). Thus also, in a suit for tithes in the Spiritual Court, where the defendant had pleaded that the plaintiff had not read the Thirty-nine articles, the Court required him to prove the negative (*u*). So in *The King* v. *Hawkins*, where the objection, upon an information in the nature of a *quo warranto*, was, that the defendant had not taken the sacrament within a year, the Court held that the presumption was that he had conformed to the law (*x*). Where a woman, twelve months after her husband had last been heard of, married again, and the husband had never afterwards been heard of, upon the question as to the settlement of the children of the second marriage, the Court held that the justices had done right in presuming the legitimacy of the children, in the absence of any proof, except the usual presumption, that the first husband was living at the time of the second marriage (*y*).

So where the question arises, in a criminal case, whether the prisoner's examination was taken down in writing before the magistrate, under the statutes of Philip and Mary, it is incumbent on the prosecutor to give negative evidence to show that it was not taken down, for otherwise it will be presumed that the magistrate did his duty in taking the examination in writing, as the statute directs (*z*). And, in general, whenever the law presumes the affirmative, it lies on the party who denies the fact to prove the negative (*a*). As where the law raises a presumption as to the continuance of life (*b*); the legitimacy of children born

(*s*) B. N. P. 298.

(*t*) *Williams* v. *The East India Company*, 3 East, 192.

(*u*) *Monke* v. *Butler*, 1 Roll. R. 83. See also *R.* v. *Rogers*, 2 Camp. 654. *Powell* v. *Millbank*, 2 Bl. R. 831.

(*x*) 10 East, 211, and per Bayley, J. *R.* v. *Twyning*, 2 B. & A. 388. Upon an indictment under the stat. 42 G. 3, c. 107, s. 1, which makes it felony to course deer in any inclosed ground without the consent of the owner, it was held, that it was necessary to prove the negative of a consent by the owner. *R.* v *Rogers*, 2 Camp. C. 654. But there the negative was part of the description of the offence. See Vol. II. tit. Quo Warranto.

(*y*) *R.* v. *Inh. of Twyning*, 2 B. & A. 386. See Vol. II. tit. Presumptions.—Settlement.

(*z*) Vol. II. 29.

(*a*) Gilb. L. Ev. 148, cited by Lord Ellenborough, 1 East, 200.

(*b*) Vol. II. tit. Death—Pedigree.

in wedlock (*c*); the satisfaction of a debt (*d*). And in general, where it has been shown that the case falls within the scope of any general principle or rule of law, or the provision of any statute, whether remedial or even penal, it then lies on the opposite party to show by evidence that the case falls within an exception or proviso (*e*).

Arguments of counsel.

In civil, and also in some criminal cases (*f*), the party, in addition to the evidence which he adduces (the *probatio inartificialis* of the Roman law (*g*),) is entitled to the aid of the comments and arguments of counsel, the *probatio artificialis*, as applied to the evidence in general. The counsel for the plaintiff has an opportunity for such comments in stating his case to the jury (*h*). When the plaintiff's case has been concluded, the defendant's counsel in his turn observes upon the evidence given, and also on that which he intends to adduce; and after the defendant calls witnesses: his counsel addresses the jury upon the case to be made out for the defendant, and upon the contradiction to be given to the plaintiff's witnesses hypothetically, upon the supposition that all which is stated will be proved; he stands therefore in a most precarious and hazardous situation with reference to the plaintiff's counsel, who is entitled to reply, and has the opportunity of commenting on the whole case, not conditionally and hypothetically, subject to the contingency that the very foundation on which his arguments rest may sink from under him, but with a full and certain knowledge of all the evidence in the cause. This practice not unfrequently induces a defendant's counsel to waive his defence by witnesses, and to rely on the infirmity of the plaintiff's case, rather than give his counsel the opportunity of replying. This is a practice attended with considerable inconvenience, inasmuch as it frequently excludes from the view of the Court and jury circumstances which might materially assist them in attaining to a correct conclusion in law and in fact.

(*c*) Vol. II. tit. BASTARDY.

(*d*) Vol. II. tit. PAYMENT, 597.

(*e*) *Doe* v. *Bingham*, 4 B. & A. 672, *supra*. *Doe* v. *Hawthorn*, 2 B. & A. 101. Where a plaintiff, for the purpose of avoiding a conveyance of land, has shown it to be for a charitable use, it lies on the defendant to bring himself within the exception. 2 B. & A. 101.

(*f*) *i. e.* in all cases of misdemeanor, and also cases of treason within the statute 7 W. 3, c. 3, s. 1.

(*g*) Quinctil. L. 5, c. 8. According to the practice of the ancient Roman law, the advocate was entitled to make a perpetual running comment upon the testimony of the witnesses, and the documentary evidence as it was adduced. Formerly, in our own courts, the junior as well as the senior counsel addressed the jury; and the form is still preserved in trials for high treason.

(*h*) The counsel for a plaintiff labours under a disadvantage in commenting upon his evidence before it has been given; it is frequently hazardous to lay much stress upon facts which afterwards may not be proved, and it not unfrequently happens that the proof varies so much from the statement as to render his comments and inferences irrelevant, and sometimes even injurious. The same observations apply to the defence, where the

Arguments of counsel.

fendant has exhausted his evidence, the plaintiff's counsel replies. And thus each party has an opportunity of commenting upon the whole of the evidence. If the defendant's counsel merely comment on the plaintiff's case, and adduce no evidence (*i*), the plaintiff's counsel cannot reply, for he has already been heard. Where the plaintiff adduces fresh evidence in contradiction of some new facts stated by the defendant's witnesses, it is unnecessary to preface such evidence by observations; for after the defendant's counsel has observed upon the evidence in contradiction, the plaintiff's counsel is entitled to a general reply. And in such case the defendant's counsel is not entitled to reason upon the whole of the evidence, but on the subject of contradiction only, having already made his observations on the supposition that his witnesses would be believed, and his case established.

Order of proof where there are several issues.

Where there are several issues, the proof of some being incumbent on the plaintiff, and of others on the defendant, it is usual for the plaintiff to begin, and to prove those which are essential to his case, and then the defendant does the same, and afterwards the plaintiff is entitled to go into evidence to controvert the defendant's affirmative proofs; the defendant's counsel is entitled to a reply upon such evidence, in support of his own affirmatives, and the plaintiff's counsel to a general reply. Where, however, there are issues involving different transactions, the proof of one of which is incumbent on the plaintiff, and the proof of the other is incumbent on the defendant, some difference has obtained in practice (*k*), on the question whether the plaintiff be bound to go into evidence, as part of his own case, to negative the defendant's case, as well as affirmatively to establish his own. According to the later authorities he is not bound to enter on any such negative evidence in the first instance, but may waive his proof until the defendant has exhausted his affirmative evidence

(*i*) But if the defendant's counsel state facts which he proposes to prove, but afterwards declines to call witnesses, the prevalent opinion seems to be, that the plaintiff's counsel is entitled to reply. *R.* v. *Bignold*, 1 Dow. & Ry. C. 59. In the case of *Crerer* v. *Sodo*, 1 Mood. & Mal. C. 86, Lord Tenterden, C. J. held, that the allowing a reply in such a case was discretionary on the part of the Judge.

(*k*) See *Rees* v. *Smith*, 2 Starkie's C. 31, where in an action of trespass, *q. c. f.* &c., to which the defendant had pleaded the general issue, and pleas of justification, Lord Ellenborough stated the rule to be, that where by pleading or by reason of notice the defence was known, the counsel for the plaintiff was bound to open the whole case in chief, and could not proceed in parts. And his lordship held the same doctrine in the case of bills of exchange, where notice had been given of the intention to dispute the consideration. *Delaney* v. *Mitchell*, 1 Starkie's C. 439. See also *Spooner* v. *Gardiner*, 1 Ry. & Mood. C. 84.

in support of his own case. But it is also laid down, that if the plaintiff elect to enter at all into such negative evidence in the first instance, he must then produce the whole of that evidence, and that he cannot in such case be permitted to adduce negative evidence generally in reply. Where to a declaration for a libel the defendant pleaded the general issue, and several pleas of justification, it was held that the plaintiff might if he chose go into evidence in the first instance to negative the plea of justification, but that he could not go into part of such evidence in the first instance, and adduce the remainder in reply to the defendant's case (*l*). And although, where there is but one transaction for inquiry, the plaintiff cannot split his case, and go into part in the first instance, and reserve the remainder by way of reply, although there be in fact several issues, as where in an action of assault and battery the defendant pleads not guilty, and *son assault demesne*; yet, if in fact the defence consist of distinct collateral matter, the negative of which requires no proof from the plaintiff in the first instance, it seems, that although the plaintiff had notice of the defence intended to be set up, it is not necessary to go into any evidence in answer to that defence, until the defendant has, by his proof, called upon him for a reply; this appears to be a matter of practical convenience, subject to the discretion of the Court (*m*). It is possible that the defendant may not be able to establish any case, and thus time may be saved by postponing the plaintiff's reply; besides, until the defendant has adduced such evidence, it cannot be known with any certainty to what points the plaintiff is to adduce his evidence in reply.

Order of proof where there are several issues.

Where the lessor of the plaintiff claimed as heir at law, and the defendant as devisee, and the plaintiff proved his pedigree and closed his case, and the defendant opened a new

(*l*) *Brown* v. *Murray*, 1 Ry. & Mood. C. 254, cor. Lord Tenterden, C. J. His lordship had previously ruled to the same effect in *Sylvester* v. *Hall*, Sitt. after Trin. July 1825; where, to an action for trespass and false imprisonment, the defendant had pleaded the general issue, and also several pleas in justification.

(*m*) Lord Tenterden, C. J. has adopted this course, and allowed a plaintiff to give evidence, in answer to a defence in an action on a bill, that there was no consideration, after notice of the intended defence. Sitt. after Hil. 1820, at Westminster; provided no suspicion has been cast on the plaintiff's title by cross-examination of the plaintiff's witnesses. 1 Ry. & Mood. C. 255. Chitty on Bills, 6th ed. 401. See Vol. II. tit. Bills of Exchange. *Spooner* v. *Gardiner*, 1 Ry. & Mood. C. 84. Lord Ellenborough usually required the plaintiff under such circumstances to go at once into the whole of his case.

Order of proof.

case, which the plaintiff answered by evidence; it was held, that the defendant was entitled to the general reply (*n*). From the report of this case it appears that the whole case went to the jury on the defendant's title as devisee; the lessor's title as heir being admitted. The title being once admitted, the effect as to the order of proof, seems to be the same as if it had not been disputed at all; and consequently the whole issue lying upon the defendant, he would be in the same situation with a plaintiff in ordinary cases. And in general, where the proof lies upon the defendant alone, the order of proof is reversed, and his counsel is entitled to a reply. As where the lessor of the plaintiff in ejectment claims under a will, and the defendant claiming under a codicil, admits the will (*o*). Or where, in ejectment, the lessor of the plaintiff claiming as heir at law, the defendant who claims under a will admits the heirship (*p*). Where the defendant brings evidence to impeach the plaintiff's case, and also sets up an entire new case, which, again, the plaintiff controverts by evidence, it seems that the defendant is entitled to a reply by counsel, confined to the new case set up by him; for upon that relied upon by the plaintiff, his counsel has already commented on the opening of the defendant's case; and that the plaintiff is entitled to a general reply.

Onus probandi, damages.

The defendant will be entitled to begin, where the *onus probandi* lies upon him, notwithstanding the technical form of the pleadings, and although, as it seems, the proof of the amount of his damages lies upon the plaintiff.

Where in an action of trespass *quare clausum fregit*, the defendant, as to the force and arms, and whatever is against the peace, &c. pleads not guilty; and as to the residue, pleads

(*n*) *Goodtitle d. Revett* v. *Braham*, on a trial at bar; 4 T. R. 497. But where the plaintiff in such a case is put to proof of his pedigree, it seems to be clear that he may, at his election, go into proof to controvert the defendant's supposed case, and he would then be entitled to the general reply.

(*o*) *Doe d. Corbett* v. *Corbett*, 3 Camp. 568.

(*p*) *Fenn* v. *Johnson*, cited 1 Mood. & Mal. C. 168 (a). Adams on Eject. 2d edit. 256, n., where Le Blanc, J. and Wood, B. so ruled on different occasions. But on another occasion, Gibbs, J. held, that the admission did not give the defendant the right to begin. Where each party claimed as heir-at-law, and the defendant, if legitimate, was clearly heir, it was held (by Vaughan, B.) that an admission by him, that unless he were legitimate, the lessor of the plaintiff was the heir-at-law, did not entitle the defendant to begin.

a justification under a right of way, the defendant is entitled to begin and to reply (*q*). Justification.

So in an action for a libel, where the only pleas are pleas alleging facts in justification, on which issues are joined (*r*). Or trespass, where the only plea consists of matter of justification, alleging an act of bankruptcy to have been committed by the plaintiff, on which issue is joined (*s*).

Where issue is taken on a plea in abatement, the proof of the affirmative lies on the defendant, and it seems that in principle the latter ought to begin, for the question as to damages does not arise until the issue has been disposed of; the practice, however, on this point, has not been uniform (*t*). Abatement.

Upon an appeal against an order of removal it is incumbent on the respondents to prove their case, by establishing a settlement in the appellant's parish. Upon an appeal against a poor's-rate, on the ground that the appellant has no rateable property within the parish, the *onus* is on the respondents to prove that he has such property (*u*) there; but if the appellant object merely to the quantum of the rate, he is to prove the inequality of such rate (*w*). Upon an appeal against an order of bastardy, the respondents must begin (*x*). Appeal.

It lies on a defendant who seeks to bring a plaintiff within an Act which, if the defendant resided within a particular district, subjects the plaintiff to a nonsuit, to prove his residence at the time of the action brought, by particular evidence of the fact; general evidence of recent residence there is not sufficient (*y*).

Where there are several issues on pleas by different defendants, and where one will decide the whole case, but the other will not, the former ought to be tried first. As where one pleads in abatement, and the other pleads to the action (*z*); or where one

(*q*) *Jackson* v. *Hesketh*, 2 Starkie's C. 520, per Wood, B. and Bayley, J.; the general issue had been pleaded originally, but had been withdrawn during the assizes (the cause was in the county palatine court), for the purpose of giving the defendant's counsel a right to reply. S. P. *Hodges* v. *Holder*, 3 Camp. C. 366.

(*r*) *Cooper* v. *Wakley*, 1 Mood. & Mal. C. 248.

(*s*) *Cotton* v. *Thurland*, 1 Mood. & Mal. C. 273.

(*t*) See *Pasmore* v. *Bousfield*, 1 Starkie's C. 296. *Ruby* v. *Howard*, 2 Starkie's C. 555. *Young* v. *Bairner*, 1 Esp. C. 103; *infra*, Vol. II. tit. ABATEMENT.

(*u*) 4 T. R. 475.

(*w*) Ibid.

(*x*) *R.* v. *Knill*, 12 East, 50.

(*y*) *Jones* v *Kenrick*, 8 B. & C. 337.

(*z*) 1 Inst. 125; Bro. Trial, pl. 1, pl. 48; 2 Rol. Ab. 627; Bac. Ab. Trial, K. But in a real action, where one pleads a plea which extends only to himself, and the other pleads a plea to the action, as that the plaintiff is a

pleads to the action, and the other a matter personal to himself (*a*); or where in trespass one pleads a release, the other not guilty, as a justification (*b*). Where there are many issues the Court will at discretion order them to be tried separately (*c*).

Statement of counsel as to the cause of action.

A plaintiff is not precluded from recovering on any demand to which he shows himself to be legally entitled, by the allegations on the record and the evidence, although his counsel may not, in opening his case to the jury, have insisted on that demand. Thus, in an action on a policy of insurance with the money counts, where the defendant showed that the risk had never commenced, it was held that the plaintiff was entitled to a return of the premium, although no claim had been made to it originally by his counsel (*d*).

It seems to be discretionary in the judge, whether, after the plaintiff has closed his case, and the defendant's counsel has commenced his address to the jury, the plaintiff's counsel can be allowed to go into a new case (*e*). In a penal action the Court will not permit a defect in the plaintiff's case to be supplied, unless it has arisen merely from inadvertence on the part of the plaintiff's counsel (*f*).

Evidence must be relevant.

2dly. As to the *nature*, *quality*, and *quantity*, of the evidence to be adduced by the parties (*g*).

In the first place, with respect to the *nature* of the evidence; as the business of trial is to ascertain the truth of the allegations put in issue, no evidence is admissible which does not tend to prove or disprove the issue joined.

Thus, in an action of trespass for a battery, the defendant cannot, under the general issue, prove that the plaintiff committed the first assault, for that is not the issue (*h*).

Must correspond with the allegations.

And as one of the main objects of pleading is to apprise the adversary of the nature of the evidence to be adduced against

bastard, it is immaterial which is tried first, for the trial of one does not dispense with the necessity of trying the other. Ib.

(*a*) 1 Inst. 124; 2 Rol. 628, pl. 7.

(*b*) Ib. And it is said that if one plead a plea which extends only to himself, on one day, and the other a plea which extends only to himself, on a subsequent day, it shall be intended that the first was first pleaded, and it shall be tried first. Bro. Trial, pl. 48; Bac. Ab. Trial, K.

(*c*) *Kemp* v. *Mackerill*, Sayer, 131.

(*d*) *Penson* v. *Lee*, 2 B. & P. 230.

(*e*) Per Le Blanc, J., 1 East, 614.

(*f*) *Alldred* v. *Halliwell*, 1 Starkie's C. 117; cor. Lord Ellenborough.

(*g*) The nature of the evidence essential to the proof of particular issues will be considered at large in Vol. II.

(*h*) See Vol. II. tit. TRESPASS, and tit. COLLATERAL FACTS.

him, it is essential to the purposes of substantial justice that such allegations should be supported by corresponding proof. And therefore, in general, every material and essential allegation, and every circumstance descriptive of its identity, must be proved as averred. Variance from the record.

The same reasons which require the cause of action or of criminal charge to be stated upon the record, require also that the allegations shall be proved; mere assertion, without corresponding proof, would be nugatory. And as such allegations and proofs are to answer certain legal purposes, it necessarily follows that it is always for the Court to pronounce whether the facts proved satisfy the allegations on the record.

As questions of variance are of daily occurrence, it may not be improper, before the decisions on the subject are noticed, to enter into a brief consideration of the principles upon which the doctrine is founded. With respect to the proof of the facts and circumstances alleged, three predicaments may occur: they are either all proved as alleged, or none of them are proved; or part are proved wholly or partially, and the rest are either not proved, or absolutely disproved or negatived. The last of these predicaments is of course the only one which can afford ground for discussion. General principles.

Now, considering that all human affairs and dealings are connected together by innumerable links and circumstances, forming one vast context, without any chasm or interruption, and undistinguished by the artificial boundaries and definitions of right and wrong prescribed by the law, it is in the nature of things impossible that a transaction detailed upon the record can be identical with the one proved, if the proof vary in the slightest particular, be it in its own nature ever so insignificant.

An act done at one day or place cannot be the same with an act done on another day, or at a different place; a robbery, where ten sovereigns were stolen, cannot be the same with a robbery where nine only were taken. It is easy, therefore, to see that to require this, as it were, *natural and absolute* identity of the allegations and proofs, would be, at the least, highly inconvenient, if not wholly impracticable. Hence it is, that an artificial and *legal identity*, as contradistinguished from a *natural identity*, must be resorted to as the proper test of variance; that is, it is sufficient if the proofs correspond with the allegations, in respect of those facts and circumstances which are, *in point of law*, essential to the charge or claim. The rules which govern the connection between the allegations and evidence must obviously result

General principles.

immediately from the principles which regulate the allegations themselves.

By the rules of law, specific remedies or punishments are annexed as incidents to certain defined combinations of circumstances. And in order to the practical application of such remedial and prohibitory definitions, it is necessary that the facts and circumstances of each individual case, corresponding with the legal definition, but amplified and particularized according to certain technical legal rules, should be detailed upon the record. And this principally with a view to the following objects: *first*, to apprise the defendant of the specific nature of the claim or charge which is made against him; and *secondly*, to enable the Court to adjudge whether the circumstances stated fall within any remedial or prohibitory law, and to pronounce the proper judgment if the facts alleged be established; and *thirdly*, to enable the parties to avail themselves of the verdict and judgment, should the same rights or liabilities be again discussed. When, therefore, in addition to the facts which are essential to the claim or charge, others are alleged which are wholly redundant and useless, the legal maxim applies, "*utile per inutile non vitiatur*;"

Mere surplusage.

and as the law did not require the superfluous circumstances to be alleged, so, although they have been improvidently stated, the law in furtherance of its object rejects them, as mere surplusage, and no more regards them for the purposes of proof than if they had not been alleged at all.

It would be nugatory to require proof of allegations which are wholly impertinent; the identity of those allegations which are essential to the claim or charge, with the proofs, is all that is material.

Thus, if it were alleged that *A.*, being armed with a bludgeon, and disguised with a visor, feloniously stole, took and carried away the watch of *B.*, the allegations that *A.* was armed and disguised, being altogether foreign to a charge of larciny, would be wholly rejected, and would require no proof on the trial (*i*).

Partial proof.

The same principle extends much further: it frequently happens that the evidence fails to prove circumstances not altogether impertinent, but which merely affect the *magnitude* or *extent* of the claim or charge; and here, although circumstances are alleged, which, if proved, would have been of legal importance, yet, although the evidence fail to establish the whole of what is alleged, the principle adverted to still operates to give

(*i*) *i. e.* on an indictment for mere larciny.

effect to what is proved, to the *extent* to which it is proved. The principles which require the cause of action or ground of offence to be stated, are satisfied: the adversary is not taken by surprise, for no fact is admitted in evidence which is not alleged against him; and the Court is enabled to pronounce on the legal effect of the part which is established as true by the verdict of the jury, and the record shows the real nature and extent of the right or liability established. Partial proof.

Thus, if *A.* be charged with feloniously killing *B.* of malice prepense, and all but the fact of malice prepense be proved, *A.* may clearly be convicted of manslaughter, for the indictment contains all the allegations essential to that charge; *A.* is fully apprised of the nature of it, the verdict enables the Court to pronounce the proper judgment, and *A.* may plead his acquittal or conviction in bar of any subsequent indictment founded on the same facts.

The same principle applies to allegations of number, quantity and magnitude, where the proof, *pro tanto*, supports the claim or charge. If a man be charged with stealing ten sovereigns, he may be convicted of stealing five; for when it is proved that he stole five, evidence is not admitted of a different offence from that charged, but of the same in legal essence, differing only in quantity, and constituting, therefore, a *natural* but no *legal* variance; no evidence is received which is not warranted by the allegations, and the party may afterwards plead his conviction or acquittal notwithstanding the variance as to number.

But the doctrine as to the sufficiency of partial proof assumes that the avidence, as far as it extends, agrees with the allegations legally essential to the charge or claim; that is, that what is proved is part of what is alleged, and differs only in quantity or extent. In other words, where an allegation is rejected *in toto*, it is assumed that the allegations are divisible, and that the averment in question may be so rejected, without destroying the *legal identity* of the charge or claim.

It is a most general rule, that no allegation which is *descriptive* of the *identity* of that which is legally essential to the claim or charge, can ever be rejected. Were it otherwise, and if proof could be admitted which varied from the record, in consequence of the omission to prove any allegation descriptive of an essential particular, it is plain that the proof would no longer agree with the cause of action, or charge alleged, to *any extent*; they would differ throughout in respect of that descriptive allegation; and as the proof would be more general than the allegations, it would no longer be partial proof of the same charge or claim, but of a Descriptive allegation.

Partial proof. Descriptive allegations.

different and more general one. As an absolute and *natural* identity of the claim or charge alleged, with that proved, consists in the agreement between them in *all* particulars, so their *legal* identity consists in their agreement in all the particulars *legally* essential to support the charge or claim; and the identity of those particulars depends wholly on the proof of the allegations and circumstances by which they are ascertained, limited and described. To reject any allegation *descriptive* of that which is essential to the charge or claim would obviously tend to mislead the adversary. The Court, in giving judgment on a general verdict, could never be sure that those facts had been proved which were essential to support their judgment; and the record would afford but very uncertain evidence as to identity, should the same matter be again litigated. For instance, if in an action for breaking the plaintiff's close, he were to describe it as abutting on the several closes *A.*, *B.*, *C.* and *D.*, these would all be allegations descriptive of that which was material, that is, of the subject-matter to which the injury was done, and a variance from any one would be fatal (*k*); for if the allegation that the *locus in quo* abutted on the close *A.* could be rejected as immaterial, the other abuttals might also be disregarded. Evidence would then be admitted of a trespass in an entirely different close; the defendant might come prepared to rebut the charge of trespass, as far as regarded the close described, but be wholly unprepared to justify an entry into any other close; and the record would afford no evidence, or, what is worse, might mislead, in case of future litigation between the same parties. So if a man were to be charged with stealing a *black* horse, the allegation of colour, although unnecessary, yet being descriptive of that which is material, could not be rejected: to admit evidence that he stole a *white* one would not be to prove a *part* of that alleged, but to prove an offence in respect of a subject-matter proved to be different.

The very omission to prove the boundaries in the former case, or the colour in the latter, would be fatal, although different boundaries, or different colour, should not be proved; for neither the trespass nor the larciny proved could be considered to be the same with that alleged, until the allegations descriptive of identity were proved, that is, whilst the proof was general, but the description special; for so long it would be possible that the subject-matter proved was wholly different from that alleged (*l*).

(*k*) *Supra*, tit. TRESPASS; 2 East, 500.

(*l*) It is otherwise where the subject-matter is identified and ascertained independently of the additional description, or where the additional de-

It seems, indeed, to be an universal rule, that a plaintiff or prosecutor shall in no case be allowed to transgress those limits which, in point of description, limitation and extent, he has prescribed for himself; he selects his own terms, in order to express the nature and extent of his charge or claim; he cannot, therefore, justly complain that he is limited by them; to allow him to exceed them would, for the reasons adverted to, be productive of the greatest inconvenience. Partial proof. Descriptive allegations.

As no allegation, therefore, which is *descriptive* of any fact or matter which is *legally essential* to the claim or charge, can be rejected altogether, inasmuch as the variance destroys the *legal identity* of the claim or charge alleged with that which is proved; upon the same principle, no allegation can be proved partially, in respect of extent or magnitude, where the *precise extent or magnitude* is in its nature descriptive of the charge or claim.

If in an action or indictment for a nuisance, the wrong be alleged to have been continued for twelve months, and proof be given that it has been continued for one month only, the variance would be immaterial, except so far as regarded the damages or punishment; for the injury or offence would in point of law be the same, whether continued for one month or for twelve; the only difference would be in point of duration.

But if a contract were to be alleged to serve for twelve months for the sum of 12 *l.*, and proof were to be given of a contract to serve for one month for the sum of 1 *l.*, the variance would be fatal; the precise time, as well as the precise sum, being essential to the contract, and descriptive of the ground of claim. For although a nuisance continued for twelve months be an offence made up of the continuance for each of the several months which make up the twelve, a contract to serve for twelve months for 12 *l.* is not made up of twelve contracts to serve for a month for 1 *l.* each month, but each is separate and distinct in point of law.

The same observations apply to prescriptions, and all other cases where precise quantities, sums, duration or extent, are in point of law essential to the identity of an entire subject-matter, and descriptive of it.

Again, as the description of facts upon the record must necessarily be finite and limited, whilst the detail of those facts in evidence must usually be attended with a multitude of particular Redundant proof.

scription is not essential to the identity of the subject-matter described; as if it were alleged that *C. D.* robbed or assaulted *A. B.*, wearing a black coat. See *Draper* v. *Garratt*, 2 B. & C. 2. *Stoddart* v. *Palmer*, 3 B. & C. 2.

Redundant proof.

circumstances connected with them, it is perfectly clear that whatever minuteness of description may be requisite in stating the claim or charge upon the record, the evidence to prove those allegations must usually be still more particular and circumstantial, and consequently that the proof of more particulars than are alleged can never be material, provided such additional particulars consist with those which are alleged. The generality of the allegations may indeed constitute a vice in the record itself, but it never gives rise to the objection of variance from the evidence, unless the subject be of so entire a nature that the matter proved, but not alleged, is inconsistent with that which is alleged, and disproves it altogether.

If a man were charged with stealing a horse, the property of *John Doe*, generally, it would be no objection that on the evidence it appeared that there were two persons of that name, the elder and the younger; for if he stole the horse of either, the allegation would be true. But if he were to be charged with stealing the horse of *John Doe*, and it turned out that the horse was the property of *John Doe* and *James Doe*, the variance would be fatal; for the interest of *James Doe*, thus proved, but not alleged, would show that the ownership was misdescribed altogether.

General inference.

The general result of these principles and inferences seems to be, that in the case of *redundant allegations* it is sufficient to prove *part* of what is alleged, according to its *legal effect*, *provided* that that which is alleged, but not proved, be neither *essential* to the charge or claim (*m*), nor *describe or limit* that which is essential (*n*); and provided also, that the facts proved be alone sufficient in law to support the charge or claim. And that *redundancy of proof* will not be material, unless that which is proved, but not alleged, *contradict or disprove* that which is alleged.

Surplusage.

In the first place, it seems that the omission to prove circumstances which are alleged, but are not essential to the claim or charge, which are mere surplusage, and might have been wholly omitted, or are merely cumulative, or which operate merely in aggravation, or affect merely the extent of damages, is not material, provided the circumstances so rejected do not operate by way of description of others which are material.

(*m*) Per Abbott, C. J., 3 B & C. 122: "It is a general rule that a variance between the allegation and proof will not defeat a party, unless it be in respect of matter which if pleaded would be material."

(*n*) See the observations of Abbott, C. J., 2 B. & A. 363.

Surplusage.

It is a general rule, that whenever an averment may be *wholly rejected* without prejudice to the charge or claim (*o*), proof is unnecessary.

Thus, where a declaration for an injury to the plaintiff's reversionary interest in land, alleged that the premises were, at the time of the injury, and *still were*, in the occupation of *A. B.*, whereas the occupation of *A. B.* had ceased previous to the commencement of the action, the variance was held to be immaterial, the possession of *A. B.* as tenant at the time of the injury being properly described (*p*). But where, in an action on the case for an injury to the reversion, the plaintiff alleged that the house was in the possession and occupation of a certain tenant thereof under the plaintiff; and the evidence was that the plaintiff was seised in fee for the use of the inhabitants of a particular parish, and that the house was occupied by paupers, under the superintendance of a person appointed by the parish; the variance was held to be fatal, for neither the poor nor the superintendant could be considered as tenants to the plaintiff (*q*).

Where the plaintiff, in an action for breach of a warranty in selling goods unfit for sale, alleged in his declaration that the defendants *knew* the goods to be unfit for sale, it was held that the allegation of knowledge, being immaterial, need not be proved (*r*).

An averment, in an action by an indorsee against the indorser of a bill of exchange dishonoured on presentment for payment, that the bill was accepted by the drawee, need not be proved (*s*).

In an action against a sheriff for taking insufficient sureties on a replevin-bond, in was alleged that the party replevying levied his plaint at the next county court, to wit, at the county court holden on, &c. before *A.*, *B.*, *C.*, &c. suitors of the court; the evidence was of a plaint levied at a court holden before *E.*, *F.*, *G.*, &c. and held to be sufficient; for the allegation that the court was held before *A.*, *B.*, *C.*, &c. was *immaterial*, and might have been altogether omitted (*t*).

So where an indictment alleged a robbery to have been committed in the dwelling-house of *A. B.*, it was held that a variance

(*o*) See the observations of Lawrence, J. in *Williamson* v. *Allison*, 11 East, 452. The rule is of course otherwise where the averment cannot be wholly rejected without also rejecting something essential to the action.

(*p*) *Vowles* v. *Miller*, 3 Taunt. 137.

(*q*) *Martin* v. *Goble*, 1 Camp. 320.

(*r*) *Williamson* v. *Allison*, 11 East, 452.

(*s*) *Tanner* v. *Bean*, 4 B. & C. 312.

(*t*) *Draper* v. *Garratt*, 2 B. & C. 2. And note, that it was observed by all the Judges that the allegation was under a *scilicet*.

Surplusage. as to the owner's name was immaterial, as it was not essential to the crime of robbery that it should have been committed in a dwelling-house (*u*). So if arson be alleged to have been committed in the night-time (*w*).

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

Where the plaintiff alleged, that before the publication of a libel by the defendant, the plaintiff's carriage came in contact with a carriage in which *E. S.* was riding, and that the accident happened without any default on the part of the plaintiff, and then alleged a publication of a libel of and concerning the accident; and upon the evidence it appeared that the accident did happen through the default of the plaintiff; it was held to be no variance so as to bar the plaintiff from recovering as to part of the libel not justified, the allegations being divisible, and the averment that the accident happened without the plaintiff's default being an immaterial circumstance (*y*).

Cumulative allegations. So where allegations are merely *cumulative*. In an action for words it is sufficient to prove so much of the words laid in any one count as are actionable (*z*).

Where an information for a seditious libel alleged that outrages had been committed in and in the neighbourhood of Nottingham, it was held the allegation was divisible, and that it was sufficient to prove that outrages had been committed 14 or 15 miles from Nottingham (*a*).

Proof of part. Where an indictment charges a defendant with composing, printing and publishing a libel, he may be found guilty of the printing and publishing only (*b*).

If an indictment for treason charge several overt acts, it is sufficient to prove one (*c*).

On an indictment for feloniously forging and causing to be forged, the prisoner may be convicted of either.

Where a declaration under the Bribery Act alleged that the bribe was to induce *White* to vote for Mr. *Lockyer* and Lord

(*u*) *Pye's case*, East's E. P. C. 785; *Johnston's case*, ibid, 786.

(*w*) *R.* v. *Minton*, East's P. C. 1021.

(*x*) 5 T. R. 162; 4 T. R. 202; 1 Saund. 135, n. 3.

(*y*) *Lord Churchill* v. *Hunt*, 2 B. & A. 685.

(*z*) *Compagnon* v. *Martin*, Bl. 794. *R.* v. *Drake*, Salk. 660; Dy. 75; Hardr. 470. *Flower* v. *Pedley*, 2 Esp. C. 491. *Secus*, where the words alleged, but not proved at all, qualify those which are proved.

(*a*) *R.* v. *Sutton*, 4 M. & S. 532.

(*b*) *R.* v. *Williams*, 2 Camp. 507. *R.* v. *Hunt*, ib. 583; 2 East's P. C. 515, 516.

(*c*) Fost. 194.

Egmont, it was held to be sufficient to prove that the bribe was to give his vote for Mr. *Lockyer* (*d*). Proof of part.

In an action by the husband for a malicious prosecution of the husband and wife, the plaintiff is entitled to recover in respect of a malicious prosecution of the wife (*e*).

In an action against the sheriff for suffering the husband and wife to escape upon an execution founded on a debt due from the wife before coverture, the plaintiff is entitled to recover, on proof that the husband alone was taken in execution, and suffered to escape (*f*).

If a plea allege two matters, either of which amounts to a justification in trespass, it is sufficient to prove one, though the whole be put in issue by the general plea of *de injuriâ* (*g*).

If the defendant avow for rent and a *nomine pœnæ* together, without alleging any demand of rent, the avowry is good for the rent, though it be ill for the penalty (*h*).

And not only may merely useless and cumulative averments be rejected, but so also may averments which are material by way of *aggravation*, provided they be not essential to support the charge or claim, or describe or limit that which is essential. As in civil cases, where matters are alleged in aggravation of trespass or slander, or other ground of action. Aggravation.

Thus, if in trespass *quare clausum fregit*, the plaintiff allege that the defendant is an inferior tradesman or dissolute person, although he fail in the proof, he is still entitled to damages for the trespass (*i*).

So on indictments for special and aggravated offences, including more general ones, if the prosecutor fail in proving the circumstances in which the aggravation consists, the defendant may still be convicted of the inferior and more simple offence (*k*).

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

(*d*) *Coombe* v. *Pitt*, 3 Burr. 1586.

(*e*) *Smith* v. *Hixon*, Str. 977.

(*f*) *Roberts & Ux.* v. *Herbert*, 1 Sid. 5; B. N. P. 299.

(*g*) *Spilsbury* v. *Micklethwaite*, 1 Taunt. 146.

(*h*) 1 Saund. 286; Hob. 153; B. N. P. 56.

(*i*) *Pallas* v. *Rolle*, Bl. 900.

(*k*) Crim. Plead. 323, 2d edit. *Macally's case*, 9 Co. 676; Co. Litt. 282, a. But where an indictment alleged that the defendant rescued goods which had been seized by the prosecutors, who were bailiffs, under a writ of *fieri facias* and warrant, and upon motion in arrest of judgment the indictment was held to be bad for not setting out the writ, the judgment was arrested, although the Court held that an indictment would have lain for the single battery. *R.* v. *Westbury*, 8 Mod. 357.

(*l*) *Bonafous* v. *Walker*, 2 T. R. 126.

Omission to prove the whole damage.

In the case of *Coombe* v. *Pitt* (*m*), Lord Mansfield said, "In penal actions, the material fact must be charged, and a fact must be proved in such a manner that all those consequences will follow the verdict which ought to attend it. But aggravations, and all circumstances that do not *vary* the offence, are out of the case as to the necessity of proving them."

So in general a variance as to the *extent* of the damages alleged is immaterial.

If a plaintiff declare on a policy for a total loss, he may recover for a partial loss (*n*).

So if a plaintiff prove part of his breach of covenant (*o*) or promise (*p*).

But here, as in all other cases, although the omission to prove that which operates merely by way of aggravation will not be fatal, yet *part* of that which is alleged, and which is sufficient to support the charge or claim, must be proved.

The plaintiff, in an action of covenant, alleged that the defendant had not treated the farm in a husbandlike manner, but on the contrary thereof *had committed waste*. The defendant pleaded that he had not committed waste, &c., and issue being taken on this plea, it was held that the plaintiff could not go into evidence to show improper treatment of the farm, short of the commission of waste (*q*).

Here it is to be observed, that as the only breach in issue was the commission of actual *waste*, a term of known legal import, acts of bad husbandry not amounting to acts of waste could not constitute *any part* of the breach in issue.

Number, magnitude, extent.

Again, a mere variance as to number, magnitude, or extent, is not material, unless the *quantum* be descriptive of the nature of the claim or charge.

If a defendant be charged with engrossing 1,000 quarters, he may be convicted on proof of having engrossed 700 quarters (*r*).

If a plaintiff declare in ejectment for a fourth part of an estate, he may recover a third of one-fourth part (*s*).

In an action of waste for cutting down trees, it is sufficient to prove that the defendant cut down part of the number alleged (*t*).

(*m*) 3 Burr. 1586.

(*n*) *Gardner* v. *Croasdale*, Burr. 904. *Nicholson* v. *Croft*, Burr. 1188; Bl. 198. And see *Goram* v. *Sweeting*, 2 Saund. 205. See also *Stevens* v. *Whistler*, Vol. II. tit. TRESPASS.

(*o*) Burr. 1907; Bl. 200.

(*p*) Burr. 914.

(*q*) *Harris* v. *Mantle*, 3 T. R. 307.

(*r*) *Vare* v. *Austen*, Lane, 59.

(*s*) 1 Sid. 239; 1 Burr. 330.

(*t*) 2 Roll. Ab. 706; Co. Litt. 282, a.; Hob. 53.

So in an action to recover double the value of goods fraudulently removed to avoid a distress for rent, the *quantum* of rent alleged to be due is immaterial (*u*). Sums, &c.

If a defendant avow for half a year's rent in arrear, he will be entitled to a verdict, though he prove but a quarter's rent in arrear (*x*).

Proof of the tender of a larger sum will support an allegation of the tender of a smaller sum (*y*).

On an indictment for taking illegal brokerage, *i.e.* more than 10*s.* in the pound, it is sufficient to prove that the defendant did in fact take more, without proving the precise excess as alleged, although it be alleged without a *videlicet* (*z*).

So on an indictment for extortion, alleging that the defendant extorted 20*s.*, it is sufficient to prove that he extorted 1*s.* (*a*).

In debt for using a trade without having served an apprenticeship, it was held that the whole time laid in the declaration need not be proved; it being alleged that the defendant forfeited 40*s.* for every month (*b*).

In an action of debt under the stat. 4 G. 2, c. 28, for double the yearly value of land held over (*c*), or for treble value for not setting out tithes, under the stat. of Ed. 6 (*d*), a variance in the value is immaterial, the action not being for a precise sum, but for a sum in proportion to the value or damage found by the jury.

In actions of trespass and replevin, if the defendant succeed in establishing his justification to the smallest extent in point of number or quantity, he will be entitled to a verdict, although a trespass be shown to a much greater extent (*e*).

The position, that a mere variance in point of extent or magnitude is not material, assumes the *divisibility* of the subject- Divisibility of averments.

(*u*) *Gwinnett* v. *Phillips & others*, 3 T. R. 643.

(*x*) *Harrison* v. *Barnby*, 5 T. R. 248. *Forty* v. *Imber*, 6 East, 434; 1 Saund. 285; Moor, 281; Salk. 580; B. N. P. 56. *Secus*, if he has title to two undivided parts of the rent only. Ibid. *Supra*, 1296. But in stating a demise, he cannot narrow the rent. Where the plaintiff declared in debt for rent, stating a lease rendering 15*l.* per annum, and proved a lease rendering 15*l.* and three fowls, the variance was held to be fatal. *Sands* v. *Ledger*, Ld. Raym. 792.

(*y*) Vol. II. TENDER, 779.

(*z*) *R.* v. *Gilham*, 6 T. R. 265.

(*a*) Per Holt, C. J. *R.* v. *Burdett*, Ld. Raym. 149.

(*b*) *Powell*, q. t., v. *Farmer*, Peake's C. 57.

(*c*) *Doe* v. *Jackson*, Dougl. 167. 704.

(*d*) Doug. 704.

(*e*) Vol. II. 820. And see *Sloper* v. *Allen*, 2 Roll. Ab. 706; B. N. P. 299. *Down's case*, 4 Rep. 29, b. *Gray's case*, 5 Rep. 79. *Brook* v. *Willett*, 2 H. B. 224. *Rogers* v. *Allen*, 1 Camp. 313.

Divisibility of averments.

matter, and does not apply in any case where the precise sum, quantity or magnitude alleged, is put in issue by the nature of the claim or charge (*f*).

It is an universal rule, that whatever is wholly surplusage, and might have been struck out on motion, need not be proved (*g*). And it seems to be clear in principle, that upon the question, whether a particular averment can be rejected, regard is rather to be had to the nature of the averment itself, and its connexion with the substance of the charge or claim, than to the mere formal manner in which it is averred.

And it seems to follow, that if averments be in their own nature divisible, supposing them to have been separately averred, they ought still to be so considered, although they be inseparable as far as the mere language of averment is considered, being connected together in one entire phrase or sentence.

The operation of this principle is in effect admitted and established in the most simple instances. If a man be charged with stealing twenty sovereigns, he may be convicted of stealing ten; the allegation is therefore considered to be divisible, although no part of the sentence can be omitted without destroying the whole, and although the ten sovereigns proved to have been stolen are inseparably connected, as far as language is concerned, with the remaining ten.

So, in numerous instances, allegations combined in the same sentence have been considered to be divisible and separable, when they are so with reference to the legal essence of a particular charge. Thus a prisoner charged with *burglariously* and feloniously stealing, may be convicted of feloniously stealing, should the evidence fail as to the burglary.

A defendant charged with composing and publishing a libel may be found guilty of publishing only.

So a general averment, including several particulars, may be construed *reddendo singula singulis*.

An averment that particular lands are in the occupation of *A.*, *B.* and *C.*, is proved by evidence that the lands are in their several occupations (*h*). And an allegation that lands are situated in the parishes *A.* and *B.* is satisfied by evidence that part is situate in the parish *A.* and part in the parish *B.* (*i*).

(*f*) *Infra*, 383. *Grant* v. *Astle*, Doug. 703, in not. *In re Gilbert* v. *Stanislaus*, 3 Price, 54.

(*g*) See Lord Mansfield's observations, in *Bristow* v. *Wright*, Doug. 642; and of the Judges, in *Hoar* v. *Mills*, 4 M. & S. 470.

(*h*) *Pool* v. *Court*, 4 Taunt. 700.

(*i*) *Goodtitle d. Bremridge* v. *Walter*, 4 Taunt. 671.

Where a declaration for a false return to a *fieri facias* against the goods of *A. and B.* alleged that *A. and B.* had goods within the bailiwick, it was held to be sufficient to prove that either of them had, the averment being severable(*k*). Divisibility of averments.

The plaintiff declared for a disturbance of his right of common, alleging that he was possessed of a messuage and land, with the appurtenances, and by reason thereof ought to have common of pasture; and it was held that the averment was divisible; and that proof that the plaintiff was possessed of land only, and entitled to right of common in respect of that land, was sufficient to entitle him to damages *pro tanto*(*l*).

The distinction is now established between matter of substance and matter of description; the former requires to be substantially proved, the latter to be literally proved(*m*). And therefore, where the declaration against a sheriff for a false return, stated that the plaintiff, in Trinity term, in the second year of the reign of king George the 4th, recovered by the judgment of the Court, as appears by the record, and the proof was of a judgment in Easter term, in the third of George the 4th, it was held that the variance was not material(*n*). Distinction between matters of substance and of description.

In the next place, it is clear that no averment of any matter essential to the claim or charge can ever be rejected(*o*). And this position extends to all allegations which operate by way of *description* or *limitation* of that which is material. Let an averment of this kind be ever so superfluous in its own nature, it can never be considered to be immaterial when it constitutes the *identity* of that which is material(*p*). Descriptive allegations cannot be rejected.

Thus where the plaintiff, in an action against the sheriff for

(*k*) *Jones* v. *Clayton*, 4 M. & S. 349.

(*l*) *Ricketts* v. *Salwey*, 2 B. & A. 360; vide 389, note (*n*).

(*m*) P *ddart* v. *Palmer*, 3 B. & C. 2.

(*n*) Ib. "There are two kinds of allegations: one of matter of substance, which must be substantially proved; another, a matter of description, which must be literally proved." Per Ld. Ellenborough, J. in *Purcell* v. *Macnamara*, 9 East, 160.

(*o*) A declaration in debt for rent on a lease for years, payable at four terms, viz. the Annunciation, Midsummer, Michaelmas, and the Nativity, showed that the rent was in arrear for one whole year, *scilicet*, à festo Annunactionis, 40, usque ad festum Annunciationis, 41, a retro fuit. After verdict for the plaintiff, on *non debet* pleaded, the Court held that the declaration was ill; for *a* excludes the first feast of Annunciation, and *usque* excludes the last, and if the *viz.* should be void, there is no allegation when the year began. *Umble* v. *Fisher*, Cro. Eliz. 702.

(*p*) Vide *supra*, 373. An indictment for stealing a note alleges that it was signed by *A. B.*, proof is material. *R.* v. *Cromer*, Russ. & Ry. C. C. L. 14. But it seems that whenever a sufficient description has once been given, a mere further useless and unnecessary allegation need not be proved. *Draper* v. *Garratt*, 2 B. & C. 2. *Stoddart* v. *Palmer*, 3 B. & C. 2.

Descriptive allegations cannot be rejected.

taking his lessee's goods in execution without leaving a year's rent, alleged that the rent was payable by four quarterly payments, it was held that this allegation, although unnecessary, must be proved (*q*). Here the necessary averment that rent was due was limited by the allegation to rent payable quarterly.

The plaintiff, in an action against his lessee for negligently keeping his fire, *per quod* the premises were burnt, alleged that he was tenant under a demise for seven years, whereas he was but tenant at will (*r*), and the variance was held to be fatal. Here the injury was to the plaintiff's reversionary interest: the fact of tenancy was essential; and the averment that it was a tenancy under a demise for seven years operated as a limitation and description of that which was material.

Where a common informer, in an action of debt against a sheriff's officer, in his declaration alleged a judgment, and a *fieri facias* upon that judgment, it was held that he was bound to prove the judgment as well as the writ, although it was unnecessary for the plaintiff to have alleged the judgment at all (*s*).

Here again the allegation of the judgment, which was immaterial, operated by way of description and limitation of the writ, which was material.

So in an action for double rent on the statute (*t*), where the declaration alleged a lease for three years, and it appeared in evidence that the lease being by parol was void, and that the defendant was but tenant from year to year (*u*).

In trespass every part of the description of the place is material (*x*).

All these cases, some of which appear to have been carried to an extent scarcely warranted by general principles, were decided on the ground, that as the superfluous and unnecessary matter *limited and described* that which was *material*, it thereby became part of that which was material, and could not be rejected.

(*q*) *Bristow* v. *Wright*, Dougl. 640. Note, that this was a variance in the statement of a *contract* unnecessarily alleged. See Lord Kenyon's observations in *Gwinnett* v. *Phillips*, 3 T. R. 645. He there says, "I have heard both in and out of court, that the doctrine in *Bristow* v. *Wright* must be confined to contracts." So where a declaration for illegally insuring a lottery-ticket falsely alleged the consideration to be 43*l.* 2*s.*, although no allegation of consideration is necessary. *Phillips* v. *Mendez da Costa*, 1 Esp. C. 59. But see the *Earl of Northumberland's case*, B. N. P. 55; Yelv. 148.

(*r*) *Cudlipp* v. *Rundle*, Carth. 202; Dougl. 643.

(*s*) *Savage*, q. t., v. *Smith*, 2 Bl. 1101, cited by Lord Mansfield, in *Bristow* v. *Wright*, Dougl. 643.

(*t*) 11 G. 2, c. 19, s. 18.

(*u*) *Shute* v. *Hornsey*, K. B. East, 19 G. 3, cited by Lord Mansfield, Doug. 643.

(*x*) Per Lawrence, J., 3 Taunt. 139. See Vol. II. tit. TRESPASS.

Descriptive allegations cannot be rejected.

Lord Mansfield, in the case of *Bristow* v. *Wright* (*y*), in citing the three last cases, observed that they were strong ones, but that they were authorities for the doctrine there laid down, as to the distinction between material and impertinent averments. He added, that he believed that the doctrine stood right, and upon the best footing, as it might prevent the stuffing of declarations with prolix and unnecessary matter, because of the danger of failing in the proof, and might lead pleaders to confine themselves to state the legal effect (*z*).

Sums, magnitudes, &c.

Wherever precise sums, quantities or magnitudes, are essential to the nature of the charge or claim, a variance will be fatal; as where they are descriptive of a contract, prescription, or written instrument.

In the case of *Grant* v. *Astle* (*a*) the declaration alleged a custom for every customary tenant to pay a reasonable fine on his admission, to be assessed by the lord; that a certain tenement was of large annual value, viz. of the annual value of 23*l.* 8*s.* 9*d.*; that the lord had assessed 46*l.* 17*s.* 6*d.* as a fine for the defendant's admission to the tenement, and that this sum was reasonable. It appeared on the evidence that the fine should have been only 46*l.* 4*s.* 3*d.*, that sum being two years annual value; and it was held that the evidence did not support the declaration, for the plaintiff had no right to recover any thing but the sum assessed, for the duty arose upon the assessment, and that by the evidence appeared to be illegal (*b*).

In an action for a false and deceitful representation of the annual returns of a business sold to the plaintiff, it was held that an averment that the returns amounted to a particular sum was material, and must be proved, although the sum be alleged under a *videlicet* (*c*).

Where the lessor of an estate to *A. B.* declared in covenant against the defendant as the assignee of *all* the demised estate,

(*y*) Doug. 643.

(*z*) See also *The Dean and Chapter of Rochester* v. *Pearse*, 1 Camp. 460. *A. B.*, Dean of Rochester, and the Chapter, declared for the use and occupation of premises held by the defendant, by the permission of the *said dean* and chapter; it appeared that the premises were occupied before *A. B.* was dean. Lord Ellenborough nonsuited the plaintiff; and the Court of K. B. were afterwards divided upon the question, whether the variance was fatal.

(*a*) Doug. 703, in n.

(*b*) Note, that the vice in this case was in the assessment itself, and could not have been aided by the mode of pleading. And see *Titus* v. *Perkins*, Skinn. 247; Carth. 13; 3 Lev. 249. 255; 3 Mod. 132.

(*c*) *Gilbert* v. *Stanislaus*, 3 Price, 54.

Descriptive allegations cannot be rejected.

and on a traverse of the assignment, as in the said declaration mentioned, it appeared in evidence that the defendant was assignee of part only of the demised estate, the variance was held to be fatal (*d*).

Allegations when descriptive.

The question, whether an averment is to be considered to be descriptive, and therefore material, depends principally upon the *nature of the averment itself*, and the subject-matter to which it is applied. But, 2dly, in many instances *the law* pronounces averments to be merely *formal*, which would otherwise, according to the ordinary rule, be deemed to be descriptive. 3dly. In other instances, again, the question depends upon the *particular and technical mode* in which the averment is framed.

In the first place, whenever an allegation *limits* and *narrows* that which is essential, it is necessarily descriptive.

Instances of this nature most usually occur in the description of written instruments and matters of contract and prescription.

In the description of libels or other written instruments (*e*), which are set out according to their tenor, every part necessarily operates by way of description of the whole; for the libel alleged cannot be the same with that proved, when they vary as to any part, however unimportant (*f*).

Averments which apply a libel to a particular subject-matter, are in their nature descriptive of the legal injury; for that depends upon the injurious nature of the meaning conveyed, which frequently arises wholly from the external facts to which the terms of the libel are made to apply by proper averments. The application, therefore, of the libel to those facts is descriptive not of the libel but of the injury (*g*); and consequently a failure

(*d*) *Hare* v. *Cator*, Cowp. 766.

(*e*) *Infra*, 418.

(*f*) *Supra*, 373.

(*g*) Vol. II. tit. LIBEL; and see *Teesdale* v. *Clement*, 2 Chitty's R. 603. So in an action for words spoken of an attorney with reference to a former cause, the proceedings in that cause must be proved. *Parry* v. *Collis*, 1 Esp. C. 399.

The question, whether partial proof of the matters connected with the libel by means of an averment, be sufficient, must, it seems, depend upon the nature and quality of the subject-matters so connected. If the allegations altogether form one entire subject-matter, a contract for instance, then no part can be rejected; for the contract being essential to the particular injury, every part of it is essential and descriptive. On the other hand, where the subject-matters of and concerning which the libel is alleged to have been published are in their nature cumulative and divisible, there, it should seem, that in principle such allegations are divisible. If, for example, it were alleged, that before the publication, &c. *M. N.* had committed three several highway robberies, and that the defendant published of and concerning the plaintiff, and of and concerning those robberies,

in proving the application to one of several facts previously stated, is not a variance from the alleged libel, but only an omission to prove part of the injury.

Descriptive allegations cannot be rejected.

And where a written instrument is not described by its tenor, but merely according to its substance and effect, if more be alleged this libel: "*A. B.* was accessory to *M. N.*" *innuendo* in the commission of the said robberies. If on the trial it was proved that *M. N.* had committed two robberies only, the injury would, it seems, be proved *pro tanto* as alleged; for as far as regarded the two robberies, it was truly alleged that he published the libel of and concerning them, and with the intent alleged; and although it is also averred that the libel was published of and concerning a third robbery, as well as of and concerning the two, yet that allegation seems to be rather cumulative than descriptive in its nature. The substance of the complaint is, that the defendant charged the plaintiff with being accessory to three robberies, and the proof is that he charged him as being accessory to two of them. If, indeed, the allegation had been, that by the terms of the libel itself the defendant charged the plaintiff as accessory to the three, the variance would have been fatal, for this would have been to misdescribe a written instrument. No question, however, of this nature arises: the declaration truly states the instrument itself; the variance is merely as to the extent of its application and injurious effect, and these are divisible in their nature. If in such a case, previous to the statute enabling the defendant to plead several matters, three robberies had been in fact committed, and the defendant could have proved that the plaintiff was accessory to one, he must have pleaded his justification to that extent specially, and pleaded not guilty to the residue; and the facts alleged in the declaration being proved on the one hand, and the justification on the other, the plaintiff would, it seems, have been entitled to a verdict, having truly declared that the libel was published of and concerning the three felonies, and the justification extending to one only. In the case of *Lord Churchill* v. *Hunt*, 2 B. & A. 685, *supra*, 378; and *R.* v. *Sutton*, 4 M. & S. 532, the prefatory allegation seems to have been considered to be divisible.—The ordinary allegation in a declaration for a libel, that the defendant published it of and concerning the matter aforesaid, is not descriptive of the libel, and does not render proof necessary that it was concerning all the matters previously alleged; and therefore, where it was alleged that money had been applied in furtherance of a prosecution against *M.*, and that the defendant published the libel of and concerning the matters aforesaid, with intent to charge the plaintiff with a fraudulent application of certain money, and it appeared on reading the alleged libel that the charge was, that the plaintiff had after the termination of the prosecution misapplied the money, it was held that the variance was not material. *May* v. *Brown*, 3 B. & C. 113. And see *R.* v. *Horne*, Cowp. 72.

In the case of *Lewis* v. *Walter*, 3 B. & C. 138, where the declaration alleged that the defendant published a libel of and concerning the plaintiff, and of and concerning him in his profession of an attorney, and the plaintiff on the trial failed to prove that the libel was published of him as an attorney, it was held that this was sufficient, the publication being actionable without reference to professional character.

Descriptive allegations cannot be rejected.

in substance and effect than the legal construction of the instrument warrants, the variance will be fatal, although the allegation on which the variance arises was impertinent (*h*).

Contract.

In cases of contract, the allegations of sums, magnitude and duration, are usually, in their very nature, essential to the identity of the contract; they are therefore descriptive, and must in general be proved as laid (*i*), unless the mode of averment show that the party did not profess to state the sum, magnitude, number, &c. precisely.

Where an action of tort is founded on a contract, a variance from the contract alleged will be as fatal as in an action on the contract itself (*k*); for the tort founded on the contract cannot be the same unless the contract be the same.

As a contract is in its nature entire, not only will a variance in omitting to prove the whole *consideration* as alleged, be fatal, but so also will an omission to prove the whole of the *promises* alleged to be founded upon that consideration, although the plaintiff prove the promise, and the breach of it, for which damages are sought to be recovered, and although it was unnecessary to state any other promise than that alleged to be broken (*l*).

Prescription.

As a prescription is founded on a supposed grant, and is therefore entire, for the subject-matter granted must necessarily be descriptive of the grant itself, it follows that partial proof of that which is claimed by the prescription is insufficient, although the proof fail only as to part which is not material on the trial. Thus where the defendant in an action of trespass prescribed for a right of fishery in four specified places, but proved the right to exist in three of them only, the variance was held to be fatal, although no trespass was proved in the excepted part (*m*).

(*h*) Vide *infra*, VARIANCE, *Written Instrument*, 418.

(*i*) *Supra*, 385; Vol. II. 46. 77. *Gwinnett* v. *Phillips*, 3 T. R. 646. *King* v. *Pippett*, 1 T. R. 240. A special count in *assumpsit* for not paying a deposit on the purchase of lands, averring that the defendant became the purchaser of divers (to wit, two lots), for divers sums of money, amounting in the whole to a large sum of money (to wit, &c.), is not proved by evidence of the purchasing of two different lots, though upon the same terms; for the agreements are separate in law and fact. *James* v. *Shore*, 1 Starkie's C. 426; Vol. II. 872.

(*k*) *Weall* v. *King*, 12 East, 452; *Green* v. *Greenbank*, 2 Marsh, 485. *Lopez* v. *De Tastet*, 1 B. & B. 538.

(*l*) Vol. II. 46, 47. It is otherwise where the law implies a promise, as in the case of *indebitatus assumpsit*. *Webber* v. *Tivill*, 2 Saund. 121; Vol. II. 57.

(*m*) *Rogers and others* v. *Allen*, 1 Camp. 309. Heath, J. overruled the objection; but the Court of King's Bench afterwards granted a new trial. See also *Rotheram* v. *Green*, Noy, 67; *Conyers* v. *Jackson*, Clay. 19.

So a prescription for a right of common, as appurtenant to a messuage and land, with the appurtenants, would not be supported by evidence of a prescriptive right appurtenant to the land only (*n*). Prescription.

An allegation of an absolute prescription or custom is not proved by evidence of a conditional or limited one (*o*).

A prescription to have pot-water out of a river is not proved by evidence that he ought to have it, paying 6 *d.* yearly (*p*).

So a justification by the lord of a manor, under a custom that the lord should have the best beast on the tenant's death, is not proved by evidence that he ought to have the best beast or good (*q*).

But the proof of a more ample right than is alleged will not destroy the identity of a prescription, any more than it would the identity of a grant, for the fact that more was granted than is alleged does not disprove the allegation that so much was granted (*r*). Descriptive averments.

In actions also of tort, not founded on any contract or prescription, the question, whether an allegation be or be not descriptive, is one for the discretion of the Court, exercised upon the nature and circumstances of the particular case. Actions of tort.

If the allegation limit and confine that which is material, the latter can never be available to any greater extent, for an averment which limits and restrains in point of magnitude or extent is always so far descriptive. So it is if the allegation limit the quality of that which is material.

In cases of tort, it is sufficient to prove part of that which is alleged, and the only question is, whether the allegation be divi-

(*n*) See *Ricketts* v. *Salwey*, 2 B. & A. 360; *supra*, 383. And see *Yarly* v. *Turnock*, Palmer, 269. *Sir Miles Corbet's case*, 7 Co. 5. *Hickman* v. *Thorne*, Freem. 211. *Pring* v. *Henley*, B. N. P. 59. *Kingsmill* v. *Bull*, 9 East, 185. It was there alleged as a custom in a manor, that the lord immemorially, until the division of a certain tenement into moieties, had a heriot, and that after the division he had a heriot for each moiety; and it was held, that the whole being one custom, was disproved by evidence of a division within the time of memory. Where it was alleged that a vestry had immemorially consisted of a certain number of select persons, it was held to be necessary to prove that it had consisted of a definite number. *Berry* v. *Banner*, Peake's C. 156.

(*o*) *Gray's case*, 5 Co. 78 b.

(*p*) In a Devonshire case, cited by Popham, C. J. in *Gray's case*, 5 Co. 78 b.

(*q*) *Adderly* v. *Hart*, Trin. 4 Geo. 1. An avowry for a heriot in kind is not supported by evidence of a right to a sum assessed in lieu of a heriot in kind. *Parkin* v. *Radcliffe*, 1 B. & P. 393.

(*r*) *Johnson* v. *Thoroughgood*, Hob. 64. *Bushwood* v. *Bond*, Cro. Eliz. 722; B. N. P. 29.

Actions of tort.

sible, and capable of partial proof, or be of so entire a nature that it cannot be separated into parts (*s*).

Several of the decisions on this head have already been referred to (*t*).

Character.

An allegation as to the character in which the plaintiff sues, or his title to damages, is usually in its nature descriptive, and requires proof, although it was superfluous. As where in an action for slandering a man in his profession or office, his appointment is unnecessarily alleged (*u*).

Title.

Where the plaintiff stated that he was proprietor *and editor* of a newspaper calumniated by the defendant, it was held to be insufficient to prove merely that he was proprietor (*x*).

Where the issue was, whether *J. S.* devised to *J. N.* and his heirs, or not, and the jury found that *J. S.* devised to *J. A.* for years, remainder to *J. N.* in fee, the Court adjudged *quod non devisavit modo et formâ* (*y*).

Where the declaration against the maker of a promissory note, payable to the bearer, unnecessarily alleged an indorsement by the payee, it was held that the plaintiff was bound to prove it (*z*).

If a party unnecessarily allege a specific title, he is bound to prove it, on a traverse taken (*a*).

Inducement.

Matter of inducement, it is said, need not be precisely proved (*b*).

(*s*) See *Ricketts* v. *Salwey*, 2 B. & A. 360; *supra*, 383. But note, that Abbott, C. J. said, that if there had been words of connexion, such as "thereunto belonging," or other words of like import, to connect the messuage and land together as one entire tenement, he should have thought that the plaintiff was not entitled to recover.

(*t*) *Supra*, 379, 380; and see Vol. II. 209. Where the declaration alleged that the plaintiff was possessed of a messuage, belonging to and supporting which were certain foundations, which the plaintiff had enjoyed or ought to enjoy; on the evidence it appeared that the plaintiff was entitled only to an easement in the foundations, which belonged to the defendant: it was held to be no variance; for the declaration does not allege any property in the foundation, but only an easement. *Brown* v. *Windsor*, 1 Cromp & Jer. 20.

(*u*) See Vol. II. tit. LIBEL.

(*x*) *Heriot* v. *Stuart*, 4 Esp. C. 437, cor. Kenyon, C. J. But note, that on a motion for a new trial, Lawrence, J. doubted: a rule *nisi* was granted, and afterwards a *stet processus* was entered by consent. See also *Stevens* v. *Aldridge*, 5 Price, 234. An indictment under the stat. 7 Geo. 3, c. 50, s. 1, states the prisoner to have been employed as a sorter and charger of letters; it was held that it was not sufficient to know that he was a sorter only. *R.* v. *Shaw*, 1 Leach's C. C. L. 79; East's P. C. 580.

(*y*) *R.* v. *Newdigate*, Sir W. Jones, 224, cited Dougl. 641.

(*z*) *Wayman* v. *Bend*, 1 Camp. 175.

(*a*) *Sir F. Leake's case*, Dyer, 365; 2 Will. Saund. 206, note (22,) *Goram* v. *Sweeting*.

(*b*) Per Buller, J. in *Gwinnett* v. *Phillips*, 3 T. R. 643. Per Chambre,

There seems, however, to be little difference in principle between such averments and any other; for if they are essential, they must be proved; and if they be alleged with descriptive circumstances, such description is material. Thus, if the terms of a contract be stated, though unnecessarily, by way of inducement, they must be proved (*c*). Matter of inducement.

2dly. It is next to be observed, that in many instances circumstantial allegations are noticed by the *law* itself as merely *formal*, and as requiring no proof. Formal by law.

These are to be regarded as exceptions made by the law, for convenience sake. Thus, it is laid down as a general rule in the *Trials per Pais* (*d*), that "where the issue taken goeth to the point of the writ or action, there *modo et formâ* are but words of form."

J., in *Smith* v. *Taylor*, 2 N. R. 210. The distinction between the gist of the action, and that which is inducement, is not always clear in principle. In *Smith* v. *Taylor*, which was an action for slandering a physician in his professional character, Chambre, J. considered that his being a physician was the very *gist* of the action, and therefore required strict proof. In *Gwinnett* v. *Phillips*, which was an action for fraudulently removing goods to prevent a distress for rent in arrear, Buller, J. said that the averment that rent was due was matter of *inducement*, and therefore did not require strict proof; yet the fact that rent was due in the latter case was just as essential to the claim for damages, as the fact that the plaintiff was a physician was in the first case. If by *inducement* such averments only be meant as are not material, but which, if struck out, would leave a valid charge or claim behind, there is no question; but if the term include essential and material averments, then proof being necessary, *legal proof* is essential, and that must, it should seem, depend upon the nature of the allegation itself, and not upon its mere order or connexion in point of time, or otherwise, with other material averments.

Although Mr. J. Buller, in *Gwinnett* v. *Phillips*, intimates that proof of the precise sum of 57 *l.* alleged to be in arrear, was not necessary, *because it was mere inducement*, yet it is clear, that if the very same allegation had been made in an action to recover the very sum itself from the tenant as rent in arrear, the precise proof would have been unnecessary; nor is it necessary in any case, unless from the very nature of the claim or charge the precise sum be material. *Supra*, 385, and *R.* v. *Gilham*, 6 T. R. 265.

On the other hand, it is certain, that whenever an allegation is material and essential, whether it fall within the scope of the term *inducement*, or not, or whatever its connexion may be in the order of time, or otherwise, with the other essential averments, it must be proved according to the precise and particular, though superfluous, description with which it is encumbered. Vide *supra*, 383.

(*c*) *Bristow* v. *Wright*, Doug. 640. And so in all cases of tort where matter of contract is alleged, though but by way of inducement. *Lopez* v. *De Tastet*, 1 B. & B. 538. *Corney* v. *Mendez de Costa*, 1 Esp. C. 302. *Weall* v. *King*, 12 East, 452.

(*d*) 389.

Formal by law.

The ground of which seems to be this, that where certain specific facts or actual results alone are essential to support the charge or claim, and the means, manner and circumstances, occasioning or accompanying such facts or results, are purely immaterial, the latter may, without inconvenience, be regarded as merely formal, although perhaps originally such allegations, as well as those of time and place, might require strict proof.

In trover, for instance, the alleging the mode by which the defendant became possessed of the goods, whether by finding or otherwise, is purely formal, and requires no proof, for the gist of the action is the conversion (*e*)

So upon indictments for homicide, the allegations of the kind of weapon or poison used to occasion the death need not be precisely proved (*f*); it is sufficient if the same kind of death be proved with that alleged.

Macalley's case (*g*) is a very strong instance to show the extent of this doctrine.

The indictment for the murder of *Fells* alleged that *P.* sheriff of London, upon a plaint entered, issued his precept to *Fells*, serjeant at mace, to arrest *Murray*; but on the evidence it appeared that there was in fact no precept, but that by the custom of London, after a plaint had been entered, any serjeant *ex officio* might arrest the defendant in the suit. But it was held by all the Judges that the variance was immaterial, for the warrant was but one circumstance, which was not necessary to be precisely pursued in evidence to be found by a jury; for the indictment alleged that the prisoner killed *Fells* of malice prepense; and although the evidence varied from the special matter, yet as it showed that the prisoner killed *Fells* of malice prepense it maintained the indictment.

Where the demandant, in a writ of entry on an alienation made by the tenant in dower to his disinherison, alleges an alienation in fee, and the tenant pleads that he did not aliene *modo et formâ* as the demandant has alleged, and it is found that the tenant aliened in tail or for life, yet the demandant is entitled to recover; for the real question is, whether the tenant did aliene (*h*).

So if in assize of *darrein presentment*, the plaintiff allege an avoidance by privation, and the jury find an avoidance by death;

(*e*) See TROVER.
(*f*) See *Macalley's case*, 9 Co. 65.
(*g*) Ibid.
(*h*) Litt. sec. 483; Trials per Pais, 387.

for the mere *result*, viz. the avoidance, is alone material; the manner of it is immaterial (*i*). Formal by law.

So again, if in an action against a wrong-doer for a disturbance of the plaintiff in his office, he mistake his title in the declaration, and the special verdict find a title for him different from that on which he has declared, yet judgment will be given for him notwithstanding the variance (*k*); for as the disturbance occasions the action, the finding the title is held to be purely superfluous.

In these and the like instances the variances are immaterial, not because such allegations are in their own nature merely formal, but because the law considers them to be so with reference to the matter directly in issue; the very same allegations, where the point arose *collaterally*, would be material. For it is also laid down as a rule, that "where a *collateral* point in pleading is traversed, there *modo et formâ* is of the substance of the plea (*l*)."

And therefore, if a feoffment by deed be pleaded, and the defendant traverses "*absque hoc quod feoffavit modo et formâ*," the jury cannot find a feoffment without a deed (*m*).

So if a feoffment by two be alleged, and it be found to be the feoffment of one only (*n*).

(*i*) 1 Inst. 282; Trials per Pais, 385. So if guardians of a hospital bring assize against the Ordinary, and he pleadeth in his visitation he deprived him as Ordinary, whereupon issue is taken, and it is found he deprived him as patron, the Ordinary shall have judgment; for the deprivation is the substance of the matter.

(*k*) Cro. Eliz. 335. 419; Cro. J. 630; Com. Dig. Action on the case for a disturbance, B. 1; B. N. P. 76; 1 Will. Saund. 346 (2). *Secus*, if the plaintiff set out an insufficient title. *Dorne* v. *Cashford*, 1 Salk. 363. *Crowther* v. *Oldfield*, 2 Ld. Raym. 1230; 1 Will. Saund. 346, a. note (2). But on issue joined on a plea of justification, under a right of common, to an action of trespass, or avowry damage-feasant, the title, by prescription or otherwise, must be proved as laid. *Supra*, 389. *Sir Francis Leake*'s case, Dyer, 365; 1 Will. Saund. 346, n. (2). Even although it would have been sufficient for the defendant to have relied on his possession alone: as where the defendant justifies an escape of the cattle from a common to the close in which, &c., through defect of a fence which the plaintiff is bound to repair, or an escape from the defendant's own close (*Faldo* v. *Ridge*, Yelv. 75); for although all that is necessary in such a case is to show that the cattle were not trespassers in the place from which they escaped, as if the defendant was tenant at will, or had a license to put the cattle there, yet if the defendant does not rely upon the averment of possession, but alleges a precise estate, the averment is traversable. *Sir Francis Leuke's case*, Dyer, 365; 1 Will Saund. 346 (2).

(*l*) Trials per Pais, 389; B. N. P. 301. See the preceding note.

(*m*) Co. Litt. 282; Trials per Pais, 389.

(*n*) Ibid. So if the issue be, whether *A.* and *B.* were churchwardens,

Formal by law.

Another distinction is, that although the issue be upon a collateral point, yet, if by the finding of part of the issue it shall appear to the Court that no such action lieth, there *modo et formâ* are but words of form (*o*).

That is, partial and deficient proof may be sufficient in law to show that no action is maintainable, although by reason of the defect the proof be insufficient to support the affirmative of the issue, the proof of which lies on the defendant.

The lord distrains; the tenant brings trespass. The lord pleads that the tenant holds by fealty and rent, and prays judgment of the writ. The tenant replies that he does not hold *modo et formâ*. If the verdict find that the tenant holds by fealty only, yet the writ shall abate, although the tenant does not hold as the lord has alleged; for as the plaintiff was tenant he cannot maintain trespass against his lord, although he distrain for services which he ought not to have (*p*), for the only material question is, whether he holds of him, or not (*q*). But it would have been otherwise in replevin, for there the avowant must make out his title to have a return according to his allegations (*r*).

Probably in early times precise proof was required of the formal allegations, even of time and place; indeed, the statute of Gloucester, in the case of an appeal of murder, required the very hour to be stated; an idle and nugatory enactment, unless proof of the averment were requisite. The *place* was essential for the purpose of awarding the *venire*.

The inconvenience of requiring strict proof has, in these and many other instances, left the mere form and semblance of precision; and as the law pronounces such allegations to be purely formal, they deceive no one.

Mode of allegation.

3dly. The question whether an averment is to be considered as descriptive, depends much on the mode of allegation. There are two kinds of allegations, one of which must be substantially proved; another a matter of description, which must be literally proved (*s*).

Debt, on a demise for years; plea, *nil habuit*, &c.; replication that he had a sufficient estate to make the demise, *scilicet*, an

proof that one was, but that the other was not, would not be sufficient. 2 Roll. 706; B. N. P. 299.

(*o*) Co. Litt. 282; Trials per Pais, 389; B. N. P. 301.

(*p*) Co. Litt. 282; Trials per Pais, 387; B. N. P. 301.

(*q*) By the stat of Marl. c. 3.

(*r*) B. N. P. 302.

(*s*) Per Ld. Ellenborough in *Purcell* v. *Macnamara*, 9 East, 157.

estate in fee: it was held to be sufficient for the plaintiff to prove any estate which would enable him to make the demise (*t*).

In many instances precise proof is rendered unnecessary by the form of allegation (*u*), which shows that the party did not mean to bind himself to precise proof; as where sums or magnitudes are averred under a *scilicet* or *videlicet* (*x*), the effect of which is to render precise proof unnecessary, in some instances, where it would otherwise have been essential (*y*); although it never renders precise proof unnecessary where from the nature of the case it is otherwise essential (*z*). Neither does the want of it ever render precise proof necessary, where from the nature of the case it is not essential. Videlicet.

Where the consideration was alleged to be the forbearance of 21 *l.* 6 *s.* without a *videlicet*, and the proof was of a forbearance of 20 *l.* 18 *s.*, the variance was held to be fatal (*a*).

But where the declaration alleged that *S. F.*, the father of the defendant, was indebted to the plaintiff in a certain sum, *to wit*, the sum of 26 *l.* 13 *s.* 6 *d.*, being the *unpaid balance* of a larger sum; and that, in consideration of the plaintiff's forbearance to sue for the recovery of the balance of 26 *l.* 13 *s.* 6 *d.*, the defendant undertook to accept a bill for the amount of the balance of 26 *l.* 13 *s.* 6 *d.*, and the balance really due was 26 *l.*, it was held to be no variance, the payment of the balance being the consider-

(*t*) *Wilson* v. *Field*, Skinn. 624.

(*u*) See the observations of Chambre, J. 2 N. R. 210.

(*x*) The expression "divers, to wit, 50 years before the death," in a special verdict, is too loose and indefinite. *Doe* v. *Earl of Jersey*, 3 B. & C. 370.

(*y*) See 2 Will. Saund. 291. *R.* v. *Aylett*, 1 T. R. 63; Crim. Plead. 252, 2d edit. *Symmons* v. *Knox*, 3 T. R. 65.

(*z*) 4 Taunt. 320; 1 T. R. 656. As in the case of a contract, where the consideration is material and traversable; *infra*, notes (*a*) and (*d*)

(*a*) *Arnfield* v. *Bate*, 3 M. & S. 173. So where the consideration for the purchase of sheep was alleged to be 54 *l.* 11 *s.* 6 *d.*, and turned out to be 54 *l.* 12 *s.* 6 *d.* *Durston* v. *Tuthan*, cited in *Symonds* v. *Knox*, 3 T. R. 67; 2 Will. Saund. 291, c. Note, that in *Durston* v. *Tuthan*, the action was on a warranty, and it was unnecessary to aver the price. It seems that the rule is this, that where the declaration would have been good without laying any sum, there, although a sum be alleged, but under a *videlicet*, a variance would not be material.

In the case of *Laing* v. *Fidgeon* (6 Taunt. 108), it was held that an allegation of a contract to deliver saddles to the plaintiff at a reasonable price, was supported by proof of an agreement to deliver saddles at 24 *s.* and 26 *s.* And it seems that if the declaration state the consideration to be certain reasonable reward, proof that a specific sum was agreed on will not be material as to variance. *Bayley* v. *Trecker*, 2 N. R. 458.

Videlicet.

ation for the promise, and the statement of a particular sum was unnecessary (*b*).

But it is a general rule that a *videlicet* will not protect, where precision is rendered essential by the nature of the case (*c*).

The defendant avowed that the plaintiff held certain lands of him, as his tenant, at a certain rent, to wit, at 110*l.* rent, payable half yearly; upon *non tenet* pleaded, it appeared that the land had been let by a written contract of 15*s.* per acre, and that the whole amounted to 111*l.* per annum; and the variance was held to be fatal (*d*).

Where the defendant pleads a set-off to a bond, the averment of the sum really due is material, and traversable, though laid under a *videlicet* (*e*).

But the want of a *videlicet* will, in many cases be immaterial, where, from the nature of the case, the precise sum, date, place, magnitude or extent, is unnecessary, and the allegation is not descriptive of matter of contract (*f*).

(*b*) *Bray* v. *Freeman*, 2 Moore, 114.

(*c*) An allegation under a *videlicet*, that the Court was sitting on a day out of term, may be rejected as surplusage. *Luckett* v. *Plumber*, 2 B. & B. 659; and see *Draper* v. *Garratt*, 2 B. & C. 2. In *Preston* v. *Butcher*, 1 Starkie's C. 3, in assumpsit for not employing the plaintiff as a clerk, the amount of the salary, though laid under a *videlicet*, was held to be material. See also *Crispin* v. *Williamson*, note (*d*). *White* v. *Wilson*, *infra*, 400. *Gladstone* v. *Neoill*, 13 East, 409. Where the consideration for a promise is material and traversable, the stating it under a *videlicet* will not avoid a variance. 6 T. R. 462; 2 B. & P. 48; 2 Will. Saund. 207; 1 Str. 233; 5 T. R. 71; 4 T. R. 591; 3 T. R. 68.—Under a declaration for maliciously charging the plaintiff with an offence punishable by law, to wit, felony, a charge of felony must be proved, for if the allegation under the *videlicet* were to be rejected there would be no charge at all. *Davis* v. *Noake*, 1 Starkie's C. 377.

(*d*) *Brown* v. *Sayce*, 4 Taunt. 320. Note, that Mansfield, C. J. said that the record would certainly be evidence as to the amount of the rent between the same parties in another action. So where the plaintiff alleged that he had agreed to sell, and the defendant to buy, certain goods and merchandises (to wit, 328 chests and 30 half-chests of oranges and lemons), at and for a certain price (to wit, the price of 623*l.* 3*s.*), and the contract proved was for 300 chests and 30 half-chests of China oranges, and 20 chests of lemons, it was held to be a fatal variance. *Crispin* v. *Williamson*, 1 Moore, 547. See also *Green* v. *Rennett*, 1 T. R. 656. *White* v. *Wilson*, 2 B. & P. 116; *infra*, 400. *Pope* v. *Foster*, 4 T. R. 590. *Grimwood* v. *Barritt*, 6 T. R. 460. *Johnson* v. *Prickett*, cited ibid. *Bristow* v. *Wright*, Dougl. 665. *R.* v. *Mayor of York*, 5 T. R. 71. *Gilbert* v. *Stanislaus*, 3 Price, 54; 386.

(*e*) *Grimwood* v. *Barritt*, 6 T. R. 460.

(*f*) *R.* v. *Gilham*, 6 T. R. 265; *supra*, 1539. *Gwinnett* v. *Phillips*, 3 T. R. 643. *R.* v. *Burdett*, 1 Ld. Raym. 149; 2 Camp. 231.

It is scarcely necessary to remark that partial proof is in no case sufficient, unless the facts proved, if alleged alone, would have constituted a ground of action, or of criminal charge of the nature alleged.

Partial proof insufficient, when.

Thus, although on a charge of murder the prisoner may be found guilty of manslaughter merely, yet upon a charge of felony he cannot be convicted of a misdemeanor, although the facts proved constitute a misdemeanor (*g*).

In the next place, the proof of more facts, circumstances and particulars, than are alleged, will not be material, unless that which is so proved, but not alleged, be so inconsistent with some essential allegation as to disprove it altogether. Proofs in their very nature must ordinarily be particular, although the allegations be general, and therefore mere simple redundancy of proof is usually unimportant.

Excess of proof.

If a man be charged with stealing ten sovereigns, proof that he stole twenty is no variance as to the legal identity of the offence, for it is still true, as alleged, that he stole ten.

Proof that a party has a right for a stated time, proves also that he has the right on a particular day included within that time (*h*).

Proof of the tender of a larger sum supports an allegation of the tender of a smaller sum (*i*).

Proof of a prescriptive right more ample than that which is alleged establishes that right as far as it is claimed (*k*).

Evidence that a modus exists in respect of several farms or closes proves an allegation that it exists with respect to one of them (*l*).

An allegation that a bill of exchange was drawn upon and accepted by *A.* *B.* and *C.* is proved by evidence of a bill drawn on and accepted by them jointly with a fourth (*m*).

So also an averment that money was received by *A.* is proved by evidence of a receipt by him jointly with a deceased partner (*o*).

An averment that *A.* was bound by a deed is proved by evidence that *A.* and *B.* bound themselves (*o*).

(*g*) *R.* v. *Westbeer*, Str. 1133; Crim. Pleadings, 2d edit. 345, 6.

(*h*) Brownl. 178.

(*i*) See Vol. II. tit. TENDER.

(*k*) *Supra*, 389. 1 Ford's MS. 404; 4 T. R. 160; 1 Skinn. 347. *Bruges* v. *Searle*, Carth. 219.

(*l*) *R.* v. *Walker*, Ford's MS. 404.

(*m*) *Mountstephen* v. *Brooke*, 1 B. & A. 224.

(*n*) *Richards* v. *Heather*, 1 B. & A. 29.

(*o*) Vol. II. tit. DEED, 272. *South* v. *Tanner*, 2 Taunt. 294.

Excess of proof.

Proof that *A. B.* supplied the poor of *W.* and of other parishes with provisions, satisfies an allegation that he supplied the poor of *W.* (*p*).

So if upon a charge of libel, or of breach of covenant or promise, it appear in evidence that the defendant published a libel containing not only the matter charged, but containing also additional injurious matter; or that he further covenanted or undertook to do some other thing, the breach of which further covenant or promise is not complained of, the additional evidence would be immaterial, for the charge or claim would still remain fully established to the extent alleged (*q*).

When material.

But whenever that which is proved, in addition to that which is alleged, is descriptive of it, and affects its identity, the variance is fatal, for that which is essential to a correct description has been omitted.

If it appear in evidence that part of a libel, covenant or promise, proved, but not alleged, qualifies or alters the sense of the libel, covenant or promise stated, the variance would be fatal, for the addition disproves the allegation.

Thus if the plaintiff declare on a covenant to repair at all times, and the covenant in fact contain the additional words "and at farthest within three months after notice," the variance is fatal (*r*).

So if the plaintiff declare on an absolute promise, and a conditional one be proved (*s*).

So if it be alleged as an absolute covenant or promise, and an exception, qualification or limitation, be annexed to it (*t*); as, if an absolute promise, and the proof be of a promise in the alternative. *Perry* v. *Porter*, 2 East, 2. *Cook* v. *Manstone*, 1 N. R. 351. See also *Howell* v. *Richards*, 11 East, 633. *Tempany* v. *Bernard*, 4 Camp. 20.

Where the declaration in debt for rent alleged a demise for 15 *l.* rent per annum, under a power to make leases for twenty-one years, and the evidence was of a demise for 15 *l.* rent per annum, and three fowls, under a power to make leases for twenty-one years in possession, and not in reversion, rendering the ancient rent, and not dispunishable of waste, the variance was held to be fatal, both in misdescribing the power as general when it

(*p*) *West* v. *Andrews*, 1 B. & C. 77.

(*q*) *Supra*, 375; Vol. II. tit. LIBEL. *Squier* v. *Hunt*, 3 Price, 68. *Miles* v. *Sheward*, 8 East, 7. *Handford* v. *Palmer*, 2 B. & B. 359.

(*r*) *Horsefall* v. *Testar*, 1 Moore, 87.

(*s*) See Vol. II. 46. See *Tate* v. *Wellings*, 3 T. R. 531. *White* v. *Wilson*, 2 B. & P. 116 *Layton* v. *Pearce*, Dougl. 16. *Churchill* v. *Wilkins*, 1 T. R. 447. *Secus*, if the condition merely affect the *quantum* of damages on a breach of contract. *Clarke* v. *Gray*, 6 East, 564. *Parker* v. *Palmer*, 4 B. & A. 387. *Thornton* v. *Jones*, 2 Marsh. 287.

(*t*) See *Brown* v. *Knill*, 2 B. & B. 395. As, if the promise be alleged as

a covenant be alleged to repair generally, and the covenant proved contain an exception of casualties by fire (*u*). Excess of proof.

Debt for rent on an indenture; the omission of an exception, referring to a subsequent proviso for the reduction of the rent, is fatal, although the reduction is to be made on the happening of a certain event, which has not happened (*x*).

Where a declaration for assaulting a constable in the execution of his office, alleged that he was constable of a particular parish, and the proof was that he was sworn in for a liberty, of which the parish was part, the variance was held to be fatal (*y*).

So if part only of a person's name be averred (*z*).

Upon the same principle, a plea of tender of half a year's rent, simply, is not proved by evidence of the tender of half a year's rent, requiring the lessor to give change and pay back the property tax (*a*).

It has even been held, that where a statute, in describing the subject-matter of aggravated larciny, uses a general term and also a specific one, it is not sufficient to use the general for the specific description, where the latter is applicable. (*b*).

In assumpsit the consideration is of so entire a nature, that not only must it be proved to the extent alleged, but an omission to allege any part is fatal; for if any part be omitted, then the basis of the promise is misdescribed; it is not true, as stated, that the defendant's promise was founded upon the consideration alleged, when it was in fact founded upon that and something else which is also essential to its support (*c*). Contract.

was special, and in misdescribing the rent. *Sands* v. *Ledger*, Ld. Raym. 792; cited Doug. 641. An allegation of an undertaking to carry from *L.* to *D.* and there to deliver, &c. is not satisfied by evidence of an undertaking to carry and deliver, &c. fire and robbery excepted. *Latham* v. *Rutley*, 2 B. & C. 20. An indictment under the 3 & 4 W. & M. c. 9, alleged the letting of a lodging-room by contract to James Bew; the Judges thought that this imported an exclusive letting to James Bew. *R.* v. *Bew*, Russ. & Ry. C. C. L. 480. A demise of three rooms at a certain rate varies from a demise of the three and also a fourth at that rent. *Salmon* v. *Smith*, 1 Saund. 202. Yet it seems that a demise may be pleaded as parcel without averring the whole. As if *A.* demise to *B.* two acres for a term, and *B.* be ejected of one by a stranger, he may allege a demise of the one. Per Saunders' arg. 1 Saund. 208. The distinction is, that in the former case the contract is described.

(*u*) 2 B. & B. 395.

(*x*) *Vavasour* v. *Ormerod*, 6 B. & C. 430. *Secus* had the exception been contained in a distinct clause; ibid.

(*y*) *Goodes* v. *Wheatley*, 1 Camp. C. 231.

(*z*) *Arbouin* v. *Willoughby*, 1 Marsh. 477.

(*a*) *Robinson* v. *Cook*, 6 Taunt. 336.

(*b*) *R.* v. *Cooke*, Leach's C. C. L. 123, 3d edit.

(*c*) *Swallow* v. *Beaumont*, 2 B. & A. 265; Vol. II. 246.

Contract. Excess of proof.

Where a sailor declared for wages, and the average price of a negro slave, due to him in consideration of service during a certain voyage, "to wit, a voyage from London to the coast of Africa, and from thence to the West Indies," and in the articles it was described as "a voyage from London to the coast of Africa, from thence to the West Indies or America, and afterwards to London in Great Britain, or to some delivering port in Europe," the variance was held to be fatal, notwithstanding the *scilicet* (*d*).

But if the additional matter proved does not alter the legal effect of that which is alleged, the variance will be immaterial. An averment, that in consideration that the defendants had become tenants to the plaintiff of certain premises, they undertook to keep the same in good and tenantable repair, is proved by an agreement containing a variety of provisions, and amongst others, that the defendants would make good all repairs within three months after notice by the plaintiff of the want of repairs; for the obligation to repair arises out of the tenancy, and the agreement was evidence to prove the promise as laid (*e*). An allegation of a contract for the delivery of gum Senegal, is supported by evidence of a contract for the delivery of *rough* gum Senegal, coupled with evidence that all gum Senegal on its arrival in this country is called rough (*f*).

So where the declaration alleged that the defendant had bought of the plaintiff a quantity of East India rice, according to the conditions of sale of the East India Company, at a specified price, to be put up at the next Company's sale, if required, and it appeared in evidence, that in addition to those conditions the

(*d*) *White* v. *Wilson*, 2 B. & P. 116.

(*e*) *Colley* v. *Stretton*, 2 B. & C. 273.

(*f*) *Silver* v. *Heseltine*, 1 Chitty, 39. See also *Parker* v. *Palmer*, 4 B. & A. 387. So where the plaintiff declared that the defendant had agreed to buy of the plaintiff a large quantity of head-matter and sperm-oil in the possession of the plaintiff, and the contract proved was for the purchase of all the head-matter and sperm-oil per the Wildman, it was held that there was no variance; for the allegations were proved as far as they went, and the additional matter proved (that it was oil by the Wildman) was immaterial; it did not qualify or annex any condition to what was stated. *Wildman* v. *Glossop*, 1 B. & A. 9; vide *infra*, 403. But it seems, that if the declaration alleged an agreement for goods expected by particular ships, a variance would be fatal; as, if the declaration allege an agreement to sell goods expected by the Fanny Almira, and the agreement proved is for the goods expected by the Fanny *and* Almira (*Boyd* v. *Siffkin*, 2 Camp. 326). So an agreement alleged to be for the delivery of all merchandisable skins, varies from the proof of a contract to deliver all merchandisable *calf*-skins. B. N. P. 145.

rice was to be sold *per sample*, it was held that this was no variance, for it was not a description of the commodity, but a collateral engagement that it should be of a particular quality (*g*). Excess of proof. Contract.

A variance, which would be fatal if it arose from superfluity of allegation, is frequently immaterial when it arises from mere redundancy of proof. For the superfluous particulars, wherever they are descriptive, must be proved as alleged, although they were unnecessary, and are consistent with the proof as far as it goes.

But redundancy of proof is immaterial unless the facts proved, but not alleged, are inconsistent with the allegations. Thus, if it be alleged, that in consideration of 100 *l.* *A.* promised to go to Rome, and also to deliver a horse to the plaintiff, and the plaintiff were to fail in proving the latter branch of the promise, the variance would be fatal, although he sought to recover in respect of the breach of the former part of the promise only, and the statement of the latter part of it was unnecessary. But if he had alleged the former part of the promise only, proof that the defendant also promised to deliver the horse would be immaterial; for true it is, that for the consideration stated the defendant did promise to go to Rome, although in fact he also promised, in addition, to deliver the horse.

But where the subject-matter is entire, a variance in proof shows the allegation to be defective, and is therefore material.

Thus if the allegation be that the defendant promised to pay 100 *l.* in consideration of the plaintiff's going to Rome, and also delivering a horse to the defendant, a variance, either in omitting to prove the whole consideration, supposing the whole to be alleged, or in proving the whole, where part only was alleged, would be equally fatal: for in the latter case the proof would show that the consideration for the promise was defectively stated.

But although the proof of more than is alleged may not prejudice by way of variance, it seems to be an universal rule that a plaintiff or prosecutor can in no case, by any proof exceeding the quantity, magnitude or extent alleged, entitle himself to a larger verdict than if the proof had not exceeded the description; Excess of proof not available to increase the damages.

(*g*) *Parker* v. *Palmer*, 4 B. & A. 387. Note, that the goods did not correspond with the samples; but after seeing the samples the defendant had taken upon himself the disposition of the goods, and had put them up to sale at a limited price, and bought them in again: the Court held, that after this he could not repudiate the contract; and the jury found that he had not repudiated the contract within a reasonable time; therefore the sale was in effect complete.

Excess of proof not available to increase the damages.

for although the precise quantity, or extent, or magnitude, need not be proved as laid, yet they are so far descriptive that they operate as limits which the party himself has prescribed, and which he ought not to be permitted to exceed.

Thus a plaintiff is always limited by the damages averred; he cannot prove more than one trespass on any one count beyond the temporal limit averred (*h*).

Upon indictments for larciny in a dwelling-house the prosecutor is bound by the value assigned to each article.

Legal effect.

It is an universal rule, that it is sufficient to prove an allegation according to its legal effect (*i*).

Thus a promise to pay may be supported by proof of a written instrument, whose tenor is, I promise *not* to pay, the word *not* having been fraudulently inserted (*k*).

Where a certain day is limited for the payment of an antecedent debt, an allegation of payment at a particular day is proved by evidence of payment before the day, for payment before is a payment at all times (*l*).

In civil cases, and upon indictments for treason and misdemeanors, the act of one is the act of all who procure the act to be done, although they be absent at the time of the act; and in the case of homicide, an allegation that *A.* struck the fatal blow, and that *B.* and *C.* were present, aiding and abetting, is satisfied by evidence that *B.* struck the blow, and that the others were present aiding and abetting; for in point of law the act of one is the act of all (*m*).

If the terms used in the allegation and proofs be convertible in fact, the variance will not be material.

In *assumpsit* on an agreement to take certain stock at a valuation, an allegation that a valuation made amounted to a specific sum, is satisfied by evidence of a valuation to that amount, setting forth the price of each article, with a condition that if any of the pans should prove to be broken the first time of using, an allow-

(*h*) Vol. II. tit. TRESPASS.

(*i*) See *Barbe* v. *Parker*, 1 H. B. 283; *infra*, 421. Where the allegation is made according to the fact, there is no ground for an objection, on the score of variance, that it is not stated according to the legal effect. *R.* v. *Healey*, 1 Ry. & Mood. C. C. L. 1. *R.* v. *Hurrell*, 1 Ry. & Mood. C. 296.

(*k*) 2 Atk. 32. See also *Arnold* v. *Revoult*, 1 B. & B. 443; Vol. II. tit. BILL OF EXCHANGE.

(*l*) Dyer, 222; Vin. Ab. Ev. T b. 111, 112. *Secus*, where the payment is made before the day when the debt becomes due by the condition of a bond. Ibid.

(*m*) Fost. Disc. 351; 9 R. 67; 1 Plow. 98; 1 Salk. 334.

ance should be made thereon, there being no evidence that any of the pans were broken at the time specified (*n*). Legal effect.

An allegation of a contract to deliver stock on the 27th of February, is satisfied by evidence of a contract to deliver on the settling day, coupled with proof that the 27th was fixed for and understood by the parties to mean the 27th (*o*).

The plaintiff declared on a contract for the purchase of a certain quantity, to wit, eight tons of goods; the proof was of a contract for the purchase of *about* eight tons; the precise quantity, which was not known at the time of the contract, having been ascertained to be eight tons; and it was held that the variance was not material (*p*).

The allegation that *A.* uttered a counterfeit note under the false pretence that it was a genuine note, may be proved by the fact of uttering, though *A.* said nothing at the time (*q*).

An allegation that *A. B.* became bankrupt cannot be proved but by evidence of a commission (*r*). It is not sufficient to show that a commission might have been supported (*s*).

All averments in terms which have an authorized legal sense and meaning annexed to them must be understood in that sense, and are not satisfied by proof according to the popular and vulgar sense (*t*). Proof of tenor of Act.

Several of the decisions on the subject of variance are noticed in considering the evidence on the particular subjects with which they are connected. It may be proper, however, in this place,

(*n*) *Welsh* v. *Fisher*, 2 Moor, 378. In *Payne* v. *Hayes* (Str. 74; B. N. P. 145), where the contract declared on was to deliver stock on the 22d of August, and the evidence of the entry in the broker's book was a contract for the opening, the variance was held to be fatal, although it was proved to be notorious that the books were to open on the 22d, and the broker swore that he took the 22d and the opening to be convertible terms. But this is to be considered rather as a mode for getting rid of a South-sea contract, than as a precedent. An allegation of an agreement to take a full cargo is not satisfied by proof of an agreement to take on board 500 quarters of wheat, although that quantity amounted to a full cargo. *Harrison* v. *Wilson*, 2 Esp. C. 108. Vide *supra*, 400, note (*f*).

(*o*) *Wickes* v. *Gordon*, 2 B. & A. 335. See the preceding note.

(*p*) *Gladstone* v. *Neale*, 13 East, 410. And see *Crispin* v. *Williamson*, 8 Taunt. 107. An allegation of a promise to remove goods within a reasonable time is satisfied by evidence of a promise to remove them in a month. *Hore* v. *Milner*, Peake's C. 42 (*a*).

(*q*) *R.* v. *Freeth*, Russ. & Ry. C. C. L. 127.

(*r*) *Bulkeley* v. *Lord*, 2 Starkie's C. 406.

(*s*) Ibid.

(*t*) Vol. II. tit. PAROL EVIDENCE. *Doe* v. *Benson*, 4 B. & A. 586.

to refer to some of the most general applications of the foregoing principles, particularly with reference to allegations of time (*u*) and place (*x*)—parties, and their names (*y*)—their acts (*z*), and the consequences of such acts (*a*)—intentions (*b*)—written instruments (*c*), &c.

Time. A variance from the formal allegation of the time of committing an act is not material, where it is proved to have been committed before the commencement of the suit (*d*), or the finding of the bill by the grand jury in criminal cases (*e*).

And *autrefoits acquit*, upon an indictment laying the offence on one day, may be pleaded to an indictment laying the offence to have been committed on a different day (*f*).

Although arson be alleged to have been committed in the night-time, the offence need not be proved to have been committed in the night-time (*g*).

But where in a declaration the injury is laid with a *continuando*, although the plaintiff may prove any number of acts within the time specified, yet if he go beyond that limit he is confined to a single act; for the allegation, as far as regards the continuation and number of injuries, is descriptive (*h*).

If the facts *A.* and *B.* be each of them material, but their priority in point of time be immaterial, a variance from the priority as alleged will not be material (*i*); as, if a declaration on a policy of insurance allege that *after* the making the policy the ship sailed, when in fact she sailed *before* (*k*).

Where the consideration for a guarantee for 5,000 *l.* was alleged

(*u*) *Infra*, p. 404.

(*x*) *Infra*, p. 405.

(*y*) *Infra*, p. 411.

(*z*) *Infra*, p. 414.

(*a*) *Infra*, p. 416.

(*b*) *Infra*, p. 418.

(*c*) *Infra*, p. 418.

(*d*) 2 Haw. C. 46, s. 179; 2 Ins. 318.

(*e*) Ibid.

(*f*) *Syer's case*, 3 Inst. 23. *R.* v. *Vane*, Keb. 164.

(*g*) *R.* v. *Minton*, East's C. P. 1021.

(*h*) See TRESPASS, and *supra*, 401. But upon the trial of a traverse of an inquisition in the Exchequer, which found that a Crown-debtor was indebted to the Crown in a specific sum for duties due between two assigned periods, and it appeared in evidence that the debtor was indebted in a different sum for duties accruing for a different period, it was held that the period alleged might be rejected as surplusage. *R.* v. *Franklin*, 5 Price, 614.

(*i*) *Peppin* v. *Solomon*, 5 T. R. 496. *Young* v. *Wright*, 1 Camp. 139; Doug. 497. 515. *Matthie* v. *Potts*, 3 B. & P. 23. *Secus* where the time is material. *Abitbol* v. *Bristow*, 6 Taunt. 464.

(*k*) *Peppin* v. *Solomon*, 5 T. R. 496. *Young* v. *Wright*, 1 Camp. 139; Doug. 497. 515. *Supra*, note (*i*).

to be credit to be given by *C. & Co.* to *D. & Co.* in a manner *then* and there agreed upon between the parties, and the proof of the guarantee consisted in evidence of several letters from the defendant, in one of which he stated that he had given the guarantee for such arrangements as *might* be entered into, it was held that there was no variance from the legal effect (*l*). Time.

In the same case, another count alleged the consideration for a guarantee for 8,000 *l.* to be that *C. & Co. would* give *V. & Co.* credit in manner *then* and there agreed upon, and it was held that there was no legal variance, although it appeared from the letters that *C. & Co.* had then credited *V. & Co.* to the amount of 5,000 *l.* of the 8,000 *l.* under the former guarantee (*m*).

But an allegation of an *executory* consideration is not satisfied by evidence of an *executed* consideration (*n*).

An allegation that a party is possessed for the remainder of a term of years, is satisfied by evidence that he is tenant from year to year (*o*), or for a fraction of a year (*p*).

Where the defendant in replevin avowed the taking as a commoner damage-feasant, and the plaintiff alleged that *J. S.* was seised of a house and land, whereto he had common, and that he demised to him to hold *from* the 25th day of March next before for a year, and the defendant traversed the lease *modo et formâ*, and the jury found that *J. S.* made a lease to the defendant *on* the 25th of March, for one year, it was held that the plaintiff was entitled to judgment (*q*).

The allegation of place is either merely formal, or it is descriptive; where it is merely formal, proof is unnecessary, even on indictments on criminal charges (*r*), and in actions for Place.

(*l*) *Irving & others* v. *Mackenzie*, 1 B. & B. 523.

(*m*) Ibid.

(*n*) 3 Lev. 98; Com. Dig. Action on the Case—Assumpsit, F. 6. An averment by way of consideration that *A.* had paid a sum of money, is not supported by evidence of consideration that *A.* would pay that money. *Amory* v. *Merryweather*, 2 B. & C. 573. *Secus*, where an *executed* consideration is alleged, and the law implies the duty. *Streeter* v. *Horlock*, 1 Bing. 34.

(*o*) *Botting* v. *Martin*, 1 Camp. 317.

(*p*) Litt. s. 67.

(*q*) Hob. 72; B. N. P. 300. The reason assigned is, that although the lease proved was not the same with that alleged, yet that the substance of the issue was, whether the plaintiff had such a lease as entitled him to use the common. But it was said, that he must not depart altogether from the form of the issue, as if it had been proved that he had a right of common by lease from *another*.

(*r*) 2 Haw. c. 46, s. 181; Salk. 288; 2 Hale, 291; Keb. 13. 33. By the provisions of the stat. 7 Hen. 5; 9 Hen. 5, c. 1; 18 H. 6, c. 12; if there be no such vill or place within the county, the indictment is void.

Place.

local offences, it is sufficient to prove the offence to have been committed within the county (*s*).

Where it is doubtful whether the allegation be merely formal, or it be descriptive, the allegation will be referred to *venue*, rather than to description (*t*), even although the action be of a local nature (*u*), and the existence of such a parish will be immaterial (*x*).

And where the place of doing an act is precisely alleged, if the description be *wholly immaterial*, the ground of charge or of complaint not being local, the description may, it seems, be rejected as surplusage. As, if a robbery be alleged to have been committed near a highway, when it was in fact committed in a dwelling-house, and not near a highway (*y*); or in a field near the highway, and the jury find that it was not committed near the highway (*z*); or in the dwelling-house of *A. B.* where the ownership cannot be proved (*a*), the variance is immaterial, for the statute takes away clergy generally.

The objection was taken in the case of *R.* v. *Goldsmith*, 3 Camp. 73, before Lawrence, J. on the Oxford Circuit, Summ. Assizes, 1808, and the learned Judge reserved the point; but the prisoner was afterwards acquitted.

(*s*) See *Warner* v. *Webb*, 1 Taunt. 371; *infra*, 409, note (*g*); Cro. Eliz. 911; Yel. 12. In an action for running foul of posts fixed in a river supporting the plaintiff's wharf, it is necessary to prove the posts or wharf to be at the place alleged, under a *videlicet*. *Hamer* v. *Raymond*, 5 Taunt. 789. Vol. II. tit. NUISANCE.

(*t*) *Jefferies* v. *Duncombe*, 11 East, 226. Vol. II. tit. CASE, ACTION ON. 2 Camp. 3; 4 T. R. 561.

(*u*) 2 East, 437.

(*x*) 11 East, 226; 3 Camp. 3. *Kirtland* v. *Pounsett*, 1 Taunt. 570; where in an action for use and occupation, it was held to be unnecessary to state in what parish the premises are situate; and that if the parish be described by a wrong name, it is immaterial, if it be described by a name generally known, and which therefore could not mislead the defendant. But see *Wilson* v. *Clarke*, 1 Esp. C. 273; and *Pool* v. *Court*, 4 Taunt. 700.

(*y*) *R.* v. *Summers & others*, East's P. C. 785. *Fowler's case*, ibid. *R.* v. *Darnford & Newton*, ibid.

(*z*) *Wardle's case*, East's P. C. 785.

(*a*) It was so held in *Pye's case*, (East's P. C. 785,) where the robbery was laid to have been committed in the dwelling-house of Aaron Wilday, and the robbery was proved, but it did not appear who was the owner, and the variance was held to be immaterial. So in *Johnston's case*, where the robbery was alleged to have been committed in the dwelling-house of *Joseph* Johnston, and it appeared that the robbery was committed by the prisoner, Sarah Johnston, in the dwelling-house of her husband, but his Christian name did not appear. East's P. C. 786.

But in *Durore's case* (Leach's C. C. L. 290), where the prisoner was indicted under the Black Act for maliciously shooting at A. Sanders, in the dwelling-house of *James* Brewer and John Sanday, and it appeared that the Christian name of Brewer was not *James* but *John*, the variance was held to be fatal. But the words of the stat. (9 Geo. 1, c. 22,) are "who shall ma-

So in an action for running down the plaintiff's boat in the Thames, near the Half-way Reach, proof that it was done in the Place.

liciously shoot at any person in any dwelling-house or other place." This case, which was decided by Hotham, B., seems to have been completely overruled by *Pye's case*, which was later, and decided by *all* the Judges.

It has been said, that where an injury is partly local, and partly transitory, and a precise local description is given, a variance in proof of the place is fatal to the whole; for the whole being one entire fact, the local situation becomes descriptive of the transitory injury (*R.* v. *Cranage*, Salk. 385.) The defendants were indicted for riotously assembling at the parish of St. Giles in the Fields, and breaking and entering the bed-chamber of Sarah S. in the dwelling-house of David *James*, and taking and carrying away thirty yards of stuff. Upon evidence, it appeared to be the dwelling-house of David *Jameson*; and Lord C. J. Parker held that the indictment could not be supported; and he said that this was not like the case 2 Roll. Ab. 677. And he cited *The Queen* v. *Sudbury*. Indictment for an assault and battery laid as a riot; two were acquitted, and two found guilty, and all were acquitted; for the crime was the riot, and the whole offence was charged under that specification and description. So of the playhouse. Indictment for acting a play, and speaking obscene words in such a parish, in a playhouse in Lincoln's-Inn Fields; if there be no playhouse in Lincoln's-Inn Fields the defendant must be acquitted; for though the words are not local, yet these are made so. One may make a trespass local that is not so. If the speaking had been alleged in Lincoln's-Inn Fields, then it had been laid as *venue*; but here it is otherwise, for here it is alleged as a description where the playhouse stood. In the principal case, part is local, and part is not local; the *cubiculum* is local; the taking and carrying away is not local; but all is put together as one entire fact, under one description, and you cannot divide them. See also 2 Haw. c. 46, s. 181, which cites the case of *R.* v. *Cranage*, and Fielding's Penal Law, 317; and lays it down too generally, that if an offence be laid in a parish, in the house of *J. S.*, a variance will be fatal. This position, however, is contrary to the cases above cited, and is not warranted by the case of *R.* v. *Cranage*, Salk. 385, which was founded on the consideration that the offence was *partly local*.

And where a trespass to goods is connected with a local trespass, a transitory count has been held to be necessary in order to avoid locality. *Smith* v. *Milles*, 1 T. R. 475.

In Buller's N. P. 5, it is laid down, that if it be alleged in an action for slander that the defendant in *clausâ ecclesiæ* Litchfield, spoke the words, the place being laid not as a *venue*, but as a description of the offence, must be proved. But a *quære* is subjoined in the margin. Yet notwithstanding the above authorities, considering that it is settled that a defendant may be found guilty of part of that with which he is charged, if it amount to an indictable offence, *qu.* whether he may not be convicted of that which is merely transitory, although the prosecutor fail as to the local part by reason of variance. See the case of *R.* v. *White*, East's P. C. 780; Leach's C. C. L. 286. *R.* v. *Woodward*, East's P. C. 780; Leach's C. C. L. 287; where, although it was held that the prisoners could not be found guilty, either of burglary, or under the stat. of Anne, of stealing in a dwelling-house to the amount of 40 *s.*, by reason of variance in the

Place. Half-way Reach is sufficient, the place being perfectly immaterial (*b*).

But it seems that wherever the allegation of place is descriptive of the terms of a contract, the proof must correspond with the averment.

Thus, if an action against a carrier the contract be alleged to be to carry from *A.* to *B.*, the *termini* are material (*c*).

So where the defendant's tenancy of land in *F.* was alleged to be the consideration of his promise to treat it in a husband-like manner, and it was proved that the land was in *F.* & *C.*, the variance was held to be fatal (*d*).

So in an action of covenant on a lease of coals, where the

name of the owner of the dwelling-house, yet it does not appear that the objection was held to extend to the simple larciny. And in *R.* v. *Davis*, East's P. C. 780, where the prisoner was acquitted of a burglary alleged to have been committed in the *dwelling-house* of William Pearce, and it appeared that it was the house, but not the *dwelling-house* of Pearce, the prisoner was recommended to mercy upon *condition of transportation*.

As a defendant may be convicted of the transitory part of an offence, though he be acquitted of the local part; and as it seems to be now established, that if the transitory part alone had been charged he might have been convicted, notwithstanding the variance from such local description, it seems to follow that he may be convicted of the transitory part alone, notwithstanding such a variance; for as neither mere locality alone, nor the omission to prove the whole of the charge, would have been fatal, it is difficult to conceive why the conjoint variance should be fatal.

(*b*) *Drewry* v. *Twiss*, 4 T. R. 558.

(*c*) *Tucker* v. *Crucklin*, 2 Starkie's C. 385. A declaration alleging a retainer, to cause the plaintiff's ship to proceed to *Gottenburgh*, in order that she might afterwards proceed to *Petersburgh*, is not proved by evidence of a retainer to cause the ship to proceed to *Gottenburgh*, and afterwards, under particular conditions, to *Petersburgh*. *Lopes* v. *De Tastet*, 1 B. & B. 538. See also *White* v. *Wilson*, 2 B. & P. 116. In the case of *Frith* v. *Grey* (4 T. R. 561, n.), in an action for not procuring the plaintiff a booth at a horse-race to be run on Barnet Common, *in the county of Middlesex*, it was proved that the whole of Barnet Common was in the county of Hertford. But Lord Mansfield and the rest of the Court, on a motion for a new trial, on the ground of variance, held, that as it was perfectly immaterial whether Barnet Common was in Middlesex, or not, those words might be rejected as surplusage. *Sed qu.*—Where the declaration was laid in tort, and stated the delivery of a parcel at Chester, in the county of Chester, to be carried to Shrewsbury, and it appeared that the delivery was at Chester within the county of the city of Chester, it was held that the variance was immaterial, no evidence being given that there was such a place as Chester within the county at large, and in common parlance Chester means Chester in the county of Chester. *Woodward* v. *Booth*, 7 B. & C. 301.

(*d*) *Pool* v. *Court*, 4 Taunt. 700.

declaration alleged the lands to be situate in the parish of Place.
B. & *M.*, instead of in the parishes of *B.* & *M.* (*e*).

In trespass, every part of the description of the place is material, and must be strictly proved (*f*).

An action for a nuisance to the plaintiff's real property, whether corporeal or incorporeal, is local, and the action must be brought in the county where the property is situate (*g*).

But it is not necessary to describe the precise local situation either of the property injured, or of the gravamen (*h*).

And unless a precise description be given, the place mentioned will be ascribed to *venue*, and not considered to be descriptive (*i*).

But if in such case a precise local description be given, it must be proved as laid, and a variance will be fatal (*k*).

Proof that the place is usually and commonly known by the description used in the declaration is sufficient.

Where, in an action for a nuisance to the plaintiff's house, "at Sheerness, in the county of Kent," it was proved that the house was situated in the adjacent parish of Minster, but that both places were usually known by the name of Sheerness, it was held to be sufficient (*l*).

Where the local description of property within a parish is material, it is sufficient to prove it to be a parish by general reputation, having churchwardens and overseers belonging to it, although it be in fact but a hamlet (*m*).

And where premises are described to be situated in a particular parish, it is sufficient to prove that the parish is usually known by the name of description (*n*).

(*e*) *Morgan* v. *Edwards*, 2 Marsh. 96; *infra*, 411. But it was also held that an allegation that the lands were in the occupation of *A.*, *B.* and *C.*, instead of in the *several* occupations of *A.*, *B.* and *C.*, was sufficient.

(*f*) Per Lawrence, J. in *Vowles* v. *Miller*, 3 Taunt. 139. But it is sufficient to prove a trespass in some part of the place described, although other part belongs to the defendant. *Stevens* v. *Whistler*, 11 East, 51.

(*g*) *Mersey & Irwell Navigation Co.* v. *Douglas*, 2 East, 497. And where no local situation in such case is alleged, it will be presumed to be situate in the county specified in the margin (*Warren* v. *Webb*, 1 Taunt. 379.) Thus, an allegation that the defendant suffered a spout to be out of repair at *A.* in the county of *B.*, is equivalent to an averment that it was situated there. *Warren* v. *Webb*, 1 Taunt. 379.

(*h*) *Mersey & Irwell Navigation Company* v. *Douglas*, 2 East, 497.

(*i*) Ibid.

(*k*) 2 East, 500, n. *Hamer* v. *Raymond*, 5 Taunt. 789. *Supra*, 406.

(*l*) *Burbige* v. *Jakes*, 1 B. & P. 225. And *semble*, the allegation might at all events have been referred to *venue*. *Supra*, 406.

(*m*) 2 Camp. 5, n. See *Kirtland* v. *Pounsett*, 1 Taunt. 570.

(*n*) *Kirtland* v. *Pounsett*, 1 Taunt.

Place.

And proof that the parish is usually described by the name of a Saint, or by any other addition, which is omitted in the pleadings, will not be material (*o*).

In ejectment, the premises were alleged to be situate at Farnham, but were proved to be situate at Farnham Royal, and it was held to be sufficient, as it was not shown that there were two Farnhams (*p*).

So where the penalty in a conviction was adjudicated to the poor of the parish of St. Mary, Lambeth, but the offence was proved to have been committed in the parish of Lambeth, it was held to be sufficient, there being no evidence to show that there were two parishes of that name (*q*). And although there be two parishes of the general name, the general description will be sufficient (*r*).

But where, in trespass for breaking and entering a house situate in the parish of Clerkenwell, it was proved that there were two parishes in Clerkenwell, the one known by the name of St. John, the other by the name of St. James, but that the whole was generally known by the name of Clerkenwell, the description was held to be insufficient (*s*).

570. *Goodtitle* v. *Walter*, 4 Taunt. 671. Per Mansfield, C. J., in *Vowles* v. *Miller*, 3 Taunt. 140.

(*o*) In *Goodtitle* v. *Walter*, 4 Taunt. 671, the Court said that the case in which the variance between the parish of Chelsea and the parish of St. Luke, Chelsea, had been held to be fatal, had been overruled by the case of *Kirtland* v. *Pounsett*, 1 Taunt. 570.

(*p*) *Doe* v. *Salter*, 13 East, 9. Where a conviction for performing a stage entertainment without licence, alleged the fact to have been done at the Coburg Theatre, in the parish of St. Mary, Lambeth, and the adjudication of the penalty was to the poor of the parish of St. Mary, Lambeth, and the evidence stated that the theatre was in the parish of Lambeth, it was held to be no variance, for it did not appear that there were two distinct parishes so named. *R.* v. *Glossop*, 4 B. & A. 616.

(*q*) *R.* v. *Glossop*, 4 B. & A. 616. And note, that Lord Ellenborough said that the variance would not be material in ejectment.

(*r*) *Doe d. James* v. *Harris*, 5 M. & S. 326. In that case a fine described the lands as situate in the parish of *Westbury*; there were two parishes of that name, Westbury-on-Trym, and Westbury-on-Severn, in the latter of which the premises were situate, and it was held that there was no variance. S. P. *Taylor* v. *Williams*, 3 Bing. 449. For the description is correct, as far as it goes; there is no variance, although the two parishes are usually distinguished by an addition.

(*s*) *Taylor* v. *Hooman*, 1 Moore, 161. *Tamen qu.* The plaintiff was nonsuited; and a new trial was moved for, on an affidavit stating that the whole district was generally known by the name of St. James, Clerkenwell, and statutes were referred to in which it was so described. Gibbs, C. J., observed, that the Acts referred to were not part of the public statutes; but the Court gave leave to amend, on payment of costs, by adding another count.

And where, in an action for an excessive distress, the premises were laid to be in the parish of St. George the Martyr, Bloomsbury, and were proved to be in the parish of St. George, Bloomsbury, it was held that the description was improper (*t*). Place.

Where the premises in ejectment were described as situated in the united parishes of St. Giles in the Fields and St. George, Bloomsbury, and it appeared that the premises were in fact situated in the parish of St. George, Bloomsbury, and that the parishes were united by Act of Parliament for maintaining their poor, but for no other purpose, the variance was held to be fatal (*u*).

Where the premises in ejectment were alleged to be situate in the parish of West Putworth and Bradworthy, and it was proved that part were in the parish of West Putworth, and part in the parish of Bradworthy, it was held to be sufficient; and that the declaration was to be construed as alleging the premises to be so distributively situated (*x*).

In an action for non-residence, the description of the parish of St. Ethelburgh for Saint Ethelburgha, is fatal (*y*).

An allegation that *A. B.* was a constable of the parish of St. Paul, Covent Garden, is not satisfied by evidence that he was presented as a fit person to serve as constable for that parish, but sworn in to serve for Westminster generally (*z*).

As natural persons, as well as aggregate corporate bodies, must be described by name, an allegation of the name of any such person or body, whose existence is essential to the claim or charge, is necessarily *descriptive*, and consequently a variance is generally fatal. Where, however, the name of a party to the action or indictment is mistaken, the objection must be taken by plea of the misnomer in abatement, and cannot be taken by a plea in bar (*a*). Name.

Where a corporation was sued by the name of the Mayor and Burgesses of Stafford, and on production of the charter, it

(*t*) *Harris* v. *Cooke*, 2 Moore, 587. The Court said that it should have been described by its known and popular name, and not by its general description; St. George, Bloomsbury, was dedicated to king George the 1st, and St. George the Martyr is quite a distinct parish.

(*u*) *Goodtitle d. Pinsent* v. *Lammerman*, 2 Camp. 274.

(*x*) *Goodtitle d. Brembridge* v. *Walter*, 4 Taunt. 671. See the case of *Morgan* v. *Edwards*, 2 Marsh. 96; *supra*, 409. In the latter case the evidence varied from the written description in the lease.

(*y*) *Wilson* v. *Gilbert*, 2 B. & P. 281.

(*z*) *Goodes* v. *Wheatley*, 1 Camp. 231.

(*a*) *Morley* v. *Law*, 2 B. & B. 34. See *Gardner* v. *Walker*, 3 Ans. 935.

Misnomer. appeared that they were "The Mayor and Burgesses of the borough of Stafford, in the county of Stafford," the Court held that the variance was not fatal, under a plea of not guilty to a declaration in case, but that the misnomer might have been pleaded in abatement (*b*). But if there be no such corporation the objection is available in bar (*c*).

Upon the trial of an ejectment on the demise of the mayor, &c. *of the borough town of Mal*don, it appeared from the charter that they were incorporated by the description of the mayor, &c. *and commonalty of Mal*den; and it was held that the variance was immaterial, the charter showing that Malden was a borough town (*d*).

Of persons. The misnomer of persons whose existence is essential to the charge or claim is usually a fatal variance.

An indictment charging the prisoner with having personated M'Ca*n*n, is not satisfied by proving his personation of M'Ca*r*n (*e*).

So Couch for Crouch is a fatal variance, in the description of a party to a bill of exchange (*f*).

So a misdescription of a name of dignity will be fatal.

The declaration in an action for a malicious prosecution alleged that the defendant went before *R. C.* baron Waterpark, of *Waterfork*, in the county of *A.*; the proof was, that he went

(*b*) *Mayor and Burgesses of Stafford* v. *Bolton*, 1 B. & P. 40. In an action for stock, the South Sea Company were described as trading *ad Maria Australia*, and it was held that the variance was fatal; but the plaintiff had leave to amend. *Turville* v. *Ainsworth*, Str. 787.

(*c*) Ibid. and Bro. Misn. 73.

(*d*) *Doe* v. *Miller*, 1 B. & A. 699. And see the cases of the *Dean and Chapter of Carlisle*, 10 Co. 124; of the *Dean and Canons of Windsor*, ibid. *Dr. Agray's case*, 11 Co. 19; Cro. Eliz. 816.

(*e*) *R.* v. *Tassett*, cor. Wood, B. Kent Lent Ass. 1818, and afterwards before the Judges. *Tarbart* for *Tabart* is a fatal variance in a bail-piece (*Bingham* v. *Dickie*, 5 Taunt. 514.) So if the plaintiff on a bail-piece be described as Christian Nicholas Venn, instead of Daniel Nicholas Venn; they are not bail in the cause, and the Court will not amend the bail-piece, but give judgment on the plea of *nul tiel* record. *Venn* v. *Warner*, 3 Taunt. 263. So *Shakpear* for *Shakespear*, on a plea in abatement. If a defendant be arrested by a wrong Christian name, as *Berend* for *Bernard*, the Court will discharge him on motion (*Wilks* v. *Lorck*, 2 Taunt. 399). See also *Smith* v. *Innes*, 4 M. & S. 360. So where a party having two Christian names is sued by one only (*Arbouin* v. *Willoughby*, 1 Marsh. 477.) *Secus*, where he has dealt with the party by the name by which he is sued (*Walker* v. *Willoughby*, 6 Taunt. 530; S. C. 2 Marsh. 230); or where the name is *idem sonans*, as *Benedetto* for *Beneditto*. *Abitbol* v. *Benedetto*, 2 Taunt. 401. See *R.* v. *Foster*, Russ. & Ry. 412.

(*f*) *Whitwell* v. *Bennett*, 3 B. & P. 550. So if in an action on the statute of usury, a bill of exchange be alleged to be drawn on *John K.* instead of *Abraham K.* *Hutchinson* v. *Piper*, 4 Taunt. 810.

before *R. C.* baron Waterpark, of *Waterpark*, in the county of *A.*; and the variance was held to be fatal (*g*). Misnomer of persons.

An allegation that *J. S.*, otherwise *R. S.*, made a deed, is not supported by evidence that *J. S.* made a deed by the name of *R. S.* (*h*).

So a declaration against a party in his right name, alleging that he executed a bond in a different name, is bad (*i*).

If the plaintiff allege that a promissory note was made payable to him, or that a promise was made to him, and on proof of the instrument or contract it appears to have been made to another, it is no variance if the plaintiff show that he was the person really meant, for that is the legal effect (*j*).

Where a person is described by name simply, without addition, proof that there are two persons of that name is no variance, for the allegation is still true.

Upon an indictment for an assault upon *Elizabeth Edwards*, it appeared that there were two of that name, mother and daughter, and that in fact the assault had been made upon the daughter; and the conviction was held to be good (*k*).

But a description of persons by the name by which they are commonly known is usually sufficient.

Proof that certain officers in the town of *A.*, within the parish of *B.*, have always been called the churchwardens of *A.*, is sufficient to warrant the description of them as the churchwardens of *A.* (*l*).

And proof that the name alleged is the reputed name is usually sufficient.

When an indictment charged the prisoner with having stolen the property of *Victory*, baroness Turkheim, the prosecutrix; and the proof was that her real name was *Selina Victoire*; that baroness Turkheim was her real title, but that she was usually known by the name of baroness Turkheim; the Judges held that the description was sufficient (*m*).

(*g*) *Walters* v. *Mace*, 2 B. & A. 756.

(*h*) *Hetchman* v. *Shotbolt*, Dyer, 277 b, pl. 9.

(*i*) *Gould* v. *Barnes*, 3 Taunt. 504.

(*j*) *Willis* v. *Barrett*, 2 Starkie's C. 29. *Moller* v. *Lambert*, 2 Camp. 548. And see *Bass* v. *Clive*, 2 M. & S. 282. *Secus*, in the case of a writ. *Scandover* v. *Warne*, 2 Camp. 270, or specialty.

(*k*) *R.* v. *Pearce*, 3 B. & A. 579. But if father and son be both called *A. B.*, by *A. B.* simply the father shall be intended. *Lepiot* v. *Brown*, 1 Salk. 7. *Wilson* v. *Stubbs*, Hob. 330. *Sweeting* v. *Fowler*, 1 Starkie's C. 106. Vol. II. 148.

(*l*) *Stead* v. *Heaton*, 4 T. R. 669.

(*m*) *Sull's case*, Leach, 1005. See also *Mary Graham's case*, Leach, 619.

Misnomer of persons.

It is sufficient if the name be *idem sonans*: on an indictment for assaulting John Whyneard, the evidence was of an assault on one who spelt his name Wynyard, but it was commonly pronounced Winniard, and the conviction was held to be right (*n*).

The misnomer of a party to the proceeding, whether civil or criminal, can usually be taken advantage of by plea in abatement only, and is immaterial where the defendant pleads in bar.

And where a defendant in assumpsit has let judgment go by default, the other defendants cannot take advantage of a misnomer of that defendant, proof being given that he has been served with process (*o*).

Where the defence to an action by *Elizabeth H.* was, a judgment against the defendant, as garnishee, in the mayor's court, in an action against the present plaintiff, in which she was called *Eliza H.*, satisfaction having been entered, it was held that the variance was not material, proof having been given that she was known by the name of *Eliza*, as well as by that of *Elizabeth* (*p*).

Character.

If plaintiffs describe themselves as the assignees of *A.*, proof that they are assignees under a joint commission against *A.* and *B.* is no variance (*q*).

Act.

To satisfy an allegation that a party did a particular act, it is sufficient to prove that the act is his in legal effect.

In an action of debt against *B.* alone, on a joint bond of *A.* and *B.*, where *B.* pleads payment, proof that *A.* paid the debt will support the issue (*r*).

Debt on bond against the executors of *Stalwood*; plea that *Hicks* was a co-obligor, and that on a day specified *Hicks* and *Stalwood* paid the money; it was held that this was proved by evidence that *Stalwood* paid one half during his life, and *Hicks* the remainder after his death (*s*).

(*n*) *R.* v. *Foster*, Russ. & Ry. C.C.L. 412. But where the indictment charged the murder of George Lakeman Clarke, a bastard child, which had been christened by the name of George Lakeman, the mother's name being Clarke, but the child had not acquired her name by reputation, it was held to be a misnomer. *R.* v. *Clarke*, 1 Russ. & Ry. C. C. L. 355.

(*o*) *Dickenson* v. *Bowes*, 16 East, 110.

(*p*) *Huxham* v. *Smith*, 2 Camp. C. 19.

(*q*) *Harvey & others* v. *Morgan*, 2 Starkie's C. 17. Vide Vol. II. 838, and tit. BANKRUPTCY, App.

(*r*) P. C. Ann. 133.

(*s*) *Groves* v. *The Executors of Stalwood*, Ann. 133.

In an action on the case against the master of a ship for loss of goods, it was alleged that the plaintiff was to pay the defendant, but the jury found that the plaintiff was to pay the shipowners, and that the latter were to pay the defendant; and the Court held that the allegation was supported, since the plaintiff did in effect pay the defendant (*t*). Act. Parties.

In an action by the consignor of goods against the carrier, on an undertaking to carry them for a certain hire and reward, to be paid by the plaintiff, proof of an agreement, as between the consignor and consignee, that the latter shall pay the carriage, does not disprove the allegation, the consignor being in point of law liable to the defendant (*u*).

An allegation in an action on an indemnity bond, that *A.* and *B.* (the parties indemnified) advanced certain money to *D.*, is satisfied by proof of the advance of the money by *A.*, *B.* and *C.*, the latter being a dormant partner (*x*).

Where the fact alone is material, and the agent immaterial, a variance as to the latter will not be fatal. If a declaration on a bill of exchange aver a presentment by *A. B.* it is sufficient to prove a presentment by another (*y*).

In all civil cases, and in prosecutions for misdemeanors, it is a general rule, that an allegation that a party did an act is sustained by evidence that he caused it to be done by another, according to the well-known maxim *qui facit per alium facit per se.*

In an action against *A.* for damage occasioned by his negligence in driving a carriage, it is sufficient to prove that the damage was occasioned by the negligence of his servant (*z*).

An averment that the defendants accepted a bill of exchange is satisfied by evidence of an acceptance by their authorized agent (*a*).

But an allegation that the plaintiff employed *A.* to repair damage to a house, and to alter a room, is not supported by evi-

(*t*) *Morse* v. *Stall*, 1 Ventr. 238.

(*u*) *Moore* v. *Wilson*, 1 T. R. 659. And see *Jordan* v. *James*, 5 Burr. 2680. *Vale* v. *Bayle*, Cowp. 294.

(*x*) *Harrison* v. *Fitzhenry*, 3 Esp. C. 238.

(*y*) *Boehm* v. *Campbell*, 1 Gow. 55.

(*z*) *Brucker* v. *Fromont*, 6 T. R. 659. If *A.* and *B.*, being carriers, horse a cart each for his own share of the road, they are jointly liable for the negligence of the servant of either. *Waland* v. *Elkins*, 1 Starkie's C. 272. But as to allegations that the principal has subscribed an instrument, which has in fact been subscribed by an agent, see *Levy* v. *Wilson*, 5 Esp. C. 180. *Helmsley* v. *Loader*, 2 Camp. 450; Vol. II. tit. AGENT.

(*a*) *Heys* v. *Heseltine*, 2 Camp. C. 604. See *Coare* v. *Giblett*, 4 Esp. C. 231.

Act. Parties.

dence that an insurance company employed *A.* to repair, and that the plaintiff employed him to alter the room (*b*).

An allegation that *A.* sold a chattel to *B.* by writing, is not proved by evidence that *B.* was the purchaser at an auction, and that *A.*'s agent wrote *B.*'s name, as the buyer, in the printed catalogue, and that *B.* gave his promissory note for the sum (*c*).

An averment of an agreement to deliver goods to *A.* is not proved by evidence of an agreement to deliver goods to the bearer of a receipt for the goods given by the defendant (*d*).

Where the consideration was alleged to be the releasing certain goods distrained for rent to the tenant, and evidence was given of a promise on consideration of returning the goods to the plaintiff, the variance was held to be fatal (*e*).

In an action for an amercement in a court-leet, an allegation that the court was held before the steward is not proved by evidence that it was held before his deputy (*f*).

An averment of an absolute assignment, alleged as a consideration for a promise, is not supported by proof of a qualified assignment (*g*).

Consequence.

Where a wrongful act and an injurious consequence are alleged, the consequence must be shown to result immediately from the act; it is not sufficient to connect the act with a remote consequence, by evidence of intermediate causes.

Where the plaintiff alleged that the defendant placed and continued a heap of earth, by means of which the refuse-water was prevented from flowing from the plaintiff's house to a certain ditch, and the proof was that the earth had been so placed originally as not to obstruct the water, but that in process of tim the earth was trodden down, and fell into the ditch, and obstructed it, it was held to be a variance (*h*).

An allegation that the defendant diverted and turned a stream of water, is not proved by evidence that by interrupting its course and penning it back he caused it to overflow the plaintiff's premises (*i*).

(*b*) *Witherington* v. *Buckland*, Ann. 309.

(*c*) *Symonds* v. *Ball*, 8 T. R. 151.

(*d*) *Samuel* v. *Darch & others*, 2 Starkie's C. 60.

(*e*) *Goodson* v. *Leary*, 4 T. R. 487.

(*f*) *Wyvill* v. *Shepherd*, 1 H. B. 162. For *semble*, a deputy cannot be appointed without special authority, under a particular grant or by established usage. See 4 Ins. 88. And see *Gery* v. *Wheatley*, 1 H. B. 163, n.

(*g*) *Vansandau* v. *Burt*, 1 Moore, 42.

(*h*) *Fitzsimmons* v. *Inglis*, 5 Taunt. 534.

(*i*) *Griffiths* v. *Marson*, 6 Price, 1; and see *Williams* v. *Morland*, 2 B. & C. 510.

An allegation of damage from the unskilful steerage of the defendant's ship, is not satisfied by evidence of damage from the improper stowing of the defendant's anchor (*j*). Act. Consequence.

If the declaration allege as special damage, that the plaintiff gave bail to the sheriff at the return of the writ, it is not proved by evidence that he paid the debt, and 10 *l.* for costs, into the hands of the sheriff (*k*).

But where the declaration alleged that the defendant erected a dam and diverted a watercourse, and prevented the plaintiff from having the use, &c., this was held to be sufficient, although the effect of erecting the dam was not to *divert* the water, but to prevent its flowing in sufficient quantities (*l*).

A variance as to the number of agents seems to be immaterial, unless the number, from the nature of the case, operate by way of description of the charge or claim. Agent.

If *A.* be indicted as accessory to *B.* & *C.* he may be convicted on proof that he was accessory to a felony committed by *B.* alone, or by *B.* & *C.* together with *D.* (*m*). Number of parties.

A livery to one of several feoffees is livery to all (*n*).

An allegation in perjury, that the oath was taken before *E. W.* one of the justices of assize, is proved by evidence that it was taken before *E. W.* and another justice of assize (*o*).

In general, in actions for torts, it is sufficient if the injury be proved to have been committed by one only of the defendants, who may be convicted, and the rest acquitted (*p*).

Where three promise to do an act upon request, a request to one is a request to all (*q*); and notice to one is notice to all (*r*).

Where it was alleged that differences depended between six persons, partners, and it appeared that three of the partners had given a joint and several bond to the other three, conditioned for

(*j*) *Hullman* v. *Bennett*, 5 Esp. C. 226.

(*k*) *Bristow* v. *Haywood*, 4 Camp. 213.

(*l*) *Shears* v. *Wood*, Moore, 345. Case, for so negligently pulling down a party-wall that plaintiff's cellar was weakened and fell in, and his wine destroyed: the proof was, that the injury was caused by the defendant's placing a quantity of bricks, in pulling down the wall, on the cellar, *per quod*, &c. and the variance was held to be immaterial. *King* v. *Williamson*, 1 D. & R. 35.

(*m*) Crim. Pleadings, 148, 2.

(*n*) Co. Litt. 48; Com. Dig. Feoffment, B. 2.

(*o*) R. v. *Alford*, Leach's C. C. L. 179.

(*p*) Vol. II. 582.

(*q*) *Brereton's case*, Noy, 135; Vin. Ab. T. b. 97; vide *supra*, 780.

(*r*) Com. Dig. Condition, L. 9.

Act. Number of parties.

the performance of the award, and that the latter had given a similar bond to the former, in which it was recited that differences existed between the above bounden three and the above named three, it was held to be no variance (*s*).

An allegation in an indictment of perjury, that *A.* filed his bill (upon the answer to which perjury is assigned) against *B.* and another, is satisfied by proof of a bill filed against *B.*, *C.* and *D.*, the perjury being assigned on a fact which is material as between *A.* and *B.* only, and it seems that it would have been sufficient to allege that it was filed against *B.* only (*t*).

Allegation of motives and intention.

If the act itself which is the foundation of the claim or charge be proved, it seems that allegations as to the manner of doing it, laid by way of aggravation, may be rejected. Thus upon a charge of murder the act is laid to have been done *wilfully* and of *malice aforethought*, yet, although neither of these allegations be proved, the prisoner may be convicted of manslaughter (*u*).

So if a libel be alleged to have been published with intent to bring the administration of justice into contempt, and also to defame particular magistrates, the defendant is liable to be convicted if a publication with either of those intentions be proved against him (*x*).

Upon an indictment charging the defendant with assaulting a female child, with intent to abuse and carnally to know her, he may be convicted of the assault with intent to abuse her, although the jury negative the rest of the intention (*y*).

If slanderous words be alleged to have been spoken with intent to injure the plaintiff in two trades, it is not a fatal variance if it turn out that the intent was to slander him in one of them only (*z*).

Written instrument.

Variances in the proof of a written instrument may be considered, 1st, Where it is set out by the *tenor*, &c.; 2dly, Where it is described in *substance* and *effect*; 3dly, Where it is vouched in proof of particular facts by a description of its date, names of parties, &c.; 4thly, Where a fact is simply alleged, without vouching the instrument, and the instrument is used but as evidence. Previously to stating the decisions applicable to this branch of the inquiry, it may be proper to observe, that by a late

(*s*) *Winter* v. *White*, 3 Moore, 674.

(*t*) *R.* v. *Benson*, 2 Camp. 501, cor. Lord Ellenborough.

(*u*) 2 Hale, 246; Fost. 329.

(*x*) *R.* v. *Evans*, cor. Bayley, J. Lanc. Sp. Ass. 1821.

(*y*) *R.* v. *Dawson*, cor. Holroyd, J. York Summ. Ass. 1821.

(*z*) *Figgins* v. *Cogswell*, 3 M. & S. 369.

wholesome statute, power is given to Courts of Record to amend the record in a civil action, or prosecution for a misdemeanor, in case it vary from a writing produced in evidence to support it (*a*). Written instrument.

In general, where a party is bound, either by the nature of the case, or by his own allegation, to strict proof of a written document, any variance which affects the sense will be fatal; but a mere variance in the spelling of a word will not be material unless the word be thereby altered into one of a different meaning (*b*).

The words "*to the tenor following*," or "*as follows*," or "*in the words and figures following*," bind to an exact recital (*c*).

Under such an allegation the insertion of the word *nec* instead of *non* (*d*), *air* for *heir* (*e*), would be fatal; but a variance of the word *abby* for *abbey* (*f*), or in an indictment for perjury, of *undertood and believed* for *understood and believed* (*g*), would not be material.

A variance in a name contained in an instrument so set out, or in a record on a plea of *nul tiel* record, will be fatal, as of *Crawley* for *Crowley* (*h*), *Ansty* for *Anesty*, *Shartless* for *Sharpless* (*i*), *Shutliff* for *Shirtliff* (*k*), unless, as it seems, the name be *idem sonans*, as *Segrave* for *Seagrave* (*l*).

(*a*) By the stat. 9 Geo. 4, c. 16, intituled "An Act to prevent a failure of justice by reason of variances between records and writings produced in evidence in support thereof," it is enacted that it shall and may be lawful for every Court of Record holding plea in civil actions, any Judge sitting at *nisi prius*, and any Court of oyer and terminer and general gaol delivery, in England, Wales, the town of Berwick-upon-Tweed and Ireland, if such Court or Judge shall see fit so to do, to cause the record on which any trial may be pending before any such Judge or Court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print, produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party as such Judge or Court shall think reasonable.

(*b*) *Supra*, tit. Forgery.—Libel. Crim. Pleadings. 100, 2d edit. Doug. 194; Cowp. 230; Salk. 660.

(*c*) Doug. 97. *R.* v. *Powell*, 2 Bl. R. 788; Salk. 660; Hob. 272; 8 Co. 78; Co. Ent. 508; 2 Saund. 121; Dyer, 75. *Lady Ratcliffe* v. *Shubly*, Cro. Eliz. 224. *Blissett* v. *Johnson*, Cro. Eliz. 503; 2 Roll. Abr. 708; *supra*, tit. Libel.

(*d*) Salk. 660.

(*e*) *Abney* v. *Wallace*, Str. 201. 231.

(*f*) Ibid.

(*g*) *R.* v. *Beach*, Cowp. 229.

(*h*) 12 Ass. pl. 2.

(*i*) Bro. Var. 20.

(*k*) *Gordon* v. *Austin*, 6 T. R. 611. See also *R.* v. *Shakespear*, 10 East, 83.

(*l*) 2 Str. 889.

Written instrument.

And so it is where a name is alleged which is to be proved by a record, or other written instrument (*m*).

An allegation that it was presented in an indictment *in manner and form* following, does not bind to an exact proof; and therefore, where the indictment set out under that allegation omitted the word *despaired*, it was held that the variance was not material (*n*).

Oyer of condition of bond.

If the condition of a bond be set out on oyer, a variance from the tenor will be fatal. Thus where, on oyer, the condition was, that if the defendant should pay to the plaintiff the full sum of 100 *l.* by six equal payments, &c., and under the plea of *non est factum* the evidence was, that the word *hundred* had been omitted in the bond, and had been interlined in it after execution, the variance was held to be fatal, although it was clear, from the context, that the word hundred was intended (*o*).

If a public statute be misrecited, the Courts will take notice of the variance, and it will be fatal (*p*); but they will not notice a variance in a private statute unless it be pleaded (*q*)

Where in setting out a statute the word *or* is used instead of the word *and*, the mistake will be fatal (*r*), unless the word *or* in the statute has always been construed to mean *and* (*s*).

Legal effect.

Secondly, when the instrument is described merely by its substance and effect, it is sufficient to prove it by one which corresponds in *legal effect*.

In debt on bond, the plaintiff alleged that the defendant acknowledged himself to be bound to *Richard Bishop*; on oyer

(*m*) *Turvil* v. *Aynsworth*, Str. 787. The plaintiff declared for stock in the company trading ad Maria *Austral*, vocat, the South Sea Company; and after great debate it was held that the variance between *Austrial* and *Austral* was fatal, but the plaintiff had leave to amend.

(*n*) *R.* v. *May*, Doug. 183.

(*o*) *Waugh* v. *Bussell*, 5 Taunt. 707. *Secus*, where the substance only is alleged and oyer is not demanded. Ib. And Gibbs, C. J. observed, that C. B. Comyns, in 5 Com. Dig. Obligation, B. 4, had misunderstood the case *Cull & Ux.* v. *Sarmine*, when he says, that if the declaration be upon a bill that he will pay, and the bill says "if he pay," the variance will not be material; and that what was really decided in that case was, that the mis-spelling, by adding an e final to the name of the widow Sarmine, did not thereby vitiate the obligation.

(*p*) *Boyce* v. *Whitaker*, Doug. 97.

(*q*) *R.* v. *Wilde*, 1 Lev. 206; Doug. 97; 1 Salk. 330; 1 Lord Ray. 318.

(*r*) *R.* v. *Marsack*, 6 T. R. 771. See the *Attorney-general* v. *Horton*, 4 Price, 237, where *thereout* for *thereon* was held to be an immaterial variance.

(*s*) Ibid.

it appeared that the defendant acknowledged himself to be bound to *Richard* —— to be paid to the said *Richard Bishop*; and on demurrer the Court held that this was no variance, for the word *said* pointed out the relation of the names so immediately that it was impossible to doubt but that the bond was made to the person to whom the money was payable (*t*). Written instrument Legal effect.

The declaration averred that a note was payable to *B.* or order and alleged an indorsement as payable to *C.* or order, and on production of the note the indorsement was, Pray pay to *C.*; it was held that there was no variance in substance, for by the indorsement it was payable as alleged (*u*).

Where the declaration was on a note promising to pay a sum of money and interest, and the proof was of a note entitled in a cause with a promise to pay the debt and costs, it was held to be sufficient (*v*).

So where the declaration alleged a bond for 40 *l.* to be paid to the plaintiff, and on oyer of the bond it was to be paid to his attorney or assigns, the Court, on demurrer, held the variance to be immaterial, for payment to the plaintiff or his attorney was the same thing; the *teneri* made it a debt to the plaintiff, and a *solvend* to any one else would be repugnant (*w*).

In an action by the husband alone, on a bond alleged to be given to him, he gave evidence of a bond to himself and his wife; and this was held to be no variance, for he had a right to reject the obligation to his wife, and in legal import it was a bond to himself (*x*).

So where, in covenant, a lease was alleged to have been made by the plaintiff on the one part, and the defendant on the other,

(*t*) *Bishop* v. *Morgan*, 11 Mod. 275. See also *Waugh* v. *Bussell*, 5 Taunt. 707. In an action on the case for detaining a bond alleged to have been given by Lord *Gave*, upon *non assumpsit* pleaded, a bond was given in evidence executed by Lord Gage; and the Court of C. B. held that the variance was not material. *Alcorn* v. *Westbrook*, 1 Wils. 115; but it seems from the report, that although the declamtion alleged the name to be Gave, yet in other parts it was stated to be *Gage*. If in setting forth the substance and effect a blank be supplied, and a meaning be thereby added which is not actually supplied by any terms contained in the instrument itself, the variance will be fatal. An indictment for perjury alleged that the defendant swore in substance and effect, "that *A.* assaulted her, and at the same *time* threatened to shoot her," the word time was omitted in the affidavit, and the variance was held to be fatal. *R.* v. *Mary Ann Taylor*, 1 Camp. C. 404.

(*u*) B. N. P. 275.

(*v*) *Coombs* v. *Ingram*, 4 D. & R. 216.

(*w*) Salk. 659.

(*x*) *Ankerstein* v. *Clarke & others*, 4 T. R. 616. Although the bond was given to the wife as administratrix. Ibid.

Written instrument. Legal effect.

and the lease proved under the plea of *non est factum*, was by the plaintiff and his wife of lands the property of the wife before marriage (*y*).

In an action against the high bailiff of Westminster for a false return to a writ of *fi. fa.*, the plaintiff alleged a warrant to levy 200 *l.* of the goods of *A. U.*, which the plaintiff had recovered against *A. U.* He proved a *fieri facias* to that effect, and a warrant to levy 200 *l.* of the goods and chattels of *A. U.*, which the plaintiff had recovered against ——; and it was held that the allegation was satisfied, for the name might be supplied by reference (*a*).

So where the declaration on a bond alleged that the defendant acknowledged himself to be bound in so many pounds, on the production of the bond, it appeared that the word pounds in the obligatory part was omitted, but it being manifest from the condition of the bond that pounds were meant, it was held that the omission might be supplied (*a*).

A declaration for maliciously holding to bail, in setting out the judgment in the former action, stated, "it was thereupon considered that the then plaintiffs should take nothing by their said writ, but that they and their pledges to prosecute should be in mercy," &c. In the record of the former judgment the words "*and* their pledges to prosecute" were omitted, and it was held that the words might be rejected as surplusage (*b*).

A declaration in setting out the condition of a bail-bond stated, that if the defendant should appear to answer the plaintiff, *according to the custom of his Majesty's court of Common Bench*, then the obligation should be void; on the production of the bond it appeared that the words in italics were omitted, but this was held to be no variance, as the legal effect was averred (*c*).

An avowry alleged certain rent to be due under a demise, and certain further increased rent for breaking up land into tillage. It appeared from the lease that the increase of rent was confined to the last three years, and the rent was, in fact, claimed

(*y*) *Arnold* v. *Revoult*, 1 B. & B. 443; 4 Moore, 66. *Beaver* v. *Lane*, 2 Mod. 217.

(*z*) *King* v. *Morris*, Str. 909; Fitzg. 198; 1 Ford, 85. See also *Hendray* v. *Spencer*, cited 1 T. R. 238. *Supra*, 738.

(*a*) *Coles* v. *Hulme*, 8 B. & C. 568.

(*b*) *Judge* v. *Morgan*, 13 East, 547. Although the judgment was pleaded with a *prout patet*. Note, that Lord Ellenborough observed that there was an &c. in the record. See *Phillips* v. *Shaw*, 4 B. & A. 435; 5 B. & A. 984; *infra*, 429.

(*c*) *Bonfellow* v. *Steward*, 3 Moore, 214.

in respect of part of the last three years, and the Court held that under the statute (*d*) this was no variance, the mere effect and operation of the demise being stated (*e*). Written instrument. Legal effect.

In an action for false imprisonment, the declaration, in setting forth the bill of Middlesex, alleged that the sheriff was commanded to take *A. B.* (the then defendant) and *John Doe*, if, &c., and them, &c. The bill produced was in words at length, and it was held to be no variance, for it was sufficient to set out the substance; and there was no variance between what was set out and the bill of Middlesex produced (*f*).

Where in proceeding against bail above, and *nul tiel* record pleaded to a replication, which alleged a *capias ad satisfaciendum*, returnable *Coram Rege apud Westm.*, a *ca. sa.* was produced, returnable *Coram Rege ubicunque*, &c., it was held to be no variance (*g*).

In an action against the sheriff for misconduct in the sale of the plaintiff's goods, under a *fieri facias*, the plaintiff, in stating the substance of the writ, alleged that the sheriff was commanded to levy 80 *s.* awarded to *J. C.* for his damages sustained by occasion of the detaining of the debt; and the writ stated that the 80 *s.* were awarded to *J. C.* for his damages sustained, as well by reason of the detaining the debt, as for his damages; and it was held to be no variance, for *costs*, in a legal sense, are included in the word damages (*h*).

Where in an action for bribery, the declaration alleged a precept to the mayor, and the plaintiff gave in evidence a precept directed to the mayor and burgesses, the variance was held to be immaterial (*i*); for the substance was proved, and the mayor being the proper returning officer, the precept should have been directed to him.

So where the declaration alleged a precept to the mayor, and proof was given of a precept directed to the mayor and commonalty (*k*).

(*d*) 11 Geo. 2, c. 19.

(*e*) *Roulston* v. *Clarke*, 2 H. B. 563.

(*f*) *Wilson* v. *Mawson*, cor. Lee, C. J., cited 1 T. R. 237.

(*g*) *Roberts* v. *Price*, Ld. Raym. 702. And see *Shuttleworth* v. *Pilkington*, 2 Str. 1155, cited by Buller, J. 1 T. R. 240; where it was held that the omission of *ubicunque* in a bail-bond was not material; for that by appearing before the King, was meant the appearing before the King in his court, and not in person.

(*h*) *Phillips* v. *Bacon*, 9 East, 298.

(*i*) *Cuming* v. *Sibley*, cited 1 T. R. 239.

(*k*) *Dickenson* v. *Fisher*, Burr. 2267. Note, that the word *commonalty* in the precept had been struck through with a pen, but not obliterated.

Written instrument. Legal effect.

So where the precept was alleged to be directed to the bailiffs and jurats of Seaford, and the evidence was of a writ directed to the bailiff and jurats of Seaford (*m*).

In an indictment for perjury, it was alleged that a bill in Chancery was directed to *Robert* Lord *Henley*, &c.; it appeared in evidence to be directed to Sir *Robert Henley*, Knight, but the objection was overruled (*n*).

Where a declaration for penalties under the stat. 55 Geo. 3, c. 137, s. 6, alleged that the defendant was overseer of the township of *S.*, *duly appointed*, and the appointment produced purported to be an appointment of the defendant as overseer of the *parish* of *S.*, and it was proved that the township of *S.* and all the other townships within the parish of *S.* maintained their own poor separately, and there was no evidence that any overseer had ever been appointed for the parish of *S.*, and that the defendant had acted as the overseer of the township of *S.*; it was held that it might be presumed that the word parish had been inserted by mistake (*o*).

The declaration stated the condition of a replevin-bond to prosecute an action for taking, &c. his *goods and chattels* in the said condition mentioned, the condition is to prosecute for taking, &c. goods and chattels, and *growing crops*, and held to be no variance, for growing crops may be considered as chattels within the stat. 11 Geo. 2, c. 19 (*p*).

An allegation that *A.* was bound by a deed is satisfied under the plea of *non est factum*, by evidence of a joint deed by *A.* & *B.* (*q*), whether the deed be joint, or joint and several, for it is still the deed of *A.* (*r*).

If the substance and effect of an instrument be alleged with

(*m*) *Warre* v. *Harbin*, 2 H. B. 113.

(*n*) *R.* v. *Lookup*, Trin. 7 Geo. 3, cited 1 T. R. 240. Where the indictment alleged the former trial to have been before Littledale, J., without a *prout patet per recordum*, and it did not appear from the record itself before whom the trial took place, but the postea stated it to have taken place before Sir C. Abbott, L. C. J., and it was proved that in fact the trial took place before Littledale, J. sitting for the Chief Justice in London.

(*o*) *Steele* v. *Smith*, 1 B. & A. 94.

(*p*) *Glover* v. *Coles*, 1 Bing. 6. Allegation of covenant to pay, &c. in twelve months, is proved by a covenant to pay in twelve *calendar* months; but (*semble*) it appeared from other parts of the record that calendar months were meant. *Cockrell* v. *Gray*, 3 B. & B. 386.

(*q*) Vol. II. 272. *Middleton* v. *Sandford*, 4 Camp. C. 36.

(*r*) Ibid. But a memorial under the Annuity Act, stating that *A.* and *B.* were severally bound, is bad, if they were bound jointly as well as severally. *Willey* v. *Cawthorne*, 1 East, 398.

more particularity than is contained in the instrument, the variance will be immaterial, provided the particulars be true in fact. An allegation that a writ was directed to *A.* and *B.* sheriff of Middlesex, is satisfied by evidence of a writ directed generally to the sheriff of Middlesex, coupled with evidence that *A.* and *B.* were the sheriff (*s*). Written instrument. Legal effect.

Where a written instrument is described merely by the substance and effect, superfluous and insensible words occurring in the description may be rejected as surplusage. Thus, where in a declaration for bribery, in setting forth the precept from the sheriff to the portreeve of a borough, it was alleged, "and *if* the said election so made should certify," &c., it was held that the word *if*, which was not in the precept itself, might be rejected as surplusage, as the precept was not described by its tenor (*t*).

An indictment for perjury, assigned on an affidavit to support a petition by the defendant to supersede a commission of bankrupt against him, alleged the petition, and that the defendant in his petition stated declarations made by the petitioner before the *commission*; upon the trial it appeared from the petition that the declarations were made before the *commissioners*, and held to be sufficient, for the commission might mean either the authority or the persons entrusted, and it appeared from the context that the latter were meant, and it was sufficient to set out the petition in *substance and effect* (*u*).

So where a word in the declaration has been mis-spelt, and the mistake and the word really intended plainly appear from the context, the variance will not be material. As where a lease granted liberty to make levels, pits and soughs, and the declaration in covenant stated it to be a liberty to make *sloughs* (*x*).

But in general a description of an instrument, or an averment to be proved by an instrument, contrary to its legal effect, will be fatal (*y*); as, if the plaintiff declare on a lease by *A.* and *B.*, and the proof be that *A.* being tenant far life, remainder to *B.* in fee, they both joined in a lease to the plaintiff (*z*): for during the life of *A.* it is the lease of *A.* and the confirmation of *B.*; and after the death of *A.* it is the lease of *B.* and the confirmation of *A.* Variance from legal effect.

(*s*) *Batchellor* v. *Salmon*, 2 Camp. C. 525.

(*t*) *King* v. *Pippet*, 1 T. R. 235.

(*u*) R. v. *Dudman*, 4 B. & C. 850.

(*x*) *Morgan* v. *Edwards*, 6 Taunt. 394.

(*y*) See *Scandover* v. *Warne*, 2 Camp. 270.

(*z*) *Treport's case*, 6 Co. 15.

Written instrument. Variance from legal effect.

So if a party make a deed granting rent, which under the circumstances operates as a covenant to stand seised, if it be pleaded as a grant of rent the variance would be fatal (*a*).

An allegation of a grant of an unqualified interest, is not proved by evidence of a qualified grant of such interest as the title of the plaintiff, as a shareholder, permitted (*b*).

If in an action of debt or recognizance of bail, the recognizance be alleged generally, and on *nul tiel* record pleaded it appear to be a recognizance with a condition annexed, the variance would be fatal (*c*).

Debt on bond conditioned for performance of an award; plea, no award; replication, setting out an award; rejoinder, no such award. If it appear in evidence that a material part of the award has been omitted, the variance will be fatal (*d*). But it is otherwise if the part omitted be void (*e*).

So if the covenant be stated as absolute which is but limited; as, if a covenant for repairing contain an exception of casualties by fire, and be stated without such exception (*f*).

Where in debt for an amercement the declaration alleged that the defendant was summoned to serve on the jury of the court-leet and court-baron, but the summons proved was to serve on the jury of the court-leet only, the variance was held to be fatal (*g*).

An allegation that the plaintiffs by the judgment of the Court recovered against the bail, with a *prout patet*, is not proved by the production of the recognizance of bail, and the *scire facias* roll containing the entry, "therefore it is considered that the plaintiffs have their execution thereupon against the bail," for this is an award or judgment of execution, and not a judgment to recover (*h*).

(*a*) Carth. 308. See also *Baker* v. *Lade*, 3 Lev. 291; 2 Will. Saund. 97, b. note (2). *Taylor* v. *Vale*, Cro. Eliz. 166; Str. 432.

(*b*) *Earl of Portmore* v. *Bunn*, 1 B. & C. 694. *Adam* v. *Duncalfe*, 5 Moore, 475. There can be no variance from the legal effect when the terms of the instrument itself are set out. *Ross* v. *Parker*, 1 B. & C. 358. Nor in general where the allegation corresponds *with the fact*; as where an act is truly stated to have been done by the under-sheriff, although, in point of law, it be the act of the sheriff.

(*c*) Per Powel, J. *Ward* v. *Griffith*, Ld. Raym. 83.

(*d*) *Foreland* v. *Hornigold*, Lord Raym. 715.

(*e*) Ibid.

(*f*) *Brown* v. *Knill*, 2 B. & B. 395. And see *Tempany* v. *Barnard*, 4 Camp. 20. *Secus*, where the qualification is no part of the covenant. Ibid. And *Elliott* v. *Blake*, 1 Lev. 88. *Gordon* v. *Gordon*, 1 Starkie's C. 94; Com. Dig. *Pleader*, C. 97.

(*g*) *Gery* v. *Wheatley*, 1 H. B. 163.

(*h*) *Phillipson* v. *Mangles*, 11 East, 516.

An allegation of a writ indorsed to levy 600 *l.* together with sheriff's poundage, officers fees, *and other legal charges and incidental expenses attending the levy*, is not (it has been held) proved by a writ indorsed to levy 600 *l.* together with sheriff's poundage, officers fees, &c. (*i*). Written instrument. Variance from legal effect.

An averment that a *clausum fregit* issued out of the Common Pleas with a *prout patet*, is not proved by the record of an appearance to a *clausum fregit* issued out of Chancery (*k*).

A bill of exchange alleged to have been drawn at Dublin, to wit, at Westminster, for a specified sum of money, is not proved by evidence of a bill of exchange drawn in Ireland for that sum of money; for English currency differs from Irish, and the bill declared upon must be taken to be a bill drawn in England for English money (*l*).

An averment of an order for the landing of goods on a quay or wharf, is not satisfied by proof of an order to deliver at the king's warehouse, although the warehouse stands upon the quay (*m*).

An omission to allege that which has no legal operation is immaterial (*n*); as, if a bill of exchange be alleged to be drawn for the payment of so much money, and the bill proved to be for the payment of so much money *sterling* (*o*).

But a variance in *alleging the substance and effect* of a deed or other instrument will be fatal, although the allegation be not material to the cause of action.

The plaintiff declared in covenant that the defendant demised to him a wharf and *storehouses*, where the word in the deed was storehouse, in the singular, and it was held to be a fatal variance, although no breach was assigned on the demise of the storehouse (*p*).

So where the declaration in an action on the case against the sheriff, alleged a judgment for non-performance of promises, and the judgment proved was for non-performance of a single promise (*q*).

(*i*) *Stiles* v. *Rawlins*, 5 Esp. C. 133.

(*k*) *Myers* v. *Kent*, 2 N. R. 563.

(*l*) *Kearney* v. *King*, 2 B. & A. 301.

(*m*) R. v. *Cassano*, 5 Esp. C. 231.

(*n*) *Sanderson* v. *Judge*, 2 H. B. 509.

(*o*) *Kearney* v. *King*, 2 B. & A. 301. *Glossop* v. *Jacob*, 1 Starkie's C. 69. So where a memorandum is made on a bill of exchange, or promissory note, which is no part of the bill or note. See *Hardy* v. *Woodroofe*, 2 Starkie's C. 319. *Butterworth* v. *Lord Le Despencer*, 3 M. & S. 150.

(*p*) *Hoar* v. *Mill*, 4 M. & S. 470.

(*q*) *Edwards* v. *Lucas*, 5 B. & C. 539.

Variance from legal effect.

In the previous case of *Hamborough* v. *Wilkie* (*r*), where the plaintiff, in declaring on a mortgage-deed, alleged that the defendant bound himself, his *heirs*, executors and administrators, and on *non est factum* pleaded, it appeared that the word *heirs* was not in the deed, it was held that the variance was not fatal, inasmuch as the allegation of heirs was purely impertinent, and might have been struck out upon motion. It is difficult, however, to rescue this case from the operation of the rule so often adverted to, that a descriptive averment, though ever so immaterial, is never impertinent. And the authority of this case seems to have been much doubted in the later case of *Hoar* v. *Mill* (*s*).

Writing vouched by date, &c.

Thirdly, Where an instrument is not alleged by its tenor, but is vouched and referred to by its date, or names, sums, days of payment, or other particulars, a variance from the precise allegations will be material, for they are descriptive of the instrument itself. First, if it be described by the date (*t*):

Where a judgment was described as in a suit during the reign of the present king, it was held that it was not supported by evidence of a judgment in a preceding reign (*u*).

So if in debt on a judgment of Hilary term, on *nul tiel* record pleaded, it appear to be a judgment of Easter term (*x*).

So if a declaration on a note payable by instalments mis-state the day on which one of the instalments is payable (*y*).

But if the date alleged be merely formal, as if it be prefaced by a *videlicet*, and therefore be not descriptive, it may be proved to have been made on another day, and the variance will not be fatal (*z*).

(*r*) 4 M. & S. 474, n.

(*s*) 4 M. & S. 470. See the observations of Lord Ellenborough, C. J. and Le Blanc, J. ibid.

(*t*) *Baynham* v. *Matthews*, Fitzg. 130. *Stafford* v. *Farrer*, cited Str. 22. A lease to commence *from* the day of the date, may mean either *exclusively* or *inclusively*. *Pugh* v. *Duke of Leeds*, Cowp. 714; see *Welsh* v. *Fisher*, 2 Moore, 378. An Act passed in the 24th year, &c. when the Parliament was continued by prorogation till the 25th year, &c., being described in a conviction as passed in the latter year, the variance was held to be immaterial. *R.* v. *Windsor*, 2 Ch. C. T. M. 513.

(*u*) *Dickins* v. *Grenville*, Carth. 158.

(*x*) *Wells* v. *Girling*, 3 Moore, 75.

(*y*) *Ince* v. *Hay*, Fort. 35.

(*z*) *Wells* v. *Girling*, 3 Moore, 75. *Nicholls* v. *Bamfylde*, 1 T. R. 657. And see Hob. 209; 3 Lev. 243. *Phillips* v. *Shaw*, 4 B. & A. 435; *infra*, 429, note (*g*). And if the declaration merely state that a promissory note was made on such a day, though it bear date on a different day, the variance will not be fatal. *Coxon* v. *Lyon*, 2 Camp. 308, n. *Pasmore* v. *North*, 13 East, 517.

An allegation of date, according both to the legal and dominical year, is supported by evidence of a deed 30th March 1701 (*a*). Writing vouched by date, &c.

An admission of the due execution of the deed stated in the declaration, does not preclude the defendant from objecting on the score of variance (*b*).

So a variance from the *place* at which a deed is dated, is also material (*c*).

Where the time of a particular fact is not material, a variance from the date will not be material, although it is to be proved by a record or other written instrument, provided the time be not alleged as descriptive of the record, by means of a *prout patet per recordum*, or otherwise; and therefore, where in an action for a malicious prosecution the plaintiff alleged that he was acquitted on a particular day (*d*), it was held that the precise day was not material, the substance of the allegation being, that the plaintiff was acquitted before the commencement of the action (*e*). So where in an action on the case for not indemnifying the plaintiff, he alleged that *B.* afterwards, to wit, in Michaelmas term in such a year, obtained judgment against him, and on the trial it appeared that the judgment was of a different term, it was held that the variance was not material (*f*), the time not being alleged with a *prout patet per recordum*. It has been since held that a *prout patet* alleged unnecessarily, and which might have been struck out of the declaration, may be rejected as surplusage (*g*).

(*a*) *Holman* v. *Burrough*, Salk. 658, 9.

(*b*) *Goldie* v. *Shuttleworth*, 1 Camp. 79. But *semble*, it would have been otherwise if the admission had run "as stated in the declaration." Ibid.

(*c*) B. N. P. 170; Salk. 659. Debt on bond *quod cum defendens apud London, &c. concessit se teneri*, on oyer it appeared that the deed was dated at Port St. David's, and the Court held that the dating was local, although the plaintiff might have averred London by way of *venue* merely under a *videlicet*. But *qu.* whether, if the place be not expressly averred as descriptive of the record, as by the words "bearing date at such a place," the averment of place would not be ascribed to *venue*.

(*d*) *Purcell* v. *Macnamara*, 9 East, 157.

(*e*) Ibid. 9 East, 660. See *R.* v. *Payne*, there cited; and *Brinley* v. *Watson*, 2 Bl. R. 1050.

(*f*) *Phillips* v. *Shaw*, 4 B. & A. 435; 5 B. & A. 984. *Gadd* v. *Bennett*, 5 Price, 549; *infra*, 434. *Rastall* v. *Stratton*, 1 H. B. 49.

(*g*) *Stoddart* v. *Palmer*, 3 B. & C. 2, P. C. The distinction is between matter of substance, which must be substantially proved, and matter of description, which must be literally proved: the *prout patet* was unnecessary, and therefore may be rejected as surplusage. Ib. Co. Litt. 303, a. *Waite* v. *Briggs*, 1 Ld. Raym. 35; 3 Salk. 565.

Writing vouched by date, &c.

It is otherwise where the date is material from the nature of the case. The plaintiff, in an action against an attorney, for not proceeding to judgment in due time, alleged under a *videlicet*, that process was sued out Jan. 24, 1785, returnable on Monday next after fifteen days of St. Hilary. He proved process sued out 24th Jan. 1784; and it was held to be material, because it affected the time of the return, and consequently the time when the defendant ought to have proceeded to judgment (*h*).

By name.

In debt on a judgment, a variance as to the name of any party, his abode or addition, will be fatal on *nul tiel* record pleaded (*i*).

Where the plaintiff declared in debt on a judgment against *Hamilton Fleming*, esquire, and on *nul tiel* record pleaded produced a judgment against the right honourable *Hamilton Fleming*, Earl of *Wigton*, having privilege of peerage, the variance was held to be fatal (*k*).

The plaintiffs being assignees of *B. Tabart*, sued as such on a recognizance of bail, the defendants pleaded *comperuerunt ad diem*, and on the production of the roll it appeared that bail had been put in at the suit of the plaintiffs, as the assignees of *B. Tarbart*, and the plaintiffs had judgment (*l*). So an allegation that a commission of bankrupt issued against the surviving partner of *Edmund Darby*, is not proved by evidence of a writ to supersede a commission against *Edward Darby* (*m*), although the plaintiffs were in fact surviving partners of *Edmund Darby*.

In an action against a surety on a bail-bond, an averment of the issuing a *latitat* against *Francis J.* by the name of *John J.*, is not supported by proof of a *latitat* against *John J.*, although the bond was signed by the principal in this form, "*Francis J.* arrested by the name of *John J.*" (*n*). But it seems that a mere variance from the omission in the declaration of the description which is superadded in the record, is not material unless some ambiguity result (*o*). The declaration styled a party in a former

(*h*) *Green* v. *Rennett*, 1 T. R. 350.

(*i*) 1 Roll. 754, l. 40.

(*k*) *Blackmore* v. *Fleming*, 7 T. R. 447. Where, on a *sci. fa.* on a judgment, a judgment was alleged to be a judgment for damages by reason of the non-performance of a certain promise and undertaking, and the judgment itself was for the non-performance of certain promises and undertakings, the variance was held to be fatal. *Baynes* v. *Forrest*, Str. 892. But it seems that the case was adjourned. 1 Ford, 38. See *Black* v. *Lord Braybrooke*, 2 Starkie's C. 7. *Supra*, 427, note (*q*). But an averment that issue was joined, was held to be proved by an information containing two counts on each of which issue was joined. *R.* v. *Jones*, Peake's C. 38.

(*l*) *Bingham & others* v. *Dickie*, 5 Taunt. 814.

(*m*) *Matthews & another* v. *Dickinson*, 7 Taunt. 399.

(*n*) *Scandover* v. *Warne*, 2 Camp. 270.

(*o*) *Amey* v. *Long*, 1 Camp. 14.

cause *Samuel Glover*, but the record in reciting the judgment against *Glover* styled him *Samuel Glover* the younger, but the objection was overruled; for although the declaration did not give the party his full description, yet it did not give him a wrong description (*p*). By name.

Where an indictment alleged that an action was depending between *A.* and *B.*, and the judgment produced began "*B.* sued by the name of *C.* was summoned," &c. it was held that the omission of the name by which *B.* was miscalled in the process was immaterial (*q*). So it seems in general that if the name of the party be not alleged as descriptive of the record, and be truly alleged, a variance from it on reading the record will not be material (*r*).

So a variance as to the number of parties (*s*) or parcels described (*t*), or damages (*u*), will be fatal. Thus a variance in setting out a covenant of a lease, in alleging the *Cellar-beer* field for the *Allerbeer* field, is fatal, although the plaintiff offer to waive damages on that breach (*x*).

Where the declaration on a deed of covenant recited certain premises to be late in the occupation of *Samuel R.*, and in the lease it stood *Saul R.*, the variance was held to be fatal (*y*).

If a judgment for an entire sum be stated, a variance will be material; but if the judgment be for several distinct sums, an allegation that the judgment was given for one or more of those sums, according to the fact, without noticing the rest, will be good (*z*).

A variance is immaterial where the defendant is precluded from taking advantage of it by estoppel; as where he has executed a deed by a name which is not his own (*a*), or by any act of his which operates in the nature of an estoppel. Thus a lessee or assignee of a lessee is estopped from disputing the title of his

(*p*) 1 Camp. C. 14. So where the declaration described a writ as against *M. B.*, and the writ produced was against *M. B.* spinster. *Brown* v. *Jacobs*, 2 Esp. C. 726. *Secus*, as to the converse. Ib.

(*q*) *R.* v. *Windus*, 1 Camp. 406.

(*r*) Vide *supra*, 420.

(*s*) 1 Rol. 753, l. 45. *Rastall* v. *Stratton*, 1 H. B. 49.

(*t*) 3 Co. 2, a.

(*u*) 1 Rol. 754, l. 40.

(*x*) *Pitt* v. *Green*, 9 East, 188.

(*y*) *Bowditch* v. *Mawley*, 1 Camp. 195. See *Pitt* v. *Green*, 9 East, 188.

(*z*) *Phillips* v. *Eamer*, 5 Esp. C. 358; where judgment was given on a *scire facias* for the debt and costs in the original action, also for the non-prossing of a writ of error brought on that action, and for the damages and costs in the *scire facias*; and the declaration against the sheriff for a false return stated the first two sums only.

(*a*) *Gould* v. *Barnes*, 3 Taunt. 104; *supra*, 413.

Parties.

lessors (*b*). And therefore, where the plaintiffs, who derived title from two of four lessors, the two other lessors having no interest in the premises, alleged a demise by the four, and also alleged that two of the four had no title, the objection being taken that the plaintiffs should have alleged a demise by the two who had title, it was held that the defendant was estopped by the lease (*c*).

An allegation, in an action against an acceptor, that the bill was drawn by certain persons trading under the name and firm of *A. B.* & Co., is satisfied by proof of a bill accepted by the defendant, and purporting to have been drawn by *A. B.* & Co., although it be proved that the firm consists of but one person (*d*); for the defendant is precluded from taking the objection by his acceptance.

But on an indictment for stealing a note signed by A. Hooper, when it was not so signed, the variance is fatal (*e*).

A lease was described to be made by the plaintiff of the first part, James Cooke of the second, and J. S. of the third, and the parties were so described in the heading of the lease, but Cooke was in other parts of the lease described as George Cooke, and it was uncertain, on the face of the deed itself, whether his name was James or George, but it purported to be executed by George Cooke; the variance was held to be fatal on *non est factum* pleaded (*f*).

Where the writing is used as mere evidence.

4thly, Where a fact is simply alleged, without vouching any instrument, and the instrument is used as mere evidence, a variance will not be fatal, if the substance of the allegation be proved.

An allegation that a *latitat* was issued on the 21st of June, is proved by evidence of the issuing of a *latitat* then, though tested of the previous term (*g*).

A declaration for not indemnifying the plaintiff alleged that *D. P.* afterwards, to wit, in Michaelmas term, 58 G. 3, recovered and obtained judgment against the plaintiff, and the record produced was of *Hilary* term; the variance was held to be

(*b*) *Atkinson* v. *Coatsworth*, 1 Str. 512. And per Gibbs, C. J. in *Wood* v. *Day*, 1 Moore, 399.

(*c*) *Wood* v. *Day*, 1 Moore, 389.

(*d*) *Bass* v. *Clive*, 4 M. & S. 13.

(*e*) *R.* v. *Craven*, Russ. & Ry. C. C. L. 11.

(*f*) *Maydston* v. *Lord Palmerston*, 1 Mood. & M. C. 6.

(*g*) *Anon.* 1 Vent. 362. But where, in an action against the sheriff for removing goods without paying a year's rent, the declaration alleged a *fieri facias* from the Court of King's Bench, and the *fi. fa.* produced was from C. B., the variance was held to be fatal. *Sheldon* v. *Whitaker*, 4 B. & C. 657.

immaterial, the time not being alleged as descriptive of the instrument by means of a *prout patet* (*h*).

Where the writing is used as mere evidence.

An allegation that rent is due in respect of a certain messuage, dwelling-house and premises, is supported by evidence of a lease of two messuages, for *premises* may be considered as a cumulative description (*i*).

An allegation in an action on the case for a conspiracy to indict for barretry, alleged it to be *coram justiciariis de pace necnon ad diversas felonias, &c.*, and the indictment proved was before justices of the peace, without more, it was held to be no variance, for as justices of the peace they might take the indictment (*k*).

Where the declaration averred that the defendant charged the plaintiff with violently assaulting him, and procured a warrant to apprehend him for the said offence, and it appeared that the charge was made for assaulting and striking, and the warrant produced recited the charge to be for assaulting and beating, it was held that the variance was not material (*l*).

But if a party unnecessarily allege that to have been effected by means of a judgment on record which might have been alleged generally, and proved by other means, he will be bound to prove it by a judgment of record (*m*).

The plaintiff alleged that the defendant permitted his bill to be discontinued for want of prosecution thereof, and that thereupon it was then and there considered by the said Court that the said defendant should take nothing by his said bill *prout patet*, &c. whereby the said suit then and there became and was wholly ended and determined; it was held that this was not proved by the production of the rule to discontinue, although had the allegation been general it would have been satisfied by the production of the rule and payment of costs (*n*).

(*h*) *Phillips* v. *Shaw*, 4 B. & A. 435; 5 B & A. 984; *supra*, 429.

(*i*) *Taylor* v. *Brooke*, 2 M. & S. 269. An averment, that in consideration that the defendants had become tenants to the plaintiff of certain premises, they undertook to keep the same in good and tenantable repair, is proved by an agreement containing a variety of provisions, and amongst others, that the defendants would make good all repairs within three months after notice by the plaintiff of the want of repairs; for the obligation to repair arises out of the tenancy, and the agreement was evidence to prove the promise as laid. *Colley* v. *Stretton*, 2 B. & C. 273.

(*k*) Cro. Jac. 22; Yel. 46.

(*l*) *Byne* v. *Moore*, 5 Taunt. 187.

(*m*) 5 Price, 540.

(*n*) *Gadd* v. *Bennett*, 5 Price, 540. It was also held that a variance from the sum in the *ac etiam* part of a writ was fatal; vide *supra*, 422.

Description of judgments. Process, &c.

The averment of a judgment with a *prout patet per recordum* does not render proof by a record necessary, where, from the nature of the judgment, as averred, it appears that it is not of record, as where the plaintiff declares in debt on a judgment in Jamaica (*o*).

Description of courts. Process, &c.

Where it is necessary to allege a court having judicial authority, it is not essential that the style set out in the record should be exactly copied (*p*).

Where a declaration in an action for a malicious prosecution alleged that the defendant caused the plaintiff to be indicted at the general quarter sessions of the peace for Middlesex, and the record stated the indictment to have been found at the general sessions, it was held to be sufficient, the offence being cognizable at such general sessions (*q*).

Action.

In an action for not indemnifying the sheriff, against whom trover had been brought for levying under a *fi. fa.*, after an act of bankruptcy, an allegation that an action was prosecuted for the recovery *of the said money* was held to be sufficient (*r*).

A bill of Middlesex is well described as a precept of the king (*s*).

An allegation that an action is depending in his Majesty's Court of the Bench at Westminster is not supported by proof of a pluries bill of Middlesex, for by such an allegation the Court of Common Pleas must be intended (*t*).

An averment that a defendant was acquitted by a jury in the Court of our said Lord the King, before the King himself, is a description of an acquittal on a trial at bar, and is not proved by an acquittal at Nisi Prius (*u*).

A commission of bankrupt, though under the great seal, does not issue out of Chancery; and it seems that an averment that it did so would be fatal (*x*).

Money.

Under penal statutes, allegations of the receipt or embezzling

(*o*) *Walker* v. *Witter*, Doug. 1. And see *Wigley* v. *Jones*, 5 East; but see *Turner* v. *Eyles*, 3 B. & P. 456.

(*p*) *Constantine* v. *Barnes*, Cro. Jac. 32. *Busby* v. *Watson*, 2 Bl. 1050.

(*q*) *Busby* v. *Watson*, 2 Bl. 1050. *Secus*, if the general sessions had not had authority. Ib.

(*r*) *Batchelor & another* v. *Salmon*, 2 Camp. C. 525.

(*s*) *Harris* v. *Bernard*, Str. 1069.

(*t*) *Impey* v. *Taylor*, 3 M. & S. 166. And see *Reynolds* v. *Smith*, 2 Marsh. 258.

(*u*) *Woodford* v. *Ashley*, 11 East, 599; 2 Camp. 193. See *R.* v. *Coppard*, 1 Mood. and M. C. 118.

(*x*) *Poynton* v. *Foster & others*, 3 Camp. 58.

of money are not satisfied by evidence of the receiving or embezzling bank-notes or bills of exchange, or other equivalent for money (*y*).

An averment that *A.* has received 500 *l.* is not satisfied by evidence that stock to that amount has been transferred into his name (*z*).

An allegation of a loan of lawful money of Great Britain is supported by evidence of a loan of foreign money, as pagodas (*a*).

Description of things.

In the ordinary description of articles of trade, or other subject-matter of averment, a variance will be material, or otherwise, in point of law, as it is material or immaterial in point of fact in ordinary language and acceptation. If the agreement alleged be to deliver merchandisable corn, proof of an agreement to deliver good corn of the second sort is insufficient (*b*).

Where the defendant in an action on a bond pleaded that the bond was given to receive money won by the plaintiff from the defendant at a game called *Faro*, it was held to be necessary to prove the money to have been lost at that particular game (*c*).

Reconcilement of variance by averment.

It will be seen, that where a written instrument, such as a record, is vouched in proof of an allegation, parol evidence is in many instances admissible to reconcile the allegations with the instrument (*d*). But where a variance occurs, which without extrinsic explanation would be fatal, it seems that an averment of identity is usually necessary to warrant such evidence.

The defendant in ejectment for the manor of Artam pleaded ancient demesne, and when Domesday Book was brought into court, offered to prove that the manor was anciently called Nettam, but the evidence was rejected, for the variance ought to have been averred on the record (*e*).

It is a rule, that where a general allegation is put in issue, par-

(*y*) Vol. II. 450. Where a clerk was charged with having received a 50 *l.* bank-note, and 14 *s.* 10 *d.* in money, and having embezzled the money, but the party who paid it could not state how he paid it, whether all in notes, or by a draft, Bayley, J. directed an acquittal (*R.* v. *Iles*, Surrey Spring Assiz. 1816; Mann. Ind. 372), and said that it ought to have been proved that the defendant received the 14 *s.* 10 *d.* in monies numbered.

(*z*) *Jones* v. *Brindley*, 5 Esp. C. 205.

(*a*) *Harrington* v. *Macmorris*, 5 Taunt. 228.

(*b*) B. N. P. 145; 1 Ray. 735.

(*c*) *Mazzinghi* v. *Stephenson*, 1 Camp. 291. See *Calborne* v. *Stockdale*, Str. 493; *Sigell* v. *Jebb*, 3 Starkie's C. 1.

(*d*) Vol. II. tit. PAROL EVIDENCE; Crim. Pleading, 325. 329, 2d edit.

(*e*) *Gregory* v. *Withers*, 28 C. 2; Gilb. Ev. 44; 3 Keb. 588.

ticular instances may be shown to prove it (*f*). It is otherwise in the case of barretry; for there, although the indictment be general, notice must be given of the particular acts intended to be proved. So also where the general question arises collaterally, for then the party cannot be prepared to answer them.

Matters admitted by the pleadings.

In the next place, it is a rule that no evidence is necessary to prove that which is agreed upon by the pleadings; for the jury are sworn to try the matter in issue between the parties, and no other question is before them (*g*). If the defendant in replevin avow the taking the cattle damage-feasant in the *locus in quo*, as parcel of the manor of *K.*, and the plaintiff make title to the manor of *K.*, and traverse that the manor is the freehold of the defendant, the plaintiff cannot prove that *K.* is no manor, for that is admitted by the traverse (*h*). And the jury cannot find against the admissions of the parties on the record, though they be contrary to the truth; but in other cases, as has been seen (*i*), the jury are not estopped to find the truth, though the parties are. But where there are several issues joined, an admission involved in one does not operate as an admission in relation to any other (*k*).

The best evidence must be adduced.

Next as to the *quality* of the evidence to be adduced by the parties.

It is the peculiar province of the jury to decide upon the force and effect of the evidence submitted to them; but, as has already been seen, the law, by many rules of a negative nature, excludes from their consideration some matters on account of their general tendency to mislead, and to create prejudice rather than to promote the cause of truth. One of the most important rules upon this subject is that which requires that the best *attainable* evidence shall be adduced to prove every disputed fact. This rule has already been adverted to, though but slightly, inasmuch as its effect is not to exclude any of the materials of evidence in the abstract, but only by comparison of the evidence offered with that

(*f*) Per Ld. Hard. 2 Atk. 339. 346. As on an indictment for keeping a house of ill fame, or issue on *non compos*. In *Clarke* v. *Perriam*, 2 Atk. 333, a bill was filed to compel a woman to give up a bond given as premium *pudicitiæ*, charging her with previous lewd conduct; and per Ld. Hard. C., general lewdness being charged, particular instances may be proved, for putting it in issue is sufficient notice.

(*g*) B. N. P. 298.

(*h*) Ibid. and see tit. WAY.

(*i*) *Supra*, 295; and see B. N. P 298, *Goddard's case*; 2 Co. 4 b.

(*k*) *Harrington* v. *Macmorris*, 5 Taunt. 228; 1 Marsh. 33; Willes 380.

which might have been produced, but which has been suspiciously withheld.

The best evidence must be adduced.

The ground of this rule (*l*) is a suspicion of fraud. If it appear from the very nature of the transaction that there is better evidence of the fact, which is withheld, a presumption arises that the party has some secret and sinister motive for not producing the best and most satisfactory evidence, and is conscious that if the best were to be afforded, his object would be frustrated (*m*): subject, then, to the observations which will be made upon the operation of this rule, it follows, that of the several gradations in the scale of evidence, no evidence of an inferior class can be substituted for that of a superior degree. It is a very general rule, that the contents of a writing cannot be proved by a copy (*n*), still less by mere oral evidence, if the writing itself be in existence and attainable (*o*). If a deed be lost, a copy is not evidence if a counterpart exist (*p*). And usually no declaration or entry by any person can be given in evidence, where the party who made such declaration or entry can be produced and examined as a witness (*q*). These are well known definite gradations of evidence, to which the principles may be applied without much difficulty. Thus, upon a question, whether the abbey de Sentibus was an inferior abbey or not, Dugdale's Monasticon Anglicanum was refused, because the original records might be had at the Augmentation Office (*r*).

The rule is of a comparative nature.

This rule relates not to the measure and quantity of evidence, but to its *quality* when compared with some other evidence of superior degree. It is not necessary, in point of law, to give the

(*l*) B. N. P. 293, 4.

(*m*) Show. 397; Carth. 310; Holt, 284; Salk. 281; Bac. Abr. E. 662.

(*n*) *Supra*, 318. To prove an insurance from fire, the books of the company are not the best evidence. The policy itself must be produced. *R.* v. *Doran*, 1 Esp. C. 127. Kenyon, C. J. 1791.

(*o*) *Supra*, 318.

(*p*) *Supra*, 341. The commissioners under an inclosure Act having made minutes of their proceedings; held, that parol evidence of the divisions and allotments was inadmisssible, the minutes of the commissioners not being produced or accounted for. *Bendyshe* v. *Pearse*, 1 B. & B. 460.

(*q*) Even although the parties to be called would criminate themselves by the proof required. *Edmunstone* v. *Webb*, 3 Esp. C. 244. *The Queen's case*, 2 B. & B. 311.

(*r*) Salk. 281. Oaths taken by a preacher under the Toleration Act are matter of record, and cannot be proved by parol evidence. *R.* v. *Hube & others*, Peake's C. 131. To prove that *A.* was chosen constable, the wardmote book containing an account of the election should be produced; a list from the town clerk's office of the persons sworn in to serve the office, in which the name of *B.* appears as having been sworn as substitute for *A.*, is not the best evidence. *Underhill* v. *Witts*, 3 [illegible] C. 56.

The rule is of a comparative nature.

fullest proof that every case may admit of. A will of lands may be proved by one witness only (*s*). If there be several eye-witnesses to a particular fact, it may be proved by the testimony of one only.

Where the defendant, in order to disprove the right claimed by the plaintiff to erect certain hatches on a river, offered in evidence ancient articles of agreement between persons standing in the respective situations of the plaintiff and defendant; and the defendant's attorney produced the deed, and said he received it from the son of the owner of the defendant's land; and on the objection being taken that this was insufficient, the father was called, whose testimony was objected to on the score of interest; it was held that the deed was admissible, for the testimony of the father had been objected to, and the next best evidence had been given (*t*).

In what cases the rule applies.

Nor does it apply in any case, unless the evidence proposed be in its general nature of an inferior degree to that for which it is sought to be substituted. It is not sufficient that it may probably be less satisfactory in the particular instance. Where a plaintiff proved notice to the defendant to produce a letter written by him to the defendant, it was held that the plaintiff was at liberty to prove the contents by any witness who knew them, and that he was not obliged to call the clerk who wrote the letter (*u*).

The rule does not include evidence when superior evidence fails.

The rule assumes, that from the nature of the transaction superior evidence may be had; and therefore it never excludes evidence which is the best that can be then produced by the party (*x*). Hence if a deed or other written document be lost, or be in the hands of the adversary, who refuses to produce it (*y*), a copy of it is admissible. If a witness to a bond, after his attestation becomes interested, it may be read upon proof of his handwriting (*z*); and so it may if he be dead, or be beyond seas, out of the jurisdiction of the court. So where the witnesses are

(*s*) See tit. WILL. But on the trial on an issue directed by a Court of Equity all the attesting witnesses must usually be called. Vol. II. tit. WILL.

(*t*) *Carol* v. *Jeans*, cor. Holroyd, J. Dorch. Sp. Ass. 1819, Manning's Ind. 375, 2d edit.

(*u*) *Liebman* v. *Pooley*, 1 Starkie's C. 167.

(*x*) Gilb. Ev. 4, 5; B. N. P. 294.

(*y*) See PRIVATE INSTRUMENT, PROOF OF, ante, 357.

(*z*) *Godfrey* v. *Norris*, Str. 34; 3 Ves. 112. It is otherwise where the witness was interested at the time. *Saire* v. *Bell*, 5 T. R. 341. Where, on principles of public policy, a document cannot be read in evidence, the effect will be the same as if it was not in existence. *Cooke* v. *Maxwell*, 2

dead, their depositions or their declarations made when they were in *extremis* frequently become evidence. Where a prisoner's examination, taken in writing before the coroner, could not, in consequence of an irregularity in the latter, be read, it was held that the coroner might be asked as to what the prisoner said on that occasion (*a*).

Does not exclude when superior evidence is unattainable.

Neither is the rule strictly adhered to where a mere negative is to be proved, especially where it results from inspecting documents of a voluminous nature (*b*). And though a witness cannot give evidence of accounts not produced, he may, it seems, be examined as to the general state of such accounts, or he may give evidence of the general course of trade, as that the practice has been to accept bills in a particular form, according to one invariable course of dealing (*c*). And in general, where evidence is given to introductory or collateral matters which do not depend at all upon the particular form or contents of the instrument, such evidence, though perhaps not strictly warranted, is for convenience sake usually admitted in practice without objection.

Again, as the rule was intended to guard against fraud, its operation ceases where the presumption of fraud does not arise; consequently it does not apply where the law itself raises a presumption under particular circumstances. And therefore, in general, in order to prove that a particular person was a magistrate or constable, it is sufficient to prove that he acted as such; for then, in the absence of evidence to the contrary, it is to be presumed that he was duly and legally appointed (*d*).

Or where no presumption of fraud arises from the substitution.

So where a document is of a public nature, a copy of it is evidence; for the production of the original is dispensed with on account of the inconvenience which would result from the frequent removal of public documents, and consequently the absence

Starkie's C. 483. Therefore where such a document contains an order from a public officer, no evidence can be given of its contents, but it may be shown that what was done, was done by the order of such officer. Ibid.

(*a*) *R.* v. *Reed*, 1 Mood. & M. C. 403.

(*b*) Where, in order to show the insolvent state of the party before bankruptcy, the assignees (plaintiffs) offered the ledger of the bankers of the bankrupt to prove that he had no funds in their hands, it was held, that they were properly received to prove the negative, without calling the different clerks who made the entries, although it might not be admissible to prove the affirmative. *Furness* v. *Cope*, 5 Bing. 114.

(*c*) *Roberts* v. *Dobson*, Peake's C. 83.

(*d*) *Spencer* v. *Billing*, 3 Camp. C. 310. But if the mode of dealing has varied, the bills must be produced. Ibid.

of the original affords no presumption of fraud: and the probability of fraud is much diminished by the consideration that it would be liable to easy detection by reference to so accessible an original (*e*).

Nor in case of an admission.

The rule does not apply where the adversary has admitted the fact which is to be proved; for he is in general barred by his own admission or representation, particularly if the other party has acted on the faith of it, and no competition arises as to the comparative efficacy of two modes of proof (*f*).

But it has been held that an admission by an obligor of his execution of a bond does not supersede the necessity of proving it by calling the attesting witness (*g*).

A collateral writing does not exclude oral evidence.

So although it be a general and most inflexible rule, that oral evidence cannot be substituted for a written document, which by authority of law, or by private compact, is constituted the authentic and appropriate instrument of evidence, yet in other cases the mere existence of written evidence never excludes independent parol evidence to prove the same fact. Where a written instrument is required by law, or made by private compact to express the intention of the parties, it possesses a force and authority superior to any other evidence (*h*); but in other cases its superiority is merely fortuitous and contingent, for it may be that the oral evidence is far more deserving of credit than the written evidence, and consequently the legal presumption of fraud does not exclude the oral evidence, however strongly it may tend to discredit it under particular circumstances (*i*). If several persons be witnesses of the same fact, and one of them, to assist his memory, makes a memorandum of it, this circumstance would not exclude the testimony of the other witnesses, who, from their number, their powers of discernment, and their concurrence in the same account, may be more entitled to credit than the witness who made the memorandum. If a prisoner confess his guilt before his examination is taken before a magistrate under the authority of the statutes, and the examination is not returned,

(*e*) *Infra*, Vol. II. tit. CHARACTER.

(*f*) See tit. ADMISSION, Vol. II. where the cases are collected.

(*g*) *Abbot* v. *Plumb*, Dougl. 205. See the ground of this rule, *supra*, 330.

(*h*) See tit. ASSUMPSIT—EJECTMENT—PAROL EVIDENCE. Where in ejectment after notice to quit, it appeared by the plaintiff's evidence that the premises had been demised by a writing, held that he was bound to produce it. *Fenn* v. *Griffith*, 6 Bing. 533.

(*i*) See this subject more fully considered, Vol. II. tit. PAROL EVIDENCE.

or cannot be received in evidence, the prisoner's confession is admissible (*j*).

Where the contents of a writing have been read to the adverse party, and admitted by him to be true, oral evidence of the contents may be given, although the writing itself be inadmissible in evidence (*k*).

Where the plaintiff's agent entered into a verbal agreement with the defendant, and made a memorandum of the terms, to assist his own recollection, which was not signed by the parties, it was held to be unnecessary to produce it, for it was not the contract, but only a private note (*l*).

Oral evidence of a contract, when excluded.

And in order to exclude parol evidence of a contract, it is necessary to prove that the contract was committed to writing. And therefore, after the plaintiff in ejectment had given parol evidence of the tenancy, the evidence was held to be sufficient, although it appeared upon the cross-examination of his witness that an agreement relative to the land in question had been produced upon a former trial between the same parties, and had been seen the same morning in the hands of the plaintiff's attorney (*m*).

Distinction between secondary

There is a distinction between the exclusion of evidence by the operation of this rule, and a mere failure or defect in evidence

(*j*) *R.* v. *Reason & Tranter*, 1 Str. 499. Where it appeared that a party was sworn and examined before justices on a charge, held that it was to be presumed to have been taken down in writing, and that parol evidence of it was not receivable until the contrary was shown. *Phillips* v. *Wimburn*, 4 C. & P. 273. *A.* gives a warrant of attorney to secure a joint debt to *B.* and *C.*; *B.* receives the whole. In an action by *C.* to recover his moiety, *A.* may be called to prove the payment, without the production of the warrant of attorney. *Bayne* v. *Stone, executor of Stone*, 4 Esp. C. 13. For though the security was the foundation of the action, the immediate cause was the money paid to the defendant, which the debtor might prove to have been paid to the party sued without production of the security. Per Ld. Kenyon, ib. See *Ingram* v. *Lea*, 2 Camp. C. 521.

(*k*) *Jacob* v. *Lindsay*, 1 East, 460. And see *Doe d. Bingham* v. *Cartwright*, 3 B. & A. 326.

(*l*) *Dalison* v. *Stark*, 4 Esp. 163. *Ramsbottom* v. *Tunbridge*, 2 M. & S. 435.

(*m*) *Doe d. Wood* v. *Morris*, 12 East, 237. *Doe d. Shearwood* v. *Pearson*, ib. 238, in n. *Secus*, where it appears by the plaintiff's evidence that there is a written agreement. *Fenn* v. *Griffith*, 6 Bing. 533.

So where a memorandum of an intended agreement has been read over to an intended tenant, but has never been signed, parol evidence of the terms is admissible. *Doe d. Bingham* v. *Cartwright*, 3 B. & A. 326. See Vol. II. tit. STAMP, 1360.

and defective evidence.

which is in itself admissible. The effect of the rule is to exclude particular evidence altogether until proof be given that better evidence is unattainable; and when such proof has been given, to admit the evidence of inferior degree. But evidence tending to the proof may be admissible, yet insufficient, and may still be so, although it be proved that better evidence cannot be had.

In the case of *Williams* v. *The East India Company* (*n*), the question was, whether the agent of the defendants, who were the freighters of the plaintiff's ship, had apprised the plaintiff or his officers of the inflammable and dangerous nature of a quantity of roghan, which had been stowed on board the ship, and which ultimately occasioned its destruction. It was the duty of the conductor of military stores to convey goods on board the ship, and of the chief mate to receive them; the chief mate was dead, and no evidence was given of what passed between him and the conductor of the stores; but the captain and second mate proved that no communication had been made to them of the nature of the roghan. It was objected, that the conductor of the stores ought to have been examined, and it was so ruled by Lord Ellenborough at Nisi Prius, and afterwards decided by the whole Court, on the ground, 1st, that the delivery without notice thus insisted upon by the plaintiff was a criminal act, and that therefore it was incumbent on the plaintiff to prove the neglect to give notice; and 2dly, that the plaintiff had not given sufficient *primâ facie* evidence of the want of notice. The defect in this instance seems to have consisted rather in a failure in the measure of the proof, than in the substitution of secondary for original evidence. It was necessary to negative the fact of communication, which, under the circumstances, could be proved by no one but the conductor, for the chief mate was dead; and that evidence which was essential was not given. The evidence which was received of the captain and second mate, that they did not know that any communication had been made of the nature of the article, was not evidence of a secondary nature, substituted in the place of superior evidence, for it was at all events admissible evidence, and would still have been admissible had the conductor been called, contrary to the nature of secondary evidence, which can never be admitted where the superior evidence is adduced, but is wholly superseded by it. Neither, like secondary evidence, could it have been substituted for the superior evidence, when the

(*n*) 3 East, 192.

latter had become unattainable; for had the conductor been dead, there would still, it seems, have been a defect in the evidence incapable of being supplied by that of the captain and chief mate.

Quantity and measure of evidence.

With regard to the *quantity* and *measure* of proof, but few observations are requisite. It is for the parties, according to their own discretion, to procure such evidence as the circumstances of the case may supply; and it is for the jury to decide upon its effect. The law rarely interferes as to the measure of proof; and the sufficiency cannot, in the nature of things, be subject to legal definition or control (*o*). All that can be done is to intercept such evidence as would tend to prejudice or mislead; the law then confides in the good sense and integrity of the jury. In some few instances, however, the law interferes as to the *number* of witnesses (*p*).

As in the case of high treason, when it works corruption of blood; there two witnesses are necessary by the express provision of the statute law (*q*) So in the case of perjury two witnesses are essential, for otherwise there would be nothing more than the oath of one man against that of another (*r*), upon which the jury could not safely convict.

In other cases the general rule seems to be, that where there is

(*o*) Quæ argumenta ad quem modum probandæ cuique rei sufficiant, nullo certo modo satis definiri potest.

(*p*) It seems, that in equity, no decree can be made on the oath of one witness against the defendant's answer on oath. Vent. 161; 3 Ch. C. 123. 69. And one witness is not sufficient against the husband, although it be supported by the answer of the wife, for she cannot be a witness against her husband. 2 Ch. C. 30; 3 P. Wms. 238. But a decree may be made on the evidence of a single witness, where the evidence of the party is falsified. 2 Vern. 554; 2 Atk. 19; 3 Atk. 419; 1 Bro. Ch. C. 52.

In general, at common law, one witness was in all cases sufficient; per Holt, C. J., who said, that the authorities cited by Lord Coke to the contrary did not warrant his opinion. Carth. 144; Co. Litt. 6, a. The Spiritual Court, acting upon the rules of the civil law, requires two witnesses; but where temporal matter is pleaded in bar of an ecclesiastical demand, and the evidence of one witness is refused, a prohibition will be awarded. As where an executor proves the payment of a legacy by one witness. Show. 151; 3 Mod. 172, 283; Comb. 160; Holt, 752; Ld. Raym. 22; Ven. 291; Carth. 142.

(*q*) 7 W. 3, c. 3; 1 Ed. 6, c. 12; 5 & 6 Ed. 6, c. 12. *Qu.* whether the stat. 1 & 2 P. & M. c. 10, repealed the stat. 1 Ed. 6, c. 12, 5 & 6 Ed. 6, c. 11, as to the necessity for two witnesses in the case of petit treason. According to Foster, 337, petit treason stands on the stat. 5 & 6 Ed. 6, and therefore two witnesses are necessary. But now see the stat. 9 Geo. 4, c. 31, s. 2.

(*r*) Vol. II. tit. PERJURY.

any legal admissible evidence tending to prove the issue, the effect of that evidence is solely for the consideration of the jury (*s*).

It is, however, in all cases requisite that the plaintiff should adduce some *primâ facie* evidence in support of every essential allegation. Where there is a failure of evidence, tending to establish any one essential averment, the Court directs an acquittal in a criminal, or directs the plaintiff to be nonsuited in a civil case. But, in civil actions, if there be any evidence, however weak, tending to the proof of the issue, the plaintiff may, by appearing when he is called, have his case submitted to the consideration of the jury: but if there should be no evidence tending to prove any one essential fact, the jury would be directed to give a verdict against him, by which he would be absolutely and finally concluded.

Matters judicially noticed.

No evidence is requisite to prove the existence of a fact which must have happened according to the constant and invariable course of nature (*t*), or to prove any general law (*u*), nor is it

(*s*) *Infra*, Vol. II. tit. CONVICTION.

(*t*) See Lord Ellenborough's observations, 8 East, 202.

(*u*) Facile patet non indigere probatione jus commune, quod judici jam notum esse censetur. Heinecc. El. J. C. 443. The Courts notice the contents of all public Acts. *Renier* v. *Fugossa*, Plow. 12; Ib. 81, a, 83, b; Bro. Ab. Cor. pl. 40. Such as relate to trade in general. *Kirk* v. *Nowell*, 1 T. R. 118; *secus*, where a statute relates to a private trade only, ib. An Act of Parliament relating to a public highway is so far a public Act.

So the Courts will notice all other general laws, as that every corporation has a right of removing one of its members. *R.* v. *Lyme Regis*, Doug. 150. The privileges of the King's Palaces. *R.* v. *Elderton*, Ld. Raym. 980. And all privileges of the Crown, ib. The Ecclesiastical Law. 1 Roll. Abr. 526; 6 Vin. Abr. 496.

The commencement of the sessions of Parliament. Plowd. 77; 1 Lev. 296; 2 Keb. 686. *Spring* v. *Eve*, 2 Mod. 240; D. Ld. Raym. 343; Moor, 551. The place of holding Parliament on a particular day. *Birt* v. *Rothwell*, Ld. Raym. 210. 343.

The prorogation of Parliament. 1 Lev. 296. The course of proceedings in Parliament, whether before one of the Houses, or before a committee. *Lake* v. *King*, 1 Saund. 131. But not the Journals of either House. 1 Ld. Ray. 15.

So the Courts will notice all Courts of General Jurisdiction, and their proceedings. 2 Lev. 176. As of the Court of Chancery. *Weaver* v. *Clifford*, Cro. J. 73. *Worlish* v. *Massey*, Cro. Jac. 607. And other courts at Westminster. *Lane's case*, 2 Co. 16, b. *Mounson* v. *Bourn*, Cro. Car. 518; W. Jones, 417; 4 Co. 93, b. The proceedings in the County Palatine Courts. 1 Saund. 84; 1 Sid. 331. Of the Courts in Wales. *Broughton* v. *Randall*, Cro. Eliz. 502. *Griffith* v. *Jenkins*, Cro. Car. 179. Of the Prerogative Court of the Archbishop of Canterbury. *Shelton* v. *Cross*, 1 Ford

necessary to prove any general customs of the realm (*x*), or any artificial regulation prescribed by public and competent authority; such as the ordinary computation of time by the calendar (*y*); or

466. The practice of the Ecclesiastical Courts is a matter of fact to be proved by witnesses. *Beaurain* v. *Sir W. Scott*, 3 Camp. C. 388.

And will notice what Courts possess a general jurisdiction. *Tregany* v. *Fletcher*, Ld. Raym, 154. *Peacock* v. *Bell*, 1 Saund. 73; 1 Sid. 340. And the limits of their general jurisdiction. 2 Inst. 557. And their officers. *Ogle* v. *Norcliffe*, Ld. Raym. 869. See *Dillon* v. *Harper*, Ld. Raym. 898; 6 Mod. 74. So every Court will notice the records of its own court, but not deeds enrolled, for these are merely the private acts of the parties, authenticated in court; nor the letters patent of another court. 10 Co. 92; Str. 520; 5 Co. 74, b., Bac. Abr. Ev. 643. Nor the nature and extent of inferior courts. *Moravia* v. *Sloper*. Willes, 37.

Nor the proceedings of inferior courts. *R.* v. *Vice-chancellor of Cambridge*, Ld. Raym. 1334 Nor any particular jurisdiction, as of a Dean and Chapter to induct. Bro. Presentation al Eglise, pl. 13, Office, pl. 2. Nor that the lord of a particular franchise has the return of writs. Bro. Office, pl. 2. Nor of a particular liberty. March. 125. Nor of the Cinque Ports. 2 Ins. 557. Nor of an entry in the sheriff's book, referred to by an affidavit. *Russell* v. *Dickson*, 1 Bing. 442.

Nor foreign laws. *Mostyn* v. *Fabrigas*, Cowp. 174. *Wee* v. *Galty*, 6 Mod. 195; 4 T. R. 192. Nor of the laws of the plantations abroad. 6 Mod. 195. Nor of the seal of a foreign court. *Henry* v. *Adey*, 3 East, 221. *Black* v. *Lord Braybrooke*, 2 Starkie's C. 7.

(*x*) As the custom of merchants. *Soper* v. *Dibble*, Ld. Raym. 175. *Erskine* v. *Murray*, Ld. Raym. 1542. *Williams* v. *Williams*, Carth. 269. *Carter* v. *Dounish*, ib. 83. The customs of gavelkind and Borough-English. *Doe d. Clements* v. *Scudamore*, Ld. Raym. 1025; 1 Bla. Com. 75; Co. Litt. 175; Cro. Car. 562.

But not of peculiarities not essential to tenures. 1 Sid. 138. *Brown* v. *Ricks*, 2 Sid. 153. *Saunders* v. *Brookes*, Cro. Car. 562. Such as a custom to devise. 2 Sid. 153. Or a gavelkind custom to hold by the curtesy, although the wife has no issue. 1 Sid. 138; 2 Sid. 153.

Nor of particular local customs. 1 Roll. R. 106; Doug. 96. 380 Such as of foreign attachment in London. *Spinke* v. *Tenant*, 1 Roll. 105. Or of carting whores. *Stainton* v. *Jones*, Doug. 379. *Argyle* v. *Hunt*, Str. 187; Fort. 319. But such customs are noticed in the city courts. Doug. 96. 381. And are noticed by the Courts at Westminster, after they have been certified. *Blacquiere* v. *Hawkins*, Doug. 363. The custom of the city, that every shop is a market overt, was certified by Sir E. Coke, Co. 83, b. The custom of foreign attachment was certified by Starkie, Recorder of that city, 22 Ed. 4; Doug. 379. The custom of a feme covert being sole trader is also noticed Burr. 1784.

(*y*) Str. 387; Lord Raym. 994; 1 H. 7. 13; Bro. Error, pl. 134; *Pugh* v. *Robinson*, 1 T. R. 116; 1 Roll. Ab. 525. The fasts and festivals appointed by the calendar. *Brough* v. *Perkins*, 6 Mod. 181. *R.* v. *Justices of Ipswich*, 2 Ford, 280. *Harvey* v. *Brand*, Salk. 626; 6 Mod. 148. The number of days in a particular month. 1 Roll. Abr. 524. The coincidence of the day of the week with that of the year. Cro. Eliz. 227; 1 Leo, 328. *Smith* v. *Bouch*, Ann. 72.

the known divisions of the kingdom (*z*); or any public matters recited in Acts of Parliament (*a*), royal proclamations (*b*), or other public documents, published by competent authority; the meaning of English words, terms of art, legal weights and measures, the ordinary admeasurement of time (*c*).

Legal presumption.

Or any matter of legal presumption (*d*.)

The nature of legal presumptions will hereafter be more fully considered; it has already been observed, that there are several distinct kinds of presumptions: 1st, absolute and conclusive presumptions, which, like the *præsumptiones juris et de jure* of the Roman law, admit of no proof to the contrary (*e*). 2dly, Legal presumptions which are applied by the Court, but which, like the *præsumptiones juris* of the Roman law, admit of proof to the contrary (*f*). 3dly, Presumptions of law and fact, which admit of proof to the contrary, but which cannot be applied by the Court, without the aid of a jury (*g*). Lastly, mere natural presumptions, which do not depend upon any artificial force given by the law, but rest wholly on their own natural efficacy (*h*).

The beginning and end of term. Cro. J. 548; Jenk. 330; 12 Mod. 647. *Austin* v. *Bewley*, Cro. J. 548. *Dobson* v. *Bell*, 2 Lev. 176. *Ball* v. *Rowe*, Ld. Raym. 4. *Pullein* v. *Benson*, ib. 354. *Estwicke* v. *Cooper*, Ld. Raym. 1557.

But *quære*, whether the Courts will notice the end of a moveable term. *Mitchell* v. *Ramsay*, Latch. 11. 118; 1 Roll. Abr. 304; Dyer, 181; 1 Sid. 308; Cro. Eliz. 210. Unless put in issue. *Courtney* v. *Phelps*, 2 Keb. 108, 109. 122. But see *Kynaston* v. *Jones*, Roll. Abr. 85; Mod. Ca. 196.

(*z*) The Courts will notice all counties, although they be inferior ones. March. 125; 2 Inst. 557. That a county is co-extensive with a particular town. *R.* v. *Baker*, 18 & 19 G. 2. Also the ecclesiastical divisions of the kingdom. *Adams* v. *Terre-tenants of Savage*, 2 Ld. Raym. 854. But not that a town is in a particular diocese. *R.* v. *Simpson*, Ld. Raym. 1379; Str. 609. So the Courts will notice the extent of a port. *Fazakerley* v. *Wiltshire*, Str. 469. Of incorporated towns. *R.* v. *Blacksmiths' Company*, Mich. 4 Geo. 2.

Also the known divisions of the kingdom into counties; but the Courts do not notice the local situation of places within particular counties, or the distance of counties from each other. *Deybel's case*, 4 B. & A. 243.

The Court will not notice without an averment, that Dublin, mentioned in a bill of exchange, is Dublin in Ireland. *Kearney* v. *King*, 2 B. & A. 301.

(*a*) As, of a war with France, the war being mentioned in several statutes. *R.* v. *De Berenger*, 3 M. & S. 67.

(*b*) *Supra*, 198.

(*c*) 1 Rol. Ab. 86. 525; 4 T. R. 314; 6 Vin. Ab. 492.

(*d*) According to the civil law, the effect of a legal presumption is "ut a probatione immunis sit qui vel presumptionem pro se habeat vel possessionem."—Heinecc. Pand. 441.

(*e*) Vol. II. 682.

(*f*) Vol. II. 683.

(*g*) Ibid.

(*h*) Vol. II. 684.

Although in all cases, where a legal presumption arises, the party is relieved by it from the burthen of proof, yet whenever the presumption is not an absolute one, proof may still be necessary to meet the adverse evidence tending to overthrow the *primâ facie* presumption.

Neither a judge nor juror can notice facts within his own private knowledge; he ought to be sworn, and state them as a witness (*i*).

Questions of law.

Secondly, It is the undoubted province of the Court, not only to expound the law as applicable to the facts, but also to decide upon all interlocutory matters which arise collaterally in the course of the trial. Previous to a few remarks upon the distinction between law and fact, it will be convenient to consider more particularly the process by which the law is applied to facts (*j*).

So infinitely varied and complicated are human affairs that no code of law can provide *à priori* for all possible predicaments which may happen; all that can be done is to annex consequences and incidents to certain defined combinations of circumstances described in general terms, capable of being applied to such particular modes or predicaments as may occur in practice. In order, then, to establish a claim or charge, circumstances must be alleged which show that the claim or charge is warranted in point of law, supposing those allegations to be true. In other words,

(*i*) *Partridge* v. *Strange*, Plow. 83, b.; *Hacker's case*, Kel. 12. The law was formerly otherwise. In taking recognitions of assize, the sheriff was bound to return such recognitors as knew the truth of the fact; and these, when sworn, retired from the bar, and brought in a verdict according to their own personal knowledge, without hearing any extrinsic evidence, or receiving the direction of the Judge. Brac. lib. 4, tr. 1, c. 19, s. 3; Ib. l. 4, c. 9, s. 2; 3 Bl. Com. 374. And when attaints came to be extended to trials by jury, as well as to recognitions of assize, the same doctrine was also extended to common jurors, that they might escape the heavy penalties of an attaint, in case they could show, by any additional proof, that their verdict was agreeable to the truth, although not according to the evidence produced; with which additional proof the law presumed they were privately acquainted, though it did not appear in court. But this doctrine was again gradually exploded when attaints began to be disused, and new trials introduced in their stead: it is quite incompatible with the grounds on which new trials are every day awarded, viz. that the verdict was given without, or contrary to, evidence. See Sty. 233; 1 Sid. 133; 3 Bl. Com. 374. See *R* v. *Sutton*, 4 M. & S. 532.

(*j*) See Hale's P. C. 306; Sid. 235. *Goodman* v. *Cotherington*, Sty. 233; *Bennett* v. *Hundred of Hertford*, Tri. per Pais, 209. *Duke* v. *Ventris*, Salk. 205; B. N. P. 313. *Kitchen* v. *Mainwaring*, cited Andr. 321.

the allegations upon the record are nothing more than an amplified specification of facts and circumstances which in point of law are essential to support the charge or claim. Thus, on a charge of larciny the indictment alleges all the particulars essential to the offence, a caption, and an asportation of specific property belonging to a particular owner with a felonious intention. Now with respect to every essential allegation, although the jury must find the facts, it is always for the Court to decide whether those facts, when proved, support the allegations in point of law. Thus, in the case of larciny, the jury must decide upon the evidence whether the prisoner removed the goods alleged to be stolen at all, and how far, and under what circumstances, he removed them; but whether such a removal be an asportation sufficient to constitute felony, is pure matter of law. Hence, in order to substantiate every charge or claim as alleged on the record, it is essential that the jury should find some predicament or state of facts falling within the description contained in each essential allegation, and that the Court should adjudge such special modes or facts to be sufficient in law to sustain those allegations. This must be done in one or other of two ways; either the Court must inform the jury hypothetically, that the facts which the evidence tends to prove will, if proved, satisfy the allegations, being but particular modes which fall within the essentials enumerated in the general definition, or the jury must find those predicaments or modes specially, and then the Court can afterwards apply the law, and pronounce whether the facts proved be or be not such as satisfy the general and defined essentials to the charge or claim.

The jury must find facts, and not mere evidence.

It is obvious, that in order to enable the Court afterwards to apply the law to the facts, the jury must find, not merely evidence or circumstances which *tend* to prove or disprove facts falling within the particulars which are essential to support the charge or claim, but must either find particular modes included within the description, or such facts as negative one or more of the circumstances essential to the charge or claim. Thus, if, in the case of larciny, the jury were to find specially, that the prisoner *took* the goods described in the house of *A. B.* with the intention of stealing them, *removed* them for the space of 100 yards; and that *A. B.*, the alleged owner, had a special property in them as a bailee to carry the goods; then, as the finding would embrace facts which were special modes falling within each of the descriptive allegations essential to the offence, the Court would be enabled afterwards to apply the law by pronouncing

the prisoner to be guilty. So if, on the other hand, the jury were in such case to find, *inter alia*, that a bale of goods was taken by the prisoner and removed, but that it still remained connected with the shop from which it was taken by a rope or chain, such a finding would negative every mode or species of asportation, and the Court would pronounce accordingly (*k*). But again, if the jury were in such case to find *mere evidence* (*l*), however cogent in its nature, of any of the essential facts, the Court could not draw the conclusion. Thus, if they were to find, that immediately after the goods were missed the prisoner was seized with the goods in his possession, and that he confessed that he was guilty, this might be abundant evidence to prove his guilt, but would be *mere* evidence (*m*), and the Court could pronounce no judgment. Law and fact.

Where a *general* verdict is given, the same process occurs at the trial; the jury decide what facts are proved, and receiving and applying the law expounded by the Court, as the Court would have applied it had the jury found the facts simply, pronounce a general verdict involving both law and fact.

It has been frequently doubted, whether a particular question General distinction.

(*k*) See *R.* v. *Phillips*, East's P. C. 662.

(*l*) In the case of a special verdict, all the facts must be found on which the judgment is founded, and not mere evidence of facts. *Hubbard* v. *Johnston*, 3 Taunt. 309. But where a special case is reserved, if the circumstances be such as to enable the Court to say, without difficulty, what ought to be the verdict of the jury upon them, the Court is at liberty to decide the question. *Thompson* v. *Giles*, 2 B. & C. 422.

(*m*) So where in trover the jury merely find a demand and refusal, without expressly finding a conversion, or any fact which in point of law amounts to an actual conversion, the Court can give no judgment. Vol. II. tit. Trover.

In the case of *Harwood* v. *Goodright*, Cowp. 87, the jury found, that after the will had been executed by a testator, in favour of Harwood, he executed another will, the contents of which were unknown; and it was contended by the heir at law that this amounted to a revocation. Lord Mansfield, in giving judgment, said, "In considering this special verdict, the duty of the Court is to draw a conclusion of law from the facts found by the jury, for the Court cannot presume any fact from the evidence stated. Presumption, indeed, is one ground of evidence; but the Court cannot presume any fact. In case the defendant had been proved to have destroyed this last will, it would have been a good ground for the jury to find that this was a revocation: but the jury, on the presumption, must have found the fact. So with regard to all other circumstances, as that the will was in the hands of the heir at law, that there were three attesting witnesses to the will, these would have been proper for the jury to have considered, but we are confined by the facts found by them."

between questions of law and of fact.

be one of *law* or of *fact*. Thus far is clear, that whenever upon particular facts found, the Court, by the application of any rules of law, can pronounce on their legal effect, with reference to the allegations on the record, such inference is matter of law. It is also clear, that whenever the Court cannot pronounce on the legal effect of particular facts, and where it is requisite, to enable them to do so, that the jury should find some other inference or conclusion, such further inference or conclusion is a question of fact. It is most emphatically true, that a jury can decide matters of fact only; they may indeed apply the law as delivered by the Court, but in this respect they act merely ministerially, under the direction of the Court.

Every general verdict, and indeed every allegation on the record found by a jury to be true, involves matter of law as well as matter of fact; for it is always a question of law, whether the particular facts proved satisfy the allegations upon the record. Every legal definition, allegation, and every general verdict, involves both law and fact. Thus, in the simplest case, if the issue be whether *A.* assaulted *B.*, it involves a question of law as well as of fact: what *A.* did is a question of fact; whether what he so did amounted in law to an assault, is a question of law. Still the question for the jury is one of mere fact, for upon the advice of the Court they find a general verdict, applying the law to the facts proved; or they find the facts, and the Court afterwards applies the law.

Hence it follows, that a question or inference of fact, is one which the jury can find upon the evidence by virtue of their own knowledge and experience, without any legal aid derived from the Court: and that an inference or conclusion of law, is one which the Court can draw from the mere circumstances of the case as ascertained by a jury, independently of any general inference or conclusion drawn by the jury.

In ordinary cases this distinction is perfectly clear; but it is now necessary to advert to a class of cases in which doubt has arisen, whether particular questions and inferences belong more properly to the Court or to the jury.

Instances of reasonable time, &c.

This occasionally happens where some general inference or conclusion is to be drawn from a number of particular facts and circumstances appertaining to the individual case. As in the instances of reasonable time, probable cause, due diligence, and others of a similar nature.

It will be proper to consider the origin and nature of these questions a little more particularly. Every law, it has been

observed, consists in the annexation of certain legal incidents to particular combinations of facts. Such definitions of necessity in the earlier and more simple stages of the law, and as matter of convenience at all times, must be of a general and abstract nature. No human sagacity can, in framing laws, provide specifically for the almost infinite variety of cases which occur in practice; and therefore all that can be done in many instances is to define, not by an enumeration of facts, which, in cases depending on a great variety of minute and varying circumstances, would be impracticable, but by means of some general result or inference from them, as in the instances above alluded to, of reasonable time, due diligence, and probable cause.

For instance, the law cannot prescribe in general what shall be a *reasonable time*, by any defined combinations of facts (*n*). So much does the question depend upon the situation of the parties, and the minute and peculiar circumstances incident to each case. If a man has a right, by contract or otherwise, to cut and take crops from the land of another, the law, it is obvious, can lay down no rule as to the precise time when they shall be cut and removed; all that can be done is to direct or to imply that this shall be done in a reasonable and convenient time; and this must obviously depend on the state of the weather and other circumstances which cannot from their nature form the basis of any legal rule or definition (*o*).

(*n*) By the general Inclosure Act, a rector or vicar is enabled to lease his allotment, "so that (*inter alia*) there be inserted in the lease, power of re-entry on nonpayment of the rent or rents to be thereby reserved, within a reasonable time, to be therein limited, after the same shall become due." See the observations of Abbott, C. J. in *Smith* v. *Doe, d. Lord Jersey*, 2 B. & B. 592.

(*o*) *Eaton* v. *Southby*, Willes, 131. Where the plaintiff in replevin pleaded to an avowry, justifying the taking goods as a distress for rent in arrear, that he took the growing crops under an execution, and afterwards cut the wheat, and let the same lie on the premises until the same in a course of husbandry was fit to be carried away; and that the defendant distrained the same before it was fit to be carried away; it was objected by the defendant, on demurrer to this plea, that the plaintiff ought to have set forth how long the corn lay on the land after it was cut, that the Court might see whether it were a reasonable time or not. But the Court decided that the objection was untenable; for though in Co. Litt. 56, b. it is said that in some cases the Court must judge whether a thing be reasonable or not, as in the case of a reasonable fine, a reasonable notice, or the like, it would be absurd to say, that in a case like the present the Court must judge of the reasonableness; for if so, it ought to have been set forth in the plea, not only how long the corn lay on the ground, but what weather it was during that time, and many other incidents which would be ridiculous to be inserted in a plea. And the Court

Reasonable time, &c.

General terms then, such as reasonable time, probable cause (*p*), and others of a similar nature, being technical and legal expres-

were of opinion that the matter was sufficiently averred; and that the defendant might have traversed it if he had pleased, and then it would have come before a jury, who, upon hearing the evidence, would have been the proper judges of it.

So in the case of *Bell* v. *Wardell*, Willes, 202, where the defendant in trespass justified under an alleged custom for the inhabitants of a town to walk and ride over a close of arable land, at all *seasonable times*, it was held, that *seasonable times* was partly a question of fact, and partly a question of law; and on demurrer to the replication of *de injuriâ*, the Court said, as the custom is laid here, if it were not a seasonable time, the justification is not within the custom; and though the Court may be the proper judges of this, yet in many cases it may be proper to join issue upon it, that is, in such cases where it does not sufficiently appear on the pleadings whether it were a seasonable time or not. Accordingly it is said in the case of *Hobart* v. *Hammond*, Cro. J. 204, that the reasonableness of fines must be determined by the Judges, either on demurrer or on evidence laid before a jury. For issues may be joined on things which are partly matters of fact, and partly matters of law; and then when the evidence is given at the trial, the Judge must direct the jury how the law is; and if they find contrary to such direction, it is a ground for a new trial.

(*p*) Although time be a necessary ingredient in almost every contract and legal obligation, yet inasmuch as the time for performing an act must depend upon a great number of varying circumstances, the law cannot lay down precise rules applicable to all cases, or do more than prescribe generally a reasonable time.

And in general, questions of reasonable time, reasonable care, due diligence, probable cause, and such like, depend so much on their own peculiar circumstances as not to admit conveniently of any general rules; and it is of greater convenience to depend on the judgment and discretion of a jury, deciding on a comparison of the circumstances with the ordinary course of practice, or with reference to the ordinary principles of fair and honest dealing, than to introduce such a multiplicity of legal rules and definitions as would be necessary for the due decision of cases subject to such infinite variety of circumstances. It is in truth a matter of important and obvious policy rather to refer questions of this nature as matters of fact to a jury, than to frame legal rules applicable to particulars. The difficulty of framing precise rules must, in such instances, be very great, for the reasons adverted to, unless they be founded on some prominent and decisive incidents: whenever the Court decided upon circumstances, the decision would become a precedent and rule of law, and as each decision would afford room by comparison for a great number of distinctions, the obvious effect would be to multiply such decisions and distinctions to a very inconvenient and burthensome extent. On the other hand, by abstaining from legal decision, except in cases where some decisive rule or principle of law is clearly applicable, and by adopting in others the inference of the jury, in point of fact, substantial justice is administered in simplicity, and free from the perplexity occasioned by nice and subtle distinctions and conflicting decisions. And this is an advantage, and by no means an unimportant one, incident to the system of trial by jury: the law can thus deal in

sions, it is clear, in the first place, that in the abstract they involve matter of law as well as matter or fact; for in the application of all legal expressions, it is a question of legal judgment and discretion to pronounce whether the facts as found by a jury do or do not satisfy that legal expression or allegation (*q*). It is therefore in all cases for the Court to pronounce whether the facts show that the time was reasonable or the cause was

General terms involve questions of law as well as of fact.

general definitions, and leave the rest as fact to the jury, without multiplying decisions and precedents; but if the Judges and not the jury were to decide, every decision would become a precedent, and legal distinctions would be multiplied to an excessive extent.

(*q*) The question, whether the facts of a particular case fall within the general terms of a statute, is always a question of law, whether the statute define the meaning of its own terms, or use them without definition according to their ordinary acceptation and meaning. If a special verdict involve the question whether a party be a bankrupt, it is not essential that the jury should draw the conclusion; the Courts may do it from the facts found. *Dodsworth* v. *Anderson*, 2 Jon. 142. So if the question be whether the party be a chapman within the stat. 5 Ann. c. 14. *Hearle, q. t.* v. *Boulter*, Say. 11; Bac. Ab. tit. stat. H.

The rule applies to all statutory expressions, and to all allegations in issue, however common and popular their sense and meaning may be. Thus, if the issue be, whether *C. D.* was an inferior tradesman (under the stat. 4 & 5 W. 3, c. 3, s. 10), although it would be for the jury to find whether *C. D.* was a tradesman, and to ascertain the nature and kind of trade, it would be for the Court to decide whether he came within the description in the statute. See Vol. II. tit. TRESPASS.

Executors shall have reasonable time to take the goods of their testator from his mansion. Litt. s. 69. This reasonable time shall be adjudged by discertion of the justices before which the cause dependeth. And so it is of reasonable fines, customs and services, upon the true state of the case depending before them; for reasonableness in this case belongeth to the wisdom of the law, and therefore to be decided by the justices. Quam longum esse debet non definitur in jure, sed pendet ex discretione justiciariorum. And this being said of time, the like may be said of things uncertain, which ought to be reasonable, for nothing that is contrary to reason is consonant to law. Co. Litt. 56 b. The question whether a market is held so near to another as to constitute a nuisance, is sometimes a question of law. Vol. II. 541. Six days was held by the Court to be a reasonable time for removing the goods of a lessee for life by his executors after his death. *Stodden* v. *Harvey*, Cro. J. 204. Power is given to the lessor's son to take the house to himself on coming of age; he must make his election within a reasonable time: a week or fortnight is reasonable; a year is unreasonable. *Doe* v. *Smith*, 2 T. R. 436. A reasonable time for countermanding a trust was held to be a question of law, 1 B. & P. 388. In *Hunt* v. *Royal Exchange Assurance Co.*, 5 M. & S. 47, a laches of five days after intelligence of the loss, and before notice of abandonment was given, was held by the Court to be too long. What is a convenient time for the taking of a prisoner, by the sheriff, to prison, is a question for the Judge. Vol. II. tit. SHERIFF, 745.

probable in point of law; just as it is for the Court to decide whether the facts found show an alleged asportation or conversion, or bankruptcy, in point of law (*r*).

But in particular cases the inference in law follows the inference in fact: where the Court cannot draw the inference that the time was reasonable or the cause probable, the jury must draw the conclusion in fact; and then the time will be reasonable or the cause probable in point of law, according as the one or the other is reasonable or probable in point of fact.

Reasonable time, when a question of law, when of fact.

Hence it follows, that the test for deciding whether such a general inference as to reasonable time, probable cause, &c. be one of law or of fact, is this: if the Court, in the particular case, can draw the conclusion by the application of any legal rules or principles, the conclusion is a legal one (*s*); for the rules and principles of law must prevail against the opinion of a jury. But if, on the other hand, the circumstances be so numerous and complicated as to exclude the application of any general principle, or definite rule of law, the further inference is necessarily one of mere fact, to be made by the jury. In other words, the rules of ordinary practice and convenience become the legal measure and standard of right.

Notice of dishonour of bill of exchange.

Thus in the case of a bill of exchange, where the law requires notice of dishonour to be given within a reasonable time; if it appear on the facts proved in evidence, that the case is one falling within a rule by which the law itself prescribes and defines what shall be considered to be reasonable time, the question is a mere question of law, for the law itself from the mere *res gestæ* makes the inference that the time was reasonable time (*t*). The duty of the jury in such a case is obviously con-

(*r*) The construction the law putteth on facts found by a jury, is in all cases undoubtedly the proper province of the Court. Fost. 256.

(*s*) This happens very generally upon the question of reasonable fines, customs and services. Co. Litt. 56 b. 59 b; 4 Co. 27 b. *Hobart* v. *Hammond*, Cro. J. 204. *Stodden* v. *Harvey*, Cro. Eliz. 583. So in the case of *Bell* v. *Wardell*, Willes, 202, *supra*, 452, where the plaintiff, in trespass, justified under an alleged custom for the inhabitants of a town to walk and ride over a close of arable land at all seasonable times, but it appeared by the plea that the trespass was committed whilst the corn was standing; the Court, upon demurrer, decided that the time was not seasonable. See Lord Raym. 241. In *Wright* v. *Court*, 4 B. & C. 596, the Court held, on demurrer to a plea justifying an imprisonment on a suspicion of felony, that the detention of the plaintiff for three days, to give the prosecutor an opportunity for collecting witnesses, was an unreasonable time.

(*t*) Vide *supra*, 258. *Williams* v. *Smith*, 2 B. & A. 496. *Wright* v. *Shawcross*, ib. 501. *Tindal* v. *Brown*, 1 T. R. 167. In the case of *Smith* v. *Doe*, *d.*

fined to the finding and ascertaining of the simple facts and *res gestæ*; any inference of theirs upon the subject, that the time was or was not reasonable, would be either simply nugatory, or both nugatory and illegal.

Reasonable time, &c. where a question of fact.

Where, on the other hand, the law is silent, and does not by the operation of any principle or established rule decide upon the legal quality of the simple facts, or *res gestæ*, it is for the jury to draw the general inference of reasonable or unreasonable, or of probable or improbable, in point of fact (*u*). In such cases the legal conclusion follows the inference in fact; in other words, the question as to reasonable time, probable cause, &c., is one of fact, and the time is reasonable or unreasonable, or the cause is reasonable or improbable in point of law, according to the finding of the jury in point of fact.

If the question be, whether reasonable notice has been given by the holder, of the dishonour of a bill of exchange; and the evidence be, that the holder gave notice by the next day's post, to an indorser, living at a distance; the question would be one of mere law, for it would fall within an express rule of law, which determines such notice to be reasonable (*x*). But where no acknowledged rule or principle of law defines the limits between reasonable and unreasonable, the question seems to be one for the jury under all the circumstances of the case (*y*).

Standard of comparison, in the absence of a legal rule.

It is next to be observed, that these terms, in the absence of any precise rule of law, always import a comparison with some usual course and order of dealing, or have reference to general convenience, utility, and the plain principles of natural justice. Where the law is silent, the jury must draw the inference, not as their own casual fancies or arbitrary opinions may dictate,

Lord Jersey, 2 B. & B. 592, Abbott, C. J. said, "I conceive that in this as well as in all other cases Courts of law can find out what is reasonable; and that in some cases they are absolutely required to do so. In many cases of a general nature or prevailing usage the Judges may be able to decide the point themselves; in others, which may depend upon particular facts and circumstances, the assistance of a jury may be requisite."

(*u*) As upon the question, whether a party has been guilty of laches in not presenting a bill payable at sight, or a certain time after, where no established rule of law prevails. See *Fry* v. *Hill*, 7 Taunt. 397; Vol. II. 158.

Whether a particular covenant is an usual covenant in a lease; *Doe* v. *Sandham*, 1 T. R. 705, per Cur. K. B. Hil. 1828. What is a reasonable time for carrying away tithes; *Facey* v. *Hurdam*, 3 B. & C. 213. For removing a distress; *Pitt* v. *Adams*, 4 B. & A. 206.

(*x*) *Williams* v. *Smith*, 2 B. & A. 496. *Wright* v. *Shawcross*, 2 B. & A. 501, n.; Vol. II. 164.

(*y*) Per Lord Kenyon in *Hilton* v. *Shepherd*, 6 East, 14, n. *Fry* v. *Hill*, 7 Taunt. 397.

but according to their judgment and discretion, upon comparison of the facts with the general and understood course of dealing, if any such exist, in reference to the matter litigated; and in the absence of any such guide, with reference to mutual convenience and utility, or the ordinary rules of fair and honest dealing; for these, in the absence of any express rule of law, are the proper, and indeed the only, standards of comparison which the case admits of.

Reasonable time, &c. is not in the abstract a question of mere law or mere fact.

It follows, that such general questions of reasonable time, probable cause, due diligence, and the like, are never in the abstract necessarily either mere questions of law or questions of fact (*z*). Whether in a particular instance the question be of the one class or the other, depends simply upon the existence and applicability of a rule of law to the special circumstances, or *res gestæ*: if any such rule be applicable, the question is a mere question of law; if no such rule apply, the inference is one of mere fact for the jury (*a*). It may even happen that the very same circumstances which at one time would have raised a question of fact, may at a subsequent period raise a mere question of law; a rule of law which governs the case having been established in the interval (*b*).

(*z*) In the case of *Darbishire* v. *Parker*, 6 East, 18, Lawrence, J. expressed an opinion, that reasonable time was *in general* a question of law, because in the case of *Tindal* v. *Brown*, 1 T. R. 167, the jury found merely the circumstances. But with great deference to the opinion of that very learned Judge, it seems to be going too far to infer, that reasonable time must always be a conclusion of law, because it was so considered in the particular case. In that case, the bill being dishonoured on the 5th, and notice not given till the 7th, although the parties lived within 20 minutes walk of each other, the jury nevertheless found for the plaintiffs; but the Court held that there was a sufficient foundation for laying down a legal rule then but imperfectly established, as to the time of notice. Lord Mansfield said, "What is reasonable notice is partly a question of fact, and partly a question of law. It may depend in some measure on facts, such as the distance at which the parties live from each other, the course of post, &c.; *but whenever a rule can be laid down with respect to this reasonableness*, that should be decided by the Court, and adhered to by every one, for the sake of certainty."

These observations remove all difficulty: he does not say, that reasonable time must always be an inference of law upon the facts; but only, where the law can lay down a rule as to reasonableness; which can only be by recognizing a practice already established, or by applying legal principles to some defined combination of circumstances.

(*a*) Intention is a mere matter of fact, where the law does not infer the intention from the fact itself. Per Lord Mansfield, *R.* v. *Woodfall*, 5 Burr. 261. See tit. INTENTION, and MALICE.

(*b*) The rule as to notice to a tenant to quit, formerly was that reasonable

Mixed question of law and fact.

Cases of this kind, where the jury are to find the special facts, and where the Court can decide upon the legal quality of those facts by the aid of established rules of law, independently of any general inference or conclusion to be drawn by a jury, have been sometimes termed *mixed questions of law and fact.* Thus it was said (*c*), that the question of reasonable notice of the dishonour of a bill of exchange was a mixed question. That the situation and places of parties, the post-hours, and other matters of that sort, are facts to be ascertained by the jury; but whether under the circumstances notice was given in reasonable time, is a question of law upon which they ought to receive the direction of the Judge. Now, it seems to be clear, that whenever any rule or principle of law applies to the special facts proved in evidence, and determines their legal quality, its application is matter of law; and on the other hand, that whenever the special facts and circumstances are such that the Court cannot by the aid of any legal rule or principle decide upon the legal quality of the facts, it is necessary that the jury should draw the inference in fact as a mere question in fact, with reference to the ordinary course and practice of dealing, and the general principles of morality and utility. It may therefore be doubted whether the expression, 'mixed question of law and fact,' be in strict propriety applicable to the former class of cases. For wherever the law uses a general technical and abridged form of expression, the question arising upon it is partly a question of law, partly a question of fact; the jury must in all instances find in ascertaining the facts, where the application of the law to the ascertained facts admits of no doubt; in another the facts may be clear and simple, and their legal effect doubtful; but still in each case the provinces of the Court and jury are perfectly plain and distinct. It is true that in some instances the Court could not, without the aid of a conclusion of fact drawn by a jury, apply the law; but this consideration does not properly occasion any intermixture of or confusion of the respective functions of the Court and jury; for the latter, in drawing their conclusion, still confine themselves to mere matter of fact.

notice should be given, but in the reign of H. 8. it was decided that six months' notice was necessary. See 6 East, 123, and see Vol. II. tit. BILL OF EXCHANGE.

(*c*) See *Darbishire* v. *Parker*, 6 East, 3; and the observations of Grose, J. ib. The observations of Lord Mansfield and Buller, J. in *Tindal* v. *Brown*, 1 T. R. 167. The terming any question a mixed question of law and fact, is chargeable with some degree of indistinctness. Questions of fact and of law are not in strictness ever mixed; it is always for the jury to decide the one, and the Court the other, however complicated the case may be. In some cases the main difficulty may consist

Mixed questions of law and fact.

the facts which form the basis of the legal judgment, unless they be admitted by the parties; and it is for the Court, in all cases, to decide upon the legal quality of those facts. So universal is this rule, that it applies even in those instances where, in the absence of any rule or principle of law, which enables the Court to draw the conclusion directly and immediately from the special facts, it is essential that the jury should draw the inference of reasonable time or probable cause, as a matter of mere fact; for even here the adjudication by the Court, that the time is reasonable or the cause probable, involves matter of law as well as matter of fact, although the question whether the time be reasonable or the cause probable, in point of law, be dependent on the question whether it be reasonable or whether it be probable in point of fact. If the jury were by their verdict to find all the special facts, and were also to find that the time was reasonable in point of fact, the judgment of the Court upon this finding would still in all cases be matter of law. If in such a case the mere facts fell within any established rule or principle, the special inference made by the jury would be entirely nugatory, and the Court would apply the rule of law to the special facts, even although the legal inference should be contrary to the inference in fact (*d*). In the absence of any such rule, the judgment of the Court, that the time was reasonable, would follow the conclusion in fact; but it would involve that which is mere matter of legal consideration and judgment, that is, the adjudication that no legal rule applied to the facts, and that the question of law was consequently dependent on the question in fact. In strictness therefore, as the legal application of every technical expression recognized by the law is partly a matter of fact and partly a matter of law, it may be doubted whether the terms 'mixed question of law and fact' serve accurately to distinguish any particular class of cases. All technical expressions whatsoever, such as asportation (*e*), conversion (*f*), acceptance (*g*), and the like, are in their application partly matters of law, partly matters of fact.

These observations may not, perhaps, be deemed to be altogether unimportant when it is considered how essential it is to

(*d*) For it would be a wrong conclusion in point of law. See 6 T. R. 466.

(*e*) See Vol. II. tit. LARCENY.

(*f*) See Vol. II. tit. TROVER.

(*g*) See Vol. II. tit. FRAUDS, STATUTE OF.

preserve the distinction between law and fact, and to prevent any misconception as to the relative functions of courts and juries (*h*).

Reasonable time.

Some of the cases to which these principles apply will next be adverted to. Reasonable time is always a question of fact, in the absence of any rule or principle of law applicable to the circumstances. Thus, in an action for not removing goods distrained for rent, after the expiration of five days, it is a question for the jury, whether they were removed within a reasonable time afterwards (*i*). So whether the sheriff or his agents have used due diligence in attempting to discover and arrest a defendant under civil process (*j*).

In the case of *Noble* v. *Kennaway* (*k*), where the defence to an action on a policy of insurance was, that there had been unnecessary delay in unloading the cargoes, it was held, that this was a question to be decided by a jury, who could not decide without being informed as to the usual practice of the particular trade. Where the defence to an action for the price of goods sold and delivered was, that they did not correspond with the sample, it was left to the jury to say whether, under the circumstances, the defendant had rejected the goods within a reasonable time (*l*).

In the cases of *Tindal* v. *Brown* (*m*), and *Darbishire* v. *Parker*, it was said (*n*), that what is reasonable notice of the dishonour of a bill of exchange is a question of law arising upon the facts; and that a jury in such cases ought to receive the directions of the Judge; a position incontrovertibly true wherever the law affords a rule which governs the case, for then the finding of the jury, that the time is reasonable or unreasonable in point of fact, cannot be placed in competition with the settled rules and principles of law, and can never prevail but where the law is silent, and where the general rules of law, founded upon a knowledge and experience of their general utility, are from the peculiar nature of the case supposed to be inapplicable.

Probable cause.

The existence of probable cause has frequently been treated

(*h*) It is of the greatest consequence to the law of England, and to the subject, that the powers of the Judge and jury be kept distinct; that the Judge determine the law, and the jury the fact: and if ever they come to be confounded, it will prove the confusion and destruction of the law of England. Per Hardwicke, C. J., *R.* v. *Poole*, B. R. II. 23.

(*i*) Vol. II. 282.

(*j*) Vol. II. tit. SHERIFF—NEGLIGENCE.

(*k*) Doug. 492.

(*l*) *Parker* v. *Palmer*, 4 B. & A. 387.

(*m*) 1 T. R. 137.

(*n*) 6 East, 10.

Probable cause.

as a question or inference of law (*o*). But although it be clear that it is sometimes a question of law, in practice it is not unfrequently a question of fact for the jury (*p*). And this must in principle happen in all cases where the result depends on the combined effect of a variety of circumstances to which no particular rule or principle of law is applicable.

The probable cause of prosecution must necessarily consist in the circumstances of the case within the defendant's knowledge, which tended to throw suspicion on the plaintiff. The existence of such circumstances, and their force and tendency, are questions rather of fact than of law; for the effect must be measured by sound sense and discretion rather than by any rule of law, which cannot measure mere probability. If such circumstances did exist, it is to be presumed that the defendant acted upon them, but this is not to be conclusively presumed; for it seems to be clear, that if, notwithstanding the existence of unfavourable circumstances, the defendant knew that the plaintiff was innocent, he would be liable in damages, for as to him, who was better informed, the circumstances could afford no probable cause or ground of accusation (*q*).

(*o*) See *Candell* v. *London*, 1 T. R. 520, n. *Johnston* v. *Sutton*, 1 T. R. 543. *Reynolds* v. *Kennedy*, 1 Wils. 232. *Golding* v. *Crowle*, B. N. P. 14. *Infra*, Vol. II. 493. In the case of *Hill* v. *Yates*, 2 Moore, 80, where a constable justified the apprehension of the plaintiff under the stat. 15 C. 2, c. 2, s. 2, which authorizes a constable to apprehend persons whom he suspects to be carrying a burthen of young trees, it was held, that the question of probable cause was for the Judge, and that he could not leave it to the jury.

(*p*) *Brooks* v. *Warwick*, 2 Starkie's C. 389. *Isaacs* v. *Brand*, ib. 167.

(*q*) See Haw. b. 2, c. 12, s. 15. *Sir Anthony Ashley's case*, 12 Co. 92. *Davis* v. *Russell*, 5 Bingh. 354; where the Judge having directed the jury to consider whether the circumstances afforded the defendant reasonable ground for supposing that the plaintiff had committed a felony, and whether in his situation they would have acted as he had done, the Court held that the direction was *substantially* correct. Best, C. J., in giving judgment, observed, it was for the jury to say whether they believed the facts; and if they believed them, whether the defendant was acting honestly. In *Beckwith* v. *Philby*, 6 B. & C. 637. Littledale, J. directed the jury to find for the defendants, if they thought on the whole that the defendants had reasonable cause for suspecting the plaintiff of felony. And Lord Tenterden said, whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury. If *A.*, having an opinion of counsel in his favour, arrests *B.*, he is not liable to an action for a malicious arrest, if he acted honestly on that opinion: *secus*, if he proceeded to arrest, believing that he had no cause of action. Whether

The inference of fraud is also in some cases a mere question of law arising upon the facts, in others is a mere matter of fact (*r*). Where a trader alienes the whole of his effects, he is guilty of fraud against his creditors, and commits an act of bankruptcy; and the Court will infer fraud from the facts, without the aid of a jury (*s*). So under the stat. of Eliz., where a transfer is made of chattels without delivery of the possession (*t*). Fraud.

If a creditor, knowing that his debtor was going to break, were, before any direct act of bankruptcy, to procure payment by *threats*, the law would pronounce that this was not fraudulent (*u*).

Or the question may be one of fact for the jury. As where it depends not on the mere act done, but upon the particular intention with which it was done (*x*). As where a trader conveys part of his property (*y*), or a debtor assigns his property, to defraud creditors (*z*.) So it is a question of fact, whether fraud has been practised in procuring a blind man to execute a will (*a*).

The inference as to *malice* and *intention*, also, may be one either of mere law, as in cases of homicide, where the law frequently infers a malicious intention from the facts, independently of any conclusion drawn by the jury (*b*): Malice and intention.

Or of mere fact, as in all cases where some malicious intention

he did so or not, is a question of fact for the jury. *Ravenga* v. *Macintosh*, 2 B. & C. 693; Vol. II. 499.

(*r*) Per Lord Mansfield, in *Foxcroft* v. *Devonshire*, 2 Burr. 931. 937. Fraud and covin is always a question or judgment of law on facts and intention; per Lord Ellenborough, in *Doe* v. *Manning*, 9 East, 59. But the *intention* is frequently a question of fact. Upon an issue taken generally on an allegation of fraud, it is a question of *fact*, and if there be no fraud in fact, there is none in law; per Buller, J. *Pease* v. *Naylor*, 5 T. R. 80, on a general replication of fraud, to plea by executor of outstanding judgments. Fraud in taking a tenement is a question of fact in a settlement case. Vol. II. tit. SETTLEMENT. The obtaining a bill of exchange by fraud is a question of fact. *Greeo* v. *Bevan*, 3 Starkie's C. 134. So whether a party in taking a bill of exchange (which turns out to have been lost or stolen) acted with a sufficient degree of prudence and caution. Vol. II. tit. BILL OF EXCHANGE, 155.

(*s*) *Newton* v. *Chantler*, 7 East, 145. *Linton* v. *Bartlett*, 3 Wils. 47. *Wilson* v. *Day*, 2 Burr. 827; *supra*, 154. See the observations of Buller, J. in *Estwick* v. *Caillaud*, 5 T. R. 420. Vol. II. p. 358.

(*t*) *Edwards* v. *Harben*, 2 T. R. 587. *Bamford* v. *Baron*, cited ib. in not. *Reid* v. *Blades*, 5 Taunt. 212. Vol. II. 617.

(*u*) Per Lord Mansfield, 2 Burr. 938.

(*x*) Vol. II. tit. INTENTION.

(*y*) *Newton* v. *Chantler*, 7 East, 145; Vol. II. 154.

(*z*) Vol. II. p. 358.

(*a*) Per Heath, J. *Longchamp* v. *Fish*, 2 N. R. 418.

(*b*) See Vol. II. tit. MURDER—LIBEL—MALICIOUS PROSECUTION—MALICIOUS ARREST.

in particular is essential to the offence (*c*); or where the nature of an act depends on the particular intention of the parties (*d*). The question whether a party had knowledge of a particular fact, is usually a question of fact to be left to the jury (*e*).

Negligence, &c.

The question whether a sheriff, attorney or agent, has been guilty of negligence, is usually one of fact for the decision of the jury (*f*).

What shall be said to be the next sessions, that is, the next practicable sessions, for an appeal against a removal order, is a question of fact, inasmuch as it frequently depends on the particular situation of the parties, and the circumstances of the case (*g*).

Reputed ownership, it seems, is a question of fact rather than of law (*h*).

Construction of written document.

The construction of a written document is matter of pure law, as it seems, in all cases where the meaning and intention of the framers is by law to be collected from the document itself. As in the instances of judicial records, deeds, &c. (*i*); but where the meaning is to be judged of by the aid of extrinsic circumstances, the construction is usually a question of fact for the jury. Thus in the case of libel, the meaning of the writer, and the truth of the innuendos, are questions of fact. So in a prosecution for sending a threatening letter, the question, whether it contains a threat,

(*c*) Vol. II. tit. INTENTION, 417; tit. MALICE, ib. 487; MALICIOUS INJURIES, ib. 500; LIBEL, ib. 461.

(*d*) *Power* v. *Smith*, 5 B. & A. 550. So according to the civil law, "Quicunque intentionem facto superstruit factum id tenetur probare, ut non neganti sed adfirmanti incumbat probatio." The intention of the parties in paying or receiving rent is for the jury. Per Gould, J., 1 H. B. 312. *Goodright* v. *Corder*, 6 T. R. 319.

(*e*) *Harratt* v. *Wise*, 9 B. & C. 712; where it was held that knowledge on the part of the captain of a vessel, of the fact that a foreign port was in a state of blockade, was not to be presumed on the ground that notice to a State was notice to all the subjects of that State, but was to be proved as matter of fact. It is a question of fact for the jury to whom credit was given by the vendor of goods. *Leggatt* v. *Reed*, 1 Carr. C. 16. *Bentley* v. *Griffin*, 5 Taunt. 356. To what purpose trees cut down by a tenant, were intended to be applied by him. *Ide* v. *Wilson*, 11 East, 56; Vol. II. 243. On a prosecution for larciny, the *quo animo* is for the jury. R. v. *Phillips*, East's P. C. 662. Vol. II. tit. LARCINY.

(*f*) Vol. II. tit. NEGLIGENCE.

(*g*) *R.* v. *Cooke*, 4 Burn, 603, 23d ed. *R.* v. *Justices of the East Riding of Yorkshire*, ib. See *R.* v. *Justices of Essex*, 1 B. & A. 210.

(*h*) Per Buller, J. in *Walker* v. *Burnell*, Doug. 317. And per Lawrence, J. in *Horn* v. *Baker*, 9 East, 241. But it is not unfrequently a question of law; *infra*, Vol. II. 90. *et sequent.*

(*i*) See Vol. II. tit. PAROL EVIDENCE—WILL.

if doubtful, is to be decided by the jury (*j*). The construction of all deeds and other express contracts is matter of law for the decision of the Court (*k*). And where the agreement is not contained in any formal instrument, but is collected from letters which have passed between the parties, their construction, where their terms are plain and unambiguous, is also for the consideration of the Court; but where they are written in so dubious and uncertain a manner as to be capable of different constructions, and can be explained by other circumstances, it is for the jury to decide on the whole of the evidence (*l*). And it seems that in general, where the evidence of a contract is matter of inference from circumstances, it is a matter of fact for the jury (*m*).

Construction of written instruments.

It is the peculiar province of the jury to draw the proper conclusion in fact from mere circumstantial evidence of the fact, and to deduce the proper inference in all cases of indirect evidence, except in those instances where the law makes particular facts the foundation of a legal presumption; and even in such instances, where the legal presumption is not conclusive, it is still for the jury to decide on the evidence whether the legal *primâ facie* presumption or intendment is repelled by contrary evidence.

It also belongs to the Court to decide all collateral matters arising in the course of the trial. Thus it is for the Court in all cases to determine upon the competency of witnesses, and the admissibility of particular evidence with reference to the facts in issue, or to the allegations on the record, even although the admissibility of the evidence should depend on matter of fact. Thus it is a question for the Court, whether a declaration made by one in *articulo mortis* be admissible under the circumstances of the case (*n*).

Collateral matters of law.

(*j*) *Girdwood's case*, Leach, C. C. L. 169.

(*k*) Per Lord Mansfield, *Macbeath v. Haldimand*, 1 T. R. 180.

(*l*) Per Buller, J. ib. Note, that Willes, J. in the same case was of opinion that the construction of letters generally was proper for the consideration of the jury; but Buller, J. intimated his dissent from the general proposition. In *Stanniers v. Dixon*, 7 East, 200, where the question was whether a piece of land was parcel of the plaintiff's freehold, or of the defendant's copyhold estate, and evidence was given of acts of ownership, and also of copyhold admissions, it was held that the effect of the admissions was matter of law for the opinion of the Court; and the result of that case seems to be, that the jury were to find upon the whole of the case, giving effect, as far as the documents were concerned, to the construction put upon them by the Court.

(*m*) The assent of the master to the service of the apprentice with another, is an inference of fact for the justices at sessions. See Vol. II. tit. SETTLEMENT.

(*n*) So held by all the Judges. See *R. v. Hucks*, 1 Starkie's C. 523, Vol. II. tit. ADMISSIONS.

It is also the province of the Court to decide all matters which depend on an inspection of the record (*o*).

The Court will, *ex officio*, exclude illegal evidence, without regard to the compact of counsel (*p*).

Bill of exceptions.

A party who is dissatisfied with the decision of the Court in point of law, may either tender a bill of exceptions, or, which is the more modern practice, may afterwards move for a new trial.

A bill of exceptions is founded upon some objection to the direction or decision of the Judge at *nisi prius*, or of the Court upon a trial at bar, as to the admissibility of evidence (*q*), the competency of witnesses (*r*), &c. The stat. 13 Edw. 1, s. 31, enacts that, "when one (*s*), that is impleaded (*t*) before any of the Justices, doth allege an exception, praying that the Justices will allow it, which if they will not allow, if he that hath alleged the question do write the same exception, and require that the

(*o*) *R.* v. *Hucks*, 1 Starkie's C. 522. Note, the question there was, whether a word in a record was *meeting* or *mutiny*.

(*p*) *Shaw* v. *Roberts*, 2 Starkie's C. 455. So the parties cannot by private stipulation bind a court of justice not to call for that proof which the law has rendered necessary. They cannot make proof of the policy sufficient, where the stat. 19 G. 2, c. 37, prohibits the recovery without further proof than the policy. 6 East, 321.

(*q*) Salk. 284. If the contention be whether the facts proved *tend* to prove the issue, the party objecting ought to demur to the evidence. *Bulkely* v. *Butler*, 2 B. & C. 434.

(*r*) 3 T. R. 27.

(*s*) The stat. extends to a plaintiff as well as a defendant. 2 Inst. 427.

(*t*) The words are, si aliquis implacitetur; hence it has been said that it does not apply in a criminal case. *Sir H. Vane's case*, Kel. 15. *Lord Grey's case*, 1 Vern. Ch. Cases, 175. It does not lie on an indictment for treason or felony. 2 Haw. c. 46, s. 610.

But it has been allowed on an indictment for trespass. *R.* v. *Lord Paget*, 1 Leon. 5. And also on an information in the nature of a *quo warranto*. *R.* v. *Higgins*, 1 Ventr. 366; *sic R.* v. *Nutt*, 1 Barnard. 307. It does not lie before justices on the trial of an appeal. R. T. H. 251. Nor in any case where a writ of error does not lie. B. N. P. 316. The stat. extends to a trial at bar, as well as to one at *nisi prius*. *Thruston* v. *Slatford*, 3 Salk. 155; Skinn. 354; contra, *R.* v. *Smith*, 2 Show. 287.

R. v. *Broughton*, Str. 1229; 1 Sid. 85; 1 Keb. 384; 1 Lev. 68; 2 Inst. 427; 2 Haw. c. 46, s. 210. Lord Coke says, the stat. extends to all actions real, personal, and mixed, but makes no mention of criminal cases. Lord Hardwicke considered this to be a point not then settled. *R.* v. *Inhabitants of Preston*, R. T. H. 251. He said, a bill of exceptions had been allowed in informations in the Exchequer, which are civil suits for the King's debt; but that it had never been determined to lie in mere criminal proceedings. Ib. And see *R.* v. *Stratton and others*, Howell's St Tr. vol. 21, p. 1187. It has been held that it does not lie on the trial of a feigned issue out of Chancery. *Bullen* v. *Mitchell*, 2 Price, 416. Wood, B. *dissentiente*.

justices will put their seals for a witness, the justices shall do so; and if one will not, another of the company shall; and if the king, upon complaint made of the justices, cause the record to come before him, and the same exception be not found in the roll, and the party show the exception written, with the seal of the justice affixed, the justice shall be commanded that he appear at a certain day to confess or deny his seal; and if the justice cannot deny his seal, judgment shall be given according to the exception, as it may be allowed or disallowed." If the Judge admit the matter to be evidence, but not conclusive, where in point of law it is conclusive, the course is to demur to the evidence (*u*), because (as it is said), although the evidence be conclusive, the jury may hazard an attaint if they please (*x*); as where the Judge leaves it to the jury whether the probate of a will be evidence to prove the devise of a term for years (*y*). The statute is silent as to the time of tendering the bill, but it has been held, on reason and principle, that it must be done at the trial, for the party may have misled his adversary by not insisting on the objection at the time (*z*); if he had stood upon his exception, the adversary might have had more evidence, and need not have put his cause upon that point. It need not, however, be put in form then, although the substance of it ought to be put into writing, since it is to become a record (*a*). Bill of exceptions.

If the bill be annexed to the record, it begins with the proceedings after issue joined, and proceeds to state the circumstances upon which it is founded: that a particular witness was called to prove certain facts, or evidence offered to prove such facts (*b*), or evidence that the bill on which the action was brought was indorsed by *E. S.*, the payee, the record, when brought into the Court of K. B., after setting out the pleadings and continuances, stated that on a certain day the cause came on to be tried; that one *W. B.* was produced and examined as a witness for the plaintiff, and stated that, &c.; on cross-examination, he stated that, &c. (see the evidence, Vol. II. 154); and then, upon no other evidence being adduced of the person calling himself *E. S.* being the payee of the said bill in the declaration mentioned, the counsel for the defendant objected to the evidence so given as aforesaid by— Form of the bill.

(*u*) See Demurrer to Evidence, *infra*, 467.

(*x*) T. Raym. 104, 5; T. Jon. 146.

(*y*) See Tidd's P. 773, 4th edit.

(*z*) 1 Salk. 288, 9.

(*a*) Per Holt, C. J., 1 Salk. 288, 9; Tidd, p. 773, 4th edit.

(*b*) Where the object for which evidence is offered, but rejected, is obvious, and must have been understood by the Judge and the jury, it is not necessary that that object should be specially stated. *Doe* v. *Earl of Jersey*, 3 B. & C. 870. In the case of *Bulkely and others* v. *Butler*, in error, 2 B. & C. 434, where the question on which a bill of exceptions was tendered, was whether there was sufficient

challenge made, or demurrer tendered; the allegations of counsel on the admissibility or effect of evidence; the opinion of the Court or Judge, and the exception of counsel to that opinion, and the verdict of the jury (*c*). Where the bill is not annexed to the record, it is necessary to set out the whole of the proceedings previous to the trial (*d*).

Course of proceeding upon it.

The Judge either sets his seal to the exceptions, or refuses to do so because the bill contains matters which are not true (*e*). On *refusal*, the party may have a writ founded on the statute, containing a surmise of an exception taken and over-ruled, and commanding the justices, that if it be so, they put their seals to the bill (*f*). If they return *quòd non ita est*, an action lies for a false return, in which the surmise may be tried; and if it be true, the plaintiff recovers damages, and a peremptory writ issues (*g*).

Bill of exceptions.

The bill of exceptions, when sealed, is not used until judgment has been signed, and a writ of error brought to remove the pro-

the said plaintiff in support of the said issue joined between the said parties, and that there was no proof to go to the jury of the identity of the said person calling himself *C. S.* with the said *E. S.*, the payee of the said bill; and then and there prayed the said Chief Justice that he would declare to the jury that there was no evidence before them of the indorsement of the said bill of exchange by the payee before mentioned; yet the said Chief Justice did then and there declare and deliver his opinion to the jury aforesaid, that although in law there should be some proof of the identity of the person making the indorsement, still it ought not to be so rigidly followed up as to clog the negotiability of bills of exchange; and the said Chief Justice did further deliver his opinion, that the said evidence above set forth was reasonable evidence to be left to the jury, whether the said indorsement was the indorsement, &c.; and thereupon, with that direction, left the same to the jury, who declared themselves to be satisfied of the identity of the said *E. S.*: concluding in the usual form. Holroyd, J. in giving judgment observed, the real question was, "whether this evidence was or was not admissible, either as containing the declarations of persons not called as witnesses, or as having no tendency to prove the matters in issue. If the objection was known *à priori*, it should have been made before the evidence was given; but if it was not discovered till afterwards, then the Judge should have been requested to strike the evidence out of his notes; and if after that he persevered in summing it up to the jury, that would have been a good ground for tendering a bill of exceptions; but if, as appears to me to have been the case, the contention was, whether, admitting the facts deposed to, they tended to prove the issue, there should have been a demurrer to the evidence." The judgment was affirmed.

(*c*) 3 T. R. 27; 2 Lut. 984; 1 Salk. 284. As to the form of the bill, see Tidd's Pr. 774, 4th ed.; Brownl. 129. 131. *Money* v. *Leach*, B. N. P. 317. *Fabrigas* v. Mostyn, 11 St. Tr. 187; Tidd's Pr. Append. 38.

(*d*) B.N. P. 317.

(*e*) Show. 120.

(*f*) 2 Inst. 427; B. N. P. 316.

(*g*) 2 Inst. 427.

ceeding into the Court above (*h*), for the proceeding is in the nature of an appeal (*i*). On the return of the writ of error, the Judge being called on by the Court, either confesses or denies his seal; if he confess it, the proceedings are entered of record, and the other party assigns error; if he denies his seal the plaintiff may take issue upon it, and prove it by witnesses (*k*). Bill of exceptions.

The Court will not grant a motion for a new trial where a bill of exceptions has been tendered, unless the bill of exceptions be abandoned (*l*). And a bill of exceptions is waived by bringing a writ of error before the Judge's signature has been obtained, and the party will then be precluded from appending the bill to the writ of error (*m*). Where the objection is to the reception of evidence as inadmissible, the party ought, if aware of the objection, to object to its reception; if not apprised previously, he ought, after it has been received, to request the Judge to strike it out of his notes, and if the Judge persist in retaining it and stating it to the jury, the proper course is to tender a bill of exceptions; but if the contention is, whether the evidence, being admissible, tends to prove the issue, the proper course is to demur to the evidence (*n*).

A party who admits the facts which the adverse evidence tends to prove, but desires to withdraw the application of the law to those facts from the jury, and to submit them for that purpose to the Court above, is at liberty to do so by his demurrer to the evidence (*o*) But his demurrer cannot be allowed unless he admit the truth of the facts which the evidence of his adversary, though it be but presumptive or circumstantial, tends to prove (*p*). For though he has a right to submit the legal effect of the facts to the judgment of the Court, yet, as the jury are the proper judges of matters of fact, the evidence must either be submitted to the jury, or the facts themselves must be admitted (*q*). The Demurrer to evidence.

(*h*) 1 Salk. 284; B. N. P. 316; 1 Bl. R. 679; Cowp. 501; 3 Bl. Com. 372; see 2 Lev. 236. And therefore where no writ of error lies there can be no bill of exceptions.

(*i*) 3 Bl. Com. 372.

(*k*) 2 Inst. 438.

(*l*) 2 Chitty's R. 272.

(*m*) *Dillon* v. *Parker*, 1 Bing. 17.

(*n*) *Bulkely* v. *Butler*, 2 B. & C. 434; *supra*, 466.

(*o*) Where the King is a party, his counsel cannot be compelled to join in demurrer; but the Court ought to direct the jury to find the special matter. 5 Co. R. 104; *infra*, 468.

(*p*) *Gibson* v. *Hunter*, 2 H. B. 187. *Wright* v. *Pindar*, Alleyn, 18. *Cockedge* v. *Fanshaw*, Doug. 119.

(*q*) Ib. and see *Baker's case*, 5 Co. 104; B. N. P. 314. But on a demurrer to evidence, the Court may draw the same inference a jury would have drawn. *Vere* v. *Lewis*, 3 T. R. 182. No objection can be taken to the pleadings. *Cort* v. *Birkbeck*, Doug. 218.

Demurrer to evidence.

Judge, it seems, may over-rule the demurrer if he think proper, and leave the case to the jury (*r*).

And if in the case of an information or any other suit evidence be given for the King, it is said that the King's counsel cannot be compelled to join in a demurrer to the evidence, but that in such a case the Court ought to direct the jury to find the special matter (*s*).

Where the demurrer is allowed, the usual course is for the Court to give order to the associate to take a note of the evidence, which is signed by counsel, and affixed to the *postea* (*t*). But if the Court over-rule the demurrer improperly the party may tender a bill of exceptions (*u*).

New trial.

The ancient practice of tendering bills of exceptions demurring to the evidence, or proceeding against the jury by writ of attaint, has in a great measure been superseded by the more modern (*w*) practice of moving the Court for a new trial; in the granting or refusing of which the Courts exercise a discretionary power according to the exigency of the case, upon principles of substantial justice and equity (*x*).

The two principal grounds for this motion, with reference to the present subject, are,

1st, Some misdirection or misruling on the part of the Judge; or,

2dly, Error or misconduct (*y*) on the part of the jury (*z*).

(*r*) *Worsley* v. *Fillisker*, 2 Roll. R. 119.

(*s*) *Baker's case*, 5 Co. 104; B. N. P. 313.

(*t*) B. N. P. 313. The damages may be assessed conditionally; or if necessary, a writ of inquiry may be executed after the Court has given judgment. Ib.

(*u*) 2 H. B. 208.

(*w*) See the observations of Lord Mansfield in the case of *Bright* v. *Eynon*, 1 Burr. 390, where he observed that a verdict can only be set right by a new trial, which is no more than having the cause more deliberately considered by another jury, when there is a reasonable doubt, or rather a certainty, that justice has not been done. And see the judgment of Wood, B. in *Stevens* v. *Aldridge*, 5 Price, 392.

(*x*) Ib.

(*y*) Where the conclusion of the jury is a reasonable inference from the evidence, the Court will not disturb the verdict, even in a criminal case. *R.* v. *Burdett*, 4 B. & A. 167. In general, the Courts will not grant a new trial in case of a verdict against evidence, where the verdict is on the honest side of the cause. Per Bathurst, J. in *Goslin* v. *Wilcock*, 2 Wils. 302; and he cited *Smith* v. *Page*. 2 Salk. 644, as a strong case to that effect.

(*z*) If the verdict be manifestly against the justice of the case, and the Judge's direction, the Court will grant a new trial without costs, though the damages be under 20*l*. Per Buller, J. in *Jackson* v. *Duchaire*, 3 T. R. 553. It is irregular in a jury to take with them, on retiring to consider their

Mistake or misdirection of the Judge.

First, a new trial will be granted where the Judge has misdirected the jury upon a matter of law; as where he states to the jury that the evidence does not prove an alleged custom, when the testimony of the witnesses, if believed, does prove the custom (*a*).

So if the Judge reject evidence which ought to have been admitted, or admit that which ought to have been rejected (*b*).

But the Court will not grant a new trial on the ground of the reception of improper evidence, where there is sufficient evidence without it to warrant the verdict (*c*).

Neither will a new trial be granted on the ground of the rejection of a witness as incompetent, who was really competent, where the fact which he was called to prove was established by another witness, and was not disputed, and the verdict was founded on a collateral point, on which the defence was rested (*d*).

The Court will grant a new trial on the ground of misdirection in a penal action after a verdict for the defendant (*e*), or although the sum recovered should be less than 20*l*.

Misdirection, waiver of.

If the plaintiff's counsel at the trial acquiesce in the ruling of the Judge, and in consequence the defendant takes a verdict without entering into his case, the plaintiff cannot afterwards move for a new trial on the ground of misdirection (*f*). And it rarely happens that the Court will grant a new trial upon a point of law which has not been taken at the trial (*g*); and in no

verdict, documents without leave of the Court; but if the document so taken be evidence on both sides, the taking it will not avoid the verdict. *R.* v. *Burdett*, Ld. Ray. 148. *Secus*, if it be evidence on one side only. *Lady Joy's case*, cited ib.; Bro. Verd. pl. 19. It is not enough, in order to set aside a verdict, to show that printed papers tending to create prejudice against a party, even in a criminal case, were circulated by strangers. *R.* v. *Burdett*, 1 Ld. Ray. 148.

(*a*) *How* v. *Strode*, 2 Wils. 269; 2 Salk. 649; 7 Mod. 64. So if that be left to the jury as an award by commissioners having jurisdiction, which is in fact necessary evidence, founded on the conduct and demeanour of the parties, and not an award or adjudication, the Court will grant a new trial. *Jarrett* v. *Leonard*, 2 M. & S. 265.

(*b*) *Thomkins* v. *Hill*, 7 Mod. 64.

(*c*) *Nathan* v. *Buckland*, 2 Moore, 153. *Horford* v. *Wilson*, 1 Taunt. 12. Even, as it seems, in a criminal case. *R.* v. *Ball*, Russ. & Ry. C. C. L. 132. *Tinkler's case*, ib. in the note; 1 East's P. C. 354. And see *R.* v. *Treble*, Russ. & Ry. C. C. L. 166.

(*d*) *Edwards* v. *Evans*, 3 East, 451.

(*e*) *Wilson* v. *Rastall*, 4 T. R. 753. *Calcraft* v. *Gibbs*, 5 T. R. 19; 3 T. R. 553.

(*f*) *Robinson* v. *Cook*, 6 Taunt. 336.

(*g*) *Ritchie* v. *Bousfield*, 7 Taunt. 309. And see *Cox* v. *Kitchen*, 1 B. & P. 339, where the Court refused to set aside a verdict on a point of law not taken at the trial, where the justice and conscience of the case were with the verdict.

New trial not granted on an objection not taken at the trial.

case where the objection, if taken, might have been removed by evidence (*h*). The Court has refused to grant a new trial, to let the party into a defence of which he was apprised at the trial (*i*); as to give the defendant an opportunity of proving by way of defence the illegality of a policy of insurance (*k*). But where the defendant in an action on a policy failed to prove a breach of the Convoy Act, through the mistake of a witness who had failed in producing the necessary document from the Admiralty, the Court granted a new trial after a verdict for the plaintiff on the merits (*l*).

Mistake or misunderstanding of the jury.

The Courts do not interfere for the purpose of granting new trials, but in order to remedy some manifest abuse, or to correct some manifest error in law or fact. Where there is a contrariety of evidence the Court will not grant a new trial, unless it clearly appear that the jury have drawn an erroneous conclusion, even although there are circumstances in the case pregnant with suspicion, and which lead to a contrary conclusion, or although the verdict be contrary to the opinion and direction of the Judge who tried the cause (*m*).

Where a plaintiff is in conscience entitled to recover, the Courts will not grant a new trial, although he has obtained a verdict upon a presumption contrary to evidence (*n*), or upon a point of law not reserved on the trial (*o*).

It is matter of discretion with the Court, in *all* cases, whether they will grant a new trial for excessive damages (*p*). Where a plaintiff is entitled to recover for part of his demand, and is also entitled to recover the residue, but in a different form of

(*h*) *Malkin* v. *Vickerstaff*, 3 B. & A. 89. If, at the trial of a cause, the counsel on both sides argue on the effect of an instrument, as being in evidence, and it is by mistake never in fact produced; after verdict, the omission cannot be taken advantage of. *Doe* v. *Penry*, 1 Anst. 266.

(*i*) *Vernon* v. *Hankey*, 2 T. R. 113.

(*k*) *Gist* v. *Mason*, 1 T. R. 84.

(*l*) *D'Aguilar* v. *Tobin*, 2 Marsh. 265.

(*m*) *Carstairs* v. *Stein*, 4 M. & S. 192. The question was, whether a commission of one half per cent. on a banking account was usurious; and the jury decided that, under the circumstances, it was not.

(*n*) *Wilkinson* v. *Payne*, 4 T. R. 468.

(*o*) *Cox* v. *Kitchen*, 1 B. & P. 338.

(*p*) *Ducker* v. *Wood*, 1 T. R. 277. *Jones* v. *Sparrow*, 5 T. R. 257. *Goldsmith* v. *Lord Sefton*, 3 Ans. 808. *Hewlett* v. *Crutchley*, 5 Taunt. 277. A new trial will not be granted, on this ground, in an action for crim. con., unless it appear that the jury acted under the influence of undue motives, or of error and misconception. *Duberly* v. *Gunning*, 4 T. R. 651. *Chambers* v. *Caulfield*, 6 T. R. 244. *Bennett* v. *Allcott*, 2 T. R. 166. And will sometimes direct the former verdict to stand as a security. *Pleydell* v. *Ld. Dorchester*, 7 T. R. 529.

action, the Court will not reduce the damages, a verdict having been obtained for the whole demand (*q*).

A new trial will not be granted after a verdict for the defendant upon an indictment for a misdemeanor, on the ground that the verdict was against evidence (*r*); nor in a penal action (*s*).

A new trial has been granted on an affidavit made by a material witness that he made a mistake in his evidence (*t*).

Practice as to nonsuits.

Where an objection is taken in the nature of a demurrer to the plaintiff's evidence, that, even admitting it to be true, it is insufficient in point of law, if the Judge accede to the objection the usual course is to nonsuit the plaintiff. But in such case, if the objection be of a doubtful nature, it is usual for the Judge, either to nonsuit the plaintiff, with leave to move to set aside the nonsuit and enter a verdict for the plaintiff for a sum agreed on or ascertained by the jury, or to permit the plaintiff to take a verdict, with liberty to the defendant to move to enter a nonsuit. This seems to be discretionary on the part of the Judge, who usually decides according to the weight of his own opinion for or against the objection.

A plaintiff after a nonsuit may move without any leave reserved to set aside the nonsuit; but in that case, although the nonsuit was improper, the Court will do no more than set aside the nonsuit (*u*). Upon such motion made without leave, if the nonsuit be not tenable on the objection urged at the trial, the Court will not support it on another ground which was not urged, unless the objection be of such a nature as to be incapable of removal (*x*). But a defendant cannot move to enter a nonsuit without leave; and even with leave he will be confined to the objections founded upon defects in evidence taken at the trial; for had the further objection been then taken, the plaintiff might probably have answered it by adducing further evidence (*y*). If the plaintiff's counsel elect to be nonsuited, on an intimation from the Court that he is entitled to nominal damages only, the Court will not grant a new trial (*z*). But if the Court directs a nonsuit where there was a case for the consideration of the jury,

(*q*) Per Abbott, C. J., *Mayfield* v. *Wadsly*, 3 B. & C. 357.

(*r*) *R.* v. *Mann*, 4 M. & S. 337. *R.* v. *Reynell*, 6 East, 315. But, under special circumstances, the Court has suspended the entry of a judgment after an acquittal on an indictment for not repairing a highway. *R.* v. *Wandsworth*, 1 B. & A. 63.

(*s*) *Brook* v. *Middleton*, 10 East, 268.

(*t*) *Richardson* v. *Fisher*, 1 Bingh. 145.

(*u*) *Doe d. Lawrence* v. *Shawcross*, K. B. Hil. 1825.

(*x*) Ib. And see *Malkin* v. *Vickerstuff*, 3 B. & A. 89.

(*y*) *Driver* v. *Thomson*, 4 Taunt. 294.

(*z*) *Butler* v. *Dorant*, 3 Taunt. 229.

the plaintiff may move to set it aside, although his counsel do not request at the trial that the case may be submitted to the jury (*a*). But where a Judge proposes to leave two questions to a jury, one of which is material, and of which there is *primâ facie* evidence, and the plaintiff elects to be nonsuited, he cannot have a new trial (*b*).

After an untenable verdict for the plaintiff, no liberty to enter a nonsuit having been reserved, the Court can only grant a new trial, for otherwise the defendant would be deprived of his right to tender a bill of exceptions (*c*).

Where the terms of a declaration are ambiguous, and taken in one sense will, but taken in another sense will not, support the verdict, and there is no evidence to support the allegation in the former sense, the proper course is (on leave given) to move to enter a nonsuit (*d*). A plaintiff in *assumpsit* may be nonsuited, although a co-defendant has let judgment go by default (*e*).

Charge to juries.

The practice of advising the jury as to the nature, bearing, tendency and weight of the evidence, although it be a duty which from its very nature must be, in a great measure, discretionary on the part of the Judge, is one which does not yield in importance to the more definite and ordinary one of directing them in matters of law (*f*). The trial by jury is a system admirably adapted to the investigation of truth; but in order to obtain the full benefit to be derived from the united discernment of a jury, it must be admitted to be essential that their attention should be skilfully directed to the points material for their consideration.

(*a*) *Ward* v. *Mason*, 9 Price, 291. Garrow, B. *dissentiente*. But he cannot urge a ground of action which he did not urge at the trial. *Waller* v. *Drakeford*, 1 Starkie's C. 481.

(*b*) K. B. Trin. T. 1830.

(*c*) *Minchin* v. *Clement*, 1 B. & A. 252.

(*d*) Where the terms used in a declaration founded on a penal clause in a statute are ambiguous, they will, after verdict, be so construed as to sustain the verdict. *Lord Huntingtower* v. *Gardiner*, 1 B. & C. 297. *Avery* v. *Hoole*, 2 Cowp. 825. And therefore where the declaration alleged in some counts the "giving money for voting," and there was no evidence of a previous agreement to give money, which was necessary to constitute the offence, the Court (leave having been reserved to move to enter a nonsuit) directed a nonsuit to be entered. For the declaration, to be sustainable, must be taken to import a previous agreement, and of that there was no evidence.

(*e*) *Murphy* v. *Doulan*, 5 B.& C. 178.

(*f*) See Comm. 375. When the evidence is gone through on both sides, the Judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury, omitting all superfluous circumstances; observing wherein the main question and principal issue lies; stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon the evidence.

Charge to the jury.

A jury taken from the body of the community may well be presumed to be possessed of such knowledge and experience, derived from their intercourse with society, as will peculiarly fit them for the determination of all disputed facts arising out of the ordinary transactions of life. It must, however, be recollected, that jurors, unaccustomed as they usually are to judicial investigations, require, in complicated cases, all the aid which can be derived from the experience and penetration of the Judge, to direct their attention to the essential points, and enable them to arrive at a just conclusion. The law, in its wisdom, ultimately relies upon their integrity and understanding, but nevertheless anxiously prepares the way for a correct conclusion, by excluding from their consideration all such evidence as is likely to embarrass, mislead or prejudice them in the course of their inquiry. So far the law proceeds by certain and definite rules. Much yet remains to be done of a nature which cannot be defined: to divest a case of all its legal incumbrances; to resolve a complicated mass of evidence into its most simple elements; to exhibit clearly the connection, bearing and importance of its distinct and separated parts, and their combined tendency and effect, stripped of every extrinsic and superfluous consideration which might otherwise embarrass or mislead a jury; and to do this in a manner suited to the comprehension and understanding of an ordinary jury, is one of the most arduous as well as the most important duties incident to the judicial office (*g*). There is, perhaps, no instance in which the

(*g*) Notwithstanding the splendid advantages which in practice are known to emanate from this wise and venerable institution, it is not to be disguised, that in some, and those essential respects, it is liable to objections, from which an ordinary tribunal, constituted of professional Judges, would be more likely to be free. Jurors are liable to prejudice and bias, and even partiality, from local and personal connection; their very prejudices in favour of right may frequently tempt them to put their oaths in peril, by their desire to act according to their own notions of justice, when those are at variance with defined and general but wise rules of law: they act but casually; they have no professional character to sustain; they assign no reasons for their decisions; in effect they are not amenable for corrupt decisions; and it can rarely happen that their individual and personal characters are at stake. In many instances too they are ill suited, by their previous habits, to decide on the effect of legal instruments, and other matters involved in and complicated with legal rules and presumptions. If such objections were not in practice to be counteracted by the discretionary aid, advice and guidance of the presiding Judge, and if the errors and mistakes of juries were not to be subject to revision and correction, it must be admitted by its warmest admirers that this mode of trial would frequently be precarious and unsatisfactory.

natural and acquired powers of the mind are more strikingly and beneficially exerted than in a court of justice, where a confused mass of evidence relating to an intricate case is, by the effort of a vigorous, acute and comprehensive mind, reduced into regularity and order.

On the discharge of this great duty the dearest interests of society, the very issues of life and death, frequently depend.

To offer any remarks on this head would be irrelevant, as well as presumptuous. Some observations will, under another division, be made upon the force and weight of evidence, and on the general principles which relate to that branch of the subject.

Province of juries to weigh probabilities.

The law, to use an ordinary phrase, has no scales wherein to weigh different degrees of probability (*h*), still less to ascertain what weight of evidence shall amount to absolute proof of any disputed fact.

Its business is to define, to distinguish, and to apply legal consequences to ascertained facts; but whether a fact be probable or improbable, true or false, admits of no legal definition. The principles on which the investigation and ascertainment of truth depend, are fixed and invariable, however the particular process prescribed by different systems of law for the purpose of investigation may vary.

As the power of discriminating between truth and falsehood depends rather upon the exercise of an experienced and intelligent mind than upon the application of artificial and technical rules, the law of England has delegated this important office to a jury of the country.

One great advantage derived from this venerable institution is that this mode of trial excludes a number of technical and artificial rules and distinctions, which but for the complete and absolute separation of law from fact would be sure to arise. Were the decision of facts to be constantly referred to the same individual, the frequent occurrence of similar combinations of facts would tempt him to frame general and artificial rules, which, when they were applicable, would save mental exertion in particular instances; and perhaps a laudable wish to decide consistently, and that fondness for generalizing which is incident to every reflecting mind, would tend to the same point, and would lead to the introduction of refined and subtle distinctions. A juror, on the contrary, called on to discharge his duty but seldom, possesses neither inclination nor opportunity to generalize and

(*h*) Vide *infra*, note (*i*).

refine; unfettered, therefore, by technicalities, he decides according to the natural weight and force of the evidence (*i*).

Juries, how far limited by law.

Although all questions of pure fact belong peculiarly to the province of a jury, who are to be guided in their decision by their conscientious judgment and belief, yet it is to be recollected, that in many instances the effect of particular evidence is the subject of legal definition and cognizance, as in the case of all legal presumptions resulting from particular facts. It will be proper, therefore, in the first place, briefly to inquire to what extent a jury is restrained by legal rules; and in the next place, to make some general observations on the natural force and weight of evidence.

With a view to the first consideration, that is, how far the law itself interferes as to the force or measure of evidence, it is to be recollected, that except in the few instances where a jury determine by the actual evidence of their senses, all evidence is either, first, *direct*, that is, where witnesses state or depose to facts of which they have had actual knowledge: or secondly, it is *indirect*; and *indirect* evidence is either *artificial* or *natural*. *Artificial*, where the law, by arbitrary appointment, annexes to particular evidence a force or efficacy beyond that which naturally belongs to it; as in the case of records, which for the sake of public convenience are usually made final and conclusive evidence of the facts recorded (*j*). So in all instances of legal presumptions, whether they be absolute and conclusive (*k*), like the *præsumptiones juris et de jure* of the Roman law, or, as the *præsumptiones juris*, be operative only until they be rebutted by proof to the contrary: or such artificial evidence may be of a *conventional* nature, as where parties by deed or other written agreement constitute the particular instrument to be the appropriate expositor

(*i*) Beccaria, (sec. 14,) thus expresses himself:—Ma questa morale certezza di prove è più facile il sentirla che l' esatta mente definirla. Perciò io credo ottima lege quella, che stabilisce assessori al giudice principale presi dalla sorte è non dalla scelta, per chè in questo caso è piu sicura l'ignoranza che giudica per sentimento, che la scienza che giudica per opinione. Again he says, Io parlo di probabilità in materia di delitti, che par meritar pena debbono esser certi. Ma svanira il paradosso, per chi considera che rigorosamente la certezza morale non è che una probabilità, ma probabilità tale che è chiamato certezza, perchè ogni uomo di buon senso vi acconsente necessariemente per una consuetudine, nata dalla necessità di agire ed anteriore ad ogni speculazione; la certezza che se richiede per accertare un uomo reo è dunque quella che determina ogni uomo nelle operazioni più importante della vita.

(*j*) *Infra*, Vol. II. tit. PRESUMPTIONS.

(*k*) Ib.

Juries, how far restrained by law.

of their intentions, and the legal memorial of the facts which it contains. In these and some other instances the law prescribes the extent to which the evidence shall operate; and in these and all other cases, where a rule of law intervenes, a jury is bound by that rule of law, even though it be in opposition to their own conclusion as to the truth of the fact drawn from all the circumstances. Or, secondly, the evidence is purely natural, where the jury decide according to the natural weight and effect of the circumstances, either by the aid of experience, where former experience supplies such natural presumptions, or by the aid of reason exercised upon the circumstances, or by the joint and united aid of experience and reason (*l*).

(*l*) Sir W. Blackstone, 3 Comm. 371, following the example of Lord Coke, classes all circumstantial evidence as *violent*, *probable* or *light* presumptions; making no distinction between such inferences as result immediately in respect of some association pointed out by previous experience, and those which are derived by the aid of reason exercised upon the special circumstances. According to this classification, the presumption is *violent* where the circumstances necessarily attend the fact; *probable*, where the circumstances *usually* attend the fact; and *light* presumptions, or rash presumptions, are those which have no weight or validity at all. The last branch of the division seems to be wholly useless, for an inference of *no weight* is a mere unwarrantable *assumption*. The division of all circumstantial evidence into circumstances which necessarily or usually attend such facts, is one of a questionable nature, inasmuch as it tends to confound those inferences which are the pure result of experience with those which result either from reason alone, exercised upon the circumstances, or upon reason and experience jointly. It is very possible that circumstances may supply moral proof, although not one of them be such as either *necessarily* or even *usually* attends the fact; the inference may be entirely independent of associations founded on experience, and rest wholly upon the exclusive force and nature of particular circumstances. Thus, in an instance cited below, where a highway robber was struck on the face by the prosecutor with a key, and was identified by the complete impression which he bore on his face, the circumstance was conclusive, but it was neither a *necessary* nor an *usual* one with reference to the fact to be proved.

It is remarkable, that the illustration cited by Sir W. Blackstone, and by him borrowed from C. B. Gilbert's Law of Evidence, (p. 160), is not an instance of presumptive evidence offered to a jury, in the sense in which Lord Coke used the terms *violenta præsumptio*, but one of a conclusive presumption, or estoppel in law. He says, "If a tenant, in answer to his landlord's demand for rent due Michaelmas, 1754, produce an acquittance for rent due at a subsequent period, in full of all demands, then this induces so forcible a presumption of payment that *no proof shall be admitted to the contrary*;" and yet he previously says, "these are called presumptions, which are only to be relied upon *till the contrary be proved.*" Besides this, an acquittance, even in full, is not conclusive unless it be under seal. See

Juries are bound by all the rules and presumptions of law, as far as they apply: they are to confine themselves strictly to the matters put in issue by the pleadings; they are bound by the admissions of the parties upon record; and although they are not bound by estoppels, as the parties might have been had the matter of estoppel been pleaded, yet they are usually bound by legal estoppels which could not have been pleaded, and also by all such matters in the nature of estoppels as in point of law conclude the parties. They are bound to give the proper legal effect to all instruments established by competent evidence, and to notice all matters which are noticed by the Court; they are to be governed by the order of proof which the law prescribes, and their verdict must be founded on the evidence adduced in the cause.

Juries bound by legal rules.

It is now perfectly settled that a juror cannot give a verdict founded on his own private knowledge (*m*); for it could not be known whether the verdict was according to or against the evidence (*n*); it is very possible that the private grounds of belief might not amount to legal evidence.

And if such evidence were to be privately given by one juror to the rest, it would want the sanction of an oath, and the juror would not be subject to cross-examination. If, therefore, a juror know any fact material to the issue, he ought to be sworn as a witness, and is liable to be cross-examined; and if he privately state such facts it will be a ground of motion for a new trial (*o*). It sometimes happens that evidence which is admitted for one purpose may be no evidence for another purpose, and in such cases a jury is bound to apply the evidence so far only as it is legally applicable. Thus, if *A.* and *B.* be tried at the same

Vol. II. tit. RECEIPT; and then it operates, not as a circumstance or ground of presumption for the consideration of a jury, but as a legal estoppel. Lord Coke, in the passage from which the illustration is cited, (Co. Litt. 373,) was treating of legal presumptions, which are mere arbitrary and positive rules of law (see Vol. II. tit. PRESUMPTION), and not of presumptive or circumstantial evidence to be weighed by a jury. Lord Coke, on the other hand, in illustration of his *violenta præsumptio*, states a case of pure circumstantial evidence, independent of previous experience of the connection of the particular circumstances: "as if one be run through the body with a sword, in a house, whereof he instantly dieth, and a man is seen to come out of that house with a bloody sword, and no other man was at that time in the house." For further observations on this subject, see Vol. II. tit. PRESUMPTION.

(*m*) Comm. 375; And. 321.

(*n*) Ibid.

(*o*) And. 321. But a new trial would not be granted if the verdict was supported by the evidence which was legally given. Ib.

time, a confession made by the one, but which criminates the other, ought not to operate with the jury against the latter.

When the jury find a general verdict they are bound to apply the law as delivered by the Court, in criminal as well as civil cases, and in the latter they must do so under peril of an attaint.

Degrees of evidence.

Previous to the remarks which will be made on the force and weight of evidence, whether direct or circumstantial, it is to be observed, that the measure of proof sufficient to warrant the verdict of a jury varies much according to the nature of the case.

Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact; absolute mathematical or metaphysical certainty is not essential, and in the course of judicial investigations would be usually unattainable.

Even the most direct evidence can produce nothing more than such a high degree of probability as amounts to moral certainty. From the highest degree it may decline, by an infinite number of gradations, until it produce in the mind nothing more than a mere preponderance of assent in favour of the particular fact.

The distinction between full proof and mere preponderance of evidence is in its application very important. In all criminal cases whatsoever, it is essential to a verdict of condemnation that the guilt of the accused should be fully proved; neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact to the exclusion of all reasonable doubt.

Mere preponderance.

But in many cases of a civil nature, where the right is dubious, and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on either side may be sufficient to turn the scale. This happens, as it seems, in all cases where no presumption of law, or *primâ facie* right, operates in favour of either party; as, for example, where the question between the owners of contiguous estates is, whether a particular tree near the boundary grows on the land of one or of the other. But even where the contest is as to civil rights only, a mere preponderance of evidence, such as would induce a jury to incline to the one side rather than the other, is frequently insufficient. It would be so in all cases where it fell short of fully disproving a legal right once admitted or established, or of rebutting a presumption of law. If a party claimed as devisee against the heir at law, full proof of the devise, with all its formalities, would be essential; circumstantial evidence, which merely showed it to be more probable that the testator had made a will in favour of the

party claiming as devisee, than that he had not done so, would be insufficient. So were a devise to be fully established by one who claimed as devisee, it would not be sufficient to show a mere probability that the devisor had made a subsequent will, revoking the former (*p*). One who seeks to charge another with a debt, must do so by full and satisfactory proof; and on the other hand, where a debt has once been established by competent proof, the debtor cannot discharge himself but by full proof of satisfaction. Again, where the law raises a presumption in favour of the fact, the contrary must be fully proved, or at the least such facts must be proved as are sufficient to raise a contrary and stronger presumption. Thus the law presumes a man to be innocent of a crime until his guilt be proved; but if the fact be proved that *A.* killed *B.*, then the presumption of law which before was in favour of *A.* is now against him, and malice will be presumed, unless he can establish facts which justify or extenuate the act (*q*).

Mere preponderance.

Another distinction to be observed upon is, between *primâ facie* and conclusive evidence: *primâ facie* evidence is that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favour that it must prevail if it be accredited by the jury, unless it be rebutted or the contrary proved; *conclusive* evidence, on the other hand, is that which excludes, or at least tends to exclude, the possibility of the truth of any other hypothesis than the one attempted to be established. All evidence is strong or weak by comparison: in civil cases slight evidence of right or title is sufficient, as against a stranger who possesses no colour of title. Thus the mere possession of goods by one who found them, is evidence of property as against a wrong-doer, in an action of trover (*r*). The occupation of land, however recent, will enable the occupier to maintain trespass against a stranger (*s*). So in a settlement case, proof that a remote ancestor of the pauper was settled in the appellant parish would be sufficient *primâ facie* evidence, and would prevail, unless it were to be rebutted by proof of some later settlement. So a special custom in a particular manor may be proved by a single instance in which it has been acted upon (*t*). So a prescription may in some instances be supported by proof of user for twenty years. On the other hand, in criminal cases, it is essential that the evidence should be of a *conclusive* nature. But here it is to

Primâ facie and conclusive evidence.

(*p*) *Harwood* v. *Goodright*, Cowp. 87.

(*q*) Vol. II. tit. MURDER.

(*r*) *Armory* v. *Delamirie*, Str. 505.

(*s*) *Cutteris* v. *Cowper*, 4 Taunt. 547.

(*t*) See tit. CUSTOM.

be observed, that it very frequently happens in criminal as well as civil proceedings, that evidence which in itself is but inconclusive derives a conclusive quality from mere defect of proof on the part of the adversary or accused.

Where a party, being apprised of the evidence to be adduced against him, has the means of explanation or refutation in his power if the charge or claim against him be unfounded, and does not explain or refute that evidence, the strongest presumption arises that the charge is true, or the claim well founded. It would be contrary to all experience of human nature and conduct, to come to any other conclusion.

Direct evidence.

Evidence to be weighed by a jury consists either in, 1st. the direct testimony of witnesses; or 2dly, indirect or circumstantial evidence (*u*); or 3dly, in both, either united or opposed to each other. The nature and force of such evidence may be considered either separately or in conflict. *First*, as to the direct testimony of witnesses. The credit due to the testimony of witnesses depends upon, 1st, their honesty; 2dly, their ability; 3dly, their number, and the consistency of their testimony; 4thly, the conformity of their testimony with experience; and 5thly, the coincidence of their testimony with collateral circumstances.

Integrity of witnesses.

First, their *integrity*: A witness, to be faith-worthy, must be both *willing* and *able* to declare the truth. His credibility is founded, in the first instance, upon experience of human veracity, from which the law presumes that a disinterested witness, who delivers his testimony under the sanction of an oath, and under the peril of the temporal inflictions due to perjury, will speak the truth.

Although general and peremptory rules of law absolutely exclude persons actually convicted of infamous crimes (*w*), and such as have a certain legal interest in the event of the suit, or in the record (*x*), yet the credit of a witness not actually excluded is always for the consideration of the jury.

A witness of depraved and abandoned character may not be unworthy of credit, where it appears that there is not the slightest motive or inducement for misrepresentation; for there is a natural

(*u*) Such indirect evidence corresponds with the signa of the Roman law, and with the σημεια or τεκμηρια of the Greeks, and supplied principally the materials of the *artificiulis probatio* of the Roman lawyers. Argument, according to Quinctilian, is defined to be "*ratio probationem præstans quâ colligitur aliud per aliud, et quæ quod est dubium per id quod dubium non est confirmat.*"—See Glassford's Essay on the Principles of Evidence, 563.

(*w*) *Supra*, tit. WITNESS.

(*x*) Ib.

tendency to declare the truth, which is never wholly eradicated, even from the most vicious minds; and the danger of detection, and the risk of temporal punishment, may operate as restraints upon the most unprincipled, even where motives for veracity of a higher nature are wanting. Integrity of witnesses.

But it is to be remarked, that it is difficult to detect the motives which may influence a depraved and corrupted mind; and hence it is for the jury to consider, whether the apparent want of motive to deceive be sufficient to accredit an exceptionable witness, and whether some assurance of the actual absence of such a motive be not necessary to warrant their confidence. A jury may, no doubt, in a criminal case, convict on the testimony of an accomplice, but then it is expected that the tainted credit of the witness should be supported by circumstances confirmatory of his testimony in material points; so that in practice such a witness is considered to be, not incompetent, but incredible, unless his testimony and his character be supported by undoubted facts and unexceptionable witnesses.

It frequently happens that a witness labours under some influence arising from natural affection, near connection, or mere expectation of contingent benefit or evil, which may afford a much stronger temptation to perjury than that which would arise from many defined and vested legal interests, which yet would have absolutely excluded his testimony. This is a necessary consequence resulting from the consideration that the law must operate by means of certain definite and peremptory rules, and the great mischief and inconvenience which would result from laying down rules too wide and exclusive in their operation. When, therefore, the peremptory rules of law cease to operate, it is for the jury to estimate the degree of influence by which the testimony of a witness is likely to be corrupted, and to determine whether, under all the circumstances, he be the witness of truth (*y*). Influence.

In arriving at this conclusion, a consideration of the demeanour Manner of the witness.

(*y*) The Roman law, De testibus, provides thus: "Testium fides diligenter examinanda est. Ideoque in *personâ* eorum exploranda erunt imprimis conditio cujusque; utrum quis decurio an plebeius sit, vero et an honestæ et inculpatæ vitæ, an notatus quis et reprehensibilis; an locuples vel egens sit ut lucri causâ quid facile admittat; vel an inimicus ei sit versus quem testimonium fert, vel amicus ei sit pro quo testimonium dat. Nam si careat suspicione testimonium, vel propter personam a quâ fertur quod honesta sit, vel propter causam quod neque lucri neque gratiæ neque inimicitiæ causâ fit, admitteudum."

Manner of the witness.

of the witness upon the trial, and of the manner of giving his evidence, both in chief and upon cross-examination, is oftentimes not less material than the testimony itself (*z*). An over-forward and hasty zeal on the part of the witness in giving testimony which will benefit the party whose witness he is; his exaggeration of circumstances, his reluctance in giving adverse evidence; his slowness in answering, his evasive replies, his affectation of not hearing or not understanding the question, for the purpose of gaining time (*a*) to consider the effect of his answer; precipitancy in answering, without waiting to hear or to understand the nature of the question; his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction, or his forwardness in minutely detailing those where he knows contradiction to be impossible; an affectation of indifference; are all to a greater or less extent obvious marks of insincerity.

On the other hand, his promptness and frankness in answering questions without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction if his testimony be false, are, as well as numerous others of a similar nature, strong internal indications of his sincerity. The means thus afforded by a *vivâ voce* examination, of judging of the credit due to witnesses, especially where their statements conflict, are of incalculable advantage in the investigation of truth; they not un-

(*z*) Sir W. Blackstone, 3 Comm. 373, observes, "In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points, all persons must appear alike when their depositions are reduced to writing, and read to the Judge in the absence of those who made them, and yet as much may be frequently collected from the manner in which the evidence is delivered as the matter of it."

(*a*) Mr. Evans (2 Pothier, 258,) observes that "a Welch witness, who intends to give unfair testimony, always affects an ignorance of the English language; in consequence of which, the effect of cross-examination is not only weakened by the intervention of an interpreter, but the witness has time to collect and prepare his answer. An ignorant witness will, however, frequently express himself with doubt and hesitation, out of mere awkwardness, or from superabundant caution, especially if he imagine that there is any design to entrap him into expressions contrary to his real meaning.

"This kind of hesitation is very general with such persons when plied with questions of an hypothetical nature, and when the answer is not so much an act of testimony as of reasoning; such as, *If it had been so, must you not have recollected*, &c. Where proof is actually given of a fact which a witness could not but know and recollect, his expressing himself with doubt and uncertainty is to be regarded as an act of wilful misrepresentation."

frequently supply the only true light by which the real characters of the witnesses can be appreciated (*b*).

Ability of witnesses.

Secondly, their *ability*: The ability of a witness to speak the truth must of course depend on the opportunities which he has had for observing the fact (*c*), the accuracy of his powers of discerning (*d*), and the faithfulness of his memory in retaining the facts, once observed and known.

Where a witness testifies to a fact which is wholly or partially the result of reason exercised upon particular circumstances, it is obvious that the reasons of the witness for drawing that conclusion are of the most essential importance for the purpose of ascertaining whether his conclusion was a correct one.

These observations apply with peculiar force to all questions of skill and science, and even to many of mere ordinary fact: thus where a witness is called to state that another witness is not to be believed upon his oath, his grounds for arriving at that conclusion are of the highest importance. Where, on the other hand, a witness states the impression on his senses, by any subject-matter of frequent experience, his reasons are of little weight; he will frequently assign a bad reason where his knowledge is certain.

The probability that the witness had originally a clear perception of the fact and its circumstances, is strengthened and confirmed by the consideration that they were of such a nature as were likely to attract his attention. On the other hand, it is diminished by the consideration that the transaction was remote, and such as was not likely to excite notice and observation (*e*).

(*b*) Tu magis scire potes quanta fides habenda sit testibus que et cujus dignitatis et quantæ æstimationis sunt et qui simpliciter visi sunt dicere, utrum unum eundemque meditatum sermonem attulerint an ad ea quæ interrogaveras ex tempore verisimilia responderint." Adrian's Epistle to Varus, legate of Cilicia. Ff. 22; 5. 3.

(*c*) When the guilt of the prisoner depends *wholly* on proof of identity, it is impossible to inquire too minutely into the means and opportunity which the witnesses had of observing the person, so as to able to speak with certainty. Many instances have occurred in which well-intentioned witnesses have sworn positively in this respect, and yet have been mistaken. I have frequently heard Mr. J. Bayley observe to juries, that fear has a very different effect upon different persons; in some it prevents the clear perception, whilst in other instances it assists in making an indelible impression.

(*d*) See Gil. L. Ev. 151, 2d ed.

(*e*) C. B. Gilbert, in his Law of Evidence, 151, 2d edit., says, "another thing that would render his (a single witness's) testimony doubtful, is the not giving the reasons and causes of his knowledge;" and again, "the same may be said as to persons who take upon them to remember things long since transacted, for if the

Such considerations operate strongly where detailed evidence is given of oral declarations, after the lapse of a considerable interval of time. Every man's experience teaches him how fallible and treacherous the human memory in such cases is. In its freedom from this defect consists one great excellence of documentary evidence, and its main superiority over that which is merely oral; and on this principle it is, that the law, out of policy, frequently deems mere oral evidence to be too weak, and requires a written voucher to prove the fact (*f*).

Of all kinds of evidence, that of extra-judicial and casual observations is the weakest and most unsatisfactory; such words are often spoken without serious intention, and they are always liable to be mistaken and misremembered, and their meaning is liable to be misrepresented and exaggerated (*g*).

A hearer is apt to clothe the ideas of the speaker, as he understands them, in his own language, and by this translation the real meaning must often be lost. A witness, too, who is not entirely indifferent between the parties, will frequently, without being conscious that he does so, give too high a colouring to what has been said.

The necessity for caution cannot be too strongly and emphatically impressed, where particular expressions are detailed in evidence, which were used at a remote distance of time, or to which the attention of the witnesses was not particularly called, or where misconception was likely to arise from their situation and the circumstances under which they were placed, or from the

matter be frivolous they ought to tell the causes of their memory, otherwise the memory is little to be accredited; for they are rather to be supposed as rash persons who take upon them to swear what they do not perfectly remember, than that they are really under the awe and conscience of an oath; for there they would be able to tell the reason and certain marks of their remembrance."

(*f*) See the statute of Frauds, &c. On this ground, also, it is that mere words will not constitute an overt act of treason.

(*g*) Finalmente è quasi nulla la credibilita del testimonio, quando si faccia delle parole un delitto, poichè il

tuono, il gesto, tutto ciò che precede, e ciò che siegue, le differenti idee, che gli uomini attacano alle stesse parole, alterano, e modificano in maniera i detti di un uomo, che è quasi impossibile, il ripeterle, quali precisamente furon dette. Di più le azioni violenti, e fuori dell' uso ordinario, quali sono i veri delitti, lascian traccia di se nella moltitudine delle circostanze, e negli effetti che ne derivano, ma le parole non rimangono, che nella memoria per lò più infidele e spesso sedotta dagli ascoltanti. Egli è adunque di gran lunga più facile una calunnia sulle parole, che sulle azioni di un uomo, poichè di queste quanto maggior numero di circostanze si ad-

prejudice of the witness, especially if his object was to extract an admission for the purposes of the cause (*h*).

Such evidence is fabricated easily, contradicted with difficulty. In cases of this kind, the conduct of the parties, and those facts and circumstances of the case which are free from suspicion, are frequently the safest and surest guides to truth. Evidence of this nature is of the very weakest kind, where it is doubtful whether the party making the admission knew his legal rights and situation (*i*).

Thirdly, *their number and consistency*: The testimony of a single witness, where there is no ground for suspecting either his ability or his integrity, is a sufficient legal ground for belief; that it is strong enough to produce actual belief, every man's experience will vouch. Number of witnesses.

It has been alleged (*k*) that two witnesses are essential to convict a man of a crime; for if there be but one, it is no more than the assertion of one man against that of another.

It is not easy to comprehend how the mere denial of guilt by an accused person, whose life may depend upon the credit attached to that denial, is to be placed in competition with the testimony of a witness examined upon oath. According to this species of logic, if six men were to commit a crime, it would require the testimony of at least seven witnesses to convict them upon their joint trial (*l*).

ducono in prova, tanto maggiori mezzi si sommistrano al reo per giustificarsi. Beccaria, sec. 13.

I once heard a learned Judge (now no more), in summing up on a trial for forgery, inform the jury that the prisoner, in a conversation which he had had with one of the witnesses, had said, "I *am* the drawer, the acceptor, and the indorser of the bill:" whilst the learned Judge was commenting on the force of these expressions, he was, at the instance of the prisoner, set right as to the statement of the witness, which was, that the prisoner had said, "I *know* the drawer, the acceptor, and the indorser of the bill." Had the witness, and not the Judge, made the mistake, the consequences might have been fatal. The prisoner was acquitted.

(*h*) The admitting evidence of loose conversations to revive an antiquated debt which would otherwise have been barred by lapse of time, has nearly had the effect of overturning the provisions of a most wholesome statute. See the observations of the Court, 4 B. & A. 571.

(*i*) As where, in a settlement case, the declaration of an inhabitant is given in evidence: or a party makes admissions involving matter of law as well as matter of fact; as in reference to marriage. See Vol. II. Or a discharge under an insolvent Act. *Summerset* v. *Adamson*, 1 Bing. 73.

(*k*) Montesquieu, Sp. of Law, b. 12, c. 3.

(*l*) The civil law requires proof by two witnesses, according to its universal maxim, "*Unius responsio testis omnino non audiatur.*" Sir W. Blackstone observes, 3 Comm. 370, that to

But although the testimony of a single witness, whose credit is untainted, be sufficient to warrant a conviction, even in a criminal case, yet undoubtedly any additional and concurrent testimony adds greatly to the credibility of testimony, in all cases where it labours under doubt or suspicion; for then an opportunity is afforded of comparing the testimony of the witnesses on minute and collateral points, on which, if they were the witnesses of truth, their testimony would agree, but if they were false witnesses, would be likely to differ (*m*).

Where direct testimony is opposed by conflicting evidence, or by ordinary experience, or by the probabilities supplied by the circumstances of the case, the consideration of the number of witnesses becomes most material. It is more improbable that a number of witnesses should be mistaken, or that they should have conspired to commit a fraud by direct perjury, than that one or a few should be mistaken, or wilfully perjured. In the next place, not only must the difficulty of procuring a number of false witnesses be greatly increased in proportion to the number, but the danger and risk of detection must be increased in a far higher proportion; for the points on which their false statements may be compared with each other, and with ascertained facts, must necessarily be greatly multiplied.

Consistency of testimony.

The *consistency* of testimony is also a strong and most important test for judging of the credibility of witnesses. Where several witnesses bear testimony to the same transaction, and concur in their statement of a series of particular circumstances, and the

extricate itself out of this absurdity, the practice of the Civil-law Courts has plunged itself into another. For as they do not allow a less number than two witnesses to be *plena probatio*, they call the testimony of one *semiplena probatio* only, on which no sentence can be founded: to make up, therefore, the necessary complement of witnesses, where they have one only to a single fact, they permit the party himself, plaintiff or defendant, to be examined on his own behalf, and administer to him what is called the suppletory oath; and if his oath happen to be in his own favour, this immediately converts the half proof into a whole one. By this ingenious device satisfying at once the forms of the Roman law, and acknowledging the superior reasonableness of the law of England, which permits one witness to be sufficient where no more are to be had, and to avoid all temptations of perjury, lays it down as an invariable rule that "*nemo testis esse debet in propriâ causâ.*" The instances of perjury and treason are exceptions to the rule: the former, upon grounds of strict principle, for there the oath of one witness is opposed to the oath of another witness; and in the latter, as a mere rule of policy devised for protecting the liberty of the subject.

(*m*) Quia a cordato judice mendacia testium deprehendi possunt si diversi interrogantur cùm contra unus facile sibi constare possit. Puffendorf, 568.

order in which they occurred, such coincidences exclude all apprehension of mere chance and accident, and can be accounted for only by one or other of two suppositions; either the testimony is true, or the coincidences are the result of concert and conspiracy. If, therefore, the independency of the witnesses be proved, and the supposition of previous conspiracy be disproved or rendered highly improbable, to the same extent will the truth of their testimony be established (*n*).

So far does this principle extend, that in many cases, except for the purpose of repelling the suspicion of fraud and concert, the credit of the witnesses themselves for honesty and veracity may become wholly immaterial. Where it is once established that the witnesses to a transaction are not acting in concert, then, although individually they should be unworthy of credit, yet if the coincidences in their testimony be too numerous to be attributed to mere accident, they cannot possibly be explained on any other supposition than that of the truth of their statement.

Effect of inconsistency.

The considerations which tend to negative any suspicion of concert and collusion between the witnesses, are either extrinsic of their testimony, such, for instance, as relate to their character, situation, their remoteness from each other, the absence of previous intercourse with each other or with the parties, and of all interest in the subject-matter of litigation; or they arise internally, from a minute and critical examination and comparison of the testimony itself.

The *nature* of such coincidences is most important: are they natural ones, which bear not the marks of artifice and premeditation? Do they occur in points obviously material, or in minute and remote points which were not likely to be material, or in matters the importance of which could not have been foreseen? The number of such coincidences is also worthy of the most attentive consideration: human cunning, to a certain extent, may fabricate coincidences, even with regard to minute points, the more effectually to deceive; but the coincidences of art and invention are necessarily circumscribed and limited, whilst those of truth are indefinite and unlimited: the witnesses of art will be copious in their detail of circumstances, as far as their provision extends; beyond this they will be sparing and reserved, for fear

(*n*) See Ld. Mansfield's remarks in *R. v. Genge*, Cowp. 16. "It is objected that these books are of no authority; but if both the reporters were the worst that ever reported, if substantially they report a case in the same way, it is demonstrative of the truth of what they report, or they could not agree."

of detection, and thus their testimony will not be even and consistent throughout: but the witnesses of truth will be equally ready and equally copious in all points.

Partial variances.

It is here to be observed, that partial variances in the testimony of different witnesses, on minute and collateral points, although they frequently afford the adverse advocate a topic for copious observation, are of little importance, unless they be of too prominent and striking a nature to be ascribed to mere inadvertence, inattention, or defect of memory.

It has been well remarked by a great observer (*o*), that "the usual character of human testimony is substantial truth under circumstantial variety." It so rarely happens that witnesses of the same transaction perfectly and entirely agree in all points connected with it, that an entire and complete coincidence in every particular, so far from strengthening their credit, not unfrequently engenders a suspicion of practice and concert.

The real question must always be, whether the points of variance and of discrepancy be of so strong and decisive a nature

(o) "I know not (says Dr. Paley) a more rash or unphilosopical conduct of the understanding than to reject the substance of a story by reason of some diversity in the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. This is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression on the minds of the Judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud. When written histories touch upon the same scenes of action, the comparison almost always affords ground for a like reflection. Numerous, and sometimes important, variations present themselves; not seldom also absolute and final conradictions; yet neither the one nor the other are deemed sufficient to shake the credibility of the main fact. The embassy of the Jews to deprecate the execution of Claudius's order to place his statue in their temple, Philo places in harvest, Josephus in seed-time; both cotemporary writers. No reader is led by their inconsistency to doubt whether such an embassy was sent, or whether such an order was given. Our own history supplies examples of the same kind: in the account of the Marquis of Argyle's death, in the reign of Charles the second, we have a very remarkable contradiction. Lord Clarendon relates that he was condemned to be hanged, which was performed the same day: on the contrary, Burnet, Woodrow, Heath and Echard, concur in stating that he was beheaded; and that he was condemned upon the Saturday, and executed upon the Monday. Was any reader of English history ever sceptic enough to raise a doubt whether he was executed or not?"

as to render it impossible, or at least difficult, to attribute them to the ordinary sources of such varieties, inattention or want of memory.

Aggregate force.

It would, theoretically speaking, be improper to omit to observe that the weight and force of the united testimony of numbers, upon abstract mathematical principles, increases in a higher ratio than that of the mere number of such witnesses.

Upon those principles, if definite degrees of probability could be assigned to the testimony of each witness, the resulting probability in favour of their united testimony would be obtained not by the mere addition of the numbers expressing the several probabilities, but by a process of multiplication.

Such considerations, however, are of no practical importance. The maxim of law is *ponderantur testes non numerantur*. No definite degrees of probability can in practice be assigned to the testimonies of witnesses; their credibility usually depends upon the special circumstances attending each particular case, upon their connection with the parties and the subject-matter of litigation, their previous characters, the manner of delivering their evidence, and many other circumstances, by a careful consideration of which the value of their testimony is usually so well ascertained as to leave no room for mere numerical comparison.

In some instances, nevertheless, where from paucity of circumstances the usual means of judging of the credit due to conflicting witnesses fail, it is possible that the abstract principles adverted to may operate by way of approximation, especially in those cases where the decision is to depend upon the mere preponderance of evidence.

Conformity with experience.

Fourthly, the *conformity* of their testimony with experience: As one principal ground of faith in human testimony is experience, it necessarily follows that such testimony is strengthened or weakened by its conformity or inconsistency with our previous knowledge and experience. A man easily credits a witness who states that to have happened which he himself has known to happen under similar circumstances; he may still believe, although he should not have had actual experience of similar facts; but where, as in the familiar instance stated by Mr. Locke (*p*), that

(*p*) Vol. II. p. 276. "The Dutch ambassador told the king of Siam that in his country the water was so hard in cold weather, that it would bear an elephant if he were there. The king replied, Hitherto I have believed the strange things you have told me, because I looked upon you as a sober fair man, but now I am sure you lie."

is asserted which is not only unsupported by common experience, but contrary to it, belief is slow and difficult.

In ordinary cases, if a witness were to state that which was inconsistent with the known course of nature, or even with the operation of the common principles by which the conduct of mankind is usually governed, he would probably be disbelieved; for it might be more probable in the particular instance that the witness was mistaken, or meant to deceive, than that such an anomaly had really occurred. But although the improbability of testimony, with reference to experience, affords a just and rational ground for doubt, the very illustration cited by Locke shows that mere improbability is by no means a certain test for trying the credibility of testimony, without regard to the number, consistency, character, independence and situation of the witnesses, and the collateral circumstances which tend to confirm their statement (*q*). In ordinary cases, where a witness

(*q*) In observing upon the general principles on which the credibility of human testimony rests, it may not be irrelevant to advert to the summary positions on this subject advanced by Mr. Hume. He says, in his Essay, vol. 2, sec. 10, "A miracle is a violation of the laws of nature; and as a firm and unalterable experience has established these laws, the proof against a miracle, from the very nature of the fact, is as entire as any argument from experience can possibly be imagined." As a matter of abstract philosophical consideration (for in that point of view only can the subject be adverted to in a work like this), Mr. Hume's reasoning appears to be altogether untenable. In the first place, the very basis of his inference is that faith in human testimony is founded solely upon *experience*; this is by no means the fact; the credibility of testimony frequently depends upon the exercise of reason, on the effect of *coincidences in testimony*, which, if collusion be excluded, cannot be accounted for but upon the supposition that the testimony of concurring witnesses is true; so much so, that their individual character for veracity is frequently but of secondary importance, *supra*, 486. Its credibility also greatly depends upon confirmation by collateral circumstances, and on analogies supplied by the aid of reason as well as of mere experience. But even admitting experience to be the basis, even the *sole* basis, of such belief, the position built upon it is unwarrantable, and it is fallacious, for if adopted it would lead to error. The position is, that human testimony, the force of which rests upon experience, is inadequate to prove a violation of the laws of nature, which are established by firm and unalterable experience. The very essence of the argument is, that the force of human testimony (the efficacy of which in the abstract is admitted) is *destroyed* by an opposite, conflicting and superior force, derived also from experience. If this were so, the argument would be invincible; but the question is, whether mere previous *inexperience* of an event testified is directly opposed to human testimony, so that mere inexperience as strongly proves that the thing *is not* as previous experience of the credibility of human testimony proves that it *is*. Now a miracle, or violation of the laws of

stands wholly unimpeached by any extrinsic circumstances, credit ought to be given to his testimony, unless it be so grossly impro-

nature, can mean nothing more than an event or effect never observed before, and to the production of which the known laws of nature are inadequate; and on the other hand, an event or effect in nature never observed before is a violation of the laws of nature: Thus, to take Mr. Hume's own example, "it is a miracle that a dead man should come to life, because that *has never been observed* in any age or country:" precisely in the same sense, the production of a new metal from potash, by means of a powerful and newly-discovered agent in nature, and the first observed descent of meteoric stones, were violations of the laws of nature; they were events which had never before been observed, and to the production of which the known laws of nature were inadequate. But none of these events can, with the least propriety, be said to be *against* or *contrary* to the laws of nature, in any other sense than that they have never before been observed, and that the laws of nature, as far as they were previously known, were inadequate to their production. The proposition of Mr. Hume ought then to be stated thus: human testimony is founded on experience, and is therefore inadequate to prove that of which there has been no previous experience. Now whether it be plain and self-evident that the mere negation of experience of a particular fact necessarily destroys all faith in the testimony of those who assert the fact to be true; or whether, on the other hand, this be not to confound the *principle* of belief with the *subject-matter* to which it is to be applied, and whether it be not plainly contrary to reason to infer the *destruction* of an active principle of belief from the mere *negation of experience*, which is perfectly consistent with the just operation of that principle; whether, in short, this be not to assume broadly that mere inexperience on the one hand is necessarily superior to positive experience on the other, must be left to every man's understanding to decide. The inferiority of mere negative evidence to that which is direct and positive, is, it will be seen, a consideration daily acted upon in judicial investigations. Negative evidence is, in the abstract, inferior to positive, because the negative is not directly opposed to the positive testimony; both may be true. Must not this consideration also operate where there is mere inexperience, on the one hand, of an event in nature, and positive testimony of the fact on the other? Again, what are the laws of nature, established by firm and unalterable experience? That there may be, and are, general and even *unalterable* laws of providence and nature, may readily be admitted; but that *human knowledge and experience* of those laws is unalterable (which alone can be the test of exclusion) is untrue, except in a very limited sense; that is, it may fairly be assumed that a law of nature once known to operate will always operate in a similar manner, unless its operation be impeded or counteracted by a new and contrary cause. In a larger sense, the laws of nature are continually alterable: as experiments are more frequent, more perfect, and as new phænomena are observed, and new causes or agents are discovered, human experience of the laws of nature becomes more general and more perfect. How much more extended and perfect, for instance, are the laws which regulate chemical attractions and affinities than they were two centuries ago! And it is probable that in future ages experience of the laws of nature will be more perfect than it is

bable as to satisfy the jury that he is not to be trusted. Thus, notwithstanding the general presumption of law in favour of

at present; it is, in short, impossible to define to what extent such knowledge may be carried, or whether, ultimately, the whole may not be resolvable into principles admitting of no other explanation than that they result immediately from the will of a superior Being. This at all events is certain, that the laws of nature, as inferred by the aid of experience, have from time to time, by the aid of experience, been rendered more general and more perfect. Experience, then, so far from pointing out any unalterable laws of nature, to the exclusion of events or phænomena which have never before been experienced, and which cannot be accounted for by the laws already observed, shows the very contrary, and proves that such new events or phænomena may become the foundation of more enlarged, more general, and therefore more perfect, laws. But whose experience is to be the test? That of the objector; for the very nature of the objection excludes all light from the experience of the rest of mankind. The credibility, then, of human testimony is to depend not on any intrinsic or collateral considerations which can give credit to testimony, but upon the casual and previous knowledge of the person to whom the testimony is offered; in other words, it is plain that a man's scepticism must bear a direct proportion to his ignorance. Again, if Mr. Hume's inference be just, the consequences to which it leads cannot be erroneous; on the other hand, if it lead to error, the inference must be fallacious. The position is, that human testimony is inadequate to prove that which has never been observed before; and this, by proving far too much for the author's purpose, is *felo de se*, and in effect proves nothing: for if constant inexperience amount to stronger evidence on the one side than is supplied by positive testimony on the other, the argument applies necessarily to all cases where mere constant inexperience on the one hand is opposed to positive testimony on the other. According, then, to this argument, every philosopher was bound to reject the testimony of witnesses that they had seen the descent of meteoric stones, and even acted contrary to sound reason in attempting to account for a fact disproved by constant inexperience, and would have been equally foolish in giving credit to a chemist that he had produced a metal from potash by means of a galvanic battery. It will not, I apprehend, be doubted, that in these and similar instances the effect of Mr. Hume's argument would have been to exclude testimony which was true, and to induce false conclusions; the principle, therefore, on which it is founded, must of necessity be fallacious. Nay, further, if the testimony of others is to be rejected, however unlikely they were either to deceive or be deceived, on the mere ground of inexperience of the fact testified, the same argument might be urged even to the extravagant length of excluding the authority of a man's own senses; for it might be said, that it is more probable that he should have laboured under some mental delusion, than that a fact should have happened contrary to constant experience of the course of nature.

In stating that the inference attempted to be drawn from mere inexperience is fallacious, I mean not to assert that the absence of previous experience of a particular fact or phænomenon is not of the highest importance to be weighed as a circumstance in all investigations, whether they be physical, judicial, or historical: the more remote the subject of testimony

innocence, a defendant may be convicted of a heinous and even improbable crime upon the testimony of a single witness.

As experience shows that events frequently occur which would antecedently have been considered most improbable, from their inconsistency with ordinary experience, and as their improbability usually arises from want of a more intimate and correct knowledge of the causes which produced them, mere improbability can rarely supply a sufficient ground for disbelieving direct and unexceptionable witnesses of the fact, where there was no room for mistake.

Conformity with circumstances.

Fifthly, Conformity with collateral circumstances: Direct testimony is not only capable of being strengthened or weakened to an indefinite extent, by its conformity on the one hand, or inconsistency on the other, with circumstances collateral to the disputed fact, but may be totally rebutted by means of such evidence. These positions lead immediately to an inquiry into the nature and force of indirect or circumstantial evidence.

is from our own knowledge and experience, the stronger ought the evidence to be to warrant our assent. Neither is it meant to deny that in particular instances, and under particular circumstances, the want or absence of previous experience may not be too strong for positive testimony, especially where it otherwise labours under suspicion. What is meant is this, that mere inexperience, however constant, is not in itself, and in the abstract, and without consideration of all the internal and external probabilities in favour of human testimony, sufficient to defeat and to destroy it, so as to supersede the necessity of investigation. Mr. Hume's conclusion is highly objectionable in a philosophical point of view, inasmuch as it would leave phænomena of the most remarkable nature wholly unexplained, and would operate to the utter exclusion of all inquiry. Estoppels are odious, even in judicial investigations, because they tend to exclude the truth; in metaphysics they are intolerable. So conscious was Mr. Hume himself of the weakness of his general and sweeping position, that in the second part of his 10th section he limits his inference in these remarkable terms, "I beg the limitations here made may be remarked, when I say that a miracle can never be proved so as to be the foundation of a system of religion; for I own that otherwise there *may possibly* be miracles or violations of the usual course of nature of such a kind as *to admit of proof from human testimony.*"

In what way the use to be made of a fact when proved can affect the validity of the proof, or how it can be that a fact *proved* to be true is not true for all purposes to which it is relevant, I pretend not to understand. Whether a miracle, when proved, may be the foundation of a system of religion, is foreign to the present discussion; but when it is once admitted that a miracle *may be proved by human testimony*, it necessarily follows, from Mr. Hume's own concession, that his general position is untenable; for that, if true, goes to the full extent of proving that human testimony is *inadequate* to the proof of a miracle, or violation of the laws of nature.

Circumstantial evidence.

Circumstantial, or, as it is frequently termed, presumptive evidence, is any which is not direct and positive.

An inference or conclusion from circumstantial or presumptive evidence, may be either the pure result of previous experience of the ordinary or necessary connection between the known or admitted facts and the fact inferred; or of reason exercised upon the facts; or of both reason and experience conjointly. And hence such an inference or conclusion differs from a presumption; although the latter term has sometimes, yet not with strict propriety, been used in the same extended sense: for a presumption in strictness is an inference as to the existence of one fact, from a knowledge of the existence of some other fact, made solely by virtue of previous experience of the ordinary connection between the known and inferred facts, and independently of any process of reason in the particular instance (*r*).

The consideration of the nature of circumstantial evidence, and of the principles on which it is founded, merits the most profound attention. It is essential to the well-being, at least, if not to the very existence of civil society, that it should be understood, that the secrecy with which crimes are committed will not ensure impunity to the offender. At the same time it is to be emphatically remarked, that in no case, and upon no principle, can the policy of preventing crimes, and protecting society, warrant any inference which is not founded on the most full and certain conviction of the truth of the fact, independently of the nature of the offence, and of all extrinsic considerations whatsoever. Circumstantial evidence is allowed to prevail to the conviction of an offender, not because it is necessary and politic that it should be resorted to (*s*), but because it is in its own nature capable of pro-

(*r*) Vide Vol. II. tit. PRESUMPTIONS.

(*s*) It is almost superfluous to remark upon the absurd and mischievous doctrine, that the nature of the crime ought at all to influence the measure of proof, and that, out of policy, slighter proof is sufficient in proportion to the atrocity of the offence, according to the pernicious maxim, *in atrocissimis leviores conjecturæ sufficiunt et licet judici jura transgredi.* Where any doubt exists as to the *corpus delicti*, whether any crime has been committed, the very reverse of the above position is true; the more atrocious the nature of a crime is, the more repugnant it is to the common feelings of human nature, the more improbable it is that it has been perpetrated at all. "La credibilità di un testimonio diviene tanto sensibilmente minore quanto più cresce l'atrocita di un delitto e l'inverisimiglianza delle circonstanze; tali sono per esempio la magia, è le azioni gratuitamente crudeli." Beccaria, s. 13. But when it has once been clearly

ducing the highest degree of moral certainty in its application. Fortunately for the interests of society, crimes, especially those of great enormity and violence, can rarely be committed without affording vestiges by which the offender may be traced and ascertained (*t*). The very measures which he adopts for his security not unfrequently turn out to be the most cogent arguments of guilt. On the other hand, it is to be recollected that this is a species of evidence which requires the utmost degree of caution and vigilance in its application, and in acting upon it, the just and humane rule impressed by Lord Hale (*u*) cannot be too often repeated: "*tutius semper est errare in acquietando, quam in puniendo, ex parte misericordiæ quam ex parte justitiæ.*"

Grounds of circumstantial proof.

By circumstantial or presumptive proof, is meant that measure and degree of circumstantial evidence which is sufficient to produce conviction in the minds of the jury of the truth of the fact in question.

To the validity of every such proof it is essential, first, that a basis of facts be established by sufficient evidence; and in the next place, that the proper conclusion should be deduced by the aid of reason and experience, from those facts and circumstances so established.

The force and tendency of circumstantial evidence to produce conviction and belief depend upon a consideration of the coincidence of circumstances with the fact inferred, that is, with the

established that a heinous crime has been perpetrated, and the only question is as to the perpetrator, it is manifest that the atrocity of the crime *in the abstract* raises no probability either for or against the accused, although under particular circumstances it may be a matter of great importance.

Thus on a charge of infanticide, where there is a doubt whether the child was destroyed by design, or by accident, during a secret delivery, the very atrocity of the offence raises a strong degree of probability in favour of the latter conclusion. On the other hand, were it clear from the circumstances under which a body was found, that the party had been murdered, then the *corpus delicti* being established, the atrocity of the offence would in the abstract raise no probability either in favour of or against any individual; but if in the particular instance the question were, whether the son of the deceased, or a stranger, was the guilty agent, then a probability from the particular circumstances would operate in favour of the son. It would, without reference to circumstances, be more probable that a stranger had committed the heinous crime of murder, than that a son had committed that horrible offence upon the person of his own father.

(*t*) See the observations of Beccaria, *supra*, 484.

(*u*) Hale, 290.

Grounds of circumstantial proof.

hypothesis, and the adequacy of such coincidences to exclude every other hypothesis (x).

All human dealings and transactions are a vast context of circumstances, interwoven and connected with each other, and also with the natural world, by innumerable mutual links and ties. No one fact or circumstance ever happens which does not owe its birth to a multitude of others, which is not connected on every side by kindred facts, and which does not tend to the generation of a host of dependent ones, which necessarily coincide and agree in their minutest bearings and relations, in perfect harmony and concord, without the slightest discrepancy or disorder.

It is obvious that all facts and circumstances which have really happened were perfectly consistent with each other, for they did actually so consist. It is therefore a necessary consequence, that if a number of the circumstances which attended a disputed fact be known and ascertained, and these so coincide and agree with the hypothesis that the disputed fact is true, that no other hypothesis can consist with those circumstances, the truth of that hypothesis is necessarily established.

And again, where the known and ascertained facts so coincide and agree with the hypothesis that the disputed fact is true, as to render the truth of any other hypothesis, on the principles of reason and experience, exceedingly remote and improbable, and morally, though not absolutely and metaphysically, impossible, the hypothesis is established as morally true. It also follows, that if any of the established circumstances be absolutely inconsistent with the existence of the supposed fact, the hypothesis cannot be true, notwithstanding the degree and extent of coincidence in other respects; for if that fact really existed, it was necessarily consistent with all the circumstances.

Coincidences between the facts and the hypothesis.

Thus, in the first place, it sometimes happens that the coincidence between the known facts and the hypothesis is such as

(x) In one respect, proof by circumstantial evidence is analogous to the indirect proof, or *reductio ad absurdum*, in geometry: in each case the truth of the proposition is attained to by negativing and excluding the truth of any other hypothesis; in the one case to a metaphysical and absolute, in the other to a moral certainty. In another and essential point they usually differ: in the geometrical proof the exclusion of *one* other hypothesis frequently excludes *all* others, and thus at once establishes the truth of the proposition; in the case of moral circumstantial proofs it may not only be necessary to exclude several different hypotheses by as many different processes of reasoning, but a doubt may still exist whether some other hypothesis may not remain unanswered.

absolutely and demonstratively to exclude any other. If, for instance, it were to be proved, that *A. B.* entered a room containing a watch, and that the watch was gone upon his departure, and it were also proved that no agent but *A. B.* in the interval had had access to the room, the proof that *A. B.* took the watch would be conclusive and complete; for the supposition that it had been removed by any other agent would be entirely excluded. Force of.

In the next place, the nature and degree of coincidence between the circumstances and the hypothesis may oftentimes be sufficient to exclude all reasonable doubt, and thus generate full moral conviction and belief, although it be not, as in the former case, of an absolute and demonstrative nature. And the probability of the hypothesis must always be proportioned to the *nature, extent* and *number* of its coincidences with the circumstances proved (*y*).

(*y*) All theories which explain the connection between natural phænomena and their causes are of this description. They consist in showing the existence and operation of a cause, and its adequacy to explain the phænomena; in other words, their coincidence with the hypothesis. Evidence, therefore, of the truth of any such theory is in no case demonstrative, although it reaches to the highest degree of moral certainty. The most splendid, important and beautiful of all philosophical theories, that of Sir Isaac Newton, for explaining the solar system, as exhibited by that great philosopher, amounts simply to this: a cause, viz. gravitation, exists. It is matter of demonstrative proof, that if such a cause did really operate upon the system, it would produce all the effects or phænomena which are actually observed; that is, the supposed cause is sufficient to explain all the phænomena; hence it is inferred to be true, and the force of this inference is in proportion to the improbability that all the minute coincidences between the phænomena and the hypothesis should be merely fortuitous, and that they should have resulted, not from a cause known to exist, and which is adequate to produce them, but from some other cause unobserved and unknown. To a certain extent, philosophical proofs as to the relations of cause and effect, in the natural world, are similar to circumstantial judicial proofs; in each case the basis of proof consists in the coincidences proved to exist between the phænomena or circumstances and the hypothesis. Beyond this point, and with respect to the effect of such coincidences, they frequently differ essentially. The philosophical proof rests on mere coincidences, indefinite in point of number, and the absence of any other cause adequate to account for the phænomena; but the agency of some other, but unknown, cause can never be absolutely excluded. On the other hand, although circumstantial proof must rest on a limited number of coincidences, yet their nature and force are frequently such as wholly to exclude the truth of any other hypothesis.

Lord Coke, as an instance of presumptive judicial proof, supposes the case where a man is found dead in a house, having been stabbed with a sword, and another is seen coming out of the house with a bloody sword in

Coincidences between the circumstances and the hypothesis.

Connections and coincidences between the circumstances and the hypothesis which they tend to prove, are either those of a natural or mechanical nature, which are the objects of sense, or they are of a moral nature. Those of the first class may consist generally in proximity in point of time and space, and all other circumstances which show that the supposed agent had the means and opportunity of doing the particular act, and connect him with it. As common instances, the possession of stolen goods, in case of robbery, and stains of blood upon the person, the possession of deadly weapons recently used, marks of conflict and violence, in case of homicide, may be cited. Happy it is for the interests of society that forcible injuries can seldom be perpetrated without leaving many and plain vestiges by which the guilty agent may be traced and detected. Instances of this nature, where apparently slight and unexpected circumstances have led to the detection of offenders, are familiar to all who are concerned in the practical administration of justice. In a case of burglary the thief had gained admittance to the house by opening a window by means of a penknife, which was broken in the attempt, and part was left in the wooden frame: the broken knife was found in the pocket of the prisoner, and perfectly corresponded with the fragment left. A murder had been committed by shooting the deceased with a pistol, and the prisoner was connected with the transaction by proof that the wadding of the pistol was part of a letter belonging to the prisoner, the remainder of which was found upon his person (*z*). In another case of murder, one of the circumstances to prove the prisoner to have been the criminal agent was the correspondence of a patch on one knee of his breeches, with impressions made upon the soil close to the place where the murdered body lay. In a case of robbery, it appeared that the prosecutor when attacked, had, in his own defence, struck the robber with a key upon the face, and

his hand, no other person having been in the house. Here the circumstances, and consequently the coincidences, are few, but they are of such a nature as wholly and necessarily to exclude any but one hypothesis. So in the ordinary case of larceny, where stolen goods, recently after the commission of the felony, are found in the possession of the prisoner, who gives no account for the purpose of explaining that possession; although the coincidences between the hypothesis that he was the thief, and the circumstances, be but two in number, viz. his *possession* of the property, and his *omission* to account for that possession, yet the latter is of an exclusive nature and tendency, it forcibly tends to *exclude* any supposition of an honest possession.

(*z*) This case was cited by the Lord Chancellor, in the course of a debate in the House of Lords, 1820.

the prisoner bore an impression upon his face which corresponded with the wards of the key. All circumstances of this nature are, as it were, mechanical links or ties which connect the supposed agent with the act which is the subject of inquiry. Further observations on this branch of the subject would be superfluous, and inconsistent with the object of the present work. There are, in fact, no existing relations, natural or artificial, no occurrences or incidents in the course of nature, or dealings of society, which may not constitute the materials of proof, and become important links in the chain of evidence.

Moral coincidences.

Circumstances of the above description, although they may be in themselves of an imperfect and inconclusive nature, frequently derive a conclusive tendency from those which are of a moral kind, and which depend upon a knowledge and experience of man as a rational and moral agent. Experience points out some laws of human conduct almost as general and constant in their operation as the mechanical laws of the material world themselves are. That a man will consult his own preservation, and serve his own interests; that he will prefer pleasure to pain, and gain to loss; that he will not commit a crime, or any other act manifestly tending to endanger his person or property, without a motive; and conversely, that if he has done such an act he had a motive for doing it: are principles of action and of conduct so clear that they may be properly regarded as axioms in the theory of evidence.

The presumption that a man will do that which tends to his obvious advantage, if he possess the means, supplies a most important test for judging of the comparative weight of evidence. It is to be weighed according to the proof which it was in the power of one party to have produced, and in the power of the other to have contradicted (*a*).

If, on the supposition that a charge or claim is unfounded, the party against whom it is made has evidence within his reach by which he may repel that which is offered to his prejudice, his omission to do so supplies a strong presumption that the charge or claim is well founded; it would be contrary to every principle of reason, and to all experience of human conduct, to form any other conclusion. This consideration in criminal cases frequently gives a conclusive character to circumstances which would otherwise be of an imperfect and inconclusive nature (*b*).

(*a*) See Lord Mansfield's observations in *Blatch* v. *Archer*, Cowp. 65.

(*b*) Notisi che le prove imperfette delle quale puo il reo giustificarsi è non lo faccia dovere divengono perfette. Beccaria, s. 14.

Thus, where the evidence against a prisoner on a charge of larciny consists in his recent possession of the stolen property, his very silence as to the fact of possession raises a strong presumption against him; for if his possession was an innocent one, as the fact must necessarily be within his knowledge, he might show, by statement, at all events, if not by proof, that such possession was consistent with his innocence. The same observations apply in general where appearances are proved against an accused person, which he refuses to account for or explain; such as marks of blood and violence on his dress and person, the possession of concealed weapons, and the like.

Moral coincidences.

The same principle applies where a party, having more certain and satisfactory evidence in his power, relies upon that which is of a weaker and inferior nature. So pregnant with suspicion is conduct of this nature, that the law, as has been seen, has laid down an express and peremptory rule upon the subject, which in cases within the scope of its operation actually excludes the inferior evidence. It is for the jury in their discretion to apply the principle, in cases which do not fall within the defined limits of the rule. Although a party may not be compellable to produce evidence against himself, yet if it be proved that he is in possession of a deed or other evidence, which, if produced, would decide a disputed point, his omission to produce it would warrant a strong presumption to his disadvantage (*o*). Again, the maxim of law is, *omnia præsumuntur contra spoliatorem* (*d*).

In the case of *Harwood* v. *Goodright* (*e*), where it was found by a special verdict that a testator made his will, and gave the premises in question to the plaintiff in error, but afterwards made another will different from the former, but in what particulars did not appear; the Court decided that the devisee under the first will was entitled against the heir-at-law. But Lord Mansfield said, that in case the defendant had been proved to have *destroyed* the last will, it would have been good ground for the jury to find a revocation. And as the destruction or withholding of evidence creates a presumption against the party who has had recourse to such a practice, so *à fortiori* does the actual fabrication or corruption of evidence.

(*c*) See Lord Mansfield's observations in *Roe d. Haldane* v. *Harvey*, Burr. 2484.

(*d*) See Lord Mansfield's observations in *Haldane* v. *Harvey*, Burr. 2484.

(*e*) Cowp. 86.

(*f*) See the judicious remarks of Mr. Evans (2 Pothier, by Evans, 337). He justly observes, that one of the most difficult points in the *Douglas cause* arose from Sir John Stewart's

The discovery of such practices must naturally and unavoidably excite a considerable degree of jealousy and suspicion, and ought undoubtedly to be most seriously weighed in estimating the degree of credit to be attached to other evidence adduced by the same party, where it is in its own nature doubtful and suspicious, or is rendered so by conflicting evidence. A considerable degree of caution is nevertheless to be applied in cases of this description, more especially in criminal proceedings; for experience shows that a weak but innocent man will sometimes, when appearances are against him, have recourse to falsehood and deception, for the purpose of manifesting his innocence (*g*) and ensuring his safety.

Conduct and intention.

The connection between a man's conduct and his motives is also one of a moral nature, pointed out by experience. It is from their experience of such connections that juries are enabled to infer a man's motives from his acts, and also to

having fabricated several letters as received from La Marre the surgeon; and cites the following passage from Mr. Stuart's observations on the subject:—

"I had been accustomed to think, that in judging upon evidence, a matter of such infinite importance in the constitution and jurisprudence of every well-regulated State, there were certain rules established, which in every court, and in every country, were received as most invaluable guides for the discovery of truth. For instance, when it appeared that on the one side there was *forgery* and *fraud* in some of the material parts of the evidence, and especially when that forgery could be traced up to its source, and discovered to be the contrivance of the very person whose guilt or innocence was the object of inquiry; in such a case I have always understood it to be an established rule, that the whole of the evidence on that side of the question must be deeply affected by a deliberate falsehood of this nature."

The natural and necessary effect of such a practice upon the minds of judges possessed of discernment and candour, is to make them extremely suspicious of all the evidence tending to the same conclusion with the forged evidence; parol testimony in support of it will be little regarded; the forgery of the written evidence contaminates the testimony of the witnesses in favour of the party who has made use of that forgery; and nothing will gain credit on that side, but either clear and conclusive written evidence, free from suspicion, or the testimony of such a number of respectable, disinterested and consistent witnesses, speaking to decisive and circumstantial facts, as leaves no room to doubt of the certainty of their knowledge, and the truth of their assertions.

On the other hand, the proof of a forgery, such as has been described, must also have the effect to gain a more ready admission to the evidence of the other party. If that evidence be consistent, if it be established by the concurring testimony of a crowd of witnesses, and supported by various articles of written and unsuspected evidence, the bias of a fair mind will be totally in favour of the party producing such authorities, and against that which had been obliged to have recourse to the forged evidence."

(*g*) *Supra*, 53.

infer what his conduct was, from the motive by which he was known to be influenced. In criminal cases, proof that the party accused was influenced by a strong motive of interest to commit the offence proved to have been committed, although exceedingly weak and inconclusive in itself, and although it be a circumstance which ought never to operate in proof of the *corpus delicti*, yet when that has once been established *aliunde*, it is a circumstance to be considered in conjunction with others which plainly tend to implicate the accused (*h*).

Again, presumptions of great importance, especially in criminal proceedings, arise frequently out of the connection between the acts of a party, and his intentions, consciousness and knowledge. That a rational agent must be taken to contemplate and intend the natural and immediate consequences of his own act, is a presumption so cogent as to constitute rather a rule of law than of mere evidence (*i*). Again, the usual connection between the conduct of a criminal agent and the supposition of his guilt, are of too obvious a nature to be dwelt upon. The seeking for opportunities fit for the occasion; the providing of poison, or instruments of violence, in a secret and clandestine manner; the subsequent concealment of them; attempts to divert the course of inquiry (*k*), or prevent investigation as to the cause of death; not unfrequently excite just cause of suspicion: above all, the restless anxiety of a mind conscious of guilt very frequently prompts the party to take measures for his security which eventually supply the strongest evidence of his criminality.

Coincidences from ordinary experience.

In judicial investigations, as well as in the ordinary course of life, that is more or less probable and likely, and is therefore, in a greater or less degree, an inducement to belief, which more or

(*h*) On the other hand, the total absence of any apparent motive must always operate strongly as a circumstance in favour of the accused, especially where there is no reason to apprehend any unsoundness of intellect. *A fortiori*, does the principle operate where the supposed agent was actuated by contrary motives. And even in cases which involve a conflict of motives, such as infanticide, where natural feelings on the one hand are opposed to a desire of avoiding shame and detection on the other, the former are necessarily entitled to the highest consideration.

(*i*) See Vol. II. tit. INTENTION—MALICE.

(*k*) I have remarked that persons of the lowest classes of society, before the commission of premeditated murders, not unfrequently throw out some dark and mysterious hints as to the death of the intended victim. This is a circumstance which I apprehend is to be attributed principally to an expectation that by this means less of surprise and of inquiry will take place when the crime has been accomplished.

less agrees with former observation. This is a ground of assent, warranted as well by philosophy as by ordinary experience. It is probable that whatever has happened will again happen under similar circumstances, however ignorant we may be of the nature or necessity of the connection; the very frequency of the association is evidence of the connection; there is no association whatsoever, whether it be moral, natural or artificial, whether it depend on the nature and constitution of the human mind, the laws of nature, or the artificial manners and habits of society, which is not rendered probable in proportion to the frequency and constancy of the connection. Hence it is, that where circumstances found to be usually associated with the fact in question are known to exist, such associations are connecting links between the known circumstances and the fact, and render its existence more or less probable (*l*). On the other hand, it is scarcely necessary to remark, that experience of the usual or constant disunion of particular facts and circumstances necessarily renders their future association unlikely and improbable, and is a proper inducement to disbelief more or less strong according to circumstances.

Absence of evidence tending to a different conclusion.

It is further to be remarked, that the force of evidence resulting from the concurrence of circumstances depends not merely upon the degree of improbability that those coincidences were merely casual and fortuitous, but frequently also upon that improbability, compounded with the further improbability that another hypothesis is true which is not supported by any circumstances. Thus in a criminal case where all the circumstances of time, place, motive, means, opportunity and conduct, concur in pointing out the accused as the perpetrator of an act of violence, the force of such circumstantial evidence is materially strengthened by the total absence of any trace or vestige of any other agent, although, had any other existed, he must have been connected with the perpetration of the crime by motive, means and opportunity, and by circumstances necessarily accompanying such acts, which usually leave manifest traces behind them.

Dependent and independent circumstances.

In estimating the force of a number of circumstances tending to the proof of the disputed fact, it is of essential importance to

(*l*) A striking instance to show the extent to which philosophical inferences may be carried by means of careful observation and analogical reasoning, may be derived from the science of comparative anatomy. From a single fossil bone of an animal whose very species is extinct, a skilful anatomist is able to represent the original animal perfect in all its parts.—See Cuvier's Fossil Remains.

Independency of the circumstances.

consider whether they be dependent or independent. If the facts *A. B. C. D.* be so essential to the particular inference to be derived from them when established, that the failure in the proof of any one would destroy the inference altogether, they are dependent facts; if, on the other hand, notwithstanding the failure in proof of one or more of those facts, the rest would still afford the same inference or probability as to the contested fact which they did before, they would be properly termed independent facts (*m*). The force of a particular inference drawn from a number of dependent facts is not augmented, neither is it diminished, in respect of the number of such dependent facts, provided they be established; but the probability that the inference itself rests upon sure grounds, is, in general, weakened by the multiplication of the number of circumstances essential to the proof; for the greater the number of circumstances essential to the proof is, the greater latitude is there for mistake or deception. On the other hand, where each of a number of independent circumstances, or combinations of circumstances, tends to the same conclusion, the probability of the truth of the fact is necessarily greatly increased in proportion to the number of those independent circumstances (*n*).

It seems to have been considered, that even mere coincidences, although not of an exclusive nature, may by their number and joint operation be sufficient to constitute a conclusive proof (*o*). It rarely, however, happens in practice, that circumstantial proofs consist purely in mere natural and mechanical coincidences,

(*m*) Quando le prove di un fatto tutte dipendono egualmente da una sola, il numero delle prove non aumente nè sminuisce la probabilità del fatto, perchè tutto il loro valore si resolve nel valore di quella sola da cui dipendono. Quando le prove sono indipendenti, l'una dall' altra, cioè quando gli indizi si provano altronde che da se stessi, quanto maggiori prove si adducono tanto più cresce la probabilità del fatto, perchè la fallacia di una prova non influisce sull' altra. Beccaria, s. 14.

(*n*) *Infra*, note (*p*).

(*o*) Matthæus de Crim.: Possunt diversa genera ita conjungi ut quæ singula non nocerent ea universa tanquam grando reum opprimunt.—According to Beccaria, chap. 14: Possono distinguersi le prove di un reato in perfette ed in imperfette. Chiamo perfette quelle che escludono la possibilità che un tale non sia reo; chiamo imperfette quelle che non la escludono. Della prima anche una sola è sufficiente per la condanna, delle seconde tante son necessarie quante bastino a formarne una perfetta, vale a dire que se per ciascuna di queste in particolare è possibile che uno non sia reo, per l'unione loro nel medesimo soggeto è impossibile che non lo sia. Beccaria, s. 14.—Singula levia sunt et communia, universa vero nocent etiam si non ut fulmine, tamen ut grandine. Quinctil.

unconnected with any of a moral nature and conclusive tendency.

The probability derived from the concurrence of a number of independent probabilities increases not in a merely cumulative, but in a compounded and multiplied proportion (*p*). This is a

Force of concurring probabilities.

(*p*) According to the principles of pure abstract mathematical reasoning, the probability arising from the concurrence of a number of independent circumstances, each of which induces a probability in favour of a particular event, is *compounded* of all the probabilities incident to the individual circumstances. When, therefore, the circumstantial probabilities are each considerable, the compound probability in favour of the event increases by a rapid progression. If the circumstances *A*, *B*, *C*, severally induce probabilities in favour of an event represented by $\frac{a}{m}$ $\frac{b}{m}$ $\frac{c}{m}$, that is, if in every m cases the circumstance *A* necessarily involved the event in question a times, and excluded it $m-a$ times, and so on, and the circumstances *A*, *B*, *C*, were wholly independent of each other, then the probability of the event, arising from the happening of all these circumstances, would be to the probability against it as $m^3-\overline{m-a}\,.\,\overline{m-b}\,.\,\overline{m-c}$ to $m-a\,.\,\overline{m-b}\,.\,\overline{m-c}$.

If the witnesses *A*, *B*, *C*, bore testimony to independent facts, each of which, if true, involved the truth of a particular event, and *A* were the witness of truth in a cases, and his testimony were false in $m-a$ cases, and so of the testimony of *B*, and of *C*, then the probability of the event, arising from their joint testimony, would be to the probability against it in the ratio above expressed.

And if $m=2$ and $a=b=c=1$, the probability in favour of the event would be to the probability against it as 7 : 1.

Again, if the probability in favour of a particular fact, arising from the testimony of *A*, were to the probability against it as $a : m-a$, and so on, as to the testimony of *B*, and *C*, the probability of the fact from their united testimony would be to the probability against it as $a\,.\,b\,.\,c$ to $m-a\,.\,\overline{m-b}\,.\,\overline{m-c}$. And if $m=2$ and $a=b=c=1$, the ratio would be that of 1 : 1; that is, their united testimony would produce no increase of probability in favour of the fact.

Such considerations admit but of a very partial and limited application in the investigation of questions arising out of the common concerns of life. The basis of all such calculations is a comparison of all the different cases which involve the particular event with those which exclude it, which assumes the possibility of resolving all possible cases, which either involve or exclude the event, into a definite number of the one class and of the other, each of which is equally likely to happen *. The most complicated and laboured analytical results on the subject of probabilities, are little more than modifications of this comparison. It is obvious, upon the slightest consideration, that the probability of error or mistake on the part of a witness, or of his honesty and sincerity, usually admits of no such comparison; still less can the complicated transactions of life, dependent as they are upon an almost infinite variety of circumstances and motives, be subjected to such an ana-

* Wood's Algebra. La Place, Theorie Analitique des Probabilités.

consequence derived from pure abstract arithmetical principles. For although no definite arithmetical ratio can be assigned to each independent probability, yet the principle of increase must lysis. But the principle may no doubt operate by way of approximation, although the concurring probabilities may admit of no numerical measure; and whenever probabilities are deducible from independent circumstances, the degree of probability must necessarily be multiplied by their concurrence. In criminal cases, however, it seems to be perfectly clear in principle that the conjoint effect of circumstances which individually are inconclusive in their nature, cannot in its nature be conclusive, unless the resulting probability be indefinite, and exceed the powers of calculation. Where mere independent and unconnected circumstances are in their nature imperfect and inconclusive, the degree of probability which results from their united operation, although greatly increased in degree, must still in its nature be definite and inconclusive, and therefore inadequate to the purposes of conviction. Let it, for instance, be supposed that *A.* is robbed, and that the contents of his purse were one penny, two sixpences, three shillings, four half-crowns, five crowns, six half-sovereigns and seven sovereigns, and that a person, apprehended in the same fair or market where the robbery takes place, is found in possession of the same remarkable combination of coin, and of no other, but that no part of the coin can be identified, and that no circumstances operate against the prisoner except his possession of the same combination of coin: here, notwithstanding the very extraordinary coincidences as to the number of each individual kind of coin, although the circumstances raise a high probability of identity, yet it still is one of a definite and inconclusive nature.

On the other hand, evidence of a *conclusive* nature and tendency is restricted by no limits of mere probability. In the case of the ordinary presumption, that an admission of a fact made by a party contrary to his obvious interest, is truly made, the probability that the admission is true far exceeds the limits of mere numerical comparison. In some instances mere mechanical coincidences are of this description. Thus, in the ordinary case where cloth is cut and stolen from a loom, the perfect coincidence between the cloth found in the possession of the prisoner and the remnant left behind, is of this description; the probability of identity arising from the perfect coincidence of the severed threads exceeds the bounds of arithmetical calculation, and deprives the mind of all power of attributing such a series of coincidences to mere accident.

But even in criminal cases, where a high degree of probability results from repeated coincidences, although that probability be of a definite and numerical nature, such coincidences may, in conjunction with others, constitute a complete and satisfactory proof. Thus, in the case already supposed, of a singular coincidence between the quantity and description of coin stolen with that found in the possession of the prisoner, although the fact, taken nakedly and alone, without any collateral evidence, would in principle be inconclusive, yet, if coupled with circumstances of a conclusive tendency, such as flight, concealment of the money, false and fabricated statements as to the possession, it might afford strong and pregnant evidence of guilt for the consideration of the jury.

obtain wherever independent probabilities in favour of an event concur, although they cannot be precisely measured by space or numbers; and even although every distinct probability which is of a conclusive tendency exceeds every merely definite numerical ratio.

Force of concurrent probabilities.

It is, however, to be remarked, that wherever mere inconclusive probabilities concur, the result, however the degree of probality may be increased by the union, will still be of a definite and inconclusive nature. And hence it seems, that in criminal cases the mere union of a limited number of independent circumstances, each of which is of an imperfect and inconclusive nature, cannot afford a just ground for conviction.

On the other hand, the force of circumstances of a conclusive nature may be greatly confirmed and strengthened by their combination with other and independent circumstances, which render the fact probable, although the latter be in themselves of an imperfect and inconclusive nature. Again, it is to be observed, that although in the course of judicial proofs the number of concurring probabilities is usually limited, yet that cases may be put where the number and extent of the coincidences are so great as to exceed all definite limits, and where, consequently, the resulting probability is of a conclusive nature (*q*).

It is to be remarked, that in thus referring to the doctrine of numerical probabilities, it is the principle alone which is intended to be applied, in order that some estimate may be formed of the force of independent and concurring probabilities. The notions of those who have supposed that mere moral probabilities or relations could ever be represented by numbers or space, and thus be subjected to arithmetical analysis, cannot but be regarded as visionary and chimerical.

Basis of circumstances.

From this short view of the subject it appears to be essential to circumstantial proof, First, *that the circumstances from which the conclusion is drawn should be fully established.* If the basis be unsound, the superstructure cannot be secure. The party upon whom the burthen of proof rests is bound to prove every single circumstance which is essential to the conclusion, in the same manner and to the same extent as if the whole issue had rested upon the proof of each individual and essential circumstance. It is obvious that proof of this nature is more strong and cogent where the circumstances are numerous, and derived from many different and independent sources, than where they are but few,

(*q*) See the preceding Note.

Proof of circumstances.

and depend on the credit and testimony of one or two witnesses. Where all the circumstances rest on the testimony of a single witness the evidence can never be superior to the lowest degree of direct evidence, and must frequently fall below it: for in addition to the question whether the witness was faith-worthy, another question would arise, that is, whether the inference was correctly drawn from the facts which he was supposed to prove.

It is obvious that the number of circumstances stated by a witness does not add to the force of his testimony, unless they be such as admit of contradiction if his testimony be false.

Number of circumstances.

The number of circumstances is not only essential, inasmuch as it repels any suspicion of fraud, but from the consideration that the greater the number of circumstances is, the greater will be the certainty as to the conclusion deduced. A few circumstances may be consistent with several solutions; but the whole context of circumstances can consist with one hypothesis only; and the wider the range of circumstances is, the more certain will it be that the hypothesis which consists with and reconciles them all is the true one.

False circumstances.

Although all facts and circumstances connected with the subject of inquiry be admissible in evidence to explain its nature, and although all facts must necessarily be consistent with truth, yet it is to be recollected that facts themselves may be simulated and fabricated with a view to deceive and mislead. Such facts, however, are necessarily exposed to great danger of detection, from the obvious difficulty of uniting by artful means that which is false with that which is genuine, and thus substituting a false and artificial for a real consistency and context of circumstances.

The great difficulty of practising frauds of this description, and their liability to detection from a careful examination and comparison of circumstances, will be best elucidated by a few examples. Attempts at this kind of deception have not unfrequently been made with a view to conceal the crime of murder, and in order to produce belief that the party died from natural or accidental causes, or was *felo de se*; in the detection of such impostures the testimony of medical practitioners cannot be too highly appreciated.

The remarkable case of Sir Edmundbury Godfrey may be cited as an instance of this kind (*r*). The deceased was found in a ditch at Chalk Farm, in the neighbourhood of London, his own

(*r*) In the State Trials.

sword passing through his body, so that the end projected two hands' breadth behind the back; his gloves and some other things were laid on the bank, so as to excite a belief that he had destroyed himself. But there was no blood about the place, and upon drawing the sword out of the body no blood followed. The body was discoloured and bruised, and the neck so flexible that the chin could be turned from one shoulder to the other. The deceased had in fact been strangled.

False circumstances.

In the State Trials a very singular case of the same description is also mentioned, of a woman who was found in bed with her throat cut: her husband's relations (the husband being absent from home at the time) occupied the apartment adjoining to the chamber of the deceased, and there was no access to her chamber but through their apartment. The relations who thus occupied the adjoining apartment, had arranged matters so that it might be supposed that the deceased had destroyed herself; but one circumstance amongst others was conclusive to destroy this supposition, for on the *left* hand of the deceased was observed the bloody mark of a *left* hand, which of course could not have been that of the deceased.

Another instance, cited in a lately published and able work on Medical Jurisprudence (*s*), is to this effect:—A citizen of Liege was found shot, and his own pistol was discovered lying near him, and no person had been seen to enter or leave the house of the deceased; from these circumstances it was concluded that he had destroyed himself, but on examining the ball by which he had been killed it was found to be too large to have been discharged from that pistol, in consequence of which suspicion fell upon the real murderer.

Secondly: It is essential *that all the facts should be consistent with the hypothesis.* For as all things which have happened were necessarily congruous and consistent, it follows, that if any one established fact be wholly irreconcileable with the hypothesis, the latter cannot be true. Such an incongruity and inconsistency is sufficient to negative the hypothesis, even although it coincide and agree with all the other facts and circumstances of the case to the minutest extent. Undoubtedly such an intimate coincidence in other respects would suggest the necessity of investigating the truth of the incongruous circumstances with great caution; yet if the incongruity cannot

Consistency of the facts with the hypothesis.

(*s*) By Dr. Paris and J. S. M. Fonblanque. See also the publications on the same subject, by Dr. Smith and Dr. Male.

eventually be removed, the hypothesis must fall, although no other can be suggested (*t*).

Conclusive tendency.

Thirdly: It is essential *that the circumstances should be of a conclusive nature and tendency.* Evidence is always indefinite and inconclusive, when it raises no more than a limited probability in favour of the fact, as compared with some definite probability against it, whether the precise proposition can or cannot be ascertained. It is on the other hand of a conclusive nature and tendency, when the probability in favour of the hypothesis exceeds all limits of an arithmetical or moral nature.

Such evidence is always insufficient, where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true: for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of proof. Whenever, therefore, the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favour of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be. To hold that any finite degree of probability shall constitute proof adequate to the conviction of an offender, would in reality be to assert, that out of some finite number of persons accused, an innocent man should be sacrificed for the sake of punishing the rest; a proposition which is as inconsistent with the humane spirit of our law, as it is with the suggestions of reason and justice. The maxim of law is, that it is better that ninety-nine (*i. e.* an indefinite number of) offenders should escape, than that one innocent man should be condemned.

Thus, in practice, where it is certain that one of two individuals committed the offence charged, but it is uncertain whether the one or the other was the guilty agent, neither of them can be convicted.

The principle extends to all cases where the ultimate tendency of the evidence is of an inconclusive nature, that is, where admitting all to be proved which the evidence tends to prove, the guilt of the accused would be left either wholly uncertain, or dependent upon some merely definite probability (*u*).

(*t*) It was on this principle that the French philosophers opposed Newton's system of the world. They objected that the calculations formed upon his hypothesis made the motion of the moon's apsides but one half as great as they were proved to be by actual observation. It was afterwards discovered that the error was in neglecting a tangential force in the calculation; and it was found that when this was taken into the account, the theoretical result coincided with the fact.

(*u*) The very remarkable case of Mr. Barnard, who was tried on a

Conclusive tendency.

It is very possible, indeed, that mere coincidences may be so numerous, as by force of multiplied probability to exclude all reasonable doubt; but this can never happen in the absence of circumstances of a conclusive tendency, unless the probability be increased to an indefinite extent beyond the reach of mere calculation. Whenever the probability is of a definite and limited nature (whether in the proportion of one hundred to one, or of one thousand to one, or any other ratio, is immaterial), it cannot be safely made the ground of conviction; for to act upon it in any case would be to decide, that for the sake of convicting many criminals, the life of one innocent man might be sacrificed.

The distinction between evidence of a conclusive tendency which is sufficient for this purpose, and that which is inconclusive, seems to be this: the latter is limited and concluded by some degree or other of finite probability, beyond which it cannot go; the former, though not demonstrative, is attended with a degree of probability of an indefinite and unlimited nature.

It frequently happens, as has been seen, that where the evidence of the circumstances attending the transaction itself would be imperfect and inconclusive, it derives a conclusive nature and tendency from a consideration of the conduct of the accused. The ordinary motives of self-preservation and self-interest, common to all mankind, furnish the strongest presumption that a party would explain, by statement at all events, and by proof where it was practicable, such evidence as tended to his prejudice. Hence it is that circumstances, which abstractedly considered would be inconclusive, acquire a conclusive character and

charge of sending a threatening letter to the Duke of Marlborough, affords an illustration of these positions. The Duke was twice required, by letter, to meet the writer, and on both occasions was met by the prisoner: the one place of assignation was near a particular tree in Hyde Park; the other, in an aisle of Westminster Abbey. That Mr. Barnard should, by mere accident, have been at both places at the very time appointed for the meetings, was certainly most remarkable: yet, notwithstanding the strong degree of suspicion created by such coincidences, they were clearly insufficient, without more, to warrant a conviction. The prisoner was, nevertheless, put upon his defence, and produced evidence to show that those coincidences were purely accidental: perhaps the real clue to the transaction may be this, that the prisoner was a party to the transaction, although no real intention existed of profiting by the contrivance. The rank and situation of the prisoner in society, and the obvious impossibility of his ever enjoying that which he demanded, are circumstances strongly tending to exclude such a supposition, and the nature and style of the demand render it probable that the real object of the writer was not personal gain,

Conclusive tendency.

tendency from the silence of the adversary, or his failure in attempting to explain them (*x*).

Where the evidence to prove larciny consists in the recent possession of the stolen property, it is in itself imperfect and inconclusive. But if the evidence of possession be coupled with the consideration, that the party charged, having it in his power to account for the possession, if it really consist with his innocence, either refuses to account for the possession, or attempts to impose a false account, the evidence is then conclusive in its nature and tendency, and is proper for the consideration of the jury.

Exclusion to a moral certainty.

Fourthly: It is essential *that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved.*

The corpus delicti must be proved.

Hence results the rule in criminal cases, that the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, avails nothing unless the *corpus delicti*, the fact that the crime has been actually perpetrated, be first established. So long as the least doubt exists as to the *act*, there can be no certainty as to the criminal agent. Hence, upon charges of homicide, it is an established rule, that the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact, or by inspection of the body: a rule warranted by melancholy experience of the conviction and execution of supposed offenders, charged with the murder of persons who survived their alleged murderers; as in the case of the uncle already alluded to, cited by Sir Edward Coke and Lord Hale (*y*). So Lord Hale recommends that no prisoner shall be convicted of larciny in stealing the goods of a person unknown, unless the fact of the robbery be previously proved (*z*). The same principle requires that upon a charge of homicide, even when the body has been found, and although indications of a violent death be manifest, that it shall still be fully and satisfactorily proved that the death was neither occasioned by natural causes (*a*), by accident, nor by the act of the deceased himself. In considering the probability of the latter supposition, it is to be recollected, that it is by no means improbable that a person bent

(*x*) *Supra*, 499.

(*y*) *Supra*, 52, and Vol. II. tit. MURDER.

(*z*) Vol. II. tit LARCINY.

(*a*) See the trial of Spencer Cowper, esq., for the alleged murder of Mrs. Sarah Stout; St. Tr. The doubt which arose in that case upon the conflicting evidence, whether the death of the deceased had been occasioned by mere accident, or by her own act, or by the act of another, afforded, as it seems, a decisive ground of acquittal.

on self-destruction would use precautions to protect his memory from the ignominy, and his property from the forfeiture, consequent on a verdict of *felo de se* (*b*).

Inquiry as to other hypotheses.

The force of circumstantial evidence being exclusive in its nature, and the mere coincidence of the hypothesis with the circumstances being in the abstract insufficient, unless they exclude every other supposition, it is essential to inquire, with the most scrupulous attention, what other hypotheses there may be which may agree wholly or partially with the facts in evidence. Those which agree even partially with the circumstances are not unworthy of examination, because they lead to a more minute examination of those facts with which at first they might appear to be inconsistent; and it is possible that upon a more minute investigation of those facts their authenticity may be rendered doubtful, or may be even altogether disproved. In criminal cases the statement made by the accused is in this point of view of the most essential importance. Such is the complexity of human affairs, so infinite the combinations of circumstances, that the true hypothesis which is capable of explaining and reconciling all the apparently conflicting circumstances of the case, may escape the acutest penetration; but the prisoner, so far as he alone is concerned, can always afford a clue to them; and though he be unable to support his statement by evidence, his account of the transaction is for this purpose always most material and important. The effect may be on the one hand to suggest a view of the case which consists with the innocence of the accused, and which might otherwise have escaped observation; on the other hand, its effect may be to narrow the question to the consideration whether that statement be or be not excluded and falsified by the evidence.

The recent possession of stolen property is, independently of the conduct and declarations of the accused, or of his silence, very imperfect evidence of guilt; the apparent possession may

(*b*) In a little work, intitled, The Theory of Presumptive Proof, is cited the case of Thomas Harris, who was executed at York, for the murder of James Gray, in the year 1642. According to that statement, Harris kept a public-house, and was charged by his man-servant, Morgan, with having strangled James Gray, a travelling guest, in his house; upon the testimony of Morgan, aided by some circumstantial evidence, as to the prisoner's having on the same morning concealed some money in his garden, the prisoner was convicted and executed, although *no marks of violence* appeared on the body of the deceased, and who had in fact died of apoplexy, as appeared by the subsequent confession of the witness himself.

have resulted from the malicious act of some other person. In a case, therefore, where no act of concealment or assumption of property can be proved, and the accused is consistent in denying all knowledge of possession, such a defence becomes entitled to the most serious attention, and exacts a most rigorous inquiry as to its truth or probability; where, on the other hand, the prisoner admits the possession, and attempts to account for it by a false statement, the necessity for such an inquiry does not arise (c).

To the exclusion of all reasonable doubt.

What circumstances will amount to proof can never be matter of general definition; the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute, metaphysical and demonstrative certainty, is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt; even direct and positive testimony does not afford grounds of belief of a higher and superior nature. To acquit upon light, trivial and fanciful suppositions, and remote conjectures, is a virtual violation of the juror's oath, and an offence of great magnitude against the interests of society, directly tending to the disregard of the obligation of a judicial oath, the hindrance and disparagement of justice, and the encouragement of malefactors. On the other hand, a juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest; and in no case, as it seems, ought the force of circumstantial evidence, where it is adequate to conviction, to be inferior to that which is derived from

(c) A lamentable case occurred some years ago (I state from common report only) which strongly illustrates the necessity of exerting the utmost vigilance in negativing satisfactorily every other possible hypothesis, in a case of purely circumstantial evidence. A servant girl was charged with having murdered her mistress. The circumstantial evidence was very strong; no persons were in the house but the murdered mistress and the prisoner, the doors and windows were closed and secure, as usual; upon this and some other circumstances the prisoner was convicted, principally upon the presumption, from the state of the doors and windows, that no one could have had access to the house but herself, and she was accordingly executed. It afterwards appeared, by the confession of one of the real murderers, that they had gained admission to the house, which was situated in a narrow street, by means of a board thrust across the street, from an upper window of the opposite to an upper window of the house of the deceased; and that the murderers retreated the same way, leaving no trace behind them.

the testimony of a single witness, the lowest degree of direct evidence.

Circumstantial evidence ought not to supersede direct evidence.

Lastly: It seems that mere circumstantial evidence ought in no case to be relied on where direct and positive evidence, which might have been given, is wilfully withheld by the prosecutor. Where direct evidence is attainable, circumstantial evidence is of a secondary nature; besides, the great excellence of indirect evidence is its freedom from suspicion, and no greater discredit can be thrown upon it than when direct evidence is withheld.

Observations on conflicting evidence.

In cases of conflicting evidence, the first step in the process of inquiry must naturally and obviously be to ascertain whether the apparent inconsistencies and incongruities which it presents may not without violence be reconciled, and if not, to what extent, and in what particulars, the adverse evidence is irreconcileable; and then, by careful investigation and comparison, to reject that which is vicious; and thus, if it be practicable, to reduce the whole to testimony and circumstances of uniform and consistent tendency.

Conflicting testimony.

Where the testimony of direct witnesses is apparently at variance, it is to be considered, in the first place, whether they be not in reality reconcileable, especially where there is no extrinsic reason for suspecting error or fraud. But if their statements upon examination be found to be irreconcileable, it becomes an important duty to distinguish between the misconceptions of an innocent witness, which may not affect his general testimony, and wilful and corrupt misrepresentations which destroy his credit altogether. The presumption of reason as well as of law in favour of innocence, will attribute a variance in testimony to the former rather than the latter origin. Partial incongruities and discrepancies in testimony, as to collateral points, are, as has been already observed, to be expected; and it is for a jury to determine whether in the particular instance they are of such a nature and character, under all the circumstances, that they may or cannot be attributed to mistake. In estimating the probability of mistake and error, and also in deciding on which side the mistake lies, much must depend on the natural talents of the adverse witnesses, their quickness of perception, strength of memory, their previous habits of general attention, or of attention to particular subject-matters. A physician or surgeon would be much more likely to observe particular symptoms or appearances in a medical or surgical case, and to form from them correct conclusions, than an unskilful and inexperienced person would be likely to do. Much also must depend upon

a comparison of the means and opportunity which the witnesses had for making observations, of the circumstances which were likely to excite and engage their attention, and of their reasons and motives for attending; and here it is to be observed, that there is an important distinction between positive and negative testimony.

Positive and negative testimony.

If one witness were positively to swear that he saw or heard a fact, and another were merely to swear that he was present, but did not see or hear it, and the witnesses were equally faithworthy, the general principle would in ordinary cases create a preponderance in favour of the affirmative; for it would usually happen that a witness who swore positively, minutely and circumstantially, to a fact which was untrue, would be guilty of perjury, but it would by no means follow that a witness who swore negatively would be perjured, although the affirmative were true; the falsity of the testimony might arise from inattention, mistake, or defect of memory; and therefore, even independently of the usual presumption in favour of innocence, the probability would be in favour of the affirmative. If, for instance, two persons should remain in the same room for the same period of time, and one of them should swear that during that time he heard a clock in the room strike the hour, and the other should swear that he did not hear the clock strike, it is very possible that the fact might be true, and yet each might swear truly. It is not only possible but probable that the latter witness, though in the same room, through inattention, might be unconscious of the fact, or, being conscious of it at the time, that the recollection of it had afterwards faded from his memory. It follows therefore, by way of corollary to the last proposition, that in such cases, unless the contrary manifestly appear, the presumption in favour of human veracity operates to support the affirmative.

And further, when in cases of conflicting testimony, upon a comparison between the witnesses in respect of the means and opportunity which they have had of ascertaining the facts to which they testify, it turns out that the one class has had more competent and adequate means of information than the other, or, that under the circumstances, the attention of the latter was not so likely to be so fully excited and particularly directed to the facts, this principle co-operates with the weight of evidence in favour of the former, in all cases where there is room for error or mistake.

The application of this principle supposes that the positive can be reconciled with the negative testimony without violence and constraint. Evidence of a negative nature may, under particular

circumstances, not only be equal, but superior, to positive evidence. This must always depend upon the question, whether, under the particular circumstances, the negative testimony can be attributed to inattention, error, or defect of memory. If in the instance above supposed, two persons were placed in the room where the clock was, for the express purpose of ascertaining by their senses whether it would strike or not, there would be little room to attribute the variance between their negative testimony and the positive testimony of a third witness to mistake or inattention, and the real question would be as to the credit of the witnesses.

Positive and negative testimony.

It is also observable that this principle is inapplicable where a negative depends on the establishment of an opposite positive fact. Thus an *alibi* negatives the actual commission of a crime by the prisoner; but the evidence is of as direct and positive a nature as that which tends to prove his presence and actual commission of the crime.

Where the testimony of conflicting witnesses is irreconcileable, and cannot be attributed to incapacity or error, it frequently becomes a painful and difficult task to decide to which class credit is due. And here it is to be observed, in the first place, that all those considerations which have been applied as tests of the credit and veracity of witnesses uncontradicted, are also tests of credibility in cases of conflict. The first point of comparison is their character for integrity. This may either depend on positive evidence as to their previous situation (*d*), conduct and charac-

Conflict of testimony.

(*d*) The Roman law was far more copious than our own in its rules of exclusion.—Consequens est ut in omnibus causis fidem testium elevet ætas puerilis, insania, *conditio* vitæ, turpitudo, *paupertas magnum opprobrium*, &c. Heinecc. El. J. C. Part IV. sec. cxxxvi. L. 10, ff. L. 10, c. h. t.—Nec servorum testimonio credendum esse nisi alia desit ratio veritatem eruendi. Ib. sec. cxxxviii. L. 7. ff. h. f.—Vacillare fidem mulierum quæ quæstum corpore fecerunt. L. 3, § 5, h.—Eorum qui vitam ad cultrum vel ad depugnandas bestias locarunt. L. 3, § 5. h. f.—Omnium viliorum et pauperum quamdiu aliorum est copia ad. L. 3, ff. L. 18. c. h. t.—Ut merito repellantur pater in causâ filii, filius in causâ patris, aliique potestati vel imperio alterius subjecti vel domestici. L. 6, L. 9, L. 24, f. L. 3, L. 6, c. h. t. Ut suspecti etiam sunt amici et inimici. L. 3. pr. ff. L. 5, L. 17.—Although a proper sense of the sacred obligation of an oath may be equally strong in every condition of society, yet the temporal consequences of detected perjury or prevarication may frequently depend much on the witness's rank or situation in life. To a common labourer, the consequences of a violation of his oath would probably be confined merely to temporal punishment, and that only upon a conviction after an expensive legal process; whilst to a solicitor or attorney, whose professional existence depends upon his

Conflict of testimony.

ter, or may be matter of inference and presumption, from their relative situation as to the parties, or the subject-matter of the cause, and the various and almost innumerable circumstances by which their testimony may be influenced or biassed. Where testimony is equally balanced in all other respects, a slight degree of interest or connection may be sufficient to turn the scale. In such cases also, any variance in the testimony of the witness from a former statement relating to the same transaction, if it be established and not explained, necessarily tends to impeach either his integrity or his ability.

All those circumstances which were likely to influence and bias witnesses in favour of the party, are of course entitled to great consideration in weighing their credit, although they do not exclude their testimony. These are of too obvious and extensive a nature to require enumeration: not only may the stronger motives arising from the ties of consanguinity, friendship, or expectation of future gain, cast a doubt upon the credit of witnesses whose testimony is contrasted with that of persons who stand wholly indifferent, but so also, in cases where in other respects the weight of testimony is nicely balanced, may many considerations of an inferior and weaker description; such as the interest which the witness may possess in a similar question, or the bias and prejudice which may arise in favour of a party from connection in the way of trade, profession or membership of any description (*e*): considerations of this kind, which would frequently afford not the slightest ground for questioning the credit of an unimpeached witness, may become of essential importance when the credit of conflicting witnesses is in other respects in a state of equipoise.

reputation and credit, loss of character consequent upon detection, although there should be no conviction, might end in his ruin. Considerations of this nature must obviously possess a contrary tendency where the testimony of a witness tends to repel and remove some charge of improper conduct, which would otherwise affect his reputation. Thus, upon a question, whether a testator was capable of executing a will, a professional witness, whether legal or medical, has an interest in proving the capacity; for the fact that he had made or even witnessed a will, executed by one utterly incapable of making one, would affect his professional character. Such observations apply in those cases only of doubt and suspicion where the evidence is of a conflicting nature.

(*e*) Parimente la credibilità di un testimonio puo essere alcuna volta sminuita quand' egli sia membro d' alcuna società privata, di cui gli usi, e le massime siano o non ben conosciute o diverse dallo publiche. Un tal uomo ha non solo le proprie ma le altrui passioni.—Beccaria, c. 13.

Demeanour of the witnesses.

These considerations become still more important where any suspicion arises from the manner and demeanour of the witness in delivering his testimony. These, indeed, frequently afford strong tests for judging of his sincerity, although his motive be not apparent. Manifestations of warmth and zeal beyond those which the occasion naturally calls for, over-forwardness in testifying that which will benefit the party for whom he testifies, and ill-concealed reluctance in declaring that which tends to his prejudice, flippancy and levity of manner, coldness and apathy in describing injuries which would naturally excite a contrary feeling, indications of subtlety, artifice and cunning, are, with a multitude of others, tests for estimating the true character of a witness and the value of his testimony.

But above all, where the credit of conflicting witnesses is doubtful, as far as regards their number, their integrity, their means of knowledge, and the consistency and probability of their testimony, a comparison of their statements with each other, and with undisputed or established facts, is the great test of credibility.

Consistency of testimonies and comparison with circumstances.

The relative consistency of testimony is a most important test of comparison. The testimonies of witnesses of truth will consist with each other, and with all the established circumstances of the case, in numerous and minute particulars, which are frequently beyond the reach of invention (*f*), and will exhibit that degree of solid coherency which necessarily results from a real and actual connection and congruity in nature, which minuteness and detail of circumstances will serve but to render more complete; with false witnesses the very reverse takes place; their testimony must either be sparing in circumstances, and therefore of a nature obviously suspicious, or be liable to detection from comparing the invented circumstances with each other, and with those which are known to be true.

In cases of conflicting testimony, and particularly where the

(*f*) Dr. Paley, with reference to historical evidence, says, "The undesignedness of coincidences is to be gathered from their latency, their minuteness, their obliquity: the suitableness of the circumstances in which they consist to the places in which those circumstances occur, and the circuitous references by which they are traced out, demonstrate that they have not been produced by meditation or by any fraudulent contrivance; but coincidences from which these causes are excluded, and which are too close and numerous to be accounted for by accidental concurrence of fiction, must necessarily have truth for their foundation."

With written documents.

subject of litigation is remote in point of time, or the question depends upon the terms of oral communications, the evidence of written documents connected with the transaction are, on account of their permanency, of the most obvious and essential importance. Every day furnishes instances of the weakness of human memory in such cases, and great opportunity is afforded for misrepresentation or mistake; whilst writings are permanent, and, as has well been observed, are witnesses difficult to be corrupted (*g*).

As the depositions of dead or absent witnesses are, in point of law, of a secondary nature to the *vivâ voce* testimony of witnesses subjected to the ordeal of cross-examination, so are they inferior and weaker in point of force and effect. So true is it that a witness will frequently depose that in private which he would be ashamed to certify before a public tribunal (*h*). It is by the test of a public examination, and by that alone, that the credit of a witness both as to honesty and ability, can be thoroughly tried and appreciated (*i*). *Nam minus obstitisse videtur pudor inter paucos signatores* (*h*), is an ancient and a powerful observation in favour of oral testimony.

Total rejection of testimony.

As the credit due to a witness is founded in the first instance on general experience of human veracity, it follows that a witness who gives false testimony as to one particular, cannot be credited as to any, according to the legal maxim, *falsum in uno, falsum in omnibus*. The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness's testimony cannot be partial or fractional; where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result his testimony is to be credited or rejected.

It is scarcely necessary to observe, that this principle does not extend to the total rejection of a witness whose misrepresentation has resulted from mistake or infirmity, and not from design; but though his honesty remain unimpeached, this is a consideration which necessarily affects his character for accuracy. Neither does the principle apply to testimony given in favour of the adversary; such evidence is rather to be considered as truth reluctantly admitted, and divulged only because it was not in the power of

(*g*) Montesquieu, Espr. de Loix, l. 28, c. 44.

(*h*) 3 Bl. Comm. 373.

(*i*) *Supra*, 25. See Pothier, by Evans, vol. 2, p. 235.

(*k*) Quinctil. l. 5, c. 6.

a corrupt witness to conceal it. Hence it is a general principle, that a jury may believe that which makes against his point who swears, although they do not believe that which makes for it (*l*). Rejection of testimony.

The rejection of the witness may not be the only consequence of detection; for if there be reason to suppose from the circumstances that his perjury or prevarication is the result of subornation, it affords a reasonable ground, in a doubtful case, for suspecting the testimony of other witnesses adduced by the same party. This observation has no weight where it is apparent that the imputation is merely personal, and results from collateral motives independent of the cause.

The presumption is always *primâ facie*, and in the absence of circumstances which generate suspicion, in favour of the veracity of a witness; but where the usual and general presumption is encountered by an opposite one, it is necessary that the credit of the witness should be established by some collateral aid, to the satisfaction of the jury. The ordinary case of an accomplice affords an illustration of this application of the principle: his testimony is in practice deemed to be insufficient unless his credit be established by confirmatory evidence.

Comparison of direct and circumstantial evidence.

As it is universally admitted that circumstantial evidence is in its own nature sufficient to warrant conviction, even in criminal cases, and as the test of sufficiency is the understanding and conscience of a jury, it would be superfluous and nugatory to enter into a discussion of the comparative force and excellence of these different modes of proof, where they do not conflict with each other. In the abstract, and in the absence of all conflict and opposition between them, the two modes of evidence do not in strictness admit of comparison; for the force and efficacy of each may, according to circumstances, be carried to an indefinite and unlimited extent, and be productive of the highest degree of probability, amounting to the highest degree of moral certainty. With regard to the comparative force and efficacy of these modes of proof, it is clear that circumstantial evidence ought not to be relied on where positive proof can be had, and that so far the former is merely of a secondary nature (*m*). Hence it seems to be clear that no conviction in a criminal case ought ever to be founded on circumstantial evidence, where the prosecutor might

(*l*) See Ld. Mansfield's observations in *Bermon* v. *Woodbridge*, Doug. 751.

(*m*) 3 Comm. 371.

Comparison of direct with circumstantial evidence.

have adduced direct evidence; and in civil cases the resorting to such a practice would be a circumstance pregnant with the strongest suspicion.

The characteristic excellence of direct and positive evidence consists in the consideration, that it is more immediate and more proximate to the fact; and if no doubt or suspicion arise as to the credibility of the witnesses, there can be none as to the fact to which they testify; the only question is as to their credit. On the other hand, the virtue of circumstantial evidence is its freedom from suspicion, on account of the exceeding difficulty of simulating a number of independent circumstances, naturally connected and tending to the same conclusion. In theory, therefore, circumstantial evidence is stronger than positive and direct evidence, wherever the aggregate of doubt, arising, first, upon the question whether the facts upon which the inference is founded are sufficiently established, and secondly, upon the question, whether, assuming the facts to be fully established, the conclusion is correctly drawn from them, is less than the doubt, whether, in the case of direct and positive evidence, the witnesses are entirely faith-worthy. Where no doubt exists in either case comparison is useless; but it is very possible, where there is room for suspecting the honesty or accuracy of direct witnesses, that the force of their evidence may fall far short of that which is frequently supplied by mere circumstantial evidence; and whenever a doubt arises as to the credibility of direct witnesses, it is an important consideration in favour of circumstantial evidence, that in its own nature it is much less liable to the practice of fraud and imposition than direct evidence is; for it is much easier to suborn a limited number of witnesses to swear directly to the fact, than to procure a greater number to depose falsely to circumstances, or to prepare and counterfeit such circumstances as will without detection yield a false result. The increasing the number of false witnesses increases the probability of detection in a very high proportion, for it multiplies the number of points upon which their statements may be compared with each other, and also the number of points where their testimony comes in contact with the truth; and therefore multiplies the danger of inconsistency and variance in the same proportion.

So, on the other hand, it is exceedingly difficult by artful practice to create circumstances which shall wear the appearance of truth, and tend effectually to a false conclusion. The number of such circumstances must of necessity be limited in their

nature; they must be such as are as capable of fabrication by an interested party, and such that their materiality might be foreseen. Hence all suspicion of fraud may be excluded by the very number of concurring circumstances, when they are derived from various but independent sources, or by the nature of the circumstances themselves, when either it was not in the power of the adverse party to fabricate them, or their materiality could not possibly have been foreseen, and consequently where no temptation to fabricate them could have existed.

Consistency of positive testimony with circumstances.

The correspondence or inconsistency of direct evidence with well-established circumstances, is the great, and frequently the only test, for trying the truth of direct testimony which labours under suspicion. A perjured witness will naturally, with a view to his own security, so frame his fiction as to render contradiction by direct and opposite testimony impracticable. He will also be sparing in his detail of circumstances which are false, and which are capable of contradiction; the more circumstantial his statement is, the more open it is to detection. Hence it is that circumstantiality of detail is usually a test of sincerity, provided the circumstances be of such a nature as to be capable of contradiction if they be false; and that, on the other hand, if a witness be copious in his detail of circumstances which are incapable of contradiction, but sparing of those which are of an opposite kind, his testimony must necessarily be regarded with a degree of suspicion. As circumstances are the best and frequently the only means of detecting false testimony, it follows that no fictions are more formidable and more difficult to be detected than those which are mixed up with a large portion of truth; every circumstance of truth interwoven with the fiction, so far from being merely negative in its effect, in affording no aid for detecting the fraud, actually tends to confirm and support it.

It is however to be observed, that positive testimony ought not to be rejected on the ground of inconsistency with circumstances, unless the incongruity be of a conclusive and decisive nature. Mere improbability is usually an insufficient ground for the rejection of positive testimony which labours under no suspicion; for experience frequently shows that circumstances do in reality agree and did actually co-exist, although, from ignorance of the numerous links by which they are united and connected, their co-existence would *à priori* have been deemed to be highly improbable.

When, however, the positive testimony labours under doubt

and suspicion, mere circumstantial evidence is frequently sufficient to prevail, although such testimony be not wholly and absolutely irreconcileable with the facts. Thus in the case of Mr. Jolliffe's will, the will was established on circumstantial evidence, in opposition to the direct testimony of the attesting witnesses.

Conflict in circumstances.

Where doubt arises from circumstances of an apparently opposite and conflicting tendency, the first step in the natural order of inquiry is to ascertain whether they be not in reality reconcilable, especially where circumstances cannot be rejected without imputing perjury to a witness: for perjury is not to be presumed; and in the absence of all suspicion, that hypothesis is to be adopted which consists with and reconciles all the circumstances which the case supplies. In the next place, where the circumstances are inconsistent and irreconcileable, it becomes necessary to inquire which of them are attributable to error or design. Here again, in distinguishing between the real and genuine circumstances, and those which are spurious, regard is to be had to those principles which have already been adverted to: it is rather to be presumed that one witness was mistaken, where there was room for mistake, than that another witness, where the facts exclude all mistake, was wilfully perjured. Where mistake is out of the question, an examination of the different degrees of credit due to the witnesses on whose testimony the conflicting circumstances depend, becomes material; and in such cases a careful comparison of the circumstances which they state, with facts either admitted or fully established is of the most obvious and essential importance. Every admitted or established fact affords an additional test for trying the truth and genuineness of those which are doubtful, by means of which those which are genuine may be established and become additional tests of truth, and those which are false may be rejected.

Rejection of circumstances inconsistent with those which are fully established.

Whenever any fact is found to be wholly inconsistent with those which are either admitted or indubitably proved, the mere rejection of that single fact, and the difficulty thus removed, is not the only step gained in the progress towards truth; the vicious evidence must have resulted from error or from fraud; and whether under the circumstances it is to be ascribed to the one source or the other, it affords a test for judging of the ability or integrity of the witness, and not unfrequently affords some insight into the conduct of the party.

Fraud in circumstances.

Frauds in circumstantial evidence are of two kinds: a false witness may swear to circumstances purely fictitious, or an honest

witness may swear to circumstances which he has really observed, but which have been prepared with a view to deceive; as in the instance already alluded to, where a discharged pistol was placed near the body of a murdered person, to induce a belief that he had destroyed himself. Those of the former description admit of absolute and positive contradiction, or may be detected by the inconsistency of the fictitious circumstances with those established by unexceptionable testimony; and the witness himself is liable to detection in his attempt to interweave that which he has invented with that which is true. Simulated facts, on the other hand, are in themselves true; they are false only inasmuch as they tend to induce a false conclusion. These, however, are open to detection by a careful comparison with established circumstances; it is beyond the power of human subtlety to create a false consistency of circumstances beyond a very limited extent (*n*).

Fraud in circumstances.

No cases of conflicting evidence are more difficult of solution than those where facts apparently well established lead to opposite conclusions. These, in some remarkable instances, are of such a nature as to leave the mind in a state of perplexity after the most patient and laborious investigation. This more especially happens where the obscurity arises from the conduct of the parties concerned; so difficult is it to ascertain the real motives by which the actors in a distant transaction were influenced, or even to determine whether their conduct has not resulted from weakness or caprice rather than from any settled and determinate principles of action, or from the operation of mixed, fluctuating and transitory motives, which can no longer be distinctly traced. The celebrated Douglas cause may be cited as a striking instance of this nature. The gross improbability that Sir John Stuart and Lady Jane would, under the circumstances, have attempted so monstrous a fraud, the effect of which might be to deprive their own future offspring of their legitimate rights, and the vast danger and difficulty of carrying such a scheme into execution, by the procurement of two suppositious children, either by stealth or by bribery, situated as they were, with but slender resources in a foreign capital, under the eye of a vigilant police, were circumstances so strong in favour of the legitimacy of the children, that nothing but the strange and unaccountable conduct of the parties could have induced fair and reasonable doubts

Conflict of established circumstances.

(*n*) *Supra*, 49.

upon this interesting and important question. To pursue these considerations farther would be inconsistent with the limits of the present treatise. Suffice it to add, that where conflicting probabilities are nicely balanced, it rarely happens that some rule of legal policy does not turn the scale, even in civil cases; and that in criminal proceedings, where reasonable doubts exist, they must ever prevail in favour of mercy.

END OF VOL. I.

APPENDIX, VOL. I.

Res inter Alios, p. 61.

TO prove the manner of conducting a particular branch of trade at one place, evidence may be given of the manner of conducting the same branch at another place. *Noble* v. *Kennaway*, Dougl. 510.

In order to show the necessity of calling in the aid of the military to execute process, proof of acts of violence by the mob collected in another quarter, but collected for the same purpose as those about the plaintiff's house, is admissible. *Burdett* v. *Colman*, 14 East, 183.

Declarations of Strangers, &c.

In trespass against the sheriff, and an execution creditor, for seizing goods of *A.*, which the plaintiffs claimed as assignees under a joint commission against *A.* and *B.*, the plaintiffs, in support of the joint commission, gave evidence of acts and declarations of *B.*, for the purpose of showing that he had become bankrupt; held that this evidence was inadmissible. *Bernasconi and others* v. *Farebrother*, 3 B. & Ad. 372.

Subpœna, p. 77.

A *subpœna*, in order to bring a party into contempt for non-attendance under it, must have inserted in the body of it the place where the cause is intended to be tried, if at the sittings in London or Middlesex. *Milsom* v. *Day*, 3 M. & P. 333.

Expenses, p. 84.

Where an indictment for a felony was removed by *certiorari* and tried at *Nisi Prius*, neither the Court nor the Judge who tried it has power to award costs of the prosecutor under 7 Geo. 4, c. 64, s. 22. *R.* v. *Exeter Co. Treas.*, 5 M. & Ry. 167.

The summary remedy given to witnesses by 53 Geo. 3, is not limited to witnesses summoned for the petitioner, but extends to costs and expenses becoming due from the sitting member as well as the petitioner; held also, that the certificate of the Speaker is conclusive as to the proof of the witness having been summoned. *Magrave* v. *White*, 8 B. & C. 412.

Production of Papers, &c., p. 87.

The Court refused to compel the defendant, who was in possession of a lease on which the plaintiff brought an action, to permit a copy to be taken, although it appeared that the plaintiff had no copy or counterpart, and although the attorney who drew the lease and counterpart had absconded. *Lord Portmore* v. *Goring*, 4 Bing. 52. But note, it was not shown that no counterpart was in existence, and on that ground the Court decided.

Protection, p. 90.

A petitioning creditor is entitled to the privileges of a party, and is protected *eundo morando et redeundo*. *Selby* v. *Hills*, 6 M. & P. 255.

A witness resident in London is not protected from arrest between the time of the service of the *subpœna* and the day appointed for his examination; but a witness coming to town to be examined is protected during the whole time during which he remains in town *bonâ fide* for the purpose of giving his testimony: a witness is not protected in going to the solicitor's office to look at the interrogatories, as preparatory to his examination. *Gibbs* v. *Phillipson*, 1 Russ. & M. 19.

Liability, *&c.*, p. 106.

A member of a society undertaking to contribute towards all law expenses respecting it, is a competent witness in an action brought against the secretary for a libel: if the agreement were, to contribute towards bearing each other harmless in doing wrong, it would be void. *Humphrey* v. *Miller*, 4 Carr. & P. C. 7.

The servant of a party who had been bargaining for the purchase of a chattel, came to the owner, and said that his master desired to look at it, and would keep it if approved of; the chattel was in consequence delivered to the servant; held that the master was a competent witness to prove in defence, that the message had been delivered by his authority, and the chattel received and kept by him. *Grylls* v. *Davies*, 2 B & Ad. 514.

Where a pilot was on board who had the control of the ship, held that he was not a witness for the owners, in an action on the case for an injury by running foul of another vessel, without a release. *Hawkins* v. *Finlayson*, 3 Carr. & P. C. 305.

Interest, *Liability*, p. 106.

Where the party in possession would be liable for mesne profits, if the lessor of plaintiff should succeed, he is not a competent witness for the defendant. *Doe* d. *Lewis* v. *Preece*, 4 Carr. & P. C. 556.

Ex Necessitate, p. 120.

In the late case of *Lancum* v. *Lovell*, 9 Bing. 465, in an action for toll claimed for passage on a public road, it was held, after argument before the Judges, that persons who had used the road, refusing to pay toll, were *ex necessitate* competent witnesses. This was decided on the ground that it is a public right in which all mankind are interested; and if such an objection were to prevail, a man would have only to set up a toll or any other claim as against all the world, and no man who had used the way could be called to controvert or contradict the claim, although he had uniformly resisted the yielding to such a demand.

It was held to fall within the second rule laid down, B. N. P. 289,

that a party who has an interest will be admitted where no other evidence can reasonably be obtained.

It was observed, that it was unnecessary to consider whether the case of *Lord Falmouth* v. *George* savoured more of a public or private right, because the present was clearly a case of public right; and that the case of *The Carpenters' Company* v. *Hayward*, Doug. 373, affected only a particular class of tradesmen, not the King's subjects in general.

In a cause of collision, where the interest of witnesses (part of the crew of the ship in default) was doubtful, and the acts and words of the crew were brought forward to support the charge of misconduct, and there was no other evidence which could be produced, the Court, on the ground of necessity, and for the purposes of justice, admitted the witnesses for the owners; and upon the evidence, the loss being found to have been occasioned by accident, imputable chiefly to an improper movement on the part of the injured vessel, and not to any misconduct of the other, the Court dismissed the latter with costs. *Catherine of Dover*, 2 Hagg. 145. See also the cases of *The Pitt* and *San Barnardina*, ib. n. 149, 151, where interested witnesses were admitted *ex necessitate rei*.

Release, p. 126.

A general release by a creditor to a bankrupt is not sufficient to render the bankrupt a competent witness for the creditor, where the result of his testimony would give the creditor a right to prove under the commission. The creditor ought also to give a release to the assignee of all claim on the bankrupt's estate, and the bankrupt ought to release his claim to a surplus. *Perryman* v. *Steggall*, 8 Bing. 369.

In case against coach proprietors and the coachman, for an injury sustained by the overturning of the coach; held, that they might be joined, but that upon the acquittal of the latter by consent, a release, executed by one of the proprieters, was sufficient. *Whitamore* v. *Waterhouse*, 4 Carr. & P. C. 383.

In an action against the sheriff for removing goods under an execution without first satisfying a year's rent, the tenant, being released, is a competent witness for the landlord; and the defendant cannot avail himself of such release by plea *puis darrein continuance*, or limit the verdict to nominal damages only. *Thurgood* v. *Richardson*, 4 Carr. & P. C. 481.

Where the witness is entitled to a distributive share of the intestate's effects, of which the sum to be recovered in the action by the plaintiff as a surviving partner (being also administrator) would form part, a general release at the trial of all claims, &c. up to the date of the release, will not render the party a competent witness, such share arising, if at all, after the release. *Matthews* v. *Smith*, 2 Y. & J. 426.

Where, in an action by the assignees, the bankrupt was called by them, held, that his incompetency not arising upon the *voir dire*, but being

involved in the very title of the plaintiffs to recover, his incompetence must be removed by the very best evidence, and that both a release and his certificate ought to be produced. *Goodhay* v. *Hendry*, 1 Mood. & M. C. 319. And see *Wandless* v. *Cawthorne*, ib. 321, n.

Bill of Exchange.

In an action by the indorsee against the acceptor, the drawer, is a competent witness for the plaintiff, although he states that the defendant had taken the benefit of the Insolvent Act, and that his name was inserted as a creditor in the schedule. *Cropley* v. *Corner*, 4 Carr. & P. C. 21.

In an action against the drawer of a bill payable to his own order, but for the accommodation of the first indorsee, since become bankrupt, held that the latter was a competent witness to prove notice to defendant of the dishonour, as coming to speak against his own interest; but that the defendant could not be deemed a person, surety, or liable for a debt of the bankrupt, within the 49 Geo. 3, c. 121, s. 8, so as to be barred by the certificate. *Mayer* v. *Meakin*, 1 Gow's C. 183.

Where two partners being sued on a bill as indorsees, one pleaded his discharge by bankruptcy and certificate, and a *non pros.* was entered as to him; held, that as since the 49 Geo. 3, c. 121, s. 8, the solvent partner, after payment of the partnership debt, might prove against his insolvent partner's estate, and the certificate be a bar to any action for contribution, the bankrupt was an admissible witness for him. *Afflalo* v. *Fourdrinier*, 6 Bing. 306; and see tit. PARTIES.

Creditor not a competent Witness for the Executor, &c., p. 137.

But on the plea of *plene adm.* held that an unsatisfied creditor was a competent witness to prove payments by the administratrix. *Davies* v. *Davies*, 1 Mood. & M. C. 345. See Vol. I. 104.

Where the plaintiff sued two on a joint contract, and one pleaded his bankruptcy and certificate, held that by suing both the plaintiff had elected not to prove the debt under the separate commission, and that a verdict in that action could not affect the interests of the bankrupt's creditors, one of whom was therefore a competent witness to prove the joint contract. *Blamin* v. *Taylor*, 1 Gow's C. 199.

Inhabitant, p. 141.

In an action against the surety for the collector of rates, held, that an inhabitant was a competent witness to prove payments to the collector, *ex necessitate*. *Middleton* v. *Frost*, 4 Carr. & P. C. 16.

Legatee not competent, &c.

That is, when he is residuary legatee. See *Baker* v. *Tyrwhitt*, 4 Camp. C. 27; and Vol. I. 104.

Trustee.

Trustees are empowered as a public body to sue and be sued in the name of their treasurer, but to be deemed the plaintiffs; *semble*, they

are not competent witnesses for the plaintiff in an action so brought. *Whitmore* v. *Wilks*, 1 Mood. & M. C. 214; and 3 Carr. & P. C. 364.

Question of Skill, p. 153.

An alleged libel imputes, *inter alia*, that a physician, in refusing to act with the plaintiff as a physician, had well and faithfully discharged his duty to his medical brethren; the defendant cannot, in support of a plea in justification, examine a medical witness as to his opinion on the subject. *Ramadge* v. *Ryan*, 9 Bing. 333.

Where the evidence discloses facts and symptoms of insanity from religious fanaticism, a medical man may be asked whether the facts proved showed symptoms of insanity, (Park, J.) *Rex* v. *Searle*, 2 Mood. & M. C. 75.

In an action for words imputing want of skill to the plaintiff, a physician, held, that although the Court could not receive medical books in evidence, a witness might be asked as to his judgment, though founded on books, as part of his general knowledge. *Collier* v. *Simpson*, 5 Carr. & P. C. 73.

Examined apart, p. 163.

The Court ordered the witnesses on the part of the defendant out of court, after the plaintiff's case was closed. *Taylor* v. *Lawson*, 3 Carr. & P. C. 543.

Witness by surprise, &c., p. 185.

Where a party, being surprised by a statement of his own witness, calls other witnesses to contradict him as to a particular fact, the whole of the testimony of the contradicted witness is not therefore to be repudiated by the Judge. *Bradley* v. *Ricardo*, 8 Bing 57.

Register, p. 210.

The clause in the stat. 50 Geo 3, c. 48, s. 7, enacts that the name painted on the outside pannel of each door of a public stage-coach shall be evidence of ownership; and as the enactment is general in its terms, it is not confined in its application to summary proceedings before magistrates, but is, in general, good evidence of proprietorship. *Barford* v. *Nelson*, 1 B. & Ad. 571.

Effect of a Judgment, p. 227.

It will be remarked, that the evidence of a former verdict is generally (except where it is directly conclusive) cautiously to be received by a jury, who are to decide on their own conscience, and not on that of other men. If there was clear and full proof to guide the opinion of the former jury, another jury will be satisfied by like proof; if the evidence before was doubtful in its nature, no verdict will render it otherwise while the facts remain the same. Perhaps there is among men in general too great proneness to be prejudiced in matters of fact, and even in points of conscience, by the notions or determinations of others who may have been antecedently so prejudiced themselves,

instead of attending to their most solemn duty, when called by the nature of the subject to use their own. On the whole, though the verdict of one jury may be evidence to another, and that verdict may vary in its real force, yet generally it seems to be evidence merely admissible; it is wisely limited by the law within very narrow bounds. In proof of an ancient custom it is very strong. Doug. on Contested Elections, 21.

Judgment against the Principal, &c. p. 238.

Although an accessory, as a receiver, may controvert the guilt of the alleged principal, yet the record of conviction of the principal is *primâ facie* evidence of the principal felony as against the accessory. *R.* v. *Blick*, 4 Carr. & P. C. 377.

Foreign Judgment, p. 247.

In order to sustain a suit in England for damages awarded by an Admiralty Court abroad, the transcript of the proceedings in the Admiralty Court should show expressly, and not by mere inference, the sentence of the Admiralty Court, and that the defendant was within its jurisdiction. *Obicini* v. *Bligh*, 8 Bing. 335.

In order to render a foreign judgment void, on the ground that it is contrary to the law of the country where it was given, it must appear clearly and unequivocally to be so. Where the law of a foreign country required that, in a suit instituted against an absent party, the proceedings should be served upon the King's attorney-general, but it was not provided that the attorney-general should communicate with the absent party; held, that such law was not so contrary to natural justice as to render void a judgment obtained against a party who had resided within the jurisdiction of the court at the time when the cause of action accrued, but had withdrawn himself before the proceedings were commenced. *Becquet and others* v. *Mary Mac Carthy*, 2 B. & Ad. 951.

Where the sentence of condemnation of a foreign prize court, for breach of blockade, was expressed with so much ambiguity as to render it impossible to ascertain the real ground on which it proceeded; held that the Court was at liberty, upon the evidence given at the trial in an action on the policy, to determine whether such violation of the blockade did take place or not; held also, that a voyage described in the policy as to *B.*, but if advised of a blockade continuing, then to *M. V.*, was not illegal. *Dalgleish* v. *Hodgson*, 7 Bing. 495. And see *Naylor* v. *Taylor*, 9 B. & C. 718. *The Shepherdess*, 5 Rob. Adm. R. 262.

Proof of Judgments, &c., p. 252.

A document produced from the Remembrancer's office in the Exchequer, purported to be a decision by parties some of whom were members of the court and others not, joined with the attorney and solicitor-general acting judicially; held, that it could not be received as the judicial proceedings of any court known to the law, nor as an

award, one of the parties not being a voluntary party; nor could it be evidence of reputation, the parties having no personal knowledge of the facts except what was derived in the course of the proceedings: held, therefore, that upon the trial of a *quo warranto* information as to an alleged usurpation of jurisdiction of a county palatine, such documents were improperly received. *Rogers* v. *Wood*, 2 B. & Ad. 245.

Witness must be dead, &c., p. 264.

The illness of prosecutor may be a ground for postponing the trial, but not of receiving his depositions taken before a magistrate (cor. Patteson, J.), *Rex* v. *Savage*, 5 Carr. & P. C. 143.

Where a witness on a former trial of an issue out of Chancery died, and a new trial was granted, parol evidence of what such witness had sworn was held to be admissible, notwithstanding an order for reading the depositions in equity of such witnesses as had died since the first trial. *Tod* v. *Earl of Winchelsea*, 3 Carr. & P. C. 387.

Examination of Witnesses on Interrogatories, &c.

Where, under the 13 Geo. 3, c. 63, s. 44, the defendant had obtained depositions in India; held that the plaintiff was entitled to take copies of them at his own expense. *Davis* v. *Nicholson*, 7 Bing. 358; 5 M. & P. 185.

A party was refused leave to examine a co-plaintiff as a witness, on a reference to inquire what was due on a bond, upon giving security for costs. *Benson* v. *Chester*, Jac. 677.

The motion to examine *de bene esse* is of course where the witness is above seventy, is the only witness, or in a dangerous state, but not in a state of mere infirmity; but the Court refused to shorten the time of notice (three days) of the intention to examine. *Tomkins* v. *Harrison*, 6 Mad. 315.

Evidence on former Trial, p. 267.

Where the witness, deposing as to what the defendant swore on a trial, stated that he could not swear he had stated all which fell from the prisoner, but would swear that he said nothing to qualify it, it was held to be sufficient. *Rowley's Case*, 1 Ry. & M. 111.

Examination under Stat. 1 *Will.* 4, *c.* 22, p. 276.

Quære, whether pregnancy and imminent delivery be a cause for the examination of a witness by the prothonotary under the statute.

If so, it must be shown by affidavits of competent persons that the delivery will probably happen about the time fixed for the trial of the cause. *Abraham* v. *Newton*, 8 Bing. 274.

The whole of an Answer, &c., p. 287.

In an action against the sheriff for a false return of *nulla bona*, to an execution issued against the goods of *E.*, the latter having filed a bill in Chancery, in which suit an order had been made that all letters

written by *E.*, *inter alia*, should be brought into court; held, that although the defendant might put in evidence the order as an act of court not affecting the right of either parties, yet that the letters of *E.* were inadmissible without the bill and answer; it not being proposed to put in with them any letter written by the plaintiff in reply, the answer might explain or wholly neutralize the effect of such letters. *Hewitt*, 5 Carr. & P. C. 75.

Where a party (in equity) reads a passage from the defendant's answer, he reads all the facts stated in that passage; if it refer to any other passage, or facts stated in any other passage, that must be read, but only for the purpose of explaining the former; and if new facts are stated in the passage so referred to, which must in grammatical construction be read for the purpose of explanation, the facts and circumstances so introduced are not to be considered as read. *Bartlett* v. *Gillard*, 3 Russ. 157.

Course of business, &c., p. 298.

It may further be observed, that the mere circumstance of an entry having been made which might operate against the interest of the party making it, would not in itself, and independent of some support from its connection with the exercise of some duty, or with the ordinary course of dealing, be sufficient to warrant the admission of the entry in evidence. Suppose, for instance, that a party were to make an entry in his pocket-book that he had made a wager with another as to the existence of some fact, and that he had lost the wager, the entry would be to a certain extent against his interest, for it might by possibility be used as evidence against him; yet it seems to be clear that the entry would not be evidence as to the fact against a stranger. The above remarks are confirmed by a recent decision. It was proved to be the usual course in an attorney's office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service. On one occasion the attorney himself prepared a notice to quit to serve on a tenant, and took it out with him, together with two others prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of having delivered it to the tenant, and two of them were proved to have been delivered; after his death the indorsement is evidence of the service of such notice. *Doe* v. *Turford*, 3 B. & Ad. 890. For (per Lord Tenterden) the indorsement having been made in the discharge of his duty, was, according to the authorities, admissible evidence of the fact of service. Park, J. held that it was admissible evidence, not on the ground that it was an entry against the interest of the party, but because, being an entry made at the time of his return from his journey, it was one of a chain of facts from which the delivery of the notice might be inferred. Taunton, J., because it was made at the time of the recorded fact in the ordinary course of business, and the fact was corroborated by circumstances.

Documents written by a Party, p. 294.

Letters written by a party are evidence against him, without producing the answers to such letters. *Lord Barrymore, administrator*, v. *Taylor*, 1 Esp. C. 326; Kenyon, C., J. 1795. And see *Smith* v. *Young*, 1 Camp. 439. *Randle* v. *Blackburn*, 5 Taunt. 245.

Entry by Third Person, p. 297.

Where an entry made by a clerk, since deceased, is ambiguous, a person conversant with the mode in the office in which the business was conducted may be called to explain a particular item. *Hood* v. *Reeve*, 3 Carr. & P. C. 532.

In ejectment, the declarations of a deceased occupier as to the party of whom he held them as tenant, are admissible. *Doe* d. *Marjoribanks* v. *Green*, 1 Gow's C. 227.

The accounts of deceased overseers of *B.*, to which the tenants of the lands were successively assessed, and against whose names crosses were made, are admissible in evidence of payment of such rates by them, as a common mode of denoting payment. *Plaxton* v. *Dare*, 10 B. & C. 17.

Entries against Interest, &c., p. 305.

Where entries were made against the interest of a party who had quitted the kingdom, there being charges of a criminal nature against him, but was still living; held that it was not sufficient to entitle his declarations to be read. *Stephen* v. *Gwennap*, 2 Mood. & M. C. 120.

Accompanying Acts, p. 301.

Statements made by the bankrupt, showing his knowledge and opinion of the state of his affairs at the time of the acts in question, held to be receivable, although not accompanying any act done; so letters received by him in answer to applications for advances, are evidence to show the refusal to render him such assistance, but not as to any facts stated in them. *Vacher* v. *Cocks*, 1 Mood. & M. C. 353.

Production, p. 318.

Where, in ejectment after notice to quit, it appeared by the plaintiff's evidence that the premises had been demised by a writing; held that he was bound to produce it.

Private Entries, &c., p. 320.

Circumstances necessary to make a document evidence must be proved *aliunde*, and not from the document itself; in order, therefore, to make entries of a corporator evidence, held that it must be first shown by other evidence that he was a corporator. *Davies* v. *Morgan*, 1 Cr. & J. 587.

Attesting Witness's Absence, excuse for, p. 325.

Where it was proved that the attesting witness had gone abroad two years ago, and it was not known what had become of him since, and

the defendant had been heard to say he had sixteen years to come of the term granted by the lease, held that proof of the subscribing witness's hand-writing was sufficient, though the party executing the deed was a marksman. *Doe* d. *Wheeldon* v. *Paul*, 3 Carr. & P. C. 613.

Where the attesting witness cannot be produced, proof of his hand-writing is sufficient evidence of execution by the obligor, although only a marksman. *Mitchell* v. *Johnson*, 1 Mood. & M. C. 176.

Where the subscribing witness to the deed of proprietors constituting a company, was beyond seas; held that proof of his hand-writing was sufficient, without further proof of the hand-writing or identity of the parties. *Kay* v. *Brookman*, 1 Mood. & M. C. 286; and 3 C. & P. 555, overruling *Nelson* v. *Whittall*, 1 B. & A. 19.

Proof in excuse of Absence, p. 327.

A fortnight before the trial inquiry is made in vain of the clerk and agent of the attesting witness, and five or six days before the trial inquiry is made of his wife and servant at his house, who could give no information; a bailiff, from whom he had escaped, stated that he had searched for him without effect; held to be sufficient. *Morgan* v. *Morgan*, 9 Bing. 359.

One whose Name appears, &c., p. 330.

The attesting witness to a bond declared that he did not see it executed by the obligor; held that it was the same as if there had appeared to be no attesting witness, and that the execution was sufficiently proved by showing the hand-writing of the obligor. *Boxer* v. *Rabeth*, 1 Gow's C. 175.

Proof of Loss, p. 336.

Where it was sworn that the original lease had been stolen from the plaintiff by a party, at the instigation of the defendant, who either had it or knew where it was, and there was no denial on the part of the defendant, the Court made a rule absolute for giving secondary evidence of its contents. *Doe* d. *Pearson* v. *Ries*, 7 Bing. 725.

The master of an apprentice having the indentures in his possession failed; an attorney took the management of his estate and the custody of his papers, which he inspected without finding the deed; this is sufficient evidence of loss, though the widow be still living, and no inquiry has been made from her: such an inquiry would have been useless after such evidence as to the master's papers. *Rex* v. *Piddlehinton*, 3 B. & Ad. 460.

Notice to produce, &c., p. 347.

Notice by the plaintiff was served on Saturday, in Essex, to produce a deed on a trial at the assizes which commenced on the following Monday; the attorney went to London and fetched the deed; a notice was served on the Monday evening to produce another deed; the attorney offered to procure it if the plaintiff would pay the expense;

no offer of payment was made; the trial was on Thursday: held that the plaintiff was not entitled to give secondary evidence of the latter deed. *Doe* v. *Spitty*, 3 B. & Ad. 182. The defendant was not bound to permit the deed to be sent by a coach, the plaintiff refusing to pay for a special messenger.

Notice to a prisoner to produce a deed, served after the commencement of the assizes at which he is tried for felony, is not sufficient. *Rex* v. *Haworth*, York Lent Assizes, 1830, cor. Parke, J.

Where in an action against partners the defence was, that the bill had been accepted by one for his private debt, with the knowledge of the plaintiff; held, that other bills accepted by that partner, and paid, were not so connected with the subject of the trial as to render a notice on the attorney to produce them (too late for him to obtain them from his client) sufficient to let in secondary evidence of them. *Afflalo* v. *Fourdrinier*, 1 Mood. & M. C. 335.

In trover for a deed, the plaintiff may prove the nature and contents without calling for it, the defendant being at liberty to produce it as part of his case. *Whitehead* v. *Scott*, 2 Mood. & M. C. 2.

The rule of dispensing with the evidence of a subscribing witness to a deed, coming from an adverse party, is confined to the case where the instrument is produced by such party at the trial. *Vacher* v. *Cocks*, 1 B. & Ad. 151.

Order of Proof, p. 366.

Wherever it appears on the record, or from the statement of counsel, that there is no real dispute as to the sum to be recovered, but the damages are either nominal or mere matter of computation, then if the affirmative of the issue is on the defendant, he is entitled to begin; where therefore, to an action on bills of exchange, there was a plea of abatement of the nonjoinder of others, held that the defendant ought to begin. *Fowler* v. *Coster*, 1 Mood. & M. C. 241; and 3 Carr. & P. C. 463.

Where the lessor of plaintiff claimed as heir at law of the person last seised, which the defendant proposed to admit, if he were legitimate, which was the question at issue; held that such admission did not go so far as to admit a complete title, and to give the right of beginning. *Doe* v. *Bray*, 1 Mood. & M. C. 166.

Where in ejectment by the heir at law, to recover premises conveyed by the deceased ancestor under a deed which was impeached on the ground of his incapacity at the time of execution; held, that as the seisin of the ancestor at the time of his death was not admitted, the mere admission of the lessor's title, as heir by pedigree, did not entitle the defendant to begin. *Doe* v. *Tucker*, 1 Mood. & M. C. 536.

Upon an action of trover brought under an order of the Vice Chancellor to try the validity of a commission directing the finding and conversion to be admitted; held that the plaintiff was nevertheless entitled to begin. *Turberville* v. *Patrick*, 4 Carr. & P. C. 557.

Where in replevin the affirmative issue was on the plaintiff, held that he was entitled to begin, there being in this respect no distinction between the action of replevin and any other. *Curtis* v. *Wheeler*, 1 Mood. & M. C. 493.

Where the plaintiff, in his pleas to cognizances, stated matters in fact amounting to *non tenuit*, yet held, that as in point of form the affirmative was on him, he was entitled to begin. *Williams* v. *Thomas*, 4 Carr. & P. C. 234.

So in trespass, where the only plea was of taking the goods under a commission of bankruptcy; held that the defendant was entitled to begin. *Cotton* v. *James*, 1 Mood. & M. 273; and 3 Carr. & P. C. 505.

Where the defendants in ejectment appeared by separate attornies and counsel, held that only one counsel could address the jury where they supported the same title. *Doe* v. *Tindale and another*, 3 Carr. & P. C. 565.

Where one of two defendants in trover appeared by counsel, and the other in person; held, that the defence being joint and by one attorney, the counsel only could address the jury, but the party might cross-examine the witnesses. *Perring* v. *Tucker and another*, 1 Mood. & M. 491; and 4 Carr. & P. C. 70.

Action for the amount of a builder's bill; the defence was that the charges were too high; the defendant called surveyors, who said they considered them 100 *l.* too high; and the plaintiff offered a letter on the part of the defendant by his attorney, some time before, complaining that the defendant's surveyor thought the charges 60*l.* too much: held that it was not properly evidence in reply. *Knapp* v. *Haskall*, 4 Carr. & P. C. 590.

An account-book having been put into the witness's hand to refresh his memory, and the opposite counsel having made observations as to the state in which it was kept; held not to give a right of reply. *Pullen* v. *White*, 3 Carr. & P. C. 434.

VARIANCE.

Surplusage, p. 377.

Where an intention to deceive is unnecessarily alleged in an indictment, it may be rejected. *Rex* v. *Jones*, 2 B. & Ad. 211.

Prescription, p. 388.

A privilege claimed for fastening ropes across a close in order to hang linen, and of hanging linen thereon to dry, is not proved by evidence of a privilege for tenants to hang lines across a yard for the purpose of drying linen of their own families only. *Drewell* v. *Towler*, 3 B. & Ad. 735.

Contract, p. 399.

Where the evidence applied only to the second count, in which the regulations of an association for mutual insurance indorsed on the

policy were altogether omitted, held, that as they formed a material part of the contract, the plaintiff could not recover; and that as they also qualified the consideration stated in the instrument, and materially altered the situation of the parties in certain cases, it was a fatal variance in the statement of the contract. *Strong* v. *Rule*, 11 Moore, 86.

Name, p. 411.

Description of a peer of Ireland by his christian and *family* name and title held to be sufficient; the insertion of the surname is no variance, as the Court will not intend the two to be only his christian name. *Rex* v. *Brinklett*, 3 Carr. & P. C. 416.

On an information for offering a bribe to one *T. D.*, an officer of the customs, to allow *bugles* to pass; held that it was no variance that the officer's name was *T. T. D.*, and not merely *T. D.*, it being in evidence that he generally went by the latter name; nor, secondly, that the articles were *beads* and not bugles, it appearing that the defendant himself had treated them as bugles, and that they were usually called by that term; held also, that an entry of customed goods, by bill of sight under 6 Geo. 4, c. 107, s. 23, obtained by fraud, was no protection to the landing without entry. *Attorney-general* v. *Hawkes*, 1 C. & J. 121; and 1 Tyrw. 3.

Writing, p. 418.

Profert of an indenture of demise, proof of the counterpart is sufficient. *Pearse* v. *Morrice*, 2 B. & Ad. 396.

Where in *assumpsit* the record of *Nisi Prius*, which corresponded with the agreement, varied from the declaration and issue delivered, and a verdict had been found for the plaintiff, the Court refused to set it aside, as the Judge might at the trial have amended the variance. *Berney* v. *Green*, 12 Moore, 174.

Courts—Process, &c., p. 434.

In an action on the case, for maliciously preferring a charge against the plaintiff, before a magistrate, of having unlawfully returned to a parish from whence he had been legally removed, held that it was not necessary to make the magistrate a co-defendant, it not being a charge of malicious conviction by him: the declaration alleged that on, &c., at the general quarter sessions holden at, &c., such conviction was quashed, but it appeared that such quashing took place at an adjournment of the general quarter sessions; held (Hullock, B. *dub.*) that it was no variance, an adjournment being in law a continuation of the original sessions. *Simpkin* v. *French*, 12 Price, 394. And *see* SLANDER.

Where taking the whole record together it sufficiently appeared that the condition of the bond was for appearance in the Court of C. P., held that it was no variance from the statement of the condition in the declaration to appear "before the Justices of our said Lord the King,

at Westminster," according to the exigency of the writ. *Crofts* v. *Stockley*, 5 Bing. 32; 1 M. & P. 81; 3 Carr. & P. C. 281. And see *Renalds* v. *Smith*, 6 Taunt. 551.

Where the declaration against the sheriff for an escape, alleged that the party was taken under a certain writ "*of the King*," called a *ca. sa.*, issued on 8th May 1826, but the writ produced was in the name of Geo. 3, but tested Sir *W. D. Best*, Knt., 8th May, in the *seventh* year, &c., indorsed "May 13th, 1826;" held that the variance was immaterial, and that the sheriff having acted under the writ, could not afterwards treat it as a nullity. *Elvin* v. *Drummond*, 12 Moore, 523.

Matters noticed by the Court, p. 444.

The Court, upon an application by one of the bail to set aside a *cognovit* and *ca. sa.*, on an alleged variance from the writ, the affidavit referring to the entry in the sheriff's book, would not take judicial notice of the sheriff's book, where the party might have ascertained whether the writ was returned. *Russell* v. *Dickson*, 6 Bing. 442.

The Court will take judicial notice, as a public matter affecting the government of the country, that an allegation that such revolted colony has been recognized as an independent state by this country, is false, notwithstanding the averment on the record, and that it must therefore be taken as if there had been no such averment; and the Court (of Equity) refused to compel a discovery of proceedings founded upon such representation: a demurrer therefore allowed. *Taylor* v. *Barclay*, 2 Sim. 213.

Jury, &c.

Park, J., stated it to be his opinion, that in a special-jury cause the plaintiff has no right to have *a tales*, without consent on the part of the defendant. *British Museum* v. *White*, 3 Carr. & P. C. 289.

After the jury are charged they can only state a question, and receive the law from the Court; the Court therefore refused to permit them to have a law-treatise on the subject, which had been cited. *Burrows* v. *Unwin*, 3 Carr. & P. C. 310.

Where upon an issue out of Chancery the jury could not agree, and the parties would not consent to discharge them, as the verdict was only to inform the conscience of the Chancellor, and he might send it down again for trial; or as in the case of eleven agreeing, and the other juryman refusing to assign any reason for not concurring, he might be satisfied without a formal verdict, the Judge took upon himself the responsibility of discharging them. *Morris* v. *Davies*, 3 Carr. & P. C. 427.

Upon the trial of an information for a seditious libel, the jury, after having retired, upon their return into court in order to deliver their verdict, it was uncertain whether all of them were within hearing of what was declared by their foreman; the Court held, that the Judge properly refused to interfere after the verdict was recorded, or to act

upon a communication from any of them; but under such uncertainty, the Court would allow the defendant a new trial, if he were disposed to apply for it. *Rex* v *Wooler*, 6 M. & S. 265.

Plea puis darrein Continuance.

A plea *puis darrein cont.*, held to be independent of a Judge's order to rejoin issuably *Bryant* v. *Perring*, 5 Bing. 414.

The Court at *nisi prius* can only receive a plea *puis darrein continuance*, but not a replication, or even a confession of it; the party must reply above. *Pascall* v. *Horsley*, 3 Carr. & P. C. 372.

The affidavit in support of a plea *puis darr. cont.* should be sworn before a Judge of assize, and not before a commissioner; the Court however allowed it to be re-sworn at *nisi prius*. *Bartlett* v. *Leighton*, 3 Carr. & P. C. 408.

Bill of Exceptions, p. 464.

Where a bill of exceptions had been sent to the plaintiff, that he might agree to it, or suggest alterations, before being signed by the Judge, and on the same day the defendant sued out a writ of error; held that, notwithstanding, the plaintiff was bound to express his assent or dissent, and return it. *Willans* v. *Taylor*, 6 Bing. 512.

New Trial, p. 468.

Where the Judge, being of opinion that the plaintiff had made out no title, directed a verdict for the defendant, and the jury being present, and no objection made at the time of entering the verdict; the Court refused an application for a new trial, on the affidavit of a juror that he had not concurred in the verdict. *Saville* v. *Lord Farnham*, 2 M. & Ry. 216.

Where no objection was made to the admissibility of evidence until the Judge commenced summing up, the Court afterwards refused a new trial on that ground. *Abbott* v. *Parson*, 7 Bing. 563.

Where the Court sees that there is evidence not merely enough to warrant the finding of the jury independently of that which is objected to as having been improperly received, but that it greatly preponderates in favour of the verdict, the Court will not send the cause to a new trial. *Doe* d. *Lord Teynham* v. *Tyler*, 6 Bing. 561.

In an action on an insurance policy against fire, one of the conditions was a forfeiture of all benefit in case of fraud or false swearing as to the amount of loss claimed; the plaintiff claimed and made an affidavit of damage to the extent of 1,085*l.*, and having sued for the amount, the jury, upon very suspicious circumstances of fraud, gave only 500*l.*; the Court granted a new trial. *Levi* v. *Baillie*, 7 Bing. 349; and 5 M. & P. 208.

Where the verdict (under 20*l.*) was against the opinion of the Judge and weight of evidence, the Court nevertheless refused a new trial, without payment of costs. *Scott* v. *Watkinson*, 4 M. & P. 237.

Where the attorney had permitted the cause, through inattention, to be called on and tried as an undefended cause, the Court refused to grant a new trial, although it was sworn that there was a good defence upon the merits. *Breach* v. *Casterton*, 7 Bing. 224.

So where, the defendant omitting to appear at the trial, the jury had, in a case of great aggravation of *crim. con.*, given more damages than were laid in the declaration, the Court refused a new trial on any terms. *Masters* v. *Barnwell*, ib. n. 225.

If after a verdict for defendant, and a new trial obtained, he again succeeds, he is entitled to costs of both trials; but if the plaintiff succeeds, he is only entitled to the costs of that trial. *Pasley* v. *Mellard*, 1 Tyrw. 260.

Where the sessions have found as a fact a contract of hiring for a year, the Court will not, if there be any premises from which that conclusion might be drawn, disturb that finding; where, after the original hiring for less than a year, the pauper and her mistress varied the terms, from which it might be inferred that they contemplated that there should be a continuation of the service beyond the original period, the Court refused to disturb the decision of the sessions. *Rex* v. *St. Andrew the Great, Cambridge*, 8 B. & C. 664.

Where the question at the trial is reduced to a single point, and a new trial is moved for, the Court, in granting it, will restrain the parties to the same point of inquiry. *Thwaites* v. *Sainsbury*, 7 Bing. 437. *Bernasconi* v. *Farebrother*, 3 B. & Ad. 372, *contra*.

Nonsuit, p. 471.

In an action of tort against several, there cannot be a nonsuit as to one and a verdict against the others. *Revett* v. *Browne*, 2 M. & P. 18.

The Court will not entertain an application for a nonsuit upon an objection taken at the trial, but not reserved by the Judge. *Matthews* v. *Smith*, 2 Y. & J. 426.

Where two issues were found for the plaintiff and two for the defendant, with liberty reserved to the latter to move for a nonsuit if the Court should think the issues found for the plaintiff immaterial, which was acquiesced in at the trial by the plaintiff's counsel: held, that a nonsuit might be entered notwithstanding the finding of some of the issues for the defendant. *Shepherd* v. *Bishop of Chester*, 6 Bing. 437.

Where the Judge nonsuited upon the opening, and consequently there was no *verdict*; held that he had no power to certify under the 6 Geo. 4, c. 50, to entitle the defendant to the costs of the special jury. *Wood* v. *Grimwood*, 10 B. & C. 701.

Verdict.

Where the verdict was by consent taken on two special counts, being in fact the same cause of action, the Court permitted it to be entered on one of them only. *Henley* v. *Lyme Regis Mayor, &c.*, 6 Bing. 100, and 3 M. & P. 278.

The Court cannot convert a special case into a special verdict unless by consent. *Attorney-general* v. *Dimond*, 1 Tyrw. 243; and 1 Cr. & J. 356.

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