A

TREATISE

ON THE

LAW OF EVIDENCE.

Ninth Edition.

WITH CONSIDERABLE ALTERATIONS AND ADDITIONS.

BY S. MARCH PHILLIPPS, ESQ.

IN TWO VOLUMES.

VOL. I.

LONDON:
SAUNDERS AND BENNING, LAW BOOKSELLERS,
(SUCCESSORS TO J. BUTTERWORTH AND SON,)
43, FLEET STREET.

1843.

1x
P55
el 9

LONDON:
PRINTED BY RAYNER AND HODGES,
109, Fetter Lane.

ADVERTISEMENT.

BEING deprived of the assistance of Mr. Amos, I have taken upon myself the task of preparing this new Edition.

It has been found necessary to make considerable alterations and additions. The whole Work has been carefully revised: many parts have been remodelled and rewritten. Some cases noticed in the last Edition, which relate more to points of Practice than to the rules of Evidence, have been omitted.

The Fourth Chapter of the Second Volume, which treats of Extrinsic Evidence in relation to Written Instruments, is entirely new, and upon a new plan. The opinions delivered in the House of Lords during the present year by some of the Judges, on questions proposed to them in two important cases, and a careful study of Vice-Chancellor Wigram's Treatise, induced me to think that it might be useful to substitute a new Chapter for that which appeared in the last Edition.

I beg to apologize to the Reader for the numerous list of Errata, and request him to take the trouble of correcting the

text. Errors, which crept unobserved into the last Edition, have, I am sorry to say, passed into this also, and were not discovered till it was too late to correct them.

For the valuable addition of a full and well-arranged Index I am indebted to Mr. Arnold, of the Northern Circuit, who has executed this part of the work with laborious attention and great professional skill.

I purpose to prepare for publication—if I shall be enabled to carry through such an undertaking—a New Edition of that part of the original work, which formed the second volume of the seventh edition, relating to Evidence in Civil Proceedings.

S. M. PHILLIPPS.

LONDON,
December, 1842.

CONTENTS

OF

VOLUME THE FIRST.

CHAPTER I.

Page

Of the several causes of Incompetency; and of Incompetency from Defect of Understanding.

Admissibility of Evidence, a question for the Judge - - - 2
The several causes of Incompetency - 3
1. *Defect of Understanding* - 3
2. *Defect of Religious Principle* - 3
3. *Infamy from Conviction of Crime* 3
4. *Interest* - - 3
Incompetency from defect of understanding 4
Idiots—Lunatics - - 4
Children, when competent - 4
Rule settled in Brazier's case - 5
Religious belief, necessary - 5
Statement, without oath, inadmissible 5
Effect of their Evidence - 6
Preliminary inquiry, as to their Competency - - 6

Page

CHAPTER II.

Of Incompetency from Defect of Religious Principle - - - 7

The sanction of an Oath required - 7
Ancient practice as to Prisoners' Witnesses 7
And as to evidence of Children - 8
Import of the Oath - - 8
Form of the Oath - - 8
Various forms in taking the Oath - 9
What religious belief necessary - 10
Case of Omichund v. *Barker* - 11
Examination as to religious belief previous to the taking of the Oath - 12
Affirmation instead of Swearing 12—13
Quakers, Moravians, Separatists 12—13
St. 7 & 8 *Wm.* 3, *c.* 34 - 13
9 *Geo.* 4, *c.* 32 - 13
3 & 4 *Wm.* 4, *c.* 49, *and c.* 82 13
Persons having been Quakers or Moravians - - 3
St. 1 & 2 *Vict. c.* 77 - 13
Excommunication no cause of incompetency 13
St. 58 *Geo.* 3, *c.* 127 - 13

CHAPTER III.

Of Incompetency from Conviction of Crime 14

General Rule - - 14
Distinction between legal *and* moral *infamy* 14
Principle of the Rule - 14
Propriety of Exclusion, on this account, questionable - - 15

	Page
1. *What offences incapacitate* -	17
Treason—felony—crimen falsi	17
Perjury—Bribery -	17
Some kinds of Conspiracy -	17
Some offences of Gaming -	18
Outlawry for treason or felony -	18
The Pillory used to incapacitate -	18
This punishment abolished—1 Vict. c. 23 n. (8)	18
2. *Of the Extent and Effect of this disability* - -	19
Affidavits of convicts in Exculpation receivable -	19
Conviction of Attesting Witness to a Deed, &c., its effect -	19
3. *Of the Proof of this disability* -	19
Proof of the judgment necessary	19
Proceedings must be regular -	20
4. *Of the mode of restoring competency*	20
Reversal of Judgment -	20
Surrender in conformity with a Statute	20
Pardon under the Great Seal—its effect - -	21
In case of Perjury, on Stat. 5 Eliz.	21
Conditional pardon—performance of condition must be shown -	21
Warrant for pardon under Sign Manual, in cases of felony—its effect - -	22
St. 7 & 8 Geo. 4, c. 28 -	22
Pardon for making a witness competent - -	22
Competency restored by suffering of punishment -	23
St. 9 Geo. 4, c. 32, s. 3, in felonies not capital -	23
S. 4, in misdemeanors -	24

Page

Satisfaction of punishment, what sufficient - - 24
Ancient practice of restoring Competency - - 24
Purgation—abolished by St. 18 *Eliz.* 24
Benefit of Clergy, and burning in the hand - - 25
Benefit of Clergy abolished, 7 & 8 *Geo.* 4, c. 28 - 25
Conviction of petty larceny, not a disqualification, 31 *Geo.* 3, c. 35 25
*Other Statutory provisions—*9 *Geo.* 4, c. 32—4 *Vici.* c. 22, *for effectual abolition of benefit of Clergy to Lords of Parliament* - 25

CHAPTER IV.

Of the Competency of Accomplices, Informers, and Self-discrediting Witnesses.

Sect. I. Of the Competency of Accomplices 26

General Rule—Situation of Accomplice 26
Accomplices Competent Witnesses - 27
Charnock's case - - 27
Object of admitting Accomplices - 27
Their Evidence given under express or implied promise of pardon - - 27
Accomplice used has Equitable claim to a pardon - - 28
Extent of this Equitable Claim - 28
Accomplice, separately indicted, competent 28
Convicted, if not sentenced, competent 28
Application to the Court to admit an Accomplice - - 28

Page

Accomplice, jointly indicted, how made a witness - - - 29
Accomplice, breaking faith, may be tried 29
Principal, competent witness against Accessory 29
Accomplice, separately indicted, may be witness for a Prisoner - - 30

SECT. II. Of the Confirmation of Accomplices 30

No positive rule of law as to necessity of Confirmation - - 30
Practice observed on this subject - 31
Principle on which some Confirmation is required - - 31
Rule as to principals in second degree—case of Manslaughter - - 33
Confirmation, when several Accomplices - 33
Evidence of Accomplice's Wife in Confirmation 33
Of the Extent of Confirmation necessary - 34
Confirmation as to individual prisoner, how far necessary - - 34
Rule on trial of several prisoners - 35
Confirmation as to circumstances, *not as to the* person *of a prisoner* - - 36
Recent cases on this subject - 36
Rule on trial of Principal with Receiver 37
Result of the cases - - 37

SECT. III. Of the Evidence of Informers and Self-discrediting Witnesses 38

Informers distinguishable from Accomplices 38
Witness alleging his own dishonesty - 39
Witness invalidating a written instrument 39
Indorsee proving usury - 39
Case of Walton v. *Shelley* - 39
Payee proving bill void - 40

Page

Case of Jordaine v. *Lashbrooke* 40
Person bribed at an Election - 40
Attesting Witness impeaching execution of a deed - - - 40
Case of Lowe v. *Joliffe* - 40
Witnesses admitting false swearing, or want of authority, or want of title - 41

CHAPTER V.

Of the Incompetency of Witnesses from Interest 41

The General rule - - 41
The expediency of this exclusive rule questionable - - 42
The order in which the several parts of the subject are to be considered - 44

Sect. I. Of the Rule of Incompetency from Interest, considered with reference to Parties in Civil Proceedings - 45

The general rule, and ground of incompetency 45
Nature of the disqualifying Interest - 46
Rule applies to members of a Corporation 46
Persons suing as Trustees, Guardian, Parochial Trustees or Directors, when incompetent - - - 47
Party to suit competent, if not interested 48
Examples—parties sued in Corporate Capacity, Inhabitants of a parish, not rated, though rateable - - - 48
Co-defendants, in case of judgment by default, nolle prosequi, *or separate judgment* - - 48

	Page
1. *Of the Effect of Judgment by default*	49
In an Action on Contract -	49
Defendant suffering judgment by default incompetent for Co-defendant - -	49
Competent against Co-defendant	49
Worrall v. *Jones* -	49
Pipe v. *Steel and another*	50
(*Two earlier cases of Brown* v. *Brown, and Green* v. *Sutton,* contrà, *cited in p.* 49, *now overruled.*)	
In Action of Tort - -	51
Defendant suffering judgment by default has been thought competent for Co-defendant	51
Ward v. *Haydon* -	51
Mash v. *Smith* -	51
Not competent against Co-defendant - -	52
Chapman v. *Graves*	52
Competent for Plaintiff in Ejectment - -	53
Doe v. *Green* -	53
Or for Co-defendant -	53
2. *Of the Effect of a* Nolle Prosequi	53
Defendant, pleading bankruptcy, competent for Co-defendant -	53
Aflalo v. *Fourdrinier* -	54
Effect of nolle prosequi *in such cases*	54
Defendant, pleading bankruptcy, not competent for Co-defendant, where no nolle prosequi - -	54
Separate verdict, when allowed in such case - - -	55
Its effect in restoring competency	56
3. *Of the Effect of a Separate Verdict*	56
Co-defendant in tort, wrongfully sued, competent for the rest -	56

Page

Practice as to taking separate verdict, and time of taking it - 57
Person named in declaration as trespasser, competent - 58
Witness sued by mistake, how enabled to give evidence - - 58
In action of Ejectment 59
4. *Of the Rule, that a Party is not compellable to give evidence against himself* 59
Not compellable by the adverse party 59
Rated inhabitants of a parish 60
Lessor of Plaintiff in ejectment 60
Co-plaintiff, for Defendant, with consent - - - 60

Sect. 2. Of the Rule of Incompetency from Interest, considered with reference to Parties Prosecutors for offences 61

General Rule - - - 61
Prosecutor, in general, not disqualified by direct interest - - 61
Nor by indirect interest in the verdict 62
Earlier cases on this subject—R. v. Whiting—R. v. Ellis—R. v. Nunez 62
Rule settled in R. v. Broughton, and R. v. Boston - 63
Prosecutor competent in trial for perjury 63
In case of forgery also, by St. 9 Geo. 4, c. 32 - - - 64
Prosecutor incompetent, when - - 65
When entitled to penalty as informer 65
Prosecutor for forcible entry - 65
Prosecutor, on charge of robbery, competent, though entitled to restitution of property 65
Or in prosecution for fraudulent gaming 66
Or for seducing artificers - 66
Or for perjury on the Statute - 66

Page

Or where penalty recoverable, if not the only punishment - 66
Defendant in criminal prosecutions, how made competent - - 67
By nolle prosequi - - 67
Judgment after Plea in Abatement 67
Separate Verdict - - 67
Plea of Guilty, and fine paid - 68
Whether competent, after Judgment by Default - - 68
R. v. *Lafone—Ward* v. *Heydon* 68

SECT. III. Of the Rule of Incompetency from Interest, considered with reference to the Husband or Wife of a Party 69

Rule in Civil Cases - - - 69
Husband and Wife not competent for each other - - - - 69
The Rule does not apply to Parties Cohabiting, not Married - - - 70
1. *Husband and Wife not competent against each other* - - - 70
1. *In Civil Cases—extent of the Rule* 70
Where Marriage was after Service of Subpœna - - 70
In an Action by Executrix of Trustee of Wife, Husband not competent - - - 71
2. *In Criminal Cases — not competent against each other* - - 71
Their Evidence Admissible in Collateral Proceedings, though it may tend to Criminate, or subject to a Demand - - 72
R. v. *Cliviger—R.* v. *All Saints —R.* v. *Bathwick* 72, 73

CONTENTS.

	Page
Rule, with reference to Actions between Third Persons - -	73
Neither of the two competent to prove non-access - - -	74
2. *Husband and Wife not competent for each other* - - -	74
Neither in Civil nor in Criminal Cases	74
Examples, where Joint Offence charged	74
Where distinct alibi set up -	74
Rule of Exclusion maintained, after Divorce	75
Or after Death of one of the Parties	75
Wife not Admissible, though the Husband Consent - - -	76
Rule as to admitting Declarations of Husband and Wife - - -	76
Their Declarations, in general, not Admissible - - -	76
Rule, in Action for Crim. Con. -	77
Rule with respect to Letters, Conversations, &c. - -	77
Where the Wife has acted as Agent for the Husband - -	77
Cases stated—Emerson v. *Blonden—White* v. *Cuyler—Clifford* v. *Burton—Gregory* v. *Parker* -	78
3. *Exceptions to the general Rule relative to the incompetency of Husband or Wife*	78
In Prosecutions for personal Violence	79
for Bigamy -	79
In exhibiting Articles of the Peace	79
Dying Declarations - -	79
Examination of Bankrupt's Wife, by statute	80
Competency in an Appeal against an Order of Bastardy, to prove Criminal Connexion - - -	80
Competency to disprove Marriage, on an Appeal against Order of Removal	80

Page

SECT. IV. Of the Rule on the subject of Interest, considered with reference to Persons not being Parties to the Suit 81

General Rule - - 81, 84
Of direct Interest in the event of a Suit 81
Of indirect Interest in the event, from Use of Verdict - - - 82
Rule settled in Bent v. *Baker, and Smith* v. *Prager* - - - 84
St. 3 & 4 Wm. 4, c. 42, referred to - 85
What is such an Interest as will Disqualify 86
Interest must be certain - - 86
Expectation of Benefit not enough 86
Competency presumed, till disproved 86
Certain Interest, to any amount, disqualifies - - - 86
Interest in Costs - - 87
Balance of Interest - - 87
1. *Rule with respect to Bail and Sureties* 88
Bail not competent for Defendant - 88
Nor Wife of Bail - - 88
How made competent - - 88
Surety in Replevin Bond - 89
How made competent - 89
2. *Rule as to Witnesses Jointly interested with the Party in the Subject-matter of the Suit* 89
Person jointly interested in a Policy 89
Underwriter, Party to Consolidation Rule 90
Party to Collateral Agreement 90
Incompetency of Partners - 90
Of Co-contractors - - 91
Joint maker of a Note - 91
Co-obligor - - 91
Nature of Interest in these Cases 92
3. *Examples in Actions by Executors or Administrators* - - - 92

	Page
Residuary Legatee - -	92
Next of Kin - - -	92
Nature of Interest - -	93
Specific Legatee - .	93
4. *Rule as to Bankrupts, Insolvents, Creditors*	93
Bankrupt—his Interest - -	93
How made competent -	93
In case of Second Commission, how interested - -	94
Incompetent to Support or Defeat a Fiat	94
Some of the Principal Cases enumerated - -	*n.* (3), 94
Reason of the Rule -	*n.* (3), 94
Restriction of the Rule	*n.* (4), 94
Insolvent Debtor—his Interest -	95
Creditor of Bankrupt or of Insolvent—his Interest - - -	96
5. *Examples, in Actions relating to Real Property* - - -	97
Tenant in Possession, incompetent for Defendant in Ejectment - -	97
Witness having agreed for a Lease	97
Remainder-man incompetent, when	97
Tenant by Curtesy, when incompetent	97
Devisee, when incompetent -	98
Party entitled to Dower, competent, when	98
Executor taking a Pecuniary Interest—Legatee of Personal Estate—Heir Apparent - -	*n.* (2), 98
Mortgagee - - -	99
Member of Corporation - -	99
Owner of Land in a District which is liable to a Charge - -	99
Rateable Occupier in such District, competent - - -	100
Rated Occupier, incompetent -	100

See 3 & 4 *Vict. c.* 26, infra, *p.* 144

Page

Person under whom Defendant makes Cognizance, in Replevin, incompetent for Defendant - - 101

Conusee under Trustee of Party beneficially interested - - 101

One of several Cognizances abandoned—Conusee competent - 101

King v. *Baker* - - 101

6. *Witnesses liable to an Action by one of the Parties* - - - 101

Action for misconduct of Defendant's Servant or Agent - - 101

Where Verdict would be Evidence in subsequent Suit, Servant is incompetent for Defendant - 102

Examples — Green v. *New River Company—Whitamore* v. *Waterhouse—Hawkins* v. *Finlayson* 103

Broker, in action against Principal, incompetent - - - 103

Sheriff's Officer—Assistant to Officer 103

Landlord receiving rent from Sheriff 104

Nature of the interest in the above Cases 105

Considered with reference to 3 & 4 Wm. 4, c. 42 - - 105

Competency of Plaintiff's Servant or Agent, in such an Action - 105

Plaintiff's Servant incompetent for Plaintiff - - 105

Cases stated—Miller v. *Falconer* 105

Morris v. *Foote—Kerrison* v. *Coatsworth* - 106

Boorman v. *Brown* - 107

Remark on the two last cited Classes of Cases with reference to 2 & 3 Wm. 4, c. 42 - - - 107

Yeomans v. *Leigh* - - 107

	Page
Other instances of interest from Liability over - - -	108
Former Vendor of Estate -	108
Former Proprietor of a Horse	108
Briggs v. *Crich* -	108
Baldwin v. *Dixon* — *Biss* v. *Mountain* -	109
Witness proving Property in himself, and Sale to Defendant -	109
Nix v. *Cutting* -	109
Witness proving Property in himself, at time of the Action -	109
Ward v. *Wilkinson* -	109
7. *Witnesses liable to a Party for Costs of the Action* - - -	110
In Actions on Bills of Exchange -	110
Drawer in Case of Accommodation Bill	110
Jones v. *Brooke* - -	110
Indorsee in such Case - -	110
Agent employed to Discount -	111
Acceptor - - -	111
Witness proving Sale by him to Defendant and Payment - -	112
Larbalestier v. *Clarke* -	112
Other Cases of liability to Costs -	113
Prochein Ami and Guardian — *Co-contractor* - - -	113
Liability arising from an Illegal Contract - - -	113
8. *Cases as to liability to one of the Parties, since the passing of the stat.* 3 & 4 *Wm.* 4, *c.* 42 - - -	114
Section 26, *Witness, for or against whom a Verdict would be Admissible, examinable* - - -	114
Section 27, *Witness's Name to be indorsed on the Record* - -	114
Meaning of the former Section -	114

Page

Earlier Decisions stated—Braithwait v. *Coleman* - - - 114
Burgess v. *Cuthell—Mitchell* v. *Hunt* 114
Harrington v. *Casswell* - 115
These Cases overruled by later Decisions 116
Later Decisions stated—Faith v. *M'Intyre* 116
Kilpack v. *Major* - 116
Cases stated, which are not within the Remedy of the Act - - 117
Harding v. *Cobley* - 117
Hodson v. *Marshall—Wedgwood* v. *Hartley* - - 118

SECT. V. What is not such an Interest as will Disqualify - - 119

Cases enumerated, where Witnesses are competent - - - 119
Wishes or expected Benefit, not an Objection 119
Witness in the same situation with the Party, competent - - - 119
Co-trespassers—Underwriter to the same Policy - - - 119
Similar Rule in Criminal Proceedings 120
Witness expecting a Pardon for giving Evidence—Accomplices—Members of a Corporation - - 120
Witness expecting to be benefited by a Verdict - - 120
R. v. *Bray—R.* v. *Boston* - 121
Borrower of Money competent, in Penal Action for Usury - 121
Abrahams v. *Bunn* - 121
Possibility of being sued, not an Objection 121
Bond-security of Administrator 121
Creditor of Administrator - 122

	Page
Witness liable as Executor de son tort	122
Cases, where Interest uncertain -	122
Specific Legatee - -	122
Witness entitled to Annuity under a Will—Nowell v. *Davies*	123
Where the Annuity is charged on Land—Bloor v. *Davies* -	123
Creditor of Estate—Paull v. *Brown*	123
Paull v. *Brown, confirmed by later Cases* - -	124
Creditor assigning his Debt -	124
Trustees and Executors - -	124
Official Assignee - -	124
Examples of competent Witnesses, in Actions concerning Real Property -	125
Tenant — Vendor — Executor—Sub-lessee —Lessor—Mortgagee—Tenant in Common - -	125, 126
Captain, Part-owner, in Action on Policy	126
Residuary Legatee, in Action for Funeral Expenses - - - -	126
Witness claiming the Property, in Trover by Assignees - - -	126
Purchaser from Plaintiff - -	127
Purchaser of a License to use a Patent	127
Insolvent, to prove his Insolvency -	127
Witness believing himself interested -	127
Honorary Obligation - -	128
Interest on both sides—balance of Interest	129
Examples, when Witness equally answerable on both sides - -	129
Captain of Ship—Lessor—Joint Contractor - - -	129
Partners in a Firm - -	130
Partner of Drawer of Bill - -	130
Joint maker of a Note—Drawer of Bill	131
Indorser—Indorsee - -	131
Accommodation Indorsee or Drawer	132

Page

Indorser—Acceptor liable to Indemnify 132
Maker of Note - - 133
Acceptor of Bill - - 133

SECT. VI. Of certain Exceptions to the General Rule on the subject of Interest 134

Various kinds of Exceptions - 134
1. *Witnesses rendered competent by Statute* 135
Owner of Stolen Goods entitled to Restitution - - . - 135
7 & 8 *Geo.* 4, *c.* 29, *s.* 57 - 135
21 *Hen.* 8, *c.* 11 - - 135
Distinction between the last Case and the Case of an Owner of Land, *entitled to Restitution, on Statutable Indictment for Forcible Entry* - 136
Rex v. *Williams* - - 136
Witness entitled to Rewards given by Statutes 136
Witness having a promise of Pardon - 137
Witness who has given a Bribe - 137
2 *Geo.* 2, *c.* 24—*Howard* v. *Shipley* 137
Informer, in Prosecution for exporting Machinery - - - 137
21 *Geo.* 3, *c.* 37 - - 137
Party who seduces Artificers, &c. - 138
23 *Geo.* 2, *c.* 13 - - 138
Loser of Money in Gaming - - 138
9 *Ann. c.* 14, *s.* 5 - - 138
Inhabitants of County - - 139
1 *Ann. st.* 1, *c.* 18, *s.* 13 - 139
Inhabitants of Hundred - - 139
8 *Geo.* 2, *c.* 16, *s.* 15 - - 139
7 & 8 *Geo.* 4, *c.* 31, *s.* 5 - 139
Inhabitants of Parish - - 139
3 *W.* & *M. c.* 11, *s.* 12 - - 139

	Page
27 *Geo.* 3, *c.* 29 - -	139
7 & 8 *Geo.* 4, *c.* 29 *and* 30 -	140
5 & 6 *Wm.* 4, *c.* 50, *s.* 100 -	140
3 *Geo.* 4, *c.* 126, *s.* 137 -	140
4 *Geo.* 4, *c.* 95, *s.* 84 - -	140
54 *Geo.* 3, *c.* 107, *s.* 9 - -	141
Cases on the last Act—Meredith v. *Gilpin—Marsden* v. *Stansfield—Hendebourck* v. *Langston—R.* v. *Hayman—Doe* v. *Cockell*	142
Doe v. *Adderley—Morrell* v. *Martin*	143
(*Other Cases referred to in note* (4)	143
3 & 4 *Vict.* c. 26 — *a more effectual Statute for rendering Inhabitants competent* - -	144
Officers concerned in Revenue Seizures	144
6 *Geo.* 4, *c.* 108 - -	144
2. *Exceptions to the Rule of Interest, on the Principle of General Convenience* -	144
Witness refusing to pay Toll on Public Road—Lancum v. *Lovell* -	145
Agents, Servants, &c., acting within their Duties - - -	145
Factors and Brokers - -	146
Carriers—Stewards of Manors -	146
Agents and Brokers incompetent to disprove Negligence - -	147
Agents acting beyond scope of their Authority, incompetent - -	147
3. *Other Instances of Exceptions* -	148
On the Trial of an Issue, Parties ordered to be examined - -	148
Witness interested in Suit in Equity, not rendered competent by 3 & 4 *Wm.* 4, *c.* 42 - - -	148
In Action for malicious Prosecution, Defendant's Deposition before Magistrates, admissible - - -	148

Page

Prosecutor, though interested in Costs under Writ of Certiorari, *competent* - 149
Where Power of awarding Costs is discretionary, Party not incompetent 149
Witness offering to Release—or refusing to accept a Release - - 149
Legatee and attesting Witness refusing to accept payment of Legacy - 150
Provision in 1 *Vict.* c. 26, *s.* 15, *as to such Witness* - *n.* 150
Interest acquired by Witness fraudulently 150
Wager on event of Trial—Barlow v. *Vowel* - - 150
Remark on opinions expressed in Bent v. *Baker* - - 151
Ground of the Decision in Barlow v. *Vowel* 151
Underwriter taking an Interest after commencement of the suit - 151
Witness taking an interest under Plaintiff, and refusing a release - 152
Prosecutor laying a wager on conviction 153

SECT. VII. Of the mode of objecting to the competency of an interested Witness; and of the means of restoring competency.

Objection, when to be taken - 153
To be taken before dismissal of Witness 154
Similar rule in case of Interrogatories - 154
Objection, how raised - - 154
Examination on voire dire - - 154
Objection removed on voire dire - 155
Rule as to Necessity of best evidence dispensed with - - 155
Examples stated - - 155
Where the Interest is proved, not on the voire dire - - 156

	Page
Interest removed by Release or Payment -	156
Release by Legatee - -	156
Drawer of bill - -	157
General Release - -	157
From Drawer to Acceptor -	157
Acceptor to drawer -	157
Person entitled to distribution -	157
Release by Guardian in action by Minor	158
Co-obligee of bond Debt -	158
Release to co-obligor - -	158
One of several Contractors -	158
Partner—earlier cases -	158
Later case of Wilson v. *Hirst* -	159
Part owner—Jones v. *Pritchard*	159
One of Committee of Joint-stock Company - - -	159
Beckett v. *Wood* - -	159
Release by residuary Legatee - -	159
Stamp of release - -	160
New stamp, when not necessary -	160
Undertaking to release - -	160
Member of Corporation, how made competent	160
Bail, how made competent - -	161
Witness liable, on his Bond, for costs of the action - - -	161
Person offering to release - -	161

CHAPTER VI.

Of the Exclusion of Evidence, when the disclosure would be in violation of professional confidence, or prejudicial to Public Interest - -	161
Sect. I. When the disclosure would be in violation of professional confidence, and of the privilege of a client -	162

		Page
General Rule	- -	162
Principle of the Rule	- -	162
Privilege of Client, its nature	-	163
To whom it extends—Wilson v. *Rastall*		163
Interpreter—Agent—Attorney's Clerk—Barrister's Clerk	- -	163
Situation of Arbitrator—of Counsel	*n.* (4)	163
Attorney, not employed as such, though confidentially consulted	- -	164
Wilson v. *Rastall*	- -	164
Consulted as such, not being Attorney		164
Rule as to medical Advisers, and Friends		164
Bankers—Stewards—Clergymen	-	165
Clerk to Commissioners—oath of Office		165
Other instances mentioned	*n.* (4)	165
What Communications privileged	-	166
Confidence before Commencement of the Suit		166
Communications collateral to Suit	-	167
Annesley v. *Lord Anglesea*	-	167
Made, when Confidence is at an end	-	167
Cobden v. *Kendrick*	- -	167
Confidence continues after Suit closed	-	167
Or after change of Attorney	-	167
Confidence not confined to Actions or Defences		168
Privilege in all cases of professional Communication	- -	169
Various forms of making the Communication	- - -	169
Communication respecting sale of Estate		169
Instructions for fraudulent Deed	-	169
Communication respecting power of leasing		169
Or possession of a Deed	-	169
Or as to contents of Deed or Paper		170
Rule in prosecutions	- -	171
Prisoner's Attorney, not to produce the Instrument, when	- -	171
R. v. *Avery—R.* v. *Smith*	-	171
Attorney acting for two Parties, not to disclose		172

	Page
Attorney acting between two Parties -	173
Attorney of one not a Party to the Suit	173
Cannot produce his client's title-deeds	174
Other instances stated -	174
R. v. Upper Boddinton — Doe v. Thomas - -	174
Inspection of papers by the Court -	175
Cases as to production of bankruptcy Proceedings n. (2)	175
Communications not privileged, under what Circumstances - -	175
Attorney, as subscribing Witness, may prove execution of a Deed -	175
Or give evidence as to an Erasure	175
Or prove Oath taken, on prosecution for Perjury - -	175
Or prove Contents of written Notice	175
Or prove usurious Consideration	175
Or prove who, as Party, has employed him in the Cause -	176
Or prove Document in possession of his Client - -	176
Or prove his Client's handwriting	176
Limitation, as to the cases above mentioned	176
Communications by Attorney to opposite Party not privileged -	176
Nor Communications between the two Parties in his presence -	176
Proposals of Compromise not privileged	177

Sect. 2. Of the Exclusion of Evidence, where the disclosure would be prejudicial to Public Interests.

Information to Government for Discovery of Offenders — Spies — Informers — Agents of Police - - -	178

Page

Name of Employer, or particulars of Employment, not to be disclosed - 178
Question as to Agent communicating his reports to a Magistrate, allowed - 178
Name of the Magistrate not to be disclosed, in general - - - 178
Question as to channel of Communication between Witness and Officer of Justice, not allowed 178
Result of Cases - - - 180
Question whether Witness has made communications to a Magistrate, allowed 181
Such a question to an officer of Government, not allowed, where public safety involved 181
Official Communications as to state of a Colony 181
Official Order, Correspondence, Reports, where privileged - - - 181
Inquiry as to Speeches in Parliament whether allowable - - 182
Inquiry of grand Juryman as to evidence before the grand Jury - - 182
Inquiry of Witness as to his evidence before the grand Jury - - 182
Private Communications to public Officers 183
Complaining of conduct of a public Servant 183
Disclosure, when against Decency or private Feelings - - - 183
Evidence of Husband or Wife as to non-access 183

CHAPTER VII.

GENERAL Rules relating to the Exclusion of Hearsay Evidence - - 184

SECT. I. Of the distinction between Original and Hearsay Evidence - - 184

Hearsay Evidence, definition of - 184

Page

Rule, where the sole object of the Hearsay is to show the Fact, not the Truth, of a transaction 185
Papers, found in possession of a Person, when evidence on a question as to his Sanity - 186
Wright v. *Tatham* - - 186
False denial by a Tradesman, or direction to deny, admissible - - 187
On question of reputed Ownership, opinion of Neighbours admissible - - 188
Where the Hearsay is to show public Feeling 188
Or state of a Person's Mind - 189
Statement of a Wife, when evidence in action for Crim. Con. - - 189—190
Statement by a Patient, as showing bodily suffering - - - 190—191
Or as to cause of injury - 192
Recent complaint, after rape committed, when evidence - - - 193
Declarations accompanying possession of property - - - 194
Declarations part of res gestæ, *and explanatory of the act* - - - 194
Proof of credit given - - 195
Accompanying the elopement of a Wife 195
In executing fraudulent conveyance 196
In questions of Bankruptcy - 197
Explanatory of acts done - 197
Time of making Declaration material 197
Bateman v. *Bailey*—*Smith* v. *Cramer*—*Ridley* v. *Gyde* - 198
Rawson v. *Haigh*—*Thomas* v. *Connell* 199
Declarations of Conspirators, when admissible 199
As part of res gestæ - 199
Stone's Case—*Hardy's Case* 200
Relating to common Object 201
When not part of res gestæ - 201
Hardy's Case - - 201
Writings in Possession of Conspirators, before or after Apprehension - - 203

Page

Watson's Case - - 203
Declarations of Rioters - - 204
Where no common object imputed, Declarations not admissible - - - 204
Expressions collateral—not explanatory of the act done, not admissible - - 204

SECT. II. Of the Rule respecting the exclusion of Hearsay - - 205

Hearsay excluded, when - - 205
Policy of the Rule - - 206
History of the Rule - - 208
Practice in the old State Trials - 208
Extent of the Rule - - 209
Declaration of attesting Witness - 209
Stobart v. *Dryden* - - 210

SECT. III. Exception to the General Rule respecting Hearsay, in questions of Pedigree - - 211

Of the exception in these Cases - 211
Reason of the exception - - 212
1. *What are Matters of Pedigree* - 213
Declaration of Parent as to time of Birth 213
As to Place of Birth - 214
R. v. *Erith* - 214
As to non-access - 215
Declaration of Person as to Settlement 215
2. *Various forms of Hearsay* - 216
Entries in family Books—Bibles—Inscriptions 216
Family Correspondence - - 217
Recitals in Deeds - - 217
Description in Wills - - 218
Probate—Ledger-book in bill in Chancery 219
Banbury Peerage case - 219
Howard de Walden, p. c. - 220
Engravings on Rings—Charts of Pedigree 220

	Page
Compilation from Registers -	221
Inscription on Tombstones—in Burial Grounds - -	221
On Monuments decayed, &c. -	222
Mistakes on Tombstones -	222
Mural inscription—Coat Armour -	223
Heralds' Books—Armorial Shield—Carriage Arms - - -	224
Conduct or Treatment of Parties equivalent to Declarations - -	225
Declaration as to Declaration -	227
Inquisitions post mortem -	227
3. *Of the qualifications with which Hearsay is received* - - -	228
Knowledge of the declarant -	228
Limitation of the Rule as to Relatives -	229
Principle of the Limitation -	230
Declaration of Husband as to pedigree of Wife	230
General reputation of Family -	231
Acknowledgment of the Family -	231
Declaration of Accoucheur - -	232
Higham v. *Ridgway—Annesley* v. *Earl of Anglesea* - -	232
Declaration of clergyman as to Marriage	232
Entry in Register - -	233
Reputation among Strangers as to Relationship	234
Relationship of declarant to be proved aliunde	235
Family Acknowledgments presumed -	236
Hearsay not contemporaneous -	237
SECT. IV. Exception to the General Rule respecting Hearsay in matters of general or Public Interest -	237
1. *Examples of Matters of public and general interest* - - -	238
Questions of Custom—Common—Modus—Parochial Boundary, &c. -	238

	Page
District Modus—Farm Modus -	240
Hearsay as to private prescriptive Rights, whether admissible -	241
Not evidence as to private Boundaries	243
Or as to private Title	244
Nor of a Presentation -	245
As to particular Facts -	245
In matters of Pedigree -	246
Payment of a Sum certain as Modus	246
Evidence of Perambulations -	247
2. *Of the Forms in which Hearsay is presented*	248
Old Documents—Leases—Composition Deed	249
Manorial Documents - -	249
Maps, setting out manorial Boundaries	250
Verdicts as to customary Rights or public Ways - - -	251
Effect of Verdicts as Evidence -	251
Finding of Juries under Commissions	252
Decree as to customary Right - -	253
Bill and Answer to be produced	253
Decree on question of Jurisdiction -	253
3. *Of Qualifications in receiving Hearsay*	254
Caution as to Hearsay, in general	254
Declarant must have competent Knowledge	255
Crease v. *Barrett—Rogers* v. *Wood*	255
Tulbot v. *Lewis* - -	257
Ancient Proceedings - -	258
Situation of Parties presumed, as stated	258
Proof of modern Exercise of Right -	259
Acts done - - -	259
Proof of Parochiality, without Proof of Acts done - - - -	260
Lis mota, *Rule with reference to* -	260
Declarations post listem motam *not admissible*	261
Berkeley Peerage Case - -	261
Lis mota *defined* - -	264
Knowledge of lis mota *by Declarant*	265
In Question of Boundary - -	266

	Page
Same rule applicable to Awards -	266
R. v. *Cotton*—*Evans* v. *Rees*	267
Applicable also to Presentments by Homage - -	267
Ancient Proceedings, when the Controversy different - - -	268
Orders of Magistrates at Sessions -	268
Statement in contemplation of Litigation, made for preventing Disputes - -	270
Declarations of Persons in pari jure -	271
In Pedigree Cases - -	271
On Questions of Boundary, Modus, &c. - - -	272
Sect. V. Exception to the General Rule respecting Hearsay, with reference to Ancient Possession - -	273
Ancient Documents, Evidence of Possession	273
Old Leases—Old Licences—Rent-Rolls	274
Evidence of Boundary - -	274
Map annexed to Deed - -	275
Proof of Acts done, respecting Documents	276
Evidence of Possession by Lessees—of Payment of Rent - - -	277
Proof of modern Possession - -	278
Sect. VI. Exception to the General Rule respecting Hearsay, in the case of Dying Declarations - -	279
Dying Declarations, when Evidence -	279
Not admissible in civil Cases -	279
Declaration by subscribing Witness	280
Wright v. *Littler*—*Doe* v. *Ridgway*	281
Limitation of the Rule in criminal Cases	282

	Page
Dying Declarations in favour of the Prisoner	283
Declaration of attainted Convict, not Evidence	283
Declaration of Accomplice -	283
Preliminary inquiry as state of the Person	283
Prospect of impending Death - -	284
Interval before Death - -	285
Expressions of Deceased - -	286
Representations to Deceased -	287
Belief of Future State implied - -	289
Manner of making Declarations -	289
Declarations reduced to Writing -	290
Signed by Deceased -	291
Must be only as to Facts -	291
Admissibility of, a Question of Law -	291
Effect of Dying Declarations -	292
SECT. VII. Exception to the General Rule respecting Hearsay, where Declarations have been made, by Persons since Deceased, against their Interest - - -	293
General Rule - - -	293
Principle on which such Evidence is received	294
Entries as to Receipt of Money -	297
Steward's Books - - -	298
Entry charging the Maker - -	298
Custody whence the Books are produced	299
Receipts for Payment of Money -	299
Rate Books - - -	300
Declarations as to Right of Property -	301
Declarations by Occupiers - -	301
Particulars of Estate recognized by Tenant for Life - - -	304
Declarations made after Occupation delivered	305
Proof of Occupation - -	305

Page

Declaration against Interest, *how to be understood* - - - 305, 6
Entry by one under whom the Title is derived 306
By Executor - - - 307
By Proctor - - - 307
Where there is a Charge, and Discharge - 307
Clerical Books—Rector's—Vicar's 307, 8
Impropriators' Books - - 310
Verbal Declarations against Interest - 310
Entries, Evidence of Facts there stated 311
Examples - - - 311
Whether Evidence of Collateral *Facts* 313
Made by one, who would not have been competent - - - 315
Where other Proof may be had - 315
Proof of Declarant's Situation, aliunde 316

SECT. VIII. Exception to the General Rule respecting Hearsay, where Declarations or Entries have been made by Persons since Deceased, in the course of Office or Business 318

Declarations (Entries, &c.) in the course of Business - - - 318
Principle of their Admissibility - 319
Earlier Cases on this Subject, stated 319—321
Later Cases, which settle the Rule - 322
Doe v. *Turford, stated at length* - 322
Indorsement on a Duplicate of Notice to Quit, Evidence of the Service of the Notice 322
Poole v. *Dicas, stated, confirming the last Case* - - - 324
Entry in Notary's Book, Evidence of Dishonour of a Bill - 324
Official Entry, not Evidence of a Fact therein stated, if Statement extra-official - - - 326

Page

Certificate of Sheriff's Officer as to Place *of Arrest, (if extra official as to the Place) not admissible, Chambers* v. *Bernasconi* - - - 326

Remarks on the Principle, (laid down in Doe v. *Turford, and Poole* v. *Dicas,) with reference to Chambers* v. *Bernasconi, and some other earlier Cases* - - 328

Entries not Evidence for Parties in Privity 330

Indorsements on Bonds and Notes as to Payment of Interest - - 330

Searle v. *Lord Barrington* - 331

Bosworth v. *Cotchett* - - 333

Gleadon v. *Atkin* - - 333

Indorsement made after Presumption of Payment - - - 334

Shop Books, not Evidence, in general 335

St. 7, Jac. 1, c. 12 - - 335

Entry must be by Person since Deceased 335

SECT. IX. Exception to the General Rule respecting Hearsay, where Witnesses, since Deceased, have given Evidence in a former Trial - - 337

Evidence of Witnesses on former Trial, since Deceased, when admissible - 337

Between same Parties, on same Issue 337

Evidence of Witness kept away by Contrivance of the Party - - - 337

Evidence on former Trial, in Proof of a Will 338

Rule between Privies, as well as Parties 338

Evidence on former Trial, how proved 339

Same rule applicable to Depositions - 339

SECT. X. Exception to the General Rule respecting Hearsay, in the Case of Admissions by Parties to the Suit 339

	Page
Principle of the Exception - -	339
1. *Of Admissions by a Party to the Suit, or by one for whose benefit the Suit is brought*	340
Whole of the Admission to be received	340
The same Rule applies to written Statements	341
Answer in Chancery - -	341
Documents referred to - -	341
Where there are other Writings, distinct and unconnected - -	342
Examination, including only Things material	342
Rule, as to producing other Parts of the Proceedings, with reference to Depositions and Answers in Chancery -	342
Effect of Admission, where some parts favourable - - -	344
R. v. *Clewes*—*Smith* v. *Blandy*—*Randle* v. *Blackburn* - -	344
Admission containing Hearsay -	345
As to Contents of Written Instruments	346
Whether Notice to produce necessary	346
Bloxam v. *Elsee*—*but Earle* v. *Picken, and Ashmore* v. *Hardy* contrà - -	346
Parol Admission not Evidence to contradict Documentary Evidence -	347
As to Matter of Record -	347
Discharge of Insolvent -	347
Conviction of Witness -	347
Offer of Terms, during a Treaty -	348
Communication made without Prejudice	348
When not made without Prejudice	348
Offer by Party Contesting -	348
Admission of collateral Facts, during a Treaty - - -	349
Admissions on Examinations - -	349
Examination before Commissioners of Bankrupt - -	349, 350

Page

Stockfleth v. *De Tastet*—*Wheate's Case* —*R.* v. *Britton* - 349, 350
Examination before Committee of House of Commons—*R.* v. *Merceron* - 350
Indirect or Implied Admissions - 351
In notice to produce Papers - 351
Advertisement for Sale - 351
Undertaking by Attorney - 351
Implied Admission of Relation or Character of Party - - 351
From acting as Party - 351, 352
From exhibiting an Account before Commissioners - - 353
Admission of Professional Qualification - 353
Berryman v. *Wise*—*Smith* v. *Taylor* 353
Implied from Conduct, Demeanor, Acquiescence, &c. - 354, 5
See also p. 358
Implied from receipt of Notice to quit, without Objection - 355, 6
Not answering a Letter, not to be construed into Admission - - - 356
Admission as to Entries in a Book, when there is free Access to it - - 357
Entries in Manor Rolls, how far evidence against Tenants - - 357
Writings in possession of Prisoner, what implied from - - - 358
Partnership Books—*Corporation Books* 358
Party's Conduct inconsistent with his Claim 358
Effect of Admission on Criminal Charge on a matter involving Law *as well as* Fact 359
Effect of Admissions generally - 360
Party estopped by Admission, from disputing the Facts admitted - - 360
Where a wrong would otherwise ensue 360
Party admitting Bankruptcy, when conclusive 360

CONTENTS.

	Page
Petitioning Creditor cannot dispute Bankruptcy - - -	361
Accounting with Toll Collector, when conclusive - - -	361
Other Examples stated, of conclusive Admissions - - -	362
Person holding out himself as Partner	362
Tenant estopped from disputing his Landlord's Title - - -	363
Lease by Deed, or Parol - -	363
Attornment without payment of Rent	363
Payment of Rent under Misrepresentation - - -	363
Title of Landlord determined -	363
Acceptor cannot dispute Signature of Drawer	364
Agent bound by his Account rendered, when	364
Wharfinger achnowledging Title of Bailor	364
Admissions, implied from Conduct, not conclusive - - -	365
Taking Oath before Tax Commissi. ners	365
Insolvent's Omission of Particular Debt	365
Entry at Custom-house as to a firm	365
Notice of Bankruptcy to Landlord	365
Admissions in Answers in Chancery -	365
By making or using Affidavits -	366
In Deeds, when an estoppel, when not	367, 8
In other Writings,—as Receipts	368
Adjustment on a Policy, when not conclusive	369
Inventory in Ecclesiastical Court — Probate Stamp - - -	369
Invoice—Bill delivered—Using a Name	370
Admission of Debt, when not an admission of Bill delivered - - -	370
Parish Certificate, effect of - -	370
Paper written by Party, but not Signed	371
Bill in Chancery—not Evidence of Facts, in general - - -	371
Whether Evidence as an Admission	371

	Page
Verbal Admissions—effect of - -	372
Admission by Party to the Record -	372
Who a Party within the Rule -	373
Admission by Party suing for another's Benefit	373, 4
By Party Interested, though not Party to the Record - - -	374
Cestui que trust *of Bond* -	374
Person Interested in Policy -	374
in Freight -	375
Rated Parishioners - -	375
Party Indemnifying - -	375
Petitioning Creditor - -	376
Third Person, when admissible, in Issue on his Liability - -	376
Bankrupt—Petitioning Creditor	276
Party, in different Capacity -	377, 8
One Party, Evidence against another Jointly Interested - -	378
Rule in Contract—in Tort	378
Partner, a Party to the Suit -	374
Part-owner not a Party -	379
Parties to Negotiable Instruments	380
2. *Of admissions by an Agent of the Party*	380
Remark on this kind of Evidence -	381
General rule - - -	381
Declaration, in course of business -	381
When not so made, not evidence -	382
Fairlie v. *Hastings*—*Garth* v. *Howard*	382
Other cases stated - -	383
General rule laid down -	383
Declaration within scope of Agent's authority	384
By Wife, when acting for Husband	384
Interpreter, employed as Agent -	385
Counsel of a party - -	386
Rule, with respect to admission of Agent, in criminal cases - -	386

	Page
Decision by Referees, on Matters referred	387
3. *Of Admissions by Under-sheriffs, Bailiffs, Guardians, Attorneys, &c.* -	387
Declaration of Under-sheriff, when evidence against Sheriff - -	387
Of Bailiff, when evidence -	387
Guardian, not evidence against Minor	388
Rule as to admissions by Attorney -	389
What proof of being Attorney -	389
Admission by Principal not evidence against Surety - - -	390
Privies Affected by Admissions of Principal	391
In Blood—in Law—by Estate -	391
Examples of statements, &c. being evidence against privies in Estate -	391
Admission by Proprietor or Occupier	391
Receipt for Modus by Lessee of Vicar	392
Statement by Landlord in Lease -	392
By Vicar as to Vicarage property	392
By Tenant in possession -	392
By third Person as to having assigned Property - -	392
By a Bishop as to his right of presentation to a Living -	392
Ancient Statements, answers to Bills, &c. in Tithe Causes - -	393
Surveys and Maps, in case of privity of Estate, when evidence - -	393, 394
Holders of Securities, Admission by	394
Limitation to the Rule in such cases	395
Beauchamp v. *Vassey* -	395
Privity of Estate determined, Declarations not admissible - - -	395
Author of the Admission need not be called	396

SECT. XI. Exception to General Rule respecting Hearsay, in case of Confessions made by Prisoners - - 397

	Page
General principle of the Rule -	397
Remarks on this kind of Evidence -	397
Confessions made in Examination taken before Magistrates - - -	398
Entire Confession of Prisoner to be produced	398
Rule laid down in The Queen's case	398
Statements in his own favour, *effect of*	399
May be disproved, or not credited	400
Inference of guilt from Demeanor -	400
Prisoner present at an Examination and not denying - :	400
Confession, a sufficient ground for Conviction	400
The Confession must be voluntary -	401
Course to be taken by Magistrates	402
Examination of Prisoner charged with an Offence, taken on Oath, not admissible as a Confession - -	402
R. v. *Smith and another* -	402
R. v. *Owen* - -	402
Examination, purporting to be upon Oath, not to be disproved, query, *R.* v. *Harris*	402
See vol. 2, p. 81.	
Examination of Prisoner, on suspicion of an offence, on oath, not admissible -	403
R. v. *Lewis—R.* v. *Davis* -	403
Statement made on oath, when Prisoner was not in custody, and not suspected	404
R. v. *Haworth—R.* v. *Tubby* -	404
Second examination, after examination on oath, with caution - -	404
R. v. *Webb* - - -	404
Confession, made under influence of religious or moral exhortation -	405
By Prisoner when drunk -	405
Obtained by promise of favour, but not connected with the charge	405
R. v. *Thomas* - -	405
Obtained by means of deception or contrivance -	405

Page

R. v. *Thomas—R.* v. *Shaw* 405

Obtained by means of questioning the Prisoner - 405

Confession, during illegal Custody - 406

Previous caution by Magistrate, not essential to render Confession admissible - 407

Inducement by Persons in authority, when sufficient to exclude - - 407

Without authority, will not exclude 407

R. v. *Row—R.* v. *Taylor* - 407

Made with apparent sanction of one in authority, excludes - 409

R. v. *Pountney—R.* v. *Taylor* 409

Suspicion of inducement, must be removed 409

Statements made, subsequently to promise 410

After caution given, admissible, when 410, 411

Finding of property, in consequence of Confession - - - 411

R. v. *Gould—R.* v. *Griffin—R.* v. *Jones* 412

After Confession implicating others 413

R. v. *Jenkins* - - 413

Confession of prisoner not evidence against others - - - 413

Naming others, to be given in evidence as made - - 414

R. v. *Hearne* - - 414

On former hearing before Magistrates, the examination on second hearing not being returned - 414

R. v. *Wilkinson* - 414

Statements of Co-conspirators, when receivable - - - 414, 415

Confession in case of High Treason - 415

Evidence of overt-act, under 7 Wm. 3, c. 3, s. 2, when proved by two Witnesses - - - 415

Proved by a single Witness, sufficient to convict under 39 & 40 *Geo.* 3, *c.* 93 416

Page

Confirmatory of evidence of Witnesses 416
Proof of collateral facts - - 416
Admissible in trial for Treason, on the same principle as in other cases - 416
Remark of Mr. Justice Foster on this kind of evidence - - 417

CHAPTER VIII.

Of the Exclusion of Secondary Evidence; and of the Rule which requires the best Evidence - - 417

Principle of the Rule - - 418
Rule explained - - - 418
Examples - - - 418
Copy of Written Instrument, when not admissible - - 418
When admissible - 418
All possible Proof not required - 418
Proof of execution of an Instrument by one of several Witnesses - 418
Admission of Payment - 419
Writing, used as a Written Memorandum 419
Further illustrations of the Rule - 419
Proof of Negative, when not necessary 419
Williams v. E. I. Company - 420
The Rule relates to the quality *not the* quantity *of Evidence* - - - 421
Parol Evidence of Writings when not admissible - - - 421
Where the Writing is the subject of dispute - - - 422
Rule in Cross-examining as to contents of Letters or other Writings - 422
Where the Writing is a Conveyance or Lease - - - 423

	Page
Where terms of Tenancy are to be proved	423
Or who was the Lessor -	423
Otherwise when only the fact of Occupation to be proved -	424
Where the Writing is a Contract of any kind - -	424
Collateral Writings need not be produced	424
Rule as to Substitution of Secondary Written *Evidence of Writings* - 424,	425
Insurance Company's Books not Evidence of Insurance - -	425
Nor memorial of Registered Deed Evidence of contents of Deed -	425
Parol Evidence of Oaths which are recorded, not admissible - -	425
Or of Day of Cause coming on for Trial	425
Or of Contents of Records -	425
Or of Discharge of Insolvent 425,	426
Examination of Prisoner before Magistrate	426
Parol Evidence of, not admissible, if examination taken in Writing -	426
Written Examination not to be added to by Parol Evidence -	426
Taken on oath, not admissible -	426
Informal Examination, Parol Evidence of, when admissible - -	427
Used as a Memorandum -	427
Copy of paper used for refreshing Memory, time of taking, material -	428
Duplicate originals — Parol Evidence of, when admissible - -	428
Oral Evidence not excluded, though there may be Writing, when - -	428
In case of Receipt for Payment	429
Or Notices to Quit -	429
Or Account read over to Party	429
Or Admission of debt -	429
Resolutions at a Public Meeting, proof of	430
Hunt's case - -	430

Page

Inscriptions on Flags, Banners, &c., proof of 430
Hunt's case - - 430
Resolutions read at a Meeting, proof of 430, 431
Dr. Sheridan's case - - 431
Cases excepted out of the General Rule 432
When contents of Records are to be proved - - 432
Or Appointment to a Public Office 432
Acting as such Officer, sufficient proof of Appointment 432
Examples - 432
Or when general mode of dealing, or state of old Records, or Solvency, &c., to be proved 432
Exception in case of Examination on voire dire 434
Notice to Quit—of Dishonour, &c., Notice to produce the Notice unnecessary 434
Rule, when the original Evidence is not attainable - - - 434
When document Lost, &c. 434

CHAPTER IX.

Of Presumptive Evidence, and of Presumptions 436

Presumption of Fact, what - 436
Presumptive Evidence - - 437
Presumptions of Law - - 438

Sect. I. Of Presumptions made by Courts and Juries - 439

Presumptions of Law - - 439
Presumptions of Fact - - 439
Presumptive compared with Direct Evidence 440
Several kinds of Presumptions at Law - 441
Presumptions with respect to Age - 443
Presumptions as to Legitimacy 443
As to a Marriage - 444

	Page
Presumption as to Intention - -	444
Malicious Design -	444
Innocence - -	445
In case of Publication of Libels -	446
In case of Possession of Stolen Goods	447
Contra Spoliatorem - -	447
From Fabrication of Evidence -	448
As to Death, after lapse of time -	449
Of Survivorship - -	449
Of Loss of Ship - -	450
Of regular Appointment to Office	450
Of omnia rite acta - -	450
From course of Public Office -	452
Of Property from Possession -	452
As to Boundaries - -	453
Incorporeal Rights -	454
2 & 3 Wm. 4, c. 71 -	454
Of Public Right of Way presumed	454
Of Faculties - -	455
Of Act of Parliament - -	455
Of Suit of ad quod damnum -	455
Of Grant from the Crown -	455
Of Private Conveyances -	455
Of Conveyance from Trustee -	456
Of Surrender of Copyhold -	457
Of Licenses - - -	458
Of Bye Laws, from Usage -	458
By the Law of Treason - -	458
Of Payment - -	459
Of reputed Ownership - -	459

SECT. II. Of the Relevancy of Presumptive Proofs. And of the Rule which confines Evidence to the Points in Issue - - 459

General Rule - - -	460
Proof of other Contracts, when admissible	460
Proof of other Transactions, to shew Knowledge - - -	461

	Page
Proof of Customs in other Manors -	462
Duke of Somerset's Case -	462
Rule, when the Question relates to Tenure - - -	463
Proof of Acts of Ownership in other Lands	464
Jones v. *Williams* - -	464
Stanley v. *White* - -	465
Cross-examining as to other Customs	466
Blundell v. *Howard* -	466
Character, Evidence of, when allowed -	467
When not - -	467
Of Prosecutor, when provable -	468
Of Prisoner - - -	469
Upon what Points - -	496
General Character -	469
Cross-examining as to Character -	470
In Criminal Cases, Evidence to be confined to the Charge - -	471
Examples—in Treason, Burglary	471
Rule, when the Felony charged is connected with others - -	472
Proof of other Criminal Acts to shew Intention - - -	472
Uttering of other Notes or Money	473
Proof of subsequent Acts for the same purpose - -	474
In case of Malicious Shooting, Threatening Letter, Libel, Receiving of Stolen Goods - -	475
Or of Conspiracy to cheat	476
In case of Murder also -	476
Or Conspiracy to riot	476
Or other Conspiracies	477
General Disposition to commit such an offence not proveable	477
Acts and Declarations of Prisoner, when evidence for him	478

CONTENTS.

	Page
Walker's Case—Lord George Gordon's Case -	478
Horne Tooke's Case -	479
Hardy's Case - -	480
Lord Russell's Case -	481
SECT. III. Of the Effect of Judgment by Default; of Payment of Money into Court; and of Particulars of Demand	481
1. *Of the Effect of Judgment by Default*	482
What the Judgment admits -	482
In Action on Bills of Exchange	482
Or for Goods sold -	482
Judgment on Demurrer — Inquiry after - -	483
2. *Of the Effect of Payment of Money into Court* - -	483
Effect of Payment as an Admission	483
To what Extent - -	483
Proof of Payment - -	486
3. *Of the Effect of a Particular of Demand*	486
Bill of Particulars, effect of -	487
When Particular confined to Part of Demand - -	487
First Particular enlarged by Second	488
Demand of Payment for less Amount	488
Interest on Note, not particularized	429
Particular of Plaintiff, Evidence to support Defendant's Plea, when	489
Evidence on Special Count, though not mentioned in Particular	489
Error in Particular - -	490
Clerical Error - -	490
Error in Date - -	490
Where Defendant's Evidence supplies other Items for the Plaintiff	491
Proof of Particular - -	491

CHAPTER X.

Page

Of the Rule for Determining which Party ought to Prove the Issues - - 492

General Rule as to Proof of Affirmative 493
Examples—Action for Loss by Barratry 493
When Breach of Duty charged 493
Examples - 493
Breach of Covenant stated negatively 494
Prosecution for Coursing without consent, &c. - - 494
When Presumption of Law is in favour of Defendant's Plea - 495
On question of Legitimacy - 495
When Fact particularly within the Knowledge of a Party - 495
Rule as to proving Disqualification 496
As to Proof of Fact alleged in Defence - - - 497
Plea of Infancy - - 497
Rule in Prosecution for Bigamy 497

CHAPTER XI.

Of the Rule that the Substance only of the Issue need be Proved - - 497

General Rule on this Subject - 498
1. *Examples in Civil Cases* - 499
In Action of Covenant—Action against a Sheriff — Assumpsit — Slander— Replevin — Assault on Constable
Plea of Tender - - 500
2. *Examples in Criminal Cases* - 501
Prosecution for Libel—False Pretences — Petit Treason — Burglary — Robbery - - 501

	Page
Prosecution for Murder -	502
Manner of Death—Rule as to Proof	502
Charge of being Principal in First Degree—*Proof of being in* Second	502
Charge of being Principal—*Proof of being* Accessory -	502
Murder of Officer in Execution of Duty - -	503
Mackenzie's Case -	503
3. *Of Material and Immaterial Variances in Civil Suits; and of the Doctrine of Variances* -	503
General Rule - - -	503
Examples—in Action on Bill of Exchange—Action of Tort—in Cases of Prescription - -	504
Rule, where an Averment is mere Inducement	504
When the Averment cannot be struck out - - -	505
Bristow v. *Wright* -	505
When the Averment may be struck out	505
Williamson v. *Allison* -	505
4. *Of Material and Immaterial Averments in Indictments* - -	506
Prosecution for Robbery—Arson—Burglary - -	506
5. *Of Variances in Actions on Contract*	506
Contract to be proved as laid—Examples - -	506
When a Contract is stated in Action of Tort - - -	507
What Parts of Contracts need be stated	508
Joint Contracts, Rule in, with reference to Party suing or sued -	509
Joinder in Torts, Rule -	506
6. *Of Variances in the Proof of Presumptive Rights* - - -	510
General Rule - -	510
When Proof is of more ample Right	510

	Page
Rule in Action for Disturbance of Right	510
7. *Of Variances in the Proof of Deeds, Records, &c., set out in Pleadings* - - -	511
Examples—where Variances used to be Fatal - -	511
When Deed set out in substance only	512
Record set out in substance	513
Averment as to Day of Acquittal	513
Or Day of Judgment -	513
8. *Of the Rule as to Proof of Time, Place, Name, &c., stated in the Pleadings* - - -	514
Proof of Time, in Prosecutions -	514
In Civil Suits - -	514
Proof of Place, in Civil Suits -	515
In Prosecutions - -	515
9. *Of the recent Statutory Provisions for Remedying the Failure of Justice, from defective Pleadings and Variances* - -	515
St. 7, *G.* 4, *c.* 64, *s.* 20 - -	515
Judgment in Indictments not to be stayed in certain Cases -	515
St. 9 *G.* 4, *c.* 15, *(Lord Tenterden's Act)* - - -	516
Recital—Enactment -	516
Certain Variances, in Actions and Misdemeanors, to be amended	516
Cases on this Statute - -	517
Masterman v. *Judson* -	517
Lamey] v. *Bishop*—*Smith* v. *Brandram*—*Ryder* v. *Malbon*—*Brooks* v. *Blanshard*—*Jelf* v. *Oriel* - -	517
St. 3 & 4 *Wm.* 4, *c.* 42, *s.* 23 - -	517
Recital—Enactments - -	519
Sect. 24, *as to finding Facts specially*	520

	Page
General View of the Provisions of this Act - - -	520
What Proceedings they apply to—what Variances—Amending, how made - - -	520
Power, when Variance not prejudicial, &c. - -	521
When Variance may be so	521
Restriction on Amendments	521
Power of amending to be exercised liberally - -	522
Amendment, when to be made -	522
1. *Cases in which Amendments have been allowed - -*	523
Hemming v. *Parry*—*Mash* v. *Denham*—*Hanbury* v. *Ella*—*Parry* v. *Fairhurst - -*	523
Howell v. *Thomas*—*Boys* v. *Ancell*—*Doe* v. *Leach*—*Dew* v. *Katz*, *Marriott* v. *Edwards, (in note)*	524
Ivey v. *Young*—*Brashier* v. *Jackson, (in note)*—*Whitwell* v. *Scheer*—*Ward* v. *Pearson, (in note)*	525
Evan v. *Fryer, (in note)*—*Smith* v. *Knowelden*—*Jenkins* v. *Phillips*	526
2. *Cases in which Amendments have been refused - -*	527
Doe v. *Errington*—*John* v. *Currie*—*Frankum* v. *Earl of Falmouth*—*Adams* v. *Power* — *Cooper* v. *Whitehouse*—*Watkins* v. *Morgan*	527
Guest v. *Elwes*—*Brashier* v. *Jackson - - -*	528
State of the Law with respect to the Power of amending in Criminal Cases — Power of amending wanted - - -	529

ERRATA IN VOL. I.

Page
7, n. (5), transfer the reference (to 7th and 11 Vols. of Howell's St. Tr.) to the end of n. (3).
—— (6), line 6, after "18" insert "How."
8, n. (1), line 1, for "7 Wm. 3, c. 3," read "7 & 8 Wm. 3, c. 3, s. 2."
11, n. (3), last line, for "148" read "143."
12, n. (3), last line, for "432" read "232."
32, note, col. 2, line 3, for "26" read "27."
41, n. (3), for "Tillo *v.* Grevet" read "Title *v.* Grevett."
49, n. (2), after "Taunt." insert "752."
———— for "2 Ro. & M. 270," read "2 Moo. & R. 269."
52, n. (2), before "Campb." insert "2."
62, par. 2, line 3, after "R. *v.* Whiting," insert "1 Salk. 283."
66, n. (4), line 3, for "2 Vol." read "2 Roll."
82, n. (1), for "Wm. 3," read "Wm. 4."
86, n. (2,) for "Sec. 2," read "Sec. 5, p. 119."
90, n. (2), at the end, add "p. 97."
92, n. (1), line 1, for "Townsend," read "Townend."
———— line 5, at the end add, "p. 110."
96, n. (1), for "Freeman," read "Ferguson."
102, par. 1, line 3, refer to "P. 114, *infra*."
———— line 9 from bottom, for "to any suit," read "in any suit."
———— line 8 from bottom, for "Wm. 3," read "Wm. 4."
109, n. (4), after "*post*," insert "p. 112."
111, par. 2, line 5, for "witness, read "plaintiff."
—— n. (3), after "*supra*," insert "p. 91."
114, line 2, and in margin, for "c. 52," read "c. 42."
117, n. (2), after "*supra*," insert "p. 105."
120, n. (2), at the end, add "1148, 6th ed."
121, n. (4), for "Bar," read "Burr."
132, n. (4), at the end, add "p. 111."
141, line 8, and in margin, for "c. 107," read "170."
142, line 12, after "Kirdford," insert "n. (2)."
149, n. (6), for "Doug. 134," read "1 Doug. 139."
156, last note, at the end, for "statute," read "Statute of Frauds."
163, n. (1), line 3, for "Remington," read "Kensington."
—— n. (5), for "Livatti," read "Livette."
165, n (1), line 4, for "if that expression," read "if by that expression."
168, n. (2), for "P. C." read "N. C."
181, n. (6), line 2, for "See," read "Lee."
215, n. (3), for "Roe," read "Rex."
221, n. (2), for "Bing. 166," read "1 Bing. N. C. 597."
224, n. (5). line 3, for "Heralds'" read "Heralds' book."
234, n. (1), last line but one, for "6 Car. & P.," read "8 Car. & P."
236, note, col. 2, at the end, for "7 P. & C. 788," read "7 B. & C. 785."
—— n. (3), after "*supra*," add "p. 231."
238, n. (1), line 6, for "Jisson," read "Sisson."
241, note, col. 2, line 3, for "Mitchel, 4 Dowl. P. C." read "Michel, 2 Price, 399."
244, n. (1), at the end, for "Lewes, 1 M. & S." read "Lowes, 2 M. & S."
250, note, col. 2, line 4, dele "P. C. 297," and add, "S. C., 2 Price, 399."
251, n. (1), line 7, for "Donaldson," read "Donison."
275, n. (2), line 3 from bottom, for "Lukin," read "Lakin."
295, n. (1), line 14, after "Rob." insert "261."
299, n. (1), line 4, for "Hutton," read "Heaton."
301, n. (3). at the end, for "Shendom," read "Mendham."
———— for "Dicken," read "Dickson."
307, n. (1), for "9 Bing. 690," read "Spiers *v.* Morris, 9 Bing 687."
311, par. 3, line 3, from bottom, for "Beddington," read "Bebbington."
315, n. (1), line 8, after "East," insert "35."

Page
317, line 7, for "could have," read "could not have."
——line 8, dele "not."
318, n. (1), line 3, for "Gleadon," read "Gleadow."
322, n. (1), for "Add." read "Adol."
328, n. (1), for "Parke, J." read "Park, J."
329, par. 1, line 8 from bottom, after "Canterbury," insert "(1)."
330, n. (1), line 2, for "126," read "826."
340, last par. line 3, dele "(3)," and transpose this note to the end of par. 1, p. 423.
349, n. (3), line 3, for "2112," read "212."
353, n. (1), line 7, for "Leke," read "Like."
——n. (2), line 11, for "Regg. *v.* Cargenven," read "Rigg *v.* Curgenven."
355, n. (4), for "Jarrat," read "Jarrett."
357, par. 2, line 4, for "against," read "by."
—— n. (2), transpose the four last lines to end of n. (3), p. 358.
359, n. (3), read thus, "Melen *v.* Andrews, M. & M. 336."
363, n. (1), line 3, for "Syivan," read "Syllivan."
364, n. (1), col. 1, last line, for "Sedford," read "Sidford."
365, n. (6), for "Hearne," read "Heane," and the same in p. 369, n. (2).
367, n. (4), line 5, for "release," read "lease."
——— col. 2, line 5 from the end, for "Willis," read "Willes."
——n. (5), line 3, for "Haytor," read "Mills."
370, note, line 3, for "Long," read "Lang."
373, n. (1), col. 2, line 1, after "Chitt." insert "Rep."
374, n. (2), after "1 Camp. 392," insert the passage in this note, "The proper remedy, &c."
377, note, col. 2, line 3, for "E." read "East."
——n. (1), for "Smith *v.* Young," read "Young *v.* Smith."
381, line 8, for "bearer," read "hearer."
——n. (1), line 3, for "Johnson," read "Jansen."
387, par. 2, line 2, for "another," read "a."
389, n. (2), line 9, for "St." read "Stark. Ca."
390, n. (1), line 5, after "Bailiff," instead of a full stop insert a comma.
——— col. 2, line 7, for "to keep," read "should be kept."
395, par. 2, line 1, for "Vassey," read "Parry."
399, n. (2), after "629," instead of a full stop insert a comma.
404, n. (1), line 2, after "Car. & P." insert "254."
——n. (2), line 3, for "Rex *v.* Wheater," read "Reg. *v.* Wheatland."
——— line 4, for "45," read "238."
406, n. (1), for "Donnington," read "Derrington."
——n. (2), for "East, 7, 1818," read "East. Term, 1818, M. S."
415, par. 2, line 15, dele "not."
——n. (8), for "Disc." read "Rep. 10."
424, n. (1), line 2, for "Dovan," read "Doran."
432, n. (3), line 6, for "Bromsfield," read "Boresfield."
437, par. 2, line 13, dele the words "of the number."
442, after "Foster *v.* Steele," refer to "3 New Ca. 892."
443, n. (6), at the end, add "Morris *v.* Davies, 5 Clark. & Fin. 163."
445, n. (1), line 11, for "Cozer," read "Crozer."
448, note, col. 2, dele "Braithwaite *v.* Coleman, 1 How. 22; Burr. 2484."
450, par. 2, line 4, for "part," read "port."
——n. (2), line 3, for "Newly," read "Newby."
——— line 9, for "Kostu," read "Koster."
463, par. 2, line 12, dele the words "the only judge then present."
464, n. (4), line 4, dele "See."
469, line 15, after "examination," instead of a full stop, put a semicolon.
483, par. 2, line 7, for "is," read "are."
484, n. (3), before "2 Barn." insert "Stoveld *v.* Brewin."
—— n. (4), line 2, dele "In."
491, par. 2, line 7 from bottom, for "held," read "observed."
500, par. 2, line 5, before "a year," insert "for."
527, par. 4, line 4, from the bottom, for "by," read "before."
528, n. (3), for "Dowl." read "Mee. & Wels."

ADDENDA IN VOL. I.

Page

5, par. 2, see "R. *v.* Williams, 7 C. & P. 320."

13, par. 2, see "St. 1 & 2 Vict. c. 105, as to the binding effect of oaths taken by jurymen, witnesses, or deponents."

36, n. (5), add "R. *v.* Farler, 8 C. & P. 106; R. *v.* Dyke, Id. 261; R. v. Birkett, Id. 732."

47, n. 3, add "See *infra*, p. 113."

48, par. 1, l. 6, from bottom, after "suit," add as a note, "See 3 & 4 Vict. c. 26, *infra*, p. 144."

91, n. (5), add "*Vide infra*, p. 113."

92, n. (1), line 3, add "*Vide infra*, p. 113."

94, n. (1), line 5, at the end, add "Ferguson *v.* Spencer, 1 Man. & Gr. 987. See 5 & 6 Vict. c. 122, providing in what cases a certificate shall be a discharge."

96, par. 2, add "Carruthers *v.* Graham, 1 Car. & M. 5; S. C. 2 M. & R. 388. Smith *v.* Groom, 2 M. & R. 388."

— n. (5), add "By the new Bankruptcy Act (5 & 6 Vict. c. 122, s. 3), the petitioning creditor's debt may be dispensed with.—Sect. 7, enacts, that no person shall be liable to become bankrupt upon an act committed more than twelve months before the issuing of the fiat.—By sect. 8, a fiat shall not, in future, be invalidated by an act of bankruptcy concerted between the bankrupt and any creditor or other person.—Sect. 37, 38, and 39, prescribe in what cases a certificate shall be a discharge to the bankrupt of all debts, claims, &c."

97, n. (1), add "Doe *d.* Cuthbert *v.* Bamford, 11 Ad. & Ell. 786. Parker *v.* Mitchell, 11 Ad. & Ell. 788. Doe *d.* Pye *v.* Branwhite, Trin. T. 1842, Queen's Bench, reported in Law Journ. Rep., vol. 20, p. 218."

98, n. (1), add "Bloor *v.* Davies, 7 M. & W. 235."

103, n. (6), add "Groom *v.* Bradley, 8 C. & P. 500."

105, n. (1), add "*Vide infra*, p. 117."

110, n. (1), add "See *infra*, p. 115, 116."

113, n. (2), add "*Vide supra*, p. 91, 92."

115, n. (2), add "*Vide supra*, p. 110, and *infra*, p. 116."

116, n. (2), see "Russell *v.* Blake, 2 M. & Gr. 374: action by a payee against one of the makers of a promissory note; the Court of Common Pleas decided that another of the makers may be made competent, under the statute, for the defendant." See also "Poole *v.* Palmer, 9 Mee. & W. 71. Hoyle *v.* Coupe, 9 Mee. & W. 450, decides, that, in an action against a copyholder, another copyholder may be made competent for the defendant to prove a beneficial custom for copyholders within the manor. See Parker *v.* Mitchell and others, 11 Ad. & Ell. 788, in which case, it seems, the witness might have been made competent under the act."

—— n. (3), add "S. C., 6 Jurist, 13."

125, n. (3), add "Read *v.* Thoyts, 9 C. & P. 515."

133, n. (3), add "Paddock *v.* Fradley, 1 Cr. & J. 90; Grylls *v.* Davies, 2 B. & Ad. 514."

144, par. 2, see "Reg. *v.* Doddington, 1 Ad. & E. (N. S.), 411."

154, n. (3), at the end, add "Fellingham *v.* Sparrow, 9 Dowl. P. C. 141."

176, n. (6), see "Davies *v.* Waters, 9 Mee. & W. 608."

221, par. 1, at the end, refer to "Vaux Peerage case, 5 Clark & Fin. 526."

—— n. (3), at the end, refer to Vaux Peerage case, 5 Clark & Fin. 526."

224, n. (5), at the end, refer to "Vaux Peerage case, 5 Clark & Fin. 526."

230, par. 1, at the end, see "Doe *d.* Bamford *v.* Barton, 2 Moo. & R. 28; declaration of illegitimate relation held to be not admissible."

237, par. 1, at the end, see "Vaux Peerage case, 5 Clark & Fin. 526."

261, n. (2), add "S. C. 4 Campb. 403."

302, n. (1), add "Woolway *v.* Rowe, 1 Ad. & El. 114."

311, n. (1), add "Davies *v.* Humphreys, 6 M. & W. 153."

314, n. (1), at the end, refer to P. 326, *infra*.

Page
324, n. (4), add "R. *v.* Cope, 7 C. & P. 720."
346, n. (2), at the end, add "Newhall *v.* Holt, 6 M. & W. 662; Slatterie *v.* Pooley, Id. 664. Ward *v.* Suffield, 5 Bing. N. C. 381."
347, n. (1), add "Fox *v.* Waters, 12 Ad. & El. 42, 51, 54. Howard *v.* Smith 3 Scott, N. R. 574."
358, n. (3), at the end, add "R. *v.* Barratt, 9 C. & P. 387."
373, n. (1), add "Smith *v.* Morgan, 2 Mo. & Rob. 257; declaration by a party suing in a representative capacity."
374, n. (3), see "Doe *v.* Wainwright, 3 Nev. & P. 598. S. C. 8 Ad. & El. 691."
376, n. (1), see also "Proctor *v.* Lainson, 7 C. & P. 629; that such creditors' statements are admissible."
378, n. (3), see "Fox *v.* Waters, 12 Ad. & Ell. 43, 51—54."
389, n. (3), at the end, add "Pope *v.* Andrews, 9 C. & P. 564."
404, n. (2), add "See R. *v.* Sandys, 1 Car. & M. 345."
428, end of n. (2), see "Horne *v.* Mackenzie, 6 Cl. & Fin. 628."
471 par. 1, at the end, refer to R. *v.* Gadbury, 8 C. & P. 676.
476, note, line 1, after "proceed," refer also to "R. *v.* Mansfield, 1 Carr. & Marsh. 140."
484, n. (5), at the end, add "Stapleton *v.* Noel, 6 M. & W. 9."
488, n. (3), add "Chisman *v.* Count, 2 Man. & Gr. 307, 310."
489, n. (3), see "Rowland *v.* Blaksley, 1 Ad. & Ell. N. S. 403."
501, n. (1), at the end, add "Henwood *v.* Oliver, 1 Gale & Dav. 25. 1 Ad. & El. N. S. 409."
505, par. 1, at the end, add "By the new rules of pleading, the inducement in an action for a libel is admitted, if not traversed; Fradley *v.* Fradley, 8 C. & P. 572."
517, par. 2, see "R. *v.* Hewins, 9 C. & P. 786; amendment in an indictment for perjury."
523, n (4), add "Mash *v.* Densham, 1 Mo. & R. 442."
525, n. (1), add "Read *v.* Dunsmore, 9 C. & P. 588; action on a custom of trade. Clarke *v.* Morrell, 2 Scott's N. S. 17. S. C. 1 Man. & Gr. 841; action on a contract, Beckett *v.* Dutton, 7 M. & W. 157; action on a promissory note."
526, n. (3), add "Foster *v.* Pointer, 9 C. & P. 718. Prudhomme *v.* Fraser, 2 Ad. & Ell. 645; S. C., 1 Mo. & Rob. 435."
527, n. (1), add the two following instances in ejectment; "Doe *d.* Street *v.* Roe, 8 Dowl. P. C. 444. Doe *d.* Edwards *v.* Leach, 9 Dowl. P. C. 877."

TABLE

OF

THE CASES CITED.

A.

Abbey v. Lill ii. 174
Abbot v. Plumbe i. 347. ii. 203
Abbott v. Smith i. 509
Abigny v. Clifford i. 7
Abignye v. Clifton ii. 125
Abel v. Potts ii. 115
Abraham v. Newton ii. 88, 388
Abrahams v. Bunn i. 121
Acerro v. Petroni ii. 402
Ackerley v. Parkinson ii. 41
Ackland v. Pearce, i. 434. ii. 226
Ackroyd and Warburton's case i. 406
Adam v. Kerr ii. 210, 214
Adams v. Arnold i. 192
—— v. Davis i. 146
—— v. Lingard i. 40
—— v. Malkin i. 96
—— v. Power i. 527
—— v. Sanders i. 369, 459
—— v. Wordley ii. 357
Adamthwaite v. Synge i. 236, 258. ii. 134, 143
Addington v. Clode ii. 182
Addison v. Overend i. 509
Adeane v. Mortlock i. 125
Adey v. Bridges i. 342
Adey's case i. 362. ii. 418
Aflalo v. Fourdrinier i. 54, 55, ii. 220
Aickle's case ii. 223
Aitken, *ex parte* i. 168
Alban v. Pritchett i. 76, 384
Alcock v. Cook, i. 251, 277, ii. 96, 101, 149
Alderson v. Clay i. 346, 357
Aldred v. Halliwell ii. 125
Aldridge v. Haines ii. 41
Alexander v. Brown i. 371
—— v. Gibson i. 381, ii. 448, 456
Alford's case ii. 138
Algernon Sydney's case ii. 270, 271
Alivon v. Furnival i. 428. ii. 55, 57. 144. 147, 215, 228
Allan v. Tapp ii. 186
Allen's case i. 420. ii. 133
Allen v. Dundas ii. 30
Allesbrook v. Roach ii. 255, 257
Allington v. Bearcroft i. 93
Allison's case i. 428
Allott v. Wilkinson i. 394
Allport v. Meek ii. 257
Almon's case i. 447
Alner v. George i. 368, 374
Alsop v. Bowtrell, i. 444. ii. 126
Altham's case ii. 303, 315, 317, 332. 334
Alton v. Farren i. 160

Page

Alves v. Bunbury ii. 143
Ambrose v. Clendon i. 197
Amey v. Long ii. 371. 377
Amitié Villeneuve, case of i. 128
Anderson v. Pitcher ii. 337
——— v. Saunderson i. 77, 78, 385
——— v. Sir W. Hamilton i. 181
Anderton v. Magawley ii. 149
Andrew v. Pledger ii. 142
Andrews v. Dobson ii. 282, 292
——— v. Palsgrave i. 484
Angus v. Smith ii. 434
Ankerstein v. Clarke i. 512
Annandale, Marchioness of v. Harris i. 367
Annesly v. Lord Anglesea, i. 167, 228, 232, 440, 448
Anon. (3 Salk. 135) i. 21
—— (2 Camp. 334) i. 51
—— (1 Brownl. 47) i. 80
Ansley v. Birch ii. 391
Anscomb v. Shore i. 83, 242
Anstey v. Dowsing i. 149, 156
Antram v. Chase ii. 148
Apothecaries' Co. v. Bentley i. 446
Appleton v. Braybrook ii. 143. 144. 164
Appleby's case i. 400
Appottens v. Dunswell i. 281
Arcangelo v. Thompson ii. 121
Arding v. Flower ii. 374
Armstrong v. Hewitt i. 308. ii. 104, 168
Arnfield v. Bate i. 507
Arnold v. Bishop of Bath and Wells ii. 119
—— v. Revoult i. 511, 512
Arnott v. Redfern ii. 55, 57
Arundel v. Arundel ii. 91
Arundle, Lord, case of i. 308
Arundell v. Lord Falmouth, i. 249, 250
Arundel v. White ii. 141, 142
Ashby v. Power i. 393. ii. 10, 16, 104
—— v. White ii. 41
Ashford v. Thornton i. 441
Ashmore v. Hardy i. 347, 366
Ashton v. Poynter ii. 41
Aslin v. Parker ii. 20
Aspinal v. Kempson i. 457

Page

Assassination Plot, case of i. 31
Atherfold v. Beard ii. 182
Athol v. Ashburnham i. 227, 229
Atkins v. Drake, i. 300. ii. 104, 120, 169
——— v. Hatton ii. 168
——— v. Humphreys ii. 89
——— v. Meredith ii. 219, 220
——— v. Palmer ii. 386
——— v. Tredgold i. 374, 380
Atkinson v. Carter ii. 219
——— v. Pierrepoint i. 363
Atterbury, Bishop, case of, ii. 251
Attorney General v. Bowman i. 467
——— v. Bulpit ii. 396
——— v. City of Coventry ii. 185
——— v. Davison, ii. 88
——— v. Forster, ii. 347
——— v. Good, i. 187
——— v. Griffith, i. 123
——— v. Grote, ii. 296
——— v. King, ii. 3, 38
——— v. Le Merchant ii. 216, 391
——— v. Parker and others ii. 347
——— v. Parnther i. 449
——— v. Plate Glass Co. ii. 277
——— v. Randall, i. 368
——— v. Theakestone ii. 108
——— v. Corporation of Warwick i. 278
Audley, Lord, case of i. 79
Austin v. Poiner ii. 419
Avery v. Dickinson ii. 178
Aveson v. Lord Kinnaird i. 191, 192, 204, 280
Ayrey v. Davenport ii. 134
Azyre's case i. 79

B.

Bacon v. Chesney i. 370, 390
Backhouse v. Middleton ii. 66
Badcock's case i. 22, 24
Baggaley v. Jones i. 392
Bailey v. Bailey i. 89

	Page
Bain v. Case	ii. 115
—— v. Mason	ii. 111
Baillie's case	i. 163
—— v. Hole	i. 88, 161
—— v. Wilson	i. 122
Baikie v. Chandless	ii. 244. 247
Baker's case	ii. 467
—— v. Dewey	i. 368, 369. ii. 351
—— v. Morley	i. 76
—— v. Paine	ii. 337
—— v. Sweet	ii. 149
—— v. Tyrwhitt	i. 92, 93
Baldney v. Ritchie	ii. 217
Baldwin v. Dixon	i. 109
Balutti v. Serani	i. 461
Bambridge's case	i. 284
Bamfield v. Massey	i. 468
Banbury Peerage case	i. 217, 219, 226, 235, 258, 443. ii. 27, 98, 99.
Barclay, Lord, case of	i. 463
Barford v. Nelson	i. 370
Baring v. Roy	ii. 51
—— v. Clagett	ii. 51, 52
Barker v. Dixie	i. 76
—— v. Keate	i. 451.
—— v. Macrae	i. 146
—— v. Ray	i. 295, 299, 301, 303, 305, 310, 311, 315, 385
Barlow v. Bishop	i. 385
—— v. Vowel	i. 150, 151, 152
Barne v. Whitmore	i. 340
Barnes v. Mawson	i. 238, 242, 250, 274
—— v. Wenkler	ii. 43. 45
Barnstaple, Corporation of v. Lathey	ii. 186, 187
Barough v. White	i. 372. 395
Barret v. Wilson	ii. 41
Barrett's case	i. 352
Barron v. Grillard	i. 76, 378
Barrow v. Humphreys	ii. 377
Barry v. Alexander	ii. 191, 192
—— v. Bebbington	i. 298. 311. 316. 421
Barrymore, Lord v. Taylor	i. 341, 342. 345
Bartlet v. Downes	i. 457
Bartlett v. Pickersgill	i. 62. ii. 359
Barton v. Boddington	i. 364
Barzillay v. Lewis	ii. 52
Bass v. Clive	i. 364
Basten v. Carew	ii. 41, 42
Batchelor v. Sir J. Honeywood	ii. 252
Bate v. Hill	i. 468
—— v. Kinsey	i. 170. ii. 222, 228
—— v. Russell	i. 55, 57
Bateman v. Bailey	i. 198
—— v. Phillips	ii. 182, 192, 195, 197
Bates v. Grabham	ii. 356
Bateson v. Hartsink	i. 175
Bath v. Montague	i. 28, 120
—— v. Battersea, Earl of	i. 340, 341. ii. 89
Batthews v. Galindo	i. 70, 362
Bauerman v. Radenius	i. 47, 373, 375
Bayley v. Edwards	ii. 55
—— v. Lloyd	i. 158
Baylie v. Wylie	ii. 150
Bayne v. Stone	i. 424
Baynham v. Guy's Hospital	ii. 349
Beale v. Bird	ii. 193, 199
Beamon v. Ellice	ii. 395, 402
Beasley v. Magrath	i. 388
Beauchamp v. Parry	i. 196, 395
Beaumont v. Fell	ii. 290, 324, 326
—— v. Mountain	ii. 129
Beaurain v. Scott	ii. 141
Beaver v. Lane	i. 512
Bebb v. Thomas	i. 196
Beckett v. Wood	i. 159
Beckwith v. Bonner	i. 176
Becquet v. M'Carty	ii. 55, 57, 59
Bedell's case	ii. 353
Beebee v. Parker	i. 260
Beeching v. Gower	i. 154. ii. 393
Beer v. Ward	i. 225, 229, 235. ii. 204
Bell v. Ansley	i. 374
—— v. Francis	ii. 218
—— v. Harwood	i. 129
—— v. Howard	ii. 366
—— v. Smith	i. 90, 375
Bellamy's case	ii. 141
Bembridge v. Osborn	i. 459
Bendshye v. Pearse	i. 422
Benjamin v. Porteus	i. 146
Bennet's case	ii. 82
—— v. Clough	i. 445
—— v. Watson	ii. 377
Bennett v. Francis	i. 484
—— v. Hundred of Hertford	i. 7

	Page
Benson v. Bennet	i. 368
——— v. Marshall	i. 394
——— v. Olive i. 393.	ii. 10, 16, 94
Bent v. Baker i. 84, 106, 119,	150, 151
Bentley v. Cook	i. 70
Bentzing v. Scott	i. 517
Bere v. Ward i. 194.	ii. 258
Berkeley Peerage case	i. 214, 217, 219, 231, 233, 235, 246, 255, 258, 261, 265
Bermon v. Woodbridge	i. 345
Bernardi v. Motteux	ii. 50, 52, 53
Bernasconi v. Farebrother	i. 372, 377. ii. 453
Berner's Peerage	i. 217, 220, 222
Bernet v. Taylor	ii. 210
Berry v. Banner i. 252.	ii. 10
—— and Goodman's case	i. 453
Berryman v. Wise	i. 353, 432
Bertie v. Beaumont	ii. 120, 160, 163, 204
Berwick's case	i. 415
Betham v. Bonson	i. 381
Betsworth v. Betsworth	ii. 30
Bettison v. Bromley	i. 125
Bevan v. Jones	i. 511
——— v. Waters	i. 176
——— *q. t.* v. Williams	i. 352
Beveridge v. Minter	i. 75
Bevis v. Lindsell	i. 482
Biddulph v. Ather	i. 242, 252, 274
Biden v. Loveday	i. 458
Bilbou and others, case of	i. 28
Billers v. Bowles	i. 482
Bilton v. Corporation of Liverpool	i. 168
Binns v. Tetley	i. 94, 95
Binstead v. Coleman	ii. 359
Bird v. Appleton	ii. 52
Birkett's case	i. 36
Birt v. Barlow i. 444.	ii. 97, 111, 112, 166
—— v. Kershaw	i. 113
Bishops, Seven, case of	ii. 273
Biss v. Mountain	i. 109
Black's case	i. 414
—— v. Holmes	i. 181
—— v. Lord Braybrooke	ii. 131, 144
Blackburn v. Scholes	i. 484
Blackeln v. Crofts	i. 335
Blacket v. Royal Exchange Assurance Company	ii. 345
Blackett v. Lowes	i. 242, 244
——— v. Weir	i. 130
Blackham's case	ii. 32, 33
Blaikeler v. Crofts	i. 311
Blake v. Foster	i. 363
—— v. Lawrence	i. 489
—— v. Pilfield	i. 183
Blakemore v. Glamorganshire Canal Company	ii. 11, 12, 23
Blakey v. Porter	ii. 194
Bland v. Ansley	i. 71, 101
—— v. Swaffham	ii. 377
Blandford v. De Tastet	ii. 377
Blewett v. Tregonning	ii. 445
Bligh v. Wellesley	ii. 236
Blogg v. Kent	ii. 195
Bloor v. Davies	i. 123
Blount's claim	i. 228
Blower v. Hollis	ii. 138, 139
Bloxam v. Elsee	i. 346
——— v. Hubbard	i. 509
Blundell v. Howard i. 466.	ii. 104
Blunt v. Blount	i. 224
—— v. Clarke	i. 451
—— v. Cumyns	ii. 337
Blyth v. Bampton	i. 508
Boardman v. Jackson	i. 341
Bohtlinck v. Schneider	ii. 144
——— v. Inglis	ii. 144
Bold v. Rayner	ii. 337
Bolton v. Corporation of Liverpool	i. 386
—— v. Gladstone	ii. 51, 52
Bond v. Seawell	i. 451
Bonham, Dr., case of	ii. 41
Boorman v. Brown	i. 107
Booth v. Howard	i. 484
—— v. Jaunce	i. 379
—— v. Wilson	i. 455
Bootle v. Blundell	ii. 296
Borthwick v. Carruthers	i. 497
Bosanquet v. Anderson	i. 364
Boson v. Sandford i. 509,	510
Boswell v. Smith	i. 459
Bosworth v. Cotchett i. 315, 330,	332, 333, 334
Botham v. Swingler i. 155,	156
Bottings v. Firby	ii. 45
Bottomley v. Usborne	i. 170
——— v. Wilson	i. 111
Boucher v. Lawson	ii. 53, 55

Bousfield v. Godfrey ii. 199, 200
Bowditch v. Mawley i. 511
Bowles v. Johnson ii. 376
——— v. Langworthy i. 347, ii. 88, 203
Bowman's case ii. 141, 142
——— v. Horsey ii. 337
——— v. Manzelman ii. 226
——— v. Norton i. 174
——— v. Rostron i. 368
——— v. Taylor i. 218, 367
Bowsher v. Cally i. 204, 388
Boxer v. Robeth ii. 214
Boydell v. Drummond ii. 299
Boys v. Ancell i. 524
Braddick v. Thompson ii. 41
Bradley v. Arthur ii. 109
——— v. Ricardo ii. 448, 449
Bradshaw v. Bennett ii. 208, 360
——— v. Bradshaw ii. 322, 325
Brady's case ii. 141
Braine v. Dew i. 238
Braithwaite v. Coleman i. 115, 448
Bramwick v. Lucas i. 177
Brard v. Ackerman i. 131, 170
Brandram v. Wharton i. 380
Brandreth's case i. 199
Brangan's case ii. 175
Brashier v. Jackson i. 525, 528
Braughe v. Cradock i. 173
Brayne v. Veale i. 384
Brazier's case i. 5, 8, 193
——— v. Bryant ii. 41
——— v. Jones ii. 148
Brekon v. Smith i. 488
Bree v. Beck i. 298, ii. 98, 104
Breedon v. Gill ii. 67, 87
Breton v. Cope ii. 115, 164, 203
Brett v. Beales i. 238, 239, 249, 267, 277, 278, 298, ii. 106, 122, 129
—— v. Levett i. 377
—— v. Ward ii. 110
Bretton v. Prettiman i. 384
Brewer v. Palmer i. 423
Brewster v. Sewell ii. 230
Briant v. Eicke i. 517
Brice v. Smith i. 451
Brickell v. Hulse i. 366
Bridget v. Coyney ii. 42
Bridgman, Sir J. v. Jennings i. 251, 276, 394
Briggs v. Crick i. 108, 109
Bright v. Walker i. 454
Briscoe v. Lomax i. 252, 465
——— v. Stevens ii. 44
Bristow v. Eastman i. 369
——— v. Wright i. 505, 507
British Museum, Trustees of v. Furnis i. 454
Brittain v. Kinnaird ii. 42
Broad v. Pitt i. 165
—— v. Vetet i. 168
Broadhurst v. Baldwin i. 485
Brocas v. Mayor of London ii. 166
Brock v. Kent i. 384
Brodie v. St. Paul ii. 298
Brogan's case ii. 155
Bromage v. Prosser i. 445
——— v. Rice ii. 256, 257
Bromley v. King i. 196, 377
——— v. Wallace i. 467
Bromwich's case ii. 70
Brook v. Willett i. 510
Brookbard v. Woodley ii. 255, 258
Brooks v. Blanshard i. 518
——— v. Warwick i. 445
Brooksby v. Watts i. 363
Broomfield v. Jones i. 505
Broughton v. Randall i. 450
Brounker, Lord v. Sir R. Atkins ii. 10, 123
Brown's case ii. 91, 92, 138
——— v. Brown i. 49, 50
——— v. Bullen ii. 40
——— v. Capel ii, 125
——— v. Crashaw i. 21
——— v. Dean ii. 151
——— v. Fox i. 49
——— v. Giles ii. 409
——— v. Gracey ii. 147
——— v. Hodgson i. 490
——— v. Jacobs i. 511
——— v. Knill i. 511
——— v. London, Corporation of i. 161
——— v. Rose ii. 192, 199
——— v. Sayce i. 507
——— v. Shelley i. 229
——— v. Thornton ii. 124, 144
——— v. Watts i. 488
——— v. Woodman i. 425, ii. 215, 236
——— v. Cumming ii. 175
Browning v. Aylwin ii. 192
Brownsord v. Edwards ii. 24
Bruce v. Hurley i. 195

Brudenell v. Roberts i. 363
Brune v. Rawlings ii. 258
Brunton's case i. 28
Bryan v. Wagstaff ii. 220
—— v. Winwood i. 465
Brydges v. Duke of Chandos ii. 350
Buchanan v. Rucker ii. 57, 58, 59, 62, 143, 146
Bucher v. Jarret i. 424
Buckhouse v. Crossly ii. 365
Buckland v. Tankard i. 132
Buckler v. Millerd ii. 350. ii. 367, 368
Buckley v. Smith ii. 211
Buckworth's case i. 337
Bullen v. Michel i. 241, 250, 298, 309. ii. 102, 103, 119, 149, 158, 163, 169, 204, 242, 465
Bunting's case ii. 31
Burdett v. Colman i. 201
Burdon v. Browning i. 62
Burgess v. Cuthell i. 115
Burghart v. Angerstein i. 389 ii. 111
Burl, *ex parte* i. 93
Burleigh v. Stibbs i. 367, 435 ii. 225
—— v. Stott i. 380
Burley's case i. 406
—— v. Bethune i. 445
Burnard v. Nerot ii. 131, 139, 141
Burnett v. Lynch ii. 208
Burr v. Harper ii. 251, 253, 255
Burridge's case i. 22
Burrough v. Martin ii. 413
Burrows v. Jemino ii. 61, 147
Burt v. Barlow i. 428
—— v. Palmer i. 384
—— v. Walker ii. 212
Burton v. Hinde i. 47, 86, 99
—— v. Payne ii. 217
—— v. Plummer i. 428. ii. 411, 413, 415
Busby v. Greenslade i. 108, 125
Bush v. Ralling i. 40, 137
Bushell v. Barrett i. 17
Bushwood v. Bond i. 510
Bust v. Palmer i. 379
Butcher's case i. 412
—— and Aldworth's case ii. 130
—— v. Butcher ii. 351
—— v. Jarrat ii. 223
Butchers' Company v. Jones i. 155
Butler's case i. 497. ii. 223
—— v. Alnut i. 452
—— v. Carver i. 155. ii. 394
—— v. Cooke i. 93
—— v. Moore i. 165
Byam v. Booth ii. 65, 149
Byerley v. Windus i. 455
Byne, *ex parte* ii. 374

C.

Caddy v. Barlow i. 475
Cadogan v. Cadogan i. 440
Call v. Dunning i. 347. ii. 203
Callaghan's case ii. 73
Calliard v. Vaughan ii. 385, 392
Calvert v. Archbishop of Canterbury i. 312, 321, 329
—— v. Bovil ii. 52, 53
—— v. Flower ii. 222
Cambridge Tolls, case of i. 249, 277
Camden v. Anderson ii. 114
Cameron v. Lightfoot i. 366. ii. 152
Campbell *ex parte* ii. 89
—— v. Hodgson ii. 359
—— v. Twemlow i. 70
Cannel v. Curtis i. 433
Cape v. Handley ii. 346
Careless v. Careless ii. 319, 323
Carey v. Pitt ii. 250, 252, 254
—— v. Gerrish i. 459
Carlisle v. Eady i. 155
—— v. Trears i. 507
Carne v. Needle i. 305
—— v. Nicoll i. 194
Carpenters' Company v. Hayward i. 2
Carpenter v. Thornton ii. 27
—— v. Wall ii. 432, 434, 435
Carr v. Burdis ii. 207, 209
—— v. Heaton ii. 10, 11
Carrick v. Vicary i. 364
Carter v. Abbot i. 160
—— v. Pryke i. 461
Cartridge v. Griffiths i. 511
Cartwright v. Williams i. 157
Carey v. Adkins i. 78
Casburn v. Reid ii. 131, 152
Castlemain, Lord, case of i. 21. ii. 431

Cates v. Hardacre ii. 417, 420
—— *q. t.* v. Winter ii. 216, 219, 371
Cato Street Conspiracy, case of i. 31
Catt v. Howard i. 342, 379
Catteris v. Cowper i. 453
Cavan v. Stewart ii. 49, 59, 143
Cazenove v. Vaughan ii. 88, 91, 92, 149
Celier's case i. 18
Chadwick v. Bunning ii. 173
Chad v. Tilsed ii. 346
Chambers v. Bernasconi i. 281, 299, 302, 305, 312, 313, 326, 327, 328, 329, 358
——— v. Chambers i. 440
Champian v. Atkinson i. 147, 463
Champneys v. Peck i. 321, 329
Chancellor v. The University of Oxford i. 445
Chandos Peerage case i. 221, 223, 224, 226. ii. 118
Chapman v. Beard i. 352, 451
——— v. Cowlan i. 239, 250. ii. 122
——— v. Gardner i. 94
——— v. Graves i. 52
——— v. Pointon ii. 376
——— v. Smith i. 238, 240, 300. ii. 104
Charlesworth's case i. 19
Charlton v. Barrett i. 475
Charnock's case i. 27
Charington v. Brown i. 187
——— v. Milner i. 131
Chaters v. Bell i. 364
Chatfield v. Fryer i. 246, 247
Chaurand v. Angerstein ii. 337
Cheetham v. Hampson i. 455
Chesmer v. Noyes ii. 124
Chetwind v. Marnell ii. 193
Cheyne v. Koops i. 91, 158
Cheyney's case ii. 315, 323, 332, 333
Child v. Chamberlain i. 57
—— v. Grace i. 356
Chippendale v. Thurston i. 380
Cholmondeley v. Clinton i. 457. ii. 66
Chorley v. Bolcott i. 362
Christian v. Coombe i. 369. ii. 125, 433
Christie v. Secretan ii. 51, 52
Chubb v. Westley i. 475
Church, *ex parte* ii. 125
Churchill v. Evans i. 455
——— v. Wilkins i. 507
Clancy's case i. 17
Claridge v. Hoare ii. 417
Clanrickard, Lord, case of ii. 110
Clark v. Lucas i. 104
Clarke v. Clarke i. 166
—— – v. Gannon i. 122
——— v. Gray i. 486, 508
——— v. Hougham i. 380
——— v. Saffrey ii. 403
Clarkson v. Hanway ii. 369
——— v. Woodhouse i. 250, 252, 274, 276, 278. ii. 2
Clay v. Langslow i. 376
—— v. Stephenson ii. 388
—— v. Willan i. 486
Clayton v. Gregson ii. 277, 282, 340, 343
Cleeve v. Powell i. 173
Clegg v. Levy ii. 144, 146
Cleghorn v. Desanges ii. 151
Clerk v. Bedford i. 320, 329
Clermont v. Tullidge ii. 255
Cleve v. Powell ii. 17, 25
Clewe's case i. 414
Clifford, Barony of ii. 99
——— v. Burton i. 78, 385
——— v. Hunter ii. 398
Clifton v. Walmsley ii. 349, 350
Clinan v. Cooke ii. 358
Clinton Peerage case i. 225
Clothier v. Chapman i. 243
Clowes v. Higginson ii. 360
Clunnes v. Pezzy i. 448
Clutterbuck v. Lord Huntingtower i. 47
Clymer v. Littler i. 280, 286
Coates v. Bainbridge i. 382, 383
Cobb v. Car i. 149
Cobden v. Kendrick i. 166, 167
Cochrane, Lord, case of ii. 427
Cockman v. Mather ii. 123
Cocks v. Nash ii. 194, 196
Cocksedge v. Fanshaw ii. 467
Coe v. Westernam ii. 29
Coghlan v. Williamson ii. 210
Cohen v. Hannam i. 507
——— v. Hinkley i. 450
——— v. Templar i. 175
Coker v. Farewell i. 337

Page

Colchester, Mayor, &c. case of i. 161
Cole v. Hadley ii. 88
Coleman's case i. 292
Coles, *ex parte* ii. 89
—— v. Trecothick ii. 298
Colledge v. Horne i. 386
Collenridge v. Farquarson i. 196
Collet v. Lord Keith i. 341, 342
Colling v. Treweek i. 434, 436. ii. 223, 225, 226
Collins v. Blantern ii. 367
—— v. Carnegie i. 354
—— v. Godefroy ii. 376
—— v. Gresley i. 277
—— v. Maule i. 234
—— v. Wright i. 348
Colpoys v. Colpoys ii. 314
Colsel v. Budd i. 459
Colson v. Selby i. 489
Colven v. H. M. Procurator-Gen. i. 450
Commins v. The Mayor of Oakhampton i. 97
Compagnon v. Martin i. 500
Conway v. Beazley ii. 54
—— v. Green i. 453
—— v. Hearn i. 170. ii. 228
—— v. Loxley i. 363
—— v. Nethercote ii. 396
—— v. Rogers i. 197
—— v. Tanswell ii. 200, 201, 221
Cooke v. Banks i. 246, 247, 312. ii. 117
—— v. Booth ii. 349
—— v. Lloyd i. 214
—— v. Maxwell i. 20, 181. ii. 141
—— v. Munstone i. 507
—— v. Sholl ii. 38
Cookes v. Hellier i. 451
Coomb v. Pitt i. 353
Coombs v. Coether i. 238, 249. ii. 119, 164
Cooper v. Amos i. 488, 489
—— v. Gibbons i. 448, ii. 216, 222
—— v. Marsden i. 320, 321, 335, 336
—— v. Meyer i. 364
—— v. Smith i. 345
—— v. Turner i. 459
—— v. Whitehouse i. 527
Cope v. Bedford ii. 110

Page

Cope v. Cope i. 183, 234, 443
Copeland v. Stanton ii. 66
—— v. Watts i. 175
Coppard's case ii. 138
Corbett v. Corbett ii. 150
Corking v. Jarrard i. 156
Cormack v. Heathcote i. 169
Cornish v. Pugh i. 70, 88
—— v. Searall i. 363
Cornwall v. Richardson i. 467
Corsen v. Duboits i. 175
Cory v. Bretton i. 348
Cosham v. Goldnay i. 130
Cossens v. Cossens i. 367
Cost v. Birkbeck i. 252
Coster v. Reed i. 421
Cotes v. Davis i. 385
Cotterell v. Cuff i. 508
—— v. Hotby i. 424
Cottington's case ii. 53
Cotton v. James i. 185. ii. 121
Counden v. Clarke ii. 317, 323
Courteen v. Touse ii. 405
Cousins v. Brown i. 513
Coveney's case ii. 69, 76
Cowling v. Ely i. 388
Cowper v. Cowper i. 448
Cox v. Allingham ii. 29, 171
—— v. Brain i. 484
—— v. Copping ii. 184
—— v. Parry i. 484
Cragg v. Norfolk i. 367
Craib v. D'Aeth i. 373
Craig v. Cundell i. 124
Cranburn's case ii. 431
Cray v. Halls i. 344
Craythorne v. Swinburne ii. 353
Crease v. Barret i. 230, 239, 247, 255, 260, 272, 295, 305, 337, 392
Creevey v. Bowman i. 117
—— v. Carr ii. 397
Crepps v. Durden ii. 42
Crew, *q. t.* v. Blackburn ii. 182
——, *q. t.* v. Saunders ii. 183, 186
Crosby, Sir P., case of i. 28
Cozer v. Pilling i. 445
Crisp v. Anderson i. 448
Crispin v. Williamson i. 508
Critchlow v. Parry i. 364
Croft v. Pawlet i. 451
Crofton v. Poole i. 353
Croke v. Dowling ii. 131, 140, 152

	Page
Crooke v. Edwards	i. 96
Crosby's case	i. 21, 22, 28
—— v. Percy	ii. 213
Cross v. Eglin	ii. 345
—— v. Fox	i. 94
—— v. Kaye	i. 352
Crossfield's case	i. 397, 416
Crouch v. Drury	i. 335
Crowley v. Page	i. 422. ii. 434
Crowther v. Hopwood	i. 18
Cuddington v. Wilkins	i. 21
Cuff v. Penn	ii. 359, 362, 363
Cullen v. Morris	ii. 41
Culley v. Doe d. Taylerson	ii. 464
Cundell v. Pratt	ii. 419, 428
Cunliffe v. Sefton,	i. 347. ii. 213, 214
—— v. Whitehead	ii. 388
Currey v. Walter	i. 163
Currie v. Child	i. 55. ii. 210
Curzon v. Lemon	i. 260
—— v. Lomax	i. 250
Cuthel's case	i. 447
Cutler v. Newling	i. 390
Cuts v. Pickering	i. 166
Cutter v. Powel	ii. 343

D.

Da Costa v. Jones	i. 183
—— v. Villa Real	ii. 30
Dagleish v. Dodd	i. 341
Dalgleish v. Hodgson	ii. 52, 53
Dalisen v. Stark	i. 424, 429
Dalston v. Coulsworth	i. 448
Dalzel v. Main	i. 369
Damaree's case	i. 201, 202, 203
Dance v. Robson	ii. 131, 151
Dandridge v. Corden	ii. 418
Daniell v. Phillipps	ii. 42
—— v. Pitt	i. 384
Daniells v. Potter	i. 204, 378
Dartmouth, Countess of v. Roberts	i. 340, 343. 365, 393
Dartnall v. Howard	ii. 141
Davenport v. Davies	i. 487
Davies v. Brown	ii. 177
—— v. Davies	i. 124. ii. 152
—— v. Edwards	i. 490
—— v. Lewis	i. 242, 243
—— v. Lowndes	i. 221. ii. 27
Davies v. Morgan	i. 118, 235, 240, 258, 316
—— v. Pierce	i. 302, 310, 392, 394
—— v. Ridge	i. 374
—— v. Williams	ii. 173
Davis and Carter's case	i. 19
—— v. Capper	ii. 42
—— v. Dale	ii. 397
—— v. Dinwoody	i. 71, 374
—— v. Humphreys	ii. 185
—— v. Morgan	i. 47, 238
—— v. Reynolds	i. 424
Dawson v. Macdonald	ii. 199
Day v. Bower	i. 490
—— v. Davies	i. 489
—— v. Trig	ii. 297
—— v. Williams	i. 457
De Berenger's case	i. 181, 436 ii. 417
— Bertram v. Smith	i. 362
— Gaillon v. L'Aigle	i. 483
— Gaminde v. Pigou	i. 369
— la Motte, case of	ii. 224, 249, 274
— Lisle Peerage case	i. 220
— Rutzen v. Farr	i. 316
— Sailly v. Morgan	ii. 432
— Symonds v. De la Cour	i. 106, 126
— Whelpdale v. Milburn	i. 366. ii. 11
Deacle v. Hancock	i. 300
Deacon's case	i. 471
Deade v. Hancock	i. 272
Deady v. Harrison	i. 396
Delafield v. Freeman,	i. 96. ii. 142
Delany v. Tenison	i. 448
Denn v. Barnard	ii. 170
—— v. Fulford	ii. 131
—— v. Hopkinson	ii. 340
—— v. Page	ii. 305
—— v. Spray	i. 238, 249, ii. 122
—— v. White	i. 76, 385
Dennison v. Elsley	i. 276
Derby, Lord, case of	ii. 25
Derosne v. Fairlie	i. 127
Despard's case	i. 27, 34, 38
Devenoge v. Bouverie	ii. 195
Devon, Earldom of	i. 217, 226
Dew v. Katz	i. 524
Dewdney v. Palmer	i. 154
Dewhurst's case	i. 427. ii. 82

Dicas v. Lawson ii. 377
Dicken v. Lodge i. 301
Dickenson v. Coward i. 351, 353, 362
——— v. Shee ii. 401
——— v. Valpy i. 362
Dickinson v. Prentice i. 131
Dickson v. Evans i. 446, 496
Digby v. Steadman i. 321, 335
Dike v. Polhill i. 218. ii. 34
Dillon v. Harris ii. 299
——— v. Parker ii. 466
Dingler's case i. 284
D'Israeli v. Jowett ii. 115
Ditcham v. Bond i. 458
Ditchburn v. Goldsmith i. 183
Ditcher v. Kendrick i. 174
Dixon's case i. 445
——— v. Cooper i. 146
——— v. Dixon i. 449
——— v. Hammond i. 364
——— v. Purse i. 94
——— v. Vale ii. 419
Dockwray v. Dickinson i. 509
Doddington v. Hudson i. 125
Dodd's case i. 447
Dodd v. Norris i. 467, 468. ii. 419
Doe v. Allen i. 356. ii. 292, 316, 319
—— d. Ash v. Calvert ii. 34
—— v. Askew ii. 122
—— d. Baggaley v. Jones i. 303
—— d. Baker v. Wombwell i. 355
—— d. Bank of England v. Chambers ii. 203
—— d. Banning v. Griffin i. 231
—— v. Barnes i. 234
—— d. Barrett v. Kemp i. 465
—— d. Bassett v. Mew ii. 171
—— d. Bath v. Clarke i. 126
—— d. Beard v. Parell ii. 213
—— v. Benson ii. 340, 341
—— v. Benyon ii. 204, 283, 285
—— v. Bingham i. 97, 424
—— v. Bluck ii. 133
—— d. Boulbee v. Adderley i. 143
—— d. Bowerman v. Sybourn i. 371. ii. 28
—— v. Bray ii. 110
—— v. Briggs i. 355
—— d. Bristow v. Pegge i. 363
Doe d. Brown v. Brown ii. 309
—— d. Brown v. Greening, ii. 309
—— v. Burt ii. 294
—— v. Cadwallader i. 356
—— v. Calvert ii. 172
—— v. Catacre ii. 111
—— v. Cawthorn v. Mee ii. 164
—— d. Chandler v. Ford ii. 354
—— d. Chevalier v. Huthwaite ii. 294
—— d. Clarges v. Foster i. 355
—— v. Clarke i. 453
—— v. Cockell i. 142, 143
—— v. Cole ii. 237
—— v. Cooke i. 456
—— d. Courtail v. Thomas i. 174
—— d. Coyle v. Cole i. 392, 434
—— d. Curtis v. Spitty ii. 219
—— d. Cuthbert v. Bamford i. 99
—— v. Deakin i. 230
—— d. Digby v. Steel i. 365
—— d. Didsbury v. Thomas i. 244
—— v. Dring ii. 296
—— d. Duncan v. Edwards ii. 143
—— d. Dunning v. Cranstoun ii. 308
—— v. Durnford i. 434
—— v. Dyeball i. 453
—— v. Edwards ii. 174
—— d. Edwards v. Leach i. 524
—— v. Evans i. 348. ii. 94, 212
—— d. Fenwick v. Reed i. 456
—— v. Fleming i. 235. 444
—— v. Forster i. 355
—— d. Foster v. Earl of Derby i. 338. ii. 13, 89
——————— v. Sisson i. 238, 260, 462
—— d. Freeland v. Burt ii. 295
—— d. Futter v. Randall i. 216, 227, 230, 236
—— d. George v. Jesson i. 449
—— d. Gord v. Needs ii. 311, 315, 316, 319, 323, 327, 328, 329, 332, 333, 334
—— v. Grey ii. 220
—— v. Green i. 53, 59, 302
—— v. Griffin i. 449
—— d. Griffin v. Mason i. 451
—— d. Guillim v. Guillim ii. 286
—— d. Gunning ii. 171

Doe v. Haddon ii. 40
—— v. Hales i. 356
—— v. Hall ii. 164
—— d. Hall v. Benson ii. 341
—— d. Hammond v. Cook i. 457
—— d. Handson v. Fyldes ii. 296
—— d. Hanson v. Smith ii. 165
—— v. Harcourt ii. 104
—— v. Hardy ii. 368
—— v. Harris i. 168
—— v. Harvey i. 423
—— v. Heather i. 524
—— v. Heming ii. 209
—— d. Hendson v. Kersey i. 150, 156
—— d. Higgs v. Cockell ii. 220
—— v. Hilder i. 457
—— d. Hindson v. Kersey i. 156
—— d. Hiscocks ii. 280, 290, 292, 293, 300, 311, 319, 325, 326, 327, 328, 329, 331
—— v. Hodson ii. 221
—— v. Holtom ii. 293, 300
—— v. Huddart ii. 8, 20, 21
—— v. Huthwaite ii. 322, 325
—— d. Human v. Pettett i. 391
—— d. Jackson v. Ramsbottom i. 363
—— d. James v. Brawn i. 433
—— d. Jersey v. Smith ii. 293
—— v. Johnson i. 452
—— d. Johnson v. Pembroke i. 217, 218
—— v. Jones i. 310, 391
—— d. Jupp v. Andrews i. 175
—— d. Knight v. Nepean i. 449
—— v. Laken i. 251, 275, 276
—— v. Lea ii. 340, 341, 342
—— d. Leicester v. Biggs i. 355
—— d. Lewes v. Preece ii. 8
—— d. Lloyd v. Deakin i. 449
—— v. Passingham i. 337
—— v. Lord George Thynne i. 317
—— d. Maddock v. Lyne ii. 258
—— d. Manton v. Austin i. 363
—— v. Thrupp i. 392
—— d. Marchant v. Errington ii. 6
—— d. Marriott v. Edwards i. 363, 522, 524
—— v. Martin ii. 219, 293, 294
—— v. Mason i. 260, 455. ii. 173
Doe d. Mee v. Litherland i. 392
—— v. Miles i. 346
—— v. Morgan ii. 317, 319
—— d. —— v. Morgan ii. 317, 323
—— v. Morris ii. 228
—— d. —— v. Roe ii. 195, 196
—— v. Rosser i. 387. ii. 41
—— d. Mudd v. Suckermore ii. 260
—— d. Neale v. Samples ii. 162, 204
—— d. Nepean v. Budden i. 363
—— v. Newton ii. 256, 257, 259
—— d. Northey v. Harvey i. 230, 231
—— d. Norton v Webster ii. 352
—— v. Ormerod ii. 172
—— d. Oldham v. Wolley i. 449. ii. 205, 207
—— v. Oxenden ii. 309
—— d. Pattershall v. Turford i. 321, 322, 452
—— v. Payne i. 194
—— d. Pearson v. Ries ii. 225
—— v. Perkins i. 428. ii. 412 413, 414
—— d. Perry v. Newton ii. 255, 257
—— v. Perratt ii. 275
—— d. Peter v. Watkins i. 173
—— v. Pettett i. 194, 302, 310, 392
—— d. Phillips v. Morris ii. 216
—— v. Pike i. 453
—— v. Plowman i. 457
—— d. Poole v. Errington i. 527
—— d. Powell v. Hill i. 312
—— d. Preedy v. Holtom ii. 309
—— d Priestley . Callaway ii. 165
—— d. Pring v. Pearsay i. 453
—— d. Pritchard v. Dodd i. 218, 367
—— v. Putland i. 457
—— v. Pye i. 356
—— v. Randall i. 231
—— d. Reed v. Harris i. 189
—— v. Rickarby i. 194, 392
—— v. Ridgway i. 206, 281
—— d. Roberts v. Roberts ii. 369
—— v. Robson i. 299, 311, 315, 318

Page

Doe v. Ross ii. 133, 237
—— d. Rowlandson v. Wainwright ii. 210, 238
—— v. Scott i. 456
—— v. Seaton i. 276. ii. 21
—— d. Shellard v. Harris i. 168, 169
—— d. Small v. Allen ii. 368
—— v. Smith ii. 314
—— d. —— v. Cartwright i. 300. ii. 118
—— v. Galloway ii. 297
—— v. Webber ii. 11
—— v. Smythe i. 363
—— d. Spicer v. Lea ii. 341
—— d. Spilsbury v. Burdett ii. 203, 206
—— v. Stacey i. 317
—— d. Stansbury v. Arkwright ii. 113
—— v. Staple i. 456
—— d. Strode v. Seaton i. 173, 394. ii. 8, 118
—— v. Suckermore ii. 248, 250, 251, 253, 254, 255, 256, 257, 258, 259, 260, 271
—— d. Sutton v. Ridgway i. 230, 234, 280
—— d. Sweetland v. Webber i. 194, 396
—— v. Sybourn i. 456
—— d. Sykes v. Durnford ii. 202
—— v. Tarver ii. 258
—— v. Teage i. 98. 125
—— d. Templeman v. Martin ii. 293
—— v. Thomas i. 174, 247
—— d. Tilman v. Tarver i. 272
—— d. Tollet v. Salter i. 515
—— v. Tooth i. 46, 47
—— v. Turford i. 294, 319, 324, 325, 326, 328
—— v. Tyler i. 84, 97, 98, 298. ii. 11
—— d. Tyrrell v. Lyford ii. 309
—— v. Vowles i. 295, 299
—— v. Wainwright ii. 209, 237
—— d. Walker v. Stephenson ii. 446
—— v. Wallinger ii. 250
—— d. Warren v. Bray i. 428
—— d. Wartney v. Grey ii. 226, 228
—— v. Watson i. 346, 363

Page

Doe v. Webber i. 305.
—— v. Webster ii. 293
—— d. Weld v. Ormerod i. 218
—— d. Westlake v. Westlake ii. 334
—— d. Wetherall v. Bird i. 390
—— v. Wilde i. 97
—— d. Wildgoose v. Pearce i. 126. ii. 204
—— Wilkins v. Lord Cleveland i. 358, 458. ii. 207
—— v. Williams i. 194, 302, 310
—— d. Willis v. Birchnore i. 97
—— v. Wilson i. 458
—— d. Wollaston v. Barnes ii. 110
—— d. Wood v. Morris i. 423, 424
—— v. Wright i. 456, ii. 20, 21
Doker v. Hasler i. 75
Donaldson v. Thompson ii. 50, 53
Doncaster v. Day ii. 88, 151
Donellan's case i. 441
Donington's case i. 406
Donnison v. Elsley i. 240, 241, 243, 251
Door v. Geary ii. 297
Dormer v. Fortescue i. 53, 59
Dorset, Lord, v. Carter i. 375
Douglas Peerage case i. 448
—— v. Forrest ii. 59
—— v. Scougal i. 442
Dover v. Mestaer i. 423, 424
Dowden v. Fowle i. 361, 374, 376
Dowdeswell v. Nott i. 47, 86
Down's case i. 510
Downes v. Moreman ii. 164
—— v. Skrymsher i. 514
Dowsett v. Sweet ii. 290
Dowton v. Cross i. 377
Doxon v. Haigh ii. 215
Drake v. Marryat i. 382. ii. 125
—— v. Smith i. 308. ii. 104, 120, 168
—— v. Sykes i. 376, 387
Draycott v. Draycott ii. 111
Drayton v. Dale i. 364
Drinkwater v. Porter i. 254
Drummond's case i. 279, 282, 283
Du Barre v. Livette i. 163, 164, 165
Du Bost v. Beresford i. 188
Ducket v. Williams ii. 88
Duffield v. Orrel i. 300. ii. 104

Duffin v. Smith i. 168, 176
Duins v. Donovan ii. 111
—— v. Pownall i. 158
Duncan v. Hill i. 488
—— v. Scott i. 364. ii. 150, 151
Dundas v. Lord Weymouth i. 512
Dunn's case i. 475
Dunn v. Aslett ii. 434, 461
—— v. Murray ii. 41
—— v. Slee i. 390
Dupays v. Shepherd ii. 108
Durham, Bishop of v. Beaumont ii. 447
Durston v. Tuthan i. 507
Dutton v. Colt i. 9. ii. 91
Dyke v. Aldridge i. 375, 376
Dyson v. Wood ii. 142

E.

Eagleton v. Kingston ii. 249, 251, 255
Eardley v. Turnock i. 510
Earl v. Lewis ii. 117, 120, 159
Earle v. Picken i. 346, 372
East Indian Company v. Glover i. 482
Eastmure v. Laws ii. 15, 21
Eaton v. Jervis ii. 256
—— v. Lyon ii. 349
Eccles v. Hill ii. 133
Eccleston v. Petty i. 217, 219, 388
—— v. Spoke i. 219
Eden v. Bute ii. 294
Edgar v. Blake i. 424
Edge v. Salisbury ii. 289
Edmonds v. Lowe i. 111, 132, 146
—— v. Rowe i. 10
—— v. Walter ii. 405
Edmonstone v. Plaisted ii. 151
Edwards v. Crock i. 77, 190
—— v. Lucas i. 511
—— v. Rees i. 298
—— v. Ronald ii. 63
—— v. Vesey ii. 178
Egerton's case i. 472, 475
Egg v. Barnet i. 459
Egglestone v. Speke i. 388
Eike v. Nokes i. 176, 370

Ekins v. Dormer i. 300
Elden v. Keddell ii. 173
Eldridge v. Knott i. 455
Eliza Ann, case of ii. 108
Ellis's case i. 472. ii. 79
Ellis v. Hardy i. 189
—— v. Soltan i. 163
—— v. Wall i. 482
—— v. Watson i. 365, 379. ii. 114, 115
Elsam v. Faucett i. 190, 467
Elton v. Larkins i. 389
Elwes v. Elwes i. 440
Ely, Bishop of v. Bentley ii. 40
—— Dean and Chapter of v. Caldecott i. 298, 358
—— v. Stewart ii. 204
—— v. Warren i. 463
Embden's case ii. 140
Emerson v. Blonden i. 77, 385
Emmett v. Butler i. 55
—— v. Norton. Addenda
England d. Syburn v. Slade, i. 363
Ennis v. Donnisthorne i. 338
Entick v. Carrington ii. 216
Erskine v. Ruffie i. 462
Essex, Earl of, Trial of i. 415
Evans v. Beattie i. 390
—— v. Bicknel i. 457
—— v. Birch i. 459
—— v. Butt i. 464
—— v. Evans i. 439
—— v. Fryer i. 526
—— v. Getting ii. 124
—— v. Lake i. 320, 377
—— v. Lewis i. 509
—— v. Morgan i. 235, 428
—— v. Philips ii. 176
—— v. Rees i. 250, 251, 267
—— v. Sweet ii. 218
—— v. Taylor i. 250. ii. 121
—— v. Williams i. 129
—— v. Yeatherd i. 91
Everingham v. Roundell ii. 239
Everth v. Bell i. 484
—— v. Hannam ii. 52
Everett v. Lowdham ii. 395
Ewens v. Gold i. 93, 94
Ewer v. Ambrose i. 343. ii. 139, 140, 433, 452, 457, 459, 460
—— v. Preston i. 376
Exon v. Russell i. 507

Page

Exparte Burl i. 87
——— Learmouth ii. 151
Eyre v. Palgrave ii. 163

F.

Fabrigas v. Mostyn i. 385
Fachina v. Sabine i. 9
Fairfax's case ii. 298
Fairlie v. Denton i. 185, 356
—— v. Hastings i. 381, 382, 383
Fairmainer v. Budd i. 369
Faith v. McIntyre i. 116, 117
—— v. Pearson ii. 50
Falconer v. Hanson i. 341, ii. 65, 94
Falmouth, Lord v. George i. 83 145
Fancourt v. Bull i. 132
Farquano v. Knight i. 164
Farrington's case i. 444
Fasset v. Brown ii. 214
Faulder v. Silk and another, executors of Jervoice ii. 100
Fawcett v. Fowlis ii. 42
Feaubert v. Turst ii. 147
Fellowes v. Williamson i. 195
Fenn v. Granger i. 60
—— d. Thomas v. Griffith i. 423
Fenwick, Sir J., case of i. 183
——— v. Reed i. 163
——— v. Thornton i. 378
Ferguson v. Mahon ii. 56
Fermer v, Lorraine ii. 104
Ferrars v. Arden ii. 16
Ferrer v. Oven ii. 148
Ferrers v. Shirley i. 371. ii. 28, 271, 273
Field v. Beaumont ii. 371
—— v. Curtis i. 94
—— v, Mitchell i. 103
Fielder v. Ray i. 423
Filliter v. Minchin ii. 253
Filmer v. Gott ii. 368
Finch v. Messing i. 298, 309
Finden v. Westlake i. 186, 359
Fisher's case i. 351, 426
——— v. Boucher i. 187
——— v. Graves i. 274
——— v. Heming i. 170
——— v. Lane ii. 44, 141
——— v. Ogle ii. 50, 52, 53

Page

Fisher v. Wainwright i. 489, 491
Fitzgerald v. Elsee ii. 214
——— v. Eustace i. 367
——— v. Fauconberg i. 451
Fitzjames v. Moys i. 7
Flad Owen, case of ii. 53
Fleming's case ii. 72
——— v. Gooding i. 363
Fletcher's case i. 414
——— v. Braddyll ii. 121
——— v. Froggatt i. 345
——— v. Greenwell i. 47
Flindt v. Atkins ii. 143
Flower v. Herbert i. 94, 95
—— v. Young ii. 114
Folkard v. Hemet ii. 182
Fonnereau v. Poyntz ii. 295
Fonsick v. Agar ii. 94
Foote v. Hayne i. 163
Forbes v. Wale ii. 204, 205
Ford v. Gay i. 367. ii. 91
—— v. Yates ii. 358
Forester v. Pigou i. 90, 151
Fort v. Clarke i. 218, 367, 368
Forty v. Imber i. 500
Forley v. Wood ii. 341
Foster's case i. 414, 427. ii. 155
—— v. Blakelock i. 370
—— v. Compton ii. 137
—— v. Jolly ii. 357
—— v. Pointer ii. 219
—— v. Steel i. 442
Fotheringham v. Greenwood i. 90, 97, 128
Foulkes v. Gellway i. 188
Fountain v. Young i. 164
Fowler v. Round i. 130
Fox v. Clifton i. 362
—— v. Jones ii. 177, 190
—— v. Lushington i. 106
France v. Lucy ii. 218
Francia's case, i. 415, 417. ii. 224, 249, 274
Francisco v. Gilmore ii. 386
Frankland v. M'Gusty ii. 59
Franklin's case ii. 107
Frankum v. Earl of Falmouth i. 527
Fraser v. Marsh i. 158
Free v. Hawkins ii. 357
Freeman v. Arkell ii. 231
——— v. Baker ii. 115
——— v. Phillipps i. 249, 264, 268, 269

Freeman's case i. 360
Fremoult v. Dedire ii 147
French v. Backhouse i. 113
Friedlander v. The London Assurance Company ii. 449, 459
Friend, Sir J., case of ii. 417, 445
Frogmorton v. Scott i. 363
Frognell v. Lwelyn i. 348
Frontine v. Frost i. 496
Frost v. Holloway ii. 425, 428
Froswell v. Welsh i. 451
Fry v. Wood ii. 204
Fuller v. Frotch ii. 39, 42, 164
—— v. Lane i. 455
—— v. Prentice ii. 376
Furley v. Newnham ii. 375, 385
Furneaux v. Hutchings i. 462, 463
Furness v. Cope i. 336, 434
Fyson v. Kemp ii. 133

G.

Gahan v. Mainjay ii. 43
Gainsford v. Grammar i. 166, 176, 384. 389
Galbraith v. Neville ii. 43, 55
Gale v. Halfknight i. 197
—— v. Packington i. 299
Galen, case of the i. 128
Ganer v. Lady Lanesborough ii. 144, 147
Garden v. Cresswell ii. 377
Gardiner v. Moult i. 367, 376, 377, 384
—— Peerage case i. 191, 192, 219, 227, 371, 443. ii. 98, 167
—— v. Tadis i. 467
Garland v. Scoones ii. 137
Garnem v. Barnard i. 302
Garnet v. Ball i. 384, 387
——'s case i. 398
Garnett v. Ferrand ii. 41
Garnons v. Bernard i. 246
—— v. Swift i. 418. ii. 240
Garrels v. Alexander ii. 249
Garrett v. Lister ii. 171, 173
Garrick v. Williams ii. 132, 244
Garth v. Howard i. 380, 382
Gartside v. Ratcliffe i. 448
Gas Company v. Clark ii. 189
Gaunt v. Wainman ii. 6
Geery v. Hopkins ii. 181
Genden v. Robson i. 362
George v. Surrey ii. 249
—— v. Thompson ii. 219
Germain v. Frederick i. 509
Gervis v. Grand Western Canal Company i. 367
Gevers v. Mainwaring i. 103, 147
Geyer v. Aguilar ii. 37, 50
Gibbon's case ii. 122
—— v. Coggon i. 376
—— v. Featherstonehaugh i. 459
Gibson v. Hunter ii. 466, 467
—— v. Maccarty ii. 24
—— v. Winter i. 374
Gigner v. Bayly ii 195
Giles v. Smith i. 125. ii. 236
—— v. Powell ii. 409
Gilham's case i. 165, 405
Gill v. Shelley ii. 283
Gillies v. Smither ii. 229
Gillingham v. Laing i. 187
Gimbert v. Coyney ii. 42
Glanville v. Paine i. 451
Gleadow v. Atkin i. 232. 315, 318, 330, 333, 334
Glossop v. Poole ii. 100, 101
Glubb v. Edwards ii. 210
Glynn v. Bank of England i. 278, 309, 320, 330, 333, 334
—— v. Thorpe ii. 2
Goater v. Nunnely ii. 195
Goblet v. Beachey ii. 277, 281, 282, 327
Goddard's case ii. 21
Godefroy v. Jay ii. 134
Godfrey v. Macauley ii. 109
—— v. Norris ii. 211
Godson v. Smith ii. 16
Gold v. Jones ii. 273
Goldie v. Gunston i. 361
—— v. Shuttleworth i. 389
Golding v. Fenn ii. 181
—— v. Nias i. 101
Goldschmidt v. Marryat ii. 197, 199
Goodacre v. Breame i, 91, 159
Goodes v. Wheatly i. 500
Goodhay v. Hendry i. 94, 156
Goodinge v. Goodinge ii. 288
Godmanchester, Bailiffs of, v. Phillips i. 454
Goodright d. Farr v. Hicks i. 467
—— v. Moss i. 183, 213, 216, 217, 221, 229, 261, 270

Goodright v. Saul i. 225, 443
Goodtitle v. Baldwin i. 458
——— d. Bremridge v. Walter i. 515
——— v. Duke ef Chandos i. 311
——— d. Pinsent v. Lamminman i. 515
——— d. Revett v. Braham ii. 254
——— v. Southern ii. 293, 307
——— v. Welford i. 122, 124
Goodwin v. West ii. 373
Gordon, Colonel, case of ii. 218
——— v. Austin i. 507
——— v. Gordon i. 511
——— v. Secretan ii. 207
——— Lord George's case i. 201, 202, 203, 478, 503. ii. 375
Gorham v. Thompson ii. 109
Gorman v. Salisbury ii. 365
Gorton v. Dyson ii. 171, 224
Gosling v. Birnie i. 364
Goss v. Lord Nugent ii. 358, 361, 362, 363, 364, 365
—— v. Tracey i. 124. ii. 211
—— v. Watlington i. 297, 300, 390. ii. 117
Gough v. Cecil ii. 214
Gould v. Barnes i. 362
—— v. Jones ii. 258
Governor of Chelsea Water Works v. Cowper ii. 204
Gracewood v. —— ii. 195
Grady's case ii. 69, 76
Grafton, Duchess of, v. Holt ii. 465
Granger v. Furlong i. 96, 124
Graham v. Dyster ii. 223
——— v. Hope ii. 109
——— v. Maxwell ii. 50
——— v. Peat i. 453
——— v. Robertson i. 509
——— Sir R., Trial of ii. 174
Grant v. Gould ii. 41
—— v. Jackson i. 366, 378, 379
Graul v. Jackson i. 379
Gravenor v. Woodhouse i. 363
Graves v. Key i. 369
Gray v. Cookson ii. 42
—— v. Palmer i. 380
——'s case i. 510
Greaves v. Ashlin ii. 358
——— v. Hunter ii. 255
Green v. Brown i. 450
—— v. Clark i. 490
—— v. Dunn i. 345
—— v. Gaturk i. 337
—— v. Greenbank i. 507
—— v. Hearne i. 482
—— v. Hewett ii. 100
—— v. Jones i. 96
—— v. Proude ii. 103. 136, 149
—— v. Rennett i. 511
—— v. Sutton i. 49, 50
—— v. Salmon i. 92, 126
—— v. The New River Company i. 102. 106, 108
Greenhough v. Gaskell i. 168
Greg's case i. 415
Gregory v. Doidge i. 363
——— v. Howard i. 348, 349
——— v. Parker i. 78
Grellier v. Neale ii. 214
Grey v. Sharp ii. 294
Griffin, Sir John, claim of i. 224
Griffith v. Davies i. 177
——— v. Matthew i. 455
——— v. Williams i. 389. ii. 256, 257
Griffiths v. Ivory ii. 257
Grigg's case i. 71, 79
Grimes v. Smith i. 4, 51
Groenvelt v. Burrell ii. 41, 175, 178
Groom v. Thomas i. 449
Groome v. Forrester ii. 42
Grose v. West i. 453
Gove v. Rutten i. 188
Groves v. Western Canal Company i. 361
Guest v. Caumont i. 515
—— v. Elwes i. 528
Guiness v. Carroll ii. 55, 63
Guisseppe Sacchi, case of ii. 442
Gully v. The Bishop of Exeter i. 98, 366, 396. ii. 230
Gunnis v. Erhart ii. 360
Gunpowder Plot i. 415
Gunston v. Downes i. 28, 120
Gurney v. Langlands ii. 254
Gutch's case i. 446
Gutteridge v. Smith i. 485
Guy v. West i. 454
Guilliam v. Hardy ii. 130
Gwinnett v. Phillips i. 505
Gyles v. Hill ii. 133

H.

	Page
Habershon v. Troby	i. 163
Haddow v. Parry	i. 301
Hadley v. Green	ii. 14, 15
Hagedorn v. Reid	i. 321, 452. ii. 239
Hailey's case	ii. 140
Haire v. Wilson	i. 445
Halden v. Glasscock	ii. 148
Hall's case	i. 406, 414. ii. 80
— v. Cazenove	ii. 356
— v. Curzon	i. 130
— v. Farmer	ii. 169
— v. Hill	i. 78
— v. Odber	ii. 55
— v. Hoddesden	ii. 66
— v. Rex	i. 91
Halliday v. Ward	i. 380
Hallett v. Mears	ii. 376
—— v. Cousens	ii. 405
Halse v. Eyston	ii. 119
Hamilton v. Dutch East India Company	ii. 50
Hammerton v. Hammerton	i. 440
Hammond v. Howell	ii. 41
—— v. Stewart	ii. 373
Hamond v. ——	ii. 92
Hampshire v. Peirce	ii. 324, 326
Hamson v. Parker	i. 454
Hanbury v. Ella	i. 523
Hancock v. Welsh	i. 375. ii. 8, 17
Handford v. Palmer	i. 508
Hands v. James	i. 451
Hankey v. Wilson	i. 364
Hanson's case	i. 479
Hanson v. Parker	i. 374
Hardcastle v. Sclater	ii. 149
Harding v. Cobley	i. 117
—— v. Crethern	i. 371
—— v. Greening	i. 447
—— v. Jones	i. 349
Hardwicke v. Blanchard	i. 110
Hardy's case	i. 178, 200, 202, 203, 414, 459, 480, 481. ii. 406, 417, 428
Hare v. Munn	i. 91
— v. Shearwood	ii. 359
Harford v. Morris	ii. 147
Hargest v. Fothergill	ii. 219
Harman v. Fisher	i. 197
—— v. Lasbrey	i. 111
—— v. Tappenden	ii. 41
Harman v. Vanhatton	i. 348
Harmar v. Davis	i. 361
Harper v. Brooke	i. 298
—— v. Charlesworth	i. 454
Harratt v. Wise	ii. 109
Harrington v. Caswell	i. 115
—— v. Fry	ii. 252, 273
Harris v. Aldrit	ii. 196
— v. Cooke	i. 515
— v. Hill	i. 174
— v. Bishop of Lincoln	ii. 294
— v. Mantle	i. 499
— v. Tippet	ii. 398
— v. White	i. 21
Harrison's case	i. 397. ii. 70, 71, 74, 431, 445
—— v. Blades	i. 299, 300, 336. ii. 211
—— v. Vallance	i. 375
—— and Wife v. Moore	i. 347, 396
—— v. Williams	ii. 186
—— v. Wood	i. 490
Harrow v. Ryslip	ii. 46
Hart v. Horn	i. 101, 375
— v. M'Namara	ii. 38
— v. Newman	i. 365
Hartley v. Cook	ii. 117
Harvey v. Clayton	i. 164
—— v. Key	i. 346
—— v. Mitchell	ii. 216
—— v. Morgan	ii. 219
Harvey's case	ii. 31
Harwood v. Goodright	i. 448
—— v. Keys	i. 376, 377
—— v. Sims	i. 238, 246, 271, 272
Hary's case	i. 420
Hasker, Dr., case of	i. 445
Haslam's case	i. 29
Hatch v. Blisset	ii. 374
Hatfield v. Hatfield	ii. 31
Hathaway v. Barrow	i. 62. ii. 23, 24
Havelock v. Cook	i. 353
—— v. Rockwood	ii. 53
Hawes v. Watson	i. 364
Hawkes v. Salter	i. 452
Hawkins v. Finlayson	i. 103, 108
—— v. Howard	i. 175
—— v. Inwood	i. 89
—— v. Warre	i. 424
Hay v. Fisher	i. 488
Haynes v. Hare	ii. 350

	Page
Haynes v. Holliday	ii. 337
Hayslep v. Gymer	i. 205, 355, 356
Haywood v. Firmin	i. 261
Hazard v. Treadwell	i. 382
Head v. Head	i. 113, 444
Headlam v. Hedley	i. 453
Heane v. Rogers	i. 360, 365, 369
Hearne's case	i. 414
Heath v. Hall	i. 96, 124
Hebden v. Freeman	ii. 119
Helliard v. Jennings	i. 98
Helyar v. Hawke	i. 381, 382
Heming v. English	i. 160
Hemming v. Parry	i. 523
Hemmings v. Robinson	i. 364
Henderson v. Wild	i. 379
Henley v. Soper	ii. 27, 62
Henman v. Dickinson	i. 73
Hennel v. Lyon	ii. 139, 140, 141
Henry v. Adey	ii. 143
—— Leigh	i. 418. ii. 115, 217, 412, 413
Henshaw v. Pleasance	ii. 39
Hensey's case	ii. 274
Henson v. Coope	ii. 359
Herbert v. Ashburner	ii. 178
—— v. Cook	ii. 55
—— v. Reid	ii. 294
—— v. Tucknal	i. 213, 217
—— v. Walters	ii. 468
—— v. Wilcocks	i. 197
Hereford, Bishop of v. Duke of Bridgwater	ii. 185
Hervey v. Hervey	i. 224, 235
Hetherington v. Kemp	i. 452
Heudebourck v. Langston	i. 142
Hevey's case	i. 415
Hewitt v. Piggott	i. 343, 357. ii. 199
Hewley, Lady, case of	ii. 276, 281, 286, 348
Hewson v. Brown	ii. 130
Hick v. Keats	i. 459
—— *in re*	ii. 148
Hickey v. Hayter	i. 369
Hickman's case	ii. 80
Higginson v. Clowes	ii. 360
Higgs v. Dixon	ii. 202
Higham v. Rabett	i. 512
—— v. Ridgway	i. 232, 295, 298, 311, 312, 315, 318
Highfield v. Peake	ii. 65, 94, 131, 139, 152
Hildyard v. Smith	ii. 193
Hill's case	i. 501
—— v. Aland	ii. 192
—— v. Bateman	ii. 42
—— v. Elliot	i. 164, 348
—— v. Fleming	i. 58
—— v. Grange	ii. 275
—— v. Hill	i. 384
—— v. Manchester W. W.	i. 278, 358
—— v. Saunders	i. 363
—— v. Squire	i. 351
—— v. Street	i. 527
Hilliard v. Phaley	i. 219. ii. 32
Hillyard v. Grantham	ii. 24, 31
Hingham v. Robins	i. 484
Hirst's case	i. 427
Hitchen v. Campbell	ii. 16
Hoar v. Mill	i. 511
Hoare v. Allen	i. 195
—— v. Coryton	i. 376
—— v. Graham	ii. 357, 358
Hobhouse v. Hamilton	ii. 132, 247
Hobson v. Parker	ii. 182
Hockin v. Cooke	i. 507
Hockley v. Lamb	i. 83
Hodenpyl v. Vingerhood	i. 379
Hodge v. Fillis	i. 507
Hodges v. Atkis	ii. 187, 190
—— v. Horsfall	ii. 299
Hodgkinson v. Fletcher	i. 76
—— v. Willis	ii. 141
Hodgson's case	i. 473, 474. ii. 419
—— v. Fullarton	i. 357
—— v. Hodgson	ii. 326
Hodnet v. Forman	ii. 210
Hodson v. Marshall	i. 118
—— v. Sharpe	i. 363
Hoe v. Nelthrope	ii. 34, 171
Hoffman v. Pitt	i. 94
Hogg v. Snaith	ii. 346, 350, 357
Holcombe v. Hewson	i. 461
Holcroft v. Smith	ii. 245
Holden v. Hartsink	i. 459
—— v. Hearne	i. 118
Holder v. Coates	i. 454
Holding v. Pigott	ii. 338
Holdsworth v. Mayor of Dartmouth	ii. 461
Holland v. Hopkins	i. 487
—— Reeves	i. 436. ii. 226, 400
Hollis v. Goldfinch	i. 356, 465
Holloway v. Rakes	i. 302, 310

	Page
Holme v. Green	i. 379, 380
Holmes v. Custance	ii. 292, 334
Holt v. Miers	ii. 219
—— v. Squire	i. 389
Holyland, *ex parte*	i. 449
Honeywood v. Peacock	ii. 211
Hood v. Reeve	i. 384
Hooper, *ex parte*	ii. 350
Hope v. Atkins	ii. 359
Hopewell v. Depenna	i. 449
Hopkins v. Neal	i. 47, 113
Horne v. Lord T. Bentick	i. 181
—— v. Smith	ii. 377
—— Tooke's case	i. 178, 201, 358, 459, 479. ii. 251
Horneyer v. Lushington	ii. 52
Horsefall v. Testar	i. 511
Houlditch v. Marquess of Donegal	ii. 56
Houliston v. Smith	i. 190
Houseman v. Roberts	ii. 219
Houstman v. Thornton	i. 450
Hovill v. Stephenson	i. 153. ii. 211
How v. Hall	i. 424. ii 223
Howard v. Canfield	ii. 412
—— v. Shipley	i. 40, 137
—— v. Tremaine	ii. 91, 92
—— de Walden Peerage	i. 220
Howell v. Lock	ii. 349
—— v. Richards	i. 511, 512
—— v. Thomas	i. 524
Howleston v. Smyth	ii. 141
Hubbard v. Johnstone	ii. 114
Hudson v. Revett	i. 120
—— v. Robinson	i. 130
Huet's case	ii. 80
—— v. Le Mesurier	ii. 111
—— v. Wilson	ii. 125
Hughes's case	i. 419
Hughes v. Cornelius	ii. 50
—— v. Rogers	ii. 257
Hulke v. Pickering	i. 459
Hull v. Vaughan	i. 363
Humble v. Hunt	ii. 119
Hume v. Rundall	ii. 34, 172
Humphrey v. Knight	ii. 102
—— v. Miller	i. 113
—— v. Moxon	i. 131
Humphreys v. Boyle	i. 75
Hunt v. Andrews	ii. 115
—— v. Hort	ii. 308, 350
Hunter v. Gibson and Johnson	i. 461
Hunter v. King	i. 64
—— v. Leathley	i. 146
—— v. Rice	i. 387
Huntingdon Peerage	i. 217, 224, 228. ii. 99, 110
Hurd v. Maring	i. 176
Hurst v. Watkis	i. 491
Hutchinson's case	ii. 54
—— v. Bowker	ii. 337
—— v. Piper	i. 507
Hutton v. Warren	ii. 338, 339, 340
Huxham v. Smith	ii. 44, 45
Huxley v. Berg	i. 57

I

Iggulden v. May	ii. 349
Ilderton v. Athinson	i. 113
—— v. Ilderton	ii. 31
Ile's case	ii. 138
Illingworth v. Leigh	i. 309. ii. 120, 149
Ingleby v. Smith	i. 367
Inglis v. Spence	i. 351, 353
Ingram v. Dade	i. 93, 155
—— v. Lea	i. 424. ii. 358
Ireland v. Powell	i. 247
Irving v. Motley	i. 381, 382
Isack v. Clarke	i. 458
Israel v. Benjamin	i. 485, 486. ii. 151
Ivat v. Finch	i. 301, 310, 392
Ive's case	ii. 3, 124
Ivey v. Young	i. 525

J.

Jackson v. Allen	ii. 220, 221
—— v. Benson	ii. 420
—— v. Bull	i. 148
—— v. Cater	ii. 359
—— v. Fairbank	i. 380
—— v. Galloway	i. 91
Jacob's case	ii. 80, 167
—— v. Lindsay	i. 341, 419, 429. ii. 413
Jacobs v. Humphrey	i. 388
Jagger, case of	i. 79
Jaggers v. Binnings	i. 379

	Page
James's case	ii. 140
—— v. Birn	i. 351
—— v. Hatfield	i. 47, 113, 388
—— *ex parte*	i. 70
Jameson v. Eamer	i. 187
Janson v. Wilson	ii. 88
Jarrett v. Leonard	i. 355, 356, 377
Jayer v. Garnett	i. 197
Jayne v. Price	i. 452
Jee v. Hockley	ii. 104
Jefferey v. Walton	ii. 358
Jelf v. Oriel	i. 518
Jelfs v. Ballard	i. 496
Jenk's case	i. 506
Jenkens v. Harvey	i. 442
—— v. Phillips	i. 522, 526
Jenkinson v. Pepys	ii. 360
Jennings v. Griffiths	i. 159
Jenys v. Fawler	i. 364
Jervoise v. Duke of Northumberland	ii. 34, 172
Jessel v. Millinghen	ii. 193, 194
John's case	i. 80, 284, 291
John v. Currie	i. 527
Johnson v. Baker	i. 122
—— v. Browning	i. 148
—— v. Durant	i. 163. ii. 41
—— v. Gilson	i. 342
—— v. Lawson	i. 227, 229, 230, 234
—— v. Mason	i. 101
—— v. Ward	i. 366. ii. 115
—— Mr. Justice, case of	ii. 230, 251
Johnston v. Parker	i. 213
Johnstone's case	i. 506
Jolly v. Taylor	i. 424. ii. 223
Jones and Beaver's case	ii. 26
—— v. Bow	ii. 31, 32
—— v. Brewer	ii. 385
—— v. Brooke	i. 40, 110, 112
—— v. Carrington	i. 300, 317, 392
—— v. Dunthorpe	ii. 66
—— v. Edward	ii. 219
—— v. Edney	ii. 360
—— v. Mars	i. 507
—— v. Mason	i. 17, 19. ii. 210
—— v. Newman	ii. 319, 323
—— v. Palmer	ii. 195
—— v. Perry	i. 188
—— v. Pritchard	i. 159
—— v. Radford	i. 364
Jones v. Randall	ii. 107, 137, 139
—— v. Stevens	i. 467. ii. 115
—— v. Stroud	i. 428. ii. 414, 415
—— v. Thompson	i. 189
—— v. Tucker	ii. 296
—— v. Waller	i. 309, 317. ii. 160, 163
—— v. White	ii. 25
—— v. Williams	i. 356, 464
Jones's case	i. 399, 400, 427. ii. 82
Jordaine v. Lashbrook	i. 39, 40, 131

K.

Kahl v. Janson	i. 381, 383
Kaines v. Knightly	ii. 356
Kay v. Brookman	ii. 213, 214
Kean's case	ii. 31
Keeling v. Ball	ii. 229
Keene v. Dearden	i. 456
Keightley v. Birch	i. 104
Kelham Bridge, case of	i. 239
Kell v. Rainby	i. 362
Kellington v. Trin. Col.	ii. 101, 149
Kenan v. Sheriff of London	i. 174
Kemble v. Farren	i. 374
Kemp v. Mackrill	ii. 254
Kempland v. Macauley	i 387
Kempton v. Cross	ii. 171, 173
Kennedy v. Earl of Cassilis	ii. 55
Kennett v. Greenwollers	i. 94
Kensington v. Inglis	ii. 230, 241, 411
Kent v. Lowen	i. 196, 395
Kenworthy v. Schofield	ii. 299
Ker v. Shedden	ii. 115
Kerrison v. Coatsworth	i. 107
Kerslake v. Shepherd	i. 384
Key v. Shaw	i. 187, 355
Kidney v. Cockburn	i. 213, 221
Killmorey's case	i. 219. ii. 167
Kilner v. Bailey	ii. 15
Kilpack v. Major	i. 116
Kindersley v. Chase	ii. 50, 51
Kinder v. Williams	ii. 374
Kine v. Beaumont	i. 434, ii. 226

	Page
King v. Baker	i. 101
—— v. Ely, Bishop of	ii. 183
—— v. Francis	i. 468
—— v. Hunt	ii. 224
—— v. King	ii. 195
—— v. Lookup	i. 513
—— v. Purnell, Dr.	ii. 188
Kingston, Duchess, case of	i. 164, ii. 21, 30, 32, 34, 35, 36, 45, 46, 88, 125
——, Mayor of v. Horner	i. 455
Kingworth v. Leigh	ii. 11
Kinnersley v. Orpe	ii. 7, 109, 132
Kirkwood's case	i. 473, 474
Kirtland v. Pounsett	i. 515
Kirwan v. Cockburn	ii. 108
Kitchen v. Manwaring	i. 7
Knapp v. Harden	ii. 358
—— v. Haskall	ii. 410
Knight v. Dauler	ii. 136
—— v. Martin	ii. 207
—— v. M. of Waterford	ii. 207, 216
—— v. Woore	i. 512
Knox v. Walley	i. 362
Koster v. Reed	i. 450
Kostu v. Innes	ii. 450
Kynaston v. The East India Company	ii. 187

L.

Lacon v. Higgins	i. 88. ii. 146
—— v. Hooper	ii. 115
Lady Dartmouth v. Roberts	i. 393. ii. 139, 140
Laing v. Barclay	i. 175
Lainson v. Tremere	i. 367
Lake v. Skinner	i. 300. ii. 120
Lambe's case	i. 397, 427. ii. 69, 79, 80, 81, 86
Lambert v. Oakes	i. 364
—— v. Pack	i. 364
Lambrith v. Roff	i. 490
Lamey v. Bishop	i. 518
Lampet's case	i. 159
Lampon v. Corke	i. 367, 368, 369. ii. 314, 315, 351
Luncum v. Lovell	i. 83, 145, 274, 278
Lane v. Hegberg	ii. 40
Lane v. Micklethwaite	i. 490
Langdon v. Hulls	ii. 226
Langhorn v. Allnut	i. 381, 383
Langley v. Earl of Oxford	i. 390
Larbalestier v. Clark	i. 109, 112, 126
Latham v. Rutley	i. 507
Latkow v. Eamer and Barnett, Sheriff of Middlesex	ii. 100
Lautour v. Teesdale	ii. 167
Lawley, Lady, case of	i. 79
Lawrence v. Dixon	ii. 111
—— v. Hodgson	ii. 148
—— v. Hooker	ii. 192
Lawson v. Sherwood	i. 418. ii. 222
Layburn v. Crisp	i. 253. ii. 27, 138, 139
Laycock's case	ii. 140
Layer's case	i. 27, 182, 427. ii. 82, 224, 249, 253, 271, 273, 375, 424, 431
Leach v. Buchanan	i. 364
Le Caux v. Eden	ii. 37, 50
— Gros v. Levemore	i. 309
— Marchant, case of	ii. 218
— Sage v. Johnson	i. 131
Leader v. Barry	i. 235. ii. 111, 166
Leathes v. Newell	i. 247, 274
Lechmere v. Fletcher	i. 484
Ledbetter v. Salt	i. 361
Lee, *q. t.* v. Birrel	i. 166
—— v. Gansell	i. 19
—— v. Lee	i. 335
— v. Meecock	ii. 112, 134
Leeds v. Cook	ii. 225, 371
Leery v. Goodson	i. 507
Lee's case	i. 28
Lees v. Marston	i. 199
—— v. Smelt	i. 161
Leeson v. Holt	ii. 109
Lefebure v. Warden	i. 320
Legal v. Miller	ii. 365
Leggett v. Cooper	i. 485
Legh v. Legh	i. 374
Leglise v. Champante	i. 509
Leigh Peerage case	i. 217, 222, 235
Leighton v. Leighton	ii. 3
Lemon v. Dean	ii. 214
Leonard v. Franklin	ii. 119
Leslie v. De la Torre	ii. 356
Lethbridge v. Winter	i. 454

	Page
Lethulier's case	ii. 337
Levett v. Wilson	i. 456
Levy v. Essex	i. 133
—— v. Pope	i. 176, 373
Lewis v. Baker	ii. 184
—— v. Hartley	ii. 220
—— v. Peake	i. 108
—— v. Rogers	i. 196
—— Sapio	ii. 249
Ley v. Ballard	ii. 214
Leyfield's case	ii. 191
Liebman v. Pooley	i. 419
Lightfoot v. Cameron	ii. 373
Like v. How	i. 353
Lincoln's case	ii. 138
—— Bishop of v. Ellis	ii. 11
Lindo v. Belisario	ii. 147
Lingard v. Messiter	i. 460
Lipscombe v. Holmes	i. 362, 485
Lisle Peerage case	i. 217, 218, 220, 221, 222, 224, 226. ii. 98, 99
Lister *q. t.* v. Priestley	i. 352
Littler v. Holland	i. 507
Lloyd v. Freshfield	i. 165. ii. 412
—— v. Passingham	ii. 111
—— v. Sandilands	i. 459
—— v. Willan	i. 384, 387
—— v. Williams	i. 58
—— v. Woodall	ii. 109, 126
Locke v. Norbonne	i. 391. ii. 9
Lockhart's case	i. 412
Lolly's case	ii. 54
London, City of v. Clarke	i. 238, 239, 252
—— Corporation of v. Long	i. 375
Long's case	i. 406
—— v. Champion	i. 343
—— v. Greville	i. 485
Lopez v. Andrews	i. 455
—— v. De Tastet	i. 507
Lord Audley's case	i. 79
—— Balmerino's case	i. 514
—— Castlemain's case	i. 21. ii. 431
—— Cheyney's case	ii. 350
—— Cholmondeley v. Lord Clinton	i. 457
—— Cochrane's Trial	ii. 427
—— Cromwell's case	ii. 353
—— Falmouth v. George	i. 83, 145
—— v. Moss	i. 165
Lord, Ferrers v. Shirley	ii. 250, 252
—— George Gordon's case	i. 201, 202, 203, 478. ii. 163
—— Halifax's case	i. 493
—— Irnham v. Child	ii. 350
—— Kilmarnock's case	i. 514
—— Lovat's case	i. 20, 154, 221. ii. 393
—— Melville's case	i. 386, 448. ii. 163, 231, 240
—— Petre v. Blencoe	ii. 348
—— Portmore v. Goring	ii. 194
—— Preston's case	ii. 249, 271, 274
—— Russell's Trial	i. 165, 200, 481
—— Southampton, Trial of	i. 202
—— Stafford, Trial of	ii. 399
—— Thanet v. Paterson	ii. 138, 139
—— Valentia's case	i. 213
—— Vane's case	i. 79
—— Walpole v. Lord Cholmondeley	ii. 290
—— Warwick's case	i. 21
Lothian v. Henderson	ii. 51
Loveden v. Loveden	i. 439
Loveridge v. Botham	i. 370
Lowe v. Lord Huntingtower	ii. 293, 306
—— v. Manners	ii. 293
—— v. Jolliffe	i. 40. ii. 148, 456
Lowry v. Doubleday	ii. 376
Lowther v. Lord Radnor	ii. 42
—— v. Raw and others	i. 463
Lucas and others v. De la Cour	i. 379
—— v. Novosilieski	i. 459
Luckett v Graham	i. 129
Lumley v. Quaree	ii. 41
Lunnis v. Rowe	i. 156
Luttrel v. Lea	ii. 130
Lutterel v. Reynell	ii. 445
Lygon v. Strutt	ii. 158, 159, 163
Lynch v. Clark	i. 341. ii. 163
Lyne, *ex parte*	ii. 374

M.

Macarthy v. Smith	i. 487, 492
Macbride v. Macbride	ii. 425, 426
Macclesfield, Lord, case of	ii. 417

	Page
Macdougal v. Young	ii. 136
Mace v. Cadell	i. 362
—— v. Kay	ii. 147
Macferson v. Thoytes	i. 364. ii. 255
Mackally's case	i. 502, 503
M'Guire's case	i. 419
Maddison v. Nuttall	i. 308, 393. ii. 120, 169
—— v. Shore	ii. 373
Maestars v. Abraham	i. 382, 383
Magrath v. Hardy	ii. 20, 21
Magee v. Atkinson	ii. 346, 363
Mainwaring v. Giles	i. 455
—— v. Mytton	i. 133
Malcolm v. Fullarton	i. 483
Male v. Roberts	ii. 147
Malkin, *ex parte*	i. 96
Maloney's case	ii. 83
Maltby v. Christie	i. 351
Manby v. Curtis	i. 316, 317, 336. ii. 160, 204
—— v. Lodge	i. 300
Manchester Mills case	i. 252. ii. 27
Manifold v. Pennington	i. 510
Mann v. Lang	i. 370, 460
—— v. Owen	ii. 41
Manners *q. t.* v. Postan	ii. 203
Manning v. Clement	i. 313
—— v. Lechmere	i. 298, 299
Mantstephen v. Brooke	i. 380
Mant v. Manwaring	i. 49
Maragora's case	i. 444
Marchmont's case	i. 219. ii. 167
Marks v. Lahee	i. 313
Marriage v. Lawrence	i. 277, 278, 307. ii. 122
Marsden v. Stanfield	i. 48, 109, 112
Marsh v. Collnett	ii. 164, 206
—— v. Meager	i. 199, 377
—— v. Robinson	ii. 114
Marshall v. Cliff	i. 351, 389
—— v. Parker	ii. 52
Marshalsea case	ii. 41
Marston v. Downes	i. 173. ii. 229
Martin v. Bell	ii. 217
—— v. Howell	i. 146
—— v. Nicholls	ii. 56
—— v. Thornton	i. 163
Mash v. Denham	i. 523
—— v. Smith	i. 51
Mason v. Mason	i. 450
Massey v. Johnson	ii. 42, 176
Masterman v. Judson	i. 517
Masters v. Drayton	i. 94
—— v. Masters	ii. 289, 294
—— v. Pollie	i. 454
Matts v. Hawkins	i. 454
Matthews v. Haydon	i. 146
—— v. Port	ii. 99
—— v. Smith	i. 93, 158
Maugham v. Hubbard	i. 429. ii. 411, 412
Mawman v. Gillett	i. 127
Mawson v. Hartsink	ii. 432
May v. Gwynne	ii. 189
—— v. May	i. 428. ii. 112
Mayler v. Eyloe	i. 198
Mayor of Carlisle v. Blamire	i. 367. ii. 225
—— Doncaster v. Day	i. 337
—— Exeter v. Coleman	ii. 187
—— London v. Jolliffe	i. 375
—— v. Long	ii. 346
—— v. Mayor of Lynn	ii. 122
—— v. Swinland	ii. 181
—— Lynn v. Denton	ii. 187
—— Southampton v. Graves	ii. 187
M'Braine v. Fortune	i. 147
M'Carthy v. De Caix	ii. 54
M'Craw v. Gentry	ii. 214
M'Gahey v. Alston	i. 390, 433. 450. ii. 229, 236
M'Intyre v. Layard	ii. 65
M'Kenire v. Fraser	ii. 205
M'Neil v. London (Sheriff)	ii. 133
M'Queen v. Farquhar	i. 451
M'Quillin v. Cox	i. 499
Mead, Mary, case of	i. 79
—— v. Robinson	i. 40, 137. ii. 115, 164
Meager v. Smith	i. 484
Meagoe v. Simmons	ii. 399
Mease v. Mease	ii. 359
Meath, Bishop of v. Winchester, Marquis of	i. 386, 393 ii. 162
—— v. Belfield Lord	i. 245. ii. 119
Mee v. Reid	i. 9
Meekins v. Smith	ii. 373
Melen v. Andrews	i. 359, 400
Mellich v. Allnut	i. 484

Melver v. Humble i. 53
Melville, Lord, trial of i. 386, 448. ii. 163, 231, 240
Mercer v. Wise i. 353, 365
Mercers of Shrewsbury v. Hart ii. 166
Meredith v. Gilpin i. 141, 143
Merle v. More i. 163, 174
Meres v. Ansel ii. 359
Mewsome v. Coles i. 362
Meyer v. Sefton i. 177, 389, 434
Michel v. Rabbitts ii. 163
Middleton v. Brewer i. 485
——— v. Janverin ii. 145, 147
——— v. Sandford ii. 215
——— v. Melton i. 294, 295, 297, 299, 300, 315, 316, 390, 421
Mildrone's case i. 9
Miles v. Sheward i. 508
Millard's case i. 473
Miller v. Falconer i. 105
—— v. Foster ii. 169
—— v. Heinrick ii. 144, 145
—— v. Miller ii. 213
—— v. Travers ii. 290, 291, 292, 293, 300, 311, 324, 325, 350
—— v. Warre ii. 468
—— v. Williams i. 485
Miller's case ii. 109
Milman v. Tucker ii. 429
Mills v. Collett ii. 41
—— v. Oddy ii. 229
—— v. Lyne i. 482
Millwood v. Walter i. 490. ii. 214
Milward v. Forbes i. 342, 350
——— v. Temple i. 389
Minshull v. Lloyd ii. 236
Minton's case i. 506
Mitchell v. Jenkins i. 445
—— v. Johnson ii. 215
——— v. Hunt i. 115
——— v. Tarbutt i. 510
Mogg's case i. 472
Mohun, Lord, case of i. 284
Moilliet v. Powell i. 517
Moises v. Thornton i. 354. ii. 125, 173
Molineaux v. Molineaux ii. 298
Moloney v. Bartley ii. 419
Molony v. Gibbons ii. 59
Molten, *q. t.* v. Harris i. 425
Monke v. Butler i. 445, 446, 493
Monkton v. Attorney-General i. 212, 213, 220, 221, 227, 231, 236, 237, 264, 270, 271, 272
Monroe v. Twisleton i. 75
Moody v. King i. 53, 54, 159
—— v. Thurston ii. 39, 178
Moone v. Witney Union ii. 337
Moor v. Adam ii. 376
Moore's case ii. 86
Moore v. Strong i. 195
—— v. Terrell i. 168, 169
Moravia v. Sloper ii. 41
Morewood v. Wood i. 241, 242. 255, 257, 259. ii. 258
Morgan's case i. 9
——— v. Ambrose i. 363
——— v. Brydges i. 362. ii. 397
——— v. Edwards i. 511
——— v. Harris i. 492
——— v. Hughes ii. 42
——— v. Morgan ii. 213
——— v. Prior i. 95
——— v. Tyler i. 309
Morish v. Foote i. 106, 107
Morrell v. Martin i. 143, 144
Morris v. Burdett i. 356
—— v. Davies i. 234, 443
—— v. Hauser ii. 219
—— v. Miller i. 359, 444
Morrison v. Kelly ii. 176
——— v. Lennard i. 4
Morrow v. Saunders ii. 195
Morley, Lord, case of ii. 70, 71
Moseley v. Davies i. 245, 246, 255, 271, 272
——— v. Hanford ii. 357
Moses v. Macfarlane ii. 43
Mosey's case i. 412
Mosley's case i. 286
——— v. Massey ii. 293, 307
Moss v. Smith i. 487
Mostyn v. Fabrigas ii. 41, 147, 385
Mott v. Mills i. 353
Moulin v. Dalison i. 462
Mountjoy, Lord, case of i. 223, 228
Mountstephen v. Brooke i. 507
Moyser v. Peacock ii. 66
Mullett v. Hunt ii. 377
Muller v. Moss i. 188
Mulvany v. Dillon ii. 66, 92
Munn v. Baker ii. 109

Munn v. Godbold ii. 237, 240
Munro v. De Chemant i. 362
Murley v. M'Dermott ii. 352
Murphy's case i. 31
——— v. Doulan i. 482
Murray v. Thornhill ii. 184
Mynn v. Joliffe i. 169
Mytton v. Harris ii. 120

N.

Nash v. Turner i. 362
Neal d. Duke of Athol v. Wilding i. 235
Neale v. Fry ii. 123
—— v. Parkin i. 356
—— v. Swind ii. 197
—— v. Wilday i. 217
—— v. Wylie i. 108
Nelson v. Whittal ii. 214, 215
Netterville Peerage case i. 220
Newburgh, Lady, case of ii. 350
——— v. Newburgh i. 274. ii 309.
Newby v. Reed i. 450
Newcastle, Duke of v. Clark i. 454
——— v. Hundred of Broxtowe i. 257, 268
New College case ii. 40
Newell v. Simpkin ii. 181
Newham v. Raithby ii. 112
Newland's case i. 128
Newman v. Stretch i. 198, 346
Newsam v. Carr i. 468
Newsome v. Coles ii. 109
Nicholls v. Dowding and another i. 379. ii. 403
——— v. Downes i. 359
——— v. Parker i. 238, 246, 263
Nicholson v. Smith i. 348
Nightingal v. Devisme ii. 149
Nix v. Cutting i. 109, 112, 126
Nixon v. Mayoh i. 175
Noble v. Kennoway i. 462, 464. ii. 337
Nodin v. Murray i. 436. ii. 226
Noel v. Wells ii. 29
Norden v. Williamson i. 60
Norris v. Norris i. 449
North v. Miles i. 204, 388
Northam v. Latouche ii. 131, 142
Norton v. Shakespeare i. 94
Norwood's case i. 360
Novelli v. Rossi ii. 57, 62
Nowell v. Davies i. 123, 124

O.

Obichini v. Bligh ii. 50, 59, 62
O'Coigley and O'Connor, Trial of i. 480. ii. 426
O'Connor v. Cook ii. 194
Oddis v. Domville i. 224
Oddy v. Bovil ii. 53
Odwin v. Forbes ii. 63
Ogle v. Atkinson i. 364
—— v. Paleski i. 154. ii. 65
Olive v. Guin ii. 173
Oliver v. Bartlet i. 188
——— Cooke ii. 299
Olroyd's case ii. 78
Omichund (or Omychund) v. Barker i. 7, 9, 11. ii. 125, 126
Ongley v. Chambers ii. 298
Orr v. Brown ii. 63
—— v. Morris ii. 208
Osborne, *ex parte* i. 96
Osgathorpe v. Diseworth ii. 47
Oswald v. Leigh i. 459
Oughnan v. Parish ii. 388
Ougier v. Jennings ii. 337
Outram v. Morewood i. 244, 246 277, 306, 309, 310, 330, 391. ii. 7, 10, 15, 17
Oxenden v. Palmer i. 100, 143
Oxlade v. Perchard i. 94

P.

Page v. Faucet ii. 121
—— v. Leapingwell ii. 294
—— v. Mann ii. 215
—— v. Thomas i. 130
Pain v. Beeston ii. 434
Palethorp v. Furnish i. 78, 385
Palmer v. Lord Aylesbury ii. 65, 150
——— v. Ekins i. 363
——— v. Sells i. 385
Palmerston, Lord, case of i. 338

	Page
Parham v. Raynal	i. 380
Parker's case	ii. 445
——— v. Barker	i. 196
——— v. Hoskins	ii. 212
——— v. Manning	i. 363
——— v. M'William	ii. 395
——— v. Palmer	i. 507, 508
——— v. Potts	i. 442
——— v. Yates	i. 167
Parkhurst v. Lowton	ii. 417
Parkin v. Moon	ii. 401, 407
Parkins v. Cobbet	ii. 235
——— v. Hawkshaw	i. 163
Parkinson v. Collier	ii. 345
Parks v. Edge	i. 517
Parry v. Collis	ii. 138
—— v. Fairhurst	i. 523
—— v. House	i. 363
—— v. May	ii. 218
Parsons v. Bellamy	i. 308
Parteriche v. Powlet	ii. 350, 358, 359
Parton v. Williams	ii. 41
Partridge v. Coates	ii. 217
——— *ex parte*	ii. 200
Pasmore v. Bousfield	i. 432
Patram's case	i. 29
Patrick, Dr., case of	ii. 40
Patterson v. Black	i. 450
Paul v. Meek	i. 436
—— v. White	ii. 394
Paull v. Brown	i. 123, 124
Payne v. Rogers	i. 374
Paxton v. Douglas	ii. 417
——— v. Popham	ii. 367
Peaceable v. Watson	i. 302, 391
Peacock v. Harris	i. 352, 361
——— v. Monk	ii. 354
Pearce v. Davis	i. 459
—— v. Hooper	ii. 207
Pearcey v. Fleming	i. 88
——— v. Heming	i. 161
Pearson v. Fletcher	i. 175
——— v. Isles	ii. 377
Pederson v. Stoffles	i. 128
Pedler v. Paige	ii. 210
Pedley v. Wellesley	i. 70, 76
Pelerick v. Turner	i. 379
Petrie's case	i. 167
Pembroke, Lord, case of	i. 284
Pendock v. Mackinder	i. 17, 18
Pendrell v. Pendrell	i. 443
Penn v. Scholey	i. 186, 196
Pennell v. Meyer	ii. 28, 139
Penny v. Porter	i. 507
Peppin v. Solomon	i. 505
Perchard v. Hamilton	i. 390
Perigal v. Nicholson	i. 308, 309. ii. 393
Perkin v. Warden of the Company of Cutlers	i. 458
Perkins v. Hawkshaw	i. 389
Perry v. Gibson	ii. 397
Perryman v. Steggel	i. 160
Peto v. Hague	i. 382
Pettman v. Bridger	i. 455
Petty v. Anderson	i. 385
Peyton v. Governors of St. Thomas' Hospital	i. 381, 382
Pfiel v. Vanbatenburg	i. 459
Phelps's case	i. 444
Philips v. Bacon	i. 513
——— v. Shaw	i. 513
Philipson v. Chace	ii. 225
Phillips's case	i. 425, 473, 474
——— v. Allan	ii. 63
——— v. Buckingham, Duke of	i. 47
——— v. Bury	ii. 40
——— v. Cole	i. 372, 395
——— v. Crawley	ii. 31
——— v. Eamer	i. 196. ii. 398
——— v. Fowler	i. 137
——— v. Hunter	ii. 43, 49, 55
Philp's case	i. 401
Philpots v. Read	ii. 63
Phipps v. Parker	ii. 214
——— v. Pitcher	i. 125
——— v. Sculthorpe	i. 363
Phythian v. White	i. 512
Pickford v. Gutch	i. 354
Pickles v. Hollings	i. 117
Pickering v. Noyes	ii. 194, 196
Picton, General, case of	ii. 108, 124, 144, 145, 146
Piercey's case	i. 219. ii. 123
Piercy v. ———	ii. 91
Piesley v. Von Esch	i. 85, 89
Pike v. Badnering	ii. 448
—— v. Crouch	i. 337
Pim v. Carroll	i. 253
Pinney v. Pinney	ii. 29
Pipe v. Steel	i. 49, 50
Pirie v. Anderson	ii. 114
Pitcairne v. Ogbourne	ii. 365
Pitcher v. Rinter	ii. 142
Pitt v. Green	i. 511

	Page
Pitt v. Knight	ii. 130
Pitman v. Maddox	i. 320, 335
Pittam v. Foster	i. 380
Pitton v. Walter	ii. 99, 137
Plaxton v. Dare	i. 238, 249, 274, 277, 300
Plumer's case	ii. 121
Plummer v. Woodburne	ii. 62
Plunket v. Cobbett	i. 182, 475
Poe, *in re*	ii. 41
Pole v. Rogers	ii. 391
Pollard v. Bell	ii. 52
—— v. Scott	i. 249, 276
—— v. Smith	i. 251
Pomeroy v. Baddeley	ii. 395
Pomfret, Lord v. Smith	i. 274, 275
Pond v. Dimes	ii. 85
Pool v. Bousfield	i. 131
—— v. Court	i. 507
Poole v. Dicas	i. 316, 319, 322, 324, 326, 328, 329
—— v. Warren	ii. 237
Pooley v. Goodwin	ii. 240
Pope v. Monk	i. 353
—— v. Skinner	i. 500
Popish Plot, Trials for	i. 22
Poplett v. James	i. 58
Porter v. Cooper	ii. 135, 141, 142
Porthouse v. Parker	i. 364
Portmore v. Goring	ii. 194, 196
—— v. Morris	ii. 359
Potter v. Brown	ii. 63
Potts v. Durant	ii. 119, 120, 159, 168, 169
Powell v. Edmonds	ii. 359, 360
—— v. Ford	ii. 249
—— v. Hodgetts	i. 204, 382
—— v. Hord	i. 103
—— v. Layton	i. 509
—— v. Horton	ii. 337
—— v. Milbank	i. 445, 446, 493
Pratt v. Dixon	ii. 44
Prescott v. Phillips	i. 275
Pressly's case	ii. 82
Preston Lord, case of	ii. 271, 274
—— v. Carr	i. 386
—— v. Merceau	ii. 359
Price's case	i. 29. ii. 141
—— v. Boultby	ii. 199
—— v. Dewhurst	ii. 49. 56, 58
—— v. Dyer	ii. 366
Price v. Fletcher	i. 512
—— v. Harwood	i. 362
—— v. Hollis	i. 384. ii. 129
—— v. Littlewood	i. 241, 247, ii. 117
—— v. Page	ii. 323, 326
—— v. Torrington, Lord	i. 319, 329, 335
—— v. Neale	i. 364
Priddle's case	i. 18
Prideaux v. Collier	i. 196, 372
Priestley's case	ii. 152
Prince v. Blackburn	ii. 210, 213, 214
—— v. Samo	ii. 483
Pritchard v. Draper	i. 379
—— v. Symonds	ii. 218
—— v. Walker	i. 352
Pritt v. Fairclough	i. 321, 452. ii. 239
Proctor v. Lainson	ii. 94
Provis v. Reed	ii. 446
Prudham v. Phillips	ii. 36
Pulley v. Hilton	ii. 168
Purcell v. Macnamara	i. 513, 514
Purchase's case	i. 202
Purdock v. Mackinder	i. 15
Putt v. Rawsterne	ii. 16
Pye's case	i. 506
Pyke v. Crouch	i. 98, 329. ii. 11, 88
Pytt v. Griffiths	ii. 213

Q.

Queen's case	i. 340, 341, 344, 398, 435, 477
Quelch's case	ii. 108

R.

Radburne's case	ii. 75
Radford, *q. t.* v. Mackintosh	i. 352
Radnor, Earl of v. Reeve	ii. 40
Raggett v. Musgrove	i. 357
Raleigh, Sir W., trial of	i. 415
Ramsbottom's case	ii. 173
—— v. Brewer	i. 485
—— v. Buckhurst	ii. 151
—— v. Tunbridge	i. 424

	Page
Rambert v. Cohen	i. 369, 429
Randale v. Lynch	i. 485
Randall v. Gurney	ii. 373, 374
Randle v. Blackburn	i. 341, 344 345
Randolph v. Gordon	ii. 160, 252
Rands v. Thomas	i. 19, 41
Rann v. Hughes	ii. 363
Rastell v. Macquesta	i. 475
Ratcliffe's case	i. 164
—— v. Bleasby	ii. 194, 195
—— v. Chapman	i. 259
Rates's case	i. 405
Raven v. Dunning	i. 54, 55
Rawson v. Haigh	i. 197, 198, 199
—— v. Walker	ii. 357, 358
Ray v. Clerk	ii. 173
Rayner v. Hall	i. 369
Re Hick	ii. 148
Read v. Gamble	ii. 223
—— v. Passer	i. 235, 428. ii. 111
—— v. James	ii. 397
Reading v. Menham	ii. 345
Reason, trial of	i. 290
Reay v. Packwood	i. 131
—— v. Richardson	ii. 358
Reazon v. Ewbank	i. 58
Redford v. Birley	i. 201
Reed's case	i. 427. ii. 82
—— v. Battie	i. 424
—— v. Deene	i. 423
—— v. Hopper	ii 132
—— v. Jackson	i. 239, 242, 251, 254
—— v. James	i. 95
—— v. Prosser	i. 444
Rees's case	ii. 79
—— v. Abbot	i. 509
—— v. Bowen	ii. 139, 152
—— v. Lloyd	i. 458
—— v. Mansell	ii. 206
—— v. Walters	i. 125
Reeves v. Slater	i. 362
Regicides, trial of	i. 7
Reid v. Coleman	ii. 195, 199
—— v. Dickons	i. 485
—— v. Margison	ii. 133
Reilly's case	i. 21
Remmie v. Hall	i. 345
Rennie v. Robinson	i. 363
Rescous v. Williams	i. 150
Rest v. Hobson	i. 451
Reusse v. Myers	Page ii. 114
Rex *or* Reg. v. Abergwelly	i. 209, 215, 281. ii. 65
—— v. Addis	i. 36
—— v. Aickles	ii. 115
—— v. Alberton	i. 443
—— v. Allison	i. 444. ii. 112
—— v. Alsley	i. 9
—— v. All Saints, Southampton	i. 236, 452
—— —— Worcester	i. 72, 73
—— v. Antrobus	i. 239, 245. ii. 184
—— v. Appleby	i. 359. ii. 87
—— v. Arnold	i. 402. ii. 70
—— v. Atwood	i. 30, 35. ii. 220
—— v. Avery	i. 171
—— v. Aylett	ii. 181
—— v. Babb	ii. 186, 189, 190
—— v. Baldwin	ii. 22
—— v. Ball	i. 473. ii. 462
—— v. Ballty	ii. 404
—— v. Barker	ii. 176
—— v. Barnard	i. 34, 36
—— v. Barnes	i. 353. ii. 170
—— v. Barr	i. 454
—— v. Bartlet	i. 400, 406. ii. 79
—— v. Bathwick, Inhabitants of	ii. 173, 205
—— v. Beavan	i. 65
—— v. Bedell	i. 80, 215
—— v. Beezley	ii. 408
—— v. Bell	i. 427
—— v. Bellamy	i. 511. ii. 134, 142
—— v. Bellringer	ii. 346
—— v. Benson	i. 419. ii. 140
—— v. Bently	i. 427. ii. 48
—— v. Berenger	ii. 403
—— v. Bestland	i. 450
—— v. Bidder	i. 30
—— v. Bigg	i. 432
—— v. Bingham	ii. 151
—— v. Bird	i. 458
—— v. Bishop Auckland	i. 100
—— —— of Chester	ii. 40
—— v. Blackman	i. 66
—— v. Blaney	i. 65
—— v. Bliss	i. 247
—— v. Bodle	ii. 408
—— v. Bonner	i. 284, 286

	Page
Rex *or* Reg. v. Boston	i. 62, 63, 84, 121
—— v. Bowler	ii. 99
—— v. Bramley	i. 80, 214
—— v. Brampton	ii. 167
—— v. Bray	i. 63, 81, 121
—— v. Brazier	i. 6
—— v. Brewer	i. 164
—— v. Bridgeman, Dr.	ii. 187
—— v. Briggs	i. 471
—— v. Briscoe	ii. 88
—— v. Britton	i. 350
—— v. Bromley	i. 235
—— v. Bromwich	i. 352
—— v. Brooke	ii. 398
—— v. Broughton	i. 63
—— v. Browne	i. 455. ii. 137
—— v. Browuell	ii. 378, 379
—— v. Buckingham	ii. 183, 184
—— v. Budd	i. 449
—— v. Burbage	ii. 375
—— v. Burchenough	ii. 26
—— v. Burdett	i. 421, 436, 439
—— v. Bury	i. 215, 281
—— v. Buttery and M'Namara	ii. 34, 35
—— v. Cadogan, Earl of	ii. 188
—— v. Carlisle	ii. 2
—— v. Carpenter	i. 139, 337
—— v. Carr	i. 341
—— v. Cass	i. 402
—— v. Castle Morton, Inhabitants of	i. 423
—— v. Castell Carenion	i. 19
—— v. Castleton	ii. 215, 234, 235, 237
—— v. Catesby	i. 450
—— v. Cator	ii. 254
—— v. Catterall	ii. 46, 48
—— v. Chadderton	i. 215, 281
—— v. Chapman	ii. 403
—— v. Chappel	i. 427. ii. 155
—— v. Charnock	i. 32
—— v. Cheadle	ii. 354
—— v. Christie	i. 287
—— v. City of London	i. 375
—— v. Clapham	i. 234. ii. 111
—— v. Clarke	i. 192, 193, 204, 365, 468, 469, 502
—— v. Clear	ii. 189
—— v. Clewes	i. 344, 399, 400, 409, 411
—— v. Cliviger	i. 70, 72, 73
—— v. Cole	i. 66, 86, 149, 477
Rex *or* Reg. v. Colley	Page ii. 395
—— v. Coombs	i. 445, 446, 493
—— v. Commissioners of Land Tax	ii. 118, 178
—— v. Cooke	ii. 383
—— v. Cooper	i. 411
—— v. Cope	i. 199
—— v. Corden	i. 494
—— v. Cornelius	ii. 188
—— v. Corsham	ii. 48
—— v. Cotton	i. 266
—— v. Court	i. 401, 405, 406
—— v. Coveney	ii. 69, 70, 76, 180
—— v. Creswell	i. 433
—— v. Crockett	i. 286, 288, 291
—— v. Crossby	i. 17
—— v. Crossley	ii. 115
—— v. Crowther	i. 209. ii. 74
—— v. Dalby	i. 63
—— v. Davis	i. 18, 403
—— v. Dawbar	i. 36
—— v. Debenham	i. 278. ii. 117
—— v. De Berenger	ii. 106, 226
—— v. Deboragh	i. 338
—— v. Denis	ii. 234, 235
—— v. Despard	i. 32
—— v. Dixon	i. 171
—— v. Doherty	i. 79
—— v. Doran	i. 424, 425
—— v. Douglas	ii. 73
—— v. Dowling	i. 515
—— v. Drew	i. 406
—— v. Duins	ii. 115
—— v. Duncombe	ii. 400
—— v. Dunn	i. 408
—— v. Durham	i. 30, 35
—— v. Eardisland	ii. 23
—— v. Eden	i. 62
—— v. Edmunds	i. 400, 426. ii. 71, 75
—— v. Edwards	ii. 427
—— v. Eldershaw	i. 443
—— v. Eldridge	i. 401
—— v. Ellicombe	ii. 219
—— v. Ellis	i. 62, 406, 463
—— v. Enoch	i. 408
—— v. Eriswell	i. 209, 215, 229, 245. ii. 65, 70, 71, 74
—— v. Erith	i. 214
—— v. Fagent	i. 287
—— v. Fagg	i. 427
—— v. Falkner	i. 401

Rex *or* Reg. v. Farleigh ii. 230
—— v. Farr ii. 404, 462
—— v. Ferry Frystone i. 209, 215, 281. ii. 65
—— v. Fisher i. 351. ii. 80
—— v. Fitzgerald ii. 115
—— v. Fleming ii. 72
—— v. Fletcher i. 29, 68
—— v. Forbes ii. 74
—— v. Ford i. 17, 18, 21
—— v. Forsyth ii. 164
—— v. Foster i. 192, 205, 282, 427
—— v. Fox i. 153
—— v. Fraternity of Hostman in Newcastle ii. 186
—— v. Frederick and another i. 74
—— v. Fursey i. 434
—— v. Gardner ii. 108
—— v. Gay i. 291
—— v. Gibbons i. 164, 408
—— v. Gibson ii. 34, 35
—— v. Gilham i. 10
—— v. Gilson i. 424, 425
—— v. Gisburn i. 155
—— v. Glossop i. 515
—— v. Gordon, Lord George ii. 163, 417
—— v. Gouche i. 451
—— v. Gould i. 412
—— v. Grady ii. 180
—— v. Grant i. 18, 412
—— v. Gray i. 120
—— v. Great Farringdon ii. 185
—— v. Great Westowe ii. 184
—— v. Green i. 405, 407
—— v. Greenacre ii. 181
—— v. Greenwick i. 215
—— v. Greepe i. 21
—— v. Griffin i. 205, 412
—— v. Grimes ii. 10
—— v. Grimwood ii. 115
—— v. Groombridge i. 443
—— v. Grundon ii. 40
—— v. Gutteridge ii. 71
—— v. Gwyn ii. 166
—— v. Hadden ii. 402
—— v. Hagan ii. 71
—— v. Hains ii. 141, 142, 163, 171
—— v. Hall i. 426. ii. 80
—— v. Hallett ii. 157
—— v. Hammersmith i. 149
Rex *or* Reg. v. Hanson i. 446
—— v. Harbonne i. 446, 449
—— v. Hardwicke i. 204, 373, 375, 378, 408
—— v. Hardy ii. 411
—— v. Hargrave i. 33
—— v. Harringworth ii. 202, 203
—— v. Harris ii. 84, 408
—— v. Harvey i. 412
—— v. Haslingfield ii. 148
—— v. Hastings i. 36
—— v. Hatfield i. 453
—— v. Haughley ii. 173
—— v. Hawkins i. 445, 494
—— v. Haworth i. 404
—— v. Hay, Dr. i. 450
—— v. Hayman i. 142
—— v. Hayward i. 288
—— v. Head i. 458. ii. 166
—— v. Hearn i. 406. ii. 156
—— v. Hebden ii. 10
—— v. Helling i. 451
—— v. Hensey, Dr. ii. 249
—— v. Heydon ii. 188
—— v. Hickman ii. 80
—— v. Higgins i. 399
—— v. Higgins and others ii. 465
—— v. Hinckley i. 450
—— v. Hodge i. 412
—— v. Hodgkiss i. 470
—— v. Hodgson i. 469
—— v. Hogg ii. 71
—— v. Holland ii. 176
—— v. Hollister ii. 190
—— v. Holt ii. 107, 108
—— v. Holy Trinity i. 423
—— v. Hope i. 427. ii. 154, 155
—— v. Hopper ii. 2
—— v. Hough i. 473
—— v. Howard i. 433. ii. 152, 289
—— v. Howes i. 410. ii. 433
—— v. Hube i. 425
—— v. Hucks i. 291
—— v. Hughes ii. 115
—— v. Hulcot i. 451
—— v. Hunt i. 201, 429, 430, 476, 477, 501
—— v. Hutchinson i. 282
—— v. Jacobs i. 426
—— v. James i. 366. ii. 152
—— v. Jeffries ii. 129

Rex or Reg. v. Jenkins i. 413
—— v. Johnson i. 66, 138
—— v. Jolliffe i. 338, 442. ii. 88
—— v. Jones i. 30, 32, 35, 406, 412, 432. ii. 386
—— v. Kea i. 74, 215
—— v. Kenilworth ii. 48
—— v. Kerne i. 352
—— v. King ii. 164
—— v. Kingston i. 408
—— v. Kirdford i. 100, 142
—— v. Knaptoft ii. 46
—— v. Koops ii. 142
—— v. Lafone i. 68
—— v. Laindon i. 368. ii. 354, 369
—— v. Lambe i. 426
—— v. Lambert and Perry i. 479
—— v. Lancashire, Justices of ii. 23
—— v. Leake i. 454
—— v. Lee ii. 188
—— v. Leefe i. 511, 513
—— v. Liecester ii. 185
—— v. Lewis i. 402, 403, 404, 427. ii. 424, 425
—— v. Lingate i. 411
—— v. Lisle ii. 10
—— v. Llangunnor ii. 354
—— v. Lloyd i. 282, 454
—— v. Locker and others i. 74
—— v. London, Mayor and Commonalty of i. 46
—— v. Long i. 472, 474
—— v. Long Buckby i. 450
—— v. Lubbenham i. 371
—— v. Lucas ii. 182, 190
—— v. Luckup i. 66, 138, 513
—— v. Luffe i. 74, 80, 215, 443
—— v. Magill i. 407
—— v. Mallinson i. 494
—— v. Martin ii. 117
—— v. Marylebone ii. 185
—— v. Mattingley ii. 354
—— v. Mayor of St. Albans ii. 346
———— Stratford-upon-Avon ii. 346
———— Chester ii. 346
—— v. M'Carty i. 427
—— v. Mead i. 281, 282, 283. ii. 188
—— v. Mellor i. 34
Rex or Reg. v. Menetone i. 63
—— v. Merceron i. 350
—— v. Megson i. 284
—— v. Merchant Tailors' Company ii. 189
—— v. Middlezoy ii. 207
—— v. Midlam ii. 176
—— v. Millard i. 473
—— v. Mills i. 406
—— v. Montagu i. 455
—— v. Moore i. 37, 430, 472, 513. ii. 224, 225
—— v. Morgan ii. 256, 257, 259
—— v. Morphew ii. 88
—— v. Morris i. 450. ii. 140
—— v. Morse ii. 83
—— v. Morton ii. 234, 235
—— v. Mosley i. 286, 287
—— v. Mothersell ii. 122, 165
—— v. Mulvey ii. 83
—— v. Murlis ii. 397
—— v. Murphy ii. 396, 403
—— v. Murray i. 443
—— v. Muscot i. 149
—— v. Mutineers of the Bounty i. 68. ii. 41
—— v. Neale i. 33
—— v. Netherthong ii. 161
—— v. Netherseal ii. 34
—— v. Noakes i. 33
—— v. North Bedburn ii. 236
—— v. North Petherton i. 234. ii. 111
—— v. Northwingfield ii. 354
—— v. Nottingham i. 214. ii. 185
—— v. Nuneham Courtney i. 209, 215. ii. 65
—— v. Nunez i. 62
—— v. Nute i. 410
—— v. Nutt ii. 465
—— v. Nuttey i. 215
—— v. Oldbury ii. 48
—— v. Oldroyd ii. 78, 452, 457, 459, 460
—— v. Olney ii. 354
—— v. Osborne ii. 73
—— v. Osbourne ii. 346, 347
—— v. Owen i. 402, 443
—— v. Padstow i. 423
—— v. Page i. 425
—— v. Paget, Lord, and others ii. 465
—— v. Parratt i. 496

Rex or Reg. v. Partridge i. 406
—— v. Payne i. 513
—— v. Pearce i. 475. ii. 218
—— v. Pendleton i. 424
—— v. Perkins i. 289
—— v. Picton i. 343
—— v. Piddlehinton ii. 235
—— v. Piercy i. 65
—— v. Pike i. 289
—— v. Pikesley i. 402
—— v. Pippet i. 513
—— v. Pitcher ii. 419
—— v. Plumer i. 356, 436
—— v. Pountney i. 409
—— v. Pressly i. 427
—— v. Preston, Inhabitants of ii. 465
—— Lord i. 7
—— v. Prosser i. 81
—— v. Purefoy ii. 74
—— v. Radburne ii. 75
—— v. Ramsden ii. 412
—— v. Rawden, Inhabitants of i. 423. ii. 234
—— v. Reading i. 80, 215, 427, 443. ii. 428
—— v. Reason and Tranter i. 290, 427
—— v. Reebly ii. 167
—— v. Reed i. 282, 427
—— v. Remnant ii. 409
—— v. Rees ii. 79
—— v. Rhodes ii. 115
—— v. Richards i. 408, 427
—— v. Ring ii. 377
—— v. Ripon, Mayor of i. 160
—— v. Rislip ii. 47
—— v. Rivers i. 402, 426. ii. 80
—— v. Roberts i. 476
—— v. Rodham ii. 374
—— v. Rogers i. 445, 494
—— v. Rooke i. 74
—— v. Rookwood i. 27
—— v. Rosier i. 411
—— v. Row i. 402, 408
—— v. Rowland i. 29, 67
—— v. Rowley i. 339, 473
—— v. Rudge ii. 430
—— v. Ryton ii. 161
—— v. Saiter i. 199, 200
—— v. Sarratt ii. 46, 48
—— v. Savage ii. 71
—— v. Scaife i. 283
Rex or Reg. v. Scammonden i. 368. ii. 354, 369
—— v. Scorey ii. 70
—— v. Scott ii. 347
—— v. Sellers i. 291
—— v. Sergeant i. 71
—— v. Sexton i. 410
—— v. Shaftesbury, Earl of ii. 428
—— v. Shaw i. 405. ii. 3
—— v. Shearman and others i. 67
—— v. Shelley i. 432. ii. 182, 189
—— v. Shepherd i. 405, 406
—— v. Sheriff of Chester ii. 177
—— v. Simmonds ii. 408
—— v. Simons i. 372, 397. ii. 70
—— v. Slaney ii. 417
—— v. Slaughter i. 408
—— v. Smith i. 35, 75, 171, 209, 446, 474. ii. 22, 74, 75, 80, 135, 142. 178
—— v. Smith and Hornage i. 402
—— v. Smithies i. 355, 400
—— v. St. Devereux i. 428
—— v. St. George ii. 399
—— v. St. Martin's, Leicester ii. 411, 412, 413
—— v. St. Mary, Lambeth ii. 48
—— v. St. Mary's, Nottingham ii. 419
—— v. St. Mary Magdalen, Bermondsey i. 47
—— v. St. Marylebone ii. 183
—— v. St. Pancras ii. 23, 26
—— v. St. Peters i. 80
—— v. St. Sepulchre i. 215. ii. 234
—— v. Sparkes i. 164, 165
—— v. Spearpoint ii. 125
—— v. Spencer i. 408. ii. 140
—— v. Spilsbury and others i. 284, 293, 405. ii. 86
—— v. Staffordshire ii. 181, 185
—— v. Stallard i. 466
—— v. Stannard i. 470
—— v. Steptoe i. 399
—— v. Stimpson ii. 499, 419
—— v. Stoke Golding ii. 216, 232, 233
—— v. Ston i. 65, 181, 200, 496
—— v. Stourbridge ii. 229
—— v. Stratten and others ii. 435

Page
Rex *or* Reg. v. Surrey, Justices of ii. 190
—— v. Sutton i. 7. ii. 106, 107
—— v. Swallow i. 34, 35
—— v. Swatkins i. 355, 410
—— v. Tarrant i. 427. ii. 82
—— v. Taylor i. 11, 406, 408, 409, 427, 511
—— v. Teal i. 15, 19, 41
—— v. Teasdale i. 137
—— v. Telicote i. 427
—— v. Thomas i. 405, 406. ii. 77, 79, 82, 180
—— v. Thompson i. 402, 406
—— v. Thornton i. 406. ii. 72, 79
—— v. Thring ii. 142
—— v. Thruscross ii. 122, 165
—— v. Tilley i. 65
—— v. Tippet i. 401
—— v. Topham i. 352
—— v. Tower ii. 190
—— v. Townsend ii. 23
—— v. Travers i. 4
—— v. Tubby i. 404
—— v. Tucker i. 6
—— v. Turner i. 446, 496. ii. 22
—— v. Twyning i. 446
—— v. Tyler i. 408
—— v. Upper Boddington i. 163, 174
—— v. Upton Gray i. 451
—— v. Utterby ii. 128
—— v. Van Butchell i. 286, 291
—— v. Vandercomb and Abbott i. 471
—— v. Varlo ii. 346
—— v. Verelst i. 433
—— v. Vincent ii. 34
—— v. Vyse ii. 125
—— v. Wade i. 5
—— v. Walford ii. 180
—— v. Walker i. 193, 403
—— v. Walkley i. 406, 414
—— v. Walter i. 403, 427. ii. 87
—— v. Ward ii. 134, 142
—— v. Warden of the Fleet i. 21. ii. 6
—— v. Wareham i. 215
—— v. Washbrook ii. 41
—— v. Watkins i. 427
—— v. Watkinson i. 176

Page
Rex *or* Reg. v. Watson i. 181, 436, 471. ii. 125, 174, 226, 395. 403, 409
—— v. Webb i. 36, 404
—— v. Wells i. 37
—— v. Westbeer ii. 71
—— v. Whealey i. 402
—— v. Wheatland i. 404
—— v. Wheelock ii. 47
—— v. White i. 401
—— v. Whiting i. 62, 120, 470
—— v. Whitley, Lower i. 375
—— v. Wick, St. Lawrence ii. 47
—— v. Wickham ii. 354
—— v. Williams i. 5, 7, 64, 65, 136, 501
—— v. Wilkes i. 36
—— v. Wilkinson i. 414. ii. 87
—— v. Wilshaw ii. 71, 153, 155
—— v. Wilson i. 406
—— v. Wilts and Berks Canal Company ii. 189
—— v. Winkles ii. 195
—— v. Withers i. 173. ii. 109
—— v. Woburn, Inhabitants of i. 60, 375
—— v. Woodcock ii. 73
—— v. Woodley i. 173, 174
—— v. Worsenham ii. 188, 196
—— v. Wye ii. 48
—— v. Wyld ii. 395
—— v. Wylie i. 473
—— v. Yeoveley ii. 135, 142
—— v. Yewin ii. 399
—— v. York, Mayor of ii. 10
—— in aid of Reed v. Hopper ii. 247
Reyner v. Pearson i. 383
Rhodes v. Ainsworth i. 100
Ribbans v. Cricket i. 186
Rice v. Shute i. 509
Rich v. Jackson ii. 359
—— v. Topping i. 131
Richards v. Bassett i. 242, 268. ii. 122
Richardson v. Allan i. 131. ii. 448
———— v. Anderson ii. 146
———— v. Edmonds ii. 296
———— v. Mellish ii. 115
———— v. Watson ii. 277, 281, 283, 293, 297, 327, 335
Richey v. Ellis ii. 194
Ricketts v. Salwey i. 510

Page

Rickman's case i. 447, 476
Ridley v. Gyde i. 197, 198, 429
——— v. Taylor i. 130
Rigg v. Cargenven i. 353
Ripon v. Davies i. 177
Rivers v. Griffiths i. 501
Roach v. Garvan ii. 53, 55
Roberts v. Allatt ii. 420. 428
——— v. Barker ii. 340
——— v. Bradshaw ii. 226, 240
——— v. Doxen i. 434
——— v. Eddington ii. 125
——— v. Fortune ii. 39
——— v. Harris i. 94
——— and wife v. Herbert i. 499
——— v. Karr i. 454
——— v. Gresley, Lady i. 389
——— v. Malsten i. 467
Robertson v. French i. 453. ii. 114, 275
Robins v. Crutchley ii. 30
Robinson's case i. 378, 471, 475. ii. 9, 16
——— v. Nahon i. 362
——— v. Page ii. 365
——— Smyth ii. 392
——— v. Williamson i. 240, 254, 300, 308. ii. 104
——— v. Yarrow i. 361
Robson v. Alexander i. 350
——— v. Andrade i. 375
——— v. Kemp i. 169, 173, 175, 197, 199
——— v. Rolls i. 197
Roche's case ii. 54
——— v. Campbell i. 507
Rocher v. Busher i. 129
Rodguer v. Tadmire i. 468
Rodwell v. Redge i. 445
Roe v. Aylmer ii. 182, 189
—— d. Brune v. Rawlins i. 304
—— d. Bushell v. Gore i. 229
—— v. Davis i. 435
—— v. Harvey ii. 222
—— v. Ireland i. 455. ii. 104
—— v. Jeffery i. 260. ii. 122
—— v. Parker i. 238, 249. ii. 122
—— v. Rawlins i. 296, 309, 312, 318, 357
—— d. Pellat v. Ferrers i. 340, 344, 345
—— v. Robson i. 294
—— d. West v. Davis ii. 225

Page

Roe v. Wilkins i. 389
—— d. Wilkins v. Wilkins ii. 209
Rogers's case i. 420
——— v. Allen i. 242, 274, 276, 278, 510
——— v. Brooks i. 455
——— v. Custance ii. 218
——— v. Jones ii. 42
——— v. Pitcher i. 363
——— v. Wood i. 238, 254, 256
Rogerson v. Whittington i. 148
Rokeby Peerage i. 221
Rolf v. Dart ii. 133
Rookwood's case i. 21, 22. ii. 431, 432
Roos' Peerage i. 220
Rose v. Bakemore ii. 429
—— v. Bryant i. 330, 334
Roscoe, *ex parte* ii. 376
Roscommon Peerage case i. 222
Ross v. Hunter i. 493
Rothero v. Elton i. 106
Roulston v. Clarke i. 512
Rouse v. Redwood i. 348, 359
Rowcroft v. Bassett i. 299
Rowe v. Brenton i. 434, 452, 464. ii. 65, 96, 101, 109, 121, 149, 150, 465
—— v. Grenfel i. 452
—— v. Hasland i. 449
—— v. Howden ii. 194
Rowland v. Ashby ii. 84
Rowntree v. Jacob i. 368, 369. ii. 351
Rudd's case i. 27, 28, 120, 128, 136, 137
—— v. Wright i. 240, 314
Rudge v. Ferguson i. 95, 96
Ruding v. Newell i. 482
——— v. Smith ii. 167
Rugby Charity, Trustees of v. Merryweather i. 454
Rullock v. Dunn i. 380
Rumbold, case of i. 292
Rumney v. Beale i. 366
Rundle v. Beaumont ii. 116, 194
Rush v. Peacock ii. 218
—— v. Smith ii. 397, 398
Rushworth v. Craven ii. 115
——— v. Pembroke, Countess of ii. 11, 89
——— v. Wilson ii. 376
Russell v. Dickson ii. 151
——— Lord, case of i. 165, 200

Russell v. Rider i. 57. ii. 400
Ruston's case i. 4, 10
Rutland, Countess, case of ii. 326, 332, 350
Ryder v. Mallon i. 213, 221
Ryle v. Haggie i. 196

S.

Sacheverell Riots, The i. 201
——— v. Sacheverell i. 366
Sadler v. Robins ii. 62
St. George, Parish of v. St. Margaret i. 444, 495
— Katharine's Hospital, case of ii. 123
— Leger v. Adams ii. 34
— Paul's, Warden of v. Morris ii. 11
Sainsbury v. Matthews i. 522
Saloucci v. Woodmas ii. 52
Salte v. Thomas i. 313. ii. 115, 164
Salter v. Turner i. 343, 365. ii. 131, 139
Sampson v. Yardley i. 208
Samuel v. Evans ii. 127
Sanderson v. Jackson ii. 299
——— v. Laforest i. 197, 377
Sandford v. Raikes ii. 297, 298
——— v. Remington i. 163
Sands v. Ledger i. 511
Sandwell v. Sandwell ii. 414
Sangster v. Mazarredo i. 379
Sarum, Earl of v. Sir B. Spencer ii. 66
Saunders v. Pittman ii. 391
Say and Sele, Barony of i. 235
Sayer's case i. 31
—— v. Garnett i. 94, 95
—— v. Kitchen ii. 222
Schinotti v. Bumstead and others ii. 182
Scholey v. Goodman i. 76
——— v. Walsby i. 369
Schooling v. Lee i. 377
Scott v. Allgood ii. 16
—— v. Clare i. 347, 359
—— v. Jones ii. 223
—— v. Lewis ii. 141, 152
—— v. Lifford i. 157
Scott v. Marshall i. 388
—— v. Shearman ii. 37
Scrimpshire v. Scrimpshire ii. 54
Searle v. Barrington, Lord i. 330, 332, 333, 334
Seddon v. Tutop ii. 13, 14
Sedford v. Chambers i. 364
Sedgworth v. Overend i. 509
Selby v. Harris ii. 151
—— v. Ewer ii. 337
Sellen v. Norman i. 459
Sells v. Hoare i. 10, 12
Selwood v. Mildmay ii. 293, 294, 307, 324
Selwyn, in the goods of i. 450
Senior v. Armitage ii. 339
Sergeson v. Sealey ii. 98, 100
Settle Mill case i. 249, 252
Seven Bishops, trial of ii. 273
Severn v. Olive ii. 376
Sewell v. Corp ii. 125
——— v. Stubbs i. 346
Sexton's case i. 406, 411
Shaftesbury, Lord v. Lord Digby i. 7
Sharpe v. Scoging ii. 431
Shaw v. Picton i. 364
—— v. Broom i. 394
Shearwood v. Pearson i. 423, 424
Sheldon v. Whitaker i. 511
Shelton v. Livius ii. 360
Shelley v. Wright i. 367
Shelling v. Farmer ii. 184, 351
Shepherd's case i. 444
——— v. Chewther i. 369
——— v. Gosnold ii. 347
——— v. Shorthouse ii. 171
Sheridan, Dr., case of ii. 76
Sheriff v. Cadell i. 453
Sherman v. Barnes i. 107
Ship Bounty, case of ii. 41
Shipwith v. Shirley i. 311
Short v. Edwards i. 489
—— v. Lee i. 294, 298, 307, 309, 310, 315, 316, 432. ii. 104, 122
Shore v. Wilson ii. 276, 277, 278, 286
Shortreed v. Check ii. 299
Shott v. Streathfield and another i. 188
Shumack v. Lock i. 382
Shuttleworth v. Bravo i. 96
——— v. Stephens i. 132

Page

Sidaway v. Hay ii. 63
Sideways v. Dyson ii. 223
Sidney, Algernon, case of ii. 270
Sikes v. Marshall i. 335
Simons v. Smith i. 158
Simpson's case i. 408
——— v. Pickering i. 126. ii. 7
——— v. Smith ii. 397
Sims v. Kitchen ii. 219
Sinclair v. Fraser ii. 55
——— v. Sinclair ii. 53, 54
——— v. Stephenson ii. 217, 218, 411, 412
Singleton v. Barrett i. 429, 491
Sissons v. Dixon i. 445
Skaife v. Jackson i. 369
Skinner v. Lord Bellamont i. 241
——— v. Stocks i. 127
Skipwith v. Shirley ii. 241
Slack v. Buchanan i. 348, 349
Slade's case ii. 16
Slane Peerage i. 217, 220, 269
Slaney v. Wade i. 218, 223, 261, 270, 368
Slater v. Lawson i. 380
Slegg v. Phillips i. 91
Sloman v. Herne i. 376
Sloper v. Allen i. 510
Smallcombe v. Bruges i. 197, 377
Smalt v. Whitmill ii. 373
Smart v. Prujean ii. 298
——— v. Williams i. 307, 320
——— v. Wolff ii. 50
Smartle v. Williams i. 320, 335. ii. 244, 245
Smith's case i. 415, 419, 474. ii. 141, 155
——— v. Battey i. 333
——— v. Beadnall i. 350
——— v. Blackham i. 97
——— v. Blandy i. 344
——— v. Brandram i. 518
——— v. Buchanan ii. 63
——— v. Chester i. 364
——— v. Cramar i. 198, 199
——— v. Davies ii. 185
——— v. Doe d. Earl of Jersey ii. 294, 295, 296
——— v. Harris i. 127
——— v. Knowelden i. 522, 526
——— v. Lyon i. 375
——— v. Maxwell ii. 167
——— v. Mercer i. 364

Page

Smith v. Miller i. 359
——— v. Moon i. 355
——— v. Nicolls ii. 55, 62
——— v. Prager i. 84, 121
——— v. Rummens i. 62. ii. 23
——— v. Sainsbury ii. 249, 260
——— v. Smith i. 391. ii. 151
——— v. Taylor i. 352, 353, 365
——— v. Veale ii. 66
——— v. Whittingham i. 297, 390
——— v. Wilson ii. 277, 282, 338, 340, 343
——— v. Winter ii. 193
——— v. Young i. 341, 345, 377, 429. ii. 219
Snow v. Phillips i. 372. ii. 27
Snowball v. Goodricke i. 387
Solita v. Yarrow ii. 256
Solomon v. Turner i. 362
Somerset, Duke, case of i. 462, 463
——— v. France i. 252, 462, 463, 464
Spargo v. Brown i. 206, 294, 297, 372, 375
Sparke v. Middleton i. 163
Spence v. Stuart ii. 374
Spenceley v. De Willot i. 461. ii. 398
——— v. Schullenberg i. 175
Spencer's case ii. 140
——— v. Billing i. 433
——— v. Golding i. 146
Spicer v. Burgess i. 160
Spieres v. Parker i. 496
Spragge's case ii. 224
Sprain v. Drax i. 341
Spring v. Eve ii. 129
Spybey v. Hide i. 501
Squier v. Hunt i. 507, 508
Stafford's case ii. 76
——— v. Clark ii. 143
——— Peerage case i. 217, 231
——— d. Marquis of v. Coyney i. 454
Stainer v. Droitwich, Burgesses of ii. 123
Stammers v. Dixon ii. 348
Standage v. Creighton i. 389
Standen v. Standen i. 233. ii. 296, 306
Stanley, Sir T. v. White i. 310, 356, 465

	Page
Stanwix, General case	i. 450
Stapylton v. Stapylton	i. 213, 215
Stead v. Heaton	i. 295, 299, 312
Stearn v. Mills	i. 369
Steel v. Prickett	i. 238, 239, 260, 356, 453
Steinkeller v. Newton	ii. 92, 93
Stephen v. Gwenap	i. 336
Stephens v. Crichton	ii. 386
Stevens v. Berwick on Tweed	ii. 184
——— v. Moss	i. 213, 215, 262
——— v. Pinney	i. 423, 424
——— v. Thacker	i. 387
Stewart v. Barnes	i. 118, 148
Still v. Halford	ii. 148, 151
—— v. Hoste	ii. 323
Stobart v. Dryden	i. 210, 279. ii. 446
Stock v. Booth	i. 455
Stockfleth v. De Tastet	i. 349, 350
Stoddart v. Palmer	i. 505, 513
Stonard v. Dunkin	i. 364
Stone's case	i. 200
—— v. Ball	ii. 356
—— v. Blackburn	i. 154. ii. 393
—— v. Forsyth	ii. 170
—— v. Lennox, Lord G.	i. 164
Stork v. Denew	ii. 65
Storer v. Hunter	i. 460
Storr v. Scott	i. 359
Stoveld v. Brewin	i. 484
Stranger v. Searle	ii. 249, 254, 255, 259
Stratford's case	ii. 41
Stratton v. Rastall	i. 368, 369
Street v. Brown	ii. 196
Strickland v. Ward	ii. 42
Strode v. Russell	ii. 289
——— v. Winchester	i. 302, 310
Strong v. Dickenson	ii. 374
——— v. Rule	i. 507
Strother v. Barr	i. 423
——— v. Willan	ii. 114, 125
Strowd v. Willis	i. 363
Strutt v. Bovingdon	i. 337. ii. 88
Stuart v. Greehall	i. 120
——— v. Lovell	i. 467, 475
Stubbs v. Sargon	ii. 298
Studdy v. Sanders	i. 176, 366
Stump v. Ayliffe	ii. 102
Suffold Witches, trial of	i. 397
Summers v. Moseley	ii. 397
Summerset v. Adamson	i. 359
Sussex, Earl of v. Temple	i. 365, 392, 393
Suster v. Cowell	ii. 192
Sutten v. Bishop	i. 19, 137
Sutton v. Buck	i. 453
——— Coldfield, Corporation of v. Wilson	i. 46
Swallow v. Beaumont	i. 511
Swan and Jeffereys, case of	i. 501
Swift v. Swift	ii. 417
Swinden's case	i. 79
Swinnerton v. Stafford, Marquis of	ii. 158, 163
Swire v. Bell	ii. 211
Sybray v. White	i. 387
Sydenham v. Rand	ii. 373
Syllivan v. Stradling	i. 363
Sykes v. Dunbar	i. 182

T.

Talbot v. Hodson	i. 451. ii. 214
——— v. Lewis	i. 257
——— v. Villeboys	ii. 185
Tanner v. Taylor	ii. 412
Taplin v. Atty	ii. 217
Tarleton v. Tarleton	ii. 55, 62
Tarrant's case	i. 427. ii. 82
Tatershall's case	i. 473
Taverner's case	i. 474
Taylor v. Blacklow	i. 173
——— v. Briggs	ii. 337
——— v. Cole	i. 219, 372
——— v. Croker	i. 364
——— v. Duplock	i. 450
——— v. Foster	i. 163
——— v. Fox	i. 300
——— v. Hooman	i. 515
——— v. Jones	ii. 244
——— v. Kinloch	i. 376, 377
——— v. Royal Exchange Assurance Company	ii. 386
——— v. Williams	i. 186, 389. ii. 466
——— *ex parte*	ii. 112
Teed v. Elworthy	i. 509
Teed v. Martin	ii. 114, 241
Telicote's case	ii. 82

Page
Tellard v. Shebbeare i. 245
Tempany v. Bernard i. 511, 512
Temperley v. Scott i. 343. ii. 64
Terry v. Huntington ii. 39, 42
Tewkesbury, Bailiff, &c., of v. Bricknell i. 510. ii. 346
Thanet, Earl of v. Foster ii. 98, 99
——— v. Paterson ii. 138, 139
Thatcher's case ii. 70
Thelluson v. Cosling ii. 108
Thomas's case ii. 77, 79, 82
——— v. Ansley i. 425
——— v. Connell i. 197, 199
——— v. David ii. 395, 398, 399, 426
——— v. Foyle i. 453. ii. 114
——— v. Jenkins i. 243
——— d. Jones v. Thomas i. 355
——— v. London, Sheriffs of ii. 138
——— v. Newton ii. 418
——— v. Thomas ii. 290, 324, 326
Thompson's case i. 406
——— v. Austen i. 340, 345, 349
——— v. Blackhurst ii. 43, 44
——— v. Bridges i. 377
——— v. Davenport i. 359
——— v. Donaldson ii. 33
——— *et Uxor* v. Trevanion i. 192
Thorne v. Rolffe i. 449
Thornton's case i. 406. ii 72, 79
——— v. Jones i. 508
——— v. Lyster i. 514
Thorpe v. Gisburne ii. 250
Threlfall v. Webster ii. 192
Throgmorton, Sir N., trial of i. 415
——— Sir R., trial of i. 208
——— v. Walton i. 449
Thurle v. Madison ii. 244
Thurston v. Slatford ii. 465
Thwaites v. Richardson i. 379
Tickle v. Brown i. 392
Tilley's case ii. 65
Tillotson, *ex parte* ii. 374
Tindal v. Whitrow i. 392
Tinkler's case i. 281, 282, 283, 286
Tinkler v. Walpole ii. 114
Tinney v. Tinney ii. 350
Title v. Grevet i. 41 ii. 417
Todd v. Winchelsea i. 337
Tomkins v. Ashby ii. 28
——— v. Attorney-Gen. ii. 115
Tong's case i. 415
Tongue's case i. 27, 31, 32
Tooker v. Beaufort, Duke of ii. 100, 131
Toosey v. Williams i. 452. ii. 239
Topham v. Braddick i. 459
Torrington, Lord, case of i. 323, 228
Tothill v. Hooper i. 100
Tovey v. Lindsay ii. 54
Towle's case i. 502
Townley's case i. 514
Townend v. Downing i. 92, 113
Townsend, Marquis of, v. Norwich, Bishop of i. 457
——— v. Campernown i. 457
Trantor, trial of i. 290
Travis v. Chaloner i. 252, 393. ii. 10, 16
——— v. Collins ii. 196, 199, 201
——— v. Oxter ii. 104
Tremain v. Faith ii. 376
Treviban v. Lawrence ii. 19, 21
Trelawney v. Coleman i. 77, 189, 190
——— v. Thomas i. 92, 128
Trial of the Regicides i. 7
Trials at York i. 34, 35, 38
Trist v. Johnson ii. 219
Trotter v. Blake ii. 27
——— v. Harris i. 453
Trowell v. Castle i. 451. ii. 138
Trowter's case i. 291
Truslove v. Burton i. 389
Trustees of British Museum v. Furnis i. 454. ii. 116
Tuck v. Tuck ii. 15
Tucker v. Barrow i. 350
——— v. Cracklin i. 507
——— v. Wilkins ii. 119, 123, 169
Tullock v. Dunn i. 374
Turner's case i. 400, 413, 414. ii. 26
——— v. Crisp i. 330, 333, 384,
——— v. Gethin ii. 184
——— v. Pearce i. 154

Page

Turner v. Pearte ii. 393
——— v. Railton i. 177, 348
——— v. Turner i. 445
Turquand v. Knight i. 168, 170, 174
Turton v. Benson i. 348
Twemlow v. Oswin i. 450
Twiselton's claim i. 235
Tyrwhitt v. Wynne i. 465

U.

Uhde v. Waters ii. 356
Underhill v. Durham ii. 101, 103, 149
——— v. Witts i. 425
Upton v. Curtis i. 101

V.

Vacher v. Cocks i. 185, 197. ii. 209
Vaillant v. Dodemead i. 163, 164, 165
Valentia, Lord, case of i. 213
Vallance v. Dewar ii. 337
Vandercomb's case ii. 26
——— and Abbot, case of ii. 175
Vane, Lord, case of i. 79
—— Sir H., case of ii. 465
Van Nyvel v. Hunter ii. 151
Van Omeron v. Dowick ii. 164
Vant Wort v. Woley i. 386
Vaughan's case i. 471
——— v. Barnes i. 483
——— v. Fitzgerald ii. 66
——— v. Martin ii. 416
Venafra v. Johnson ii. 85
Venning v. Shuttleworth i. 133
Vernon's case ii. 353
Vicary's case i. 366, 378
Vice v. Anson, Lady ii. 220
Villers v. Beaumont ii. 353
Ville de Varsovie (case of) i. 14, 18
Vincent v. Cole i. 422, 424
——— v. Prater i. 187

Page

Viney v. Barrs i. 461
Vooght v. Winch i. 455. ii. 18, 20, 21
Vowke's case i. 472, 475
Vowles v. Miller i. 454
——— v. Young i. 230, 231

W.

Waddington v. Cousins ii. 257
Wade v. Beasley i. 488
—— v. Broughton ii. 273
Wadley v. Bayliss ii. 348
Wadsworth v. Hamshaw i. 168
Wagstaff v. Wilson i. 389
Wain v. Warlters ii. 359
Waithman v. Weaver i. 467
Wake v. Locke i. 107, 117
Wakefield's case i. 79. ii. 373
Wakeman v. West i. 275, 276
Walden Peerage i. 220
Waldridge v. Kennison i. 348, 349
Waldron v. Combe ii. 63, 125
——— v. Ward i. 163
Walker and others, case of i. 478
——— v. Beauchamp i. 265, 266. ii. 166. 167
——— v. Broadstock i. 302, 303, 392
——— v. Burnell i. 353
——— v. Holman i. 308
——— v. Kearney i. 17, 19
——— v. Wildman i. 168
——— v. Wingfield i. 229. ii. 112
——— v. Witter ii. 43, 55
Wallace v. Cook ii. 115
——— v. Small i. 348
Waller v. Horsfall ii. 240
Wallis's case i. 502
——— v. Delancey ii. 210
Walpole v. Cholmondeley ii. 290
Walter's case i. 447. ii. 87
——— v. Gunner i. 455
Walters v. Pfiel ii. 170
Walton v. Green i. 195
——— v. Shelley i. 39, 81
Wandless v. Cawthorne i. 155
Ward's case ii. 141
—— v. Ellayn ii. 44
——— v. Haydon i. 51, 52, 68

Page

Ward v. Man i. 67
——— v. Pearson i. 525
——— v. Wells ii. 94, 210
——— v. Wilkinson i. 109, 112, 126. ii. 6
Wardell v. Fermore ii. 212, 213
Wardle's case i. 506
Wargent v. Hollings ii. 236
Warren v. Greenville i. 299, 311, 315
——— Hastings, trial of ii. 451
——— v. Stagg ii. 362
——— v. Warren i. 452
Warrender v. Warrender ii. 54
Warriner v. Giles ii. 181
Warwick, Lord, case of i. 21
Warwickshall's case i. 397, 412
Waterman v. Soper i. 454
Watkins v. Morgan i. 527
——— v. Towers i. 485
Watson's case i. 31, 178, 199, 201, 203, 358, 429, 430, 447. 459. ii. 427, 429, 431
——— v. Bevern ii. 418
——— v. Clark i. 442
——— v. King i. 449, 450. ii. 116
——— v. Threlkeld i. 362
——— v. Wace i. 360
Watts v. Lawson i. 348
——— v. Thorpe i. 376
Waugh v. Russell i. 511
Wayman v. Hilliard i. 348
Weall v. King i. 507
Weaver v. Prentice ii. 125
Webb v. Fox i. 453
—— v. Plummer ii. 340
—— v. Potts i. 241
—— v. Smith i. 378, 388
Wedgwood v. Hartley i. 118
Wedrington, Dr., case of ii. 40
Weeks v. Maillardet i. 511
——— v. Sparke i. 229, 239, 240, 241, 242, 248, 254, 255, 257, 259
Welborne's case i. 287, 288, 291
Weld v. Hornby ii. 347
Weller v. Governsrs of Foundling Hospital i. 48
Wells v. Fisher i. 70
—— v. Jesus College i. 241, 246
—— v. Maccarmick ii. 41
Welsh's case ii. 67
——— v. Nash ii. 42

Page

Welsh v. Richards ii. 178
——— v. Seabone i. 459
West, Dr., case of i. 28. ii. 186, 187, 419, 423
Westlake v. Collard i. 348
Weston v. Emes ii. 356
——— v. Vaughton ii. 104
Wharam v. Routledge ii. 222
Whateley v. Menheim ii. 6
Whatley v. Fearnley i. 88
Wheater's case i. 350
Wheatley v. Williams i. 176
Wheeler v Atkins i. 342. ii. 65
——— v. Lowth ii. 138
Wheeling's case i. 401
Whiley's case i. 472
Whitaker v. Bank of England i. 185
Whitamore v. Waterhouse i. 103, 108
Whitmore v. Wilks i. 47
Whitbourne v. Pettifer ii. 195
Whitcomb v. Whiting i. 380
White's case i. 410
——— v. Cuyler i. 77, 78
——— v. Driver i. 449
——— v. Lisle i. 240, 241, 242, 259, 300
——— v. Wilson i. 449, 507. ii. 359
Whitehead v. Scott i. 185, 188 424. ii. 223
——— v. Tattersall i. 387. ii. 41
Whitehouse's case i. 79
——— v. Atkinson i. 104
Whitelocke v. Baker i. 228, 229, 264, 265
——— v. Musgrove ii. 215
Whitford v. Tuting ii. 218
Whitnash v. George i. 297, 390
Whitter v. Cazalet ii. 199
Whittingham v. Bloxham ii. 410
Whittuck v. Waters i. 215, 222. ii. 112
Whitwell v. Bennet i. 507
——— v. Scheer i. 525, 526
Wickes v. Clutterbuck ii. 42
Wigglesworth v. Dallison ii. 338
Wightwick v. Banks ii. 131
Wigley v. Jones ii. 177
Wild's case i. 405
Wildman v. Glossop i. 507

	Page
Wilkins v. Ford	i. 95
——— v. Wingate	i. 363
Wilkinson's case	ii. 87
——— v. Lutwidge	i. 364
——— v. Payne	i. 444
Willaume v. Gorges	i. 459
Williams v. Bartholemew	i. 363
——— v. Bridges	i. 376
——— v. East India Company	i. 420, 445, 446, 494
——— v. Goodchild	i. 242
——— v. Innes	i. 384
——— v. Johnson	i. 74
——— v. Jones	ii. 358
——— v. Lord Bagot	ii. 44
——— v. Mundie	i. 166, 168
——— v. Munnings	ii. 228
——— v. Stevens	i. 96
——— v. Taylor	i. 337
——— v. Williams	i. 93, 440. ii. 65
——— v. Younghusband	ii. 235
Williamson v. Allison	i. 505
——— v. Thompson	i. 240
Willingham v. Matthews	ii. 374
Willis's case	i. 415, 416
—— v. Bernard	i. 185, 190, 313
—— v. Peckham	ii. 376
Wills v. Fletcher	i. 70
Wilson v. Bowie	i. 424
—— *q. t.* v. Gilbert	i. 515
—— v. Hart	ii. 363
——— v. Hirst	i. 157, 159
——— v. Hodges	i. 449
——— v. Mitchell	i. 360
——— v. Rastall	i. 163, 164, 166, 167
——— v. Rogers	ii. 177
——— v. Turner	i. 389
Wilton v. Webster	i. 190
Wiltshire v. Sidford	i. 454
Wiltzie v. Adamson	i. 357
Winch v. Winchester	ii. 360
Winkworth's case	i. 472, 475
Winsmore v. Greenbanck	i. 76, 77
Winter v. Wroot	i. 189, 190
Wishaw v. Barnes	i. 125
Withen v. Law	i. 234. ii. 111
Withnell v. Gartham	i. 244. ii. 348
Wood v. Braddock	i. 379
—— v. Drury	ii. 210
—— v. Mackinson	ii. 398
Wood v. Strickland	ii. 223
—— v. Veal	i. 454
Woodbridge v. Spooner	ii. 357
Woodcock's case	i. 80, 279, 284, 285, 286, 289, 290, 291. ii. 73
Woodcraft v. Kinaston	ii. 130
Woodford v. Ashley	i. 511
Woodley v. Brown	ii. 125
Woodnorth v. Lord Cobham	i. 274, 309
Woodward v. Cotton	ii. 129
——— v. Larking	i. 367
Woodyer v. Haddon	i. 454
Woolett v. Roberts	i. 371. ii. 27
Wooley v. Brownhill	i. 241, 300. ii. 242
——— v. Roe	i. 336
Woolmer v. Devereux	ii. 194
Woolway v. Rowe	i. 248, 395, 396
Worrall v. Jones	i. 45, 49, 60
Worsley v. Filisker	ii. 468
Wright's case	i. 406
——— v. Beckett	ii. 448, 451, 452, 453, 461
——— v. Court	i. 204
——— v. Goddard	i. 483
——— v. Netherwood	i. 450
——— v. Paulin	i. 57
——— v. Pindar	ii. 467
——— v. Rudd	i. 241
——— v. Sharpe	ii. 467
——— v. Doe d. Tatham	i. 186, 338, 419, 421. ii. 8. 65, 90
——— on the demise of Clymer v. Littler	i. 280, 281
Wrottesley v. Bendert	i. 378
Wyatt v. Bateman	ii. 213
——— v. Gore	i. 181
——— v. Hertford, Marquis of	i. 369
——— v. Wilkinson	i. 94
Wych v. Meale	i. 378
Wyndham v. Chetwynd	i. 150
Wynne v. Anderson	i. 57
——— v. Tyrwhit	i. 298, 317. ii. 204

Y.

Yabsley v. Doble	i. 387
Yates v. Harris	i. 275
—— v. Leigh	i. 317

	Page
Yeates v. Pim	ii. 345
Yeatmair, *ex parte*	i. 168
Yeomans v. Legh	i. 107, 108
York v. Blott	i. 130
—— trials at	i. 34, 35, 38
Young v. Bairner	i. 91, 159
—— *ex parte*	i. 54
—— v. Lynch	ii. 186
Young v. Smith	i. 374, 376
—— v. Wright	i. 389, 504

Z.

Zouch Peerage case	i. 217, 220, 272. ii. 118

CASE OMITTED.

Mendham v. Thompson - - - i. 301

INDEX

TO

STATUTES CITED.

	Page
4 Edw. 1,	ii. 101, 121
29 Edw. 1,	ii. 97
14 Edw. 3, st. 1, c. 13,	ii. 97
9 Hen. 5, st. 1, c. 1,	i. 515
8 Hen. 6, c. 9,	i. 65
18 Hen. 6, c. 46,	ii. 97
1 Hen. 8, c. 8,	ii. 97
21 Hen. 8, c. 11,	i. 135
26 Hen. 8, c. 3,	ii. 102
27 Hen. 8, c. 16,	ii. 132, 244
——— c. 27,	ii. 119
32 Hen. 8, c. 46,	ii. 97
33 Hen. 8, c. 22,	ii. 97
1 Edw. 6, c. 12, s. 13,	i. 25
3 & 4 Edw. 6, c. 4,	ii. 246
1 & 2 Phil. & M. c. 13,	i. 403. ii. 67, 68, 81
2 & 3 Phil. & M. c. 10,	i. 403. ii. 67, 68, 81
5 Eliz. c. 9,	i. 66, ii. 370, 377
13 Eliz. c. 6,	ii. 246
18 Eliz. c. 7, s. 3,	i. 24
21 Jac. 1, c. 19, s. 5 & 6,	i. 80
——— c. 25,	i. 65
——— c. 27,	i. 441
12 Car. 2, c. 24,	ii. 87, 97
13 Car. 2, c. 1,	i. 12
16 Car. 2, st. 1, c. 12,	ii. 417
29 Car. 2, c. 3,	ii. 359, 362
1 Wm. & M. c. 18, s. 13,	i. 12
3 Wm. & M. c. 11, s. 12,	i. 139
6 & 7 Wm. 3, c. 6,	ii. 110
7 Wm. 3, c. 3,	i. 415, 471. ii. 378
7 & 8 Wm. 3, c. 3, s. 2,	i. 8
——— c. 34,	i. 12
10 & 11 Wm. 3, c. 23, s. 5,	i. 137
1 Ann. s. 1, c. 18,	i. 139
——— s. 2, c. 9, s. 8.	ii. 378
5 Ann. c. 31, s. 4,	i. 137
7 Ann. c. 21,	ii. 395
9 Ann. c. 14, s. 5,	i. 18, 66, 138
10 Ann. c. 18, s. 3,	ii. 245, 246, 247
4 Geo. 1, c. 11,	i. 30
8 Geo. 1, c. 6,	i. 13
9 Geo. 1, c. 7,	ii. 354
11 Geo. 1, c. 30, s. 32,	i. 433
2 Geo. 2, c. 24,	i. 40, 137
——— c. 36, s. 8,	ii. 226
5 Geo. 2, c. 30,	ii. 88, 374
8 Geo. 2, c. 6, s. 22,	ii. 246
——— c. 16, s. 15,	i. 139
17 Geo. 2, c. 38, s. 14,	ii. 116
19 Geo. 2, c. 37, s. 6,	ii. 197
22 Geo. 2, c. 13, s. 1,	i. 66, 138
——— c. 46, s. 36,	i. 13
26 Geo. 2, c. 33,	ii. 110
27 Geo. 2, c. 3,	ii. 379
2 Geo. 3, c. 22,	ii. 116
13 Geo. 3, c. 63,	ii. 88, 386, 387
——— c. 78,	i. 149
15 Geo. 3, c. 39,	ii. 384
18 Geo. 3, c. 19,	ii. 379, 380
21 Geo. 3, c. 37, s. 1,	i. 137
22 Geo. 3, c. 58,	i. 29

Page

26 Geo. 3, c. 77, s. 13, i. 433
27 Geo. 3, c, 29, i. 139
29 Geo. 3, c. 26, s. 4, i. 494
31 Geo. 3, c. 35, i. 17, 25
——— c. 39, s. 6, ii. 226
32 Geo. 3, c. 58, s. 4, ii. 185
39 & 40 Geo. 3, c. 93, i. 416
41 Geo. 3, c. 100, ii. 384
42 Geo. 3, c. 46, ii. 116, 117
——— c. 85, ii. 88, 386
——— c. 107, s. 1, i. 494
43 Geo. 3, c. 58, i. 502
——— c. 92, ii. 378
——— c. 140, ii. 375
44 Geo. 3, c. 106, ii. 375
45 Geo. 3, c. 92, ii. 382
——— c. 126, ii. 417
46 Geo. 3, c. 37, ii. 417, 420, 421
47 Geo. 3, c. 1, ii. 88
——— c. 68, ii. 125
48 Geo. 3, c. 149, ii. 164
49 Geo. 3, c. 121, s. 8, i. 54, 55
——— s. 10, ii. 88
——— s. 14, i. 361
52 Geo. 3, c. 146, ii. 110, 113, 166
53 Geo. 3, c. 141, s. 5, ii. 197
54 Geo. 3, c. 15, ii. 386
——— c. 170, s. 9, i. 60, 100, 141, 375
55 Geo. 3, c. 91, ii. 383
——— c. 108, ii. 384
58 Geo. 3, c. 127, i. 13
——— c. 70, ii. 380
59 Geo. 3, c. 12, ii. 94

1 Geo. 4, c. 101, ii. 386
1 & 2 Geo. 4, c. 21, ii. 417
——— c. 87, ii. 125
3 Geo. 4, c. 126, s. 137 i. 140
4 Geo. 4, c. 76, ii. 113
——— c. 95, s. 84, i. 140
6 Geo. 4, c. 16, i. 54, 80, 94, 353. ii. 88, 93, 374, 384
——— c. 108, s. 5, i. 144
——— c. 110, s. 43, ii. 167
7 Geo. 4, c. 57, ii. 131, 142
——— c. 64, i. 403, 426, 515, 517. ii. 67, 68, 69, 73, 78, 81, 152, 381
——— ss. 22, 23, i. 61
7 & 8 Geo. 4, c. 18, s. 11, ii. 135

Page

7 & 8 Geo. 4, c. 28, s. 6, i. 25
——— s. 13, i. 22
——— c. 29, s. 2, i. 17, 25, 350
——— ss. 54, 58, i. 30
——— s. 57, i. 135
——— s. 61, i. 140
——— c. 30, s. 29, i. 140
——— c. 31, s. 5, i. 139
——— c. 64, s. 20, i. 515
9 Geo. 4, c. 14, i. 380
——— c. 15, i. 516
——— c. 31, s. 22, ii. 35
——— c. 32, i. 13, 23, 24, 25, 64

1 Wm. 4, c. 22, ii. 88, 387
1 & 2 Wm. 4, c. 56, ii. 142
2 & 3 Wm. 4, c. 71, i. 454
——— c. 114, s. 3, ii. 132, 142
——— s. 7, ii. 93
3 & 4 Wm. 4, c. 42, i. 459, 483, 486, 518, 519, 520, 521
——— ss. 26, 27, i. 44, 82, 85, 102, 104, 105, 107, 114, 116, 117, 145, 147, 151. ii. 385
——— c. 49, i. 13
——— c. 82, i. 13
5 & 6 Wm. 4, c. 50, s. 100, i. 140
——— c. 76, ii. 183, 185
——— c. 82, ii. 133
6 Wm. 4, c. 76, s. 55, i. 137
6 & 7 Wm. 4, c. 86, ii. 110, 113, 183
——— c. 89, ii. 382
——— c. 114, i. 470. ii. 69, 178, 179
——— c. 111, ii. 136
7 Wm. 4, & 1 Vict. c. 83, ii. 183

1 Vict. c. 23, i. 18
——— c. 26, s. 15, i. 150, 156
——— c. 44, ii. 382
——— c. 68, ii. 382
1 & 2 Vict. c. 77, i. 13
3 & 4 Vict. c. 26, i. 100, 144
——— c. 92, ii. 113
4 Vict. c. 22, i. 25

A

TREATISE

ON

THE LAW OF EVIDENCE.

VOLUME THE FIRST.

WITH a view to assist the proceedings of Courts of Justice in the investigation of facts submitted for their decision, general rules have been laid down respecting the admissibility and effect of evidence, and the order in which the several proofs are to be adduced. These rules constitute the Law of Evidence, and are the subject of the following Treatise. In inquiries upon this subject, the great end and object ought always to be the ascertaining of the most convenient and surest means for the attainment of truth. The end sought is truth; the rules laid down are the means used for the attainment of that end.

The evidence adduced before juries upon controverted questions of fact, is of two kinds, Parol evidence, consisting of the *viva voce* examination of witnesses; and Written evidence. In treating of these kinds of evidence, the following work will be divided into three parts. In the first part, it is proposed to consider the subject of proof by witnesses, and the principal rules relative to evidence in general; in the second part, to consider the subject of written evidence; and in the third part, it is proposed to consider certain branches of the law of evidence, chiefly of a practical nature—such as the means of enforcing the attendance of witnesses, the mode of examining witnesses, bills of exceptions, and demurrers to evidence.

PART THE FIRST.

CHAPTER I.

OF THE SEVERAL CAUSES OF INCOMPETENCY; AND OF INCOMPETENCY FROM DEFECT OF UNDERSTANDING.

THE parties to a suit are not permitted to adduce every description of evidence which, according to their own notions, may be supposed to elucidate the matter in dispute; if such a latitude were permitted, evidence might be often brought forward, which would lead rather to error than to truth, the attention of the jury might be diverted by the introduction of irrelevant or immaterial evidence, and the investigation extended to a most inconvenient length. In order to guard against these evils, the law has laid down certain rules for limiting and regulating the admissibility of evidence.

It is the province of the judge presiding at the trial, to decide all questions on the admissibility of evidence; it will be for the judge also to decide any preliminary question of fact, however intricate, the solution of which may be necessary for enabling him to determine the other question of admissibility. Upon this subject, it has been said by Mr. J. Buller, (1) that whether there is any evidence is a question for the judge, but whether the evidence is sufficient is a question for the jury.

The law excludes some descriptions of evidence as wholly improper to be submitted to the jury, and rejects the testimony of certain persons, who are on this account termed incompetent witnesses. The rules respecting the competency of witnesses are chiefly founded on the consideration, that, in the generality of instances, the testimony of those witnesses, whom the law deems

(1) Carpenter's Company *v.* Hayward, Doug. 375. B. N. P. 297.

incompetent, would mislead juries; and it is obvious that the propriety of the exclusion in each particular case must be judged of, according to the constitution of the tribunal to which the evidence is submitted, and with reference to the mode of proceeding before it. For this purpose, it is necessary to refer to the difference which exists between judicial investigations and the ordinary transactions of life, more especially with regard to the space of time allowed for decision, the temptations to deceive, the facilities of deception, and the consequences of deciding incorrectly. It is true the legal tests of incompetency may, in some instances, affect very slightly, if at all, the credit of a person as a witness, while yet there may be other grounds of objection which, though not amounting to legal disqualification, would cast the strongest suspicion upon his testimony. But it is to be remembered, the rules adopted for the exclusion of witnesses do not profess to be infallible tests of credibility; and further, that the propriety of the rules of evidence must be judged of by their general tendency and their general practical result.

Several causes of incompetency.

The cases, in which a witness is deemed incompetent to give any evidence at all, are fourfold: *viz.* 1st, When the witness labours under a defect of understanding. 2d, Where he refuses to take an oath, or from defect of religious principle does not acknowledge its sanction. 3rd, Where his character is infamous in consequence of a conviction of some crime. And 4thly, Where he is interested in the matter in issue. Every person, not affected by any of these objections, will be competent to give evidence. "I find no rule less comprehensive than this," said Mr. Justice Lawrence, in the case of *Jordaine* v. *Lashbrooke*, "that all persons are admissible witnesses, who have the use of their reason, and such religious belief as to feel the obligation of an oath, who have not been convicted of any infamous crime, and who are not influenced by interest."

It is proposed now to examine separately the several causes of incompetency, which have been mentioned. And 1st, of incompetency from defect of understanding.

Idiots, &c.

Persons who have not the use of reason are from their infirmity utterly incapable of giving evidence, and therefore excluded as incompetent witnesses. Incompetency from defect of understanding may arise, where there is a natural deficiency of the intellect, as in the case of idiots; or where the intellect has become disordered, as in the case of insane persons; or where the intellect is immature, as in the case of children.

Natural deficiency.

An idiot is one who, from his nativity, is by a perpetual infirmity *non compos mentis*; (1) such a person is wholly incapable of giving evidence. But persons born deaf and dumb, (although it has been said that in presumption of law they are to be considered as idiots,) (2) are not on this account incompetent: and if it appear, that they have sufficient understanding and know the nature of an oath, they may give evidence by signs, through the medium of an interpreter; (3) or if they are able to write, their testimony will be taken in writing, as the more certain mode. (4).

Disordered intellect.

Persons who have become permanently deranged in intellect, are incompetent; but lunatics, and persons afflicted only with occasional fits of insanity, although incompetent while under the influence of their malady, may yet be witnesses in their lucid intervals, if it be satisfactorily shewn that they have sufficiently recovered the use of their understanding. (5)

Children.

There is no precise age fixed, at which children are excluded from giving evidence. At one time, indeed, their age was considered as the criterion of their competency, and it was a general rule that none could be admitted under the age of nine years, very few under ten; (6) which in some cases would operate to deprive them of the protection of law against acts of violence. (7) A more reasonable rule has since been adopted,

(1) Co. Lit. 247, *a*.
(2) 1 Hale, P. C. 34.
(3) Ruston's case, 1 Leach, Cr. Ca. 455.
(4) Morrison *v.* Lennard, 3 Car. & P. 127.
(5) Com. Dig. Testmoigne, A. 1.
(6) R. *v.* Travers, 2 Stra. 700, and cases in East, P. C. 442. 1 Hale, P. C. 302. 2 Hale, P. C. 278.
(7) B. N. P. 293.

and the competency of children is now regulated, not by their age, but by the degree of understanding which they appear to possess. In Brazier's case, on an indictment for assaulting an infant five years old with intent to ravish her, all the judges agreed, that children of any age might be examined upon oath, if capable of distinguishing between good and evil, and possessing sufficient knowledge of the nature and consequences of an oath; but that they could not in any case be examined without oath. (1) This is now the established rule, as well in criminal as in civil cases, and it applies equally to capital offences and to offences of an inferior nature. Children.

According to this rule the admissibility of children depends not merely upon their possessing a competent degree of understanding, but also, in part, upon their having received such a degree of religious instruction as not to be ignorant of the nature of an oath, or of the consequences of falsehood. Religious instruction.

In criminal cases, where a child, who is a necessary witness for the prosecution, appears not sufficiently to understand the nature and obligation of an oath, it is competent to the judge to postpone the trial, that the child may be in the mean time properly instructed. (2) But an application to postpone the trial upon this ground ought properly to be made before the child is examined by the grand jury; at all events before the trial has commenced; for if the jury are sworn, and the prisoner is put upon his trial before the incompetency of the witness is discovered, the judge cannot discharge the jury, but should direct an acquittal. (3)

When a child is unfit to be sworn, it follows as a necessary consequence, that any account of the transaction, which it may have given to others, ought not to be admitted. On an indictment therefore for a rape on a child five years old, where the child was not admitted as witness, but an account of what she Children. Account given by.

(1) 1 Leach, C. C..199. 1 East, P. C. 443. B. N. P. 293. 4 Bl. Com. 214.

(2) 1 Leach, 430, n. But see R. *v.* Williams, 7 Car. & P. 320.

(3) R. *v.* Wade, 1 Ry. & Mo. C. C. 86. In this case the witness was an *adult*, possessed of sufficient intellect, but wholly without religious instruction.

Children.

had told her mother about three weeks after the transaction, was given in evidence by the mother, and the jury convicted the prisoner, principally as was supposed on that evidence, the judges, in a case reserved for their opinion, thought the evidence clearly inadmissible, and the prisoner was accordingly pardoned. (1)

Effect of their evidence.

With regard to the weight and effect of the testimony of children Sir W. Blackstone observes, (2) "that when the evidence of children is admitted, it is much to be wished, in order to render the evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that a conviction should not be grounded on the unsupported accusation of an infant under years of discretion." In many cases, undoubtedly, the statements of children are to be received with great caution; but it is clear a prisoner may be legally convicted upon such evidence alone and unsupported; and whether the account of a child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given.

Preliminary inquiry.

It may be observed, the preliminary inquiry, usually made for ascertaining their competency, is not always of the most satisfactory nature, and sometimes is of such a description, that merely by a very slight practising of the memory, a child might be made to appear competent and qualified as a witness. The inquiry is commonly confined to the ascertaining of the fact, whether the child has a conception of Divine punishment being a consequence of falsehood; it seldom extends so far as to ascertain the child's notions of the nature of an oath, and scarcely ever relates to the legal punishment of perjury. In a recent case, however, it has been held, that the effect of the oath on the conscience of a child should arise from religious feelings of a permanent nature, and not merely from instructions confined

(1) R. *v.* Tucker, 1808, MS. See also R. *v.* Brazier, 1 East, P. C. 443. 1 Atk. 29. Mr. Hume's remarks on the law of Scotland, respecting the admissibility of infants, 12 How. 559, n.

(2) 4 Com. 214.

to the nature of an oath, which have been communicated with reference to the trial. (1) Independently of the sanction of an oath, the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; what is wanted in the perfection of the intellectual faculties, is sometimes more than compensated by the absence of motives to deceive. Children.

CHAPTER II.

OF INCOMPETENCY FROM DEFECT OF RELIGIOUS PRINCIPLE.

IT is an established rule, that all witnesses who are examined upon any trial, civil or criminal, must give their evidence under the sanction of an oath. This rule is laid down as an acknowledged proposition, by some of our earliest writers; (2) and it appears to be of universal application, except in the few cases in which a solemn affirmation has been allowed by statute in the place of an oath. No exemption from this obligation can be claimed in consequence of the rank or station of a witness. A peer cannot give evidence unless sworn; (3) and the same appears to be the case in regard to the King himself. (4) The rule also holds even in the case of a judge, (5) or juryman, (6) who happens to be cognizant of any fact material to be communicated in the course of a trial. A striking exception to this rule formerly prevailed in the case of witnesses for prisoners accused of treason or felony, who were not permitted to give Witness sworn.

(1) R. *v.* Williams, 7 Car. & P. 320.

(2) Sheppard's Abridg. Tryal.

(3) Lord Shaftesbury *v.* L. Digby, 3 Keb. 631. R. *v.* Lord Preston, 1 Salk. 278.

(4) 2 Roll. Ab. 686. In Abigny *v.* Clifford, Hob. 213. King James the First certified to the chancellor, under his sign manual, the substance of the promise made by the defendant to the King, and the certificate was admitted without objection. But Willes, C. B. (in Omichund *v.* Barker, Willes' Rep. 550,) states that, except in the preceding case, the King's certificate, under his sign manual, has always been refused.

(5) Kel. 12, Trial of the Regicides. See also 5 How. St. Tr. 1181, n. 7 How. St. Tr. 874, 1458. 11 How. 459.

(6) Bennett *v.* Hundred of Hertford, Sty. 233. Fitzjames *v.* Moys, 1 Sid. 133. Kitchen *v.* Manwaring, cit. And. 321, and see R. *v.* Sutton, 4 M. & S. 532, 537, n. 6 How. St. Tr. 1612, n. 18 St. Tr. 123.

evidence upon oath; but this unreasonable and unjust distinction has been long since abolished. (1) At one time it was thought that a child, who was incapable of understanding the nature of an oath, might be examined without being sworn, (2) but it is now settled, as shewn in the preceding chapter, that the statement of a child cannot be received except upon oath; and that where the child is incapable of understanding the nature and obligation of an oath, its testimony will be rejected. (3)

Import of oath.

An examination upon oath implies, that the witness should go through a ceremony of a particular import; and also that he should acknowledge the efficacy of that ceremony as an obligation to speak the truth. By taking an oath, a witness makes a formal and solemn appeal to the Supreme Being for the truth of the evidence which he is about to give, and imprecates the Divine vengeance on his head, if what he shall say should be false. (4)

Form of oath.

The particular form or ceremony of administering an oath is quite distinct from the substance of the oath itself. The substance of the oath must always be the same, though the form, in which an oath is taken, varies in different countries, and according to different forms of religion. In England, the customary form in which an oath is administered, consists, as is well known, in calling upon the witness to declare the truth, as he may be helped by God, and requiring him to touch with his right hand and to kiss the four Gospels.

If the same form of oath were required in all cases, without reference to the religious opinions of witnesses, some might refuse to comply with it from conscientious scruples, and their evidence would be excluded; while others might attach no binding force

(1) See stat. 7 W. 3, c. 3. Stat. 1 Ann. st. 2, c. 9. See 3 Inst. 79. 2 Hale, P. C. 283. 4 Bl. Com. 359.

(2) 1 Hale, P. C. 634.

(3) *Ante*, p. 5. Brazier's case, 1 Leach, C. C. 237. 1 East, P. C. 443.

(4) By Lord Hardwicke, 1 Atk. 49. For the definition of an oath by our old writers, Bracton, Britton, Fleta, and others, see 1 Atk. 22. By Sir E. Coke, and some other writers, an oath is often confounded with the form in which it is usually administered.

to the prescribed form; thus the object of the law in requiring a religious sanction would be entirely defeated. The rule of our law, therefore, is, that witnesses may be sworn according to the peculiar ceremonies of their own religion, or in such manner as they consider binding on their consciences. Jews have accordingly been sworn in our Courts from a very early period on the Pentateuch, and they take the oath with the head covered. (1) A Mahometan is sworn upon the Koran. (2) The deposition of a Gentoo has been received, who touched with his hand the foot of a Bramin. (3) A Scotch covenanter, and a member of the Kirk, have been allowed to take the oath, by holding up their hands without kissing the book; (4) and upon the same principle, all persons may be sworn according to the ceremony sanctioned by their particular religion or sect. (5) Whatever be the form, the meaning of the oath is the same. It is an appeal to God, calling upon him to witness what we say, and invoking his vengeance, if what we say be false. (6)

The same indulgence, that is allowed in the case of different religions and sects of religion, has also been extended to the conscientious scruples of individuals, who have objected to be sworn in the manner usually adopted by persons of their own religion or sect. Thus in an old case, where a witness, who was Vice Chancellor of Oxford, refused to be sworn in the usual form by laying his right hand on the book and kissing it, Glin, C. J., ruled, that he might be sworn by having the book laid open before him, and holding up his right hand. (7) "In my opinion," said the Chief Justice, "he has taken as strong an oath as any other witness." And in a late case, a witness who professed Christianity, but objected to be sworn on the

(1) 1 Atk. 40, 42. Willes, 543. Cowp. 389.

(2) Morgan's case, 1 Leach, C. C. 64, by Gould, J., delivering the opinion of all the judges. Cowp. 390. Fachina *v.* Sabine, 2 Stra. 1104.

(3) See Omichund *v.* Barker, 1 Atk. 21. In R. *v.* Alsley, O. B. Sess. 1804. Peake's Evid. 138, (5th edit.) a Chinese was sworn by dashing a saucer on the ground after he had concluded the oath.

(4) By Gould, J., in Mildrone's case, 1 Leach, C. C. 459. Mee *v.* Reid, 1 Peake, N. P. C. 22.

(5) Omichund *v.* Barker, 1 Atk. 21.

(6) Forma jusjurandi verbis differt, re convenit; hunc enim sensum habere debet, ut Deus invocetur. Grotius, L. 2, c. 13, s. 10.

(7) Dutton *v.* Colt, 2 Sid. 6.

Gospels was allowed to be sworn on the Old Testament, on his stating that he considered an oath so administered to be binding on his conscience. (1) A Jew who has made no formal renunciation of Judaism, but professes himself to be a Christian, may be sworn on the Gospels. (2) And in a case where a new trial was moved for, on the ground that a witness, who had been sworn on the Gospels in the usual manner, had since been discovered to be a Jew, the Court of Common Pleas refused the rule, and were unanimously of opinion, that the oath taken was binding on the witness, both as a moral and religious sanction. (3)

Religious belief.

But besides the performance of a ceremony of the importance just described, the law requires that the witness should acknowledge the efficacy of the ceremony as an obligation to speak the truth. It is therefore essential to the reception of a witness, that he should believe in the existence of a God, by whom truth is enjoined and falsehood punished. Without such belief, one sanction, which the law regards as a material security for truth, namely, the fear of Divine punishment invoked by the witness upon himself, is wanting. It is not sufficient, that a witness believes himself bound to speak the truth from a regard to character or to the common interests of society, or from a fear of the punishment which the law inflicts upon persons guilty of perjury. (4) Such motives have indeed their influence, but they are not considered as affording a sufficient safeguard for the strict observance of truth: our law, in common with the law of most civilized countries, requires the additional security afforded by the religious sanction implied by an oath, and, as a necessary consequence, rejects all witnesses who are incapable of giving this security.

Atheists, therefore, and such infidels as profess not religion that can bind their consciences to speak trutl excluded from being witnesses. (5) Doubts formerly ex

(1) Edmonds *v.* Rowe, Ry. & Mo. N. P. C. 77.
(2) R. *v.* Gilham, 1 Esp. N. P. C. 285.
(3) Sells *v.* Hoare, 3 Bro. & B. 232.
(4) Ruston's case, 1 Leach, C. C. 455.
(5) Bul. N. P. 292. 1 Atk. 40, 45, 48. Gilb. Ev. 129.

with respect to Jews and the inhabitants of countries professing religions different from Christianity. Lord Coke says generally, that it is an objection to a witness if he be an infidel, (1) under which denomination he intended to comprise Jews as well as Heathens. (2) And Serjeant Hawkins thought, that a witness who believed in neither the Old nor the New Testament, was incompetent. (3) But Lord Hale was of a different opinion, and strongly points out the unreasonableness of excluding indiscriminately all heathens from giving evidence. (4) All doubts on this subject have long since been set at rest, and it may now be considered as an established rule, that not only Jews, but infidels of any country, believing in a God who enjoins truth and punishes falsehood, ought to be received as witnesses; (5) and they are to be sworn, as we have already seen, according to the form which is authorized by their country or their religion.

Examination as to religious belief.

The only means of ascertaining the competency of a witness, with reference to religious principle, is by examining the party himself. The proper mode of examination for this purpose, it is said, is not to question the witness as to his particular opinions, but to inquire generally, whether he believes in the existence of a God and in a future state. (6) In a case before Buller, J., where a witness, who had been sworn in the usual way, was asked, whether he believed in the Gospels on which he had been sworn, the question is said to have been overruled. (7) But although a witness may not be questioned as to his particular religious opinions, he may be asked, whether he considers the form of administering the oath to be such as will be binding on his conscience.

Examination

(1) Co. Lit. 6, *b*.

(2) 2 Inst. 506. 3 Inst. 165. 1 Atk. 43. Willes, 541.

(3) Hawk. P. C. *b*. 2, c. 46, s. 148.

(4) 2 Hale, P. C. 279.

(5) See Omichund *v*. Barker, 1 Atk. 21. 1 Wils. 84, S. C. Willes, 538, S. C.

(6) It seems, however, that an infidel who believes in a God, and that he will reward and punish him in this world, but does not believe in a future state, may be examined upon oath. By Willes, C. B. Omichund *v*. Barker, Willes, 550.

(7) R. *v*. Taylor, Peake, N. P. C. 11.

previous to swearing.

whether the form of administering the oath is such as will be binding upon his conscience, is previous to the administration of the oath. But as it may occasionally happen, that the oath is administered in the usual form, unobserved by the Court or the counsel, the question in such case may properly be asked afterwards. And if, in answer to the question, the witness shall declare in the affirmative, namely, that he considers the oath, taken by him, to be binding upon his conscience, it would be irrelevant to ask further whether there be any other mode of swearing that would be more binding than that which has been used. (1) If the witness says he considers the oath to be binding upon his conscience, he affirms in effect, that in taking that oath he has called his God to witness that what he shall say will be the truth, and that he has imprecated the Divine vengeance upon his head, if what he shall afterwards say is false; and when this is done, it would be perfectly unnecessary and irrelevant to ask any further questions. (2) Such an acceptance of the oath not only imposes upon the witness all its religious obligation, but, should he violate its sanctions, subjects him also to the temporal penalties consequent on the crime of perjury. (3).

Affirmation in lieu of oath—Quakers, Moravians, &c.

The evidence of Quakers, and the members of other sects who refused to take a formal oath in any shape, was for a long time held inadmissible. (4) By the stat. of the 7 & 8 W. 3, c. 34,

(1) Resolution of the judges delivered by the Lord Chief Justice in the proceedings on the Bill of Pains and Penalties, Aug, 24, 1820. In the case of the witness Gargi.lo, p. 116, of the printed evidence. 2 Brod. & Bing. 284.

(2) By the Lord Chief Justice, on the same occasion.

(3) The fact of a witness having assumed a false name, and swearing in the common form upon the Gospels, but discovered after the trial to be a Jew, is not a ground for a new trial. Sells *v.* Hoare, 3 Brod. & Bing. 432.

(4) Before the Revolution, Quakers, who refused to take a legal oath, were treated as obstinate offenders, and subject to penalties. [St. 13 C. 2, c. 1.] These hardships were removed by the Toleration Act, [St. 1 W. & M. c. 18, s. 13] which first allowed them to make a declaration of their fidelity to the state instead of taking an oath of allegiance, and exempted them from all pains and penalties on their making, if required, certain other declarations there prescribed. And by another statute, which passed about six years after, [St. 7 & 8 W. 3, c. 34] their solemn affirmation in courts of justice is admitted to have the same effect as an oath taken in the usual form, excepting only that on such affirmation they are not permitted to give evidence in criminal cases. This exception against the testi-

the solemn affirmation of Quakers was admitted to have the same effect as an oath in civil cases, but they continued to be excluded from giving evidence in criminal cases, until a very recent period. This disability has now been entirely removed, by stat. 9 Geo. 4, c. 32, by which Quakers and Moravians are allowed to give evidence upon their solemn affirmation in all cases, criminal as well as civil. And by a later enactment (1) their affirmation is to be of the same force and effect as an oath in the usual form, in all cases when an oath is by law required. By another statute (2) a similar provision is made in favour of a religious sect called Separatists.

Separatists.

Persons, who have been Quakers or Moravians.

The recent act of 1 & 2 Vict. c. 77, provides, that any person who has been a Quaker or Moravian, and who entertains conscientious objections to the taking of an oath, should be allowed to make solemn affirmation and declaration in lieu of taking an oath, as fully as he might be allowed to do in case he still remained a member of either of these denominations of Christians, and this affirmation or declaration is made of the same force and effect as if an oath had been taken in the usual form.

Excommunication.

It was formerly laid down by writers on the law of evidence, on the authority of a dictum of Sir E. Coke, (3) that excommunicated persons were not competent witnesses, on the ground that persons excluded from the Church could not be under the influence of any religion. But this species of disability, if it ever existed, has been entirely removed by the stat. 58 Geo. 3, c. 127, s. 2, 3, which enacted, that persons excommunicated shall in no case incur any civil penalty or disability.

mony of Quakers in criminal prosecutions was continued in several succeeding acts of the legislature on this subject, [St. 8 Geo. 1, c. 6. St. 22 G. 2, c. 46, s. 36.]

(1) 3 & 4 W. 4, c. 49.
(2) 3 & 4 W. 4, c. 82.
(3) 2 Bulst. 155. Att. Gen. *v.* Griffith. See B. N. P. 292. Gilb. Evid. 146, (3d edit.)

CHAPTER III.

OF INCOMPETENCY FROM CONVICTION OF CRIME.

A third cause of incompetency is infamy of character, proceeding from conviction of certain offences.

General rule.

The conviction of an infamous crime, followed by judgment, disqualifies a person from giving evidence in our courts of justice;(1) and persons rejected for this cause, are said to be incompetent on account of the infamy of their character.

Distinction between legal and moral infamy.

There is a distinction between infamy of character in the ordinary sense of the expression, and that legal infamy which results from the sentence of a court of justice. "If," says Sir W. Scott,(2) "a man is stigmatized by public fame only, it affects the credit of his testimony, but not his admission to the formal character of a witness." It frequently happens that a witness is suffered to give evidence, because not absolutely disqualified by the rule of law, though he may be far lower in point of credit and real character, than another who is excluded as incompetent. Writers on the law of evidence distinguish between the *infamia juris* and the *infamia facti*; the former of which may destroy the credibility of a witness, but the latter can only affect his competency.

Principle of the rule.

The principle of this rule of exclusion has been variously explained. Some appear to justify the disqualification as a supernumerary punishment of the offence. Such a punishment would be unjust: the disqualification would be a punishment and loss, not to the convict, but to the party who requires his evidence; the power of giving evidence ought not to be regarded as a personal privilege of the witness, but for the benefit of suitors or of the public.

(1) Our earliest writers notice this cause of disqualification. And the rule of the Roman law was similar, "Publico judicio damnati et non in integrum restituti admittendi non sunt ad testimonii fidem." Dig. l. 22, tit. 5, de Testibus, art. 3, s. 5.

(2) 2 Dods. 188, case of Ville de Varsovie.

Another ground, upon which this rule has sometimes been justified, is, that the testimony of persons convicted of infamous crimes is destitute of all presumption of credit, and would therefore be more likely to mislead than to assist, in the investigation of truth in Courts of Justice. Sir W. Scott, in the judgment from which a quotation has been already made, observes that, "the law considers the commission of a crime of this nature to imply such a dereliction of moral principle on the part of the witness, as carries with it the conclusion, that he would entirely disregard the obligation of an oath." (1) And C. B. Gilbert observes upon the same subject, that "the producing such a witness is perfectly ineffectual, because the credit of his oath is overbalanced by the stain of his iniquity." (2)

Propriety of exclusion questioned.

It may be objected against such reasoning, that although the moral principle of a witness on some former occasion has proved too weak to resist a passion or temptation of interest, it does not follow that he ought to be accounted wholly undeserving of credit, when there may be no temptation to lead astray, or where it may be reasonably supposed that the oath he takes, and the fear of the temporal punishment annexed to perjury, will not be without influence in causing him to adhere to truth. Though a person may be proved on his own shewing, or by other evidence, to have forsworn himself as to a particular fact, it does not follow that he can never afterwards feel the obligation of an oath. (3) If incompetency from infamy of character proceeds on the ground of an entire want of credibility, it is not easy to understand, why there should be any distinction between the case of a witness who has been convicted of perjury, and one who has not been convicted, but who admits having committed the offence. Yet, as will be presently shewn, the one is competent, and the other incompetent. It is also difficult to understand with reference to this principle, why the suffering of the punishment awarded by law for an offence should occasion a restoration of competency; for

(1) 2 Dods. Rep. 188.
(2) Gilb. Evid. 143, (4th edit.); and see per Willes, C. J. Purdock *v.* Mackinder, Willes, 667.
(3) R. *v.* Teal, 11 East, 311, by Lord Ellenborough.

although the endurance of punishment may satisfy the ends of public justice, it is not easy to explain, how it can operate to improve the convict's character or credit.

The true cause of many of these apparent inconsistencies in the law of evidence is to be found in the disposition of courts of justice, in modern times, not to shut out evidence unnecessarily, but rather to limit as much as possible the old rules of exclusion. The only effectual remedy for the inconveniencies of the present practice would be a legislative provision, allowing persons to be examined as witnesses, notwithstanding the conviction for an offence. The distinction between offences, for which a conviction disqualifies a witness, is often purely technical; the whole class of offences which come under the denomination of felony, incapacitate, although in many misdemeanors there may be much more depravity than in some kinds of felony. The modes of restoring competency also shew, that the objection which is capable of being removed by means so entirely unconnected with real character and credit, is not of a substantial nature.

It is to be observed that, in practice, witnesses are rarely rejected on the ground of infamy,—in consequence of the difficulty of establishing their incompetency by formal proof of the conviction and judgment, especially where there is no previous notice that the convict is to be produced. The cross-examination of the witness, as to the fact of his trial for the crime, generally produces all the effect of discrediting him, which can properly be desired.

In treating of the subject of incompetency from infamy, it is proposed, in the present chapter, to consider what offences incapacitate; what is the effect and extent of the incapacity; how incompetency from infamy of character is to be proved; and how a witness who has incurred this disability, may be restored to competency. The next chapter will treat of the evidence of accomplices, informers, and self-discrediting witnesses,—a subject, connected with this branch of the law of evidence, which from its importance appears to deserve a separate consideration.

1. *What Offences Incapacitate.*

There are many offences which our law considers such blemishes on the moral character, as to incapacitate the party convicted from giving evidence. Of this kind are treason, *præmunire*, and the whole class of offences which come under the denomination of felony.(1) Petty larceny was formerly an exception to the rule which disqualifies for conviction of felony; (2) but the distinction between grand and petty larceny having been abolished, and the latter being made subject to all the incidents of the former, (3) that exception now no longer exists.

Treason and felony.

It has been generally laid down by writers on the law of evidence, that every species of the *crimen falsi* renders the party convicted an incompetent witness. (4) The term *crimen falsi* is one which has been taken from the Roman law, and the precise extent of the signification which it has received in our law, appears to be involved in some degree of uncertainty. It is clear that a conviction for forgery will disqualify; (5) as will also all offences tending to pervert the public administration of justice, by falsehood, or fraud. Of this nature are perjury, and subornation of perjury; attaint of false verdict; (6) bribing a witness to absent himself, in order that he may not give evidence; (7) conspiring to procure the absence of a witness; (8) conspiring to accuse another person of a capital offence; (9) barratry. (10) But it does not appear, that every offence, which involves the charge of falsehood or fraud, will render a witness incompetent; and in a modern case, in the Admiralty

Crimen falsi.

Forgery.

Perjury.

Bribing a witness; conspiracy.

Conspiracy.

Fraud.

(1) Co. Lit. 6, *b*. Com. Dig. Testm. A. 5. 2 H. P. C. 277. Fortesc. Rep. 209. Jones *v.* Mason, 2 Stra. 833. Walker *v.* Kearney, 2 Stra. 1148.

(2) Stat. 31 Geo. 3, c. 35. Before this statute petty larceny disqualified, see 2 H. P. C. 277. Pendock *v.* Mackinder, Willes, 667.

(3) Stat. 7 & 8 Geo. 4, c. 29, s. 2. The consequence of incapacitating witnesses was probably not contemplated by the legislature.

(4) Bul. N. P. 291. Gilb. Evid. 141. Co. Lit. 6, *b*, n. 1, (Harg. edit.)

(5) 2 Hale, P. C. 277. Com. Dig. Testm. A. 5. Co. Lit, 6, *b*. B. N. P. 291.

(6) See authorities cited, n. 4. *supra*.

(7) Adjudged in Clancy's case, by seven judges, (Holt, C. J., doubting at first,) Fortesc. Rep. 208.

(8) Bushell *v.* Barrett, Ry. & Mo. N. P. C. 434.

(9) 2 H. P. C. 277. 11 Rep. 99, *a*. Hawk. P. C. *b*. 1, c. 72, s. 9. Com. Dig. Testm. A. 5. See R. *v.* Crossby, 2 Leach, C. C. 496.

(10) R. *v.* Ford, 2 Salk. 690. B. N. P. 292.

Court, which underwent much discussion, Sir W. Scott determined, on great consideration, that a conviction for a conspiracy to commit a fraud, in raising the price of the funds by false reports, would not render an affidavit of the convicted party inadmissible. (1) Lord Tenterden also appears to have entertained the same opinion in a subsequent case, which occurred at Nisi Prius. (2)

Gaming.

A conviction for keeping a public gaming house has been thought not to render a witness incompetent. (3) But it seems that a person who has been convicted under the 9th Ann. c. 14, s. 5, of winning at the games mentioned in that statute, by fraud or ill practice, would be incapacitated; for the statute expressly enacts, that the party convicted shall be deemed infamous; and one of the legal consequences of infamy is incapacity to give evidence. (4)

Outlawry.

Judgment of outlawry for treason or felony has the same effect as judgment after a verdict or confession, (5) and it therefore follows, that such an outlaw cannot be a competent witness. (6) But outlawry in a personal action is no ground of exception. (7)

Infamous punishment.

Some kinds of *punishment* were formerly thought to be marks of infamy, and witnesses were frequently rejected after branding, or after standing in the pillory. (8) But the distinction is now clearly settled, that legal infamy arises not from the nature of the punishment, but from the nature of the offence. (9) The maxim is, *ex delicto non ex supplicio emergit infamia.*

(1) Case of Ville de Varsovie, 2 Dods. Adm. R. 174.

(2) Crowther *v.* Hopwood, 3 Stark. N. P. C. 21.

(3) R. *v.* Grant, Ry. & Mo. N. P. C. 270, by Abbott, C. J.

(4) Co. Lit. 6, *b.* Fortesc. 208.

(5) 3 Inst. 212. Hawk. P. C. b. 2, c. 48, s. 22.

(6) Celier's case, Sir T Raym. 369.

(7) Co. Lit. 6, *b.* Com. Dig. Testm. A. 5. Hawk. P. C. b. 2, c. 48, s. 22.

(8) 2 Hale, P. C. 277. Co. Lit. 6, *b.* 2 Dods. Rep. 187. The punishment of pillory is now in all cases abolished by 1 Vict. c. 23, which enacts that judgment shall not be awarded against any offender to stand in the pillory.

(9) Gilb. Evid. 277. B. N. P. 292. R. *v.* Davis, 5 Mod. 75. R. *v.* Ford, 2 Salk. 690. Pendock *v.* Mackinder, Willes, 666. 2 Wils. 18; S. C. Fortesc. Rep. 209. Priddle's case, 2 Leach, 496.

2. As to the Extent and Effect of this Disability.

As persons convicted of infamous offences cannot be witnesses, their affidavits are inadmissible in any suit or proceeding between other parties. With regard to proceedings to which they are themselves parties, it has been held that they are incapable of making affidavits as complainants; (1) but their affidavits have been received for the purpose of exculpation or defence. (2) Upon the same principle, before Quakers had been made competent witnesses in criminal proceedings, their affirmations were admitted in their defence upon a criminal charge. Affidavits.

When a witness becomes incompetent from infamy, the effect is, for some purposes, the same as if he were dead; and if he has been attesting witness to any written instrument before conviction, proof may be given of his handwriting. (3) Conviction of attesting witness.

3. Of the Proof of this kind of Incompetency.

Incompetency arising from conviction of an infamous crime can only be established by proof of the conviction and judgment in due course of law. The fact of the party having committed the offence cannot be proved *vivâ voce*, (4) nor will even an admission by the witness himself of having been confined in a gaol for felony, (5) or of his having been guilty of perjury, make him incompetent, however it may affect his credit. (6) The rule, most commonly laid down, is that a *conviction* makes the witness incompetent; but it is not to be understood, that incompetency arises from the conviction alone, for that may have been quashed, on motion in arrest of judgment. (7) It is necessary to prove the judgment as well as the conviction, and this must be done in the usual way by the record or a copy of the record. (8) Judgment.

(1) 1 Salk. 461. 2 Stra. 1148.
(2) Davis and Carter's case, 2 Salk. 461. Charlesworth's case, cited by the Court in Walker *v.* Kearney, 2 Stra. 1148.
(3) Jones *v.* Mason, 1 Stra. 833.
(4) 1 Sid. 51.
(5) R. *v.* Castell Careinion, 8 East, 78.
(6) R. *v.* Teal, 11 East, 309. Rands *v.* Thomas, 5 M. & S. 244.
(7) Lee *v.* Gansell, Cowp. 8. Gilb. Evid. 129. Com. Dig. Testm. A. 5. Sutten *v.* Bishop, 4 Bur. 2283.
(8) 8 East, 78. See *post*, Proof of Judgments.

Proceedings must be regular.

The proceedings must appear to be regular, and when they have taken place in another court, it must appear from the record that it was a court of competent jurisdiction. A document, purporting to be an indictment and conviction, is imperfect as a record without a caption; since the caption shews by what authority the indictment was found; and the indictment must state all circumstances essential to constitute the offence. (2)

4. *How competency is restored.*

A person convicted of an infamous crime, being thus disabled from giving evidence, it remains to be considered by what means the disability may be removed.

The competency of the witness may be restored:—1st, By reversal of the judgment or other proceedings producing the disqualification; 2ndly, By pardon; and 3rdly, By enduring the punishment awarded for the offence.

By reversal of judgment.

Due proof of the judgment having been given by the party objecting to the witness, the opposite party may shew that such judgment has been reversed on a writ of error. So, if the disqualification arise from outlawry for treason or felony, the reversal of the outlawry may be shewn in like manner. In a case where it was objected, that the witness had been attainted by a statute, which subjected him to the penalties of an attainder, unless he surrendered before a certain day, (which is a kind of parliamentary outlawry,) the objection was met by shewing, that the witness had surrendered conformably with the act; and a record of a proceeding, commenced on the part of the crown, and defended on the part of the witness by a plea of surrender, which the Attorney General confessed to be true, was allowed to be conclusive proof of the fact of the surrender within the limited time. (2) This however was not evidence in the nature of a reversal of the attainder, but its effect was to shew, that the penalties of the act had never been incurred by the witness.

Surrender conformably with a statute.

(1) Cooke *v.* Maxwell. 2 Stark. N. P. C. 183.

(2) Lord Lovat's case, 9 St. Tr. 652, 665, fol. ed. S. C. 18 How St. Tr. 1004, 1011.

Competency restored by pardon.

The competency of a witness may be restored by a pardon from the crown under the great seal. Whatever doubts were formerly entertained upon the subject, (1) it has long since been settled, that a pardon not only takes off every part of the punishment, but also clears the party from the legal disabilities of infamy resulting from his offence. (2) A pardon is said to make the witness a new creature, and to give him a new capacity; the crime may indeed be urged against him as affecting his credit, but his competency is entirely restored.

This rule must however, as it seems, be understood subject to one qualification. A pardon will always restore competency, when the disability is a consequence of the judgment, according to the ordinary rules of law; but where the disability is annexed to the conviction of a particular offence by the express words of a statute, not merely as consequential on the crime, but as a specific prohibition, it is laid down that a pardon will not in such a case restore competency, for the prerogative of the crown is controlled by the act of the legislature. (3) Thus, if a man be found guilty on an indictment for perjury at common law, a pardon from the crown will make him a good witness; but if he be convicted of perjury, or subornation of perjury, on the stat. 5 Eliz. c. 9, he will not be rendered competent by a pardon; for the statute expressly provides that he shall never be admitted to give evidence in any Court of Record, until the judgment be reversed.

Proof of conditional pardon.

In order to prove a pardon, it must be produced under the great seal. And if the pardon is conditional, the performance of the condition ought to be shewn, (4) for on that depends all its efficacy. Thus, where the pardon is on condition of

(1) By Lord Coke, in Brown *v.* Crashaw, 2 Bulst. 154. By Doddridge, J., in Harris *v.* White, Palm. 412, Latch, 81. And other dicta cited 2 Harg. Jur. Arg. 263.

(2) Cuddington *v.* Wilkins, Hob. 67, 82. Rookwood's case, Rep. temp. Holt, 685. 4 St. Tr. 682, fol. ed. 13 Howell's St. Tr. 185. Crosby's case, Lord Raym. 39. Lord Castlemain's case, Sir T. Raym. 379. 2 H. P. C. 278. Com. Dig. Testm. A. 5. Reilly's case, Leach, 510. Lord Warwick's case, 13 Howell's St. Tr. 1003.

(3) 2 H. P. C. 278. Rex *v.* Greepe, 2 Salk. 514. 1 Lord Raym. 256. S. C. R. *v.* Ford, 2 Salk. 690. Crosby's case, 2 Salk. 689. B. N. P. 292. Hawk. *b.* 2, c. 46, s. 112. R. *v.* Warden of the Fleet, Rep. temp. Holt, 135. *Anon.* 3 Salk. 135.

(4) Hawk. *b.* 2, c. 37, s. 45.

transportation for a number of years, the witness is not competent before the expiration, or other lawful determination, of the term. (1)

Pardon under sign manual.

Where a warrant is granted under the sign manual, countersigned by a principal Secretary of State, for a free or conditional pardon of a person convicted of felony, his discharge from custody in the case of a free pardon, and the performance of the codition in the case of a conditional pardon, will have the same effect as a pardon under the great seal, in regard to the felony for which the pardon is granted. (2)

The restoration to competency, by means of a pardon, probably proceeded on the ground of a presumption, that the pardon was granted in consequence of the error of the Court, which pronounced the conviction; because as Courts of Justice are not infallible, there may be perfect innocence, notwithstanding a legal conviction of guilt. (3)

Pardon for making witness competent.

Pardons are not unfrequently granted for the purpose of procuring the evidence of a witness as to some offence, which might otherwise go unpunished. Thus the crown has the power of supplying evidence, or withholding it: and convicts, in the hope of receiving a pardon, may be tempted to exaggerate and strain their evidence. There is danger, that the course of public justice may thus be prejudiced; and, in point of credibility, such a witness must be regarded in the same light (if not worse), after a pardon as before. (4) It has hap-

(1) Burridge's case, 3 P. Wms. 485. See Badcock's case, Russ. & Ry. Cr. Ca. 248.

(2) Stat. 7 & 8 Geo. 4, c. 28, s. 13.

(3) See Mr. Hargrave's Tract on the effect of the King's pardon for Perjury. 2 Hargr. Jur. Arg. and 2 Hale, 278, Crosby's case, 5 Mod. 15.

(4) This doctrine, of the restoration of a witness's credit by a pardon, appears to be of modern origin. Lord Coke, 2 Bulstr. 154, is an authority against it, and the maxim was "Pœna potest tolli, culpa perennis erit." There is considerable fluctuation of opinion upon the subject, in the trials arising out of the Popish Plot, particularly with regard to the evidence of Dangerfield, 7 St. Tr. 296, 1054, 1083. But Lord Holt, after the Revolution, appears to have firmly established the doctrine. Crosby's case, 12 Howell's St. Tr. 1296. It was debated till 1696 in Rookwood's case, 13 Howell's St. Tr. 183. See 2 Hale, 278. 2 Salk. 690. Fitz. 107. 1 Lord Raym. 39. Sir T. Raym. 639.

pened, that, for the support of a single prosecution, no less than five convicts have been pardoned, thus escaping the punishment due to their crimes: (1) whereas, if such evidence could be used without a pardon, it would be more free from suspicion, and the ends of Justice would be more effectually attained.

Competency restored by suffering of punishment.

Statute 9 Geo. 4, c. 32, s. 3.

The restoration of competency, by suffering the punishment awarded for the offence, depends, at the present day, upon the provisions of the stat. 9 Geo. 4, c. 32. Before the passing of this act, the endurance of the punishment in many cases operated to restore competency, but the law upon this subject was involved in some confusion, in consequence of the recent extensive changes effected in the criminal law of the country. By the 3rd sect. of this statute, after reciting that it was expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who had undergone the punishment to which they had been adjudged, it is enacted, "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 shall have the like effect and consequences as a pardon under the great seal, as to the felonly whereof the offender was so convicted. Provided always, that nothing herein contained, nor the enduring of 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."

In felonies.

We have already seen that a pardon under the great seal operates as a complete restoration of the competency of a witness, who has been convicted of a disqualifying offence. And since the above enactment, the endurance of the punishment awarded will have precisely the same operation in all cases of felonies not capital.

(1) On a trial for the murder of a convict killed on board a hulk. Other instances have occurred in which two or three convicts have been pardoned, for the purpose of being made competent to give evidence.

In misdemeanors.

Sect. 4.

A separate provision is introduced in the same statute, relative to misdemeanors, by sect. 4, which is as follows: "And whereas there are certain misdemeanors, which render the parties convicted thereof incompetent witnesses, and it is expedient to restore the competency of such parties, after they have undergone the punishment: be it therefore enacted, that when 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 any court or proceeding, civil or criminal." This enactment expressly restores to competency, in all cases except perjury or subornation of perjury, persons convicted of misdemeanors, after suffering the punishment awarded by their sentence.

What sufficient satisfaction of punishment.

Questions may sometimes arise, as to what will amount to an endura :e of the punishment, within the meaning of the statute. In a case of this nature, which arose upon an enactment of a similar description in a statute now repealed, (1) where a witness had been convicted of grand larceny, and sentenced to transportation for seven years, but had been confined for that time in the hulks and then discharged; it was held, that such confinement under the sentence of transportation restored his competency, and the judges thought that the circumstance of his having twice escaped for a few hours each time, made no difference, as he had been brought back and confined for the remainder of the term.

Ancient practice.

Purgation.

In ancient times, competency was restored, after conviction of any offence which admitted of benefit of clergy, by purgation before the Ordinary. The stat. 18 Eliz. c. 7, s. 3, abolished purgation, and enacted, that after allowance of clergy, and burning in the hand, the offender should be forthwith delivered out of prison; and it was held upon this statute that the burn-

(1) Badcock's case, Russ. & Ry. C C. 248.

ing in the hand, substituted for purgation, produced the same effect as purgation in restoring competency. By various subsequent statutes, other punishments were substituted in lieu of burning in the hand, and it was provided that the suffering such substituted punishments should operate as a pardon, and remove all incapacities. But these enactments were confined to clergyable offences, and as the privilege of clergy, at common law, extended only to capital felonies, and not to petty larcenies or misdemeanors, persons convicted of these minor offences remained incompetent, notwithstanding they might have endured the sentence of the law. This inconvenience was in part removed by the stat. 31 Geo. 3, c. 35, which enacted, that no person should become incompetent by reason of conviction for petty larceny. By the 7 & 8 Geo. 4, c. 28, s. 6, benefit of clergy was abolished; and by the 7 & 8 Geo. 4, c. 29, s. 2, the distinction between grand and petty larceny was abolished, and the latter made subject to all the legal incidents of the former. The alterations introduced by these enactments gave rise to the provisions of stat. 9 Geo. 4, c. 32, s. 3 & 4, above mentioned. Some doubts having been entertained, whether the clause in stat. 7 & 8 Geo. 4, c. 28, s. 6, for abolishing the benefit of clergy with respect to persons convicted of felony, has effectually abolished, for all purposes, the allowance of such benefit to lords of Parliament, and to peers of the realm, under the 13th section of stat. 1 Edw. 6, c. 12, it has been enacted, by stat. 4 Vict. c. 22, that every lord of Parliament, or peer of the realm, against whom any indictment of felony may be found, shall plead to the indictment, and, upon conviction, shall be liable to the same punishment as any other of her Majesty's subjects.

Burning in the hand.

Benefit of clergy abolished.

4 Vict. c. 22.

CHAPTER IV.

OF THE COMPETENCY OF ACCOMPLICES, INFORMERS, AND SELF-DISCREDITING WITNESSES.

SECTION I.

Of the Competency of Accomplices.

General rule. It has been shewn in the preceding chapter, that a witness is not incompetent from infamy of character, unless a conviction and judgment are proved against him; not even though he may admit himself guilty of an infamous crime. And it is also a settled rule of evidence, that a witness in a criminal prosecution will not be incompetent on the ground that he has been an accomplice with the prisoner at the bar, in the particular crime which is the subject of the indictment.

With respect to any objection that might be made against the reception of the evidence of accomplices, on the ground of the admitted infamy of their character, there appears to be no distinction between an accomplice, who acknowledges that he has participated in the commission of the crime with which the prisoner at the bar stands charged, and any other witness, who admits that he has been guilty of a similar crime on a different occasion. But the testimony of an accomplice is usually given under an express, or implied promise of pardon; sometimes, in the expectation of receiving a reward on the prisoner's conviction;—and this peculiarity in the situation of an accomplice, undoubtedly, appears to furnish a much stronger ground of objection to his evidence, than exists with regard to witnesses whose conduct has been equally guilty,

but who do not give their evidence from the same interested motives. It has however long since been settled, that an unconvicted accomplice is not an incompetent witness, although he may have had a promise of pardon or reward, on condition of giving evidence against the prisoner. (1)

Accomplices competent.

The evidence of accomplices has been at all times admitted, and its admission has been supported on the ground of public policy, and indeed of necessity, from its being scarcely possible to detect conspiracies, and many of the worst crimes, without their information. In Charnock's case (2) Lord Holt, in his address to the jury, said, "Conspiracies are deeds of darkness as well as of wickedness, the discovery whereof can properly come only from the conspirators themselves; and the evidence of accomplices has been allowed good proof in all ages, and they are the most proper witnesses; for otherwise, it is hardly possible, if not altogether impossible, to have full proof of such secret contrivances." In answer to an objection of the prisoner, that "although an accomplice was a legal witness, he was not a good one," Lord Holt added, "the credit of what he says, as in all other cases, must be left to the jury, who are judges of the matter of fact, and of the credibility of witnesses."

Object of admitting accomplices.

The object of admitting the evidence of accomplices, is in order to effect the discovery and punishment of crimes, which cannot be proved against the offenders without the aid of an accomplice's testimony. In order to prevent this entire failure of justice, recourse is had to the evidence of accomplices, and they are admitted to give evidence for the crown, either under an express promise of pardon, offered upon certain conditions by special proclamation, in the Gazette, or otherwise; or, more commonly, under an implied promise of pardon, on condition of their making a full and fair confession of the whole truth. (3) In the former case, accomplices who comply with

Express or implied promise of pardon.

(1) Tongue's case. Kel. 17. 1 H. P. C. 303, S. C. Layer's case, 10 St. Tr. 259. 19 How. St. Tr. 373. S. C. Hawk. P. C. *b.* 2, c. 46, s. 135. Willes, 423, 425. 4 East, 180. Say. 289. R. *v.* Rookwood, 4 St. Tr. 681.

(2) 4 St. Tr. 594. S. C. 12 How. 1454, referred to by Lord Ellenborough in Despard's case, 28 How. St. Tr. 488.

(3) See Rudd's case, Cowp. 339. The practice of admitting the evidence of accomplices appears to

the proposed conditions, are entitled to pardon as a matter of right: in the latter case, they have an equitable title to be recommended to mercy, on a strict and ample performance of the condition, on which they are admitted as witnesses, to the satisfaction of the presiding judge. This equitable right cannot be pleaded in bar, or in any manner set up as a legal defence to an indictment charging them with the same offence, though it may be made the ground of a motion for putting off their trial, in order to allow time for an application to the proper quarter. (1) With regard to other offences with which the prisoner at the bar is not charged, an accomplice can derive no advantage from such equitable claim to a pardon: the claim must be considered as limited to the particular offence, for the prosecution of which his testimony is admitted. (2)

Equitable claim to pardon.

If an accomplice is himself separately indicted for the same offence, this will not affect his competency before conviction; (3) and even after conviction he is not incompetent, unless judgment has been passed upon him; for it is not the conviction but the judgment that creates the disability.

Practice, as to admitting accomplices.

It is not a matter of course, to admit a person charged with the commission of a crime, as a witness against his associates, not even after he has been allowed to give evidence before the committing magistrate: but if his evidence is deemed to be absolutely necessary in support of the prosecution, the proper course is to apply to the court, for permission to send him as a witness before the

Application to the Court.

have arisen from the ancient doctrine of approvement which has been long since obsolete. See as to Approvement, 2 Hale. P. C. 227, c. 29. Cowp. Rep. 335.

(1) Rudd's case, Cowp. 339.

(2) Lee's case, Russ. & Ry. C. C. 361. Brunton's case, Russ. & Ry. 454. It is entirely in the discretion of the judge in these cases, whether he will recommend the accomplice to mercy. As the accomplice is entitled to no protection in respect to other offences, he is not bound to answer questions relative to such offences on his cross-examination. West's case, O. B. Sessions, 1821. See *post*, Examination of Witnesses. It is not usual to admit accomplices who are charged with other felonies.

(3) Case of Bilbou and others, 2 H. P. C. 279. 1 H. P. C. 305. Gunston and Downs, 2 Roll. Abr. 685, pl. 3. Hawk. b. 2, c. 46, s. 99. Gilb. Evid. 118. Bath v. Montague, cit. Fortesc. Rep. 247. It was formerly thought, from analogy to the ancient doctrine of approvement, that an accomplice separately indicted for the same offence, could not give evidence against the others, unless he had first pleaded guilty to the indictment against him; Sir P. Crosby's case, 1 Hal. P. C. 303.

grand jury; and it is in the discretion of the judge, under all the circumstances of the case, whether he will grant or refuse an order. Where it is intended to make this application, the accomplice ought not to be included in the indictment; but where he has been included with his confederates in a joint indictment, he may still be used as a witness in some cases with the consent of the court. (1) Thus, in a prosecution for a conspiracy, a verdict of acquittal may be taken against some of the defendants before the opening of the case: and the defendants so acquitted may be called as witnesses for the prosecution. (2) And there seems to be no objection to the same course being adopted, with the permission of the court, in cases of felony. So also, if an accomplice, jointly indicted with others, plead guilty, and is fined by the court, and pays the fine, (in a case where such fine may be imposed by way of punishment, and where the suffering the punishment restores competency,) he may be called as a witness against the other prisoners. (3)

Accomplice jointly indicted.

If an accomplice, after having confessed the crime, and after having been received as a witness against his associates, breaks the condition on which he has been admitted, by refusing to give full and fair information, the court may direct a bill to be presented forthwith to the grand jury against him, or, if they are discharged, may commit him to prison, and he may be tried and convicted on his own confession.

Breach of compact.

On the trial of a person for a misdemeanor in receiving stolen goods, under the repealed statute, (22 Geo. 3, c. 58,) which authorized proceedings against the accessary, notwithstanding the principal felon might not have been convicted, or might not be amenable to justice, the party who had committed the theft, but had not been convicted, was held to be a competent witness for the prosecution, (5) and the same doctrine

Principal and accessary.

(1) See *infra*, comptency of parties to the suit.

(2) R. *v.* Rowland, Ry. & Mo. N. P. C. 401.

(3) A witness so circumstanced is competent for the other defendants, see R. *v.* Fletcher, 1 Stra. 633, and the principle is the same in regard to his competency for the prosectuion.

(4) Haslam's case, 1 Leach, Cr. Ca. 467. Price's case, *ibid.* 468, n. (1). Patram's case, 2 East, P.

would be applicable to the case of a receiver, prosecuted for a substantive felony under the provisions of the statute now in force on this subject. (1)

Accomplice admissible for prisoner.

As the infamy of an accomplice's character does not render him an incompetent witness for the prosecution, it follows, upon the same principle, that he will be also a competent witness on behalf of the prisoner, notwithstanding he may be himself charged on a separate indictment, unless he has been actually convicted and sentenced. (2) And upon a joint indictment against several prisoners, when there is either no evidence whatever, or very slight evidence against one of them, the court, in the exercise of its discretion, sometimes will direct a verdict to be given for him, and upon his acquittal admit him as a witness for the other prisoners. (3) In such a case, however, the witness stands wholly absolved from the charge, and can no longer be considered in the light of an accomplice.

Section II.

Of the Confirmation of Accomplices.

Rule of law.

Since accomplices are competent witnesses, it appears to follow as a necessary consequence, that if their testimony is believed by the jury, a prisoner may be legally convicted upon it, though it be unconfirmed by any other evidence. It is the peculiar province of the jury to determine upon the degree of credit to be attached to any competent evidence submitted to their consideration; and it has accordingly been laid down in many cases as a settled rule, that a conviction obtained upon the unsupported testimony of an accomplice is strictly legal. (4)

C. 782. So also it was decided that on an indictment on the stat. 4 Geo. 1, c. 11, for taking a reward to help to the discovery of stolen goods, the principal who had not been convicted might be called as a witness; Wild's case, 2 East, P. C. 782. See 7 & 8 Geo. 4, c. 29, s. 58.

(1) 7 & 8 Geo. 4, c. 29, s. 54.

(2) 2 Hale, P. C. 280. 2 Roll. Abr. 685 Fostesc. 246.

(3) 2 Hawk. P. C. c. 46, s. 98. R. *v.* Bidder, 1 Sid. 237.

(4) R. *v.* Atwood, Leach, Cr. Ca. 521. 7 T. R. 609. R. *v.* Durham, Leach, Cr. Ca. 538. 1 Hale, P. C. 303. See by Lord Ellenborough, R. *v.* Jones, 2 Camp. 132. 31 Howell's St. Tr. 325. 7 T. R. 609, S. P. By Lord Denman, 7 C. & P. 152, and by Alderson, B., 7 C. & P.

Practice.

But great injustice would result, if it were the practice of juries to convict upon the unsupported evidence of accomplices, whose testimony, though admitted from necessity, ought always to be received with great jealousy and caution. For upon their own confession they stand contaminated with guilt; they admit a participation in the very crime, which they endeavour by their evidence to fix upon the prisoner; they are sometimes entitled to reward upon obtaining a conviction, and always expect to earn a pardon. Accomplices are therefore of tainted character, giving their testimony under the strongest motives to deceive; and a jury would not in general be justified, in giving to such witnesses credit for a conscientious regard to the obligation of an oath. Sometimes they may be tempted to accuse a party who is wholly innocent, in order to screen themselves or a guilty associate; and if the prisoner has been their participator in crime, they may be disposed to colour and exaggerate their statement against him, with a view to hide their own infamy, or, by obtaining his conviction, to protect themselves from his vengeance, and secure the expected benefit (1). The doctrine, therefore, of a legal conviction upon the unsupported evidence of an accomplice, has been greatly modified in practice; and it has long been considered, as a general rule of practice, that the testimony of an accomplice ought to receive confirmation, and that, unless it be corroborated in some material part by unimpeachable evidence, the presiding judge ought to advise the jury to acquit the prisoner. (2)

Confirmation necessary.

273. On the general subject, as to the evidence of accomplices, with reference to the point of confirmation, see Sir T. Witherington's argument, 5 How. 176. Discussion in Sayer's case, 16 How. 158. Sir R. Atkyn's remarks, 9 How. 721, as to the evidence of an indicted accomplice. Murphy's case, 19 How. 702. Sir J. Copley's remarks in Watson's case, 32 How. 513. Lord Ellenborough's charge in Watson's case. 32 How. 583. Lord Tenterden's charge in the cases of the Cato-street Conspiracy, 33 How. 689.

(1) See Lord Hale's remarks on Tongues' case, 1 Hale, P. C. 304. In the earlier state trials the protection and countenance afforded by the judges to accomplices, spies, and informers was carried to a shameful length. The language of Lord Holt, as reported in the trials for the Assassination Plot, may probably be thought, at the present day, too favourable to accomplices. See particularly Charnock's case, 12 How. St. Tr. 1454.

(2) See the cases collected and stated in the text, *infra et seq.* On the subject of the Evidence of Accomplices, see a tract by the present Lord Chief Baron of Ireland, published in 1836, which contains an elaborate examination into the

It has been laid down, that this practice, of requiring some confirmation of an accomplice's evidence, must be considered in strictness as resting only upon the discretion of the presiding judge. (1) And this, indeed, appears to be the only mode, in which it can be made reconcileable with the doctrine already stated, that a *legal* conviction may take place upon the unsupported evidence of an accomplice. But it may be observed, the practice in question has obtained so much sanction from legal authority, that a deviation from it in any particular case, would be justly considered as of questionable propriety. Although the judge does not in express language declare, that a case depending on the unconfirmed evidence of an accomplice, is insufficient in law to warrant a conviction, but merely advises the jury not to place credit on the evidence; yet, as it is not likely an instance should arise, in which the jury would disregard the advice so given, and convict the prisoner, the substantial result appears to be nearly the same, as if the practice had depended upon a rule of law, instead of being only the exercise of the discretion of the presiding judge. The only distinction appears to be, that if the judge were to submit a case of this nature to the jury without any such recommendation, and a conviction ensued,—or if a jury were to convict in opposition to the recommendation of the judge—it could not properly be said in either case, consistently with the authorities on the subject, that the conviction would be illegal.

origin and history of this practice. According to the view of this learned writer, the practice of requiring confirmation cannot be traced back more than half a century. And he observes, that in the earlier cases which have been referred to as authorities for the practice, nothing can be found which leads to the inference of any general regulation on the subject, and that the credibility of an accomplice, whether confirmed or unconfirmed, appears to have been treated as a question for the jury. See Tongue's case, 6 How. St. Tr. 226, by Sir O. Bridgman, 1 Hale, P. C. 334. See also R. *v.* Charnock, 12 How. St. Tr. 1454. In this case, almost the only material witnesses were accomplices. The observations of Lord Holt, as to their competency have been cited in the text, *ante*, p. 26; they were said by Lord Ellenborough, in R. *v.* Despard, to comprise in a few words the good sense and sound law on the subject. In R. *v.* Rudd, Cowp. 339, Lord Mansfield said, "the single testimony of an accomplice is *seldom* of sufficient weight with the jury to convict the offender." The practice of requiring confirmation has been stated not to extend to misdemeanors; (see by Gibbs, Attor.-Gen., R. *v.* Jones, 31 How. St. Tr. 315); but there appears to be no sound reason for a distinction.

(1) By Lord Ellenborough, see R. *v.* Jones, 2 Camp. 132.

Principals in second degree.

In a recent case, in which the prisoner was indicted for manslaughter at a fight, it was objected, that all persons, who had been present, were principals in the second degree, and that their evidence ought to receive confirmation as in the case of accomplices, but the judge was clearly of opinion, they were not such accomplices as would require any further evidence to confirm them. (1) Such persons are manifestly not in the situation of accomplices.

Rule in case of several accomplices.

The practice of requiring confirmation, when the case for the prosecution is supported by an accomplice, applies equally, when two or more accomplices are brought forward against a prisoner. In a case in which two accomplices spoke distinctly to the prisoner's guilt, the judge directed the jury, that, if their statement were the only evidence against him, he could not advise them to convict; observing, that it was not usual to convict on the evidence of one accomplice without confirmation, and that, in his opinion, it made no difference, (with respect to the practice, and the propriety of convicting,) whether there were more accomplices than one. (2)

Evidence of accomplice's wife in confirmation.

It appears to have been held, in a late case, that a confirmation by the wife of an accomplice would be insufficient: it was said, that the wife and the accomplice must be considered as one for this purpose. (3) In that case, the circumstances of the case might have been such, as to warrant this decision. But it may often happen, that the evidence of the wife is so free from all suspicion, so independent of the evidence of the husband, so manifestly unconcerted and uncontrived, and so undesignedly corroborative of his evidence, that it might be proper not to consider the accomplice and his wife as one, but to act upon her evidence as sufficient confirmation.

Extent of confirmation.

From the anomalous nature of the rule of practice requiring confirmation, more especially from the circumstance that it is considered in law to rest merely upon the discretion of the

(1) R. *v.* Hargraves, 5 Car. & P. p. 170, by Patteson, J.

(2) R. *v.* Noakes, 5 Car. & P. 326. O. B. cor. Littledale, J., Bolland, J., and Alderson, J.

(3) R. *v.* Neale, 7 Car. & P. 168, by Park, J.

presiding judge, and that it appears in fact to have originated in the exercise of such discretion, it might be expected, that some difference of opinion would arise as to the nature and extent of the necessary confirmation. It is clearly unnecessary that the accomplice should be confirmed in every circumstance which he details in evidence; for there would be no occasion to use him at all as a witness, if his narrative could be completely proved by other evidence free from all suspicion.(1) The rule upon the subject which has generally been laid down is, that if the jury are satisfied, that he speaks truth in some material part of his testimony, in which they see him confirmed by unimpeachable evidence, this may be a ground for their believing, that he also speaks truth in other parts, as to which there may be no confirmation.(2) So far all the authorities agree; the only point on which any difference of opinion has been supposed to exist, relates to the particular part or parts of the accomplice's testimony, which ought to be confirmed.

Confirmation as to the individual prisoner.

In some cases it has been considered, that the confirmation ought to be such as affects the individual prisoner, and connects him immediately and directly with the crime; in other cases this description of confirmation has been considered unnecessary, and it has been held, that confirmation of the accomplice in some parts of his testimony, which do not connect him directly with the crime, may be sufficient to entitle the accomplice to credit, and to warrant the judge in leaving the case to the jury without a recommendation to acquit.

In the first case, in which this question appears to have been expressly raised, two prisoners had been convicted on the evidence of an accomplice, who was confirmed as to the circumstances attending the offence, but not as to the identity of the prisoners, and the judges were unanimously of opinion, that the

(1) See report of the Trials at York, on Special Commission, 1813, pp. 16, 17, 50, 150, 165, 201, particularly the charges of Thompson, C. B., in R. *v.* Swallow, and of Le Blanc, J., in R. *v.* Mellor.

(2) See authorities cited in the preceding note, and Despard's case, 28 How. St. Tr. 488, and by Lord Ellenborough, 31 How. St. Tr. 325. R. *v.* Barnard, 1 Car. & P. 88.

conviction was good, upon the general ground already mentioned; namely, that a prisoner may legally be convicted upon the unconfirmed evidence of an accomplice. (1) In a case occurring shortly afterwards, a similar decision took place, and, as it appears, on the same ground. At the trial the court observed, that the practice of rejecting an unsupported accomplice was rather a matter of discretion with the judge, than a rule of law; and the case having been left to the jury, and the prisoner convicted, the judges afterwards held the conviction good. (2)

Confirmation not necessary as to all the prisoners.

The same general doctrine was laid down in the case of *R.* v. *Jones* (3) by Lord Ellenborough, who there referred to a case, in which the judges were of opinion, that four prisoners had been properly convicted upon the testimony of an accomplice, whose evidence had been confirmed as to three of the prisoners, but not as to the fourth. And in the report of the York Trials under a special commission, it is laid down by C. B. Thompson, that "confirmation need not be of circumstances which go to prove, that the accomplice speaks truth with respect to *all the prisoners*, (when several are tried,) and with respect to the share they have each taken in the transaction; for if the jury are satisfied that he speaks truth in those parts in which they see unimpeachable evidence brought to confirm him, that is a ground for them to believe that he speaks also truly with regard to the *other prisoners*, as to whom there may be no confirmation. (4)

Again, in a later case, where an accomplice was confirmed as to one of several prisoners jointly indicted, but not as to the others, Bayley, J., told the jury, that if they were satisfied from the confirmation, that the accomplice was a credible witness, they might act on his testimony with respect to the prisoners,

(1) R. *v.* Atwood, Leach, C. C. 521. 7 T. R. 609.

(2) R. *v.* Durham, Leach, C. C. 538. It was, however, said in this case that the witness (a receiver) was rather an accessary after the fact than an accomplice in the fact. In R. *v.* Smith and another, reported in a note to the last case, where the only witness affecting the prisoners was an accomplice, the Court admitted the rule of law, that the uncorroborated testimony of an accomplice was legal evidence, but thought it too dangerous to suffer a conviction to take place on such testimony, and the prisoners were acquitted.

(3) 2 Campb. 132. 31 Howell's St. Tr. 325.

(4) R. *v.* Swallow. See *ante*, p. 34. (1)

as to whom he had not been confirmed, and they were convicted. (1) In Birkett's case, (2) the judges were of opinion, that an accomplice did not require confirmation as to the person charged by him, if he were confirmed in the other particulars of his statement. And in a very recent case at the Old Bailey, before Lord Denman, Mr. Justice Park, and Mr. Baron Alderson, when the counsel for the prosecution stated, that he should not be able to confirm an accomplice, who was to be called as a witness, with regard to the persons of the prisoners, but only as to the general circumstances of the case, Lord Denman said, he considered, and he believed his learned brothers concurred with him, that it was altogether for the jury, who might, if they pleased, act on the evidence of the accomplice without confirmation; but observed, that a person so situated, would not be likely to receive any great degree of credit. (3)

Some late cases as to the confirmation requisite.

In the case of *R.* v. *Addis*, (4) an accomplice, who was the principal witness, was corroborated as to collateral facts, none of which tended to connect the prisoner with the accomplice or with the transaction: Mr. Justice Patteson observed, that the corroboration ought to be as to some fact or facts, the truth or falsehood of which would go to prove or disprove the offence charged against the prisoner. And in a later case, on an indictment against two persons, Mr. Baron Alderson pointed out the distinction between confirmation as to the circumstances of the felony, and confirmation affecting the individuals charged; the former only proves that the accomplice was present at the commission of the offence; the latter shews that the prisoner was connected with it. (5) In summing up, the Judge observed, that confirmation merely as to the circumstances of the felony, was really no confirmation at all; that it

(1) R. *v.* Dawbar, 3 Stark. N. P. C. 34, and see R. *v.* Barnard, 1 Car. & P. 88, by Hullock, B.

(2) Russell & R., C. C. 252.

(3) R. *v.* Hastings, 7 Car. & P. 152. In this case, the evidence for the prosecution was gone into, after the statement that confirmation could not be given as to the persons of the prisoners; but the prisoners were acquitted, the subsequent evidence being contradictory, rather than confirmatory of the accomplice.

(4) 6 Car. & P. 388.

(5) R. *v.* Wilkes, 7 Car. & P. 272. See also R. *v.* Webb, 6 Car. & P. 595.

was true, the jury might legally convict on the evidence of an accomplice only, if they could safely rely on his testimony, but that he always advised juries not to act on the evidence of the accomplice, unless confirmed as to the particular person charged with the offence. After adverting to the facts of the case, as affecting the two prisoners, the same Judge stated to the jury, that if they thought the accomplice was not sufficiently confirmed as to one, they would acquit that one, and that if they thought he was confirmed as to neither, they would acquit both.

In another case, (1) where a thief and receiver were jointly indicted, the same learned judge expressed his opinion, that confirmation as to the thief did not advance the case against the receiver. And in a former case of a similar description, where there was a slight confirmation as to the receiver, but none as to the principal felon, Littledale, J. thought the case failed altogether, and that the accomplice ought to be confirmed as to the principal, before the jury could be asked to believe the witness's testimony as to the guilt of the receiver. (2)

On a review of the cases above cited, the utmost that can properly be deduced from them, seems to be, that on the trial of a prisoner against whom an accomplice appears as witness, there should be (for warranting a Judge in advising the jury to give credit to such a witness, and to warrant the jury in convicting,) some confirmatory evidence, that is, some proof independent of the evidence of the accomplice, from which it may be reasonably inferred, that the prisoner was concerned with the accomplice in the commission of the crime. And on the trial of several prisoners charged as being jointly concerned in a crime, to warrant the jury in convicting all the prisoners, there should be some unimpeachable independent evidence, from which the jury may reasonably be satisfied, that the accomplice speaks truly as to all the prisoners, and that they were all jointly concerned with him. But it would be going much too far, to

Result.

(1) R. *v.* Moores, 7 Car. & P. 270.

(2) R. *v.* Wells, Mood. & Ma. N. P. C. 326.

bind the discretion and judgment either of a Judge or a jury, by any fixed rigid rule as to the quantity or kind of confirmatory evidence which ought to be given. This, however, is settled, that the confirmation required should not be a confirmation merely of those parts of the narrative, which implicate the accomplice alone, and which may be true without involving the prisoners in any share of the transaction; but such a corroboration by unimpeached evidence, as may satisfy the jury, that those persons whom he charges with a participation of the crime, were, in truth, as he represents, his confederates and associates in guilt. (1) It appears to be settled also, by the authorities before cited, that the question, whether evidence, brought forward to confirm the accomplice, is a satisfactory and sufficient confirmation, is a question which the jury, and the jury only, are to determine.

SECTION III.

Of the Evidence of Informers and Self-discrediting Witnesses.

1. Informers.

There is another class of witnesses, who cannot properly be considered as coming within the description of accomplices, or as partaking of their criminal contamination; namely, persons, who have entered into communication with conspirators, with an original purpose of discovering their secret designs, and of disclosing them for the benefit of the public. (2) The existence of such original purpose on their part is best evinced by a conduct, which precludes them from wavering or swerving from the discharge of their duty, if they might otherwise be disposed so to do; as, when the witness voluntarily makes an early disclosure, and thenceforth acts in pursuance of directions given to him, as to the part which he is to bear in the general confederacy. Such a witness is not to be considered in the light of an accomplice, although perhaps, on other grounds, no small degree of prejudice or disfavour may attach to him; for certainly, no man of honour or right feeling would continue to associate with his companions, apparently forwarding

(1) See the report of the Trials at York, before referred to.

(2) Part of Lord Ellenborough's address to the jury in Despard's case, 28 How. St. Tr. 489.

the purposes of a conspiracy, with the intention afterwards of betraying, and giving them up to justice. Whatever may be the merit or demerit of this species of conduct on other grounds, such a witness is not, strictly speaking, an accomplice.(1) In prosecutions under the laws against coining and uttering counterfeit money, the proof of the offence often rests in a great measure on the testimony of some person, employed by the agents of the Mint for the purpose of obtaining the counterfeit coin under feigned pretences. This testimony is usually supported, in some material facts, by other unimpeachable evidence.

2. Witness alleging his own dishonesty.

The objection to the competency of informers, on the ground of being entitled to a penalty on the conviction of the offender, against whom they give information, will be considered in another part of this Work.

Mr. Justice Lawrence observes, (2) that the constant practice of examining accomplices shews, that the mere circumstance of a man's having represented himself as having done things inconsistent with common honesty, is not sufficient to reject his testimony, however it may weaken and impeach it. The maxim of the civil law, *nemo allegans suam turpitudinem est audiendus*, would not admit of such a practice. But this maxim is of a nature so exclusive in it's operation, and at the same time so vague and undefined, that our Courts of law have properly rejected it as a rule of evidence.

Witness invalidating an instrument.

Indorser.

In the case of *Walton* v. *Shelley* (3) indeed, which was an action upon a bond, given by the defendant in consideration of the plaintiff's delivering up certain promissory notes, the Court of King's Bench held, that the indorser of one of the notes ought not to be allowed to prove the consideration of the note usurious, on a supposed principle of public policy, that no party who has signed a paper or deed, and has, by his signature, given it credit, shall ever be permitted to give testimony to in-

(1) See 28 How. St. Tr. 489.

(2) Jordaine *v.* Lashbrooke, 7 T. R. 601.

(3) 1 T. R. 296. "Testes qui adversus fidem suam testationis vacillant, audiendi non sunt," was the maxim of the civil law. Domat. book 3, tit. 3, sect. 6, art. 12.

validate that instrument. This appears to have been the first case in support of such a rule: but the contrary principle is now fully established.

In the later case of *Jordaine* v. *Lashbrooke*, (1) this subject was very fully discussed; and the court there determined,

Payee. that in an action on a bill of exchange against the acceptor, the payee, who was also indorser, was a competent witness for the defendant, to prove that the bill, which was unstamped, and purported to be drawn at Hamburgh, was, in fact, drawn in London, and therefore void for the want of a stamp. Nor is there any distinction with respect to negotiable or unnegotiable securities, when the point to be considered is the competency of the witness: for supposing what he has done, in putting such instruments into circulation, to be ever so great a fraud and ever so mischievous, he still is a witness unconvicted of any crime, and without interest, and not more devoid of principle than many who have been before mentioned as admissible. (2)

Person bribed. This rule applies to all cases, civil as well as criminal, in which a witness's character is open to objection from the turpitude or impropriety of his conduct. Thus in an action under the statute 2 Geo. 2, c. 24, for bribery at an election, a person who has received a bribe may be a competent witness against the defendant. (3)

Subscribing witness. And one who has set his name as subscribing witness to a deed or will, is admissible to impeach the execution of the instrument; (4) although his evidence is to be received with all the jealousy necessarily attaching to a witness, who, upon his oath, asserts that to be false, which he has by his solemn act attested as true. (5)

Other instances. In an action to recover the price of goods supplied to a ship,

(1) 7 T. R. 6. 601. Ashurst, J. *contra*. See Jones *v*. Brooke, 4 Taunt. 464. 1 Ves. & Beam. 208.

(2) 7 T. R. 611. By this case of Jordaine *v*. Lashbrooke, the case of Adams *v*. Lingard, 1 Peake, N. P. C. 117, and some other cases of the same kind are overruled.

(3) Bush *v*. Ralling, Say. 289, cited by Lord Mansfield, Cowp. 199. Mead *v* Robinson, Willes, 423, and n. (*c*) *ibid*. 425. Howard *v*. Shipley, 4 East, 180.

(4) Lowe *v*. Joliffe, 1 Black. Rep. 365. 7 T. R. 604, 611. 6 East, 195.

(5) 1 Ves. & Beam. 208.

against a party whose name appeared on the register as part owner, it was decided, that a witness, upon whose oath the register had been obtained, was competent to prove, that he had inserted the defendant's name therein without his privity or consent; and the objection, that the witness's evidence was at variance with his oath, would only affect his credit. (1) A person, who has joined in an assignment of a ship, is a competent witness to prove that, in point of fact, he had no property in the vessel at the time of the assignment. (2) A vendor of property is competent to prove, that he had no title in the lands pretended to be sold and conveyed. (3) And, as we have already seen, a witness who admits, that upon a former proceeding he swore falsely with regard to the matters upon which he is examined, is not incompetent, however the objection may affect his credit. (4)

CHAPTER V.

OF THE INCOMPETENCY OF WITNESSES FROM INTEREST.

THE fourth ground of incompetency is interest.

General rule.

It is a general rule, that all persons interested in the event of a cause, are to be excluded from giving evidence in favour of that party, to which their interest inclines them. This rule is founded upon a presumed want of impartiality in an interested witness. "When a man," says C. B. Gilbert, (5) "who is interested in the matter in question, comes to prove it, it is rather a ground for distrust, than any just cause of belief; for men are generally so short-sighted as to look at their own private benefit which is near to them, rather than to the good of the world, which is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such biassed testimony, than to believe it."

(1) Rands *v.* Thomas, 5 M. & S. 244.
(2) By Willes, J., 1 T. R. 301.
(3) Tillo *v.* Grevet, 2 Lord Raym. [illegible] 7 T. R. 609.
(4) R. *v.* Teal, 11 East, 309.
(5) Evid. (3 edit.) 122.

Objections against the rule.

The exclusion of witnesses on account of interest is much more frequent than for any of the grounds of incompetency before mentioned. The policy of the law on this subject is very questionable. The arguments for, and against, the rule, may be supposed to be as follows:—Those who argue against the existing rule as not just or sound, may deny the pretended principle of the rule, and insist, that there is no just ground for inferring, that, in the generality of instances, persons interested in the subject in controversy would be disposed, from a regard to their interest, to violate the duties of morality and religion, or to incur the penalties of the law by committing perjury; nor, if they should be so disposed, that they would be successful in imposing upon the judge and jury, after strict cross-examination, before the public, in open court; especially, if the judge and jury act upon that supposed principle of human nature, which is said to be the foundation of the rule, namely, that "there is more reason to distrust such biassed testimony, than to believe it:" where jealousy and distrust are likely to be so strong, the danger of being deceived will not be great. It may be remarked also, that it is not reasonable, and scarcely consistent, to exclude witnesses on account of some trifling pecuniary interest, so small perhaps as not to be supposed capable of producing a bias on their minds,—when yet others are freely admitted, though subject to the powerful influence of relationship, friendship, passion, or feeling: and that, at all events, the possibility of occasional risk in judicial inquiries, from the admission of interested witnesses, is a much less evil than that of counteracting and frustrating, in many instances, the great object to which all rules of evidence ought to be directed, namely, the discovery of truth. In proportion as the means of inquiry and information are shut out, the discovery and enforcement of truth must become more difficult. The inconveniences, also, necessarily arising out of the application of such a rule, are not to be overlooked. Of this nature are the difficulties and uncertainty occasioned by frequent reference to a great variety of decisions, which require considerable research, abound with many subtle distinctions, and occasionally by their contrariety create much legal doubt. It may also be remarked, that the numerous exceptions to the general rule,

which have been introduced, (especially in the administration of criminal justice, where offers of reward on conviction will not disqualify a witness for the prosecution), are so many arguments against the policy of such restrictions, and are not reconcileable with the principle of the rule itself. For these reasons, it would appear to be the wiser and better course, to admit the evidence of interested witnesses without exception, and to allow the objection to be urged against their credit, not against their competency.

Reasons for the rule.

The argument, in support of the existing rule, may be supposed to be to the following effect. It may be said, common experience shews, that the strict rule of law is seldom relaxed by allowing persons adversely interested (especially parties to a suit) to be examined as witnesses, without manifest danger of perjury on the one side or the other; and that the inconvenience of excluding witnesses, whose interest is of a trifling nature, is a necessary consequence of allowing the objection to prevail in any case. It may be argued, that there is no inconsistency in rejecting such witnesses, while others are admitted under the influence of relationship and other similar causes, the reasons for exclusion in the former case being inapplicable to the latter; the influence of relationship is various, uncertain, and capricious, while that which arises from interest is palpable and universal; no satisfactory line, therefore, could be drawn in the former case, while the latter admits of a precise and definite rule: it may be remarked also, that the objection arising from relationship would be irremovable, while that from interest may, in ordinary cases, be removed by release or payment. With regard to the argument, that the objection should be left in every case to the consideration of the jury, who will decide upon the credibility due to a witness, it may be said, that a jury is frequently composed of persons unskilled in discriminating between truth and falsehood, ignorant of the real characters of the witnesses, and allowed only a short time for deciding upon evidence. The practical inconvenience, it may be said, is by no means so extensive, as might at first be supposed; the strictness of the old law having been much relaxed

in modern times. (1) An interested witness may in general be rendered competent by means of a release: where the interest is trifling, no great hardship can arise from requiring it to be removed, and, in proportion as it increases in amount, there is the more reason for rejecting the witness, if his interest be not removed. It will generally happen, that the direct testimony of persons excluded for interest may be supplied by inferences from the circumstances of a case: and the practical consequence of the rule often is, that parties come to the trial prepared with unimpeachable evidence of a transaction, when otherwise they would produce witnesses, whose testimony might perplex or mislead a jury: so that, upon the whole, evidence is not lost, and it's character is improved.

If the summary here given is a fair representation of the arguments on each side of the question, the weight of the reasoning must be allowed to preponderate against the policy of the rule, that is, to be against the rejection of interested witnesses.

In treating of the incompetency of witnesses from interest, it is proposed to consider the subject in the following order:

1st. Of the rule of incompetency from interest, considered with reference to parties to the suit in civil proceedings.

2dly. Of the same rule, considered with reference to parties in criminal prosecutions.

3dly. Of the same rule, considered with reference to the husband or wife of a party to the proceedings.

4thly. Of the same rule, considered with reference to persons, not parties to the suit.

5thly. Of certain exceptions to the general rule of incompetency from interest,—and,

Lastly. Of the mode of objecting to a witness on account of interest, and of the means by which the competency of an interested witness may be restored.

(1) A material improvement in this respect has been effected by the statute, 3 & 4 W. 4, c. 42, s. 26, 27, which will be afterwards mentioned.

SECTION I.

Of the Rule of Incompetency from Interest, considered with Reference to the Parties in Civil Proceedings.

Principle of incompetency of parties.

IT has been stated to be the general rule, that all persons, interested in the event of a cause, are to be excluded from giving evidence in favour of that side to which their interest inclines them. The persons who have the most immediate and obvious interest in the event of a cause, are the parties to that particular cause; and they are therefore, in general, incompetent witnesses. In considering this branch of the subject, it will be convenient to treat; 1st, Of the incompetency of the parties in civil proceedings; and 2ndly, In criminal prosecutions. Their exclusion in both cases depends on the same general principle. In prosecutions, as well as in actions, the general rule is, that a person interested in the event is not competent. (1) In each case the competency or incompetency of the parties to give evidence depends upon the question, whether they are, or are not, interested in the event.

General rule.

The general rule is, that a party to the record, in a civil suit, cannot be a witness at the trial, for himself or for a joint suiter, against the adverse party. (2)

Ground of incompetency.

The incompetency of the parties to the record to give evidence in their own behalf, appears to be founded upon the sole ground of their being interested in the event. In delivering the judgment of the Court of Common Pleas in a recent case, (3) Lord C. J. Tindal says, "No case has been cited, nor can any be found, in which a witness has been refused upon the objection, in the abstract, that he was a party to the suit. On the contrary, many have been brought forward, in which parties to the suit, who suffered judgment by default, have been admitted as witnesses against their own interest: and the only inquiry seems

(1) See per Cur. 9 B. & C. 560.
(2) 1 Vernon, 230. 1 P. Wms. 398, 399. 596. Gilb. Evid. 116.
(3) Worrall *v.* Jones, 7 Bing.

to have been in a majority of cases, whether the party called was interested in the event, or not: the admission or rejection of the witness has depended upon this inquiry." So Lord C. B. Gilbert, after stating the general rule, that no man interested in the matter in question can be a witness for himself, observes, that it is a corollary to be deduced from this rule, "that the plaintiff or defendant cannot be a witness in his own cause, for these are the persons who have a most immediate interest." (1)

Nature of the interest.

The parties to the record in civil suits are in general interested both in the question at issue in the cause, and in the question of costs, which commonly depends upon the event of the cause. It is not necessary that they should be interested in both these questions: if they are interested in either point of view, they will be incompetent witnesses; it seldom, therefore, happens, that they are competent to give evidence.

Members of corporations.

The same principles, which render parties to the record incompetent, when suing in their individual capacities, apply to members of a corporation suing in its corporate name. Thus, in ejectment for lands of a corporation, a member of the corporation is an incompetent witness, if he be interested either in the lands sought to be recovered, or in the general funds of the corporation which are liable to the costs of the action. (2) It appears to have been at one time considered, that in cases of this nature, an individual corporator might be admitted, if the interest were of a very trifling nature: thus, in the case of the *King* v. *The Mayor and Commonalty of London*, (3) and in that of the City of London, concerning water bailage, (4) it was held, that in a question concerning the right of the corporation to tolls, an individual corporator might be received as a witness for the corporation, because, it was said, the tolls would be received for the benefit of the whole corporate body, and the interest of any individual must therefore be inconsiderable. But as it has been fully settled by subsequent cases, that any

(1) Gilb. Evid. 132, (3d edit.) See also by Lord Hardwicke, 3 Atk. 401.

(2) Doe v. Tooth, 3 Y. & J. 19.

(3) 2 Lev. 231.

(4) 1 Ventr. 351. And see Corporation of Sutton Coldfield v. Wilson, 1 Vern. 254.

interest in the event of the suit, however minute, will render a witness incompetent, the above decisions may be considered as overruled. (1)

Interest in costs.

Where the party to an action has no interest in the question in dispute, but is suing as a mere trustee for another person, he will nevertheless, in general, be incompetent, on the ground of liability to costs. (2) A *prochein ami*, or guardian, suing for an infant, is incompetent upon this ground. (3) Persons appointed governors and directors of the poor of a parish, under an act of parliament, which authorizes them to assess rates on the inhabitants, but, in case of appeal, makes them liable for costs, to be indemnified out of the parochial funds, are not competent witnesses on the trial of such appeal, being individually liable to costs, in the first instance. (4) In a late case, where parochial trustees were empowered by statute to sue in the name of their treasurer, or clerk, and the act contained a provision for re-imbursing such treasurer, or clerk, his costs out of the rates, Lord Tenterden appears to have considered, that, in an action brought in the name of the treasurer, a trustee was an incompetent witness for the plaintiff, although the trustees took no benefit under the statute, and rated parishioners were thereby made competent witnesses. (5)

Party competent, when not interested.

As the objection to the competency of a party to the suit is founded, not upon the abstract ground of being a party, but upon the ground of being interested, it follows, that if a

(1) See Bul. N. P. 290. Burton *v.* Hinde, 5 T. R. 174. Doe *v.* Tooth, 3 Y. & J. 19.

(2) Per Cur. Dowdeswell *v.* Nott, 2 Vern. 317. Davis *v.* Morgan, 1 Tyrwh. 457. 1 C. & J. 87. Bauerman *v.* Radenius, 7 T. R. 668. Phillips *v.* Duke of Buckingham, 1 Vern. 230, and see the cases cited 13 Price, 512.

(3) Clutterbuck *v.* Lord Huntingtower, 1 Stra. 505. James *v.* Hatfield, 1 Stra. 548. Hopkins *v.* Neal, 2 Stra. 1025. Gilb. Evid. 107.

(4) R. *v.* St. Mary Magdalen, Bermondsey, 3 East, 7.

(5) Whitmore *v.* Wilks, Mo. & Ma. N. P. C. 214. The ground of Lord Tenterden's opinion seems to have been, that the trustees were the substantial plaintiffs. The witness was admitted, leave being given to move, and a rule nisi for a new trial appears to have been granted on this, and another point, but the final result does not appear. See Fletcher *v.* Greenwell, 5 Tyrwh. 316, where it was decided, that a parochial director was competent, under circumstances similar to those of the preceding case.

person, tendered as a witness, has no interest whatever in the event of the suit, he will be competent, although he is a party to the record. Thus, in an action against parties in a corporate capacity, who had no individual interest in the question in dispute, and were not personally liable to costs, Lord Kenyon admitted several of the defendants, as witnesses against the claim of the plaintiff. (1) And indeed, it appears to have been always considered, that, in actions by or against corporations, individual corporators are competent, where they have no interest in the event of the suit: for in all these cases the objection to the witness has been, not that he was a member of the corporation, and consequently one of the parties to the suit, but that he had some personal interest which disqualified him from giving evidence. So in proceedings against the inhabitants of parishes and other districts, relative to settlements, repairs of highways and bridges, and other questions affecting the rates of particular districts, rated inhabitants have been always adjudged to be incompetent, (unless rendered competent by statute), by reason of their interest in the event of the suit: but inhabitants not rated have no such interest, and have been always considered competent, although the particular proceedings, in the course of which their evidence was admitted, were nominally by, or against, all the inhabitants of the district. And even rateable inhabitants are not incompetent, if not actually rated. (2)

Corporations.

Inhabitants of parishes, counties, &c.

Co-defendant.

The preceding observations relate to the incompetency of parties, who retain their original situation assumed at the commencement of a suit. But questions, with regard to the competency of parties to the record, have frequently arisen in actions against several defendants, one of whom has been placed in a different situation on the record from that of his co-defendants, in consequence of a judgment by default, or *nolle prosequi*, or a separate verdict on the trial. In some of these cases, the question of the witness's competency is rather complicated and difficult, and it is perhaps not easy

In case of judgment by default, or *nolle prosequi*, or separate verdict.

(1) Weller *v.* Governors of Foundling Hospital, Peake, N.P.C. 153. See 3 Atk. 401.

(2) See Marsden *v.* Stanfield, 7 B. & C. 818.

to reconcile all the decisions on the subject; but in all of them, the inquiry has been, whether the effect of the particular proceeding, that has taken place with regard to the witness, has been to remove his interest at the trial; if such appears to be the case, he will be competent: but if he still appears to have an interest in the determination of the cause, in favour of the party on whose behalf he is tendered as a witness, he will be incompetent.

1. *Of the Effect of a judgment by default.*

Action on *contract.*

One defendant suffering judgment by default, incompetent for another defendant.

In an action against two defendants on a joint contract, it was ruled by Lord Kenyon, that one of the defendants, who had suffered judgment by default, was incompetent as a witness, in behalf of the other defendant, to negative the contract; for if negatived as to one, the contract failed as to the other, and the plaintiff could make no use of his judgment by default against the witness, who was consequently interested in obtaining a verdict for the defendant. (1)

It was decided, in the cases of *Brown* v. *Brown and others*, and *Green* v. *Sutton and others*, (2) that a defendant so situated is not competent for the plaintiff; because, if the plaintiff should succeed in the action, the witness would be entitled to contribution from his co-defendant, but if the plaintiff fail, the witness would himself be liable for the whole demand. And in another case, (3) a witness, similarly situated with the witnesses in the two preceding cases, was considered incompetent for the plaintiff, although he had been released by the plaintiff as to all actions except the action on trial.

One of several defendants suffering judgment by default, competent for plaintiff.

But in the case of *Worrall* v. *Jones*, (4) which was an action on a bond, against a principal and two sureties, the Court of Common Pleas decided that a defendant, the principal in the bond, who had suffered judgment by default, would be a com-

(1) Brown *v.* Fox, Ex. Sum. Ass. 1789. 8 Taunt. 141

(2) Brown *v.* Brown, 4 Taunt. Green *v.* Sutton and others, 2 Ro. & M. 270. These cases have been overruled by the case of Pipe *v.* Steeland Harvey, stated *infra*, p 50.

(3) Mant *v.* Manwaring, 8 Taunt. 139. 2 Moore, 9, S. C.

(4) Worrall *v.* Jones, 7 Bing. 395.

FOLLOWING PAGE(S) MUTILATED

petent witness against the other defendants. In giving judgment in this case, Lord Chief Justice Tindal said, no objection could arise on the ground that the witness was interested to procure a verdict for the plaintiff, inasmuch as, being the principal debtor, he could not call for contribution from the other defendants, but was himself ultimately liable to all the damages and costs recovered in the action; and that there was no case which decided that a witness would be disqualified merely from being a party to the suit, if he was not interested in giving his testimony.

In the case of *Pipe* v. *Steel and Harvey*, decided in Hilary Term, 1842, (1) the question whether one of two defendants, who had suffered judgment by default, was a competent witness for the plaintiff, in an action upon a contract, was decided by the Court of Queen's Bench. Lord Denman, in delivering the judgment of the court, said, "The objection, of his being a party to the record, has been deliberately overruled in *Worrall* v. *Jones*, a case of great authority, in which Lord C. J. Tindal gave the unanimous judgment of the Court of Common Pleas, that a party to the record may be examined as a witness, provided he be disinterested. In the case of *Green* v. *Sutton*, Lord Abinger rejected a person so situated, on the express ground that having admitted himself liable by suffering judgment by default, he would be directly interested in throwing a part of that burden on another; which was also the ground of the decision in *Brown* v. *Brown*. And if the joint liability were an established fact, at the time when the witness is called, this argument would be conclusive; but, on the contrary, it is the very fact in issue, and the witness's interest is that it may not be established, because unless it is, no judgment can be had against him in this action. He may, indeed, after suffering judgment by default, have little ground to expect ultimately to escape the consequences of a joint liability; but his conduct even in that respect might admit of explanation.—Upon the whole, it appears that the reason for excluding the witness fails, and that he ought to be received."

Action on *tort*.

In actions of tort against several defendants, the situation

(1) Judgment delivered Jan. 14, by Lord Denman.

Co-defendant suffering judgment by default,

of a defendant, who has suffered judgment by default, varies from that of a defendant, who has suffered judgment by default in an action against several parties upon a joint contract. In the latter case, if the plaintiff fails upon the trial against the other defendant, his judgment will, in general, be rendered wholly unavailing; but in the former case, he will, in general, be entitled to enforce his judgment against the party who has suffered it to pass against him, although the other defendants who have pleaded may obtain a verdict. In the case of *Ward* v. *Haydon*, (1) it was ruled by Lord Kenyon at *nisi prius*, that a defendant in an action of trover, who had suffered judgment by default, was a competent witness for his co-defendant, who had pleaded not guilty. Lord Kenyon observed, that by reason of the judgment by default, the cause was at an end, with regard to the witness: that he was not liable to the costs of the issue tried against the other defendant, and was not himself released, whatever might be the event of that issue. The same point appears to have been ruled at *nisi prius* in the same way, in an action of trespass. (2)

competent *for* co-defendant.

But *qu.* if interested in assessment of damages.

But there may, perhaps, be some doubt, whether the decisions, just adverted to, are to be considered as furnishing a general rule, applicable to all cases, in which one of several defendants in an action of tort has suffered judgment by default. According to the ordinary practice, there is but one assessment of damages in cases of this nature, and the same jury, that try the issue between the plaintiff and the defendants who have pleaded, also assess the damages against the defendant, who has suffered judgment by default, and the other defendants if they are found guilty. It is obvious, that a defendant, who has suffered judgment by default, has an immediate interest in reducing the amount of damages, and therefore, as it should seem, could not be called for this purpose. And in a late case, (3) in which a defendant, who had suffered judgment by default in an action of trespass, was called as a witness for two co-defendants, who had pleaded, Best, C. J., was of opinion,

(1) Ward *v.* Haydon, 2 Esp. N. P. C. 553. Peake's Add. Ca. 126, S. C.

(2) *Anon.* 2 Campb. 334, n. by Wood, B. See also by Le Blanc, J., 2 Campb. 333, n.

(3) Mash *v.* Smith, 1 Car. & P. 577.

that the witness was incompetent; for if his evidence were admitted on behalf of the other defendants, it might give such a complexion to the case as to operate in reduction of the damages against himself. (1)

Incompetent *against* co-defendant.

Whatever may be the true rule with regard to the competency of one of several defendants, who has suffered judgment by default, as a witness for his co-defendants, it has been ruled at *nisi prius*, that he will not be an admissible witness for the plaintiff against them. In the case of *Chapman* v. *Graves*, (2) which was an action of trespass against three, Mr. Justice Le Blanc rejected one of the defendants, who had suffered judgment by default, and was tendered as a witness against the others who had pleaded, and he distinguished the case from *Ward* v. *Haydon*, by observing, that there the witness was called to *exculpate* his co-defendant, but that here he was called to *inculpate* the others. He also observed, that the general rule was, that a party to the record was not an admissible witness, and that where there had been an innovation of the rule, he was not disposed to extend it. (3)

Trespass.

In a joint action of ejectment against two defendants, a de-

(1) The Lord Chief Justice however, admitted the witness, with leave to move if the result of the cause should render it material. The result does not appear from the report, nor does it appear whether the nature of the testimony of the witness was such as might tend to reduce the damages. In Ward *v.* Haydon, cited *ante*, p. 51, the action was trover for a carriage, and the witness was called, not upon any point connected with the value of the carriage, but only to shew that the conduct of the other defendant was not such as amounted to a conversion by him. See the note in the report of this case in Peake's Add. Ca. 126, with reference to the question whether, according to the practice of the Court, the witness was not in fact interested in regard to the costs. In addition to the difficulty adverted to in Mash *v.* Smith, there appears to be another, which may perhaps, in some cases, prevent a defendant, who has suffered judgment by default, from giving evidence in behalf of a co-defendant who has pleaded; for it should seem, that where the plea set up by the latter is of such a nature as to shew that the plaintiff could have no real cause of action against any of the defendants, the defendant, who has suffered judgment by default, will be entitled to the benefit of the defence if established. See Tidd's Prac. 9 edit. 894, 895. 2 Stra. 1108, 1222. Where the defence of the party, who has pleaded, goes merely to his own personal discharge, without affecting the plaintiff's right of action against his co-defendant, of course this difficulty would not arise.

(2) Campb. 333, n.

(3) These expressions would appear to countenance the notion of a technical rule disqualifying parties to the record as parties, without reference to the question of interest. But see Worral *v.* Jones, *supra*, 50, and 7 Bing. 398.

fendant who suffers judgment by default has been considered a competent witness for the plaintiff, to prove the other defendant in possession. (1) Lord Ellenborough in this case said, that a verdict for the plaintiff would not prevent him from suing the witness for mesne profits; and that the only supposed interest imputable to the witness was the possibility, that the plaintiff would sue the other defendant alone, but that this remote and possible interest would not render the witness incompetent.

Competent for plaintiff.

In ejectment.

It appears also that one of several defendants in ejectment, in possession of part of the premises, and who suffers judgment by default as to such part, will be competent to give evidence for a co-defendant who pleads. In Buller's *Nisi Prius*, (2) it is said that if a material witness for the defendant in ejectment be also made a defendant, the right way is for him to let judgment go by default; but if he plead, and by that means admit himself to be tenant in possession, the Court will not afterwards upon motion strike out his name. In such a case, adds Mr. J. Buller, if he consent to let a verdict be given against him for so much as he is proved to be in possession of, I see no reason, why he should not be a witness for another defendant. (3)

Competent for co-defendant, in ejectment.

2. Of the effect of a nolle prosequi.

It has been decided, in several cases, that if one of several defendants, in an action on a joint contract, pleads bankruptcy and certificate, and the plaintiff, instead of denying the plea, admits it, and enters a *nolle prosequi* as to the defendant so pleading, such defendant will be a competent witness for a co-defendant who has pleaded to the merits. (4) In a late case, this point arose in an action against two persons, who had been partners upon a bill of exchange accepted during the partnership, and Lord C. J. Tindal, delivering the judgment of the Court of Common Pleas, said, that the only question in

Plea of bankruptcy.

Defendant competent for co-defendant.

(1) Doe *v.* Green, 4 Esp. 198.
(2) P. 285.
(3) B. N. P. 286, citing Dormer *v.* Fortescue, 9 Geo. 2. Willes, 343, n.
(4) Said by Park, J. (7 Taunt. 607) to have been so ruled by Le Blanc, J. See also Moody *v.* King, 2 B. & C. 558. Melver *v.* Huuble, 16 East, 171.

the case was, whether the defendant, who had pleaded, would be entitled to sue the witness, either at law or equity, for contribution; that it was clear, he might have done so before the stat. 49 Geo. 3, c. 121, s. 8, but that since that statute the solvent partner was entitled, and consequently obliged, to prove under the commission, and that the certificate would be a bar to any action for contribution: the bankrupt, therefore, being discharged from all liability, was a competent witness for the defendant. (1)

Effect of *nolle prosequi*, in such cases.

It may probably be considered, that in these cases, the effect of the *nolle prosequi* is entirely to put an end to the proceedings in the action, as far as the particular defendant is concerned, and that consequently, although he was originally one of the parties to the suit, he cannot be considered as a party at the time of the trial. At all events, upon the *nolle prosequi* being entered as to him, he ceases to have any immediate interest in the action, and the question of interest in the event could only arise in respect of a liability over to the other defendant, for whom he is called as a witness.

Defendant pleading bankruptcy not competent for co-defendant, where no *nolle prosequi*.

Where no *nolle prosequi* is entered as to the witness, his situation is obviously different. In an action of assumpsit on a joint contract against two defendants, one of whom had pleaded bankruptcy, and the other had pleaded non-assumpsit, and issue had been joined on both pleas, Lord Kenyon refused to admit the former as a witness for the latter, although it was proposed to give releases from the defendant, who had so pleaded, to the bankrupt, and from the bankrupt to his assignees: he said, that the witness was liable to the costs of the action, and that this was an interest which could not be released. (2)

In a subsequent case of the same description, before Lord

(1) Aflalo *v.* Fourdrinier, 6 Bing. 306. The bankrupt had released his surplus, and thereby removed any interest he might have had in increasing the fund of his estate by defeating a demand in respect of which the solvent partner might have proved for contribution. See, as to the effect of the 49 Geo. 3, c. 121, s. 8, in restoring competency, Moody *v.* King, 2 B. & C. 558. *Ex parte* Young, 2 Rose, B. C. 40. Wood *v.* Dodson, 2 M. & S. 195. The provisions of this statute are contained in sect. 52 of 6 G. 4, c. 16.

(2) Raven *v.* Dunning, 3 Esp. 25.

Ellenborough, the certificate of the bankrupt was put in, and it was proposed that a verdict should be taken in his favour, and that he should then be called as a witness for the other defendant, but Lord Ellenborough refused to permit this course to be taken, and the witness was rejected. (1) So in a later case, (2) in which two out of five defendants in an action of assumpsit pleaded bankruptcy, and the plaintiff had proved under their commission, thereby electing to take the benefit thereof, it was held, by the Court of Common Pleas, that these defendants, having substantiated the plea, were not entitled to a separate verdict in their favour, in order that they might be called as witnesses, on behalf of the other defendants, who had pleaded the general issue. It was contended in this case, that the proposed witnesses were disinterested, inasmuch as they were entirely discharged from either contribution or costs by the stat. 49 Geo. 3, c. 121, and that, having proved their plea, they were entitled to a verdict; but the Court held otherwise: Gibbs, C. J., said he knew no rule of law which required a judge to stop in the middle of a cause, to consider separately the case of certain of the defendants, in order that they might be made witnesses for the other defendants. (3)

Separate verdict not allowed.

But in a more recent case, at *nisi prius*, where one defendant had pleaded bankruptcy, and the other to the merits of the action, and it was proposed, that, on proof of the bankrupt's certificate, a verdict should be taken for him, in order that he might appear as a witness for his co-defendants, Parke, J. permitted this course to be adopted, and the witness was admitted. (4) If the plaintiff consents to a verdict being entered

Separate verdict allowed.

(1) Currie *v.* Child, 3 Campb. 283.

(2) Emmett *v.* Butler, 7 Taunt. 599. 1 Moore, 332, S. C.

(3) 7 Taunt. 606.

(4) Bate *v.* Russell, Mo. & Ma. N. P. C. 332. In this case upon the preceding cases of Raven *v.* Dunning, Currie *v.* Child, and Emmett *v.* Butler, being cited as authorities against the admissibility of the witness, Parke, J., observed, that they were no longer in point, in consequence of the altered state of the bankrupt laws, but that he would give no opinion on the competency of the witness, but would admit him, giving leave to move. No motion was made on the question of competency, and the point appears the same as in Aflalo *v.* Fourdrinier, 6 Bing. 306, *supra*, 54. It is observable, however, that the cases of Currie *v.* Child and Emmett *v.* Butler, both occurred after the 49 Geo. 3, c. 121, (by the operation of which statute it was decided, that the bankrupt

in his favour, and the judge has no reason for disapproving of that course, why should not such defendant, who is discharged of all liability, be considered competent on behalf of the plaintiff? If he is not any longer interested in the suit, he is not disqualified, and ought to be admitted.

Effect of separate verdict, in restoring competency. See *infra*.

The effect of the separate verdict appears to be the same as that of a *nolle prosequi*, in putting an end to the proceedings, as far as the bankrupt is concerned, and in depriving him of all immediate interest in the result with regard to the other defendants. It will be seen, presently, that one of several defendants has been frequently made a competent witness for his co-defendant, by the effect of a separate verdict in an action of *tort*, but the case just cited appears to be the first, in which this course has been allowed to be taken in an action on a contract. It would however appear to be difficult to assign any good reason for not permitting the practice to be adopted in actions of contract, and it is obvious, that if it were not allowed, it would be in the plaintiff's power to deprive the defendant, who had pleaded to the action, of the benefit of the evidence of the bankrupt, by joining issue on the plea of bankruptcy, instead of entering a *nolle prosequi*, although there might be no pretence for questioning the truth of the plea.

We shall now proceed to notice the cases, in which a defendant in an action of tort may be rendered a competent witness for his co-defendants, by the effect of a separate verdict at the trial.

3. *Of the effect of a Separate Verdict.*

Co-defendant in *tort*, wrongfully sued, competent for the rest.

The general principle, which governs the decisions on this subject, is laid down by C. B. Gilbert, as follows: If any person be arbitrarily made a defendant, to prevent his testimony in the cause, the plaintiff shall not prevail by that artifice, but the defendant, against whom nothing is proved, shall notwithstanding be sworn; for here the defendant does not swear in

became competent in Aflalo *v.* Fourdrinier), but these cases seem to have proceeded less upon the ground of incompetency in the witness, than upon the propriety of allowing a separate verdict to be taken in his favour at the trial.

his own justification, but in justification of another with whom he was unnecessarily joined; and if this were not allowed, the plaintiff might turn all the several witnesses into defendants, and thus might be able to prove what he pleased, without contest. (1) But this rule must be understood to apply to those cases only, where there is no kind of evidence against such defendant; for it is laid down, that if there be any evidence against him, though not enough in the judge's opinion to convict him, he cannot be called as a witness, but his guilt or innocence must await the event of the verdict, the jury being judges of the fact. (2)

Separate verdict taken.

In order to render a party, so unnecessarily sued, competent to give evidence, the jury are directed to find a separate verdict in his favour, and, the cause being then at an end with respect to him, he may be called as a witness on behalf of a co-defendant. Some contrariety of practice has prevailed with respect to the particular stage of the cause, at which the separate verdict may be taken in favour of the party or parties unnecessarily sued. In some cases the rule laid down has been, that one of several defendants is not entitled to a verdict separately from the rest, immediately at the close of the plaintiff's case, but must wait until the whole of the case of the other defendants, exclusive of the evidence which he may have to give, is entirely finished. (3) But it is now settled, by the unanimous opinion of all the judges, that a defendant against whom the plaintiff has adduced no evidence, is entitled to a separate verdict immediately upon the close of the plaintiff's case. (4)

As to time of taking verdict.

(1) Gilb. Evid. 117. Bul. N. P. 285. See *ante*, p. 55.

(2) *Ibid.*

(3) Wright *v.* Paulin, Ry. & Mo. N. P. C. 128. Huxley *v.* Berg, 1 Stark. N. P. C. 98. Wynne *v.* Anderson, 3 Car. & P. 596.

(4) By Parke, J., 6 Car. & P. 215. Child *v* Chamberlain. And see Russell *v.* Rider, 6 Car. & P. 416. It has already been observed, that the cases, in which a separate verdict has been allowed to be given for one of several defendants, in order to enable him to appear as a witness for the rest, have been for the most part cases of actions of *tort*. It is obvious, that the question can rarely arise in actions of contract, except in cases where one of several defendants pleads a plea of personal discharge, such as bankruptcy and certificate. See *ante*, 55. And see Bate *v.* Russell, Mo. & Ma. 332, where a separate verdict was allowed to be taken.

Party named in the declaration as a trespasser, but not made a defendant.

In an action of tort, where a particular person is named in the declaration, as having been engaged in committing the alleged injury, but has not been made a defendant in the suit, he will be a competent witness. Thus in trespass, where the declaration alleged, that the defendant, together with A.B., committed the alleged wrong, and the defendants pleaded, that A. B. paid the plaintiff a guinea in satisfaction, and issue was joined thereon, the defendant called A. B. as a witness, and Eyre, C. J., permitted him to be examined. (1) It is obvious, that in this case, although the party is named in the record, he is not a party to the suit, and the grounds that would disqualify a co-defendant in trespass from giving evidence, would not apply to the witness in the preceding case, for not being a party, he could not be immediately affected by the event of the suit, in regard either to the damages sought to be recovered, or to the costs; if the plaintiff succeeded, the witness would not be liable to an action for contribution, for there is no contribution between wrongdoers; and if the plaintiff failed, and afterwards sued the witness, the verdict in the former action would not be evidence in the witness's favour. It appears, however, to have been considered that if the plaintiff could prove a party named in the *simul cum.* guilty, and shew that he was made a party, by producing the original or process against him, and proving an ineffectual endeavour to arrest or serve him, the defendant would not be allowed to have the benefit of his testimony. (2)

Witness sued by mistake, how made to give evidence.

Where a material witness for the plaintiff is by mistake made a defendant, the Court will on motion suffer his name to be struck out of the record, even after issue joined, and then he may be examined; (3) or in the case of an information, the

(1) Poplett *v.* James, B. N. P. 286.

(2) Reazon *v.* Ewbank, B. N. P. 286. See also by Lord Hardwicke, Lloyd *v.* Williams, R. T. H. 123. In the latter case, the plaintiff had proceeded to outlawry against the proposed witness, and he was rejected. See also Hill *v.* Fleming, R. T. H. 264. These cases appear to have proceeded on the ground, that a co-trespasser, who had been originally made a party to the suit upon sufficient grounds, ought not to be allowed to come forward as a witness to defeat the plaintiff, after he had prevented the plaintiff from proceeding effectually against him, by his own wrongful act in eluding the process. See 1 Atk. 452.

(3) 1 Sid. 441, Bul. N. P. 285.

Attorney General may enter a *nolle prosequi* as to one of the defendants, who may then be a witness. (1)

In an action of ejectment, if a material witness for the defence has been made a co-defendant through mistake, it has been said that after plea pleaded the Court will not, upon motion, strike out his name. (2) It has been shewn, that he will be a competent witness, if he suffer judgment by default. (3) And Mr. Justice Buller observes, (4) with reference to the case of a tenant in possession of part of the premises, "if he consent to let a verdict be given against him for so much as he is proved to be in possession of, I see no reason why he should not be a witness for another defendant." How, in ejectment.

4. Of the rule, that a party is not compellable to give evidence against himself.

The general rule, respecting the incompetency of parties to a suit as witnesses, has been before laid down; namely, that a party to the record, in a civil suit, is not competent to give evidence for himself or for a joint suitor, against the adverse party. (5) By the general rule also, a party to the suit is not compellable to give evidence against himself.

A party to the suit is never compelled to give evidence for the adverse party against himself. Inconvenience from the exclusion of evidence of this description is not extensively felt in practice; as, notwithstanding the ordinary tests to which the testimony of witnesses is subjected, parties would perhaps rarely venture to avail themselves of the testimony of their adversaries. This rule seems to have originated from some apprehension of vexation or inconvenience which might ensue, if a person were bound to prejudice or accuse himself. It may be doubted, whether it is altogether consistent with the general administration of impartial and severe justice. Thus much may be said for the rule, that it shuts out opportunities of false swearing and perjury; and, in criminal trials, saves the judges from the Party not compellable by the adverse party.

(1) Rep. temp. Hardw. 163. B. N. P. 285.
(2) B. N. P. 285, citing Dormer v. Fortescue, Willes, 343, n.
(3) *Ante*, 53, and Doe *v.* Green, 4 Esp. 198.
(4) B. N. P. 285.
(5) *Supra*, p. 45.

necessity of questioning prisoners to their conviction,—a practice, which in some instances might be ill employed, and would generally give offence to public feeling.

Rated inhabitants.

On a question of settlement, it has been determined in the case of the *King* v. *Woburn*, (1) that the rated inhabitants of either parish, being in reality parties to the proceedings, can not be compelled to give evidence against their own parish.

Lessor of plaintiff in ejectment.

In an action of ejectment, on the several demises of two lessors, one of them is not compellable to give evidence for the defendant, though no title has been proved under his demise. (2) The lessors of the plaintiff, said Lord Ellenborough, are substantially the parties on the record; all are jointly liable; that lessor, upon whose title the recovery proceeds, is generally the trustee of the other; and there are the same reasons for protecting them from being examined, which have produced the general rule of law, that the parties on the record cannot be compelled to give evidence against themselves, and are not permitted to swear in their own favour.

Co-plaintiff witness for defendant, with consent.

In the case of several plaintiffs or defendants, the privilege is personal to each plaintiff and defendant. Where one of several co-plaintiffs comes forward voluntarily to disprove the defendant's liability to the demand made upon him, it has been held, that he may be called on the part of the defendant, and admitted to give evidence, though he defeats the claim of those who jointly sue with him (3): for, if the plaintiff were to make a declaration against his interest out of court, evidence of that declaration would be admissible; and how is the proof less credible, said C. J. Mansfield, if, with the consent of the defendant, who waives all objection to his testimony, he declares the same thing upon oath at the time of trial.

(1) 10 East, 403. This case was decided before the statute 54 Geo. 3, ch. 170, s. 9. It does not appear to be determined, whether, since that statute, parishioners are compellable to give evidence, or are merely rendered competent. The same question arises upon the various other statutes making rated inhabitants competent witnesses.

(2) Fenn dem. Pewtress *v.* Granger, 3 Campb. N. P. C. 178.

(3) Norden and another *v.* Williamson, 1 Taunt. 378, by Mansfield, C. J., and Chambre, J., who were the only judges present. And see Worrall *v.* Jones, 7 Bing. 395, *ante*.

Section II.

Of the Rule of Incompetency from Interest, considered with reference to Parties Prosecuting for Offences.

In treating of the subject of the present section we shall, in the first place, consider the competency of the prosecutor or party injured by the offence, who is generally, though not necessarily nor always, the prosecutor.

General rule.

The general rule is that the prosecutor, or party injured by an offence, is a competent witness on the part of the prosecution. An indictment, though commonly set in motion and carried on at the instance of the party injured, is in fact a proceeding instituted in the name and on the behalf of the crown; and its object is not the reparation of individual injury, but the satisfaction of public justice. The single question, upon which the jury pronounce their verdict, is the innocence or guilt of the prisoner. And the prosecutor or party injured has, in general, no direct interest in the determination of the question, or in the sentence which follows a conviction. In civil suits, a party to the proceeding, who has no beneficial interest in the question in controversy upon the record, is commonly incompetent to give evidence, upon the ground of an interest in the question of costs; but in criminal proceedings, it is well known that the costs are in general not dependent upon the event of the prosecution. (1) Except therefore, in particular cases, which will be presently noticed, a prosecutor or party injured has no direct interest in the event of the prosecution.

Prosecutor not disqualified by direct interest.

Although the prosecutor or party aggrieved is in general free from all direct interest, it was formerly supposed that he was incompetent, by reason of an indirect interest arising from the use of the record of conviction, as evidence in his favour in a subsequent civil suit.

(1) The general power of awarding costs in criminal trials, depends upon the stat. 7 Geo. 4, c. 64, s. 22, 23, which gives a discretionary power to the Court, without any reference to the result of the proceedings.

Nor by indirect interest in the verdict.

But it has now become an established rule in all the courts, that a verdict in a criminal prosecution can, in no case, be used as evidence in a subsequent civil suit, either at law or in equity, on behalf of the party who has himself been called as a witness on behalf of the prosecution. (1) From hence it appears to follow, that no objection, on the ground of an indirect interest in the record for the purposes of evidence, can be made to the prosecutor or party aggrieved, who has appeared as a witness in support of the indictment; because, by the very act of appearing in the character of a witness, such party gives up all power of using the verdict as evidence, in his own favour, on any subsequent occasion. The earlier and later cases upon this subject are as follows:—

Earlier cases.

One of the earlier reported cases in which the prosecutor appears to have been rejected on the ground of an indirect interest, was the case of *The King* v. *Whiting*, where, upon an indictment for a fraud, in obtaining a promissory note from the prosecutor, against whom an action had been brought upon the note, it was held, that the prosecutor was an incompetent witness for the prosecution, on the ground that the conviction of the defendant would influence the jury on the trial of an action on the note. So in indictments for perjury alleged to have been committed by the defendant, on the trial of an action of ejectment, (2) or in a suit in equity (3) to which the prosecutor was a party, it was considered that the prosecutor was an incompetent witness in support of the indictment, on the supposition that he might derive some benefit in the civil proceedings, by convicting the defendant of perjury. And where the indictment was for perjury in a civil action, in which judgment had been obtained against the prosecutor on the testimony of the party indicted, it was thought an indispensable requisite to show, that the judgment had been satisfied, on the supposition that the prosecutor, in the case of his procuring a conviction, might use it for the purpose of obtaining relief in equity against the judgment. (4) Even where the prosecutor had actually

Fraud.

Perjury.

(1) Bartlett *v.* Pickersgill, 4 East, 577, n. (c) 4 Bur. 2255. 1 Eden, 515. 1 Cox, 15. R. *v.* Boston, 4 East, 572, 581. Smith *v.* Rummers, 1 Campb. 9. Hathaway *v.* Barrow, 1 Campb. 151. Burdon *v.* Browning, 1 Taunt. 520.

(2) R. *v.* Ellis, 2 Stra. 1104.

(3) R. *v.* Nunez, 2 Stra. 1043.

(4) R. *v.* Eden, 1 Esp. N.P.C. 97.

paid the money to which he had become liable through the testimony of the party indicted, he was still considered incompetent, if he had filed a bill in equity for relief. (1)

Later cases

On the other hand, the principle of the decision in *R.* v. *Whiting*, after having been questioned by Lord Hardwicke, (2) was overruled in a later case, in which it was held that the objection that the witness was interested in a civil action, involving a similar question, went only to the credit of the witness, and not to his competency, unless the conviction in the prosecution could be given in evidence in the civil action. (3) And on the trial of an indictment for perjury, where a civil action and a suit in equity were pending at the same time between the prosecutor and the defendant, and the perjury was alleged to have been committed in an answer put in by the defendant in the suit in equity, it was decided that the prosecutor was a competent witness in support of the indictment, as he could not avail himself of the conviction as evidence in his favour, in any civil proceeding between them at law or in equity. (4) If the prosecutor were to admit that he expects some benefit from a conviction inasmuch as the defendant is likely to be a witness against him on the trial of a suit pending, this would not render the prosecutor incompetent; for he could not use the verdict in his favour, and his expectation of some benefit from the result of the trial will not disqualify him. (5).

Prosecutor competent.

Prosecution for perjury.

Competent in prosecution for forgery.

Upon this subject, an exception formerly prevailed in the case of a prosecution for forgery, in which case it was the settled doctrine, that the party, upon whom the alleged forgery had been committed, was incompetent to prove the instrument not genuine, although it was clear that he could not use the conviction as evidence in his own favour, in a civil suit upon the forged instrument. This doctrine, (which appears to have originally proceeded, in part, upon the notion that a prosecution for forgery was a species of proceeding *in rem*, and that a con-

(1) R. *v.* Dalby, 1 Peake, N. P. C. 12. See also R. *v.* Menetone, cited in R. *v.* Dalby; and 4 East, 576.

(2) R. *v.* Bray, Rep. temp. Hardw. 358.

(3) R. *v.* Broughton, 2 Str. 1229, and see by Lord Mansfield, 4 Burr. 2255.

(4) R. *v.* Boston, 4 East, 472.

(5) See *infra*, as to witness believing himself interested; and R. *v.* Bray. R. T. H. 358.

viction warranted a judicial cancellation of instrument), was long considered as an anomaly in the law of evidence, (1) and was often productive of great inconvenience in excluding the most satisfactory testimony that could be given in trials for this offence. This inconvenience has been removed by the late statute of the 9 Geo. 4, c. 32, s. 2, whereby it is enacted, "that on any prosecution by indictment or information, either at common law or by virtue of any statute, against any person for forging any deed, writing, instrument, or other matter whatsoever, or for uttering or disposing of any deed, writing, instrument, or other matter whatsoever, knowing the same to be forged; or for being accessary before or after the fact to any such offence, if the same be a felony,—or for aiding, abetting or counselling the commission of any such offence, if the same be a misdemeanor,—no person shall be deemed to be an incompetent witness in support of any such prosecution, by reason of any interest which such person may have, or be supposed to have, in respect of such deed, writing, instrument, or other matter." The effect of this enactment is, to place the law of evidence in cases of forgery upon the same footing as in other criminal prosecutions: and therefore, the party aggrieved by an alleged forgery, whether he be prosecutor or not, is now in all cases a competent witness in support of the indictment.

Stat. 9 Geo. 4, c. 32.

Prosecutor incompetent from interest, when.

In general, a prosecutor or party aggrieved has no interest in the event of a prosecution, and is therefore a competent witness. But there are many cases, in which, by virtue of some legislative enactment, he is entitled, on the conviction of the party accused, to a particular benefit or advantage. In these cases, if the benefit or advantage immediately result to the witness on a conviction being obtained, the witness is interested in the event, and will be incompetent, unless the general rule of law be dispensed with in the particular case, either by some other legislative enactment, or on some principle of public policy. (2) Thus, in cases of summary

(1) See by Lord Ellenborough, 4 East, 582. By Abbott, C. J., 4 B. & Ald. 210. The doctrine was confined to criminal prosecutions, and did not apply where the question of forgery arose in a civil suit. Hunter *v.* King, 4 B. & Ald. 209.

(2) See the judgment of the Court of K. B. in R. *v.* Williams, 9 B. & C. 545, 560.

convictions, where a penalty is imposed by statute, and the whole or part is given to the informer, who becomes entitled to receive it immediately upon the conviction, the informer is an incompetent witness, unless he is made competent by statute. (1) And upon an indictment for a forcible entry upon the 21 Jac. 1, c. 25, or the 8 H. 6, c. 9, where the effect of a conviction is to entitle the tenant to an immediate award of restitution of the lands, such tenant is incompetent by reason of his immediate interest in the event of the prosecution. (2)

Informer.

Forcible entry.

Restitution.

There are, however, many cases, in which a prosecutor or party grieved is entitled, by virtue of some statute or otherwise, to an immediate benefit upon obtaining the conviction of the party indicted, but is nevertheless competent to give evidence in support of the prosecution, either by the express provisions, or by necessary implication of the statute conferring the interest, or on some strong ground of public policy. Such cases are to be viewed as exceptions to the general principle, relative to the incompetency of interested witnesses, and they will be particularly examined hereafter in treating on this branch of the subject under consideration. One exception of this nature occurs in prosecutions for robbery or theft, where the party injured is competent, notwithstanding he becomes entitled to restitution of his property, immediately upon conviction of the offender. (3)

Exceptions.

Prosecution for robbery.

Restitution of property.

There are other cases in which the person committing an offence is liable to a pecuniary penalty, to be paid to the party injured, and recoverable, not by means of a criminal prosecution, but by a separate civil action. In these cases no objection arises to the competency of the party as a witness in a criminal prosecution, because, although he should be a witness in support of the prosecution, the conviction could not be used as evidence for him in a subsequent civil action for the recovery of the penalty. Thus, on an indictment on the

Where penalty is recoverable by action.

(1) R. *v.* Tilley, 1 Stra. 315. R. *v.* Stone, 2 Lord Raym. 1545. R. *v.* Piercy, Andr. 18. R. *v.* Blaney, Andr. 240.

(2) R. *v.* Williams, 9 B. & C. 549. R. *v.* Beavan, Ry. & Mo. N. P. C. 242.

(3) See 3 Bing. 300, 301. By Parke, J., 9 B. & C. 550, and by Bayly, J., *ib.* 557.

Prosecution for fraudulent gaming.

statute 9 Ann. c. 14, s. 5, for fraudulent gaming, the loser of the money is competent to prove the loss; (1) for the pecuniary penalty imposed by the statute is not immediately recoverable upon a conviction, but is given by the express words of the statute to such parties as shall sue for the same by a separate action, and the conviction would not be admissible evidence in an action by the party to recover the penalty. (2)

For seducing artificers.

So in a prosecution for seducing artificers, under the statute 23 Geo. 2, c. 13, s. 1, which subjects offenders to a penalty of 500*l*., the prosecutor is a competent witness; for the statute impliedly renders a separate action necessary, for the purpose of obtaining the penalty. (3)

For perjury, on stat. 5 Eliz. c. 9.

Upon the same principle, it has been said, on an indictment for perjury founded on the statute 5 Eliz. c. 9, which imposes a pecuniary penalty, and gives half to the party grieved, such party would be a competent witness; for the penalty appears to be recoverable not by means of an indictment, but by a separate action, and the party grieved could not use the conviction as evidence in the action. (4) Cases of this nature are not, therefore, to be viewed as exceptions to the rule respecting interested witnesses; for in none of them has the witness any real interest in the event of the prosecution.

Where fine or imprisonment discretionary.

Even in cases, where by statute a pecuniary penalty may be immediately recoverable upon the event of a criminal prosecution, and where the prosecutor, or informer, is entitled to part of the amount, it has been held, that he will not be an incompetent witness, if it be in the discretion of the Court to punish the offender by fine or imprisonment. (5) This is on the ground that a witness will not be incompetent from interest unless the interest be certain: and in cases where a fine is made to depend upon the discretion of the Court, it is not

(1) R. *v.* Luckup, Willes, 425, (*n.*)

(2) See *per Cur.* 9 B. & C. 557, 558.

(3) R. *v.* Johnson, Willes, 425, and 9 B. & C. 557, 558.

(4) *Sed qu.* The point appears to have been ruled otherwise in an old case, Bacon's case, 2d vol. Ab. 687, and see Bul. N. P. 289. Gilb. Evid. 111. The question, of course, depends upon the point, whether a separate action is, or is not, necessary for the recovery of the penalties. Prosecutions under the statute are not usual at the present day.

(5) R. *v.* Cole, 1 Esp. 169, overruling R. *v.* Blackman, 1 Esp. 96.

certain, until the judge pronounces his sentence, whether the informer will derive any benefit from the event of the prosecution.

With regard to the competency of defendants in criminal prosecutions, it is scarcely necessary to observe, that as they are in general immediately interested in the event, it does not often happen that they can be called as witnesses. But as in civil actions against several defendants, a co-defendant may sometimes be so circumstanced as to be a competent witness: so in criminal prosecutions, one of several persons jointly indicted may be rendered competent to give evidence either for the prosecution or for his co-defendants. Thus, upon an information by the crown against two or more, if a *nolle prosequi* be entered by the attorney general, either before or at the trial, as to one of the defendants, such defendant may be called as a witness for the crown against his co-defendant. (1) So where, upon a joint indictment against two, one had pleaded in abatement, and for want of replication judgment had been entered that he should be dismissed and discharged, he was admitted, without objection, as a competent witness for the other defendant, being himself no longer interested in the event of the prosecution. (2)

Defendant in criminal prosecutions, how rendered competent.

Nolle prosequi.

Plea in abatement and judgment.

One of several defendants may also be rendered competent in some cases, by a separate verdict at the trial. Thus, where several persons were jointly indicted for a conspiracy, Lord Tenterden permitted a verdict of acquittal to be taken in favour of two defendants, at the request of the prosecutor's counsel, before the case was opened, in order that they might be called as witnesses against the others. (3) And where, upon an indictment against several, it appears at the close of the case for the prosecution, that there is no evidence against one of the defendants, he is entitled to a separate verdict of acquittal, and may then be called as a witness on behalf of the

Separate verdict.

(1) Bul. N. P. 285. By Lord Hardw. Rep. temp. Hardw. 163, and see by Lord Hardwicke, in Ward *v.* Man, 2 Atk. 229.

(2) R. *v.* Shearman and others, Rep. temp. Hard. 303.

(3) R. *v.* Rowland and others, Ry. & Mo. N. P. C. 401. See *ante*, where some of these cases have been already noticed in treating of the admissibility of accomplices.

others.(1) This is upon the same principle, that is commonly acted upon in the case of an action of tort against several defendants, where no evidence is adduced against one or more of them.

Plea of guilty, and fine paid.

It has also been decided, upon an indictment against two defendants for an assault, where one of them pleaded guilty, and was fined and paid the fine, that he might be called as a witness on behalf of the other defendant, who had pleaded not guilty; the trial being at an end with respect to the witness.(2)

Judgment by default.

In the case of *R.* v. *Lafone*, as reported,(3) a defendant, who had suffered judgment by default to an indictment for a misdemeanor, was tendered as a witness at the trial on behalf of another defendant who had pleaded, but Lord Ellenborough said, he had never known such evidence admitted, and rejected the witness. "The admission of such evidence," said Lord Ellenborough, "might be extended to every other criminal case, and thus one of the party who suffers judgment by default may protect the rest: there is a community of guilt; they are all engaged in an unlawful proceeding; the offence is the offence of all, not of a single individual only." No authorities appear to have been cited in this case. According to the language attributed to Lord Ellenborough, the incompetency of the witness is not placed on the ground of his being interested, but upon the supposed impolicy of permitting one of several persons jointly indicted to screen the others at his own expense. This appears to be a doctrine at variance with the cases in which it has been held, that a defendant in an action of *tort*, who has suffered judgment by default, is competent to exculpate a co-defendant who has pleaded.(4) It is also to be observed, even assuming it to be probable that one of several parties indicted would be desirous of protecting the rest at his own expense, it does not follow that he would be successful in doing so, as his credibility would be entirely for

(1) R. *v.* Mutineers of the Bounty, cit. 1 East, 313. R. *v.* Bedder, 1 Sid. 237. Hawk. P. C. c. 46, s. 98.

(2) R. *v.* Fletcher, 1 Stra. 633.

(3) 5 Esp. 154.

(4) Ward *v.* Heydon, 2 Esp. N. P. C. 553. By Le Blanc, J., 2 Campb. 333, n.

the consideration of the jury. It is not easy to understand the concluding observations attributed to Lord Ellenborough. The guilt of a party who has suffered judgment by default is admitted; but the guilt or innocence of a party who has pleaded, remains to be ascertained by the verdict of the jury. To state, therefore, that there is a community of guilt, and that the offence is the offence of all, is, with regard to the defendant repelling the charge, to assume the very question which the jury have to try; and, with regard to the witness himself, and the situation in which he stands, it is settled that a party who admits himself guilty of an offence for which another is indicted, is a competent witness (as an accomplice) for the prisoner as well as for the prosecution, unless he has been rendered incompetent by actual conviction and judgment.

Section III.

Of the Rule of Incompetency from Interest, considered with reference to the Husband or Wife of a Party.

Rule in civil cases.

As a party to a suit is not a competent witness, so neither is the husband or wife of the party competent to give evidence either for or against the party. (1) No other relation is excluded: (2) a father may give evidence for his son, or the son for his father; though the relation between them may influence his testimony, it will not render him incompetent. The reason for excluding the husband and wife from giving evidence either for or against each other, is founded partly on their identity of interest, and partly on a principle of public policy, which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice. They cannot be witnesses for each other, because their interests are absolutely the same; they are not witnesses against each other, because this is inconsistent with the relation of marriage.

The rule does not apply to

This rule relatesto persons who have entered into the rela-

(1) Co. Litt. 6. (*b*). Hawk. b. 2, c. 46, s. 70. Gilb. Ev. 119. Bull. N. P. 286.

(2) 1 Hale, P.C. 303. 2 Hale, P.C. 276. Hawk. b. 2, c. 46, s. 76. Bull. N. P. 287. 1 Wils. 332.

persons not married, but cohabiting.

tion of husband and wife; and does not extend to those who, not being married, have lived together and cohabited as man and wife. Where a woman, produced by the defendant, had lived with the plaintiff as her husband during the time of the transactions to which she was called to speak, but had ceased to live with him when her former husband (who had been absent from this country upwards of thirty years, and was supposed to be dead) returned from abroad, it was held that there was no objection to her evidence. (1) Though a person has represented a woman to the world as his wife, (to whom he was never married,) it has been decided, that she is not therefore incompetent to give evidence in any legal proceeding, in the event of which that person is interested. (2)

1. Husband and wife not competent against each other.

First, it is a general rule, that husband and wife cannot be witnesses against each other, either in civil or criminal proceedings. It has been resolved, says Lord Coke, (3) that a wife cannot be produced against the husband, as it might be the means of implacable discord and dissention between them,

Civil cases.

and the means of great inconvenience. In an action brought by a woman as feme sole, the defendant cannot call the plaintiff's husband to prove her married, thereby to nonsuit her. (4)

A husband is incompetent to give evidence in support of the interest of his wife, who takes a reversion in fee in the property in dispute. (5) And the wife of a bankrupt can not be examined to prove his bankruptcy. (6)

Extent of rule.

In cases where the husband or wife is directly interested in the event of the proceeding, the principle of the rule for the exclusion of their testimony is carried to its full extent. Thus,

Marriage after subpœna served.

it has been held, that a wife is an incompetent witness against her husband, although the marriage took place after the wife was served with a subpœna to give evidence in the suit. (7)

(1) Wells *v.* Fisher, 1 Mo. & Ro. 99. Wills *v.* Fletcher, 5 C. & P. 12, S. C.

(2) Batthews *v.* Galindo, 4 Bing. 610. See Campbell *v.* Tweinlow, 1 Price, 81.

(3) Co. Lit. 6 (*b*).

(4) Bentley *v.* Cook, cited in R. *v.* Cliviger, 2 T. R. 265. 269.

(5) Cornish *v.* Pugh, 8 D. & R. 65.

(6) *Ex parte* James, 1 P. Wms. 611. See *infra*, p. 80, as to examination before commissioners.

(7) Padley *v.* Wellesley, 3 Car. & P. 558.

Action by trustee of wife.

In an action brought by the executrix of a surviving trustee under a marriage-settlement, to recover back the value of certain goods, which had been sold by the defendant, as sheriff, under an execution against the husband of the *cestuy que trust*, the husband was not admitted to prove, on the part of the plaintiff, that the goods had been conveyed in trust to the plaintiff for the separate use of his (the witness's) wife. (1) In this case, as the witness's debt would have been discharged by a sufficient execution, his evidence would have been in that respect against his personal interest (2): but, on the other hand, it was the wife's interest to have the property secured for her separate use; and though the action was between third persons, yet it directly affected her interest, the action being brought by her trustee for her benefit, and the real point in issue being, whether the goods belonged to her or to her husband.

Criminal cases.

The husband and wife are not allowed to be witnesses against each other in criminal proceedings, except in certain cases which will afterwards be mentioned. In a prosecution for bigamy, the first husband cannot be admitted to prove the former marriage against the wife; (3) such evidence would directly criminate, and, therefore, is not admissible for the reason before mentioned. On a trial for murder, the wife of the prisoner cannot be a witness against him. On a prosecution against a woman and others, for a conspiracy in procuring a marriage between her and her husband, the man is not a competent witness against her in support of the prosecution. (4) It seems to be the better opinion, that a wife is not compellable to give evidence against her husband on a charge of high treason. (5)

Collateral proceedings.

Although the husband and wife are not allowed to be witnesses against each other, where either is interested in the event of a proceeding, whether civil or criminal, yet, in collateral proceedings, not immediately affecting their mutual inte-

(1) Davis *v.* Dinwoody, 4 T. R. 678.

(2) See Bland *v.* Ansley, 2 New Rep. 331.

(3) Mary Grigg's case, Sir T. Raym. 1.

(4) R. *v.* Serjeant and others, 1 Ry. & Mo. 352, before Abbott, C. J.

(5) H. P. C. 301; Brownl. 47; contradicting Sir T. Raym. in Grigg's case, cited Gilb. Ev. 19; B. N. P. 259.

Such evidence admissible.

rests, their evidence is receivable, notwithstanding that the evidence of the one tends to criminate the other, or to contradict the other, or may subject the other to a legal demand.

As to the evidence of one tending to criminate the other, or to subject to a demand,

in collateral proceedings.

The rule, as laid down in the case of the *King* against *the Inhabitants of Cliviger* (1) (namely, that a husband or wife ought not to be permitted to give any evidence that may even *tend to criminate* each other), is now considered as having been laid down in terms much too general, and undefined. In that case, on an appeal against an order of removal of a pauper and also of a woman as his wife, the respondents having proved the marriage, the appellants called the pauper for the purpose of proving his former marriage with another woman, but he swore directly the reverse; they then called the woman to prove the alleged former marriage. The court of quarter sessions rejected the witness; and the Court of Queen's Bench determined, that she was not competent to give such evidence. Mr. Justice Ashurst and Mr. Justice Grose (the only judges present in court), were of opinion, that a husband and wife are not permitted, from a principle of public policy, to give any evidence that may even *tend to criminate* each other; that the objection is not confined merely to cases, where they are *directly accused* of a crime; but, even in collateral cases, if their evidence *tends that way*, it shall not be admitted; for although the evidence of the one could not be used against the other on a subsequent trial for the offence, yet it might lead to a criminal charge, and cause the other to be apprehended.

The one competent to contradict the other in collateral cases.

The rule so laid down in the case of the *King* v. *Cliviger* was much discussed in the case of the *King* against *the Inhabitants of All Saints*, in Worcester. (2) In this case, the Court of King's Bench was of opinion, after much argument, that the rule, laid down in the case of the *King* v. *Cliviger*, was too large and general; that the former wife would have been competent to prove her marriage, though the second marriage had been first proved by the respondents; and that even if the second marriage had been proved by the appellants, still she

(1) 2 T. R. 263.

(2) 6 M. & S. 194.

would be competent, and the respondents in reply might have called her to prove the former marriage; for her evidence did not directly criminate the husband, and never could be used against him, nor could he ever be affected by the judgment of the court founded upon such evidence. "If we were to determine," said Lord Ellenborough, "without regard to the form of proceeding, whether the husband was implicated in it or not, that the wife is an incompetent witness as to every fact which may possibly have a tendency to criminate her husband, or which, connected with other facts, may perhaps go to form a link in a complicated chain of evidence against him, such a decision, as I think, would go beyond all bounds; and there is not any authority to sustain it; unless, indeed, what has been laid down, as it seems to me, somewhat too largely, in the *King* v. *Cliviger* may be supposed to do so." Same subject continued.

The decision in the case of the *King* v. *Cliviger* was again commented on in the later case of *The King* v. *Bathwick*. (1) Lord Tenterden there said, "That decision appears to have been founded on a supposed legal maxim of policy, *viz.* that a wife cannot be a witness to give testimony in any degree to criminate her husband. This will undoubtedly be true in the case of a direct charge and proceeding against him for any offence; in such a case, she cannot be a witness to prove his innocence of the charge." With reference to the case then before the Court, Lord Tenterden said (what is applicable also to the other case of the *King* v. *Cliviger*,) "The present case is not a direct charge or proceeding against the husband. It is true, that if the testimony given by both be considered as true, the husband has been guilty of the crime of bigamy; but nothing that was said by the wife in this case, nor any decision of the court of session, founded upon her testimony, can hereafter be received in evidence to support an indictment against him for that crime. This is altogether *res inter alios acta*; neither the husband nor the wife has any interest in the decision of the question."

A wife may be a witness, in an action between third persons not immediately affecting the interest of the husband, though Rule in action between third persons.

(1) 2 Barn. & Ad. 639. See also Henman *v.* Dickinson, 5 Bing. 183.

her evidence may possibly expose him to a legal demand: as, in an action between third persons for goods sold and delivered, to prove that the goods had been sold not on the credit of the defendant, but on her husband's credit. (1) This evidence, it may be said, was in some measure against the husband, though he was not a party to the suit. On the other hand, to reject her evidence in such a case would be a hardship on the defendant, who may have no other means of defending himself against an unjust demand: and, though upon her testimony the defendant might have a verdict, and an action might afterwards in consequence be brought against the husband, she would not then be admitted as a witness, nor could her evidence in the first suit be produced against him.

Neither party competent to prove non-access.

It is settled, that a wife is incompetent, as well after as before the death of her husband, to prove non-access, that is to say, the absence of the fact of sexual intercourse, or of the opportunity of sexual intercourse with her husband, whatever may be the form of the legal proceeding, or whoever may be parties to it. (2) This rule is established, independently of any possible motives of interest in the particular case, upon principles of public policy.

2. Husband and wife not competent for each other.

Secondly, it is a general rule, that neither the husband nor the wife will be allowed to give evidence for each other, in civil or criminal proceedings. In a prosecution for larceny, or murder,

Criminal cases.

the one would not be a competent witness for the defence of the other. On a prosecution against several persons for a conspiracy, Lord Ellenborough, C. J., refused to admit the wife of one of the defendants to be a witness for the others; a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for the husband. (3)

On the trial of an indictment against two prisoners for burglary, in which each of them set up the defence of a distinct

(1) Williams *v.* Johnson, by King, C. J. 1 Str. 504. Bull. N. P. 287, S. C.

(2) R. *v.* Rook, 1 Wils. 340. R. *v.* Kea, 11 East, 132. R. *v.* Luffe, 8 East, 203.

(3) R. *v.* Locker and others, 5 Esp. N. P. C. 107. 1 Ry. & Mo. 354. R. *v.* Frederick and another, 2 Str. 1094, S. P.

alibi, it was proposed, on the part of one of the prisoners, in proof of his *alibi*, to call the wife of the other prisoner; but her evidence was rejected, on the ground that it tended to shew that the witness for the prosecution was mistaken as to one of the prisoners, which would weaken the effect of that witness's testimony, as to the other prisoner her husband. It was decided, by a majority of the judges, that the witness had been properly rejected. (1) But this case must be understood as having been decided on it's own peculiar circumstances, and not as warranting the conclusion, that where prisoners set up a separate and distinct defence, the wife of one prisoner cannot in any case be a witness for another prisoner.

Rule in case of divorce.

This general rule of evidence, which has been adopted for the purpose of promoting a perfect union of interests, and of securing mutual confidence, is so strictly observed, that even after a dissolution of marriage for adultery, the wife is not admitted to give any evidence of what occurred during the marriage, which would have been excluded, if the marriage had continued. (2) This, as Lord Ellenborough has said, is on the ground, that the confidence, which subsisted between them at the time, shall not be violated in consequence of any future separation. Thus one great cause of distrust is removed, by making the confidence, which once subsists, ever afterwards inviolable in courts of law.

Or in case of death.

Upon the same principle, in an action by an executor against a sheriff for a false return to a writ of *fi. fa.*, it has been held, that the widow of the testator cannot be allowed on the part of the defendant, to give evidence of a conversation between herself and the testator. (3)

(1) Rex *v.* Smith and another, Moody's Cr. Ca. 289. It should be remarked, though it is not stated in the report, the only witness for the prosecution, who identified either of the prisoners, was the person whom the wife of one of the prisoners was called to prove mistaken as to the identity of the other prisoner.

(2) Monroe *v.* Twisleton, cited in Aveson *v.* Lord Kinnaird, 6 East, 192.

(3) Doker *v.* Hasler, 1 Ry. & Mo. 198, by Best, C. J. In Doker *v.* Hasler, the evidence was rejected. In Beveridge *v.* Minter, 1 C. & P. 364, the evidence was received by Lord Tenterden. See also Humphreys *v.* Boyle, 2 M. & M. 140, where a wife's declarations during coverture were received in a suit brought by her administratrix against the husband.

Rule, in case of consent.

Consent of husband.

In a case before Lord Hardwicke, he would not suffer a woman to be a witness, though her husband consented. (1) "The rule," he said, "is for the peace of families, and such consent should never be encouraged." In the case of *Pedley* v. *Wellesley*, (2) Chief Justice Best expressed his willingness to receive the evidence of the defendant's wife, if the defendant had consented, but the defendant refused his consent. Where a party consents that his wife shall be examined as a witness against himself, there can be no violation of confidence, which is a principal ground of the rule of exclusion; but the probability, that if such evidence were generally admitted, family dissentions might be increased, is not altogether obviated by the circumstance of consent.

Rule, as to declarations of husband or wife.

The same reason applies to the declarations of the husband or wife. Where an action is brought by or against the husband, or by the husband and wife jointly in right of the wife, the general rule is, that the declarations of the wife are not evidence against or for the husband. (3) In an action of trespass against a husband and wife, the wife's confession of a trespass, committed by her, cannot be given in evidence against the husband. (4) In an action for goods supplied to the defendant's wife, who, as it appeared, lived separate upon an allowance from him, her declarations as to the receipt of the allowance could not be admitted in his favour. (5)* A discourse between the husband and wife, in the presence of a third person, may be given in evidence against the husband, like any other conversation in which he may have been concerned.

(1) Barker *v.* Sir Woolston Dixie, Rep. temp. Hard. 264.
(2) 3 C. & P. 558.
(3) Winsmore *v.* Greenbank, Willes, 577. Alban and others *v.* Pritchett, 6 T. R. 620. Barron *v.* Grillard, 3 Ves. & Beam. 165. Baker *v.* Morley, Bull. N. P. 28.
(4) Denn *v.* White and another, 7 T. R. 112.
(5) Hodgkinson *v.* Fletcher, 4 Campb. N. P. C. 70.

* In Scholey *v.* Goodman (1 Bing. 349.), an action on an agreement, by which the defendant agreed to live separate from his wife, and to pay the plaintiff a certain allowance for the use of his (the defendant's) wife, a question arose as to the admissibility of the wife's declarations, to prove that she was living in a state of adultery, during the time for which the allowance was claimed. The point was not decided by the Court.

Same rule as to letters.

Letters written by the husband or wife are subject to the same rule as their declarations. In general, letters written by the husband to the wife may be read as evidence against him, but her letters to him will not be evidence for him. (1)

In an action for crim. con.

In an action for criminal conversation with the plaintiff's wife, the wife's letters to the defendant are not evidence for the defendant against the husband, nor is her confession evidence for the husband against the defendant; but conversations between her and the defendant are evidence against him. (2)

Letters of wife to husband.

Evidence of the manner in which the husband and wife used to live together, before her connection with the defendant, is clearly admissible, for the purpose either of increasing or lowering the damages; and upon this principle it has been determined, that where the husband and wife have lived apart from each other, the letters of the wife to her husband, written before any suspicion of a criminal intercourse, are admissible in evidence, as showing their demeanor and conduct to each other, and whether they were living on terms of mutual affection; but, on account of the obvious danger of collusion, it ought to be strictly proved, that the letters, which are offered in evidence, were written at a time when the wife was not suspected of misconduct. (3)

Rule, as to letters, conversations, &c.

Admission of wife acting for husband, with consent.

The rule in question has no application to cases where the wife has acted for the husband in his business, and by his authority and consent; he thereby adopts her acts, and will be bound by any admission or acknowledgment made by her respecting that business; the wife in such cases being considered his agent. Thus, where the wife has made a contract for her husband, which has been adopted by him, her acknowledgment as to the amount of the money due will be evidence against him. (4) In the case of *White* v. *Cuyler*, which was an action of assumpsit by a servant for wages, the plaintiff was allowed to give in evi-

(1) Bull. N. P. 28.

(2) Bull. N. P. 28. Winsmore *v.* Greenbank, Willes, 577.

(3) Edwards *v.* Crock, 4 Esp. N. P. C. 39. Trelawney *v.* Coleman, 1 Barn. & Ald. 90. 2 Starkie, N. P. C. 191, S. C.—The cause of their separation was not shown in the latter case. In the former, they were living separate, as servants in different families.

(4) Emerson *v.* Blonden, 1 Esp. N. P. C. 142. 1 Str. 527. Bull. N. P. 287. Anderson *v.* Saunder-

dence a deed executed by the wife of the defendant at the time of the hiring, which, though void as a deed, was admitted in order to show the terms of the contract. (1) And in a late case, in an action of assumpsit for goods sold and delivered at the defendant's shop, an offer by the wife to settle the demand was admitted in evidence, as she used to serve in the shop, and was in the habit of transacting the business in his absence. (2) Upon the same principle, the wife's acknowledgments, as to a debt being due for goods furnished with her husband's consent for her accommodation, or for goods purchased by her for the husband, and used by him, have been held to be sufficient to take the case out of the Statute of Limitations. (3) *

Exceptions to the general rule.

There are several exceptions to the general rule upon this subject, where, from the nature of the inquiry, the information to be expected is peculiarly within the knowledge of the husband or wife, and where to exclude such evidence would occasion insecurity to that relation of society, which it is the object of the rule to protect. It has before been observed, that the authorities for admitting the wife's evidence, in such excepted cases, in favour of her husband, are equally authorities for receiving it, where it operates against him.

In case of personal violence.

A wife is a competent witness against her husband on any

son, Holt, N. P. C. 591. See *infra*, as to admissions and declarations of agents, as evidence against their principals.

(1) White *v.* Cuyler, 6 T. R. 176.

(2) Clifford *v.* Burton, 1 Bing. 199. 8 Moore, 16.

(3) Gregory *v.* Parker, 1 Campb. 394. Palethorp *v.* Furnish, 2 Esp. N. P. C. 511, n. Anderson *v.* Saunderson, Holt, N.P.C. 591, 2 Starkie, N. P. C. 204, S.C. And see 15 Ves. 159. The cases here cited appear to have overruled the case of Hall *v.* Hill, 2 Str. 1094, where, in an action of assumpsit brought by the husband for wages earned by his wife, the acknowledgment by the wife, as to her having been paid by the defendant, was not allowed to be evidence.

* In the case of Carey *v.* Adkins, 4 Campb. 94. (an action against an officer of the police, to recover money which he had taken from the plaintiff's wife on suspicion of her having got it unlawfully), Lord Ellenborough admitted the account given by her, respecting the money, on her examination before a magistrate, to be given in evidence on behalf of the defendant: "the money," said Lord Ellenborough, "appears never to have been in the husband's possession, and, as the wife had the exclusive custody and management of it, he must be bound by what she said concerning it."

charge which affects her liberty or person, as on a prosecution for forcible marriage, although afterwards she voluntarily cohabited with him. (1) A wife may be a witness on the prosecution of her husband for a rape committed on her person. (2) And on a prosecution against a man for beating his wife, she has been allowed to give evidence. (3)

In case of bigamy.

On an indictment for a second marriage during the continuance of a former marriage, though the first wife cannot be a witness (4), yet the second wife may, after proof of the first marriage. (5) After such proof, she would be competent to give evidence for as well as against the prisoner. (6).

Charge for shooting at.

On the trial of an indictment against a man for shooting at his wife, the evidence of the wife was ruled to be admissible against the husband; but Holroyd, J. thought that the wife could only be permitted to prove such facts as could not be proved by any other witness. (7)

Articles of the peace.

A wife is permitted to exhibit articles of the peace against her husband (8): and the court will not receive affidavits on the part of the defendant, to contradict the truth of the articles exhibited against him, and prevent his giving surety. (9) So, an affidavit of a married woman has been admitted to be read, on an application to the Court of King's Bench for an information against her husband, for an attempt to take her away by force after articles of separation (10): and it would be strange, says Mr. Justice Buller, to permit her to be a witness to ground a prosecution, and not afterwards to be a witness at the trial. (11)

(1) By Hullock, B., Wakefield's case, 2 Russ. 606. Swinden's case, 4 Howell, St. Tr. 575. Hawk. P. C b. 1, c. 41, s. 13.

(2) Lord Audley's case, 1 St. Tr. 393. 3 Howell. St. Tr. 413. Hutton, 116. 1 Hale, P. C. 301. Rep. temp. Hard 83. Bull. N. P. 287.

(3) Azyre's case, 1 Str. 633. Bull. N. P. 287. Jagger's case, 1 East, P. C. 454.

(4) Mary Grigg'a case, Sir T. Raym. 1. Hawk. b. 2, c. 46, s. 71.

(5) 1 Hale, P. C. 393. Bull. N. P. 287. 1 East, P. C. 469.

(6) See 1 Ry. & Mo. 354.

(7) Whitehouse's case, by Holroyd, J., and Garrow, J., 2 Russ. 606.

(8) Bull. N. P. 287.

(9) Lord Vane's case, 2 Str. 1202. more fully stated from Ford's MS. in 13 East, 171, n. (a); R. *v.* Doherty, *ib.* S. P.

(10) Lady Lawley's case, Bull. N. P. 286. Mary Mead's case, 1 Burr. 543.

(11) Bull. N. P. 287.

Dying declarations.

On the trial of a man for the murder of his wife, her dying declarations are evidence against him (1); they are evidence also for him.

Examination of bankrupt's wife.

By stat. 21 J. 1, c. 19, s. 5 & 6, which recites, that doubts had arisen upon the point, it is provided, "that, after the party is declared a bankrupt, the commissioners may examine his wife on oath, for the finding out of the estate, goods, and chattels of such bankrupt, concealed, kept, or disposed of by such wife, in her own person, or by her act or means, or by any other person." Before this statute, the commissioners could not examine the bankrupt's wife. (2) The same power is given by a later statute. (3)

Appeal against order of bastardy.

Upon an appeal against an order of bastardy, in the case of a married woman, Lord Hardwicke and the other Judges held, that she was a competent witness to prove her criminal connection with the appellant, though her husband was interested both in the question and in the event of the appeal; because such a fact, so secret in its nature, can scarce ever be proved by other evidence. (4) And by a parity of reason, said Lord Ellenborough in the case of the *King* v. *Luffe*, it should seem, if she be admitted, as a witness of necessity, to speak to the fact of the adulterous intercourse, it might also perhaps be competent for her to prove, that the adulterer alone had that sort of intercourse with her, by which a child might be produced within the limits of time which nature allows for parturition.

Appeal against order of removal.

On an appeal against the removal of a woman, as the widow of A. B. deceased, *primâ facie* evidence of the marriage having been produced on the part of the respondents, the Court of King's Bench determined, that the woman was a competent witness, on the part of the appellants, to disprove the marriage. (5)

(1) Woodcock's case, 2 Leach, Cr. C. 563. John's case, 1 East, P. C. 357.
(2) Anon. case, 1 Brownlow, 47.
(3) 6 Geo. 4, c. 16, s. 37.
(4) R. *v.* Reading, Rep. temp. Hard. 82. R. *v.* Bedell, Andr. 8. Gilb. Ev. 139. R. *v.* Luffe, 8 East, 203.
(5) R. *v.* Bramley, 6 T. R. 330. R. *v.* St. Peter's, Burr. Sett. Cas. 25, S. P.

Section IV.

Of the Rule on the Subject of Interest, considered with reference to Persons not Parties to the Suit.

The general principle, on which a witness interested in the event of a cause is incompetent to give evidence in support of such interest, has already been stated, and we have examined into the application of this rule, with regard to the persons who are, in general, most obviously and immediately interested in the event of a suit. We have now to consider the application of the rule with regard to ordinary witnesses; which will lead to a more extensive and complicated inquiry.

On this subject, it is scarcely possible to reconcile the earlier cases with those of a more recent date. "The old cases on the competency of witnesses," said Lord Mansfield, "have gone upon very subtle grounds: but, of late years, the courts have endeavoured, as far as possible, consistently with those authorities, to let the objection go to the credit rather than the competency of the witness." (1)

General rule.

The general rule is laid down by Gilbert, C. B., in these words, "The law looks upon a witness as interested, where there is a certain benefit or disadvantage attending the consequence of the cause one way." (2) And Mr. Justice Buller, in the case of the *King* v. *Prosser*, says, "I take the rule to be this, if the witness can derive no benefit from the cause before the Court, he is competent." (3)

Direct interest in the event of a suit

In inquiring into the competency of the parties to the record in civil suits, it has been seen, that in general they are incompetent to give evidence, by reason of a direct interest in the event of the suit. Many cases arise, in which persons not being parties to the record are open to the same objection.

(1) 1 T. R. 300. Walton *v.* Shelley, cit. by Lord Kenyon, 3 T. R. 32, and see R. *v.* Bray, Ca. temp. Hardw. 360.

(2) Gilb. Evid. 106-7.

(3) 4 T. R. 20, and see B. N. P. 284.

Thus, the nominal plaintiff on the record may sometimes have no real interest in the question at issue, and the action may be prosecuted solely for the benefit of a third person who is not a party to the record: and if at the trial such person were tendered as a witness for the plaintiff on the record, he would be obviously incompetent, by reason of the direct interest which he would have in obtaining a verdict for him; for such verdict, when obtained, would enure to his own benefit, and the witness therefore would have a much stronger interest than the plaintiff himself, in obtaining a favourable termination of the cause. The same principle would of course be equally applicable with regard to the defendant, as with regard to the plaintiff. And it would hold equally in the case of a partial, as well as an entire interest in the subject matter of the action. In all such cases, there would be a certain benefit or disadvantage directly resulting to the witness from a favourable or unfavourable verdict, and he would therefore be incompetent to give evidence, by reason of this direct interest in the event of the suit.

Indirect interest.

But a direct and immediate benefit or disadvantage from the result of the suit was not the only species of interest, which at one time rendered a witness incompetent to give evidence. For until the passing of a recent statute, which has effected a material alteration in the law in this respect, and the provisions of which will be fully stated hereafter, (1) witnesses who were neither parties to the record, nor had any direct interest in the event of the suit, were often rendered incompetent, by reason of an indirect interest in the record with regard to some subsequent suit. This description of interest has already been adverted to, in treating of the competency of a prosecutor, or party grieved, to give evidence in a criminal prosecution; with respect to whom an objection was formerly supposed to exist, on the ground that he might be able to avail himself of the record of a conviction as evidence in support of his own interest in some subsequent civil suit. But when it became a settled rule, that a judgment in a criminal prosecution, could in no case be used as evidence in a subsequent civil suit, on

(1) Stat. 3 & 4 Wm. 3, c. 42, s. 26, 27.

behalf of a party who had been a witness for the prosecution, the foundation of this objection failed, and it was then adjudged that the prosecutor and party injured were not disqualified by reason of this supposed indirect interest in the record. In like manner, with regard to the parties to civil suits, it will be found, upon an examination of the cases that have been decided with respect to their competency, that they are generally disqualified, by reason of a direct and immediate interest in the event of the suit, and that when they are free from this direct interest, no objection can be raised to their competency on the ground of such an indirect interest in the record.

But with respect to ordinary witnesses the case was often different, and they were, in many instances, open to the objection of an indirect interest, and on that ground excluded, in cases where they could derive no immediate benefit or disadvantage from the termination of the particular suit. Thus, if an action was brought by or against one of several persons claiming a customary right of common, or some other species of customary right, and the question of the existence and validity of the custom would be determined by the record, the judgment obtained in the action would be admissible evidence in a subsequent action, for or against a person claiming under the same general customary right, although he was a stranger to the record in the former action: and therefore, (before the passing of the above mentioned act,) if a person so situated were tendered as a witness in the first action, the courts used to hold that this circumstance, of the record being admissible evidence for or against his own claims in a subsequent suit, was an interest which, in general, would render him an incompetent witness. (1)

Thus, there used to be two distinct modes, in which a

(1) See 1 T. R. 302. 3 T. R. 32. B. N. P. 283. Hockley *v.* Lamb, 1 Lord Raym. 731. Anscomb *v.* Shore, 1 Taunt. 261. Lord Falmouth *v.* George, 5 Bing. 286. The rule had an exception where all the subjects of the king are interested, and where no other evidence can reasonably be expected. See Lancum *v.* Lovell, 9 Bing. 470. B. N. P. 289.

person, not a party to the record, might derive a benefit or advantage from the event of the suit, and in either case he became incompetent to give evidence. "This benefit," says Lord C. J. Tindal, in a late case, (after citing the general rule in the words of C. B. Gilbert, already quoted in the text,) "this benefit may arise to the witness in two cases: first, where he has a direct and immediate benefit from the event of the suit itself; and secondly, when he may avail himself of the benefit of the verdict in support of his own claims in a future action."(1)

These were the only grounds, upon which a witness became incompetent from interest, and it was fully settled by many decisions, that all other objections on the ground of a supposed interest would not affect his competency, although they might affect his credit. This was the rule laid down and acted on in the case of *Bent* v. *Baker*, (2) which has always been considered a leading authority on this subject. And in the subsequent case of *Smith* v. *Prager*, Lord Kenyon, referring to the rule there established, said, "That case laid down a clear and certain rule, by which I have ever since endeavoured to regulate my opinion. The rule there laid down was, that no objection could be made to the competency of a witness on the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest." (3) So also Lord Ellenborough, in giving judgment in a case which has been cited in the preceding chapter, (4) recognises the authority of *Bent* v. *Baker* and *Smith* v. *Prager*, and observes, that the rule was well laid down and established in those cases, "That where a party is not immediately interested in the cause, nor has any interest in the event, in support of which the verdict in that cause may be given in evidence by him in any other proceeding instituted by or against him, he is a competent witness."

(1) Doe *v.* Tyler, 6 Bing. 394.
(2) 3 T. R. 27.
(3) 7 T. R. 62.
(4) R. *v* Boston, 4 East, 581, *supra.*

Stat. 3 & 4 W. 4, c. 42. Alteration of law as to *indirect* interest.

A material alteration has lately been effected in the Law of Evidence, with regard to witnesses, who were once considered incompetent on the ground of an indirect interest which might accrue from the use of the record as evidence for or against them in some subsequent suit. By the stat. 3 & 4 W. 4, c. 42, s. 26, it is provided, that in cases where witnesses are objected to upon this ground, they shall nevertheless be examined, but that in such a case a verdict or judgment by or against the party for whom the witness shall be examined, shall not be admissible in evidence by or against the witness or any person claiming under him. The effect of this enactment is to remove the objection to the competency of the witness in civil suits, by removing the interest out of which the objection arises; and the principle, upon which the statute is founded, appears to be in some degree analogous to that of the rule adverted to in the preceding chapter with reference to criminal proceedings, namely, that a witness in a criminal prosecution shall in no case be allowed to avail himself of a conviction, where he has himself been called as a witness in support of the indictment. The supposed interest of the witness is removed by putting an end to all possible interest in the record, and by preventing his deriving any benefit or sustaining any loss with reference to the use of the record, and the termination of the suit in favour of either party.

The particular provisions of this statute, and the cases that have been decided upon it, will be subsequently stated. It is sufficient to observe at present, that the effect of it appears to be to remove one of the grounds of incompetency from interest which existed before the passing of the act; and to render all witnesses competent, as far as regards objections from interest, unless it can be shewn that they have a direct interest in the event of the particular suit.

In pursuing the inquiry into the present state of the law with respect to the incompetency of witnesses from interest, it is proposed to shew, in the first place, in what cases a witness will be disqualified; and secondly, in what cases he will not be

disqualified from this cause. The first of these subjects of inquiry, will occupy the remainder of the present section.

What is such an interest as will disqualify.

It is proposed now to show in what particular cases persons, not being parties to the suit, are incompetent on account of a direct interest in the event of a suit.

Certain interest.

It is a general rule, that a witness will not be incompetent on the ground of interest, unless the alleged interest be certain in its nature; for if it be a matter of uncertainty whether the witness will gain or lose by the event of the cause, it cannot be said of him that he is in fact interested, and his testimony will therefore be received. (1)

Expectation.

It is also a rule, that the interest must be a legal existing interest; if it exist merely in the imagination, or belief, or expectation of the witness, he will not be incompetent, however strongly the objection may be urged with respect to his credibility. (2)

Competency presumed.

In all cases in which an objection is raised to the competency of a witness on the ground of interest, it lies upon the party making the objection to establish its existence and validity. The competency of a witness ought to be presumed, until the contrary be clearly shewn; and in cases of doubt the courts are always disposed to receive the witness and to let the objection go to his credibility rather than to his competency.

Amount of interest.

If it be made to appear clearly that the witness is directly interested in the event of the particular suit, the exact amount of his interest is immaterial; however small and inconsiderable it may be, the witness is incompetent. (3) A person who loses or gains the smallest sum by the event of a suit, whatever may

(1) R. *v.* Cole, 1 Esp. 98.
(2) See cases on this subject, *post*, sec. 2.
(3) Burton *v.* Hinde, 5 T. R. 574. *Per cur.* Dowdeswell *v.* Nott, 2 Vern. 317.

be his rank, fortune, or character, is as incompetent to give evidence, as one who may be interested to the amount of thousands. This is the unavoidable consequence of the general rule. If interest be allowed to disqualify in any case, it must in all; as it is impossible by any scale to measure the different effects, which it may have on different minds.

Interest in costs.

The interest may be either in the subject in issue in the action, or in the costs; for, as we have seen, in treating of the evidence of the parties to the suit, a plaintiff or defendant, who has no actual interest in the action, but merely sues or defends for the benefit of a third party, will be incompetent, if he be liable to be called on for costs. And, of course, the same rule applies to witnesses not being parties to the suit.

Balance of interest.

Where the witness is so situated, that he is interested on both sides, his competency will depend upon the equality or inequality of the adverse interest. If they should be exactly equal, one will counterbalance the other, and the witness will be competent; but if there should be any excess of interest on either side, the witness will be incompetent to give evidence on the side, where there is a preponderancy of interest; it is obvious, that he is interested to the amount of the excess, in procuring a verdict on that side.

It may be observed, that many of the cases, which might be cited in illustration of these general principles, do not belong to the present subject of inquiry, *viz.* what interest will produce disqualification, but range themselves under the next head of inquiry, *viz.* what interest will *not* produce disqualification. However, as both branches of inquiry are intimately connected, and the above division has been adopted merely for the purpose of convenience, it will be of material use to bear in mind the general principles, before laid down, while we enter in detail on the consideration of those decided cases, in which witnesses have been rejected as incompetent on the ground of interest. In some of these cases, the interest of the witness will be found to be perfectly clear and direct; in others, some nicety will be required

in distinguishing between direct interest in the event of the particular suit, and interest in the record as matter of evidence; in other cases again, it will be found difficult to discover, whether the witness has any interest whatever in the event of the suit. The method, we shall in general pursue in examining these cases, will be, to commence with those in which the interest is most obvious and direct, and in which the situation of the witness approaches nearest to that of a party in the proceedings.

1. *Rule with respect to Bail and Sureties.*

Bail.

The bail for the defendant are incompetent witnesses for him, being directly interested in the event of the suit; for if the verdict be given against the principal, the bail become immediately answerable, and they are immediately relieved from this liability by a verdict in his favour.(1) Upon the same principle, a person who has deposited in the hands of the sheriff, in lieu of bail, a sum of money, which by rule of court is made to abide the event of the suit, is not competent for the defendant. (2) Whenever the husband of a witness would be incompetent to give evidence on account of his interest in the cause, it necessarily follows that the wife will also be excluded, having an unity of interest with her husband; and the wife of the bail is, therefore, incompetent to give evidence for the party, on whose behalf her husband has become bound. (3)

Wife of bail.

Bail made competent.

When a material witness for the defendant has become bail for him, the court will allow his name to be struck out, on the defendant adding and justifying another bail instead of the witness. (4) And even at the trial the judge will allow the witness's name to be struck out of the bail piece, if the defendant deposit with the associate a sufficient sum, as a security for the debt and costs. (5) Of course, immediately the name of

(1) See 1 T. R. 164, by Buller, J. Piesley *v.* Von Esch, 2 Esp. 605.

(2) Lacon *v.* Higgins, 3 Stark. N. P. C. 182.

(3) Cornish *v.* Pugh, 8 D. & R. 65.

(4) Whatley *v.* Fearnley, 2 Chit. Rep. 103. Tidd's Pr. (9th edit) 259.

(5) Baillie *v.* Hole, Mo. & Ma. N. P. C. 289. 3 C. & P. 560. Pearcey *v.* Fleming, 5 C. & P. 503. In the former of these cases, the sum deposited was the amount sworn to, together with a further sum to cover the costs: in the

the bail has been struck out of the bail piece by competent authority, his liability ceases, and his interest is therefore removed; but his incompetency will continue, where it does not distinctly appear that his liability has terminated. Thus, where a witness stated on the *voire dire* that he was bail to the sheriff in the action, and that he did not justify, but that he had not done anything to get discharged from the liability which he had contracted by becoming bail, he was rejected as an incompetent witness. (1) And where an attachment had been granted against the sheriff for not putting in bail, but which was afterwards set aside on terms, one of which was, that the attachment should stand as a security, the bail to the sheriff were ruled to be incompetent witnesses for the defendant. (2)

When not.

A surety in a replevin bond is interested in procuring a verdict for the plaintiff, in the same manner as bail are interested in procuring a verdict for the defendant, and is therefore incompetent; but if his testimony be required, the courts will permit the substitution of a new surety in lieu of the witness, in order that the latter may be rendered competent. (3)

Surety in replevin bond.

In the cases which have just been stated, respecting the incompetency of bail and sureties, the situation of the witness was that of a party immediately conected with the proceedings in the action, and his interest in procuring a verdict, in favour of the party for whom he has become bound, is apparent from the proceedings themselves.

2. Rule as to Witnesses jointly interested with a party in the Subject-matter of the Suit.

When an action is brought by or against a person as a trustee for another, the person who is substantially interested in the action, though not nominally a party, is incompetent by reason of a direct interest. Therefore, in an action on a policy of insurance, where the declaration averred that the policy was made in the names of the plaintiffs as agents for the sole use

Person interested in policy.

latter case, double the sum sworn to was deposited.

(1) Hawkings *v.* Inwood, 4 Car. & P. 148.

(2) Piesley *v.* Von Esch, 2 Esp. N. P. C. 605.

(3) Bailey *v.* Bailey, 1 Bing. 92. 7 Moore, 439, S. C.

and benefit of A. and B., who were interested in the goods insured, neither of the persons so interested is a competent witness for the plaintiffs. And even their release to the plaintiff, of all actions for any sum recovered by them on the policy, will not restore their competency; for it must be presumed, until the contrary be shewn, that, as they are interested in the policy, the action has been brought by their authority, and that they are liable to the attorney for the costs of the action. Nor will the circumstance that the nominal plaintiffs in the action have received an indemnity from other persons, make any difference, the witness still remaining liable to the attorney in respect of costs. (1)

Consolidation rule.

In actions on policies of insurance where there has been a consolidation rule, an underwriter, who is a party to such rule, is of course as directly interested in the event of the particular cause, as if he were a party to the cause itself; and he is, therefore incompetent. So in a case, where the defendant in an action on a policy of insurance called another underwriter as a witness, who stated that he had paid the loss to the plaintiff, upon an undertaking that he was to be repaid in the event of this action failing, and that he had since received a letter from the plaintiff, promising to return the money on that event, Lord Ellenborough, C. J., at the trial rejected the witness. On a motion afterwards for a new trial, the court sent the case to be re-tried, for the purpose of ascertaining more particularly the time when the undertaking was made to the witness; but on that occasion Lord Ellenborough said, "If a person, who is under no obligation to become a witness for either of the parties to the suit, choose to pay his debt before hand, upon a condition that it is to be determined by the event of that suit, he becomes as much interested in the event of that suit, as if he were a party to the consolidation rule. (2).

Collateral agreement.

Partners.

Upon the same principle, one who is in partnership with

(1) Bell *v.* Smith, 5 B. & C. 188. See also Fotheringham *v.* Greenwood, 1 Str. 129, stated *infra.*
(2) Forester *v.* Pigou, 1 Maule & Selw. 9. 3 Campb. 380, S. C.

the defendant is not a competent witness to discharge a debt, to which, as partner, he would be jointly liable. In an action for goods sold and delivered, the plaintiff having proved the sale of the goods to the defendant and one J. S. as partners in trade, Lord Kenyon held, that J. S. could not be called for the defendant to prove that the goods were sold to himself, and that the defendant was not concerned in the purchase, except as his servant, observing, that the witness came to defeat an action against a man proved to be his partner, and that by discharging the defendant he benefited himself, as he would be liable to pay his share of the costs recovered by the plaintiff in that cause. (1) In a similar action, where the plaintiff proved that the goods had been sold and delivered to the defendant, it was held that a partner of the defendant was an incompetent witness for him, to prove that the goods had been sold to the defendant and to the witness jointly, and had been paid for by them. (2) And in a late case where the action was on a bill of exchange, and the defendant called a witness who admitted that he was a co-contractor with the defendant, the Court of Common Pleas held, that the witness was incompetent, for being liable to contribution for the costs and damages in the action, he had an interest to defeat the action, or reduce the damages. (3) In an action against one of two makers of a joint and several promissory note, the party not sued is not a competent witness for the party sued, to prove the consideration of the note illegal. (4) So also where in an action the defendant pleads the non-joinder of a co-contractor in abatement, such co-contractor will be an incompetent witness for the defendant in support of the plea. (5)

Co contractor.

In an action on a joint and several bond against one of the obligors, who was surety for another, that other obligor (the principal) is not competent for the defendant, to prove a payment of money by himself in discharge of the bond; for he

Co-obligor.

(1) Goodacre *v.* Breame, Peake N. P. C. 174.

(2) Evans *v.* Yeatherd, 2 Bing. 133. See also Cheyne *v.* Koops, 4 Esp. 112. Jackson *v.* Galloway, 8 Carr. & P. 480.

(3) Hall *v.* Rex, 6 Bing. 181.

(4) Slegg *v.* Phillips, 4 Ad. & Ell. 852.

(5) Young *v.* Bairner, 1 Esp. 103. Hare *v.* Munn, Mo. & Ma. N. P. C. 241, n. (*a*).

has an interest in favour of his surety to the extent of the costs of the action. (1)

Nature of the interest in these cases.

It is to be observed, that in all these cases the proposed witness admitted his own liability to the demand, which was the subject of the action, and therefore to a certain extent he appeared to be giving evidence against his own interest. But although he admitted his liability to be sued in another action, yet the object of his testimony was to defeat the plaintiff in the particular action then pending; and hence arose that direct interest in the event of the suit, which rendered him incompetent. For if the plaintiff had succeeded in the action, the witness, as partner or co-contractor, would have been liable to contribution not only for the damages recovered, but also for the costs; whereas by defeating the plaintiff the witness would not only have relieved himself from all liability in respect of the plaintiff's costs, but would also have thrown upon the plaintiff the burthren of the costs incurred by the defendant, and in respect of which the witness might also have been called on to contribute.

3. *Examples in Actions by Executors or Administrators.*

Residuary legatee.

In an action by an executor to recover a debt due to the testator, a residuary legatee is an incompetent witness for the plaintiff. (2) This incompetency does not arise from the use of the verdict as evidence in any future suit, for the witness could neither be plaintiff nor defendant in an action relating to the debt; the witness is disqualified, because he receives an immediate benefit by a verdict for the plaintiff. (3) The action is in the name of the executor, but the witness is the party substantially interested in the event. And even if the witness release all claim to the debt in question, this will not restore his competency, for he has still an interest in supporting the

(1) Townsend *v.* Downing, 14 East, 565. See also Trelawney *v.* Thomas, 1 H. Bl. 306. And see other cases as to incompetency from liability to costs, *infra*.

(2) Baker *v.* Tyrwhitt, 4 Campb. 27. In assumpsit by an undertaker for funeral expenses, the residuary legatee is a competent witness for the plaintiff. Green *v.* Salmon, 8 Ad. & Ell. 348, stated *infra*.

(3) By Tindal, C. J., 6 Bing. 394.

action, in order that the costs may not be a charge on the estate. (1)

In an action by an administrator against a debtor of the intestate, a person entitled to a distributive share of the estate, will not be a competent witness to support the action. (2) And it has also been ruled, that a witness so situated will not be competent for the administrator, in an action brought against him in that character. (3) Next of kin. Action by administrator.

In these cases, the natural and immediate effect of a verdict in favour of the executor or administrator would be to benefit the general fund in which the witness was interested; but it will be seen hereafter, that the principle of these cases has been held not to apply to specific legatees, whether paid or unpaid, or to creditors of the testator or intestate.

4. *Rule as to Bankrupts, Insolvent Debtors and their Creditors.*

The situation of a bankrupt bears some resemblance, in point of interest, to that of a residuary legatee. The bankrupt is interested in increasing his estate, for his allowance under the Bankrupt Act depends upon the clear amount of the funds recovered by his assignees, and the surplus, if any, after his creditors are satisfied, belongs to himself. This is an interest which, in actions by or against his assignees, renders him an incompetent witness on behalf of the assignees, for the purpose either of adding to the amount of the fund, or of preserving it from diminution. (4) In order to render the bankrupt competent in such cases, he must release his allowance and surplus: and it is also necessary, that he should have obtained his certificate, Bankrupt. How made competent.

(1) Baker *v.* Tyrwhitt, 4 Camp. 27.

(2) Matthews *v.* Smith, 2 Y. & J. 426. It was also decided in this case, that a release from the witness to the administrator of all claims *up to the time of executing the release* would not restore competency, the right of the witness being prospective. The question of costs seems not to have been adverted to in this case. See Ingram *v.* Dade, *post*.

(3) Allington *v.* Bearcroft, Peake's Add. Ca. 212.

(4) Ewens *v.* Gold, B. N. P. 43. Butler *v.* Cooke, Cowp. 70. *Ex parte* Burl, 1 Mad. Rep. 46. Williams *v.* Williams, 6 Mees. & Wels. 170.

without which his evidence will, in no case, be admissible on behalf of his assignees. (1)

Second commission.

Where there has been a second commission against the bankrupt, and he has not paid fifteen shillings in the pound, he will not be a competent witness for his assignees, although he has obtained his certificate and released his allowance and surplus; for his future effects remain liable until payment of fifteen shillings in the pound, and he is therefore interested in increasing the fund, in order to relieve himself from this liability. (2)

Incompetent to support or defeat *fiat*.

There is another case, in which a bankrupt is wholly incompetent to give evidence in any action by or against his assignees, notwithstanding he may have obtained his certificate and released his surplus and allowance: this is, where the bankrupt is called for the purpose of proving any fact, which is material either to support, or to defeat, the *fiat* issued against him. (3)

Reason of the rule.

The doctrine, that a bankrupt is incompetent to give evidence in support of his commission, has been sometimes referred to the ground of interest; it has been said, if the *fiat* or commission is not good, the certificate and all other proceedings are void, and the bankrupt will be again liable to

(1) See Dixon *v.* Purse, Peake's Add. Ca. 187. Masters *v.* Drayton, 2 T. R. 496. Goodhay *v.* Hendry, Mo. & Ma. 319.

(2) Kennett *v.* Greenwollers, Peake's N. P. C. 3. 6 Geo. 4, c. 16, s. 127. The same principle applies to a party who has become bankrupt after having compounded with his creditors. See the words of the section above referred to. But where the composition has not been general, but has been limited to particular creditors only, the objection will not arise. Roberts *v.* Harris, 2 C., M. & R. 292. See Norton *v.* Shakspeare, 15 East, 619.

(3) The following are some of the principal cases on this point. That a bankrupt is incompetent to prove his own act of bankruptcy. Field *v.* Curtis, 2 Stra. 828. Ewens *v.* Gold, B. N. P. 40. By Lord Kenyon, Oxlade *v.* Perchard, 1 Esp. 288. By Lord Ellenborough, Hoffman *v.* Pitt, 5 Esp. 25. Wyatt *v.* Wilkinson, 5 Esp. 187. That a bankrupt is incompetent to prove the petitioning creditor's debt, Cross *v.* Fox, 2 H. Bl. 279, n. (*a*); Flower *v.* Herbert, *ib.* 279, n. (*a*); Chapman *v.* Gardner, 2 H. Bl. 279. That a bankrupt is incompetent to disprove the alleged act of bankruptcy, or to explain an equivocal act, Hoffman *v.* Pitt, 5 Esp. 22; Binns *v.* Tetley, McLel. & Y. 404, in which case all the authorities were reviewed.—Sayer *v.* Garnett, 7 Bing. 103. In Oxlade *v.* Perchard, 1 Esp. 287, Lord Kenyon had ruled differently, and had considered the bankrupt admissible to explain an equivocal act, but in Sayer *v.* Garnett, 7 Bing. 104, Park, J., said, that Lord Kenyon afterwards changed the opinion he had there expressed.

his debts. (1) If, however, this were considered as the sole foundation of the rule, it would appear to follow, that the same ground which disqualified a bankrupt from giving evidence to support his commission, would render him competent to defeat it. But it seems to be pretty clear that in either case the interest of the bankrupt, one way or the other, will depend entirely upon circumstances. A bankrupt has frequently an interest in supporting a commission or fiat, but he has also as frequently an interest in defeating it, where such is his object and desire. (2) The rule in question, therefore, seems to have been considered as resting not entirely upon the ground of interest, but partly upon considerations of policy and convenience. It would often be exceedingly difficult to discover when the bankrupt is, and when he is not interested, in supporting or defeating his commission. And if his testimony were generally admitted, he would often be called on to make statements of matters resting in his own knowledge alone, and the proceedings under fiats of bankruptcy would be rendered generally insecure. (3) Whatever may have been the foundation for the rule, at all events the practice on the subject has been fully settled, and it is clear, the bankrupt cannot be called either to affirm, or disaffirm his bankruptcy, nor, if called and examined for any other purpose, can he be asked on cross-examination any questions as to facts which are material to support or defeat the fiat. (4)

Insolvent debtor.

The objection of a direct interest in increasing the fund of his estate, which, in general, disqualifies a bankrupt from giving evidence in behalf of his assignees, applies also to the case of a person who has taken the benefit of the Insolvent Act. (5) And as the future effects of an insolvent are liable to his

(1) See by Lord C. J. Ryder, in Flower *v.* Herbert, 2 H. Bl. 279, n.(*a*). By Bayley, J., and Holroyd, J., 2 B. & C. 18, 19.

(2) By Tindal, C. J., 7 Bing. 104.

(3) *Ibid.*

(4) Binns *v.* Tetley, McLel. 397. Sayer *v.* Garnett, 7 Bing. 103. The rule is restricted to evidence affirming or disaffirming the bankruptcy, and will not be extended to exclude the bankrupt from giving evidence of facts which in themselves are not material to the validity of the fiat. See Reed *v.* James, 1 Stark. N. P. C. 134. Morgan *v.* Prior, 2 B. & C. 14, *post*.

(5) Rudge *v.* Ferguson, 1 Car. & P. 253. Wilkins *v.* Ford, 2 Car. & P. 344.

creditors under the judgment, which the act directs to be entered against him, he will not be rendered a competent witness by releasing his surplus to his assignee. (1)

Creditor of bankrupt or insolvent.

In the case of bankruptcy or insolvency, the interest of the bankrupt or insolvent in the fund is of the nature of a residuary interest, being subject to the rights of creditors, who are the persons primarily interested in any fund realized by the assignees. The amount of the creditors' dividend must depend upon the amount of the fund, and a creditor is an incompetent witness for the purpose of increasing the estate, on account of this direct interest in the event of the suit. (2) He cannot, therefore, give evidence to deprive the bankrupt of his allowance. (3)

The creditor of a bankrupt is also interested in supporting the bankruptcy, the effect of the bankruptcy being to appropriate the whole estate and effects of the bankrupt towards the immediate satisfaction of his creditors. A creditor is, therefore, an incompetent witness to support the fiat, and it is immaterial, whether he has or has not availed himself of the right of proving under the bankruptcy. (4) It is clear that the petitioning creditor is incompetent to prove the fiat regularly sued out, for (independently of the objection which applies to other creditors) he gives a bond to the Chancellor, conditioned to establish the fact upon which the validity of the *fiat* depends. (5) The interest of other creditors, as we shall hereafter see, may be removed by a release to the assignees: and if a creditor has sold his debt, or agreed to sell it, his interest will be extinguished. (6) The cases relative to the competency of a bankrupt, of a creditor to diminish the fund, and of a creditor to reduce the amount of his own debt, or to

(1) Delafield *v.* Freeman, 6 Bing. 294. 4 Car. & P. 67, S. C. Rudge *v.* Freeman, *supra*. See stat. 7 G. 4, c. 57, sect. 57.

(2) Shuttleworth *v.* Bravo, 1 Stra. 507.

(3) S. C.

(4) Adams *v.* Malkin, 3 Campb. 543. Crooke *v.* Edwards, 2 Stark. 303, overruling Williams *v.* Stevens, 2 Campb. 301. And see 1 Rose, 392, n., *Ex parte* Malkin, 2 Rose, 27. *Ex parte* Osborne, 2 V. & B. 177.

(5) Green *v.* Jones, 2 Campb. 411.

(6) See *post*. And Granger *v.* Furlong, 2 Bl. R. 1273. Heath *v.* Hall, 4 Taunt. 326.

defeat the commission, will be stated in the next Section, which treats of particular cases where a witness will not be disqualified by interest.

5. *Examples in Actions relating to real Property.*

The next class of cases which may be here noticed, are those in which witnesses have been rejected on the ground of interest in actions relating to real property.

Tenant in possession in ejectment.

In an action of ejectment, a tenant in possession is incompetent for the defendant, having an immediate interest in the event of the suit; (1) for the verdict and judgment in the action would have the effect of turning him out of possession immediately. (2) So also, if a plaintiff agree with a witness, that, in case he recovers the lands, he will grant the witness a lease of them for so many years, this excludes his evidence; for he would have a fixed and certain advantage by the event of the verdict: (3) he is therefore incompetent, upon the same principle as a witness, who, if the plaintiff fail in the action, is to repay a sum of money in his hands belonging to the plaintiff, but is not to repay any part of it, if the plaintiff succeed. (4).

Agreement for lease.

Remainder man.

In ejectment brought by a tenant in tail to try the validity of a common recovery suffered of the lands in dispute, a remainder man, after the tenant in tail, is incompetent to give evidence for the latter; for by recovering in the ejectment, the tenant in tail would be in as of his former right, and the witness would thereupon acquire a vested interest in the remainder in tail. As the effect, therefore, of the verdict would be to revest the remainder in the witness, he has a direct and immediate interest which renders him incompetent. (5) So also in a *quare impedit* respecting the right of presentation to

Tenant by curtesy.

(1) Doe *v.* Wilde, 5 Taunt. 183. See also 6 Bing. 304; and Doe *v.* Bingham, 4 B. & Ald. 672. Doe dem. Willis *v.* Birchmore, 9 Add. & Ell. 662.

(2) 6 Bing. 394. 5 Taunt. 183.

(3) Gilb. Evid. 108.

(4) Fotheringham *v.* Greenwood, 1 Stra. 129.

(5) Doe *v.* Tyler, 6 Bing. 390. Smith *v.* Blackham, 1 Salk. 283. And see by Lee, C. J., Commins *v.* The Mayor of Oakhampton, Sayer, 45.

an advowson, which was claimed by the defendant through his mother, it was held, that the father of the defendant, who was tenant by the curtesy of the mother's property, was an incompetent witness on the defendant's behalf, on the ground that he had a direct interest in the result of the cause. (1)

Devisee.

On the trial of an issue on *devisavit vel non*, a devisee, who takes under the will a vested interest in the testator's estate, has been considered incompetent to support the will, in an action of ejectment brought by another devisee against the heir. (2).

Party entitled to dower.

It may be observed here, that a claim to an estate or interest in land, on the part of a witness in an action of ejectment, will not in all cases disqualify. Thus in the recent case of *Doe* v. *Maisey*, (3) an action of ejectment brought to recover premises which the defendant claimed as heir at law to his father, the defendant's mother was tendered as a witness for him, and was objected to, on the ground that her evidence would tend to establish for her a title to dower; but the Court of King's Bench, after time taken to consider, held, that she had no legal interest in the event of the suit, and was competent. Lord Tenterden, in delivering the judgment of the Court, said that the judgment in the action would be no evidence of her husband's seisin; and that if he was seised, she was entitled to dower, whether the premises were in the hands of the lessee of the plaintiff or of the defendant. (4)

(1) Gully *v.* The Bishop of Exeter and another, 5 Bing. 171.

(2) In Helliard *v.* Jennings, 1 Lord Raym. 505, on an issue of *devisavit vel non*, it was assumed as a clear proposition that a *devisee* was not competent. See also Pyke *v.* Crouch, 1 Lord Raym. 730. The ground of these cases would not

Executor.

prevent an executor, taking a pecuniary interest under a will, from giving evidence to support the will in an action of ejectment brought by the heir at law; for the verdict against the plaintiff would only have the effect of establishing the will as to the real property, and the witness would have no immediate interest in the termination of that suit; nor has he any indirect interest in the record, since the judgment would not be evidence in the Ecclesiastical Court upon a question, whether the will were good as to the personalty. (Doe *v.* Teague, 5 B. & C. 335.) Upon the same principles, a *legatee* of personal estate seems also to be competent in such a case. An heir apparent is also competent upon any question concerning the lands, for the heirship is no interest, but a mere contingency. (See the following section.)

(3) 1 Barn. & Ad. 439. See Gully *v.* Bishop of Exeter, and Doe *v.* Tyler, *supra*.

(4) *Ibid.* 440. It would seem that the widow assisted her case for dower by her evidence.

In an action of ejectment by an assignee of a mortgage made by the defendant, a person who has taken a later mortgage from the defendant, is not a competent witness for the defence, to show the first mortgage void on account of fraud; (1) for if this action succeed, there would be a change of possession, and the witness would not be able to recover against the new possessor, without proving what he himself comes to prove in the action; whereas if the action fail, he would be entitled to possession at once, since the defendant cannot resist him; the witness therefore is interested in the event of the suit itself. (2) Mortgagee.

We have seen, in actions by or against corporations respecting the lands of the corporation, that individual members are incompetent, when they have an interest, as members of the corporation, in the lands which are the subject of the action. So also, in an action of trespass brought by the tenant of a corporation, in which a question arose respecting the right of the corporation to inclose the *locus in quo*, against the defendant who claimed a right of common thereon, freemen of the corporation were held incompetent for the plaintiff, to prove that there was a sufficiency of common left, although the rent was nominally reserved to the mayor and bailiffs alone. (3) It was objected in this case, that if any interest existed in the witness, it was too minute to form a ground of incompetency, and it is obvious, that the same objection might be raised in most cases of a similar description, and in many of those which have been before stated in the text; but the principle was fully settled by that case, and has ever since been adhered to, that if there be an interest to any amount, the objection must prevail, however small it may be in reality. Corporation interest in land.

On the trial of an issue, whether the owners of property within a particular district are liable by immemorial usage to the charge of repairing a chapel, an owner of property within the district was held incompetent to disprove the liability, (although he neither resided nor was rated in the district,) having leased Charge on land.

(1) Doe d. Cuthbert *v.* Bamford, 11 Ad. & Ell. 786.
(2) See Lord Denman's judgment.
(3) Burton *v.* Hinde, 5 T. R. 174.

Owner.

his property to a tenant who was bound to pay the rent without deduction: the owner was immediately interested in removing such a permanent charge, and thus to improve the value of his estate. (1)

Rateable inhabitant.

In a subsequent case, upon an issue whether a messuage was situated within a chapelry, it was determined that an occupier of property within the district, who was not actually rated, was competent to prove, that it was so situated; and although the decision proceeded chiefly upon the operation

54 G. 3, c. 170.

of the statute of the 54 Geo. 3, c. 170, s. 9, in restoring competency in such cases, (which statute will be noticed afterwards,) yet the court expressed an opinion that as the witness was not actually rated, but only rateable, he was competent at

Rated inhabitant.

common law. (2) Before the act of 3 & 4 Vict. c. 26, (noticed afterwards), a rated inhabitant was held to be an incompetent witness for the defendant in an action against the surveyor of the highways, in support of a custom to take materials from the sea beach for the purpose of repairing the road; for if such custom were established, the highways would be repaired at less expense, and the highway rates be thereby diminished: (3) nor was the witness rendered competent by

54 G. 3, c. 170.

the statute 54 Geo. 3, c. 170, s. 9. (4) So also in an action to recover a sum, alleged to be due to the plaintiff for attending a pauper, against an overseer who defends on the part of the parish, a rated inhabitant was an incompetent witness for the defendant; (5) for if the plaintiff recovered the amount claimed, it would be a charge on the rates; and the witness was not rendered competent by the statute 54 Geo. 3, because the question in the action was not "*a matter of rates or cesses of the parish*," within the meaning of that statute. (6)

Replevin.

In an action of replevin, a party under whom the defendant

(1) Rhodes *v.* Ainsworth, 1 B. & Ald. 87. See *post* as to the effect of the rule (by statute 54 Geo. 3, c. 170, s. 9,) upon questions of this description.

(2) Marsden *v.* Stanfield, 7 B. & C. 815, 818. See Rex *v.* Kirdford, 2 East, 559.

(3) Oxenden *v.* Palmer, 2 B. & Ad. 236. See the provisions of St. 3 & 4 Vict. c. 26, stated *infra*, p. 144.

(4) S. C. & R. *v.* Bishop Auckland, 1 Ad. & Ell. 744. See this statute, *infra*, p. 141. See also p. 144.

(5) Tothill *v.* Hooper, 1 M. & R. 392. See 3 & 4 Vict. c. 26, *infra*, p. 144.

(6) See the words of the act, and by Lord Tenterden, 2 Barn. & Ad. 243-4.

makes cognizance is, in general, an incompetent witness for the defendant, being the person really interested in the event of the cause, and in truth the substantial defendant. And in a case where there were two cognizances, one under the party beneficially interested, and the other under a trustee for him; the evidence of the latter was rejected, notwithstanding the absence of any beneficial interest on his part in the premises. (1) Conusor.

In the case of *Upton* v. *Curtis*, (2) it appears that a party, under whom cognizance was made, was considered incompetent for the defendant, although that particular cognizance had been abandoned. But it has been settled in a very recent case, that where distinct cognizances are made under different parties, who do not appear to be in any manner connected in interest, if one of the cognizances be abandoned at the trial, the party, under whom it is made, is a competent witness for the defendant. (3) Lord Denman in delivering the judgment of the court, after observing that there was reason to suppose that the facts of the case of *Upton* v. *Curtis* were not reported with perfect accuracy, said, the court were of opinion, that the offer to abandon the issue joined on the cognizance under the witness, was tantamount to consenting that a verdict should be found for the plaintiff on that issue. (4). Conusor. Present rule. Distinct cognizances.

6. *Witnesses liable to an Action by one of the Parties.*

It is now proposed to notice an important class of cases, in which witnesses have been rejected as incompetent to give evidence in a particular suit, on account of their liability to a subsequent action by one of the parties to that suit. On this ground, in the case of actions against a master or principal, for the misconduct of a servant or agent of the defendant, such servant or agent has been generally rejected as incompetent for Action for misconduct of defendant's servant or agent.

(1) Golding *v.* Nias, 5 Esp. N. P. C. 272. In a prior case, it appears that the wife of a party under whom cognizance was made, was admitted as a witness for the defendant; but no objection seems to have been taken, or any question raised as to her competency. Johnson *v.* Mason, 1 Esp. N. P. C. 89.

(2) 1 Bing. 210.

(3) King *v.* Baker, 2 Ad. & Ell. 333.

(4) 2 Ad. & Ell. 339, 340. In the case of Hart *v.* Horn, 2 Campb. 92, it was ruled that the declarations of a party under whom cognizance had been made, were inadmissible in evidence for the plaintiff. For another example of direct interest, see Bland *v.* Ansley, 2 N. R. 331.

the defendant to disprove his own misconduct. In the numerous cases of this description, which occurred before the passing of the statute 3 & 4 Wm. 4, c. 42, the rejection of the witness almost always proceeded on the ground of an indirect interest in the record with reference to a subsequent suit: for if the servant or agent has been guilty of the misconduct imputed to him, he will in general be liable to make good all damage sustained by the master or employer in consequence of such misconduct, and may be compelled by the latter, through the medium of an action, to repay any damages and costs recovered by the party injured: and in such action, the record in the first suit would be admissible for the purpose of shewing the *quantum of damages* sustained by the master or employer in consequence of the witness's misconduct, (the fact of his misconduct being first proved by other evidence), although it would not be evidence for the purpose of establishing the fact of the misconduct of the witness. (1) Now it has been seen, that, before the statute of the 3 & 4 Wm. 3, c. 42, it was a settled general rule, that a witness was incompetent to give evidence to any suit, where the record of the proceedings in that suit would be evidence for or against him in a subsequent action; and as it was clear, that in the cases above mentioned, the defendant in the first action might produce the record thereof as evidence in a subsequent action against the servant or agent, the latter when tendered as a witness in the first action, has generally been rejected upon the ground of this indirect interest in the record.

Where verdict is evidence in subsequent suit.

Servant incompetent for defendant.

Examples.

Thus, in the case of *Green* v. *The New River Company*, (2) which was an action to recover damages, sustained by the plaintiff through the alleged misconduct of a servant of the defendants, the servant was held an incompetent witness for the defendants, to disprove his own negligence. It was said by the court, that although a tradesman's servant is permitted to prove the delivery of goods on behalf of his master, this is an exception to the general rule, proceeding merely from necessity; (3) and that this exception would not extend to actions arising from the misconduct of coastmen and sailors, in which cases the

(1) 4 T. R. 589.
(2) 4 T. R. 589.
(3) See *post* chapter on exceptions to the rule of incompetency from interest.

verdict against the proprietor might be given in evidence in a subsequent action by the latter against the servant, as to the *quantum of damages*, though not as to the fact of the injury; and so in the case then before the court, the verdict might be given in evidence in an action by the defendants against the witness, and therefore he was incompetent without a release. (1) So also in an action against a coach proprietor for negligence in the management of the coach, the guard, who appeared to be implicated in the alleged mismanagement, has been considered incompetent, without a release. (2) In an action against the captain and owner of a vessel for an injury occasioned by imputed mismanagement of the vessel, a pilot, who had the control of the vessel at the time, has been also considered incompetent to give evidence for the defendant. (3)

Broker.

Upon the same principle it has been ruled, in an action against a principal for misconduct in the purchase of certain goods, that a broker, who had been employed by the defendant to make the purchase, was incompetent to disprove negligence in the transaction. (4) And in an action for an excessive distress, the broker, who made the distress, has been considered incompetent to prove that it was not excessive. (5)

Sheriff's officer.

In like manner, in an action against a sheriff for a false return, the sheriff's officer, who has given security for the due execution of process, (and is consequently liable over to the sheriff in case of misconduct,) has been adjudged to be an incompetent witness to prove the correctness of the return. (6) But in a case, where in an action of this nature, an objection was made to the competency of an assistant to the sheriff's officer, upon the ground, that although the witness was not immediately liable to the sheriff, he was liable to his own employer, the officer, and that in an action against the officer the sheriff might give in evidence the record in the first action, and that the record of the second action would be evidence for the officer in a

Assistant to sheriff's officer.

(1) 4 T. R. 590.
(2) Whitamore *v.* Waterhouse, 4 Car. & P. 383.
(3) Hawkins *v.* Finlayson, 3 Car. & P. 305.
(4) Gevers *v.* Manwaring, Holt, 139.
(5) Field *v.* Mitchell, 6 Esp. 71.
(6) Powell *v.* Hord, 2 Lord Raym. 1411. 1 Stra. 650, S. C.

subsequent action against the witness, Lord Tenterden held, that this circuity of interest was no legal ground of exclusion. He observed, that the rule established and acted upon was, that in order to exclude a person called as a witness, the verdict must be evidence for or against him, and that an interest beyond this was too remote to establish incompetency. (1) In another case, the officer himself was rejected by Lord Tenterden as incompetent for the sheriff, even where he had received an indemnity from the execution creditor, and had not employed the attorney for the defence; on the ground, that, if there should be a verdict against the sheriff, the liability of the officer would be certain, and that he might never get paid on his indemnity. (2)

Landlord receiving rent from sheriff.

It has also been decided, in an action against the sheriff for a false return to a *fi. fa.*, which stated that he had paid a sum of money to the landlord of the premises for arrears of rent, that the landlord is incompetent to prove the rent due; for if the action were to succeed, the witness would be liable to an action at the suit of the sheriff, in which the judgment in the former action would be evidence of special damage. (3) In this last case, it will be observed, the witness did not stand exactly in the situation of an agent employed by the defendant to do a particular act, and misconducting himself in the course of his employment; but the principle, upon which he was rejected, was the same as in the preceding cases, namely, that there would be a legal liability over to the sheriff, arising from the alleged misconduct of the witness in claiming rent, which, it was contended, was not really due, and that in a subsequent action by the sheriff against the witness, the record of the verdict would be admissible in evidence to enforce such liability.

Nature of the interest in these cases.

In most, if not in all the cases of this nature, which arose after the case of *Green* v. *the New River Company*, and before the passing of the late statute of the 3 & 4 Wm. 4, c. 42,

(1) Clark *v.* Lucas, Ry. & Mo. N. P. C. 32.
(2) Whitehouse *v.* Atkinson, 3 Car. & P. N. P. C. 344.
(3) Keightley *v.* Birch, 3 Campb. 521.

witnesses liable over to the defendant, were held incompetent to give evidence for him, for the reason before stated; namely, that the verdict might be given in evidence in a subsequent action against the witness, to prove the *quantum of damages*. This was a sufficient ground for the rejection of the witness before the statute 3 & 4 Wm. 4, c. 42; but the 26th and 27th sections of that statute appear, (as we have already observed), to have produced the effect of removing all objections to the competency of witnesses, which are founded on an *indirect interest in the record* as being admissible evidence in a subsequent action. And it therefore becomes material to ascertain, whether, in the class of cases now under consideration, the witness is or is not liable to objection, on the ground of a direct interest in the event of the particular suit.

3 & 4 Wm. 4, c. 42.

It will be observed, that in all the cases which have been above cited and referred to, the witness was tendered on behalf of the *defendant*. And if no objection to his competency could have been made, except on the ground of the subsequent use of the verdict as evidence against him, it would seem to follow, that in all actions of a similar description, a servant, or agent, or other person liable over to the *plaintiff*, would be a competent witness, on his part, to prove that the injury complained of arose from negligence or improper conduct on the part of the defendant; because, whatever might be the result of the action, the verdict could in no case be used as evidence for or against such witness for the plaintiff in any subsequent proceeding.

It has, however, been decided in several cases, that the *plaintiff's* servant or agent is equally incompetent to give evidence on behalf of the plaintiff, as the *defendant's* servant or agent is to give evidence on behalf of the defendant. Thus, in *Miller* v. *Falconer*, (1) which was an action against the defendant for negligently running against the plaintiff's cart with a dray, the plaintiff's servant, who was driving the cart, was objected to as incompetent, on the ground that *primâ facie* he was himself answerable to his master, and that he was interested in fixing the liability on the defendant, and the objection was allowed by Lord Ellenborough, who observed, that the witness certainly

Servant of the plaintiff incompetent.

Direct interest.

(1) 1 Campb. 251.

came to discharge himself, and therefore was incompetent without a release.

The same point was subsequently decided by the Court of Common Pleas, in the case of *Morish* v. *Foote.* (1) In this last case it was contended, that the witness was competent, because no use whatever could be made of the verdict as evidence against him in a subsequent action; and that the case was distinguishable from that of *Green* v. *the New River Company*, on the ground, that there the witness was called on the part of the *defendant*, but here he was tendered on the part of the *plaintiff;* but the court decided, that the witness was incompetent, as having a direct interest in the event of the suit; for if the plaintiff obtained a verdict, the witness was placed in a state of security. In giving judgment in this case, Gibbs, C. J., referred to and recognised a prior *nisi prius* decision, in which the same principle had been acted on by Lord Kenyon, (2) in a case where the action was upon a policy of insurance on the plaintiff's goods, and the right to recover depended upon the question, whether the ship was seaworthy or not. In order to prove the vessel was staunch, the plaintiff called the owner, who was objected to on the ground that he exonerated himself from all liability by fixing the defendant. On the other hand it was contended, that it had been settled by the case of *Bent* v. *Baker*, that a witness was competent in all cases, except where the verdict could be used as evidence for or against him. But Lord Kenyon said, it was held in *Bent* v. *Baker*, that a witness was incompetent, not only in cases where the verdict would be evidence for or against him in another suit, but also where he was directly interested in the event of the particular suit; and that in the case then before him the witness was directly interested in procuring a verdict for the plaintiff. (3) So in a later case it was ruled at *nisi prius*, that in an action for an injury to a stage coach by a cart, the coachman was an incompetent witness for the

(1) 8 Taunt. 434. 2 Moore, 508.

(2) Rothero *v.* Elton, Peake, 84. See by Gibbs, C. J., 8 Taunt. 457. See also De Symonds *v.* De la Cour, 2 N. R. 374, in an action on policy of insurance, the captain is incompetent to give evidence on the question of deviation.

(3) Peake, 85. See also Fox *v.* Lushington, *ib.* 85, n. S. P.

incompetent witness for the plaintiff without a release ;(1) and in two recent cases of a similar nature the same point has been ruled in the same way. (2)

In the recent case also of *Boorman* v. *Brown*, (3) an action against a broker for negligently delivering goods of the plaintiff without payment, the Court of Queen's Bench decided, that a person employed by the plaintiff to attend to the delivery of goods under the orders of brokers, was not a competent witness on behalf of the plaintiff, to prove that the delivery had been directed by himself under the orders of the defendant. If the act, from which the damage accrued, was done by the witness without the plaintiff's authority, he would have been responsible; he was therefore directly interested in the event of the suit, and in fixing the liability upon the defendant.

Remark on the two classes of cases last cited, with reference to 3 & 4 Wm. 4, c. 42.

It appears to be established by the class of cases last cited, (4) that when a witness produced for the plaintiff is so connected with the transaction in question, that a verdict for the plaintiff would entirely relieve him from all liability, he will be incompetent, as being directly interested in the event of the cause. To this class of cases the stat. 3 & 4 Wm. 4, c. 42, seems not to apply; and the witness would still be considered incompetent. (5) But in the other class of cases before cited, (6) when the witness produced on the part of the defendant was thought to be incompetent, his interest was of a different kind; his liability would not have been established by a verdict against the defendant, and he was not interested, except that the verdict might be used against him to shew the amount of damages resulting from his misconduct. This class of cases appears to be within the scope and meaning of the stat. 3 & 4 Wm. 4, c. 42; (7) and if such cases should occur again, the witnesses, it is conceived, would be admitted as competent within the provisions of that act. In the case of *Yeomans* v. *Legh*, (8) the Court of Exchequer decided, in an action against the defendant for the negligent driving of his carriage, that the de-

(1) Kerrison *v.* Coatsworth, 1 C. & P. 645.

(2) Wake *v.* Lock, 5 Car. & P. 454. Sherman *v.* Barnes, 1 Moo. & Rob. N. P. C. 69. In both these cases, the authority of Morish *v.* Foote, *supra*, was expressly recognised.

(3) 9 Add. & Ell. 487.

(4) p. 105—107.

(5) See *infra*, p. 117.

(6) p. 101—105.

(7) See *infra*, p. 116.

(8) Yeomans *v.* Legh, 2 M. & W. 419.

fendant's servant who drove the carriage, was a competent witness for the defendant. "The effect of the clause in the statute," said Mr. Baron Parke, "is to make the witness competent, when the only interest is that the verdict may be used for or against him. In this case there is no interest, except that the verdict might be used against him in an action by his master, to shew the amount of the damages recovered." (1)

There are several other cases remaining to be noticed, in which witnesses have been rejected as incompetent, on the ground of an interest arising from a liability over to one of the parties to the suit; in some of which cases the interest is sufficiently clear, but in others its precise nature and extent are not easily discoverable; neither, indeed, is it easy to reconcile some of them with the principles upon which the courts have acted in other cases.

Sale of land with warranty.

In an action between the vendor and purchaser of an estate in which the title to the estate comes in question, a person who had previously sold the estate, and who is liable to the vendor if the title prove defective, is incompetent to give evidence in support of the title. (2) But if the former vendor sold the estate without any covenant for good title or warranty, he will be competent; (3) for in this case the witness is under no liability.

Sale of goods with warranty.

It has been decided, that if the buyer of a horse, warranted to him, resell with a warranty, and upon being sued offers the defence of the action to the person from whom he bought, but who does not interfere, the buyer may recover against him the costs of the action, as part of the damage occasioned by the breach of warranty. (4) In the case of *Briggs* v. *Crick*, (5) it is said to have been ruled, that a former proprietor of a

(1) The case of Yeomans *v.* Legh, is here stated, as being immediately connected with the cases above cited. It should also be referred to in p. 116, *infra*. The question of competency decided *against* the witness in Green *v.* The New River Company, Whitamore *v.* Waterhouse, Hawkins *v.* Finlayson, (see p. 102, 103, *suprà*) would now, conformably with Yeomans *v.* Legh, be decided in favour of the witness. The reader is referred to a note on this subject in Mr. Smith's Selection of Leading Cases, vol. 2, p. 52, where all the cases are collected.

(2) 2 Roll. Abr. 685.

(3) Busby *v.* Greenslade, 1 Stra. 445.

(4) Lewis *v.* Peake, 7 Taunt, 153.

(5) 5 Esp. 99.

horse, who had sold with a warranty, was competent, without a release, to prove the soundness: and in a later case Lord Tenterden appears to have ruled to the same effect.(1) But in a very recent case at *nisi prius*, in which the same question arose, and the case of *Briggs* v. *Crick* was cited in support of the witness's competency, Mr. Justice Alderson was of opinion, that as the effect of a verdict would be to relieve the witness from an action at the suit of the defendant, to whom he had sold and warranted the horse, he was incompetent to give evidence on the defendant's behalf.(2)

In the case of *Nix* v. *Cutting*, (3) it was decided, in an action of trover for a horse alleged to be the plaintiff's property, that a witness was competent to prove, on the part of the defendant, an agreement between the plaintiff and the witness, that he (the witness) should take the horse as a security for a sum of money due to him from the plaintiff, and should sell it if the money were not repaid on a day certain, and that, on default of payment, the witness sold the horse to the defendant: an objection was taken against the witness, that by selling the horse, he had warranted it to the defendant to be his property, to whom he would be liable over, if the plaintiff succeeded in the action; but the court held, that this was not a sufficient objection, and said, that as between the witness and the plaintiff, and the witness and the defendant, the verdict obtained upon his testimony in the cause would be of no avail.(4) So also in the case of *Ward* v. *Wilkinson*, (5) it was decided, in an action of trover for goods in the defendant's possession which were claimed by the plaintiff, that a witness was competent to prove that the goods belonged to him, and had been fraudulently obtained from him by the plaintiff; because the verdict could not be evidence for or against the witness in any subsequent action: and the court in this case recognised the decision of *Nix* v. *Cutting*. (6) But it does not appear, that in this case of *Ward* v. *Wilkinson* any question arose as to in-

Witness proving property in himself, and that he sold to defendant.

Witness proving property in himself, at time of action.

(1) Baldwin *v.* Dixon, 1 Mood. & Rob. 50.
(2) Biss *v.* Mountain, 1 Mood. & Rob. 302.
(3) Taunt. 18.
(4) 4 Taunt. 20. See case of Larbalestier *v.* Clark, *post*.
(5) 4 B. & Ald. 410.
(6) See by Holroyd, J., 4 B. & Ald. 412, 413.

competency on account of liability over to either of the parties, for the witness had not sold the goods to the defendant, (as in the former case,) but was called to prove that they actually belonged to himself at the time of trial.

7. *Witnesses liable to a Party for Costs of the Action.*

Actions on bills of exchange.

There are several cases, of actions on bills of exchange, in which witnesses have been rejected as incompetent, from being liable over to one of the parties to the suit. The general rule is, that, in actions brought against parties to such negotiable instruments, other parties to the bills are competent to give evidence, either for the plaintiff or defendant; and their competency depends upon the principle of an equal liability on either side. But an exception to this rule prevails in the case of actions on accommodation bills; there the party, for whose accommodation the defendant has put his name to the bill, is incompetent to give evidence to defeat the plaintiff, being liable over to the defendant not merely for the amount of the bill, but also for the costs of the action. Thus in *Jones* v. *Brooke*,(1) a leading authority on this subject, in an action against a party who had accepted a bill for the drawer's accommodation, it was decided, that the drawer was incompetent, on the part of the defendant, to prove that the plaintiff held the bill on an usurious consideration. It was argued in this case, that the drawer was indifferent, as having an equal liability on either side; for if the defendant succeeded, the witness would be liable to the plaintiff (the holder), and if the plaintiff succeeded, the witness would be liable to the defendant, who had accepted the bill for his benefit. But the court said, that the witness had an interest to protect the acceptor, to whom he would be liable, not only for the amount of the bill, but also for all damages which the acceptor might sustain by being sued for it: the drawer of an accommodation bill being bound to indemnify the acceptor against the consequences of an acceptance made for his accommodation. So also it has been ruled at *nisi prius*, that in an action by the indorsee against an accommodation indorser of a bill, a witness who was indebted to the

Liability to costs.

Accommodation bills.

Jones v. *Brooke.*

Drawer.

Indorsee.

(1) 4 Taunt. 463. Hardwicke *v.* Blanchard, Gow. 113, S. P.

plaintiff, and for whose accommodation the defendant indorsed the bill as a security for the debt, is incompetent to defeat the plaintiff, for he is liable to indemnify the defendant against the costs of the action. (1)

Agent employed to discount bill.

So in an action on a bill of exchange against the drawer, where the question was, whether the bill, as the defendant maintained, had been delivered by one A. B. to the plaintiff to be discounted, or whether it had been delivered in payment for goods bought by A. B. of the witness, Lord Chief Justice Gibbs held, that A. B. was not a competent witness for the defendant, to prove that the former was the case; for if the witness had received the bill merely to get it discounted, and instead of doing so had pledged it for his own debt, he would be liable for the costs of the action, as special damage resulting from his breach of duty. (2) And in a more recent case, where the action was brought by the indorsee of a bill against the drawer, and a question arose, whether the plaintiff had received the bill from the acceptor in discharge of a debt due from him, or whether, as the defendant alleged, the bill had been accepted for a debt due from the acceptor to the defendant, and had been delivered to the acceptor that he might get it discounted, which acceptor had delivered the bill to the plaintiff on condition that the latter would get cash for it, but this the plaintiff had neglected to do, it was decided, that the acceptor could not be examined as to these facts on the part of the defendant; for although he was uninterested as to the amount of the bill itself (being liable on both sides), yet he was interested further as to the costs, against which he would have to indemnify the defendant, if the plaintiff got a verdict. (3) In the latter of these cases the witness was a party to the bill, and in the former he was not a party, and in neither of them were the circumstances exactly the same as in the before-mentioned cases of accommodation bills; but the principle upon which the witness was rejected, appears to be the same in all these cases; *viz.* a liability to indemnify the defendant against the costs of an action,

Acceptor.

(1) Bottomley *v.* Wilson, 3 Stark. 148.

(2) Harman *v.* Lasbrey, Holt, N. P. C. 390.

(3) Edmonds *v.* Lowe, 8 B. & C. 407.

to which he had been subjected through the act or default of the witness.

Witness proving sale by him to defendant, and payment.

This principle was recognized as fully settled, in the late case of *Larbalestier* v. *Clark*, (1) where the defence in an action for goods sold and delivered was, that a third person had bought the goods of the plaintiff and sold them to the defendant on his own account, and had been paid for them by the defendant, and he was tendered as a witness to prove these facts on the defendant's behalf. The Court of King's Bench thought, that under the particular circumstances of the case the witness was competent, as it did not appear that he had acted in the transaction in such a manner as to render himself liable to the defendant for the costs of the action, if the plaintiff obtained a verdict; but they were of opinion, that if the witness had appeared to have acted fraudulently in the matter, so as to incur this liability to costs, he would not have been competent. And Mr. Justice Littledale, in giving judgment, says, "It is now well established, that a person 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 of the plaintiff, or in his own right, if his conduct has been such that he would be liable, in the event of a verdict for the plaintiff, to pay the defendant, not only the money received, but also the costs of that action in which the plaintiff should recover; since in such a case he has an interest in defeating the action." The same Judge added, that he regretted that such a rule had been established, because in many cases, it was extremely difficult to ascertain whether a party so situated would be liable to costs. And Mr. Justice Taunton observed, in the same case, that he had understood the rule of evidence as stated by Mr. Justice Littledale to be well established ever since the case of *Jones* v. *Brooke*.

In some cases which had occurred prior to the case of *Jones* v. *Brooke*, it appears to have been considered, that where the witness was liable on both sides, his competency was not af-

(1) 1 Barn. & Ad. 899. See Nix *v.* Wilkinson, *ib.* *v.* Cutting, *supra*, p. 109, and Ward

fected by the circumstance of a greater liability to the defendant in respect of the costs of the action; (1) but the contrary appears to be now fully established by the authorities above referred to. It has been before shown, that on this ground of liability to costs a co-obligor of a bond, who was the principal debtor, was considered incompetent, in an action on the bond against a surety, to give evidence on behalf of the defendant. (2) In the case in which this point was decided, Lord Ellenborough asked, why there should not be an interest in costs as well as on any other account.

Other cases of liability to costs.

The general rule, that a liability on the part of a witness either to pay or contribute to the costs of a cause will render him incompetent, appears to have been recognized in several other cases. Thus, as we have seen, parties to the suit, who have no beneficial interest in the subject-matter, are incompetent, by reason of their liability to costs. In an action by an infant plaintiff, his *prochein ami* and guardian are not competent witnesses for him, on the ground of such liability. (3) So in most actions upon contracts, a co-contractor is incompetent to give evidence for the defendant, being interested to defeat the action and thereby to avoid the liability of contribution to the costs. (4)

Liability arising from illegal contract.

In a recent case on this subject, where the action was in tort, being for a libel against a person who was secretary to a society, the members of which had agreed to contribute towards all law expenses, Lord Tenterden appears to have considered that a member of the society was competent for the defendant without a release, on the ground that a contract between parties for bearing each other harmless in doing wrong, was void, and consequently, that there was no legal liability to affect the witness. But he observed, at the same time, that if the witness would be liable for a share of the expenses in the event of a judgment passing against the defendant, he would be incompetent. (5)

(1) Ilderton *v.* Atkinson, 7 T. R. 480. Birt *v.* Kershaw, 2 East, 450.

(2) Townend *v.* Downing, 14 East, 565.

(3) James *v.* Hatfield, 1 Stra. 548. Hopkins *v.* Neal, 2 Stra. 1026. Gilb. Evid. 107. Head *v.* Head, 3 Atk. 511, 547.

(4) See cases cited *supra*, and French *v.* Backhouse, 4 Burr. 2727.

(5) Humphrey *v.* Miller, 4 Car. & P. 7-12.

7. *Cases as to liability to one of the parties, since the passing of the statute 3 & 4 Wm. 4, c. 52.*

St. 3 & 4 W. 4, c. 52.

It now only remains to notice the cases, upon the subject of incompetency from a liability over to one of the parties to the suit, which have occurred since the statute 3 & 4 Wm. 4, c. 52, came into operation; that it may be seen, what effect the provisions of that statute have had on this numerous and difficult class of cases.

Section 26.

Objection, where verdict admissible.

The 26th section of that act is as follows: "In order to render the rejection of witnesses on the ground of interest less frequent, be it further enacted, that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action on which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined, but in that case a verdict or judgment in that action, in favour of the party in whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him."

Section 27.

Remedy.

By the 27th section, it is further enacted, "That the name of every witness objected to as incompetent, on the ground that such verdict or judgment would be admissible in evidence for or against him, shall, at the trial, be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceeding, in which the verdict or judgment shall be offered in evidence."

Cases within the act.

The meaning of the former of these two enactments appears to be this, that where the objection taken to the witness's competency is that the verdict or judgment for or against the party on whose behalf he is proposed to be examined, would

be admissible in evidence for or against the witness, in such case he may be examined; the ground of objection is removed by enacting that the verdict or judgment shall not be admitted in evidence either for or against him, nor for or against one claiming under him. The remedy provided for preventing the exclusion of the witness seems to apply to those cases only, but to all those cases, where the sole objection taken is that just mentioned; so that other cases would be left, as they were before the passing of the act.

Some earlier cases.

There has been some difference of opinion, however, on the construction of the provision in question. In four cases which will be first mentioned, the witness was not allowed to be examined, as being liable to costs—although certainly that liability could only have been enforced through the medium of the verdict and judgment. In one of the earliest cases reported since the passing of the statute, it is said to have been ruled by Lord Lyndhurst, that in an action on a guarantee, the party primarily liable, who was tendered as a witness for the defendant, and objected to on the ground of his being liable to indemnify the defendant against the costs, was not rendered competent by the provisions of the statute. (1) And in an action on a bill of exchange, accepted by the defendant for the accommodation of the drawer, Lord Lyndhurst is said to have ruled, that the drawer was not rendered competent by the statute, which, he thought, was not intended to apply to cases of this nature. (2) In a subsequent case, in an action for injuring the plaintiff's house by improperly digging a cellar, whereby the plaintiff's wall sunk, the person employed to dig the cellar by the defendant was tendered as a witness on behalf of the defendant, but Mr. Justice Patteson is reported to have been of opinion, that the witness was not rendered competent by the statute, and that the statute was not intended to apply to such cases. (3) The same Judge is reported also to have ruled, that a carrier's servant is incompetent to disprove negligence in an action against his master without a release. (4)

(1) Braithwait *v.* Coleman, Hertf. Spring Ass. 1834. 2 Har. Ind. 1047.

(2) Burgess *v.* Cuthell, 1 Mood. & Rob. 315. 6 Car. & P. 282.

(3) Mitchell *v.* Hunt, 6 Car. & P. 351.

(4) Harrington *v.* Caswell, 6 Car. & P. 352.

In these cases the witnesses called on behalf of the defendant were objected to as incompetent, on the ground of their being liable to the defendant, if the verdict should be against him, for the costs of the action. For the recovery of such costs, the verdict and judgment would be admissible in evidence against him in a suit, and not only admissible, but also necessary and indispensable proof. All these cases, therefore, appear to come precisely within the meaning and scope of the act; for when the only objection is a liability to costs, which liability can only be enforced through the medium of the verdict and judgment, the objection is altogether removed by making the verdict and judgment unavailable and inadmissible in evidence.

Later decisions.

In a recent case the subject was again considered, and another construction was put upon the act, larger and more commensurate both with the terms and object of the clause in question, than the construction adopted in the cases above-mentioned. In the case of *Faith* v. *M'Intyre*, (1) Mr. Baron Parke ruled, that the drawer of a bill was a competent witness for the defendant, in an action against a person who had accepted it for the drawer's accommodation. It was stated at the trial, Lord Lyndhurst had ruled, that such a witness was not rendered competent by the 3 & 4 Wm. 4, c. 42; but Mr. Baron Parke said, he thought, that by indorsing the witness's name on the postea, according to the 27th section, the witness would be rendered competent, for he could only be made liable to the costs of that action by means of the verdict or judgment, which in consequence of the indorsement of his name could not be used against him; and to the amount of the bill he was liable at all events. The witness's evidence was accordingly received, and the defendant obtained a verdict. (2)

Where the objection is available only by means of verdict.

Drawer of accommodation bill competent.

Drawer competent for defendant in action by *indorsee* v. *acceptor*.

The authority of the case of *Faith* v. *M'Intyre* has been recognized and supported by the Court of Queen's Bench, in the recent case of *Kilpack* v. *Major*. (3) It was an action by the indorsee of a bill against the acceptor, who pleaded first,

(1) 7 Car. & P. 44.

(2) A rule *nisi* for a new trial was afterwards obtained, but not (as it seems) on the ground of the improper admission of the witness, and the rule was afterwards discharged, 7 Car. & P. 48, n.

(3) Judgment delivered by Lord Denman, Hil. Term, Jan. 14, 1842.

that the drawer was indebted to A. B., and that the bill was given to secure that debt and an additional sum to be lent by A. B. to the defendant; and secondly, that A. B. obtained the bill by fraud. The drawer was called to prove this defence, and objected to as incompetent; the judge admitted him, being of opinion that he might be rendered competent by the mode pointed out by the statute. The Court were of opinion, on a motion for a new trial, that they were bound by the authority of *Faith* v. *M'Intyre*, which had been recognized in subsequent cases in the Court of Exchequer, and thought that the witness was rendered competent.

Objections not removed by the act.

But where witnesses are objected to on the ground of their having a direct and immediate interest in the event of the suit, (independent of the consideration as to the verdict being admissible in evidence for or against him in some other suit,) that is a substantial objection not included or touched by the enactment. Such cases are not within the act, and to be dealt with as if the act had not passed. Thus, in a case before Lord Denman, (1) in an action for an injury alleged to have been done to the plaintiff's horse by the negligent driving of the defendant's servant, the plaintiff called as a witness on his part a servant, who had the care of the horse at the time of the accident; the servant was objected to as incompetent without a release; and Lord Denman allowed the objection, saying that it was so decided in the case of *Wake* v. *Lock*, (2) which he had considered a good deal. And the statute 3 & 4 Wm. 4, c. 42, being relied on as restoring the witness's competency, Lord Denman appears to have considered, that the statute did not apply, since it only rendered competent those persons for or against whom the verdict or judgment would be evidence; but if this witness should state what he was expected to state, and should be believed, there never could be any action against him.

Interest independent of the use of the verdict.

In a still later case, a witness called for the plaintiff was rejected by Lord Denman, on the same ground of an im-

(1) Harding *v.* Cobley, 6 Car. & P. 664. See also Pickles *v.* Hollings, 1 Mood. & Rob. 468. Creevey *v.* Bowman, 1 Mood. & Rob. 496.

(2) 5 Car. & P. 454, vide *supra*.

mediate interest in the event of the suit, arising from a liability to the plaintiff, which would be removed by a verdict in the plaintiff's favour. In this case the action was for use and occupation, and in order to show that the defendant had occupied the premises, a witness was called, who stated that he had taken the premises of the plaintiff, and had not been released from his tenancy, and upon his being asked whether he had not given up the premises to the defendant, it was objected that he was interested in fixing the defendant; and the statute being referred to in support of the admissibility of the witness, Lord Denman ruled, that the witness was not competent, on the ground that he had a direct interest in the event of the suit; for if the plaintiff succeeded in getting the amount he claimed from the defendant, that would put an end to his claim for rent during the time for which he sought to recover it in the action. (1)

In an action of trespass for entering the plaintiff's house and taking away his goods, where the defendants pleaded, first, that the plaintiff was tenant of the house to them as overseer, &c., and justified under a distress for rent in arrear; secondly, that W. W. was tenant of the house to them; and issue was joined as to each of these tenancies: the wife of W. W., called on behalf of the plaintiff, proved that the house had been built by W. W. on waste land and occupied by him as his own above twenty years, and, further, that the plaintiff was let into possession by W. W. as his tenant. The witness was objected to, but the evidence received. On a motion for a new trial, the Court of Queen's Bench decided, that the witness was incompetent, being directly interested to disprove the tenancy of W. W. under the defendants, inasmuch as W. W. would be liable over to the plaintiff, in case the defendants should succeed on that issue; and this ground of incompetency, being independent of any use that might be made of the verdict, was not remedied by the statute. (2)

(1) Hodson *v.* Marshall, 7 Car. & P. 16. See also Davies *v.* Morgan, 1 Beav. 405. 409. Holden *v.* Hearne, 1 Beav. 445. Stewart *v.* Barnes, 1 Mod. & Rob. 472.

(2) Wedgwood *v.* Hartley and others, 10 Ad. & Ell. 619. The question as to incompetency was precisely the same as if W. W. himself had been called as a witness. The objection seems not to have arisen on the *voire dire*.

Section V.

What is not such an Interest as will disqualify.

The general rules relative to the incompetency of witnesses have been explained in the preceding section, and numerous cases referred to where witnesses are liable to be rejected from this cause. It is now proposed to give examples of cases where witnesses may be so connected with questions at issue as to raise a suspicion of interest in the event, but where there is no legal interest capable of producing incompetency.

Wishes, or expected benefit.

It is not an objection to the competency of a witness that he has wishes or a strong bias on the subject matter of the suit, or that he hopes to obtain some benefit from the result of the trial. Such circumstances may influence his mind and affect his credibility; they are therefore always open to observation, and ought to be carefully weighed by the jury, who are to determine what dependence they can place on his testimony; but it is clear, from what has been stated in the preceding section, that they are insufficient to render him incompetent.

Witness in the same situation with the party.

A witness who stands in the same situation as the party for whom he is called to give evidence, is under a strong bias, and may have strong wishes on the subject; but unless he will gain or lose by the event of the particular suit, he will not be disqualified. Thus, if there are two actions brought against two persons for the same assault, in the action against one the other may be a witness, because he is not interested in the event. (1)

Co-trespassers.

Underwriter to the same policy.

So also, in the case of *Bent* v. *Baker*, (2) which is a leading authority as to the rule of incompetency from interest, it was decided, after much argument, that in an action against an underwriter on a policy of insurance, another underwriter was a competent witness for the defendant, on the ground that he would neither gain nor lose directly by the event of the particular suit, nor could the verdict therein be evidence for or against him in any subsequent suit. So also it appears, that in an

(1) By Ashurst, J., 1 T. R. 301. By Abbott, C. J., 5 B. & C. 387.

(2) 3 T. R. 27.

action in which a question arises concerning the validity of a deed, the attorney who prepared the deed is a competent witness to prove that the deed is valid, notwithstanding there is another action pending against him, in which he must fail, if the deed be invalid. (1)

The same rule in criminal proceedings.

The same rule prevails in criminal proceedings; as, when several persons are separately indicted for perjury in swearing to the same fact, either of them may, before conviction, be a witness for the others. (2) So in *Rudd's* case, a woman, whose husband had been before convicted, was admitted to give evidence against the prisoner, though she expected, in case of his conviction, that her husband would receive a pardon. (3) In

Accomplices.

treating of the evidence of accomplices, it has been seen, that persons admitting their participation of crime with the prisoner at the bar, but not indicted with him, are competent to give evidence for him as well as for the Crown; and though separately indicted for the same offence, they are not incompetent, until rendered infamous by actual conviction. Where separate informations of *quo warranto* are brought against several members of a corporation, on the trial of one of the informations the other parties are competent witnesses on behalf of the defendant. (4)

Influence of verdict.

A witness who has no actual interest in the event of a suit is not imcompetent on the ground that the verdict may afterwards come to the knowledge of a jury in an action brought by the witness himself, and so have an influence on their decision, though not adduced as evidence before them. This subject has been before touched upon, in treating of the competency of the prosecutor, or party grieved, to give evidence upon indictments. In the case of the *King* v. *Whiting*, (5) Lord Holt, on an indictment for a cheat in obtaining a person's subscription to a note of 100*l.* instead of 5*l.*, rejected the evidence of the

(1) Hudson *v.* Revett, 5 Bing. 368.

(2) Bath *v.* Montague, cit. Fortesc. Rep. 247. Gunstone *v.* Downes, 2 Roll. Ab. 685, Art. 3. S. C. cited 2 H. P. C. 280, and in R. *v.* Gray, 2 Selw. N. P.

(3) 1 Leach Cr. Ca 151.

(4) R. *v.* Gray, 2 Selw. N. P. 1148 (6th edit.)

(5) 1 Salk. 283.

maker of the note, on the ground that the verdict would certainly be heard of in an action on the note, and would influence the jury; and this decision was followed by Lord Hardwicke, in a case before him. (1) But in a subsequent case, Lord Hardwicke reviewed his own opinion and that of Lord Holt, and decided that the objection went only to the credit, and not to the competency of the witness; and with respect to the possibility that the jury might hear of the verdict, he said, that sitting as a judge, he could only hear of it judicially. (2) This doctrine was fully confirmed in the subsequent case of the *King* v. *Boston*, (3) where it has held that a witness was competent to give evidence for the prosecution upon an indictment for perjury, although a civil action was pending between himself and the party indicted, in which the same question arose as upon the indictment, and which was coming on for trial at the same assizes.

Borrower in case of usury.

In an action for penalties, under the statute of usury, against the lender of the money, the borrower is a competent witness for the plaintiff; and whether he has or has not repaid the money lent, does not appear to make any essential difference, so far as his competency is affected; for in neither case does he gain anything immediately by the event of the suit: nor could any objection be made to his competency on the ground of an indirect interest in the record, for the verdict in the action for penalties could not be used as evidence in a subsequent action for the debt. (4)

Possibility of action.

In the preceding section we have seen, that a legal liability to be sued in respect of the matters in issue in a particular action, in the event of an unfavourable verdict, will in many cases exclude witnesses from giving evidence. But the bare possibility of an action being brought against a witness is no objection to his competency. Thus, it has been decided, that in an action against an administrator, one of the bond securities

Bond security of administrator.

(1) R. *v.* Nunez, 2 Stra. 1043.
(2) R. *v.* Bray, Rep. temp. Hard. 572.
(3) 4 East, 572. *Supra.*
(4) Abrahams *v* Bunn, 4 Bar. 2251. Smith *v.* Prager, 7 T. R. 60. See Masters *v.* Drayton, 2 T. R. 496.

Creditor.

for the defendant's due administration of the intestate's effects is a competent witness, on the part of the defendant, to prove a tender; and the court said in this case, that if a *creditor* of the administrator had been offered as a witness (which was a stronger case), there could have been no objection to his evidence being received. Mr. J. Buller added, "In order to shew a witness interested, it is necessary to prove that he must derive a *certain* benefit from the determination of the cause one way or the other. In this case, supposing there were no assets, though the defendant would be answerable for the costs, he would not be liable on his bond to the Ecclesiastical Court. He is only bound to distribute the intestate's effects, and it does not appear in this case how they have been applied." Upon the same principle, a witness is competent to prove a codicil, made subsequently to a second will, and reviving a former will, though he has acted under the first will, and might possibly be subjected to actions brought against him as executor *de son tort*, if it should be set aside. (1)

Witness liable as executor de son tort.

It has been before stated, that in actions by or against executors or administrators, a residuary legatee, or person entitled as next of kin to a distributive share of the estate, is incompetent to increase the fund in which he is so interested, for he has a direct and certain interest in giving evidence to this effect. But the principle of these cases does not apply to legatees of specific sums or chattels, for it is a matter altogether uncertain, whether they will or will not derive any benefit from a favourable termination of the suit. Thus, in an action by an executor to recover a debt due to the estate, it was ruled by Lord Tenterden, that a paid legatee was a competent witness for the plaintiff to increase the estate. (2) It was objected to his competency, that he would be obliged to refund, in case the estate should prove deficient, but Lord Tenterden observed there was nothing to shew that the other funds were insufficient,

Specific legatee.

(1) Baillie *v.* Wilson, cit. 4 Bur. 2254, and see Goodtitle *v.* Wilford, 1 Doug. 140.

(2) Clarke *v.* Gannon, Ry. & Mo. N. P. C. 31. In Johnson *v.* Baker, 2 Car. & P. 207, an unpaid legatee was admitted in an action against the executor, but it appears that in that case the demand was considered as one which was not recoverable out of the estate. See 5 B. & Ad. 370, by Patteson, J.

and although the debt sought to be recovered in the action had not been paid, it was not to be assumed that there was not some other estate sufficient. In a recent case, the Court of King's Bench, decided, in an action against executors for a debt of the testator, that a person entitled to an annuity under the will was a competent witness on the part of the defendants. (1) On the authority of this decision, a rule nisi for a new trial was obtained in the case of *Bloor* v. *Davies*, (2) on the ground that a competent witness had been rejected; but after full argument and time for consideration, the Court of Exchequer discharged the rule. It was an action of debt on bond against the devisee and heir of the obligor and testator: the defence was, that the testator's signature on the bond was a forgery: a person entitled under the testator's will to an annuity charged upon the testator's real estates, was called as a witness on the part of the defendant, and, being objected to as a witness, was rejected. Lord Abinger, in delivering the judgment of the court, distinguished the case from *Nowell* v. *Davies*: "This, said the Lord Chief Baron, was the case of an action by a bond creditor of the testator against the devisee of the real estate, in which the object of the plaintiff is to have execution against the real estate, out of which an annuity is payable to the witness under the will: the witness was therefore, directly interested, for the object of the witness' evidence was to prevent the plaintiff from recovering against the very estate devised for payment of the annuity."

Witness entitled to annuity under a will.

Where the annuity is charged on land.

Upon the same principle, on which witnesses are not disqualified in the above mentioned cases, that is to say, because the interest is altogether uncertain, a creditor of the estate is a competent witness for an executor or administrator to increase the fund. In the case of *Paull* v. *Brown*, (3) it was ruled, in an action by an executor to recover a debt due to the estate, that a creditor was a competent witness for the plaintiff; and Macdonald, C. B., said, the creditor may give evidence for his debtor in his lifetime, and is equally competent to give evidence for his executor after his death.

Creditor of estate.

(1) Nowell *v.* Davies, 5 B. & Ad. 368.

(2) Bloor *v.* Davies, 7 Mees. & Welsb. 235.

(3) 6 Esp. 34.

In a subsequent case,(1) indeed, it was ruled by Lord Ellenborough, that a creditor was not competent for the executor, if it appeared that the estate was insolvent, although it was urged that the interest must necessarily be quite uncertain, for an executor was not bound to distribute equally, but might give a preference to any creditor whom he thought fit to select. But the opinion of Lord Ellenborough on this point was questioned by Parke, J., in a late case before him at nisi prius, (2) in which he ruled that an unsatisfied creditor was a competent witness for an administrator upon a plea of *plene administravit*; and the authority of the case of *Paull* v. *Brown* was fully upheld by the Court of King's Bench in the case of *Nowell* v. *Davis*. (3)

Creditors of bankrupt, &c., assigning.

It will be observed, that there is a material difference between these cases and the class of cases collected in the preceding section, which decide that the creditor of a bankrupt or insolvent is incompetent to increase the fund; for in the latter cases the assignee is under an obligation to distribute equally amongst all the creditors, to whom, therefore, the fund *primâ facie* belongs, and whatever is either added to, or taken from the fund, must naturally be presumed to be for the advantage or disadvantage of the creditors. But even in these cases, if the creditor has assigned his debt, though only by parol, his competency will be restored, for he is then a mere naked trustee having no beneficial interest whatever. (4)

Trustees and executors.

It may, indeed, be laid down as a general rule, that mere trustees and executors in trust are not rendered incompetent by an interest, which is, as far as they are concerned, only nominal. (5) If a trustee has a beneficial interest, or is exposed to any immediate liability in respect of costs, that may be another ground of objection, but, without such interest or liability, trustees and exe-

(1) Craig *v.* Cundell, 1 Campb. 186.

(2) Davies *v.* Davies, Mo. & Ma. 345.

(3) By Lord Denman, C. J., 5 B. & Ad. 371. In neither of the last two cases does it appear that any evidence was given with respect to the solvency or insolvency of the estate. It is difficult to understand how the solvency or insolvency can alter the question with respect to the competency of a creditor.

(4) Heath *v.* Hall, 4 Taunt. 326. Granger *v.* Furlong, Bl. Rep. 1273.

(5) See 1 Mod. Rep. 107. Goss *v.* Tracy, 1 P. Wms. 287. Gilb. Evid. 123. 1 Bl. Rep. 366.

cutors are competent witnesses. (1) In an action by a bankrupt against his assignee, the official assignee is a competent witness to sustain the bankruptcy, for his allowance is uncertain, and depends upon the discretion of the commissioner. (2)

Official assignee.

In an action on the case by a reversioner, for an injury done to his inheritance by a stranger, the tenant in possession is a competent witness to prove the injury. (3) In an action between a vendor and a purchaser of lands, a former vendor, who has sold without warranty, is competent to prove the title. (4) An executor is also competent to prove the sanity of the testator in an action of ejectment concerning his real property. (5) In none of these cases does the witness gain or lose directly by the event of the suit, and as the verdict could not have been evidence for or against him in any subsequent action, he was not incompetent upon this ground even before the latter species of disability was removed by the late statute. Upon similar grounds it has been decided, in an action for mismanagement of a farm, that the sub-lessee of the defendant is competent to prove its proper cultivation. (6) In an action for a trespass on the plaintiff's close, a lessor of the plaintiff is a competent witness to prove the defendant in possession of the close under him. (7) And where, in an action of trespass, the defendant pleaded *liberum tenementum* in a third person, and justified under him, and it appeared at the trial that the plaintiff also claimed under a conveyance from the same person, who had subsequently conveyed the land without warranty to the defendant, and after that had taken a mortgage of the lands from the defendant, it was decided, that such person was a competent witness for the defendant, for he had no legal interest in the event; the objection, as to his coming to impeach a former con-

Action as to real property.

Tenant.

Vendor.

Executor.

Sub-lessee.

Lessor.

Mortgagee.

(1) Goodtitle *v.* Welford, 1 Doug. 140. Bettison *v.* Bromley, 12 East, 250. By Mansfield, C. J., 4 Taunt. 328. Phipps *v.* Pitcher, 6 Taunt. 220. See 1 Ball and Beatty's Rep. 100, 414, and cases there cited as to the rule in equity.

(2) Giles *v.* Smith, 1 Mood. & Rob. 443.

(3) Doddington *v.* Hudson, 1 Bing. 257. Adeane *v.* Mortlock, 5 Bing. 236. S. P.

(4) Busby *v.* Greenslade, 1 Stra. 445.

(5) Doe *v.* Teage, 5 B. & C. 335.

(6) Wishaw *v.* Barnes, 1 Campb. N. P. C. 341.

(7) Rees *v.* Walters, 3 Mees. & Welsb. 527.

veyance to the plaintiff, would not affect his competency but only his credit. (1)

Tenant in common.

In ejectment by a party claiming under a devise as tenant in common, a person claiming another undivided interest as tenant in common in the same estate, under the same will, is a competent witness for the lessor of the plaintiff: (2) he takes under the will a separate interest, which cannot be affected by the event of the verdict.

Captain, part-owner.

In an action on a policy of insurance on goods, where the only question was concerning the original destination of the ship, the captain has been considered competent to give evidence for the plaintiff respecting that fact, though he was a part-owner of the ship, and, as such, liable to the owners of the goods, in case the ship had unnecessarily deviated from the voyage; but if the question had turned on a deviation, he could not have been examined. (3)

Residuary legatee.

In an action of assumpsit for funeral expenses, against a person (not being executor or administrator of the deceased,) the residuary legatee is not incompetent to give evidence for the plaintiff. (4) The objection was, that he had an interest in relieving the residue by charging the defendant: the answer to which is, that, on whichever side the verdict may be, the estate must pay the reasonable expenses of the funeral.

Witness claiming the property.

In an action of trover by assignees of a bankrupt, for goods in the possession of the defendant, who had obtained them under a sale from the bankrupt, (the validity of which transaction the plaintiffs disputed,) a third person was held competent for the defendant, to prove that the goods belonged neither to the plaintiffs nor to the defendant, but to himself. (5) It has

(1) Simpson *v.* Pickering, 5Tyrw. 143.

(2) Doe d. Wildgoose *v.* Pearce, 5 Mees. & W. 506.

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

(4) Green *v.* Salmon, 8 Ad. & Ell. 348.

(5) Ward *v.* Wilkinson, 4 B. & C. 410, and see Nix *v.* Cutting, and Larbalestier *v.* Clark, *supra*. The same doctrine was applied in ejectment for tithes, Doe *d.* Bath *v.* Clarke, 3 Bing. N. C. 429.

also been held, that in an action on a contract, in order to recover damages for the loss of some copies of a work, which loss was alleged to have been occasioned through a breach of the defendant's contract to insure them from fire, a witness who had purchased a number of the copies from the plaintiff, but was not privy to the contract with the defendant, was competent on the part of the plaintiff to prove the contract. (1) In an action for infringing a patent, a purchaser of a license to use the patent is a competent witness for the plaintiff. (2) And in an action for falsely representing the circumstances of a person who was insolvent, that person is competent on the plaintiff's part to prove his insolvency. (3)

Purchaser from plaintiff.

Insolvent.

A witness will not be disqualified, because through a mistaken view he may believe himself to have an interest, which he does not possess. It is true, if a witness believes himself to be interested, the impression on his mind, and his bias in favour of the party calling him, may be as strong, as if he were legally incompetent. But the difference is, that in the one case the inquiry it more simple and more easily defined; in the other it would be complicated, vague and uncertain. For the purpose of determining whether a witness was incompetent, on the ground of believing himself to be interested, it might be necessary to examine him on a great variety of points, which after all would be more proper for the consideration of a jury; as for example, on the nature of the benefit he expects, the reasons for his expecting it, or the impression which such an expectation might have produced on his mind. Such an inquiry would in all cases be extremely indefinite, and would lead to great inconvenience. The course therefore uniformly taken, is to inquire, not into the state of the witness's belief on the subject, but to ascertain whether or not, as a matter of fact, he has any existing legal interest in the event of the suit.

Witness believing himself interested.

(1) Mawman *v.* Gillett, 2 Taunt. 325, n. This case has been sometimes cited as deciding, that a dormant partner of the plaintiff may be a witness for him against the defendant, where there has been no privity of communication relative to the contract on his part, and the language of Mansfield, C. J., appears to warrant the inference; but it would seem that this proposition cannot be supported. See Skinner *v.* Stocks, 4 B. & A. 437.

(2) Derosne *v.* Fairlie, 1 Mood. & Rob. 457.

(3) Smith *v.* Harris, 2 Stark. 2 P. C. 47.

Honorary obligation.

It has been held, that a witness who believes himself under an obligation of honour to indemnify the bail in an action, is not incompetent, unless he has in fact entered into an engagement to that effect. (1) Such an obligation is in general of a nature so uncertain and variable, that it cannot safely be recognised in courts of justice as a motive of conduct. Besides, where the sense of honour is so strong and binding as to influence a witness against his interest, it must be unnecessary to reject the witness; as the same principle, which would induce him to pay the costs, would oblige him, in giving his evidence, to speak only the truth; and, in cases where the sense of honour is less firm and imperative, the ground of the objection fails, since the witness is not bound in point of law, and does not feel himself absolutely bound in point of morals. But, independently of this reasoning, another more general answer is, that the ends of justice are most effectually attained by a full and complete investigation of the subject in dispute; and, unless the objection to the witness is founded on a strictly legal interest, he will be admitted to give evidence. In the case supposed, of a witness who says he thinks himself bound in honour to pay the costs, it might be injurious to the party who calls him to be deprived of his testimony on account of such a fancied obligation; more especially, as it is an obligation which may easily be pretended by the witness, but which it is scarcely possible for the court justly to appreciate, and which, from the nature of the case, the party cannot release or enforce against the witness; on the other hand, his testimony may not deserve all the credit due to a witness free from bias, and it ought therefore to be strictly examined and sifted. The witness, then, is to be heard, but his evidence is open to observation. (2)

(1) Pederson *v.* Stoffles, 1 Camp. 145, S. P., said to have been ruled *contra*, in an old case, by Parker, C. J.; see Fotheringham *v.* Greenwood, 1 Str. 129.

(2) There are several dicta in support of the position, that a witness is not competent, if he believes himself interested, whether he is or is not interested in strictness of law. By Pratt, C. J., in Fotheringham *v.* Greenwood, 1 Str. 129, cited and approved by Lord Loughborough, C. J., and by Gould, J., in Trelawney *v.* Thomas, 1 H. Bl. 307. S. P. by Perryn, B., in Newland's case, 1 Leach, Cr. C. 353. And see a case tried before Lord Mansfield, cited by counsel in Rudd's case, Leach, Cr. C. 154. See also the case of the Amitié, Villeneuve, 5 Robinson, Adm. Rep. 344, n.; and the case of the Galen, 2 Dodson, Adm. Rep. 20.

Interest on both sides.

Cases not unfrequently arise, in which a witness, who has an interest inclining him to one of the parties to a suit, has also an interest inclining him to the opposite party. These cases have been adverted to in a former section, where it has been shewn, that if the interest on one side be greater than that on the other, the party will be an incompetent witness on that side on which his interest preponderates; but where the liability or interest, on the side on which he is called, is counterbalanced or outweighed by an equal or greater liability or interest on the other side, he will be competent.

Captains of ships.

Thus, in an action of assumpsit for money paid to the use of the defendants, who were ship-owners, Lord Kenyon admitted the captain as a witness for the plaintiff, to prove that he had received the money for the defendants' use; for he stood indifferent between the parties, and, which ever way the verdict might go, he was equally answerable. (1) So, in an action of covenant for rent, where the point in issue was, whether A. B., whose title both the plaintiff and the defendant admitted, had demised the premises first to the plaintiff or to another person, A. B. was considered a competent witness for the defendant to prove the fact, the court saying that it was a matter of indifference to the witness, whether he had one person or the other for his tenant, and though he might feel inclined to prefer one tenant to another, this objection would go to his credit only, and not to his competency, because the verdict could not be given in evidence in any action to be brought by or against him. (2)

Lessor.

Joint contractors.

Several cases, relative to the competency of witnesses equally interested on either side, have arisen with regard to co-contractors and partners. In an action on a bond against one of several obligors, another of the obligors is competent for the plaintiff to prove the execution of the bond. (3) And in an action on a promissory note against one of several joint makers, a maker of the note who is not sued is competent to prove the defendant's

(1) Evans *v.* Williams, 7 T. R. 481, n. (*c.*) Rocher *v.* Busher, 1 Stark. N. P. C. 27.

(2) Bell *v.* Harwood, 3 T. R. 308.

(3) Luckett *v.* Graham, 1 Stra. 35.

signature. (1) In these cases it has been said, if the plaintiff recover, the witness will be liable to the defendant for contribution; if the plaintiff fail, he may resort to the witness for the whole, and in that case the witness will be entitled to contribution for the defendant; so that in either point of view the witness stands indifferent between the parties. So also in assumpsit for goods sold and delivered, a witness, who admitted himself to be a partner of the defendant, was considered competent on the part of the plaintiff to fix the defendant's liability. (2) And in an action charging the defendant as a partner in a trading company, a witness, proved to be himself a shareholder, was held competent on the part of the plaintiff to prove that the defendant was a partner. (3) Upon the same principle, in an action of contract in which the defendant pleads the non-joinder of a partner or co-contractor in abatement, the alleged joint contractor is a competent witness for the plaintiff to negative the plea: (4) for it is indifferent to the witness, which way the verdict goes. Indeed, if he be in fact a partner, the verdict in favour of the plaintiff would rather be prejudicial to him, for he would then be liable to contribution, increased by the amount of the costs. In the one way, therefore, the verdict would be indifferent, in the other prejudicial. (5)

Partner.

Co-contractor.

Partner of drawer of bill.

From the case of *Ridley* v. *Taylor*, (6) it appears to have been considered by the Court of King's Bench, that in an action by the indorsee against the acceptor of a bill drawn in the name of a firm, a member of the firm was a competent witness for the defendant, to prove that the bill had been drawn by one of the partners in fraud of the rest, and indorsed by him to the plaintiff for a separate debt.

In actions on negotiable securities many instances arise in

(1) York *v.* Blott, 5 M. & S. 71. Page *v.* Thomas, 6 Mees. & Wels. 733.

(2) Blackett *v.* Weir, 5 B. & C. 385.

(3) Hall *v.* Curzon, 9 B. & C. 646.

(4) Hudson *v.* Robinson, 4 M. & S. 476. Cosham *v.* Goldnay, 2 Stark. N. P. C. 414. Fowler *v.* Round, 5 Mees. & Wels. 478.

(5) By Lord Ellenborough, 4 M. & S. 479. It has been before shown, that on account of the superior liability for costs, the witness has been thought incompetent for the defendant.

(6) 13 East, 175.

which parties to the instrument are competent witnesses, by reason of an equal liability on either side. It has already been mentioned, that in an action against one of several makers of a note, a joint maker not sued is a competent witness for the plaintiff. And in an action against the acceptor of a bill, the drawer is a competent witness for either party.(1) Thus, he has been admitted for the plaintiff, to prove the defendant's handwriting to the bill; (2) and he has also been admitted for the defendant, to prove payment of the bill,(3) and also to impeach the plaintiff's right to recover, on the ground of an usurious consideration. (4)

Joint maker of notes.

Drawer of a bill.

In an action on a promissory note or bill by an indorsee, the indorser is in general a competent witness, either for the plaintiff or the defendant. He may be called by the plaintiff to prove his own indorsement, (5) and by the defendant to prove that the bill has been paid, (6) or that it is void on the ground of not being properly stamped, having been actually made in London, though dated in a foreign country.(7) In these cases there is no interest to disqualify the witness from giving evidence for the plaintiff, for although the circumstance of the plaintiff succeeding in the action may prevent him from suing the witness, it is not certain that it will have this effect; and whatever part of the bill or note the indorser is compelled to pay, he may recover again from the drawer or acceptor: the witness is also competent for the defendant, for if the plaintiff fail he is not prevented from suing the witness. (8)

Indorser.

In an action by an indorsee against an acceptor, issue being joined on a plea of payment, a prior indorsee, who has received money from the defendant to pay to the plaintiff the amount of the bill, is a competent witness for the defendant. (9)

Indorsee.

(1) Dickinson *v.* Prentice, 4 Esp. N. P. C. 32.

(2) *Ibid.*

(3) Humphrey *v.* Moxon, Peake, N. P. C. 52. See Pool *v.* Bousfield, 1 Campb. 55. Le Sage *v.* Johnson, Forrest, 23.

(4) Rich *v.* Topping, Peake, N. P. C. 224. Brard *v.* Ackerman, 5 Esp. 119.

(5) Richardson *v.* Allen, 2 Stark. N. P. C. 334.

(6) Charrington *v.* Milner, Peake, N. P. C. 6.

(7) Jordaine *v.* Lashbrooke, 7 T. R. 601.

(8) See Bayly on Bills, 5th edit. 536.

(9) Reay *v.* Packwood, 7 Ad. & Ell. 917.

Accommodation indorsee or drawer.

If a bill has been drawn for the accommodation of the indorser, he is a competent witness for the plaintiff, to prove that the latter gave him value for the bill: (1) for the reason, upon which an accommodation drawer or indorser has been held incompetent for the defendant, namely, on the ground of a liability to costs, does not apply, when the witness is called on the part of the plaintiff. And in a very recent case, where a bill had been accepted for the accommodation of the drawer, who had misapplied the bill, and the acceptor brought trover to recover it from a third party, it was decided by the Court of Common Pleas, that the drawer was a competent witness for the plaintiff, on the ground that whichever way the verdict went, he would be liable to one or other of the parties, and therefore stood indifferent. It was argued in this case, that if the plaintiff failed, the witness would be liable to him for the costs, but the court said there was no principle, upon which the witness could be held liable to the plaintiff for the costs of an action, which the latter was unable to support. (2)

Indorser.

It was held, in the case of *Buckland* v. *Tankard*, (3) that in an action by an indorsee against the acceptor, the indorser of a bill was incompetent for the defendant to prove that he indorsed the bill to the plaintiff upon trust to enable him to obtain payment from the defendant on account of the witness himself, and not for any consideration, or with intent to convey any interest on the bill. The reason given for the rejection of the witness was, that if the plaintiff succeeded, the witness would be put to much greater difficulty in getting back his money than if the plaintiff were defeated. This appears to be the only case which has been decided on such a ground, and from the leading cases on this subject, which rest on the broad ground of immediate certain interest, such a circumstance may now more properly be considered as having a strong influence on the witness, than as forming any solid objection to his competency. We have seen, that in the case of *Edmonds* v. *Lowe*, (4) which was an action

Acceptor liable to indemnify.

(1) Shuttleworth *v.* Stephens, 1 Camph. 408.
(2) Fancourt *v.* Bull, 1 Bing. N. C. 681.
(3) 5 T. R. 578.
(4) 8 B. & C. 407. *Supra.*

by an indorsee against the drawer of a bill, the acceptor was considered incompetent for the defendant to prove that the plaintiff had received the bill from him upon condition that he should get it discounted, and that he had not done so; but this was upon the special ground, that under the circumstances of that case the acceptor would have been liable to indemnify the defendant against the costs, if the plaintiff obtained a verdict.

Maker of promissory note.

In an action by the indorsee against the indorser of a promissory note, the maker is a competent witness for the plaintiff, for if the plaintiff succeeds the witness will be liable to the defendant, and if the defendant succeeds the witness will still be liable to the plaintiff; and his liability to the one cannot exceed his liability to the other. (1) The maker also is a competent witness for the defendant, on the same ground; as, to prove that the date of a note has been altered. (2) But it has been ruled, that in an action on a bill against the drawer, the acceptor is not competent for the defendant to establish a set-off, arising upon a bill accepted by the plaintiff and indorsed by the witness to the defendant, on the ground that the witness would be answerable to the drawer only to the amount recovered by the plaintiff. (3)

Acceptor of bill.

(1) Venning *v.* Shuttleworth, Bayly on Bills, 5th edit. 536.

(2) Levy *v.* Essex, Chit. Bills, 413, 7th edit.

(3) Mainwaring *v.* Mytton, 1 Stark. 83. In Bayly on Bills, 4th edit. 540, it is observed on this case, "that if the drawer be protected against the holder by a cross demand against the holder, *quære*, whether such cross demand, when set-off, is not equivalent to payment? And will not the drawer be entitled to call on the acceptor for the full amount of the bill, as much as if he had paid the full amount in money?" In an ordinary case of set-off, no doubt, this would be the case; but in Mainwaring *v.* Mytton, the set-off arose on a bill indorsed by the witness to the defendant; and if the second bill was indorsed to the defendant, by way of satisfaction or security for the amount of the first, it is clear, if the defendant obtained the benefit of it by way of set-off in an action on the first bill, he could not sue the witness, as he might have done, if he had been compelled to pay the first bill from his own resources.

Section VI.

Of certain Exceptions to the general rule on the subject of Interest.

It has been stated, as a general rule, that all persons who gain or lose by the event of a cause are incompetent to give evidence. To this general rule, however, there are several exceptions.

Some of these exceptions depend upon acts of parliament: as, where persons entitled to restitution of stolen goods, informers, inhabitants of parishes and other districts, are by express enactment or by necessary implication rendered competent witnesses in proceedings, in the issue of which they are interested. Other exceptions arise from necessity or a principle of public policy: as, where evidence is received from agents, factors, or servants,—notwithstanding that they may gain or lose by the event of the particular cause, in which their testimony is required.

Objections on the ground of interest proceed upon the supposition of an undue bias in the mind of the witness, and on the public utility of rejecting partial testimony. The presumption of bias may be taken off by shewing, that the witness has an equal or a greater interest the other way, or that he has given up what interest he had. And the presumption of public utility may be answered by shewing, that it would be very inconvenient, under the particular circumstances, not to receive such testimony. (1)

In the last section, we have seen in what cases the bias, which is presumed to arise in the mind of a witness interested on one side of a particular cause, may be removed by shewing that such interest is counterbalanced by an equal or a greater

(1) By Lord Mansfield, 1 Burr. 422.

interest on the other side. In the present section, it is intended to consider the particular cases, in which, on principles of public policy and utility, the admission of interested witnesses is allowed by the provisions of acts of parliament, or by the decisions of courts of law.

1. *Witnesses rendered competent by Statutes.*

One of the most ordinary cases of exception to the general rule of interest arises in the case of the owner of stolen goods prosecuting the offender to conviction. By the statute 7 & 8 Geo. 4, c. 29, s. 57, it is enacted, that in order to encourage the prosecution of offenders, if any person guilty of any felony or misdemeanor (mentioned in the statute) in stealing, taking, obtaining, converting, or knowingly receiving any property, shall be indicted for such offence by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, the property shall be restored to the owner or his representative: and a summary power is given to the court to award restitution. Under this enactment, the party entitled to restitution has a direct interest in procuring a conviction; but notwithstanding this interest, he is a competent witness. This exception is founded upon the policy and intention of the statute which gives the right of restitution: for the intention of the act was to facilitate the conviction of criminals by holding out an additional inducement to aggrieved parties to prosecute; and if the courts were to determine that the right to restitution produced incompetency, the consequence would be that instead of the conviction of criminals being facilitated, it would be rendered more difficult from the want of proper evidence. It is also observable, that the statute 21 H. 8, c. 11, which first gave the right of restitution, directs that it shall be awarded in those cases where the felon shall be attainted "by reason of evidence given by the party robbed, or owner of the money, &c., or by any other by his procurement,"—thereby expressly recognising the competency of the owner as a witness. (1) And although the modern statute does not contain these words, yet its policy is the same, and the object of

Owner of stolen goods entitled to restitution, competent.

7 & 8 G. 4, c. 29, s. 57.

(1) By Parke, J., 9 B. & C. 550, and see by Bayly, J., *ib.* 557.

the enactment is expressly stated to be, "in order to encourage the prosecution of offenders."

Owner of land entitled to restitution not competent.

It has been shewn in the case of an indictment under the statutes relative to forcible entries, that the right of the tenant to an award of restitution of the lands is an interest which renders him incompetent. The reason for this distinction, between the effect of a right to restitution of land and that of a right to restitution of goods, is that the statutes relative to forcible entries do not contain any provisions which expressly or impliedly recognize the competency of the tenant; and there is not the same ground of public policy requiring the reception of his evidence. An indictment for a forcible entry may be prosecuted at common law, and upon such an indictment the tenant, not being entitled to restitution, would be a competent witness; less impediment therefore to the satisfaction of public justice arises from excluding his evidence upon an indictment under the statutes. (1) Upon these grounds it was decided, after consideration, by the Court of King's Bench, in the case of *Rex* v. *Williams*, (2) that there was no sufficient reason for establishing an exception to the general rules of evidence in the case of a statutable indictment for a forcible entry, and that the tenant, being interested, was therefore an incompetent witness.

Persons entitled to rewards.

A variety of statutory rewards were formerly payable, upon the conviction of criminals, to persons who had been active in apprehending them and procuring their conviction; and it was always held that persons entitled to these rewards were not incompetent witnesses. (3) This was upon the principle that the exclusion of their testimony would be inconsistent with the policy and spirit of the statutes giving the rewards, for (as in the case of restitution of goods before-mentioned) the object of the legislature was to stir up greater vigilance in the apprehension and prosecution of criminals, which intention would be defeated, if the expectation of a reward were to disqualify a

(1) See by Bayly, J., 9 B. & C. 560.

(2) 9 B. & C. 549.

(3) See Rudd's case, Leach, Cr. Ca. 157, 158, 353, n. Hawk. P. C. b. 2, c. 46, s. 135.

witness who would otherwise have been competent. (1) So where, instead of a pecuniary reward, a pardon is offered by the statute to any person guilty of a particular offence, on the conviction of another person upon his evidence, the party expecting the pardon is competent, such being the evident and express intention of the legislature. (2)

Statutory pardon.

Upon the same ground, in actions or prosecutions for bribery, it is no objection to a witness that he has been guilty of bribery himself, and will be entitled to an indemnity under the discovery clause of the 2 Geo. 2, c. 24, (3) in case of the conviction of the defendant, against whom he is called as a witness. (4) In these cases, as observed by Lord Ellenborough, the statute gives a parliamentary capacitation to the witness, notwithstanding his interest in the result of the cause; for it is not probable, the legislature would intend to discharge an offender upon his discovering another so that the latter might be convicted, without intending that the discoverer should be a competent witness. (5)

Party bribing.

2 G. 2, c. 24.

We have seen that informers, who are entitled to the whole or any part of a penalty, are in general incompetent witnesses in support of any proceeding instituted for the recovery of such penalty. But in the case of *Rex* v. *Teasdale*, (6) it was ruled by Lord Kenyon, that in an indictment under the statute 21 Geo. 3, c. 37, s. 1, for exporting machinery, an informer, who was entitled to the penalties imposed by the statute, was a competent witness, although there was no express provision in the act for admitting his evidence. In this case the informer appears to have been considered competent upon the same principle as the discoverer in cases of bribery; namely, by

Informer.

Prosecution for exporting machinery.

21 G. 3, c. 37, s. 1.

(1) See 9 B. & C. 556. 10 Mod. 193.

(2) *Per cur.* Rudd's case, 1 Leach, 134, and see statutes 10 & 11 W. 3, c. 23, s. 5, and 5 Ann. c. 31, s. 4, (now repealed).

(3) Bush *v.* Ralling, Sayer, 289. Phillips *v.* Fowler, cit. *ib.* 291. Howard *v.* Shipley, 4 East, 180. Mead *v.* Robinson, Willes, 425. Sutton *v.* Bishop, Bur. 2283.

(4) Section 8. A similar enactment is contained in the Municipal Corporation Reform Act, 6 W. 4, c. 76, sect. 55.

(5) See 4 East, 183, and by Dennison, J., Sayer, 289.

(6) 3 Esp. N. P. C. 68.

necessary intendment from the statute imposing the penalties, and in order to give effect to its enactments. Where a statute can receive no execution unless a party interested be a witness, there, says C. B. Gilbert, he must be allowed; for a statute must not be rendered ineffectual by the impossibility of proof. (1)

Party seducing artificers.
23 G. 2, c. 13, s. 1.
Loser of money in gaming.
9 Ann. c. 14, s. 5.

On a prosecution under the statute 23 Geo. 2, c. 13, s. 1, for seducing artificers to go out of the kingdom, the prosecutor was held competent, though entitled to a moiety of the penalty.(2) And on a prosecution under the statute 9 Ann. c. 14, s. 5, the loser of money at cards was held competent to prove his loss. (3) But it appears that these cases are not to be considered as exceptions from the general rule upon interest; for the penalties imposed by the statutes are not recoverable by force of a conviction, but only by means of a distinct suit, in which the conviction would not be evidence; and therefore the witness is wholly free from interest in the event of the prosecution, which will neither advance nor prejudice his right to the penalties. (4)

Besides the cases above noticed, in which the evidence of interested witnesses is admitted in furtherance of the intention of some act of parliament, there are a variety of other cases in which interested witnesses are made competent by express enactment to this effect. Many of these enactments

Inhabitants of places.

authorize the admission of the inhabitants of particular districts as witnesses upon trials, in the event of which the general body of the inhabitants of the district are interested. In these cases, the interest of any individual inhabitant (although sufficient to exclude him at common law) must be very trifling, and the various statutes alluded to, have been made in order to obviate the great inconvenience that would result from excluding all the inhabitants of the district.

(1) Gilb. Evid. 114.
(2) R. *v.* Johnson, Willes, 425, n. (*c.*)
(3) R. *v.* Luckup, Willes, 425, n. (*c.*)
(4) See 9 B. & C. 557, by Bayly, J., who appears to have considered that the admissibility of the witnesses in R. *v.* Luckup and R. *v.* Johnson was confined to cases of indictments.

Inhabitants of county, &c.

On an indictment for not repairing a public bridge or the highway adjoining, the inhabitants of the county, town, riding, &c. in which such bridge is situated, are rendered competent witnesses by the statute 1 Ann. st. 1, c. 18, s. 13. (1)

1 Ann. st. 1. c. 18, s. 13.

Inhabitants of hundred.

In an action against the hundred on the statute of Winton, by a party who had been robbed, the inhabitants of the hundred were rendered competent witnesses for the defence by the statute 8 Geo. 2, c. 16, s. 15. The party robbed was always considered to be a competent witness *ex necessitate*, (2) for it would be useless to give him the right of action, if he were not admitted as a witness to speak to facts, which in general no person could be expected to speak to but himself.

8 G. 2, c. 16, s. 15.

7 & 8 G. 4, c. 31, s. 5.

By the modern statute relative to actions against the hundred, for injuries arising from riotous assemblies, (3) it is enacted, "That in any action to be brought by virtue of this act against the inhabitants of any hundred or other like district, or against the inhabitants of any county of a city or town, or of any such liberty, franchise, city, town, or place, as is therein mentioned, no inhabitant shall by reason of any interest arising from such inhabitancy, be exempted or precluded from giving evidence either for the plaintiff or for the defendants."

Inhabitants of parish.

In actions against churchwardens or overseers of a parish for mispending money collected by them on behalf of the poor, parishioners, who do not receive alms or other gifts out of the parochial funds, are made competent witnesses by statute 3 W. & M. c. 11, s. 12.

3 W. & M. c. 11, s. 12.

So also in cases where pecuniary penalties, imposed on any offence, are directed to be applied to the use of the poor or for the benefit and exoneration of the parish or other place, inhabitants are rendered competent witnesses on the trial of the offender by statute 27 Geo. 3, c. 29, provided the penalty does not exceed 20*l*. And in the case of summary convictions, under the

27 G. 3, c. 29.

(1) Even before the statute such evidence had been thought admissible from necessity. See R. v. Carpenter, 2 Shower, 47. 1 Ventris, 351. Gilb. Evid. 113.

(2) See Bul. N. P. 187.

(3) 7 & 8 Geo. 4, c. 31, s. 5.

Party aggrieved competent in summary convictions for penalties under 7 & 8 Geo. 4, c. 29, and c. 30.

provisions of the statutes 7 & 8 Geo. 4, c. 29, and 7 & 8 Geo. 4, c. 30, the evidence of the party aggrieved shall be admitted in proof of the offence, and also the evidence of any inhabitant of the county, riding, or division, in which the offence shall have been committed, notwithstanding any penalty or forfeiture incurred by the offence may be payable to the general rate of such county, riding, or division. (1)

Indictment for non-repair of highways.

5 & 6 W. 4, c. 50, s. 100.

Inhabitants of parish.

By the general rule of law, the rated inhabitants of a parish, indicted for not repairing a highway, are not competent to give evidence for the parish. (2) But by the recent statute for consolidating the laws relating to highways (not turnpike), it is enacted, "That no person shall be deemed incompetent to give evidence, or be disqualified from giving testimony or evidence, in any action, suit, prosecution, or other legal proceeding to be brought or had in any court of law or equity, or before any justice or justices of the peace, under or by virtue of this act, by reason of being an inhabitant of the parish in which any offence shall be committed, or of being a treasurer, clerk, surveyor, district surveyor, assistant surveyor, collector, or other officer appointed by virtue of that act." (3)

Turnpike act. 3 G. 4, c. 126, s. 137.

Inhabitants.

4 G. 4, c. 95, s. 84.

Trustee. Mortgagee, &c.

By the general Turnpike Act, (4) it is also enacted, That the inhabitants of any parish, township, or place, in which any offence shall be committed contrary to that act, shall not be deemed incompetent witnesses by reason of their being such inhabitants. And by a subsequent statute, (5) it is enacted, That no person shall be deemed incompetent to give evidence in any action or other proceeding at law or equity, or before any justice under or by virtue of any act for making or maintaining any turnpike road, or under that act or the act of 3 Geo. 4, by reason of being a trustee or commissioner of such road, or a mortgagee or creditor of the tolls thereof, or a former lessee or collector of such tolls, or a treasurer, or clerk, or surveyor, or other officer under such act.

(1) See sect. 64 of the former statute and sect. 29 of the latter: Where the party aggrieved is admitted as a witness, he is not to receive any portion of the penalty. Sect. 66 & 32.

(2) See 15 East, 474, and by Lord Ellenborough, 1 B. & Ald. 66.

(3) Stat. 5 & 6 W. 4, c. 50, s. 100.

(4) 3 Geo. 4, c. 126, s. 137.

(5) 4 Geo. 4, c. 95, s. 84.

It will be observed, that the provisions respecting the competency of inhabitants, which have been hitherto noticed, only apply to a few particular cases, in which questions arise affecting the interests of parishes and other districts. But in order to provide more effectually against the inconvenience of excluding the testimony of the inhabitants at large, upon questions of this nature, a more general provision was made by the statute 54 Geo. 3, c. 107.

Questions relating to rates, cesses, &c.

54 G. 3, c. 107.

By the 9th section of this statute, it is enacted, "that no inhabitant or 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, prrish, township, or hamlet, *in any matter relating to such rates or cesses*,—or to the boundary between such district, parish, township, or hamlet,—or to the settlement of any pauper in such district, parish, township, or hamlet,—or touching any bastards chargeable, or likely to become chargeable to such district, &c., or to 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 to the allowance of the accounts of any officer or officers of any such district, parish, township, or hamlet; any law, usage, statute, or custom, to the contrary in anywise notwithstanding."

Sect. 9.

One of the earliest cases after its passing was an action of trespass against the overseers of a township, in which the question was, whether certain lands were vested in the overseers under a local act of parliament; and the Court of Exchequer decided, that a rated inhabitant of the township was not an incompetent witness on the part of the defendants, although the lands in question, if vested in the defendants, would be vested in trust for the township and in aid of the poor rates. (1) The court considered that the statute should receive a liberal construction, and that the matter in issue related to the rates.

Cases within this act.

Meredith v. *Gilpin.*

(1) Meredith *v.* Gilpin, 6 Price, 146.

Marsden v. Stansfield.

In a subsequent case in the King's Bench, (1) it was decided, that upon an issue directed by the court, for the purpose of trying whether a certain messuage was situated within a chapelry, a person occupying rateable property within the chapelry was competent to prove that it was so situated. The court said, the burthen of making out that a witness was incompetent lay upon the party objecting to his testimony, and that nothing appeared to show that the witness would be a gainer, by proving that the messuage was within the chapelry; and as the witness was only stated to be the occupier of *rateable* property, and not actually *rated*, he was competent at common law, on the authority of *Rex* v. *Kirdford*. The court further said, the case was plain on the true construction of the statute, for the substantial question was, whether the owner of certain property was liable to contribute to the rates of the chapelry, which was a matter "relating to the rates or cesses" of the district. And the question, whether certain land was situate within the chapelry, was "a matter relating to the boundary between the district in question, and the adjoining district." (2)

Heudebourck v. Langston.

In a later case at *nisi prius*, it was ruled by Lord Tenterden, in an action of debt by a surveyor of highways against his predecessor in office, to recover the penalty imposed by the highway act for not accounting, that inhabitants of the parish were competent for the plaintiff, although their evidence would tend to increase the funds in relief of the rates. (3) And this case was followed by another, in which Lord Chief Justice

R. v. Hayman.

Tindal ruled, (4) that such inhabitants were rendered competent by the statute, upon an indictment for the non-repair of a bridge and highway within the parish, which it was alleged the defendant was bound to repair *ratione tenuræ*.

Doe v. Cockell.

In a still more recent case at *nisi prius* it was ruled, on the trial of an ejectment by parish officers to recover a parish-house, that an occupier of rateable property within the parish was a

(1) Marsden *v.* Stansfield, 7 B. & C. 815.
(2) 2 East, 559.
(3) Heudebourck *v.* Langston, Mood. & Mal. N. P. C. 402, n.
(4) R. *v.* Hayman, M. & M. N. P. C. 401.

competent witness on behalf of the lessors of the plaintiff. Mr. Baron Alderson there observed, that the statute enacted, that the party should not be incompetent in any matter relating to rates or cesses; and that the only way, in which his interest could be affected, was on the ground that the recovery of the property would diminish the rates or cesses. (1) Upon the same case coming subsequently before the King's Bench, the court decided that the witness was properly admitted, apparently upon the ground that he was competent at common law, independently of the statute. (2) And in a later case, (3) the Court of Queen's Bench held, that in ejectment either by or against parish officers claiming to hold property for the parish, rated inhabitants are competent witnesses for the officers under the statute. Lord Denman, in delivering the judgment, said, the court on consideration approved of the decision in *Meredith* v. *Gilpin*, and could not agree with the case of *Oxenden* v. *Palmer*, or with the decisions to which that case had given birth. (4)

Doe & Boultbee v. Adderley.

The last reported case, in the construction of the section above referred to, is the case of *Morrell* v. *Martin*, (5) an action of replevin against the defendant who justified under a warrant when taken by themselves, would seem to apply to any rates or cesses, yet that the Court thought the matter in question did not strictly and properly relate to rates or cesses of the parish. And in the case of R. *v.* Bishop Auckland, (1 Ad. & Ell. 744. 1 Mood. & Rob. 286, 287, n.), the same Court decided, that the rated inhabitants of a district, indicted for the non-repair of a highway, were not rendered by the statute competent witnesses for the defence. It seems to have been ruled also at *nisi prius* (Tothill *v.* Hooper, 1 Mood. & Rob. 392), that in an action for medical attendance on a pauper, against an overseer who was defending on the part of the parish, and in pursuance of an order of vestry, that a rated inhabitant, who had signed such order, was not within the statute, and his testimony on behalf of the defendant was therefore rejected.

Morrell v. *Martin.*

Cases where witnesses were thought not competent within the act.

(1) Doe *v.* Cockell, 6 Car. & P. 525.

(2) 4 Ad. & Ell. 478.

(3) Doe *d.* Boultbee *v.* Adderley, 8 Ad. & Ell. 502.

(4) The cases here referred to, which must now be considered as overruled by the decision in the case of Doe *d.* Boultbee *v.* Adderley, are as follows: In the case of Oxenden *v.* Palmer, (2 B. & Ad. 236), it was decided, in trespass against the surveyor of highways for a parish, who justified under a custom to take shingle from the sea beach for the repair of the roads, that inhabitant rate-payers of the parish were incompetent to give evidence for the defendant in support of such custom. Lord Tenterden, in delivering the judgment of the court, said, that they entertained great doubt whether the case of Meredith *v.* Gilpin was properly decided, and observed that the statute related chiefly to the poor, and that although when the words of the ninth section,

(5) 6 Bing. N. C. 373.

Morrell v. *Martin.*

directed to him and to a surveyor of highways for distraining the plaintiff's goods for an assessment due on a highway rate. The surveyor, being called as a witness on behalf of the defendant, was objected to as being an inhabitant of the parish, and so interested to increase the fund for the repair of the highways. But the objection was overruled by Patteson, J. at the trial, and the Court of Common Pleas decided, that the case was one which strictly related to the rates of the parish, because, if the defendant should fail in his cognizance, it would have the effect of enabling the plaintiff to a return of the goods seized in satisfaction of the highway rate; and so the case comes strictly within the provision of the statute.

St. 3 & 4 Vict. c. 26, for removing disqualification from liability to rates.

For the purpose of more effectually removing all disqualification of witnesses, arising from liability to the payment of parochial rates, it has been recently enacted by st. 3 & 4 Vict. c. 26, that no person shall be disabled from giving evidence, as a witness on any trial in any court, by reason only of being rated, or liable to be rated, to the relief of the poor, or toward the maintenance of church, chapel, or highways, or for any other purpose whatever. And no churchwarden, overseer, or other officer, for any parish, &c., or any person rated, or liable to be rated, as aforesaid, shall be disabled from giving evidence on any trial or other proceeding, or by reason of being liable to costs in respect thereof, when he shall be only a nominal party to such trial, &c., and shall be only liable to contribute to such costs in common with other rate-payers.

6 G. 4, c. 108. Officers concerned in revenue seizures.

In proceedings relative to seizures and penalties under the Customs Act, 6 Geo. 4, c. 108, it is provided by the fifth section of that statute, that officers, and persons acting in their aid and assistance, shall be deemed competent witnesses, on the trial of any suit or information on account of any seizure or penalty mentioned in the act, notwithstanding that such officer or other person may be entitled to the whole or any part of such penalty.

2. *Exceptions to the Rule of Interest, by Common Law.*

Exceptions at common law from necessity.

In addition to the statutory exceptions hitherto considered, there are some common-law-exceptions to the rule of interest, which depend upon the principle of necessity, or of public policy.

Question of public right.

Thus, it is laid down by Mr. Justice Buller, that a party interested will be admitted, where no other evidence is reasonably to be expected; and this principle was acted on in the late case of *Lancum* v. *Lovell*, (1) argued before all the judges; in which it was decided, in an action for toll claimed on a public road, that persons who refused to pay the toll were, from necessity, competent to give evidence against the claim, notwithstanding their interest in the result of the cause. This case arose before the statute 3 & 4 Wm. 4, c. 42, and the witnesses were objected to, on the ground that the verdict might be used as evidence against themselves in a subsequent action for the toll; but the judges were unanimously of opinion, that the witnesses were competent notwithstanding this interest, upon the broad ground that the claim was in the nature of a public right, in which all the king's subjects were interested, and that no other evidence could be reasonably expected but that of persons from whom toll had been demanded. (2)

Witnesses refusing to pay toll on public road, competent.

Agents, servants, &c., acting within their duties, competent.

The admission of the evidence of agents, servants, and factors has also been considered as an exception to the general rule, depending upon public policy; and Mr. Justice Buller says that this evidence is admitted "for the sake of trade and the common usage of business." (3) Formerly, when the rule of incompetency was more strict than in modern times, and when an interest in the *question* in dispute was considered as a test of competency, without reference to the inquiry whether the witness could derive actual benefit or disadvantage from the event of the cause, the reception of this description of evidence was, properly speaking, an exception to the general rule. But now, as the true criterion of competency is, whether a witness can derive any immediate gain or loss from the event of the cause, the evidence of agents, servants, and factors, for the purpose of proving contracts made by them on behalf of

(1) 9 Bing. 465.

(2) The Court seemed to think that the case of Lord Falmouth *v.* George, 5 Bing. 286, *supra*, savoured more of a *private* right; but the distinction has become immaterial, since the 3 & 4 W. 4, c. 42, which removes the objection arising from the subsequent use of the verdict.

(3) See B. N. P. 289. Fortesc. 247. By Eyre, C. J., 2 H. Bl. 591. Upon the nature of this and other exceptions, see Bentham's Rationale, b. 9, c. 3, vol. 5, p. 66.

their employers would, probably in the great majority of cases, be admissible under the general rule, and not by any way of exception. However, it is still laid down as an established principle, that the evidence of agents employed in ordinary transactions of commerce, is admissible *ex necessitate*, (1) notwithstanding they may be interested; and cases sometimes arise, in which the reception of their evidence could only be warranted on this ground.

Factors and brokers, competent.

There are many cases which have been decided with reference to the competency of factor and agents to give evidence of matters within the scope of their employment. It has been held, that a factor may prove a sale in the course of his employment, though he is to receive a poundage on its amount; (2) or though he is to be entitled to what he has bargained for beyond a stated sum. (3) And a broker, who has effected a policy, is a competent witness, *ex necessitate*, to prove all matters connected with the policy, notwithstanding he may have an interest arising from a lien on the policy. (4) It is laid down by Eyre, C. J., that the exception is not confined to mere agents and brokers, but that every man who makes a contract for another comes within the description: but in a later case it appears to have been considered by Lord Tenterden, that the principle of the exception did not apply, where the only agency or connexion between the parties arose out of the particular transaction in question. (5)

Servants and carriers, competent.

It is the common practice to admit servants and carriers, to prove the payment of a receipt of money, or the delivery of goods, on behalf of their master or principal. (6) Thus, if money has been overpaid by a servant, or paid by mistake, he is a competent witness in an action to recover it back. (7)

Steward of manor

And where the question was, whether, by the custom of a

(1) By Lord Tenterden, 8 B. & C. 408. By Parke, J., 10 B. & C. 864.

(2) Dixon *v.* Cooper, 3 Wils. 40. 1 Atk. 248.

(3) Benjamin *v.* Porteus, 2 H. Bl. 520. R. *v.* Phipps, B. N. P. 289.

(4) Hunter *v.* Leathley, 10 B. & C. 858.

(5) Edmonds *v.* Lowe, 8 B. & C. 408.

(6) By Holt, C. J., 11 Mod. 262. B. N. P. 289. See 4 T. R. 589, 590. Matthews *v.* Haydon, 2 Esp. N. P. C. 509. Spencer *v.* Golding, Peake N. P. C. 129. Adams *v.* Davis, 3 Esp. N. P. C. 48.

(7) Martin *v.* Howell, 1 Stra. 647. Barker *v.* Macrae, 3 Campb. 144.

manor, a fine was due to the lord during his minority on the tenant's admission, the steward of the manor was allowed to give evidence for the lord, though it was objected that he would be entitled to a fee on admission, which he would lose if the tenant were not admitted. (1)

competent, though entitled to fees.

But though agents and brokers are competent to prove a sale or contract in the ordinary course of their employment, it was decided (before the statute 3 & 4 Wm. 4, c. 42, s. 26,) in an action against the principal for misconduct or negligence, that they were not competent to prove that a contract had been properly executed. Thus, in an action against an agent for misconduct, in purchasing goods of an inferior quality, Lord Chief Justice Gibbs rejected, as an incompetent witness, the broker of the defendant, who was called to prove that he had purchased goods of the best quality. (2) And where a person had entered into a contract for the purchase of goods in his own name, it was ruled, that he was not a competent witness in an action for goods sold and delivered, to prove that he purchased them as the agent for the defendant. (3)

Agents and brokers incompetent to disprove negligence.

So also, where the act of the servant has been out of the ordinary course of his employment and a mere breach of duty, the principle does not apply; and it has been ruled, that in such a case the servant is incompetent without a release. Thus in an action to recover back money which had been entrusted to the plaintiff for a special purpose, and paid by the servant in illegal insurances, he was considered incompetent. And before the stat. 3 & 4 Wm. 4, c. 42, it was considered as a settled rule, in actions against a master for the negligence of his servant, that the servant was not competent to disprove the fact of his negligence. The cases on this subject have already been fully discussed in treating of incompetency by reason of a liability over, and in considering the effect of the late statute on this class of cases.

Agents acting beyond the scope of their authority, incompetent.

(1) Champion *v.* Atkinson, 3 Keb. 90. Rep. temp. Hard. 360.

(2) Gevers *v.* Mainwaring, 1 Holt, N. P. C. 139.

(3) McBraine *v.* Fortune, 3 Campb. 317. See the preceding section as to the effect of the stat. 3 & 4 W. 4, c. 42, s. 26, on incompetency arising from liability over.

Some other cases may be added, which will range more conveniently within this section than any other.

In case of issue from Court of Equity.

Upon issues sent from Courts of Equity, it is not an unusual thing to direct that the parties to the suit shall be examined at the trial as witnesses. It has been said in a case in the Court of Chancery upon this subject, that upon an order of this nature no objection is waived, except that which arises from the party being plaintiff, or defendant in the cause. (1) And it has been ruled in a late case at *nisi prius*, that where a witness is interested in the result of a suit in equity, in consequence of the decree in the suit being evidence for or against his own claims on a subsequent occasion, he is not made competent upon the trial of an issue directed in such suit, by the statute 3 & 4 Wm. 4, c. 42, s. 26, the language of which, as we have seen, only applies to cases where the objection is "on the ground that the verdict or judgment in the action" would be admissible for or against the witness. (2)

Action for malicious prosecution.

It has also been treated as an exception to the general rule, from necessity, that in an action for a malicious prosecution, the evidence which the defendant gave before the grand jury in support of the indictment, or his deposition before magistrates

Evidence of prosecutor before the grand jury, or magistrate.

in support of a charge of felony, (3) is under special circumstances admissible on his behalf at the trial of the action. In *Johnson* v. *Browning*, the evidence so given by the defendant's wife, who was the only person present at the time of the supposed felony, and who, as the report says, could not herself be a witness, was admitted by Holt, C. J., on the ground, "that otherwise one that should be robbed would be under an intolerable mischief, for if he prosecuted for such robbery, and the party should be acquitted, the prosecutor would be liable to an action for a malicious prosecution, without

(1) See Rogerson *v.* Whittington, 1 Swanst. 39. The precise meaning of this observation seems not very clear, but it appears to assume that a party to a suit is incompetent, *qud* party, and without reference to any interest in the event. But see the judgment of Tindal, C. J., 7 Bing. 398.

(2) Stewart *v.* Barnes, 1 Mood. & Rob. 172.

(3) Jackson *v.* Bull, 2 Mood. & Rob. 176.

the possibility of making a good defence, though the cause of prosecution were ever so pregnant."(1)

Interest in costs, under writ of *certiorari*.

An exception, in the case of a person interested in the costs of a criminal prosecution, may occur on the trial of an indictment which the defendant removes by *certiorari*. In this case, the prosecutor is entitled to costs on the event of the indictment being found in his favour, but he is nevertheless a competent witness, upon the special ground of the policy and intention of the statute; for the object of the statute was to discourage the removal of indictments; and if the defendant could disqualify the prosecutor from giving evidence, by removing the indictment, such removals would be encouraged and multiplied. (2) Upon an indictment for the non-repair of a road, power was given to the court by the Highway Acts, (3) to award costs against the prosecutor, if the prosecution appeared to be vexatious; but this provision does not affect the prosecutor's competency; (4) the evidence of the prosecutor is receivable according to the general rule; and, besides, the interest is uncertain, as the power of awarding costs is in the discretion of the court. (5)

Witness offering to release his interest.

There are yet a few cases, which are exceptions to the general rule of evidence, and made so for the purpose of preventing an abuse or perversion of the rule.—Where a witness offers to surrender or release his interest, and thus does all in his power to remove the objection to his testimony, but the other party refuses to accept the release, it will not be competent to such party to object to the witness's testimony, and his evidence may be received. (6) Or, if the interest may be removed by the release of one of the parties to the cause, and such party offers to remove it, and the witness refuses, he cannot thereby deprive the party of his testimony.

In the case of *Anstey* v. *Dowsing*, (7) Lee, C. J., ex-

(1) See also B. N. P. 14, citing Cobb *v.* Car. 1746.
(2) R. *v.* Muscot, 10 Mod. 193.
(3) See stat. 13 Geo. 3, c. 78, s. 64.
(4) R. *v.* Hammersmith, 1 Stark. N. P. C. 357.
(5) See R. *v.* Cole, 1 Esp. 169.
(6) Goodtitle *v.* Welford, Doug. 134. By Buller, J., 3 T. R. 35.
(7) 2 Str. 1253.

Legatee refusing payment.

pressed an opinion, that a legatee was not competent to prove the due execution of the will, although payment of the legacy was tendered to him, which tender he refused. But the ground of this opinion was, that, even if he had accepted the legacy, he still would have been incompetent, as having been interested at the time of attestation; a point on which, though there has been some difference of opinion, the greatest authorities are in support of the contrary proposition, namely, that the payment of the legacy would restore the competency of the witness. (1) *

Interest acquired fraudulently.

If a witness has acquired an interest in the subject-matter, for the mere purpose of depriving the party to the suit of the benefit of his testimony, this ought not to exclude him from giving evidence. It was ruled by Lord Holt, in the case of

Wager.

Barlow v. *Vowel*, (2) that if a man be a witness of a wager, and

Barlow v. *Vowel.*

afterwards bet himself, this shall not be a reason to except against his being sworn to prove the wager. And from analogy to this case, Lord Kenyon and Mr. Justice Ashurst were of opinion in the case of *Bent* v. *Baker*, (3) (where, on the trial of an action on a policy of insurance, the broker had been called as witness for the defendant, but rejected, because he had underwritten the policy after the defendant, that even if it were true in general, that one underwriter could not be a witness for another, yet the witness ought to have been admitted in that case, as the defendant had acquired an interest in his testimony before the witness had signed the policy. And they laid down, as a general principle, deducible from the case of *Barlow* v. *Vowel*, that where a person makes himself a party in interest after a plaintiff or defendant has an interest in his

(1) Wyndham *v.* Chetwynd, 1 Burr. 414. Doe *d.* Hendson *v.* Kersey, 4 Burn's Ecc. Law, 97.

(2) Skin. 586. See Rescous *v.* Williams, 3 Lev. 152, and Cowp. 736.

(3) 3 T. R. 27.

---

1 Vict. c. 26. Legacy void. Legatee competent.

* By st. 1 Vict. c. 26, s. 15, it is enacted, If any person shall attest the execution of any will, to whom, or to whose wife or husband, any beneficial devise, legacy, interest, &c., of real or personal estate shall be made (except charges or directions for the payment of debts), such devise, &c., shall be void so far as concerns the person attesting, or the wife or husband, or other person claiming under such person, &c., and, notwithstanding the devise, such person attesting shall be admitted as a witness to prove the execution, its validity or invalidity.

testimony, he may not by this deprive the plaintiff or defendant of his testimony.

Query, that case not applicable to *Bent* v. *Baker*.

However, it appears to be questionable, whether this proposition is not expressed in too large and general terms. The incompetency of a witness on account of interest must depend rather on the nature of the interest, than upon the time of acquiring it. The question on the *voire dire* is, whether he is interested at the time of his examination. If he is directly interested at that time, he is not a competent witness in general without a release, and it seems to be no answer to the objection to show, that he has become interested only since the commencement of the action, or since the time of his being acquainted with the fact which he is called to prove. Thus, before the 3 & 4 W. 4, c. 42, upon a trial on a customary right of common, a witness was incompetent, who admitted upon the *voire dire*, that he was in the occupation of a messuage, and that he claimed a similar right of common as annexed to his tenement; and it could not be material, whether he had been in possession for a number of years or had the tenement only just before the trial of the cause. In either case he appeared to be equally incompetent: yet in the latter it might be said, that he had acquired his interest after the party had become interested in his testimony. The case of *Barlow* v. *Vowel* must be considered as having been determined on the ground of fraud: the witness, proposed to be examined, was the original witness of the wager; it was a fraud, therefore, to deprive the party of the benefit of his testimony. (1)

Interest acquired since cause of action.

Underwriter taking an interest after commencement of the suit.

In the subsequent case of *Forester* v. *Pigou*, (2) where the defendant in an action on a policy of insurance called another underwriter to prove the policy void on account of a misrepresentation of the nature of the risk, and upon the *voire dire* the witness stated, "that he had paid the loss to the plaintiff, upon an understanding that he was to be repaid in the event of

(1) By Lord Ellenborough in Forester *v.* Pigou, 1 Maule & Selw. 9, in which the case of Barlow *v.* Vowel was referred to.

(2) 3 Campb. 380. 1 Maule & Selw. 9, S. C.

this action failing, and that he had since received a letter from the plaintiff promising to return the money in that event," an objection was taken to his competency, on the ground of his being interested in the event; the point was argued on the other side upon the authority of *Barlow* v. *Vowel*, and it was said, the witness had not become interested until after the commencement of the action, and that the plaintiff ought not to be allowed to defeat, by his own act, the interest which the defendant had in the witness's testimony; but the witness was considered to be incompetent and rejected: for although he would not be disqualified by any agreement *fraudulently* entered into between him and the plaintiff for the purpose of taking off his testimony, yet, on the other hand, the pendency of a suit could not prevent third persons from transacting business *bonâ fide* with one of the parties; and if an interest in the event of the suit is thereby acquired, the general consequence of law must follow, that the person so interested cannot be examined as a witness for that party, from whose success he will necessarily derive an advantage. A motion was afterwards made for a new trial on account of the rejection of this witness, as well as of another also, who was similarily situated; and a new trial was granted for the purpose of ascertaining more particularly the precise time, when the undertaking was made to the witnesses; but the court added, that, if a person who is under an obligation to become a witness for either of the parties to a suit, choose to pay his debt before-hand, upon a condition that is to be determined by the event of the suit, he becomes as much interested in the event, as if he were a party to a consolidation rule.

Witness taking an interest under plaintiff, and refusing to be released.

In a more recent case in the Common Pleas, where the plaintiff in an action on a charter-party had communicated to the attesting witness an interest in the profits, which were expected to arise from the adventure, the witness who refused to release his interest was rejected, as incompetent at the trial; and the court held, that his evidence was inadmissible, upon the ground that he had derived his interest immediately from the plaintiff, who proposed to call him, and that the plaintiff

could not justly complain that his witness was disqualified, when he himself was the cause of his disqualification. (1)

Wager on conviction.

Lord Raymond, in the case of the *King* v. *Fox*, (2) admitted the prosecutor to be a witness, although he had laid a wager, that he should convict the defendant; and the true reason seems to be, not because the witness had made the wager at a time when public justice became interested in his testimony, but because it would be against public policy to allow a witness, by any such gratuitous act, to exclude himself from giving evidence. In addition to this, it may be observed, that the wager would now probably be considered absolutely void, on a principle of public policy, as tending to produce an improper bias on the mind of the witness, and therefore, as directly prejudicial to the administration of justice.

Section VII.

Of the Mode of Objecting to the Competency of an Interested Witness, and of the Means of Restoring Competency.

It is proposed to consider, in the present section, the regular mode of objecting to the competency of a witness on the ground of interest, and the means of restoring his competency.

Objection when to be taken.

The rule formerly was, that the objection ought to be made on the *voire dire*, and that if made after the examination in chief, it would not have the effect of excluding the witness. But the strictness of the rule on this subject has been relaxed, and now, if it be discovered during any part of the witness's examination, or even after his cross-examination, that he is interested, the objection may be taken, and his evidence will be

(1) Hovill *v.* Stephenson, 5 Bing. 493. Best, C. J., in delivering the judgment of the court, said, the case of Forester *v.* Pigou was stronger than that before the court. It was also held that evidence of the witness's handwriting was inadmissible. In general, where an attesting witness, subsequently to the execution of the instrument, becomes interested by operation of law, evidence of his handwriting is admissible. *Post*, Part 2.

(2) 1 Str. 652.

struck out. (1) It has, indeed, been laid down, that the objection may be taken at any stage of the cause; (2) but it was ruled at *nisi prius*, in a case before Gibbs, C. J., where the examination of a witness had been completed, and he had left the box, but was recalled by the judge for the purpose of asking him a question, that it was too late then to object to his competency. (3) The case of *Dewdney* v. *Palmer*, (4) decides, that after a witness has been dismissed from the box without objection to his competency, the adverse party will not be allowed to call a witness to prove his incompetency, not even to prove him the real party to the suit.

To be taken before witness is dismissed.

Dewdney v. *Palmer.*

Similar rule in case of interrogatories.

It seems also, that when witnesses have been examined on interrogatories, which are afterwards read on the trial of a cause, it is too late to object to their competency on the ground that they appear from the depositions to be interested; and that the objection ought to have been taken at the time of examination, or upon application to the court to suppress the depositions before their production at the trial. (5)

Objection how raised.

The party, against whom a witness is called, may examine him respecting his interest on the *voire dire*, or may call another witness, and produce other evidence in support of the objection. If the fact of interest is satisfactorily proved by other evidence, the witness will be rejected, though he may have ventured to deny it on the *voire dire*. (6)

Examination on *voire dire.*

Where the interest of the witness arises from some written instrument not produced, he may be examined as to the

(1) See Turner *v.* Pearce, 1 T. R. 720. Stone *v.* Blackburn, 1 Esp. 37. By Lord Ellenborough, 2 Campb. 14.

(2) By Lord Kenyon, 1 Esp. 37.

(3) Beeching *v.* Gower, Holt, N. P. C. 314. Where a party has been fully apprized of the grounds of a witness's incompetency by the opening speech of counsel, or the examination in chief of the witness, doubts have been entertained at nisi prius, whether an objection to the competency of a witness can be postponed.

(4) 4 Mees. & Wels. 664.

(5) Ogle *v.* Paleski, Holt, N. P. C. 485. *Anon.* 2 Tidd's Prac. 812. 9th edit.

(6) The old rule appears to have been that the statement of a witness, who had been examined as to the fact on the *voire dire*, and denied that he was interested, could not be contradicted. See by Lord Hardwicke, in Lord Lovat's case, 9 St. Tr. 647, fo. ed. 10 How. St. Tr. 506.

contents of it on the *voire dire*. The general rule, which requires the production of the instrument itself, or that a notice to produce it shall be given before a witness can be examined as to its contents, does not apply to such a case; for the objecting party may be ignorant of its existence before the examination of the witness, and he cannot be supposed to know that a particular witness would be called on the other side. If, however, the witness himself produces the instrument, it ought, of course, to be read as the best proof of the witness's situation. (1)

Objection removed on *voire dire*.

When the objection arises from a witness's answer on the *voire dire*, it may likewise be removed on the *voire dire*. Thus, in an action brought by a chartered company, where a witness for the plaintiff admitted on the *voire dire*, that he had been a freeman of the company, but added that he was then disfranchised, Lord Kenyon ruled, that it was not necessary to prove the disfranchisement by the regular entry in the company's books, and that the witness was competent. (2) In a case where a witness, examined on a settlement question, stated on the *voire dire*, that he occupied a cottage in the appellant's township, but that he was not rated, nor did he pay any public rate, the Court of King's Bench held, that there was no ground for objecting to his competency, and that it was not necessary for the appellant, who called him, to produce the rate as the best proof of his not being rated. (3) So, in an action by an administrator, where a witness called for the plaintiff admitted that he was next of kin, and was objected to on this ground, but answered on re-examination that he had released all his interest, this was held by Lord Ellenborough to remove the objection. (4) So in an action by an indorsee of a bill of exchange drawn by J. S. on the defendant, where the defendant pleaded that J. S. was an accommodation drawer, and no value given, J. S., being called as a witness for the defendant and

Rule as to *the best proof* dispensed with.

(1) Butler *v.* Carver, 2 Stark. N. P. C. 434.

(2) Butchers' Company *v.* Jones, 1 Esp. N. P. C. 162. Botham *v.* Swingler, Peake, N. P. C. 214, 1 Esp. 164, S. C.

(3) R. *v.* Gisburn, 15 East, 57.

(4) Ingram *v.* Dade, Lond. Sitt. after Mich. T. 1817. Wandless *v.* Cawthorne, Mo. & Ma. 321, n. Carlisle *v.* Eady, 1 C. & P. 234.

objected to, was allowed to prove on his examination that he had been released by the defendant, and to give parol evidence of the contents of the release; and this ruling at *nisi prius* was afterwards confirmed by the Court of Queen's Bench. (1)

Rule, when the proof is independent of the *voire dire.*

Where the party calling a witness, who has been objected to on the *voire dire*, attempts to remove the objection by other independent proof, and not by a further examination of the witness on the *voire dire*, he will be subject to all the ordinary rules of evidence, and the best proof will be required according to the nature of the case. Thus, if another witness is called to prove that a witness, objected to on the ground of interest, has been released, he cannot be allowed to speak of the contents of the release, but the release itself, if in existence, ought to be produced. (2)

Release.

Whatever interest a witness may have had, if he is divested of it by release or payment, or by any other means, when he is ready to be sworn, there is no objection to his competency.

Release by legatee.

Thus, it is said "to have been solemnly agreed by the judges, that where a person had a legacy given him, and did release it, he was a good witness to prove the will." (3)* So a release

(1) Lunnis *v.* Rowe, 10 Ad. & Ell. 606. The case of Goodhay *v.* Hendry, Mo. & Ma. N. P. C. 319, and another case, referred to in p. 321. n. *ib.*, which were not according to the rule above laid down, must be considered as overruled by Lunnis *v.* Rowe.

(1) Corking *v.* Jarrard, 1 Camp. 37, and see by Lord Kenyon, Botham *v.* Swingler, 1 Esp. N. P. C. 164.

(4) Vin. Ab. tit. Evidence, 14, n. 53, cited by Lord Mansfield, 1 Burr. 423. The competency of the witness does not depend on the language of the statute, *ibid.* 417.

---

* Lord Chancellor Hardwicke established the will of Lord Ailesbury on similar proof, in the year 1748. (See 1 Burr. 427.) And in Wyndham *v.* Chetwynd (1 Burr. 414,) where the subscribing witnesses were creditors of the testator, they were admitted to prove the will, as their debts had been paid. So in Doe dem. Hindson *v.* Kersey, (4 Burn. Ecc. Law, 97,) three of the judges were of opinion, that a subscribing witness was restored to his competency, if all his interest had been released or extinguished at the *time of the examination.* Lee, C. J., in Anstey *v.* Dowsing, (2 Str. 1253), and Lord Camden, C. J., in Doe on the demise of Hindson *v.* Kersey, were of opinion, that if a subscribing witness was interested at *the time of attestation*, nothing *ex post facto* could give effect to his attestation. In the former of these cases, Mr. Justice Dennison differed from Lee, C. J., on this point. (See 1 Burr. 427, 428.)

1 Vict. c. 26.

The reader is referred to st. 1 Vict. c. 26, ss. 14, 15, 16, and 17, as to the situation and competency of attesting witnesses, devisees or legatees, creditors, and executors. *Supra*, p. 150, note.

from the drawer of a bill of exchange to an acceptor, will render the latter a competent witness. (1)

Release from drawer of bill.

A general release of all actions and causes of action, for any matter or thing which has happened down to the time of the release, will discharge the witness from all liability depending upon the event of the existing suit. Such a release from a defendant, who had drawn a bill of exchange, to the witness who accepted it, was held to have this effect; (2) for, as Lord Ellenborough said in that case, the transaction was already past, which was to lay the foundation of future liability; and if the drawer should have a cause of action against the acceptor, it would have reference back to the acceptance, and would be discharged by the release. A similar point arose in the case of *Cartwright* v. *Williams*, (3) where the defendant was the acceptor, and the witness was one of the drawers, for whose accommodation the bill had been accepted; there the witness was a bankrupt, and it was objected that a release to the assignees was necessary in addition to the general release, since the defendant, as surety, might prove the debt under the commission of the witness, in case the plaintiff should recover in this action; but Lord Ellenborough held, and the Court of King's Bench were afterwards of the same opinion, that the release in question, comprehending all future claims in consequence of any cause existing at the time of granting the release, would extend to bar any claim of the defendant as surety on the bill, this being an inchoate cause of action then existing. (4)

General release.

Release from drawer to acceptor.

Release from acceptor to drawer.

But in an action by an administrator, where a witness called for the plaintiff was entitled to a distributive share of the intestate's estate, it was held by the Court of Exchequer, that his competency was not restored by giving to the administrator a release of all causes of action from the beginning of the world to the date of the release; it was said, such a release would not

Witness entitled to distribution.

(1) Scott *v.* Lifford, 1 Campb. 249.
(2) *Ibid.*
(3) 2 Starkie, N. P. C. 342.
(4) See also by Best, C. J., 4 Bing. 652, and see Wilson *v.* Hirst, 2 B. & Ad. 760.

affect the witness's right to a share of the proceeds of the action, in case the administrator recovered. (1)

Release by guardian.

In an action by a minor who appears by his guardian, a release by the latter will not be sufficient, the guardian not having any authority to release. (2) A release of a bond debt by one of several obligees will operate as a release by all; (3) and a release to one of several obligors will have the same effect as to all the others, whether the bond be joint, or joint and several. (4)

Release of bond debt.

Release to one of several contractors.

In a case at *nisi prius*, where it appeared that several persons had agreed equally to bear the expenses of a joint undertaking, and an action was bronght against one of them, it was ruled, that another of the contractors was rendered a competent witness for the defendant, if released by him, though the rest did not join in the release. (5)

Release to partner.

It seems to have been ruled by Lord Tenterden, in an action brought against one of several persons, who were partners in business, that the defendant could not, by means of a release, make his partner a competent witness for him: (6) and in an earlier case, (7) Lord Alvanley is said to have expressed an opinion, that a partner of the defendant could not be made a competent witness for him by means of a release, on the ground, that if the defendant died or became insolvent, the plaintiff would have a right, by a bill in equity, to compel all the partners to contribute. But in a late case in the Court of King's Bench, this doctrine appears to have been overruled. It was there decided, that in an action against two partners to recover the balance of a banking account extending over several years, a witness called for the defendants, who adinitted that he had been a partner with the defendants during a part of the time over which the account extended, was rendered competent by

(1) Matthews *v* Smith, 2 Y. & J. 426.

(2) Fraser *v.* Marsh, 2 Stark. N. P. C. 41.

(3) Bayley *v.* Lloyd, 7 Mod. 250.

(4) Co. Lit. 232, *a.* 2 Roll. Abr. 412 (G.) 1 Bos. & Pul. 630.

(5) Duke *v.* Pownall, Mo. & Ma. N. P. C. 430.

(6) Simons *v.* Smith, Ry. & Mo. N. P. C. 29. The reason for this decision is not mentioned.

(7) Cheyne *v.* Koops, 4 Esp. N. P. C. 112.

general releases from the witness to the defendants, and from the defendants to the witness. (1)

Release to part-owner.

In the recent case of *Jones* v. *Pritchard*, (2) it was held, in an action brought against one part-owner for work done to a vessel, that another part-owner is a competent witness for the defendant after a release; a release from the witness was not considered necessary.

Release to one of committee of joint-stock company.

The Court of Common Pleas lately determined in the case of *Beckett* v. *Wood*, (3) an action for wages brought by the plaintiff as secretary of an intended joint stock company, against one of the provisional committee of the company, that another member of the committee was a competent witness for the defendant, on being released by him; for, after releasing the witness, the defendant could not himself have set up against any other joint contractor a demand for that share of contribution, which, but for his own release, he might have derived from the witness, and which, by such release, he must be taken to have voluntarily abandoned against all; consequently no other joint-contractor could afterwards have called upon the witness for contribution.

Residuary legatee—release by him of all claim.

A residuary legatee is not rendered a competent witness, in an action by an executor to recover a debt due to the testator, by releasing all claim to the debt in question; for if the plaintiff fail in the suit, although he would not be liable for costs to the opposite side, he must pay costs to his own attorney; and the executor would be entitled to the allowance of these costs out of the estate, the action being brought *bonâ fide*; thus independently of the debt to be recovered, the residue would be diminished. The witness, therefore, has still an interest to support the action, and can only be rendered competent by

(1) Wilson *v.* Hirst, 4 B. & Ad. 760. It was considered that the future right, which was released, had a foundation and original inception at the time of the release, and was a necessary and common liability, and that, therefore, the rule in Lampet's case, 10 Rep. 506, was satisfied.

(2) 2 M. & Wel. 199, see Young *v.* Bairner, 1 Esp. 103; Goodacre *v.* Breame, Peake, 174; Jennings *v.* Griffiths, R. & M. 42; Moody *v.* King, 2 B. & C. 558.

(3) 6 Bing. New Cas. 380.

releasing the residue, or by a release of the costs of the action from the attorney. (1)

Stamp of release.

Where the defendant executed a release to a witness at the trial, but, before the release was given to the witness, it was handed to the plaintiff's counsel, who objected to the form, in consequence of which it was altered and re-executed, the release was held sufficient, and a new stamp was considered unnecessary. (2) And in a late case, in which the defendant executed a release to one of the witnesses before the trial, and gave it to his attorney, and at the trial it appeared that another witness would require to be released, and his name was accordingly inserted, and the release re-executed before it had been delivered out of the attorney's possession, it was held by the Court of Exchequer, that the instrument was still *in fieri* at the time of the re-execution, and did not therefore require a fresh stamp. (3)

New stamp when not necessary.

Undertaking to release.

Where the defendant has suffered an incompetent witness to be examined, on the undertaking of the plaintiff's attorney to execute a release to him after the trial, and the plaintiff has obtained a verdict, a new trial will not be granted, on the ground that the release has not been given, but the witness will have a remedy on the undertaking. (4)

Member of corporation, how made competent.

When a witness is objected to as a member of a corporation, whose interests are in question, his competency may be restored either by his resignation, (which will be effectual even by parol, provided it has been accepted, and another person elected in his place,) (5) or by disfranchisement. The method of disfranchisement is said to be by an information in the nature of a

(1) Baker *v.* Tyrwhitt, 4 Campb. 27. See Carter *v.* Abbot, 1 B. & C. 144, and Perryman *v.* Steggel, 8 Bing. 369, as to its being necessary for the bankrupt to release his surplus to his assignees, or to obtain releases from his creditors, besides being released by the party who calls him. In Carter *v.* Abbot, three releases were given. In Perryman *v.* Steggel, the general release was held insufficient.

(2) Alton *v.* Farren, 5 Car. & P. 513.

(3) Spicer *v.* Burgess, 1 C., M. & R. 129. 4 Tyr. 598. *Qu.* as to the sufficiency of a single stamp on a release to two witnesses. See by Lord Lyndhurst, 4 Tyr. 605.

(4) Heming *v.* English, 1 C., M. & R. 568. 5 Tywr. 185.

(5) R. *v.* Mayor, &c. of Ripon, 2 Salk. 432. Com. Dig. tit. Franchise (F. 30.)

quo warranto against the member, who then confesses the information, and upon that there is judgment of disfranchisement. (1) This judgment must be such as cannot be avoided; for if it appear that the witness can avoid the judgment for irregularity, (as he may, if he has never been summoned, and knew nothing of his disfranchisement,) he is not competent. (2)

Bail.

It has been shown that the competency of a witness who is the defendant's bail may be restored by applying to the court to strike out his name from the bail piece, or by depositing a sum of money in court at the trial of the cause as a security for the debt and costs. (3)

Obligor for costs.

So, a witness called for a plaintiff, who is liable to the defendant upon a bond for the costs of an action, will be allowed to deposit the amount of the penalty of the bond with the officer of the court, and his evidence will then be received. (4)

Release refused.

It has also been noticed, that if a witness offers to release or surrender his interest, and executes a release accordingly, his competency is restored, though the party refuse to accept his release.

CHAPTER VI.

OF THE EXCLUSION OF EVIDENCE, WHERE THE DISCLOSURE WOULD BE IN VIOLATION OF PROFESSIONAL CONFIDENCE, OR PREJUDICIAL TO PUBLIC INTERESTS.

THE preceding chapters have treated of the grounds of incompetency, from want of understanding, from defect of religious principle, from infamy of character, and from interest in the event of the suit. The objection to witnesses from these

(1) The case of the Mayor, &c. of Colchester, 1 P. Wms. 595, n.

(2) Brown *v.* Corp. of London, 11 Mod. 225.

(3) Baillie *v.* Hole, Mo. & Ma. N. P. C. 290, and see Pearcey *v.* Heming, 5 Car. & P. 503.

(4) Lees *v.* Smelt, 1 M. & Ro. 329.

causes depends upon one principle, the supposed want of personal credit attaching to the testimony of the witnesses. Two other grounds for the exclusion of evidence are now to be considered: Where the disclosure would be of matters communicated under professional confidence: And where the disclosure would be prejudicial to public property. These grounds of exclusion will be the subject of the two following sections.

Section I.

Of the Exclusion of Evidence, where the disclosure would be in Violation of Professional Confidence. And of the Privilege of a Client.

General rule.

Communications made on the faith of that professional confidence which a client reposes in his counsel, attorney, or solicitor, are not allowed to be revealed in a court of justice to the prejudice of the client.

The expediency of this rule must depend, not on the impropriety of violating the confidence reposed, but on a consideration that the collateral inconvenience, which would ensue if no such confidence were reposed, would preponderate over the direct mischief produced by a chance of the failure of justice resulting from the exclusion of evidence. If, in the cases within the operation of the rule, the only confidence reposed were a confession of guilt or dishonesty, the rule would be obviously detrimental to the interests of justice; but it is conceived, that in a multitude of instances, a person possessed of just rights would be materially impeded in vindicating them, if every communication made to his professional adviser might be used against him; if such were the law it would be necessary, in self-defence, to accompany all communications made to a professional adviser, with a statement of the several circumstances and explanations, which, however unnecessary for the purpose of the communication, would be requisite to prevent it from being unfairly used. And it is to be observed, that the evidence in question, being generally a species of hearsay evidence, is open to much objection upon that ground, especially as it would generally be delivered either by a very favourable or a very hostile witness.

Nature of privilege.

The privilege is that of the client and not of the professional adviser; an attorney will not be allowed, against his client's will, to disclose matters of professional confidence, though himself willing to do so. (1) The client may waive his privilege. (2) But he is not to be considered as waiving it, by calling his attorney as a witness. (3)

To whom it extends.

With respect to the character and situation of the persons receiving the communications, it is to be observed that this professional privilege extends to the three cases of counsel, attorney, and solicitor. (4)

Interpreter or agent.

A person who acts as interpreter (5) or agent, (6) as the organ of communication between an attorney and his client, stands precisely in the same situation as the attorney himself; he is considered as the organ of the attorney, and is under the same conditions of secresy. An attorney's clerk (7) cannot be called to prove a confidential communication. A barrister's clerk cannot be called to prove the date of his master's retainer. (8)

(1) B. N. P. 284. Wilson *v.* Rastall, 4 T. R. 759. Sandford *v.* Remington, 2 Ves. Jun. 189.

(2) Merle *v.* More, R. & M. 390. In this case the person waiving the privilege was not a party to the suit.

(3) Waldron *v.* Ward, Styl. 449. Vaillant *v.* Dodemead, 2 Atk. 524. The case decides that he cannot be examined as to confidential communications unconnected with the subject of the questions in chief.

(4) Wilson *v.* Rastall, 4 T. R. 759. Waldron *v.* Ward, Styl. 449. In Bailie's case, 21 St. Tr. 358, a witness objected to be examined respecting confidential communications between himself and the opposite party in a cause, at his client's request, where he was called on by his client to disclose them. In Currey *v.* Walter, 1 Esp. 456, it was held to be at the option of a counsel to relate what was stated by him in making a motion before the Court; it seems that this was not on the ground of confidence, but of the privilege of counsel. It would seem that an arbitrator has the like privilege, not on the ground of confidence, but of protection in respect of his situation, Ellis *v.* Soltan, cited 4 C. & P. 327. Johnson *v.* Durant, *ibid.* Habershow *v.* Troby, 3 Esp. 38. In Martin *v.* Thornton, 4 Esp. 181, the arbitrator was examined. In Sparke *v.* Middleton, 1 Keb. 505, pl. 68, the counsel for the defendant was called by the plaintiff and was allowed to take a special oath.

(5) Du Barre *v.* Livetti, Peake, 78, recognized 4 T. R. 756.

(6) Parkins *v.* Hawkshaw, 2 Stark. 239. Whether the privilege extends to the executor of an attorney, see Fenwick *v.* Reed, 1 Mer. 114.

(7) Taylor *v.* Foster, 2 C. & P. 195. R. *v.* Upper Boddington, 8 D. & R. 732.

(8) Foote *v.* Hayne, R. & M. 165.

Attorney not employed as such.

But a person, though by profession an attorney, if he be not employed in the particular business which is the subject of inquiry, (as, where he is undersheriff at the time) is not precluded from giving evidence, though he may have been consulted confidentially. (1) And it has been ruled, that a person who was consulted confidentially, on the supposition of his being an attorney, when, in fact, he was not one, is compellable to answer. (2)

Medical advisers, and friends not within the rule.

The professional privilege is confined to the cases which have been enumerated. (3) There are, indeed, cases, said Mr. Justice Buller in the case of *Wilson* v. *Rastall*, to which it is much to be lamented that the law of privilege is not extended: those in which medical persons are obliged to declare the information which they have acquired by attending in their professional characters. (4) This point was much considered in the *Duchess of Kingston's* case, where Sir C. Hawkins, who had attended the duchess as a medical man, was compelled to disclose what had been committed to him in confidence. (5) Lord Kenyon, in the same case of *Wilson* v. *Rastall*, observed, "If a friend could not reveal what was imparted to him in confidence, what is to become of many cases even affecting life, for instance, Dr. *Ratcliff's* case: (6) and if the privilege claimed extended to all cases and persons, Lord W. Russell died by

(1) Wilson *v.* Rastall, 4 T. R. 753. See Rex *v.* Brewer, 6 C. & P. 363. Hill *v.* Elliot, 5 C. & P. 436.

(2) Fountain *v.* Young, 6 Esp. 113. Sir D. Evans, in his edition of Pothier, suggests that it follows from Wilson *v.* Rastall, that communications to a conveyancer are not privileged, when made to him in that capacity, though he may happen to be a counsel or attorney. But in Farquano *v.* Knight, 2 M. & Wel. 100, it was said by Lord Abinger, C. B., that it was no objection to an attorney's privilege that a document was brought to him in the character of a scrivener, for that Lord Nottingham had laid it down, that he would not compel a scrivener to disclose communications made to him. Harvey *v.* Clayton, 2 Swanst. 221, n. *Anon.* Skinn. 404. In the same case, Parke, B., observed, it would be difficult to say that a licensed conveyancer is privileged as such.

(3) 4 T. R. 758. Vaillant *v.* Dodemead, 2 Atk. 524. 2 Swanst. 221. Stone *v.* Lord G. Lennox, Lord Chancellor's Cond. West., Nov. 4, 1836. It was formerly thought that a trustee was privileged, B. N. P. 184.

(4) 4 T. R. 759. See also R. *v.* Gibbons, 1 C. & P. 97. R. *v.* Sparkes, cited in Peake's N. P. C. 77, Du Barre *v.* Levette.

(5) 20 Howell's St. Tr. 613,614.

(6) Dr. Ratcliffe's case, 18 Howell's St. Tr. 428.

the hands of an assassin and not by the hand of the law; for his friend, Lord Howard, was permitted to give evidence of confidential conversations between them." (1)

Bankers.

The bankers of one of the parties in a cause are bound to answer as to the amount of the balance of such party on a particular day. (2)

Stewards.

And a steward is not, like the legal adviser of a party, protected by his relative situation, from the disclosure of his knowledge of the affairs of his employer, or of the existence and contents of instruments, with which he has become acquainted in consequence of his employment. (3)

Clergyman.

A confession to a clergyman is not privileged. (4)

Clerk to commissioners.

In a case at *nisi prius*, where a clerk to the Commissioners of the property-tax was called to prove the defendant a collector, and refused to give evidence, on the ground of his having taken an oath of office not to disclose what he should learn as clerk respecting the property-tax, except with the consent of the commissioners or by force of an act of parliament, the court

Oath of office.

(1) See Lord Russell's trial, 9 Howell's St. Tr. 599. It is too much to affirm that Lord Russell *died by the hand of the law*,—if that expression is meant, that the trial was regular, and that justice was duly administered. It is conceived that an impartial judge, on a calm and considerate review of the whole of the proceedings in Lord Russell's case, will come to this conclusion—that the law was strained, and injustice done; but that the law was less strained, and less injustice done, than in most of the state trials of the same period.

(2) Lloyd *v.* Freshfield, 2 C. & P. 329.

(3) Lord Falmouth *v.* Moss, 11 Price, 455. The question related to the point, whether a steward could be allowed to say, that an ancestor of his employer granted a certain lease, and whether that ancestor, under deeds in his employer's possession, took an estate for life. The court guarded themselves from deciding whether a steward could be asked general questions as to his employer's title and as to deeds in his possession. That stewards are not privileged, see Vaillant *v.* Dodemead, 2 Atk. 524. Per Buller, J., 4 T. R. 756.

(4) R. *v.* Sparkes, cited in Du Barre *v.* Livette, Peake, 77. In Broad *v.* Pitt, 3 C. & P. 519, Lord Wynford said, it had been decided in Gilham's case, R. & M. Cr. Cas. 194, that the privilege did not extend to clergymen, but that he would never compel a clergyman to disclose communications made to him by a prisoner; but if he chose to disclose them, he should receive them in evidence. He also observed, that the confidence, in the case of attornies, was a great anomaly in the law. A confession to a Popish priest has been held not to be privileged; Butler *v.* Moore, Macnally, 253. In Du Barre *v.* Livette, Peake, 108, Lord Kenyon apparently dissents from the decision in R. *v.* Sparkes. A Peer is not privileged. See 11 St. Tr. 246.

held, that this oath would not exempt the witness, and that it must be construed, as containing an implied exception of the evidence which he might be called to give in courts of justice in obedience to the writ of *subpœna*.(1) In an early case, (2) where the defendant pleaded, to an action of debt on a bond, the statute against buying and selling of offices, and called a witness to show on what occasion the bond was given, Lord Holt is said to have refused his evidence, because it appeared, that he was privately intrusted to make the bargain, and to keep it secret. But the principle and authority of this case seem to have been over-ruled by that of *Wilson* v. *Rastall*, and the later decisions on this subject.

What communications privileged.

With respect to the nature of the communications which are privileged, it may be observed, that the cases may be divided into those which have reference to some suit, and those in which no suit was in contemplation.

It was observed, by Lord Ellenborough, in *Gainsford* v. *Grammar*, (3) that it had been established in *Cobden* v. *Kendrick*, (4) and *Wilson* v. *Rastall*, (5) that communications by a party to a witness, if not made in confidence, (whether prior or subsequent to the relation of client and attorney subsisting between them,) are not privileged; but that this confidential relation might be formed before the commencement of any suit. An attorney may be retained and confided in as such before the commencement of any suit, and in such a case, he is not bound to disclose whatever has been revealed to him previous to the suing out of the writ. In *Clark* v. *Clark*, (6) Lord Tenterden observed, "Suppose a party to consult his attorney whether or no he should bring or resist an action, it could not be doubted that such a communication would be privileged, though no suit was pending at the time:" and he

Confidence before commencement of suit.

(1) Lee q. t. *v.* Birrel, 3 Campb. 337.

(2) Bull. N. P. 284.

(3) 2 Campb. 10.

(4) 4 T. R. 431.

(5) *Ibid.* 753, and see Cuts *v.* Pickering, 1 Ventr. 197, as to matters communicated before the retainer.

(6) 1 M. & Ro. 5. In this case, Lord Tenterden says, that the doctrine reported to have been laid down by him in Williams *v.* Mundie, R. & M. 34, was too narrow, and it would seem that a formal retainer is not essential.

held, that where a matter was in dispute and controversy, although no cause was in existence with respect to it, the communication was privileged.

Communications collateral to suit.

But, although a suit be pending or recently terminated, communications made to a counsel or attorney by his client are not privileged, if they are not made to the person in his capacity of counsel or attorney, or for the purposes of the suit. Thus, in the great case of *Annesly* v. *Lord Anglesea*, the attorney of a prosecutor of an indictment was allowed to state what his client had observed to him, pending the proceedings on the indictment, *viz.* that he would give a large sum of money to have the prisoner hanged. (1)

Where confidence is at an end.

Where a person (who had brought an action on a promissory note, which was afterwards compromised by the defendant,) had informed the attorney, after the compromise, and in the interval between the time when a warrant of attorney was given, and the time when the money was to become due, that there never had been any consideration for the note, the Court of King's Bench held, that the attorney was compellable to disclose that circumstance, in an action brought to recover back the money. "The communication," said Lord Kenyon, "was not here made in contemplation of a suit; on the contrary, the purpose in view had been already obtained; and what was said by the client was from exultation, in having before deceived his attorney as well as his adversary." (2)

Suit closed.

Attorney changed.

But where confidential communications have been made to an attorney with reference to a suit, the attorney will not be at liberty to divulge them when the suit is determined; his mouth is closed for ever. (3) And the confidence continues, though the attorney has ceased to act for the party, and another attorney conducts the suit. (4)

(1) Annesly *v.* Lord Anglesea, 17 Howell's St. Tr. 1221, where the subject of the privilege is very fully discussed.

(2) Cobden *v.* Kendrick, 4 T. R. 432.

(3) By Buller, J., in Wilson *v.* Rastall, 4 T. R. 753.

(4) Parker *v.* Yates, 12 Moore, 520. Petrie's case, cited 4 T. R. 756.

Where no suit expected.

The privilege of professional confidence is not limited to cases, in which a suit is in contemplation. This is manifest from the authorities which will be presently noticed, in which the attornies of parties not connected with the suit have not been allowed at the trial to reveal matters, of which they have acquired knowledge through the professional confidence of their clients. But, as between the *parties* to a suit, it is only lately that the law has been relieved from much perplexity, in those cases where professional confidence has existed but has been unconnected with the immediate suit. Upon a consultation on the express subject between the Lord Chancellor, the two Lord Chief Justices, and the Lord Chief Baron, they considered that the privilege was not confined to cases where the communication related to the bringing or defending an action.(1)

It seems that the privilege extends to all cases where a communication is made to an attorney or other legal adviser in his professional capacity; (2) and that the rule is correlative with that which governs the summary jurisdiction of the courts over attornies. (3) That rule has been thus laid down: "Where an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But when the employment is so connected with his professional character, as to afford a presumption that his character formed the ground of his employment by the client, there the court will exercise this jurisdiction." (4)

(1) *Ex relatione* Parke, J., in Moore *v.* Terrel, 4 B. & Ad. 876, and in Doe *v.* Harris, 5 C. & P. 593. The authorities for restricting the privilege were Williams *v.* Mundie, R. & M. 34. Broad *v.* Vetet, M. & M. 233. Duffin *v.* Smith, Peake, 108. Wadsworth *v.* Hamshaw, 2 Br. & B. 5, n. The authorities for the more extensive privilege are Greenhough *v.* Gaskell, Mylne & Keen, 98. Bilton *v.* Corporation of Liverpool, *ib.* 88. Moore *v.* Tyrrell, 4 B. & Ad. 870. Doe *d.* Shellard *v.* Harris, 5 C. & P. 594. See 2 Swanst. 199, n.

(2) See Doe *v.* Harris, 5 C. & P. 593. Walker *v.* Wildman, 6 Madd. 47, and cases cited in the last note. Doe d. Peter *v.* Watkins, 3 Bing. P. C. 421.

(3) Turquano *v.* Knight, 2 M. & Wel. 101; by Alderson, J. The court adverted to the case of Greenhough *v.* Gaskell, 1 Mylne & Keen, 98, as one in which all the authorities had been reviewed.

(4) *Ex parte* Aitken, 4 B. & Ald. 49. *Ex parte* Yeatman, 4 Dowl. P. C. 309.

Mode of making the communication.

A communication made to a solicitor, if confidential, is privileged, in whatever form made. If it would be privileged, when communicated in words, spoken or written, it will be privileged equally when conveyed by means of sight instead of words. Thus, an attorney cannot give evidence as to the fact of the destruction of an instrument, which he has been admitted in confidence to see destroyed. (1)

Communication respecting sale of estate.

Instructions for fraudulent deed.

It has been held that communications made between a client and his attorney respecting the sale and purchase of estates are privileged, although no suit be either existing or expected. (2) And where instructions had been given to an attorney for drawing a deed which the attorney refused to draw, and the deed was drawn by another person; the validity of the deed bing afterwards questioned on the ground of fraud, in an action against the sheriff, in which the attorney first applied to was not employed, the Court of Common Pleas refused a rule *nisi* for a new trial, on the ground that the evidence of the attorney, as to the instructions he had received for drawing the deed, had been rejected (3) An attorney will not be allowed to make a statement, derived from a knowledge of his client's title, that his client has no power to grant freehold leases. (4) In an action of trover for a lease, brought by the assignees of a bankrupt, it was pleaded that before the bankruptcy the bankrupt deposited the lease with the defendant as a collateral security; at the trial the plaintiffs endeavoured to shew that the lease was deposited after an act of bankruptcy, and they proposed to ask a witness, who had been the attorney for the bankrupt after the act of bankruptcy, and who had been applied to by him to raise the money, whether the bankrupt had not the lease in his possession at that time, and whether

Leasing power.

Possession of deed.

(1) Robson *v.* Kemp. 5 Esp. 54.

(2) Mynn *v.* Joliffe, 1 M. & Ro. 327. See also a case cited *ib.* tried before Parke, J., and by Richardson, J., in Cormack *v.* Heathcote, 2 Br. & B. 6.

(3) Cormack *v.* Heathcote, 2 Br. & B. 4, and see Doe dem. Shellard *v.* Harris, 5 C. & P. 594. The witness cannot be interrogated, whether the advice was asked for a lawful or unlawful purpose, *ib.* See *Anon.* Skinn. 404, Vin. Ab. (B. a.) pl. 10. For the decisions in equity upon this subject, and as to the production of cases submitted to counsel, and their opinions upon such cases, see Hare on Discovery, Chap. III.

(4) Moore *v.* Terrel, 4 B. & Ad. 878.

he had not brought it to him for the purpose of raising money upon it. It was held, that the witness could not be allowed to answer the question. (1)

Production of deeds.

The principle of protection, afforded to professional confidence in regard to communications made by a client, must obviously preclude an attorney from producing or disclosing the contents of deeds or other papers deposited with him confidentially in his professional character. "The names, times, or dates, contained in a written instrument," said Lord Ellenborough, "though not known from the communication of the client, yet come to the knowledge of the attorney from the delivery of the instrument by his client." (2) If a deed deposited confidentially with an attorney has been obtained out of his hands for the purpose of being produced in evidence by another witness, it cannot be received. Thus, in a case tried before Mr. Justice Bayley, the plaintiff's counsel having proved a certain deed in the possession of the defendant, and the defendant refusing to produce it, though he admitted having received notice, the counsel for the plaintiff offered in evidence a copy of the deed, which had been obtained from one who many years ago acted as attorney for the person under whom the defendant claimed, and who had been intrusted by him with the original deed in his professional character. The counsel on the part of the defendant objected that this evidence ought not to be received, as the original deed had been deposited confidentially with the attorney; and Mr. Justice Bayley refused to admit it. He said, "the attorney could not give parol evidence of the contents of the deed which had been intrusted to him; so neither could he furnish a copy. He ought not to have communicated to others what was deposited with him in confidence, whether it was a written or verbal communication. It is the privilege of his client and continues from first to last." (3)

(1) Turquano *v.* Knight, 2 M. & Wel. 98. It was stated to be no objection to the privilege, that the lease was brought to the attorney in the character of scrivener.

(2) Brand *v.* Ackerman, 5 Esp. 119. And see Bath *v.* Kinsey, 1 Cr. M. & R. 42.

(3) Fisher *v.* Heming, Leic. Lent Ass. 1809. See Bottomley *v.* Usborne, Peake's Add. Ca. 101, after a notice to produce. Cook *v.* Hearn, 1 M. & Ro. 201.

Rule in prosecutions.

The obligation of secrecy has been enforced between attorney and client, in a case where the interests of criminal justice were concerned. (1)* In a prosecution for the forgery of a promissory note, an attorney, who had the note in his possession, refused to produce it before the clerk of arraigns, who required it for the purpose of setting it out in the indictment: upon which he was summoned to appear before the judge, and show cause why he should not produce the note. He accordingly attended, together with counsel for the prosecution, and counsel for the prisoner. Mr. Justice Holroyd inquired minutely into the circumstances, by which he had the note in his possession; when it appeared, on the statement of the attorney, that he had been consulted by the prisoner on the note in question, and that by his direction he had commenced an action to recover the amount of the note, against the person in whose name it was now supposed to be forged: that a short

(1) R. *v.* Smith, Derby Sum. Ass. 1822. In support of this decision, see R. *v.* Dixon, 3 Burr. 1687.

---

* The case of R. *v.* Smith having been cited, in the case of R. *v.* Avery, (8 Carr. & P. 596), as an authority in point, against the reception of a written instrument communicated by the prisoner to an attorney, as being a privileged professional communication, Mr. Justice Patteson is reported to have held the case not to be good law. If the case of R. *v.* Smith, there cited as an authority, had been fully in point *against* the admission of the evidence offered in that case, it could not be considered good law; for unquestionably in R. *v.* Avery, the evidence was admissible. It appeared that the prisoner applied to a solicitor to procure for him a loan of money on mortgage, the solicitor being employed by another person to put out money on mortgage security; in proof of his title to freehold lands, he delivered to the solicitor a will, for the forgery of which he was then to be tried; the solicitor upon this advanced the money of his client, and prepared the mortgage deed: the question was, whether the solicitor could produce the will, and give in evidence what had passed between him and the prisoner as to the advance of the money. The distinction between this case and the case of R. *v.* Smith is obvious. In the case before Mr. Justice Patteson, the prisoner deposited the instrument in the hands of his solicitor, not with reference to a suit, nor with reference to any transaction resting solely between themselves, but for the purpose of a money transaction between himself and a third person, and to be disclosed and communicated to that person. In the case of R. *v.* Smith, on the contrary, the instrument was deposited with the solicitor for the purpose of a suit in which he consulted him professionally, as a matter in confidence between him and his solicitor, and solely for his own interests. The two cases, therefore, are not inconsistent, and the one does not overrule the other. For these reasons, and from regard to the high authority of the late Mr. Justice Holroyd, who was remarkable for the scrupulous and singular care with which he decided every question that came before him, and to this particular case gave more than ordinary time and attention, the case is still retained in the text.

time afterwards, he had been summoned before a magistrate, when the prisoner was apprehended on a charge of forgery, and he was then desired to produce the note: upon this, he inquired of the prisoner, who was present, whether he would consent to its being produced: the prisoner consented, asserting his innocence, and the note was accordingly produced. The magistrate, after taking the depositions of witnesses, remarked, that he thought it would be proper to deposit the note in the hands of the high constable: on which the attorney said, that as the note had come into his hands professionally from his client, he expected to have it restored to him, at the same time asking the prisoner whether he would consent to its being deposited with the high constable, and the prisoner replied, he wished it to be placed in the hands of his attorney. The magistrate returned the note to the attorney observing that he would doubtless have notice to produce it at the trial. The attorney (who was not, however, employed professionally for the prisoner in the ensuing trial,) had been *subpœnaed* to produce the note, which was still in his possession; but, before he was *subpœnaed*, a demand of the note had been made upon him by the attorney now employed in the prisoner's defence. On these facts the question was argued by the counsel for the prosecution, and the counsel for the prisoner; and Mr. Justice Holroyd said, he would consider the point. On the following day, the subject was again mentioned, when Mr. Justice Holroyd refused to make an order upon the attorney to produce the note, or to give a copy of it, to the clerk of arraigns. A bill, charging the prisoner with forgery, was prepared, and found by the grand jury. At the trial, the same attorney was called on the part of the prosecution, for the purpose of producing the note; and, on his re-stating the facts above detailed, the learned judge declared his opinion, that he ought not to produce it. Secondary evidence of its contents was not offered; the prosecution consequently failed; and the prisoner was acquitted.

Attorney acting for two persons.

Where a deed or other paper is intrusted to an attorney by two persons, the attorney must, as against strangers, keep it according to the nature of his original employment, and subject

to the rights of both the persons by whom he is employed. Therefore, when a vendor had a draft of a conveyance made by his own attorney, from which title deeds were afterwards prepared, and the attorney was paid for his business by the vendor and purchaser in moieties by agreement, but the latter employed an attorney on his own part to look over the draft, and the draft remained afterwards with the vendor's attorney; it was held, that such draft was confidentially deposited with the vendor's attorney, by the purchaser as well as by the vendor, and that it could not be produced at the trial against the interest of the purchaser's devisees, though with the consent of the vendor and his attorney. (1) So an attorney, who being resorted to by a borrower to raise money for him, peruses, on the part of the proposed lender, the abstracts of the borrower, is not allowed to give evidence concerning them against the borrower. (2) But communications made to an attorney, acting as such between two parties, are not privileged from disclosure against either party, each party having a right to such disclosure. (3)

Attorney of stranger to suit.

The protection afforded to professional confidence applies not only to the professional advisers of the parties to a suit, but also to the professional advisers of strangers to the suit. (4) Though it is convenient to collect the cases respecting professional confidence in the same chapter, the protection afforded to such disclosures, when made by strangers, is founded on principles which are reserved for consideration in the chapter which treats of the examination of witnesses.

(1) Doe dem. Stroder *v.* Seaton, 2 Ad. & Ell. 171.

(2) Doe dem. Peter *v.* Watkins, 3 Bing. N. C. 421, and see Taylor *v.* Blacklow, 3 Bing. N. C. 235.

(3) Cleeve *v.* Powell, 1 M. & Ro. 228. Braughe *v.* Cradock, 1 M. & Ro. 182. See Robson *v.* Kemp, 4 Esp. 235, where the assignees of one of two persons employing an attorney to prepare a deed were not allowed to use the attorney's evidence against the other alleging fraud.

(4) R. *v.* Withers, 2 Campb. 578. If the judge improperly receives such evidence, the party to the suit cannot avail himself of the objection: Marston *v.* Downes, 1 Ad. & El. 31. It has been held, that the counsel in the cause have a right to argue the admissibility of the evidence at the trial: R. *v.* Woodley, 1 M. & Ro. 391. See Doe d. Peter *v.* Watkins, 3 Bing. N. C. 421.

Verbal communications.

Questions of this nature can seldom occur in regard to verbal communications, in consequence of the rule which excludes hearsay evidence. But they have not unfrequently arisen, where an attorney has been called upon to produce the title deeds of a stranger to a suit, which have been confidentially deposited with him. In an action against the sheriff for an escape, it has been held that the attorney for the original defendant could not be called to prove the debt, where he became acquainted with the business only from the information of his client. (1)

Case for opinion.

The attorney of a stranger to the cause cannot produce a case with the opinion of counsel, which he holds confidentially for his client. (2) On a question of settlement, a mortgagee, a rated inhabitant of the appellant parish, *subpœnaed* by the respondent parish, was held not compellable to produce

Title deeds.

the title deeds of the mortgagors; and that he was not at liberty to produce an abstract of the deeds, or to give parol evidence of their contents. (3) In like manner it has been held, that the solicitor of one of the parties to a deed of composition is not compellable to produce it in an action between strangers. (4)

But where, by an order of the Court of Chancery, made in a suit depending between a lessor and a lessee, a lease was deposited in the hands of the lessor's attorney, and the lessee was at liberty to inspect the same, it was held in an action of ejectment brought by the lessee against the tenant in possession, that the attorney of the lessor was bound to produce the lease, as it was not part of the lessor's title. (5)

(1) Keman *v.* Sheriff of London, 2 Esp. 696, and see Merle *v.* Moore, R. & M. 390. Bowman *v.* Norton, 5 C. & P. 177, as to communications by a bankrupt to his attorney. Turquano *v.* Knight, 2 M. & Wel. *supra.*

(2) R. *v.* Woodley, 1 M. & Ro. 390. See Ditcher *v.* Kendrick, 1 C. & P. 161. It does not appear whether, in this case, the deed was a document of title. It would seem that the attorney's privilege was not more extensive than that of his client; and in Doe *v.* Thomas, 9 B. & C. 288, it seems to have been considered that the privilege was confined to documents of title.

(3) R. *v.* Upper Boddington, 8 D. & R. 726.

(4) Harris *v.* Hill, 3 Str. 140. As to the admissibility of secondary evidence in such cases, see *infra*, on the proof of deeds.

(5) Doe d. Courtail *v.* Thomas, 9 B. & C. 288.

Inspection by court.

Where an attorney is called upon to produce deeds or papers belonging to his client, who is not a party to the suit, the court will inspect the documents, and pronounce upon their admissibility, according as their production may appear to be prejudicial or not to the client; in like manner, as where a witness objects to the production of his own title deeds. (1)

Bankruptcy proceedings.

And, notwithstanding some conflicting opinions, the same rule appears to be held in respect of proceedings or documents in the custody of solicitors for assignees of bankrupts. (2)

Communications not privileged.

The attorney of a party in the cause may be examined, like any other witness, as to any collateral fact, with which he has become acquainted otherwise than from a disclosure or confession by his client. Thus, if he is the subscribing witness to a deed, he may be examined concerning its execution. (3) If there be a question about an erasure in a deed or will, he may be asked, whether he had ever seen the instrument in any other state. (4) If an attorney were present when his client was sworn to an answer in chancery, he might be a witness, on an indictment for perjury, to prove the fact of taking the oath, which is not a fact peculiarly within his knowledge as an attorney, and not communicated to him in secrecy. (5) So the attorney of one of the parties may be examined as to the contents of a written notice, which had been received by him in the course of the cause, requiring him to produce papers. (6) On the same principle and with the like qualification, an attorney was admitted by Lord Kenyon, in an action of debt

(1) Copeland *v.* Watts, 1 Stark. 95. Hawkins *v.* Howard, R. & M. 64.

(2) See Laing *v.* Barclay, 3 Str. 38. Hawkins *v.* Howard, R. & M. 64. Bateson *v.* Hartsink, 4 Esp. 43. Pearson *v.* Fletcher, 5 Esp. 9. Corsen *v.* Duboits, Holt, 239. Cohen *v.* Templar, 2 Stark. 260. Nixon *v.* Mayoh, 1 M. & R. 76. In Laing *v.* Barclay, *supra*, the solicitor for the commission was held not to be bound to produce the proceedings, apparently on the ground that their production might prejudice another cause which was pending. In Hawkins *v.* Howard, *supra*, the solicitor was bound to produce the proceedings, as the assignees would not be affected by the verdict, and there was but a possibility of their being prejudiced. In Pearson *v.* Fletcher, *supra*, Lord Ellenborough considered the production of bankruptcy proceedings a matter of public duty.

(3) Doe dem. Jupp *v.* Andrews, Cowp. 846. Robson *v.* Kemp, 4 Esp. 235. 5 Esp. 53.

(4) B. N. P. 284. 1 Ventr. 197.

(5) B. N. P. 284. By Lord Mansfield, C. J., in Cowper, 846.

(6) Spenceley *v.* Schwlenberg, 7 East, 357.

upon a bond, to prove that the bond had been given on an usurious consideration. (1)

An attorney conducting a cause in court may be called as a witness by the opposite side, and asked as to his employer, in order to shew the real party, and let in his declarations. (2) He may be called to prove the identity of the defendants to a suit, though he knows nothing of them, but from his intercourse with them professionally. (3) He may prove that his client is in the possession of a particular document, so as to let in secondary evidence of its contents (4); and may prove his client's handwriting. (5)

But it seems that cases of the above description must be understood with a limitation, that the privilege extends to all knowledge obtained by the attorney which he would not have obtained, if he had not been consulted professionally by his client. And it has accordingly been held that an attorney is not compellable to state, whether a document, shewn to him by his client in the course of a professional interview, was in the same state as when produced on the trial; as, for example, whether it was stamped or not. (6)

It is obvious, that communications by an attorney to the opposite party or to strangers, and communications between a plaintiff and defendant in the presence of an attorney, do not fall within the principle or terms of the rule, which protects private communications between parties and their professional advisers. (7) The rule is also inapplicable to admissions or

(1) Duffin *v.* Smith, Peake, 108.

(2) Levy *v.* Pope, M. & M. 416.

(3) Studdy *v.* Sanders, 3 D. & R. 347. For other examples see Beckwith *v.* Bonner, 6 C. & P. 681. Hurd *v.* Maring, 1 C. & P. 372. Eike *v.* Nokes, M. & M. 303. R. *v.* Watkinson, 2 Str. 1122, with the *quære* of the Reporter.

(4) Bevan *v.* Waters, M. & M. 235.

(5) 2 Hawk. ch. 46, s. 89.

(6) Wheatley *v.* Williams, 1 M. & W. 533. It was said that the case in B. N. P. 284, must apply to a case where the attorney has his knowledge independently of any communication from his client; and that if a document be exhibited in pursuance of a confidential consultation, all that appears on the face of the document is a part of the communication.

(7) See Gainford *v.* Grammar, 2 Campb. 10. It seems to have been considered in that case, that although a communication between

proposals of compromise made by counsel or attornies; these will be considered afterwards, in that part of the work which treats of admissions by agents.

Communication of client as to facts not professional.

Communications made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information concerning a matter of fact, (as, whether he could attend a meeting of creditors with safety, which would depend on the fact whether any arrangements had been made to prevent his arrest,) are not privileged. "A question for legal advice," said Lord Tenterden, "may come within the description of a confidential communication, because it is part of the attorney's duty, as attorney, to give legal advice; but a question for information as to matter of fact, regarding a communication which the attorney has made to others, where the communication might have been made by any other person as well as an attorney, and when the character and office of an attorney has not been called into action, has never been held within the protection, and is not within the principle upon which the privilege is founded." (1)

Section II.

Of the Exclusion of Evidence, where the disclosure would be prejudicial to Public Interests.

The discovery of truth in inquiries necessary for the administration of criminal justice, as also where the rights of private individuals are concerned, is an object, which, however desirable in itself, may nevertheless be counterbalanced by serious inconveniences from disclosures prejudicial to public interests. And the danger of such disclosures has been

the defendant's attorney and the plaintiff could be proved by a third person, and that the defendant's authority to make the communication would be presumed, yet that the attorney himself could not prove the communication; there seems, however, no reason for excluding the attorney's evidence; and in subsequent cases under similar circumstances, the attorney has been examined. See Ripon *v.* Davies, 2 N. & M. 310. Griffith *v.* Davies, 5 B. & Ad. 502. Turner *v.* Railton, 2 Esp. 474. A letter written by an attorney to his client, and produced with the client's signature indorsed, is treated as the letter of the client, Meyer *v.* Sefton, 2 Stark. 274.

(1) Bramwick *v.* Lucas, 2 B. & C. 744.

deemed, in particular instances, an adequate ground for the exclusion of evidence.

It will not be allowed to examine witnesses in criminal prosecutions, as to information given by them to government for the discovery of offenders against the law. The names of persons who are the channels by which detection is made, are not to be disclosed. This is not the principle of the witness, but may be justly called a public privilege, on account of its importance to the public; it is observed by courts of justice on a principle of public policy, and from regard to public interests.

Communication of spies.

On the trial of Hardy for high treason, a man who had been employed by an officer of the executive government to collect information at a meeting of one of the corresponding societies, was not allowed to disclose the name of his employer, or the nature of the connection that had subsisted between himself and the officer. (1)

Agent of police.

Another witness, in the course of the same trial, had made reports, from time to time, of the proceedings of some corresponding societies, and had made these reports by the advice of a third person, and under the impression that the information contained in the reports would be transmitted to another quarter for the purpose of disclosure; the witness was asked, whether he had communicated his reports to a magistrate of any description; Lord Chief Justice Eyre considered this a proper question. (2) The witness, on answering in the negative, was asked, to whom he had made a communication. This question was objected to; Lord Chief Justice Eyre upon this said, "It is perfectly right, that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained on account of its importance to the public for the detection of

(1) 24 Howell's St. Tr. 753, on cross-examination of Groves. The same principle was acted upon in the prosecution of Horne Tooke for high treason; in the prosecution of Walker and others for a conspiracy; and in the prosecution of Watson for high treason. Gurney's Report, 159. See also 32 Howell's St. Tr. 100.

(2) 24 Howell's St. Tr. 808; on the cross-examination of Lynam.

crimes, that those persons, who are the channel by means of which that detection is made, should not be unnecessarily disclosed. If it can be made appear, that it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me, that it is within the ordinary course to do it, or that there is any necessity for it in this particular case."

The cross-examination of the same witness then proceeded, and the witness admitted, that he had related what he knew to a friend, who advised him to communicate his reports of the proceedings to another person. He was then asked, whether that friend was a magistrate; this he answered in the negative: then came the question, who was the friend? This was objected to; (1) and the objection was, that the person, by whose advice the information was given to a person standing in the situation of a magistrate, was to all intents and purposes the informer, and that his name, therefore, could not be disclosed. (2) The judges differed in opinion upon this point; the Lord Chief Baron Macdonald and Mr. Justice Buller were of opinion, that the question was proper; but the majority of the court, consisting of the Lord Chief Justice Eyre, Mr. Baron Hotham, and Mr. Justice Grose, were of the opposite opinion. Lord Chief Justice Eyre said, "Those questions, which tend to the discovery of the channels, by whom the disclosure was made to the officers of justice, are not permitted to be asked. Such matters cannot be disclosed, upon the general principle of the convenience of public justice. All persons in that situation are protected from discovery. It is no more competent to ask who the person was that advised the witness to make the disclosure, than it is to ask to whom he made the disclosure in consequence of that advice, or than it is to ask any other question respecting the channel of information, or what was done under it." Mr. Justice Grose considered the adviser of the witness to be substantially in the situation of an informer, and that his name, therefore, ought not be revealed. Mr. Baron Hotham also

(1) 24 Howell's St. Tr. p. 811. (2) 24 Howell's St. Tr. 814.

considered the person to be an informer; the witness, he said, had made the communication to his friend, under an impression and full persuasion that through him the intelligence might be conveyed to a magistrate; and there was no distinction, he added, between making a disclosure to the magistrate himself, or making it to another person who was to communicate it to the magistrate. The judges, who were of opinion that the question might properly be asked, admitted the general rule, and differed only in the application of that rule to the particular facts of the case. The Lord Chief Baron said, If he were satisfied that the friend to whom the witness disclosed this matter was in any way a link in the communication, he should certainly agree that the rule applied to him; but this person not being connected either with the magistracy or the executive government, the case did not appear to him to fall within the rule. Mr. Justice Buller admitted the rule with respect to the informer to the utmost extent: "If the name of the informer," he said, "were to be disclosed, no man would make a discovery, and public justice would be defeated." He admitted also that if a middle man is made the channel of communication, he ought to receive the same protection as the first person to whom it was mentioned. But he differed in opinion only as to the situation of the friend respecting which this question arose: in his view of the evidence, he considered that the witness had communicated the information to another man, not for the purpose of prevailing on him to make the disclosure to a magistrate, but merely to consult him for the purpose of making up his own mind, whether he should himself make the discovery; he was, therefore, of opinion that the witness ought to be allowed to answer the question."

Result of cases.

Hence, it appears, that a witness who has been employed to collect information for the use of government, or for the purposes of the police, will not be permitted to disclose the name of his employer, or the nature of the connection between that employer and himself, or the name of any person to whom he may have conveyed the information for the purpose of being transmitted. And as it would not be proper to inquire to what officer of government the information had been given, so

neither can it be asked, whether the information has been made by that officer to the government.

There seems to be no infringement of the rule, in questioning a witness, who is a spy or informer, to this point, whether his communications have been made to a magistrate. (1)

Officer of Government.

Upon the trial of Watson for high treason, a clerk of the works in the Ordnance department, who had resided many years in the Tower of London, was called, on the part of the prosecution, to prove that a plan produced was part of the interior of the Tower. He was afterwards asked, upon cross-examination, whether another printed plan, which was shown to him, was a correct plan of the Tower; this was asked, with the view of proving afterwards, that such maps might be purchased without difficulty in the shops of London. But the court held, that the evidence could not be received, on the ground that it would be attended with public mischief to allow an officer of the Tower to be examined as to the accuracy of such a plan. (2)

Official communications.

On a like principle of public policy, official communications between the governor and law-officer of a colony respecting the state of the colony; (3) orders given by the governor of a colony to a military officer; (4) a correspondence between an agent of government and a secretary of state; (5) the report of a military court of inquiry respecting an officer whose conduct the court had been appointed to examine; (6) the official correspondence between the commissioners and an officer of the customs; (7) a letter from a secretary of state to a person act-

(1) *Vide* cases *supra*, and R. *v.* Watson, 2 Stark. 1 Rep. 136, where a witness was not permitted to say whether he delivered a short-hand note to the under-secretary of state. R. *v.* Stone, cited by Lord Ellenborough, in R. *v.* Watson, 2 Stark. Rep. 136. 32 Howell's St. Tr. 101. Another example may be seen in De Berenger's case, p. 344 of Gurney's Report.

(2) R. *v.* Watson, 2 Stark. Rep. 148.

(3) Wyatt *v.* Gore, Holt's N. P. C. 299.

(4) Cooke *v.* Maxwell, 2 Stark. R. P. C. 183.

(5) Anderson *v.* Sir W. Hamilton, 2 Br. & B. 156, n.

(6) Horne *v.* Lord T. Bentick, 2 Br. & B. 130. See q. t. *v.* Birrell, 3 Campb. 355.

(7) Black *v.* Holmes, Fox & Smith's Rep. 28, K. B. in Ireland.

ing under his authority; (1) all these are confidential and privileged communcations, which courts of justice will not allow to be disclosed.

Members of parliament.

In the case of *Plunket* v. *Cobbett*, (2) which was an action against the defendant for publishing a libel reflecting on the conduct of the plaintiff as a member of the Commons' House of Parliament in Ireland, the counsel for the defendant, in cross-examination, inquired of one of the witnesses, the Speaker of the House of Commons, as to the expressions and arguments which the plaintiff had used in Parliament on a particular subject, when Lord Ellenborough interposed, and stopped the examination, observing 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.

Grand juryman questioned as to evidence given to grand jury.

It does not appear to be completely settled, whether a grand juryman is at liberty to disclose the evidence laid before the grand jury in the course of a criminal proceeding. In an action on the case, for maliciously indicting the plaintiff, Lord Kenyon is reported to have allowed the counsel for the plaintiff to inquire of a grand juryman, whether the defendant was prosecutor of the indictment; being of opinion, that this inquiry did not infringe upon the official oath taken by the witness. (3)

Witness questioned as to evidence given by him to grand jury.

On the trial of Watson for high treason, a witness was questioned by the counsel for the prisoner, as to his having produced and read a certain writing before the grand jury: this being objected to by the Solicitor-general, Lord Ellenborough, C. J., said, "He had considerable doubt upon the subject: he remembered a case, in which a witness was questioned as to what passed before the grand jury, and, though it was a matter of considerable importance, he was permitted to answer." The Solicitor-general then intimating, that if such a case had not

(1) Case cited 2 Stark. N. P. C. 185. As to minutes taken before the Privy Council, see Layer's case, 6 T. R. 231.

(2) 29 Howell's St. Tr. 71, 72.

(3) Sykes *v.* Dunbar, 2 Selw. N. P. MSS.

occurred, he should have thought that "what passed before the grand jury could not properly be inquired into, as they are sworn to secrecy," Lord Ellenborough added, that "He had doubts, and that many very eminent men at the bar had entertained doubts upon the point; but that he remembered the case perfectly."(1) Here the matter seems to have dropped; and the question, as originally put, was not repeated.

Private communications to official persons.

But communications, though made to official persons, are not privileged, if they have not been made in the discharge of any public duty. Thus, a letter written by a private individual to the Secretary of the Postmaster-general, complaining of the conduct of the guard of a mail, has been held not to be within the principle of the rule justifying the exclusion of evidence. (2)

When the purposes of public justice require that certain evidence should be given, which the court from regard to decency would be disposed to suppress, (whether upon indictments for crimes, or on questions of private rights or private wrongs,) the evidence, however inconvenient, must be disclosed. It has therefore been considered, that Mr. Justice Burnet was wrong in refusing to try an action of defamation, in which a woman charged a man with proclaiming to the world that she had a secret defect in her person, and the defendant by plea justified that it was true that she had such defect. (3)

Non-access.

It was said by Lord Mansfield, in *Goodright* v. *Moss*, (4)

(1) 32 Howell's St. Tr. 107. And see the discussion in Sir J. Fenwick's case, 5 Harg. St. Tr. 72. In a case cited 12 Vin. Ab. Ev. Ba. 5, the evidence of the clerk of the grand jury was rejected.

(2) Blake v. Pilfield, 1 M. & Ro. 198.

(3) By Lord Mansfield in Da Costa *v.* Jones, Cowper, 733. But the courts have frequently refused to try wagers, on the ground of their leading to admission of indecent evidence, or as unnecessarily injuring the feelings of third parties. Ib. and see Ditchburn *v.* Goldsmith, 4 Camp. 152.

(4) Cowper, 594. See Cope *v.* Cope, 1 M. & Ro. 274. In Bull. N. P. 113, a case is referred to, as shewing that the wife might be examined after her husband's death, to prove the child a bastard, which is inconsistent with the principle adopted by Lord Mansfield. Lord Hardwicke, Rep. temp. Hard. 83, puts the incompetency of the wife, to give evidence of non-access, upon the ground of interest; a ground which would only apply in particular instances, as, in orders of filiation. It does not appear clearly, how the circumstance of the wife being the offending party can affect the question.

that it is a rule founded in decency, morality, and policy, that a husband or wife shall not be permitted to say, after marriage, that they have had no connection, and therefore, that the offspring is spurious; more especially the mother, who is the offending party; and he added, that the point had been solemnly decided.

CHAPTER VII.

GENERAL RULES RELATING TO THE EXCLUSION OF HEARSAY EVIDENCE.

HAVING investigated several rules for the exclusion of evidence, as regarding the peculiar character or situation of a witness, or the peculiar subject of his testimony, we proceed to consider some rules of a more general nature, which have been adopted, principally with a view to provide against the danger of juries being perplexed or misled by evidence of doubtful credibility.

The first general rule of this description, which will be treated of, is the rule relative to hearsay evidence. In the first section, it will be convenient to consider the distinction between original and hearsay evidence; and, in the second section, to treat of the rule which excludes hearsay. The exceptions to the rule will afterwards be considered in separate sections.

SECTION I.

Of the distinction between Original and Hearsay Evidence.

Hearsay, what. When a witness, in the course of stating what has come under the cognizance of his own senses concerning a matter in dispute, states the language of others which he has heard, or

produces papers which he identifies as being written by particular individuals, he offers what is called *hearsay* evidence. This evidence may sometimes be the very matter in dispute, or something from which a pertinent inference, relative to the matter in dispute, may be drawn; or, on the other hand, it may consist of a verbal or written narrative of facts received by the witness from some other person, which he delivers at second hand to the court. The term, *hearsay* evidence, is used with reference both to that which is written, and to that which is spoken. But, in its legal sense, it is confined to that kind of evidence which does not derive its effect solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person, from whom the witness may have received his information.

Transactions by word or writing,

In some cases, the words or writings offered in evidence are transactions, concerning which the only inquiry instituted is whether they have taken place or not. For example, letters written to a bankrupt before his bankruptcy, containing matters material to an act of bankruptcy, are admissible, without calling the writer of them, as evidence against the bankrupt, that he received intimation of certain facts; but not to prove, that the facts were true. (1) So letters written to a person a short time previous to his bankruptcy, and containing a refusal to advance money, are evidence of the fact of such refusal. (2)

evidence as to collateral facts.

In like manner, in an action for a malicious prosecution, a letter and an affidavit were received in evidence, not as proving the facts therein stated, but as proving some collateral fact to be inferred from them; the first, as showing how the plaintiff came to be bailed; the latter, as showing a step taken by

(1) Cotton *v.* James, 1 M. & M. 273. The time of receiving information being important, this was proved by the post mark.

(2) Vacher *v.* Cocks, 1 M. & M. 353. Lord Tenterden suffered only that part of the letter to be read, which contained the refusal. In Fairlie *v.* Denton, 2 C. & P. 103, the part of a plaintiff's unanswered letter, which contained a demand, was allowed to be read. It is, however, an established rule, that letters, which are admissible for one purpose, will not be rejected, merely because they contain hearsay evidence of the truth of facts; but the jury will be directed in the proper use of them as instruments of evidence. Willis *v.* Bernard, 8 Bing. 376, and cases *ib.* For other instances of letters, see Whitaker *v.* Bank of England, 6 C. & P. 700. Whitehead *v.* Scott, 1 M. & Ro. 2.

the persons conducting the prosecution. The evidence, as Lord Tenterden observed, was admissible for one purpose, but not for another. (1) In an action for a libel, evidence that the publisher of the libel followed it up by a charge, the particulars of which correspond with the imputation in the libel, is admissible on the part of the defendant, though obviously the proof of the particulars of the charge tends in no degree to establish their truth. (2)

Papers found in possession of a person,—on a question of sanity:

On an issue to try, whether a testator had, at any period between the time of his attaining his full age and the time of his death, possessed ordinary powers of understanding, letters written and sent to him during this interval, and found among other papers of the testator in his room after his death, by persons acquainted with him and since deceased, are not receivable in evidence, to show that he was rational and intelligent at the several times when he was addressed as such by the writers, without some previous proof that the testator did some act upon the letters, or with reference to them, that is, some act of an intelligent man. Such previous proof is indispensably necessary; without it, the letters could only be produced in evidence as showing that the deceased wrote to him as possessing understanding, or, in other words, as showing their opinion of his sanity; and in that point of view they would be clearly inadmissible. This rule was settled in the case of *Wright* v. *Doe dem. Tatham*, which underwent frequent discussion. (3) All the judges agreed as to the principle of the rule, though there was a difference of opinion among them on the question, whether certain letters, which had been rejected, ought not to have been admitted under that rule. The Chief Justice Tindal, who disapproved of the rejection of one particular letter, laid down the principle of the rule very clearly and fully in the following terms: (4) "I consider such treatment only of a person by his friends or others to be admissible in evidence,

(1) Taylor *v.* Williams, 2 B. & Ad. 845. In Penn *v.* Scholey, 5 Esp. 243, an affidavit made by a stranger was read in evidence.

(2) Finden *v.* Westlake, 1 M. & M. 561.

(3) 7 Ad. & Ell. 313—408. 4 Bing. 489, S. C.

(4) Ib. 402. See also the judgments of Bosanquet, J., and Parke, J.

upon a question concerning his competency, as appears to have come home to his understanding, and upon which he has been shown in some degree to have acted; for, after all, it is not the treatment itself which is of any value, but the mode in which the party conducts himself when such treatment takes place. It is not what the third person does, or says, or writes, which furnishes of itself any indication of the state of mind of the party respecting whom the inquiry is made, but what such party himself does, or says, or writes, or how he conducts or bears himself on the occasion." And in the latter part of his judgment, "The question which the judge had to determine with respect to this letter, was, whether there is reasonable evidence to satisfy his mind, that it came to the testator, and *that he exercised upon it some act of judgment or understanding, though in ever so small a degree.*"

False denial by tradesman.

Proof of a false denial of a person, by a wife or servant, the person being at home at the time, is original evidence. Nothing could be added to the credibility of the fact of the denial, by calling the person who made it, even supposing that the witness were perfectly disinterested; and although the jury may draw an inference from the fact of the denial, they are not required to attach credit to the statement of any person not before them. (1) And, clearly, all verbal instructions (as, of a bankrupt ordering himself to be denied to creditors,) are in their nature original evidence. (2) The same is to be said of communications of various kinds, where the object of giving them in evidence is not that their truth may be inferred solely

Directions to deny.

(1) Attorney General *v.* Good, M'Clel. & Y. 286; information for custom-house penalties. The husband was denied by the wife, immediately after uncustomed goods were discovered on the husband's premises. In Key, assignee of Sherwin *v.* Shaw, 8 Bing. 320, It appeared that when a creditor called, the bankrupt was seen peeping over his wife's shoulder in a retired part of the shop, and immediately afterwards she came into the front part, and said, "My husband is not at home." See also Charington *v.* Brown, 1 B. Moore, 341; the answer of a wife to a creditor.

(2) Jameson *v.* Eamer, 1 Esp. 281. Gillingham *v.* Laing, 6 Taunt. 532; directions by a bankrupt to a friend, to say that he was not upon exchange. Fisher *v.* Boucher, 10 Barn. & Cress. 710. Vincent *v.* Prater, 4 Taunt. 603, where the direction shewed that there was no intention to delay creditors.

from the fact of the communication having been made, and from the credit of the person making it. (1)

In many cases, the expressions of persons are the very matter in issue: as where the controversy is respecting the question, whether they have been used or not. The proof, therefore, of their having been used, is in its nature original evidence.

Reputed ownership.

Thus, upon an inquiry respecting reputed ownership under the bankrupt laws, hearsay evidence of the opinion of neighbours is admissible, either to prove or disprove the reputed ownership of the bankrupt. In one case, Gibbs, C. J., observes, "What is reputed ownership? it is made up of the opinions of a man's neighbours; it is a number of voices concurring upon one or other of two facts." (2) The existence of a public rumour has been allowed to be proved in the same way. (3)

Character.

And this is the nature of the evidence respecting general character, which, it will be seen in the course of this work, is relevant to various inquiries. (4)

General opinion.

In like manner, in an action for destroying a picture, where the subject of inquiry was as to the impression produced by the picture on the minds of the public, the declarations of spectators in looking at it were admitted in evidence; (5)

(1) Shott *v.* Streathfield and Another, 2 M. & M. 9. In this case A. went out of partnership, and introduced B. (a defendant) to the witness as his successor; the witness was asked whether (in the absence of the defendants) he reported this conversation to the plaintiffs. In Whitehead *v.* Scott, 2 M. & M. 2, it was held, that a party to a suit has a right to have a letter read making a demand, though the counsel for the other party offers to admit the demand.

(2) Grove *v.* Rutten, Holt's N. P. C. 327. See Oliver *v.* Bartlet, 1 Br. & B. 269. 2 B. Moore, 592, S. C. in which case the court said, that they did not decide, whether reputation alone without facts would suffice. And see the cases as to notoriety of transfer upon assignments of property. Muller *v.* Moss, 1 M. & S. 335.

(3) Jones *v.* Perry, 2 Esp. 482; action for keeping a malicious dog, by which the plaintiff's child was bitten. Lord Kenyon allowed a witness to be asked respecting a report in the neighbourhood, that the dog had been bitten by another dog.

(4) See *infra*, respecting relevancy of proofs. Foulkes *v.* Gellway, 3 Esp. 236, is a strong example of this kind of evidence. It was an action for breach of promise of marriage, where the defence was, that the plaintiff was a woman of bad character; and a witness, who had gone to the place where the plaintiff lived, was allowed to give evidence of what he there heard.

(5) Du Bost *v.* Beresford, 2 Camp. 512. The defence was, that

what was said by the spectators was the effect produced by the picture; it was not received as evidence of the painter's design, upon credit given to assertions of persons not before the court. The declarations of a testator have been held to be receivable in evidence, to shew his intentions, when his will is impugned on the grounds of either fraud, circumvention, or forgery, (1) or to shew the state of his mind. (2)

Intention of testator.

In cases where it is material to inquire into the demeanor, the conduct, and mental feelings of an individual at a particular period, the expressions used by the individual at the period in question are, in their nature, original evidence. For they are the thing itself which is inquired into, as far as outward behaviour is important; and as evidence of inward sentiments, they are unlike a statement of past occurrences; for they derive their credit from being usually identified with, and naturally resulting from, particular corresponding feelings. Accordingly, in actions for criminal conversation, where it is material to inquire into the terms, upon which the husband and wife lived together before the connection of the wife with the defendant, it is usual to give evidence of what the husband and wife have said to each other, in order to shew their demeanor and conduct, and whether they were living upon better or worse terms. (3) With the same object, evidence has been given of the anxiety expressed by the wife about her husband, and of her mode of speaking of him in his absence. (4) On the other hand, it is admissible to give general evidence, in reduction

Expressions used, evidence of feelings, conduct, &c.

Letters of wife, when evidence in actions of crim. con.

the picture (of Beauty and the Beast) was a libel, inasmuch as the public generally understood, by looking at the picture, who were the individuals meant to be portrayed.

(1) Ellis *v.* Hardy, 1 M. & Ro. 525.

(2) Doe dem. Reed *v.* Harris, 7 C. & P. 350. A testator's declaration may be in the nature of original evidence, where they are adduced for the purpose of designating the object of his bounty, or the subject of a bequest, as distinguished from evidence of his intentions.

(3) By Lord Ellenborough, C. J., in Trelawney *v.* Coleman, 1 B. & A. 90. By Holroyd, J., 2 Stark. C. 192, stated to be so ruled by Lord Kenyon, 4 Esp. 39. In Jones *v.* Thompson, 6 C. & P. 415, the witness was asked, whether the wife kept a journal, and for what purpose. The evidence, it has been thought, c ght to be general. See Winter *v.* Wroot, 1 M. & Ro. 404.

(4) Trelawney *v.* Coleman, 2 Stark. C. 191. It was held in this case, that the judgment which the witness had formed from the wife's anxiety, was admissible.

of damages, that the wife had complained of her husband's treatment. (1) The letters of the wife to the husband, (2) or, as it has been recently decided, the letters of the wife to a third person with reference to her husband, are evidence to shew what her feelings were towards him. (3) In such cases the jury do not substitute the knowledge of an absent person for their own, but they reason as from an effect to a cause.

It is, however, always required, that proof should be given that the declarations or letters of a wife, purporting to express her feelings, were of a time antecedent to the date of any facts calculated to raise suspicion of a criminal intercourse, and when there existed no ground for imputing collusion. (4) It has been held, that the letters of the wife are inadmissible, if written after an attempt to commit adultery by the defendant. (5)

Statements by patient to medical attendant.

The expressions of a person afflicted with bodily pain or illness, relative to his health and sensations, have been considered to be in their nature original evidence; such expressions being ordinarily the natural consequence and the outward indication of co-existing sufferings. The representations of a patient to his medical attendant, who has an opportunity of observing whether they correspond with the symptoms to which they refer, appear to be entitled to greater weight, than if made

(1) Winter *v.* Wroot, 1 M. & Ro. 404.

(2) Trelawney *v.* Coleman, 1 B. & Ald. 90, where there was no direct evidence given of the cause of the parties living separate. Edwards *v.* Crook, 4 Esp. C. 39.

(3) Willis *v.* Bernard, 8 Bing. 376, where it was said, that the letter was less open to exception than if written to the husband. The letter shewed the wife's affection, and also that she was not dissatisfied at being left abroad. The letter also contained a statement of facts, as to which, though the whole letter was read, it was not evidence. Letters written to the defendant, before the criminal facts are proved to have been committed, are receivable. Elsam *v.* Faucett, 2 Esp. 562. That the letters of the wife are not in general evidence for the defendant, see Bull. N. P. 28.

(4) Edwards *v.* Crook, 4 Esp. 39, where the letters were refused on this ground. Trelawney *v.* Coleman, 1 B. & Ald. 90. Houliston *v.* Smith, 2 C. & P. 24, where it was held that the dates of the letters were not sufficient evidence of the time when they were written. In Trelawney *v.* Coleman, 2 Stark. 191, the period at which the letter in question was written, was proved by a person to whom the wife read the contents. In other cases, the postmark has afforded the requisite proof.

(5) Wilton *v.* Webster, 7 C. & P. 198.

to an inexperienced person, and to afford a stronger presumption that they are genuine. (1) But although not made to a medical man, they appear to be admissible evidence. (2)

Statement by patient as to previous symptoms.

When a patient enters into a history of his complaint, and relates some earlier symptoms experienced at a former period, he is giving a narrative from memory, rather than yielding to the impressions forced upon him by his situation; and it would seem, upon principle, that what he says ought not to be received in evidence. The case of *Aveson* v. *Lord Kinnaird*, (3) as to this point, appears to have been decided on its peculiar circumstances. That was an action upon a policy of insurance, by which the plaintiff had insured the life of his wife. The plaintiff produced a surgeon, who had given a certificate upon which the policy had been effected, to prove that the wife was in good health on a particular day; and he swore at the trial to his belief of the fact. On cross-examination, he stated, that his opinion was formed principally from her answers given at the time. The defendant, in order to meet this evidence, produced a witness who had been an intimate friend of the wife, and had called accidentally upon her within a week after the day to which the certificate related, and found her in bed with the appearance of being ill; and the wife related to this witness that she had not been well from a time which included the day specified in the certificate. This evidence of the defendant's witness was allowed: first, on the ground that it was the declaration of a patient on the subject of her own health at the time: and, secondly, that it was a species of cross-examination of the surgeon produced by the plaintiff, who had formed his opinion principally in consequence of the wife's answers. It is to be observed, however, that the part of the wife's conversation with the defendant's witness, which was material to the case, did not relate to her contemporary sensations, but to the state of her health at a previous time; an

(1) See the observations of the Attorney General (Copley) in the Gardiner Peerage case, p. 79.

(2) Aveson *v.* Lord Kinnaird, 6 East, 188, where the representations were made to an intimate friend. And the rule is there laid down by Lord Ellenborough, with regard to patients, without qualification. The representations admitted in that case were opposed to other representations made by the same individual to a surgeon.

(3) 6 East, 188.

objection which does not appear to have applied to the answers given to the surgeon.

Medical evidence.

In the Gardiner Peerage case, where the inquiry turned upon the ordinary period of gestation, the medical witnesses were not allowed to state what they had been told by women whom they had attended in their confinement, as to the date of their conception. It was held to be an objection to the evidence tendered, that it related to a circumstance which took place before the medical men were consulted. (1)

Statement of patient as to cause of injury.

Although it is now settled that what a patient says to a medical man about his sufferings is receivable in evidence, (2) it should seem that a statement by him respecting the particular cause of his sufferings, (as, for example, the circumstances of an assault which he had received,) would be open to greater objection. It was, however held in the case of *Thompson and Wife* v. *Trevanion*, (3) that what the wife said immediately on receiving an injury, and before she had time to devise any thing for her own advantage, was admissible. From the report of the case, which is very short and loose, it may perhaps be presumed, that the wife had related the particulars of the assault: and in *R.* v. *Foster*, (4) it was held by Gurney, B., and Park, J., that what a deceased person had said immediately upon receiving a fatal injury, as to the cause of the injury, was admissible in evidence. It may be observed, that these cases differ from those which have been decided respecting the statement of a patient's complaint; for statements of the latter des-

(1) Gardiner peerage case, p. 79, 136, 170, several of the women were afterwards produced as witnesses, and their evidence shewed in a striking manner, the difference between taking their evidence from their representations to the medical witnesses, and taking it in open court, subject to being sifted according to those rules, which experience has found to be so useful in separating truth from error.

(2) In Aveson *v.* Lord Kinnaird, 6 East, 188, Lawrence, J., says, It is every day's experience, that what a man has said of himself to his surgeon is evidence to shew what he suffered by reason of an assault.

(3) Skinner, 402, cited by Lord Ellenborough in Aveson *v.* Lord Kinnaird, 6 East, 188. In Adams *v.* Arnold, 12 Mod. 375, an action of assault on the plaintiff's wife, and getting her with child; what the wife declared in her labor was rejected. But as the nature of the wife's declaration is not stated, nor the reason assigned for its rejection, the case is of little value.

(4) 6 C. & P. 325. But see R. *v.* Clarke, *infra*, p. 193. n. 2.

cription would not, it is conceived, depend, for their admissibility, upon the time when the injury was received.

Complaint in rape.

In prosecutions for rape, though it has been regarded as admissible evidence, on the part of the prosecution, and is generally considered essential, to show that the prosecutrix made a complaint recently after the commission of the alleged crime; (1) yet it has been held, that the particulars of the complaint are not evidence of the truth of the statement. (2) It is now the general practice to exclude any mention of the details of the complaint. In case of the death of the party injured, or in case of her absence for any cause, the particulars of her complaint, stated in the absence of the prisoner, could under no circumstances be received; which shows that such statements are not regarded as part of the *res gestæ*. (3)

In *R.* v. *Meeson and others*, on a trial for rape, a statement made by the person alleged to have been ravished, who had since died, was proposed to be given in evidence, for the purpose of shewing the particulars of which she complained, and what persons had committed the offence: but the statement was rejected. (4) The object, here, was to give in evidence the particulars of the complaint as original independent proof, with the view of shewing who were the guilty parties.

Declarations accompanying possession.

Declarations of persons in possession of property have, in some cases, been received as original evidence, explanatory of the nature of their possession. Thus, the declaration of a

(1) The point is rather assumed than expressly decided in Brazier's case, 1 East's P. C. 444. But it is the common practice to give evidence of this nature: and the absence of recent complaint, unless explained by particular circumstances, is generally fatal to the prosecution, see 1 Leach, 199. 1 Russel on Crimes, 565. According to the old law respecting rape, it was required that the woman should have gone to the next town, immediately after the offence was committed, *cum clamore et hutesio*, 1 Hale's P. C. 632. Barrington notices that certain periods, within which complaint was to be made, were limited by the laws of several counties. Observations on the Statutes, p. 125.

(2) R. *v.* Clarke, 2 Stark. C. 242. R. *v.* Walker, 2 Mood. & Rob. 212.

(3) It seems formerly to have been considered, that the narrative of an infant presently after the wrong done, was receivable in evidence. See the authorities in 1 East's P. C. 441. This has been long disallowed.

(4) 9 Carr. & P. 420.

widow in possession of certain premises, that she held them for life, and that after her death they would go to the heirs of the husband, have been held admissible, to negative the fact of her having had twenty years' adverse possession; but it seems to be now considered, that such declarations are not evidence, unless they are against the interest of the person making them. (1)

Possession inferred from declaration.

On a question of legitimacy, the declaration of a lady, whose marriage was in question, that a certain box contained her marriage certificate, was, after objection, received both by Chief Justice Dallas and Lord Tenterden, C. J., as evidence, that she was then in possession of a document of a particular description. (2) Here the fact of possession was inferred from the declaration, which was not merely explanatory of a known possession.

Original declarations not part of the *res gestæ*.

The original evidence of verbal or written matters, which has been here considered, is often said to be admissible, as constituting a part of the *res gestæ*. In several of the examples above given, the words or writings are in themselves independent transactions, yet in some they are the ultimate facts of inquiry, not necessarily connected with any act done; in others, they are receivable as the natural and immediate result of particular situations, impulses, or feelings.

Declarations, part of the *res gestæ*.

Words and writings appear, perhaps, more properly to be admissible as part of the *res gestæ*, when they accompany some act, the nature and object or motives of which are the subject

(1) Doe *v.* Pettet, 5 B. & A. 224. Doe *v.* Richarly, 5 Esp. 4, was a case decided apparently on the principle mentioned in the text. There the declarations of a person, found in possession of premises, that he rented them, were held to be evidence of an underletting. The case is opposed by a conflicting decision, Doe *v.* Payne, 1 Stark. C. 86. See 4 Taunt. 766. Doe *v.* Williams, 6 B. & C. 41. Doe d. Sweetland *v.* Webber, 1 Ad. & Ell. 738. It is difficult to distinguish the class of cases under consideration, from a numerous class in which declarations of deceased persons against interest are admissible. Carne *v.* Nicoll, 1 Bing. N. C. 430.

(2) Bere *v.* Ward, printed report of trial on first issue; and on second issue, p. 164. The evidence was offered for the purpose of connecting a certificate, produced in evidence, with a document in her custody.

of inquiry. In such cases, words are receivable as original evidence, on the ground that what is said at the time affords legitimate, if not the best, means of ascertaining the character of such equivocal acts as admit of explanation, from those indications of the mind, which language affords. For where words or writings accompany an act, or where they indicate the state of a person's feelings or bodily sufferings, they derive their credit from the surrounding circumstances, and not from the bare expressions of the declarant. And the language of persons at the time of their doing a particular act, in the same manner as their demeanour or gesture, is more likely to be a true disclosure of what was really passing in their minds, than their subsequent statements as to their intentions, even if such statements would not be excluded on other grounds.

Declaration, as proof credit given.

Thus, in an action on the case for fraudulently representing the solvency of a person, whereby the plaintiffs trusted him with goods their declarations at the time they were applied to for the goods, are admissible, to show that they gave trust in consequence of the representation. (1) A letter, being the envelope of a promissory note, has been admitted to show for what purpose it was sent. (2)

Envelope, of letter.

Declarations of wife, when admissible in an action for crim. con.

In an action for criminal conversation, where the defence was that the plaintiff had connived at his wife's elopement, evidence was received, on the part of the plaintiff, of the wife's declarations as to her intentions and purposes in going. (3) And in *Aveson* v. *Lord Kinnaird*, (4) Lord Ellenborough

(1) Fellows *v.* Williamson, 1 M. & M. 306. The goods were furnished five months after the representation; but the representation was expressly referred to on delivery. And see Moore *v.* Strong, 1 Bing. N. C. 441; conversation at the time of delivering goods, to shew whether furnished by way of payment.

(2) Bruce *v.* Hurley, 1 Stark. C. 24. The plaintiff's own letter was admitted for himself, to shew that the note had been sent to procure payment, the question being whether it was in a bankrupt's possession for a special purpose only.

(3) Hoare *v.* Allen, 3 Esp. 276. The evidence was doubtingly admitted. The wife represented that she was only going to her uncle's house, and the husband suffered her to go under that impression.

(4) 6 East, 188. And see Walton *v.* Green, 1 C. & P. 621: as to a confession by a wife of adultery immediately previous to being turned out of doors; and letters found in her writing desk.

observed, that if a wife, upon quitting her husband's home declared at the time that she fled from immediate terror of personal violence, he should admit the evidence; though not, if it were a collateral declaration as some matter which happened at another time.

Declarations in executing fraudulent conveyance.

In an action against a sheriff for a false return, where the defence was a fraudulent bill of sale, declarations by the party executing the bill of sale, made by him at the time of execution, were held to be admissible, but not those made at another time. (1) Where a trader, being in embarrassed circumstances, executed an assignment for the benefit of his creditors, it was held, in an action after his death against the assignee, treating him as executor *de son tort*, that a list of creditors made out, about the time of the execution of the assignment, by the direction of the assignor, was evidence as part of the transaction for the purpose of disproving fraud. (2)

Declarations evidence on questions of bankruptcy.

Upon questions of bankruptcy, where the intentions of the alleged bankrupt are often material to be inquired into, it is usual to give evidence of declarations, as furnishing an explanation of transactions in their nature equivocal. (3) Thus, it

(1) Phillips *v.* Eamer, 1 Esp. 357. For other examples of the principle of *res gestæ*, see Penn *v.* Scholey, 5 Esp. 243, as to an affidavit to explain an execution on a judgment. See Bebb *v.* Thomas, 2 W. Bl. 1043, as to contemporary declarations, explaining equivocal act of cancelling a will. Collenridge *v.* Farquarson, 1 Stark. C. 259, as to a distinction between an entry in an account book made after the transaction, and a contemporaneous entry. It often happens, that declarations, which are in their nature original evidence, are also receivable on the ground that they are made by persons identified in interest with the parties to a suit: as in Kent *v.* Lowen, 1 Campb. 177, where letters from the payee to the maker of a promissory note, contemporaneous with the making of the note, were held admissible to prove usury, on the ground that the plaintiff claimed title through the payees. See by Park, J., in Beauchamp *v.* Parry, 1 B. & Ad. 91.

(2) Lewis *v.* Rogers, 1 Cr., M. & R. 48. 4 Tyr. 872. And see Prideaux *v.* Collier, 2 Stark. 57; on declarations by a drawee on presentment of a bill. Ryle *v.* Haggie, 1 Jac. & W. 234; declarations as to property being parted with by way of gift.

(3) Questions on this subject are to be distinguished from numerous questions respecting the reception of admissions of bankrupts concerning their trading, or the petitioning creditor's debt, and which are not explanatory of any co-existing motives. Parker *v.* Barker, 1 Br. & B. 9. Bromley *v.* King, R. & M. 228. Respecting admissions of trading made before bankruptcy,

has been held, that a declaration accompanying a purchase of goods is admissible evidence, to show whether a person sought his living by buying and selling. (1) Similar evidence has been received to explain a bankrupt's motives, where a payment made by him is sought to be invalidated as a fraudulent preference. Upon such a question, it is competent to inquire into the bankrupt's declarations as to the state of his affairs, made about the time of the transaction in question, though not accompanying or connected with that transaction. (2) And it is very common to give evidence of conversations and letters, in order to explain acts, which, according to the intentions of the party at the time, may or may not amount to acts of bankruptcy. (3)

Accompanying a purchase.

Explanatory of acts done.

Much discussion has arisen with respect to the limits of time, (with reference to the date of the transactions insisted upon as an act of bankruptcy,) within which the declarations of the alledged bankrupt ought to be proved to have been made, that they may be admissible in evidence. It is a question for the court, in each case, to consider, whether the declaration, proposed to be received, does or does not come within a reasonable time of the disputed act: and, for this purpose, the court will inquire into the existence of any connecting circumstances between the declaration and the act of bankruptcy. (4) The rule is not confined to the precise time of the act in question. (5)

Time of making the declaration, material.

see Smallcombe *v.* Bruges, M'Clel. 45, and Sanderson *v.* Laforest, 1 C. & P. 46, respecting admissions of petitioning creditor's debt.

(1) Gale *v.* Halfknight, 3 Stark. C. 58.

(2) Vacher *v.* Cocks, 1 M. & M. 353. Herbert *v.* Wilcocks, 1 M. & M. 355, n. That the intention upon such a question is material, see Cook *v.* Rogers, 7 Bing. 438. Harman *v.* Fisher, Cowper, 117.

(3) B. N. P. 40. Robson *v.* Rolls, 9 Bing. 349. Jayer *v.* Garnet, 7 Bing. 103.

(4) See the observations of the court in Ridley *v.* Gyde, 9 Bing. 349, and in Rawson *v.* Haigh, 2 Bing. 99.

(5) See the observations of the court in Ridley *v.* Gyde, 9 Bing. 349, and in Thomas *v.* Connell, 4 Mees. & Wels. 267. The language of Lord Ellenborough in Robson *v.* Kemp, 4 Esp. 233, confining the inference of intention to previous or contemporary declarations, may, perhaps, be considered as no longer adhered to by the courts. The rule seems to have been formerly confined to contemporary declarations: Ambrose *v.* Clendon, Ca. temp. Hard. 267.

Examples.

Bateman v. Bailey.

In the leading case upon this subject, *Bateman* v. *Bailey*, (1) a conversation with the bankrupt was permitted to be given in evidence, which had passed on his return home at night, after having been absent nearly two days. And this case has been recognised, and followed by subsequent authorities to the like effect. (2) In one of the latest cases, the trader absented himself on the 16th of February till the 9th of March; and two letters written by him on the 16th of January preceding, asking for time on two bills of exchange payable in February, were received, as showing that the bankrupt was a needy man, and to give a colour to his absence. (3)

In cases where the act of bankruptcy insisted on is a fraudulent transfer, which is not capable of being proved by any single incident, but depends on the situation of the bankrupt or, his conduct and language, with reference to the whole transaction,—a considerable interval may frequently elapse between the date of a disputed act of bankruptcy, and that of the declarations calculated to explain it. In the case of *Ridley* v. *Gyde*, (4) a conversation with a bankrupt was, under the peculiar circumstances of the case, allowed to be given in evidence, which had passed twenty-six days after the disputed act of bankruptcy, which was a fraudulent transfer. And in cases of continuing acts of bankruptcy, as departing the realm, or remaining abroad with intent to defeat or delay creditors, letters or declarations may be received during the continuance of the act of bankruptcy, and long after the commencement of it. Thus, in *Rawson* v. *Haigh*, (5) where the alleged act of bankruptcy consisted in departing the realm

(1) 5 T. R. 512. The language of the court is not quite so strong as the effect of the decision. See observations on this case, Eden's Bankrupt Law, 3d edit. p. 360. Evans's Pothier, vol. 2, p. 285.

(2) Newman *v.* Stretch, 1 M. & M. 338. Rawson *v.* Haigh, 2 Bing. 99. Ridley *v.* Gyde, 9 Bing. 349. There is also a prior case, Mayler *v.* Eyloe, 2 Stark. C. 809.

(3) Smith *v.* Cramer, 1 Bing. N. C. 585.

(4) 9 Bing. 349. Mr. Justice Park relied much on an intervening circumstance of a fraudulent transfer between the declaration and the act of which the bankrupt, at the time of the declaration, falsely professed a total ignorance.

(5) 2 Bing. 99. Accordingly, declarations which might be inadmissible, from their remoteness, to explain an act of departure from the dwelling-house, may in some cases, be competent to explain the continuing act of "absenting."

with intent to delay creditors, two letters were received, one sent from Calais, and the other from Paris, the latter having been written upwards of a month after the time of the bankrupt quitting England.

In an action by the assignees of a bankrupt, to recover money paid by the bankrupt to the defendant in fraudulent preference, declarations by the bankrupt, made two months before the *fiat* in bankruptcy were admitted, for the purpose of shewing his knowledge of his own insolvency at the time of his making them. (1) They would not be admissible, as proof of the fact of his insolvency; and before they are received in evidence as proof of *his knowledge* of the fact, the most correct practice would be to prove *aliunde* in the first instance, the *fact* of his insolvency. (2)

The declarations or letters must be connected with the state of the party's mind at the time of doing the act; (3) and in a case, where there was no evidence as to the time, when declarations explanatory of an act of bankruptcy were made, they were rejected. (4)

Declarations of conspirators, admissible as part of *res gestæ*.

Another well known example of evidence admissible as part of the *res gestæ* is supplied in the instance of prosecutions involving a charge of conspiracy. It is an established rule, that where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party. (5) It follows, that any writings or

(1) Thomas *v.* Connell, 4 Mees. & Wels. 267.

(2) *Ibid.* 269.

(3) See observations of the court in Rawson *v.* Haigh, 2 Bing. 99.

(4) Marsh *v.* Meager, 1 Stark. C. 353. And see Robson *v.* Kemp, 4 Esp. 233. In Lees *v.* Marston, 1 Mo. & Ro. 210, Parke, J., held that a statement of a bankrupt could not be received, unless it could be proved to have been made whilst he was absenting himself, or immediately on his return. This authority was cited in Smith *v.* Cramer, 1 Bing. N. C. 585.

(5) Charge of Mr. Justice Bailey in Watson's case, 32 St. Tr. 7. Brandreth's case, 32 St. Tr. 854, 857. Rex *v.* Salter, 5 Esp. 125. Rex *v.* Cope, 1 Stark. 144. In such cases it is necessary, that there should be given, at some period of the trial, sufficient evidence to go to the jury, of concert and connection on the part of the prisoner.

verbal expressions, being acts in themselves, or accompanying and explaining other acts, and therefore part of the *res gestæ*, and which are brought home to one conspirator, are evidence against the other conspirators, provided it sufficiently appear that they were used in the furtherance of a common design. (1)

Stone's case. In *Stone's* case, the prisoner was indicted for treason, and was charged with conspiring, together with a person of the name of Jackson, to collect and communicate intelligence to the French government. After evidence had been given of a conspiracy for this purpose, a letter written by Jackson, containing treasonable information, and which had been intercepted, was received in evidence against the prisoner. (2)

Hardy's case. Upon the same principle, in *Hardy's* case, a letter written by the chairman of a meeting in London to a delegate sent by that meeting into Scotland, was received in evidence; the letter containing encouragement to that delegate to proceed in the cause in which he had been engaged by the direction of the meeting in London; and that meeting being composed, amongst others, of the prisoner, the writer of the letter, and the person to whom it was addressed. (3) In the same case, (4) evidence was admitted to prove, that Thelwall (who was a member of the Corresponding Society with the prisoner) had brought a paper with him to a printer, and desired him to print it; the paper being considered as evidence to prove a circumstance in the conspiracy.

In like manner, consultations in furtherance of a conspiracy are receivable in evidence, (5) as also letters or drafts of answers to letters, and other papers found in the possession of co-conspirators, and which the jury may not unreasonably conclude were written in prosecution of a common

(1) Hardy's case, 24 St. Tr. 704. What the effect of such evidence will be, must depend on a variety of circumstances; as, whether the prisoner was attending to the conversation; whether he approved or disapproved. By Eyre, C. J., *ib.* Stone's case, 6 T. R. 527. Rex *v.* Salter, 5 Esp. 125.

(2) Rex *v.* Stone, 6 T. R. 527. 1 East's P. C. 97. 25 Howell's St. Tr. 1311, S. C.

(3) Hardy's case, 24 St. Tr. 704. The scruple of Eyre, C. J., in consequence of the letter never having reached its destination, does not appear to have any weight.

(4) 24 St. Tr. 199.

(5) Lord Russell's case, 9 St. Tr. 578; cited in Hardy's case.

purpose to which the prisoner was a party. (1) These are examples of acts done, and, although the material part of these acts were, in their nature, only proveable by hearsay, yet the evidence in such cases was original in its nature.

Declarations as to a common object.

For the same reason, declarations or writings explanatory of the nature of a common object, in which the prisoner is engaged together with others, are receivable in evidence; provided they accompany acts done in the prosecution of such an object, arising naturally out of these acts, and not being in the nature of a subsequent statement or confession of them. Upon this principle, (namely, that the evidence offered is part of the transaction), in the prosecution of *Damaree* for high treason, the expressions of the mob in the *Sacheverell* riots, that they designed to pull down the meeting houses, were admitted in evidence. (2) The same kind of evidence was received in *Lord George Gordon's* case; (3) and on the same principle, in other cases, the hissing of a mob, their declarations, and inscriptions upon banners, have been held to be admissible, as original evidence. (4)

Statements of conspirators, when not part of the *res gestæ*.

But where words or writings are not acts in themselves, nor part of the *res gestæ*, but a mere relation of some part of the transaction, or as to the share with which other persons have had in the execution of a common design, the evidence is not in its nature original. It depends on the credit of the narrator, who is not before the court, and therefore it cannot be received.

(1) In Horne Tooke's case, 25 St. Tr. 220. The draft of a letter intended to have been sent by Hardy, as secretary to the Corresponding Society, in answer to another letter, and which was found in Hardy's possession, was admitted. And in the same trial, another letter was admitted, which was written by the secretary of a society at Sheffield, and was addressed to the prisoner, but was found in Thelwall's possession. And see the point respecting letters found in the possession of co-conspirators in Watson's case, *infra*.

(2) 15 Howell's St. Tr. 552.

(3) 21 Howell's St. Tr. 542.

(4) Rex *v.* Hunt, 3 B. & A. 566. Redford *v.* Birley, 3 Stark. C. 76. A point was raised in R. *v.* Hunt, whether the evidence of inscriptions on banners was the best evidence; as to which, see *infra*, on *secondary evidence*. A point occurring in the same trial, as to the admissibility of resolutions at a former meeting, seems to depend rather upon the doctrine of admissions, and properly to belong to that part of the present work which treats of the relevancy of proofs. And see Burdett *v.* Colman, 14 East, 193.

Hardy's case.

Thus on the trial of Hardy for high treason, (1) a question arose as to the admissibility of a letter written by Thelwall, and sent to a third person not connected with the conspiracy, containing seditious songs, which the letter stated to have been composed and sung at the anniversary meeting of the London Corresponding Society, of which society the prisoner and the writer of the letter were proved to be members. The argugument in favour of the evidence was, that the letter was an act done in furtherance of the conspiracy; that the letter contained language of incitement, not merely a narrative or confession by a stranger, and that in such case "*scribere est agere.*" The objection was, that the letter contained merely a relation by the writer, that certain songs had been sung, which could not be evidence against the prisoner. The majority of the court decided against the admissibility of the letter. The Lord Chief Justice Eyre, the Lord Chief Baron Macdonald, and Mr. Baron Hotham were of opinion, that the letter could not be received. Mr. Justice Buller (with whom Mr. Justice Grose agreed, in thinking it admissible), said, the letter ought to be received in evidence, for the purpose of showing what was the nature and extent of the conspiracy; that in *Damaree's* and *Purchase's* cases, evidence was received of what some of the parties had done, when the prisoner was not there; that, on the trial of Lord Southampton, something said by Lord Essex, previous to the prisoner's being there, was admitted as evidence; and that, in Lord *George Gordon's* case, evidence of what different persons of the mob had said, though he was not there, had been admitted. But the Lord Chief Justice Eyre, and the other judges, considered the letter, not as an act done in prosecution of the plot, but as a mere narrative of what had passed. "Correspondence," said the Chief Justice, "very often makes a part of the transaction, and in that case the correspondence of one who is a party in a conspiracy would undoubtedly be evidence, that is, a correspondence in furtherance of the plot; but a correspondence of a private nature, a mere relation of what had been done, appears a different thing." And with respect to the cases alluded to by Mr. Justice Buller, the Chief Justice observed, "In the cases of

(1) 24 Howell's St. Tr. 452, 475. See 32 Howell's St. Tr. 351.

Damaree and Lord *George Gordon*, the cry of the mob at the time made a part of the fact, part of the transaction, and therefore such evidence might properly be received."

On the same trial numerous letters were read which had been written by co-conspirators in furtherance of the common object, and tracts and other writings distributed by them were received in evidence; being in the nature of verbal acts, for which the prisoner, though not personally present when they were spoken, written, or published, was nevertheless responsible.

Writings in possession of conspirators, before and after apprehension.

It is in consequence of the distinction between writings or declarations which are acts, or part of the *res gestæ*, and such as are in the nature of subsequent statements, that the admissibility of writings often depends on the time when they are proved to have been in the possession of co-conspirators; whether it were before or after the time of the prisoner's apprehension. Thus in the trial of *Watson*, (1) some papers, containing a variety of plans and lists of names, which had been found in the house of a co-conspirator, and which had a reference to the design of the conspiracy, and in furtherance of the alleged plot, were held to be admissible evidence against the prisoner. All the judges were of opinion that these papers ought to be received; inasmuch as there was in the case strong presumptive evidence, that they were in the house of the co-conspirator *before* the prisoner's apprehension; for the room in which the papers were found had been locked up by one of the conspirators. And the judges distinguished the point in this case from a point cited from *Hardy's* case, where the papers were found *after* the prisoner's apprehension in the possession of persons, who, possibly, might not have obtained the papers till afterwards. (2)

Watson's case.

(1) 32 How. St. Tr. 348, 350. 2 Stark. C. 140.

(2) See a point, in the same case, as to the admissibility of a paper containing questions and answers calculated to excite mutiny in the army. It was held that the question of publication was irrelevant to the inquiry; but it was doubted, whether it had been clearly proved that the paper in question was intended to be used in furtherance of the common purpose.

Declarations of rioters.

The principal decisions respecting writings and declarations used by conspirators have been pronounced, on the occasion of trials for high treason; but similar evidence has been frequently given upon prosecutions for conspiracy merely, or for riot, and, generally, for offences perpetrated by confederates. (1) And the principles upon which such evidence is admitted, are equally applicable to the trial of civil injuries, in the commission of which different defendants have concurred. (2)

Common design.

But evidence of this discription is inadmissible in actions where no common motives or object can be imputed, as in actions for negligence; (3) at least, it ought not to affect co-defendants, where such a consequence can be avoided. And it would seem, that the principle upon which the declarations of associates are admitted, (in civil actions, not less than in proceedings upon criminal charges,) only applies where such declarations are strictly part of the transaction in question. (4)

Expressions collateral.

It is to be observed, that declarations, though accompanied by acts, are not admissible as being part of a transaction, unless when they explain the nature of the acts themselves. (5) This

(1) Such evidence was repeatedly given upon the trials under the Nottingham Special Commission, A. D. 1832, on prosecutions for demolishing a mill, and for arson; the offences having been committed by a riotous mob. Also in actions against the hundred, arising out of the same disturbances. The like evidence is often given in cases of confederacies for uttering counterfeit coin; and on trials for felonies of various kinds, involving a charge of conspiracy. See 6 T. R. 528.

(2) By Lord Ellenborough, Rex *v.* Hardwicke, 11 East, 585. See Powell *v.* Hodgetts, 2 C. & P. 432. North *v.* Miles, 1 Campb. 389. Bowsher *v.* Cally, 1 Campb. 391.

(3) Daniels *v.* Potter, 1 M. & M. 501. The statement was received as against the person making it, who had suffered judgment by default.

(4) In Rex *v.* Hardwicke, 11 East, 585, the rule is incidentally laid down by Lord Ellenborough, but apparently without proper limitations: he says, "although an admission by one of several defendants in trespass will not establish others to be co-trespassers; yet if that is proved by other competent evidence, the declaration of one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object." In Wright *v.* Court, 2 C. & P. 232, Garrow, B., admitted the declaration of a co-trespasser as to common motives, in an action for false imprisonment made five weeks after the injury complained of; he was a defendant on the record, and had not suffered judgment by default.

(5) See observations of Lord Ellenborough in Aveson *v.* Lord Kinnaird, 6 East, 193, as to a collateral declaration by a wife on quitting her husband's house; and Evans's Pothier, vol. 2, 287, and R. *v.* Clarke, 2 Stark. C. *supra.*

is a distinction of some nicety. Where a prisoner was charged with stealing a guinea, and the prosecutor had told him that it would be better for him to confess, some judges seem to have thought it allowable to prove, that the prisoner gave up the guinea to the prosecutor as the guinea that had been stolen from him. (1)

In the various instances which have been considered in the present section, where evidence of words or writings has been admitted, it is obvious that, as regards the evidence of words, it is liable to greater mistake and misrepresentation than attaches to the evidence of facts. But this objection can be no ground for precluding inquiry into such transactions as consist of expressions that have been used. Even where the expressions deposed to are explanatory merely of acts or conduct, this, it may be observed, usually occurs when the matter in dispute could not be proved otherwise than by the statement of a suspicious or incompetent witness concerning his inward feelings or intentions at a prior time. And further, the expressions given in evidence are limited to a period, when their probability and genuineness are capable of being tested by circumstances in their nature not liable to be misunderstood or perverted.

Section II.

Of the Rule respecting the Exclusion of Hearsay Evidence.

Hearsay excluded.

The technical meaning of the term *hearsay evidence* having been explained in the preceding section, it remains to state, that the general rule of evidence is (and it is a rule of very extensive influence in the law), that hearsay reports of transactions,

(1) R. *v.* Griffin, R. & R. 151. There was a difference of opinion among the judges, and the decision appears questionable, *vide infra, Confessions.* In Hayslep *v.* Gymer, 1 Ad. & Ell. 162, it seems to have been thought admissible to prove property in the plaintiff, by evidence of what the plaintiff said upon delivering a chattel, as to the terms upon which the plaintiff had received it. There was another ground, *vide infra, Admissions.* And see R. *v.* Foster, 6 C. & P. 325, *supra.*

whether verbal or in writing, given by persons not produced as witnesses, are not receivable.

Policy of the rule.

The principle of the rule, according to which evidence is rejected on the ground of its being hearsay, is, that such evidence requires credit to be attached to a statement made by a person, who is not subjected to the ordinary tests enjoined by the law for ascertaining the correctness and completeness of testimony:—the author of the statement not delivering his evidence subject to cross-examination in the presence of a court of justice, and not speaking under the moral and political sanctions of an oath; his character and motives not being investigated, his deportment not being observed. It may be further remarked, that other objections apply to this species of evidence, which are equally applicable to evidence of oral matters in general, and which seem to render the application of the tests referred to peculiarly necessary. Such evidence is very liable to be fallacious, from the facility by which it may have been imperfectly heard, or from having been misunderstood, or inaccurately remembered, or perhaps perverted, or possibly altogether fabricated. It is to be observed also, that persons communicating such evidence are not subject to the danger of a prosecution for perjury (in which a contradiction by two witnesses is requisite); for where the hearsay statement is stated to have been made when no third person was present, or purports to be that of a deceased person, the witness has no cause to be apprehensive of punishment, even though he has entirely fabricated it.

With reference to the necessity of an oath or affirmation, "no evidence," says Mr. Justice Buller, "is to be admitted but what is upon oath: and if the first speech was without oath, another oath that there was such a speech, makes it no more than a bare speaking, and so of no value in a court of justice."(1) The misconstructions to which evidence of oral matters is subject from the ignorance or inattention of hearers, or from

(1) B. N. P. 294. And see by Bayley and Littledale, J., in Spargo *v.* Brown, 9 B. & C. 938; and by Lord Tenterden in Doe *v.* Ridgway, 4 B. & Ald. 55.

criminal motives, are powerfully adverted to by Mr. Justice Foster in his treatise on the Laws of Treason. (1)

For the reasons which have been stated, it may be thought, that in the great majority of cases where hearsay evidence might be tendered, it would not enable juries to arrive at a safe conclusion upon the matters submitted to them. Unless it were clear that the discovery of truth would be materially promoted by the admission of such evidence, the inconveniences in regard to the expense to be incurred by the opposite party who would have to encounter such evidence, in regard also to the consumption of public time which its production would occasion, ought to be weighed against its advantages. Besides, the exclusion of such testimony may have some beneficial effect in many instances, by obliging parties to come furnished with evidence from other less exceptionable sources, from which evidence it would be more easy to draw a safe conclusion. In estimating the validity of these reasons, we must take into consideration the motives for falsifying judicial evidence, and the limited means of detecting such falsehood by that tribunal to which the constitution entrusts the determination of questions of fact; regard must also be had to the persons of which that tribunal is composed, and to the shortness of the time afforded for estimating evidence which often tends to an indefinite extent, which produces so many collateral questions, and which requires very nice discrimination in those who are to decide upon it.

It will probably be thought by persons acquainted with judicial proceedings, that juries do not, in general, properly discriminate between hearsay and original evidence. An opportunity of noticing this frequently occurs, in cases relating to the various exceptions to the rule of exclusion; and, more particularly, where hearsay evidence is introduced collaterally; as, where it is part of a confession of one prisoner affecting another prisoner,—or where it is contained in a letter which is introduced for a different object,—or where it consists of a state-

(1) Foster on Treasons, 200.

ment of hearsay matters made in the presence of a party to the suit. In such cases, the hearsay evidence generally has much too strong an effect upon the jury, although the judge may caution them not to give weight to the evidence as proving the truth of the facts therein stated.

History of the rule.

The rule under consideration is not of great antiquity. So late as the year 1790, it does not appear to have been settled with regard to depositions taken before magistrates, (whether upon criminal charges or upon other occasions); and, as will appear from the following pages, several of the exceptions to this rule have been much narrowed within very modern times. (1)

Practice in the old State-trials.

Throughout the State-trials before the time of the Commonwealth, the worst species of hearsay was constantly received; such as the examinations of persons who might have been produced as witnesses, or of persons convicted of capital offences, or of persons who had signed confessions in the presence only of the officers of government, and under the torture of the rack.

On the trial of Sir Walter Raleigh, for example, the only piece of evidence directly affecting him, was a paper purporting to be a statement by a third person, of the effect and result of Lord Cobham's examination, which that person had signed under threats from the Chief Justice. This was admitted, as the Chief Justice observed, lest there should be "a gap opened for the destruction of the King;" though Sir W. Raleigh urged, "that he might see his accuser face to face," adding that "if, being charged on his soul, Lord Cobham affirmed the matter of the examination, he consented to be taken to be guilty." And on the trial of Sir R. Throgmorton, the principal deposition had been taken from a man who had been convicted of treason, but whose execution had been respited from time to time in order to induce him to accuse the prisoner.

(1) One of the earliest cases in which the rule was acted upon is Sampson *v.* Yardley, Pasch. 19 Car. 2, Keb. 223, pl. 74.

Even during the reign of Charles the Second, though the practice of reading the depositions of persons, who might have been produced as witnesses, was discontinued, yet hearsay evidence was allowed in many cases, in which it would now be rejected. On the trials for the Popish Plot, the evidence consisted principally of a narrative of the transactions of the supposed conspirators in various countries, collected during a long period of time from a multitude of letters, the contents of which were given from recollection; the witnesses not having taken a note of any part of the letters at the time of reading, not having read them for a great number of years, nor being required in reading to notice their contents, and not producing one of the letters, nor a copy, nor even an extract.

Extent of the rule.

The rule under discussion applies, although the account has been given upon oath and in the course of a judicial proceeding; as, where a pauper has been examined upon oath (unless under particular statutes,) by magistrates, respecting his parochial settlement; (1) or where a deposition has been taken by magistrates upon a criminal charge in the absence of a prisoner. (2)

The rule applies also, notwithstanding that no better evidence is to be found, and though it be certain that, if the account is rejected, no other can possibly be obtained: as, where the evidence purports to be the narrative of an eye-witness of a transaction, and that witness was the only one, and he since dead.

Declaration of attesting witness.

Doubts were formerly entertained, whether declarations by an attesting witness to a will or other instrument might not be given in evidence after his death, to shew that he had forged or fraudulently altered the instrument. It was suggested, that as the one party used the declaration of the subscribing witness, as evidenced by his signature, to prove the execution, the defendant might use any declaration of the same witness

(1) R. *v.* Nuneham Courtnay, 1 East, 373. R. *v.* Ferry Frystone, 2 East, 54. R. *v.* Abergwelly, *ib.* 63. See R. *v.* Eriswell, 3 T. R. 725.

(2) See R. *v.* Crowther, 1 T. R. 125. R. *v.* Smith, 2 Stark. C. 208. Holt, 614. R. & R. Cr. C. 339.

to disprove it: and further, that the declaration was a substi tute for the loss of the benefit of cross-examination, which might have been had, if the witness had been alive and examined. But in the case of *Stobart* v. *Dryden*, (1) it was held, that such declarations were inadmissible in evidence. The observations of the court upon the inconvenience, which would attend the adopting of an exception in such a case, illustrate the general expediency of the rule. It was said, that "the rights of parties under wills would be liable to be affected at remote periods by loose declarations of attesting witnesses, which these parties would have no opportunity of contradicting or explaining by the evidence of the witnesses themselves. The party impeaching the validity of the instruments would, it is true, have an equivalent for the loss of his power of cross-examining the living witness: but the party supporting it would have none for the loss of his power of re-examination.

It is now proposed to treat of certain exceptions to this general rule of the exclusion of hearsay evidence, in the following order:—

First, of the exception in questions of pedigree.

Secondly, of the exception in matters of public or general interest.

Thirdly, of the exception with reference to ancient possession.

Fourthly, in the case of dying declarations.

Fifthly, in the case of declarations against interest by persons since deceased.

Sixthly, of the exception in the case of declarations or entries made in the course of office or business.

Seventhly, of the exception in the case of testimony given on a former trial by a witness since deceased.

Eighthly, in the case of an admission by a party to the suit, or partner or agent of a party.

Lastly, of the exception in the case of a confession by a prisoner.

(1) 1 M. & W. 623: in which case the authority of two cases cited with approbation by Lord Ellenborough and Mr. Justice Bayley are examined. See *infra*, *Dying Declarations*.

Section III.

Exception to the General Rule in Questions of Pedigree.

It is obvious that the objections to hearsay evidence do not apply with the same force to every species of it; and that the inconvenience of rejecting it must be greater in some kinds of inquiry than in others. Hence the courts have established various exceptions to the rule which excludes hearsay evidence. The expediency of this rule of exclusion cannot indeed be satisfactorily judged of, without taking a view of the exceptions. For, on the one hand, the exceptions may be thought to obviate many objections which would exist if the rule were unlimited in its operation, while, on the other, they have themselves occasioned a substantive mischief by that mass of legal decisions which has arisen out of them,—decisions, which contain many subtle distinctions and not unfrequently conflicting opinions. It will also probably be thought, that in some instances the rule of exclusion has been injudiciously relaxed, and in others unnecessarily maintained in its full strictness.

It is proposed to treat, in the present section, of the exception to the general rule, in matters of pedigree.

Hearsay statements of deceased persons are allowed to be received in matters of pedigree, subject however to various qualifications. This exception appears to be founded on the considerations, that the facts which are the subject of inquiry are frequently of an ancient date, and that the knowledge of them is usually confined to few individuals. By limiting the exception to the statements of deceased persons, a resort to this kind of evidence is precluded where the hearsay tendered indicates the existence of more satisfactory proof, and is only admitted on failure of the ordinary channels of information. According to the qualifications under which

evidence of pedigree is received, provision is made that the statement should be derived from a person who would be likely to be well informed upon the subject on which he was speaking, and free from any apparent motive for perverting the facts.

The exception in question is framed upon general principles adapted to circumstances of frequent occurrence. It may happen, that these principles will fail of application in many instances, to which the exception might seem to extend. The exception is not confined to ancient facts, but extends also to matters of pedigree which have recently transpired; and the hearsay of deceased witnesses is admitted as to facts, which have occurred in the presence of living witnesses.

Reason of the exception.

It would be impossible to prove descents according to the strict rules, by which contracts are established and rights of property regulated, requiring the facts from the mouth of the witness who had the knowledge of them. (1) On inquiring into the truth of facts which happened a long time ago, the courts have varied from the strict rule of evidence applicable to facts of the same description happening in modern times, on account of the difficulty or impossibility (by lapse of time) of proving those facts in the ordinary way by living witnesses. (2) On this ground, hearsay and reputation (which latter is no other than the hearsay of those who may be supposed to be acquainted with the fact handed down from one to another) have been admitted as evidence in particular cases. On that principle, in cases of pedigree, stands the evidence of declarations of deceased members of the family, of monumental inscriptions, and of entries made in family Bibles. Such evidence is admitted on the principle, that it is the natural effusion of a party who must know the truth, and who speaks upon an occasion where he stands in an even position, without any temptation to exceed or fall short of the truth. (3)

(1) By Lord Erskine, 13 Ves,143. And see by Best, C. J., 9 B. Moore, 188.

(2) By Le Blanc, 10 East, 119.

(3) By Lord Eldon, 13 Ves. 514. These observations are adopted by the Lord Chancellor in Monkton *v.* Attorney General, 2 Russ. & Mylne,

It will be convenient, in the present section, to consider in order, first, what are matters of pedigree; secondly, the different forms of hearsay evidence in cases of pedigree; thirdly, the qualifications under which hearsay evidence is received in cases of pedigree.

1. *What are matters of Pedigree.*

First, Pedigree, with reference to the subject under consideration, consists of general evidence of descent or relationship, of evidence of particular facts, (as births, marriages, and deaths,) and of the time when such events occurred, either absolutely or relatively to each other. (1)

Time of birth.

Thus, upon questions whether a testator at the time of making his will was of full age, a written memorandum by a deceased parent, stating the time of his birth, has been admitted to be good evidence. (2) In like manner, the declarations of parents are admissible to prove, that a birth took place before marriage, as well as to disprove the fact of marriage entirely. (3) In an issue out of Chancery to try whether A. B. was the eldest son born out of wedlock, the declarations of his

162. See upon the subject of hearsay and relaxations of the old rules of evidence, Burke's Works, vol. 14; Report from Committee appointed to inspect the Lords' Journals.

(1) In Monkton *v.* Attorney General, 2 Russ. & Mylne, 161. The Lord Chancellor describes as matters of pedigree, such points as these,—"who was related to whom; by what links the relationship was made out; whether it was a relationship of consanguinity, or of affinity only; when the parties died, or whether they are actually dead." In Kidney *v.* Cockburn, 2 Russ. & Mylne, 167, it is reported, that Tindal, C. J., at *nisi prius*, rejected the evidence of inscriptions on a tombstone and monumental tablet, and also of declarations, and of a letter stating the ages of individuals; on the ground, that although relationship in general might be proved by hearsay, particular facts, such as the ages of parties, could not. The Lord Chancellor, however, expressed a contrary opinion, as also Mr. Justice Park, and Mr. Justice Littledale, to whom the point was submitted. The Lord Chancellor, notwithstanding, granted a case for the opinion of the Court of K. B. But the cause was compromised. The case of Herbert *v.* Tucknal, T. Raym. 84, is a precise authority for admitting hearsay as to dates; and the admissibility of such evidence is to be collected from Lord Mansfield's words in Goodright *v.* Moss, Cowp. 591, and from general practice. It was received by Littledale, J., in Ryder *v.* Malbon, cited 2 Russ. & Mylne, 169.

(2) Herbert *v.* Tuckal, Tr. at Bar, Sir T. Raym. 84, cited 7 East, 290. And see Johnston *v.* Parker, 3 Phill. 42. By Lord Mansfield, in Goodright *v.* Moss, Cowp. 593.

(3) Stevens *v.* Moss, Cowp. 593. Stapylton *v.* Stapylton, and Lord Valentia's case, cited *ib.* Rex *v.*

elder brother that he himself was a bastard, were received. (1) On a question, which of three children, all born at a birth, was heir, evidence was admitted, on one side, of declarations by the father stating which was the eldest son, and that he called them Stephanus, Fortunatus, and Achaicus, (according to the order of names from St. Paul's Epistle,) for the purpose of distinguishing their seniority; on the other side, the court received declarations by a relative, who was present at the birth, and who, upon the birth of the second and third child, took a string and tied it round their arms, to know them from the eldest. (2) A variety of illustrations of what is deemed in law to be matter of pedigree, will be found under the subsequent heads of this subject.

Place of birth.

The exception in favour of admitting hearsay testimony in matters of pedigree has been limited to cases, in which the facts are peculiarly within the knowledge of relations, on the ground that in those cases alone exists the necessity for relaxing the general rules of evidence. Thus, it has been held, that the declaration of a deceased parent, though they are good proof of the time of a child's birth, yet that they are not admissible as evidence of the *place* of the birth. (3) "The point in dispute," said Lord Ellenborough, in a case where the admissibility of such evidence was discussed, "turns on a single fact involving only a question of locality, and therefore, not falling within the principle of the rules applica-

St. Peter, Burr. Sett. Cases, 25. Rex *v.* Bramley, 6 T. R. 330. May *v.* May, 1762, Tr. at Bar. B. N. P. 112. Cooke *v.* Lloyd, Peake's Ev. App. 78.

(1) Cooke *v.* Lloyd, Peake's Ev. App. 78. The evidence was deemed admissible, as the representation of one of the family respecting the degree of relationship which he bore to it. In the same case, evidence was given of the declarations of the parents, as to the date of their marriage; of opprobrious epithets applied by the father to the children alleged to be born before the marriage, and to the wife; and of declarations of the father on his death-bed, who pointed to a younger son as his heir. The declaration of the elder brother was after he had conveyed away the estate. And see Rex *v.* Nottingham, 13 East, 57, n., that a person is competent to give evidence of his own illegitimacy, as by statements respecting acknowledgment and reputation. Concerning declarations of legitimacy, see the Berkeley case, 4 Campb. 401.

(2) Vin. Ab. Ev. T. b. 91: referred to by Lawrence, J., in the Berkeley peerage case, 4 Campb. 401: the second question referred to the Judges in the Berkeley peerage case, 4 Campb. 403, 418.

(3) Rex *v.* Erith, 8 East, 542.

ble to cases of pedigree." (1) It may be observed, however, that this fact is seldom proveable except by the evidence of relations; and they are more likely to remember accurately the *place* than the *time* of the birth.

Non-access.

It has been stated, as a ground for rejecting the evidence of a father or mother as proof of want of access, (to bastardize a child born during wedlock), that the want of access, implying the continued separation of the parties, must be notorious to the whole neighbourhood where they resided, and is therefore capable of more satisfactory proof; (2) and this objection would apply to their declarations, if by the term *non-access* is meant the want of opportunity for sexual intercourse. If, by that term is meant the fact of sexual intercourse, it should seem that the declarations could only be rejected on the ground of interest or of public policy. Both the wife's and the husband's declarations, as to the facts in general tending to the proof of illegitimacy, have been rejected. (3)

On questions of settlement.

Formerly, it was the practice to admit the declarations of deceased persons as to particulars concerning their settlements. (4) But it is now settled that all such evidence is inadmissible. (5)

(1) *Ibid.*

(2) B. N. P. 113, citing Rex *v.* Reading, and Rep. temp. Hardw. *ib.* 79

(3) Roe *v.* Reading, Rep. temp. Hard. 79, as to the ground of interest. Stapylton *v.* Stapylton, *ib.* 277. Stevens *v.* Moss, Cowp. 593, as to the ground of policy. Rex *v.* Luffe, 8 East, 203. Rex *v.* Kea, 11 East, 133. 1 Wils. 340. Burr. Sett. Cases, 25. *Vide supra*, the chapters on incompetency of witnesses to give evidence upon particular subjects; and *infra*, chapter on *Presumptive Evidence*. Notwithstanding the observations of Lord Ellenborough in Rex *v.* Luffe, as to the wife's proof, "that the adulterer alone had that sort of intercourse with her, by which a child might be produced within the ordinary period," it appears to have been considered, that a wife cannot, by her sole testimony, bastardize her issue; but that the fact of non-access must also be proved, and by other witnesses. R. *v.* Luffe, 8 East, 203. R. *v.* Reading, Rep. temp. Hard. 82. R. *v.* Bedall, 2 Str. 941, 1076.

(4) R. *v.* Greenwick, Burr. Sett. Cases, 243. Rex *v.* Nuttey, *ib.* 701. R. *v.* Wareham, Cald. 141. Rex *v.* Bury, *ib.* 486. Rex *v.* St. Sepulchre, *ib.* 547.

(5) Rex *v.* Eriswell, 3 T. R. 707. Rex *v.* Chadderton, 2 East, 29. Rex *v.* Nuneham Courtney, 1 East, 373. Rex *v.* Ferry Frystone, 2 East, 55. Rex *v.* Abergwelly, 2 East, 63. In Whittuck *v.* Waters, 4 Carr. & P. 376, it would seem, that hearsay evidence of pedigree had been rejected, on the ground

General kindred.

General kindred, as that a person was heir to another, being his cousin or relation, is matter of pedigree, and declarations to that effect appear to be receivable in evidence, though the point was formerly considered to be doubtful, at least so far as regarded proof of title in an ejectment. (1)

2. Of the various forms in which the Hearsay may be presented.

The hearsay evidence, which is admissible in matters of pedigree, may be conveyed under various forms. One class of proofs seems to rest principally on the credit due to the authors of the statements, such as, entries in family Bibles or other family books, family correspondence, descriptions in wills, recitals in deeds, statements in bills, or answers in Chancery. There is another class, apparently resting not so much upon the credit due to the authors of the statements, as upon the adoption of others, such as, inscriptions on tombstones or on coffin plates, engravings on rings, pedigrees hung up in a family mansion, or the like. The authorities, however, do not admit of being arranged with much precision, according to these classifications. The distinction is here noticed, because it will afterwards become important to advert to the examples about to be detailed, according to this view of them.

Entries in family books, &c.

Inscriptions.

Entries in Bibles, &c.

An entry in a family Bible derives some credit from the circumstance of its being entered in a book which is kept as the ordinary register of families. (2) But memoranda inserted in

that the suit did not relate to a matter of pedigree. But there appears to be no foundation for a distinction between cases, where a matter of pedigree is the direct subject of the suit, and other cases where it occurs incidentally.

(1) Doe d. Futter *v.* Randall, 2 M. & P. 24, a declaration by a deceased person, that A. B. was to have his estate, and see by Burrough, J., *ib.* p. 26. By Lord Erskine, 13 Ves. 147. By the Lord Chancellor, 2 Russell & Mylne, 158.

(2) By Lord Ellenborough, 4 Campb. 421; and see Johnston *v.* Parker, 3 Phillimore, 82. By Lord Mansfield in Goodright *v.* Moss, Cowper, 594. Lord Erskine, 13 Ves.514. Le Blanc, J., 10 East, 120. 2 Russell & Mylne, 162. But the Lord Chancellor considered entries in family Bibles, as standing on the ground of family acknowledgments, and admissible on account of their publicity, without proof that the entries were made by a member of the family.

other books, as an almanack, (1) a missal, (2) a prayer-book, (3) and in other documents or papers, (4) have been admitted in evidence.

Family correspondence.

Correspondence between members of the family, addressing each other as relatives, and making statements of pedigree, have been admitted in several claims of peerage. (5)

Recitals in deeds.

Recitals in family deeds, as marriage settlements and the like, have been admitted, on the footing of declarations of relatives. (6) Mr. Baron Perrott is said to have rejected a slip of parchment, found in a shoemaker's shop, and marked Mr. A. B.'s measure, which purported to be two lines of a deed, and contained a recital of descent, but the Court of King's Bench granted a new trial, on the ground that the evidence ought to have been admitted. (7) In an early case, where *vivâ voce* evidence was offered on the part of the plaintiff, that on a former trial in ejectment against the same defendant, a deed had been produced on the part of the defendant, having a clause in it relating to a pedigree, the court held such proof to be admissible, on the ground that the defendant had the deed in his custody, and might disprove the witness, if he swore falsely. (8) But in two recent cases in the Court of Chancery, it

(1) Herbert *v.* Tucknal, Sir T. Raym. 84.

(2) Slane Peerage, 1830, printed minutes, part 2, p. 49.

(3) Leigh peerage, 1829, printed minutes, p. 310.

(4) See the answers of the Judges to the second *quæry* in the Berkeley case, 4 Campb. 401. Vin. Ab. Evidence, b. 87, pl. 5, an old book out of Lord Oxford's library, mentioning the pedigree of William Zouch, signed by himself. The entry is not the less admissible, though it expressly purport to be made for the purpose of perpetuating evidence of legitimacy. See the Berkeley peerage case, 3d *quæry*. B. N. P. 233. By Lord Mansfield, declarations for the purpose of preventing family disputes, in Goodright *v.* Moss, Cowper, 591. 2 Russell & Mylne, 164.

(5) Berner's peerage, Collins on Baronies, 355, 356, 361. Leigh peerage, printed minutes, part 2, p. 140. Huntingdon peerage, Attorney General's report, p. 357.

(6) Bull. N. P. 233. Carth. 79. Neale *v.* Wilday, 2 Str. 1151. Chandos peerage, printed minutes, p. 27. Stafford peerage, printed minutes, p. 110. Zouch of Hurgugworth peerage, printed minutes, 1804, p. 275; and see Doe d. Johnson *v.* Pembroke, 11 East, 505. 13 Ves. 514. Lisle peerage case, pp. 116, 127. Banbury peerage case, pp. 6, 117. Devon earldom case, by Nicholas, 1832, App. pp. 44, 46.

(7) Cited by Thomson, B., 2 Peake, N. P. C. 204. (Additional Cases)

(8) Eccleston *v.* Petty, Carth. 79.

has been considered, that recitals in deeds were not evidence of pedigree against persons who were strangers to the deeds. (1) It may be observed, that recitals are frequently in the nature of conventional admissions between the parties to a deed, by which they agree to be bound without reference to the real state of facts.

Descriptions in wills.

A description in the will of a member of the family is also admissible on the same ground, and this even though the will is found cancelled, and not known to have been proved or acted upon, if it appears to have been treated as a paper relating to the family. (2) In the Lisle peerage case, (3) a description in a will, of certain individuals being the next "heirs in blood," was relied upon as showing that a particular person was illegitimate.

The probate.

Ledger-book.

It may be observed, that, upon the principles applicable to the proof of documentary evidence, a probate would not be evidence even of the fact of relationship, in an action for the recovery of real estate; though it would be otherwise with respect to the ledger-book of the Ecclesiastical Court or a copy of it. (4)

(1) Fort *v.* Clarke, 1 Russ. 604. Slaney *v.* Wade, 1 Mylne & Craig, 338, where the recital stated that A. B. was the child of the marriage of the persons named in the deed, and the question was that of A. B.'s legitimacy. On the effect in general of recitals, see *infra*, Chapter on *Admissions*; and Doe d. Pritchard *v.* Dodd, 2 Nev. & Mann. 45. Bowman *v.* Taylor, 2 Ad. & Ell. 278.

(2) Doe d. Johnson *v.* Earl of Pembroke, 11 East, 504. See 7 East, 279.

(3) Nicholas's Lisle peerage, 51, 53.

(4) Not even to prove the relationship of father and son by the father's will. Roll. Abr. 678. B. N. P. 246. Doe d. Weld *v.* Ormerod, 1 M. & Ro. 466. Dike *v.* Polhill, Lord Raym. 744. As to the ledger-book, see Bull. N. P. 246. In claims of peerage, however, the original wills are generally required to be produced. But a question arose in the late claim to the barony of De Lisle, whether, in support of the claimant's pedigree, the will of Ambrose Dudley, Earl of Warwick, dated in 1589, could be read from the register, upon proof that it was the custom of the Prerogative Office, at the time when the will was proved, in nine cases out of ten, to deliver the originals back to the executors, after the wills had been proved and registered. Counsel were directed to ascertain, whether, in consequence of this custom, some cases had not occurred where the books were received in evidence; the result of their search does not appear, but in the principal case the register was afterwards produced, and an examined copy admitted. Nicolas' report of the De Lisle peerage, pp. 51, 52, printed minutes of same, pp. 203, 206.

Bills, &c. in Chancery.

In the cases respecting the admissibility of wills, answers, and depositions in Chancery as evidence of pedigree, some confusion occurs, attributable chiefly to a difficulty in determining in what particular cases these sources of evidence are open to the objection of being *post litem motam.* (1) Lord Kenyon held the opinion, that a bill in Chancery by an ancestor was evidence to prove a family pedigree stated therein, in the same manner as an inscription on a tombstone, or entry in a Bible. (2) And although, before this, answers and depositions were held inadmissible as proofs of pedigree, there appears always to have been some other ground of rejection peculiar to the case,—as that the answer was made by an infant through his guardian, (3) that the party making it was alive, (4) or that the depositions were not accompanied by the answer. (5) The judges, however, held, upon a question put to them by the House of Lords, in the Banbury Peerage case, (6) that a bill or depositions in Chancery, in a suit to perpetuate testimony, could not be received as evidence in the courts below, on the trial of an ejectment against a party not claiming or deriving in any manner under the plaintiff in the Chancery suit, either as evidence of the facts therein deposed to, or as declarations respecting pedigree. They added, (though the question does not appear to have been put to them), that it would not make any difference in their opinion, if the bill had been a bill seeking relief.

But the Judges, in their answer to the question put to them by the House of Lords, appear to consider the existence of a controversy (*lis mota*) as invalidating the deposition; and it certainly has been the practice of the House of

Marchmont peerage case, p. 5. Kilmorrey case, p. 10. But in the Gardiner peerage case, to prove the marriage of Lord Gardiner at Madras, a book brought from the secretary's office in the India House, containing entries of marriages and burials in Madras, copied from the original register in England, was received. *Vide infra,* where the proof of wills and registers is more particularly treated of.

(1) *Vide infra,* where the subject of the *lis mota* is considered.

(2) Taylor *v.* Cole, 7 T. R. 3, n.

(3) Eccleston *v.* Petty, Carth. 79. Eccleston *v.* Spoke, Comb. 156. 12 Vin. Ab. 94.

(4) Hilliard *v.* Phaly, 8 Mod. 180.

(5) Piercey's case, Jones, 164.

(6) 2 Selwyn's N. P. Le Marchant's Gardiner peerage, App. 411. And see the opinions of the Judges in the Berkeley case, 4 Campb. 412.

Lords, both before and since the opinion was delivered, to admit, as evidence of the pedigrees of claimants of peerage, bills and answers in Chancery, made in suits where the facts of the pedigree were not in dispute, but only incidentally stated. (1)

In the report of the Attorney General (Sir Arthur Pigott) on the claim of Charles Augustus Ellis to the Barony of Howard de Walden, in 1806, he stated that part of the evidence, offered to him in support of the claimant's pedigree, was a bill and answer in Chancery with the decree thereon, which he considered as adequate evidence: because the bill, having set forth the pedigree to show an heirship, the answer did not controvert such heirship; and the decree, after giving leave to the plaintiffs to bring an ejectment to try the title, directed the defendant to admit the heirship. (2) This evidence had been admitted by the House of Lords in an earlier claim to the same barony, (3) and was again admitted in the claim upon which this report was made. (4)

Engravings upon rings.

Engravings upon rings, (5) and charts of pedigree hung up in family mansions, (6) or found among family documents, (7)

(1) Roos' peerage, printed minutes, 1804, p. 293, 294. Zouch of Hurgugworth peerage, printed minutes, 1804, p. 221. Slane peerage, printed minutes, 1830, part 1, p. 32; part 2, p. 42. Netterville peerage, printed minutes, 1827, p. 43. In these two last cases the bills and answers were from the Chancery in Ireland, the claims being to Irish peerages.

(2) Attorney General's report, 1806, p. 35.

(3) Claim of Sir John Griffin in 1781, minutes reprinted 1806, p. 15.

(4) Printed minutes, Howard de Walden peerage, 1806, p. 25.

(5) 13 Ves. 144, cited 2 M. & P. 26.

(6) 2 Cowp. 594.

(7) De Lisle peerage case, report by Nicolas, p. 45. See also the case of the Berner's Barony, Collins on Baronies, 333. In Monkton *v.* Attorney General, 2 Russell & Mylne, 161, it was expressly held, that a pedigree was admissible, though not hung up or made public, on proof of its having been made by a member of the family. But it was considered by the Lord Chancellor, that where the pedigree is hung up, it is admissible, without proof of its having been made by the directions of the family, on the ground of being a family acknowledgment. Rings and inscriptions on tombstones were considered by him as admissible on the same ground; and that the publicity of them supplies the defect of proof in not shewing that they were declarations made by members of the family. The pedigree admitted by the Lord Chancellor was founded on hearsay, and was in some respects erroneous, but these circumstances were not considered to affect its admissibility.

have been received in evidence. But a pedigree found in the Ashmolean Library at Oxford, unaccompanied by any proof that it was made by a member of the family, or by any person connected with it, was rejected. (1) And a pedigree, purporting to be "collected from parish registers, wills, monumental inscriptions, family records, and history," has been rejected; being upon it's face a mere compilation from existing documents, which ought to be produced as the primary evidence. (2)

Charts of pedigree.

Compilation from registers, &c.

Inscriptions on tombstones are constantly received in evidence in questions of pedigree, both in Courts of Law, and by the House of Lords in claims of peerage; (3) and inscriptions on coffin plates in family vaults and graves have also been given in evidence, on the same ground, in several peerage cases. (4) Examined copies of those inscriptions are admitted for the sake of convenience, the case forming an exception to the rule which admits copies only when the originals are public books. The admissibility of this evidence is clearly not affected by the circumstance of the originals being in a church or churchyard. In the case of the Barony of Say and Sele, in 1781, part of the evidence for the petitioner was an

Inscriptions on tombstones.

On coffin plates.

Monument in Dissenter's burial ground.

(1) Chandos peerage, prited minutes, p. 11. See *infra*, where the proper custody of documents is more particularly considered.

(2) Davies *v.* Lowndes, Bing. 166. The pedigree was indorsed and signed by one of the family, as being correct and confirmatory of the tradition in the family. But this statement evidently could not remove the objection.

(3) Lord Mansfield, in Goodright *v.* Moss, Cowper, 594. Vin. Ab. Evidence, T. b. 87. 13 Ves. 144, 514. B. N. P. 233. 7 T. R. 3, n. 10 East, 120. Duncomb Tr. *per pais*, 424. 1 Lilly's Pract. Reg. 552. Sty. 208. Nicholas's Lisle Peerage, 50, 173. Peerage claims, *passim*. Kidney *v.* Cockburn, 2 Russell & Mylne, 171. Ryder *v.* Malbone, cited *ib.* where Littledale, J., admitted an inscription on a tombstone, stating the death of a party at a particular age. See also Monkton *v.* Attorney General, 2 Russell & Mylne, 163. With respect to the weight due to inscriptions on tombstones, much may depend on the circumstances, whether they are contemporaneous, and whether they are set up in the view of surviving relatives. It is to be observed, that this species of evidence often trenches on the rule which rejects secondary evidence; inasmuch as the authors of the evidence may be alive. In Monkton *v.* Attorney General, the Lord Chancellor considers tombstones on the same footing as rings, pedigrees hung up, and family Bibles, and as admissible on account of their publicity, without connecting them with the family.

(4) Chandos, printed minutes, p. 10. Rokeby, printed minutes, p. 4. Lovat, printed minutes, p. 77.

inscription on a tombstone in the burial ground for Dissenters at Bunhill Fields; (1) and in a late case, Mr. Justice Park admitted, with some hesitation, an inscription on a tombstone in a Dissenter's burial ground, for the purpose of proving the death of a *cestui que vie*. (2) Where monuments have been decayed by time or surreptitiously destroyed or removed, evidence of the recollection of witnesses respecting them, and as to the inscriptions they bore, has been admitted by the House of Lords. (3)

Mistakes on tombstones.

The credit of monumental inscriptions may always be impeached, and their evidence seems peculiarly open to attack, not only on account of the great facility of forgery, but also because the preparation of them is often committed to undertakers, executors, or other persons not members of the family, or because perhaps the inscription has been delayed till a period when the facts are but imperfectly remembered. In the claim of Katherine Bokenham to the Barony of Berners, an inscription upon the tombstone of a person who was one of the links in the pedigree, was given in evidence; but it appeared from the entry of her burial in the parish register and from her will, that there was a mistake of a year on the tombstone as to the time of her death; and the mistake is said to have arisen from a delay in laying down the stone. (4)

(1) Mr. Serjeant Hill's Collections in Linc. Inn Library, vol. 26, p. 173.

(2) Whittuck *v.* Waters, 4 Carr. & P. 376. There does not appear to be any ground for the judge's doubts upon this subject; as the admissibility of the inscription depends on a totally different principle from that of the admissibility of registers.

(3) In the Roscommon and Leigh peerage cases. The latter case turned wholly on the existence of a monument, alleged to have been surreptitiously removed from Stoneley Church. Numerous witnesses were examined for and against its existence. See the printed evidence, 1829.

(4) Collins on Baronies, 363, and note. There are several well known instances of similar mistakes. In the epitaph upon Spencer's monument in Westminster Abbey, there is a mis-statement as to the time of his birth of no less than forty years, and as to that of his death of three years; see Biog. Brit. nom. Spencer. The time of death is erroneously stated on the monument of Sterne, see Biography, prefixed to his Works, ed. 1816; and the time of birth on that of Goldsmith, see Boswell's Johnson, vol. 3, p. 69, Oxford ed. 1826. In the Lisle peerage case (Nicolas's Lisle peerage case, 89), a monumental inscription was produced in these terms, "To the memory of the Lady Katherine, late wife of Sir Richard Leveson, one of the daughters and co-heirs of Sir R. Dudley, Knight, son to Robert, late Earl of Leicester, by

Mural inscription.

An ancient mural inscription, giving an historical account of a family, and placed in a chancel, which was used formerly as the burial place of the family, and part of the church belonging to the parish where the family had long been resident proprietors, has been held to be admissible evidence, on a question of pedigree, for the purpose of proving the facts stated in the inscription. In the same case, it was held, that although the inscription had been defaced twenty-four years ago, it's contents might be proved by copies made when the inscription was entire. The evidence was said to be admissible, as well upon the authority of the cases respecting tombstones, as of that respecting a pedigree hung up in a family mansion. (1)

Coat armour.

Coat armour has sometimes been relied on in questions of pedigree. Lord Coke speaks of it's use to the bearers in "manifesting of what families they be;" (2) and Siderfin says, "arms serve to distinguish family from family, and to prevent branches of the same family interfering with one another." (3) So long as the Heralds possessed and exercised the power of punishing usurpations, some credit may have been due to this evidence, probably on the ground, that, by the assumption of a particular bearing, the party must have meant to affirm, that he was connected in that manner with the family to which it belonged. The claim of Sir Michael Blount to the Barony of Mountjoy, in the time of Queen Elizabeth, turned almost wholly on the arms in a window at Iver, in Buckinghamshire, set up in the reign of Henry the Seventh; and elaborate arguments of the Heralds have been preserved, (4) as to the credit due to this evidence, in support of the claim of Sir Michael, as heir male of the body of Walter, first Lord Mountjoy, in contradiction to the books in the Herald's Office, which deduced his descent from Thomas, a brother of this Walter. In the modern case of the Barony of Chandos, where the claimant alleged that he was descended from the third son of the first

Alicia, his wife, daughter to Sir T. Leigh, of Stoneleigh, Knight and Baronet," which, it was observed, was an ingenious device to represent to the cursory reader, that Sir R. Dudley was a legitimate son of the Earl of Leicester.

(1) Slaney *v.* Wade, 1 Mylne & Craig, 338.

(2) Co. Litt. 27, *a.*

(3) 1 Sid. 354.

(4) Harl. MSS. 1386, 6141.

Herald's books.

Lord Chandos, he was allowed to give in evidence the arms of his family in the Herald's Visitation Books, and upon seals of deeds, delineations on parchment, and other family papers; which arms a Herald proved were those of the Chandos family, with the mark of the third branch. (1) An achievement with the same arms was likewise produced, which the mother of the claimant proved to have been hung up in the family mansion when she first married, and that she had heard her husband say, it had belonged to his grandfather. (2) In the Huntingdon Peerage case the Attorney General admitted in evidence an armorial shield, carved upon oak, which had been given by the late Earl of Huntingdon to the father of the petitioner.

Armorial shield.

On this shield, which was produced from a family chest, were the arms of Stanley and Hastings quartered, in consequence, as it was supposed, of the marriage in the reign of James the First of Henry the Fifth, Earl of Huntingdon, with the daughter of Ferdinando Stanley, Earl of Derby. (3) So in support of the presumption of a marriage, evidence has been

Carriage arms.

adduced that the husband impaled his wife's arms with his own on his plate, seals, and carriage. (4) It is observable, however, that the value, if not the admissibility, of this evidence depends upon its antiquity; and therefore the Attorney General in the Chandos Peerage case cross-examined the Herald, to shew that at the time when it was proved that the achievement before mentioned was in the family of the claimant (about 1699), there was no authority in existence to correct usurpation. The year of the last Herald's Visitation (1686), seems to have been thought the time when this authority, or at least the exercise of it, ceased. (5)

Conduct, &c. may be equivalent to declarations.

It may be convenient to mention, in treating of the subject of pedigree, (though it more properly belongs to the head of

(1) Chandos peerage, printed minutes, pp. 6, 24, 37, 40, 49.

(2) *Ibid.* pp. 40, 49.

(3) Huntingdon peerage, by bill, p. 280. Attorney General's report, *ibid.* p. 359.

(4) Hervey *v.* Hervey, 2 W. Bl. 877.

(5) Chandos peerage, printed minute, p. 40. And see further as to the authority of the Herald's, Russel's case, 4 Mod. 128. Oddis *v.* Domville, Show. Ca. Parl. 66. Blunt *v.* Blount, 1 Atk. 295. As to the Earl Marshal's book, see Lisle peerage case, p. 12. With respect to the evidence of the Herald's books, *vide infra*, where the subject of public documents is more particularly considered.

presumptive evidence), that the conduct of parties to each other, the disposition of property, the devolution of property and title, and similar circumstances, are frequently received in questions of pedigree, on the footing of declarations. They are properly *facts*, from which an inference as to the opinion and belief of families is drawn; and, therefore, they ultimately rest upon the same basis as hearsay evidence of family tradition. Chief Justice Mansfield, speaking of a father bringing up a son as legitimate, "this," he said, "amounts to a *daily assertion* that the son is legitimate." (1) And in *Goodright* v. *Saul*, (2) Ashurst, J., observes, that in that case "there were strong circumstances to shew that the son was a bastard; amongst others, a very forcible one occurred, namely, that the son had taken a different name from his birth, the name of the person with whom his mother was living at the time, which had been retained by him and his decendants ever since; this was a very strong *family recognition* of his illegitimacy." In the Leigh peerage case much stress was laid upon the alleged fact that an ancestor of the claimant, in indigent circumstances, had once paid a visit to Lord Leigh, which he used to boast of among his neighbours, and that his Lordship had given him a suit of clothing. (3) And in the Clinton peerage case, part of the evidence for the claimant was, that the sole descendant of an elder branch of the family, who died unmarried, had bequeathed several family pictures to a person who was the claimant's undoubted ancestor; and that the sole descendant of another elder branch had limited certain estates to the right heirs of his maternal grandfather, which estates were then in the possession of the claimant as such right heir. (4)

The separate weight which is due to this evidence was recognised in the case of *Beer* v. *Ward*. A deed was put in evidence by which certain estates were limited in remainder by the owner to his grandson, (the person whose legitimacy was in question,) and the deed described him as if he were legitimate;

(1) 4 Campb. 416.
(2) 4 T. R. 356.
(3) Printed minutes p. 298, *et seq.*
(4) Claimant's case, Mr. Serjeant Hill's Collections, vol. 30, p. 331.

Chief Justice Dallas said he was quite aware that besides the manner of describing him, there was an argument arising out of the disposition of the property. (1)

This kind of evidence is often material in raising the presumption of death without issue; the devolution of title or property upon a younger branch, especially after an express previous limitation to an elder, being relevant, though of course by no means conclusive, evidence of a failure of the issue of the latter. Thus, in the recent claim to the Earldom of Devon, it was shewn that property had been settled on the eldest son William in tail remainder to the second son Humphrey in tail, remainder to the third son Peter in tail, and the death of Humphrey without issue was in part proved by an inquisition taken after the death of Peter, finding that he died seised of the lands so settled. (2) This occurred in the reigns of Richard 2nd and Henry 4th, after the statute *de donis* and before the introduction of fines and recoveries, when it might be reasonably presumed that the land must have gone according to the settlement. For the same purpose similar evidence has been given of the devolution of property under the like circumstances in later periods, accompanied with proof of a search at the Warrant-of-Attorney Office, and at the King's-Silver Office, to shew that no recovery was suffered or fine levied of the lands settled. (3)

In the case of the De Lisle peerage, part of the proof that Robert Dudley, Earl of Leicester, died without lawful issue, was that the right of presentation to a Hospital at Warwick, which had been given by the deed of foundation after the Earl's death to his heirs, had been uniformly exercised from the death of the Earl down to the last presentation by the collateral branch through which the petitioner claimed. (4) In the Banbury peerage case, the illegitimacy of the claimant was principally established by inferences arising out of the conduct of

(1) Printed report of trial on first issue, pp. 39, 40.

(2) Nicolas's report of the case of the earldom of Devon, App. p. 36.

(3) Chandos peerage, printed minutes, p. 11.

(4) Nicolas's report of the case of the De Lisle Barony, pp. 50, 120, printed minutes of same, pp. 171, 197.

the parties; as that the birth was concealed, and that the child took the name of Vaux; and that Lord Banbury accepted dignities from the King, and made a disposition of his property inconsistent with the idea of his knowing that he had any children. And, in the Gardiner peerage case, where a great deal of evidence was adduced as to the conduct of the parties concerned, Lord Eldon says that evidence of conduct, and of declarations connected with conduct, were to be considered, in order to come to a just determination upon the subject of the claim. (1)

Declaration upon declaration.

There appears to be no objection, in questions of pedigree, to receiving hearsay in the second degree, when both degrees are within the family. Accordingly, it has been held, that the declarations of a deceased lady, that her first husband was accustomed to make certain statements respecting the pedigree of the family, were receivable in evidence. (2) And the same principle has been recently recognised in a case in Chancery. (3)

Inquisitions *post mortem.*

Evidence of pedigree is frequently presented in other forms, and derived from other sources, besides those which have been enumerated, and particularly from public documents, as inquisitions *post mortem*, parish books, parish and marriage registers. But the admissibility of these documents and of Herald's books, which have been incidentally noticed, depends upon principles differing in some respects from those which have been treated of in the present section, and which require a separate consideration. (4) In the same part of the work

(1) See the speech of Copley, Attorney General, in the Gardiner peerage case, p. 285.

(2) Doe d. Futter *v.* Randall, 2 M. & P. 20. By Best, C. J., *ib.* In the earlier case of Johnson *v.* Lawson, 2 Bing. 88, Chief Justice Best had observed, that declarations upon declarations have never been received, although made by members of a family.

(3) Monkton *v.* Attorney General, 2 Russell & Mylne, 165. The case of Athol *v.* Ashburnham, B. N. P. 295, was cited as an authority for receiving declarations at second hand, or hearsay upon hearsay.

(4) *Vide infra*, where the subject of public and official documents is more particularly treated of. Parish books frequently afford evidence on matters of pedigree. Thus the date of Caxton's burial was fixed by a charge of twenty-pence for two torches and four tapers used at his

will be more conveniently considered the cases relative to various kinds of unauthorized registers containing evidence of pedigree.

3. *Of the qualifications with which the Hearsay is received.*

In matters then of pedigree, as defined by the preceding illustrations, hearsay evidence in the various forms that have been mentioned is receivable. But it remains to be stated under what qualifications it is received.

Requisite knowledge.

As to qualifications—it is obvious that the value of these declarations, as indeed of all hearsay evidence, must greatly depend upon the knowledge which the declarant possessed of the facts spoken to by him. It was long unsettled, whether any and what kind of connection (from which knowledge might be presumed) must have subsisted between the party making the declaration and those to whom it referred. Formerly there seems to have been no limitation to any particular class of persons; and evidence of the reputation of the country or neighbourhood and of general tradition, as to the facts of descent or relationship, was in some cases admitted. (1) Afterwards it was thought necessary that the hearsay should proceed from those whose connection with the family afforded them peculiar means of knowledge. "The doctrine of Lord Mansfield (that tradition is sufficient evidence in point of pedigree,) (2) must," said Lord Eldon, in the case of *Whitelocke* v. *Baker*, (3) "be understood as it has been practised and acted upon. The tradition must be from persons having such a connection with the family, that it is natural

funeral, entered in one of the parish books of St. Margaret's, Westminster.

(1) Annesley v. Earl of Anglesea, 17 How. St. Tr. 1160, 1195. Claim of Sir Michael Blount to the barony of Mountjoy, temp. Elizabeth, where "common fame" was relied on as evidence of his descent; and see as to general tradition, by Lord Mansfield, Cowp. 594; 2 W. Bl. 1099; 14 East, 330. In the Huntingdon peerage case, the Attorney General admitted affidavits of persons resident in Leicestershire, as to the reputation of the county: Attorney General's report, Huntingdon Peerege, 359. According to the Scotch law, fame is admissible in questions of propinquity of blood: Stair Inst. lib. 4, t. 42, s. 16. And in the disputed election of Scotch Peers, 1790, the House of Lords admitted evidence, that it was the general belief of the country, that a claimant was lineal descendant and lawful heir male, and that he was "habite and repute as such." Printed Minutes of Evidence, p. 136.

(2) Cowp. 594.

(3) 13 Ves. 514.

and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken." The nature of this connection was, however, undefined, though it does not appear to have been thought requisite that the declarant should be related to the family by blood or affinity. Upon several occasions at *nisi prius*, the declarations of servants, physicians, and intimate friends were admitted; (1) and the practice was countenanced by *obiter dicta* of Mr. Justice Buller, Lord Kenyon, and other Judges. (2) But at a later period, Lord Eldon speaks doubtfully upon the point; (3) and afterwards in the case of *Beer* v. *Ward*, Chief Justice Abbott received the declarations of servants and acquaintances, subject to further discussion, expressing at the same time an opinion against their admissibility. (4)

Limitation of the rule to relatives.

The question remained thus undecided, when it came before the Court of Common Pleas in the case of *Johnson* v. *Lawson*,(5) upon a motion for a new trial, on account of the rejection of the declarations of a deceased housekeeper, that a certain person, under whom the plaintiff claimed, was the heir of her master. The court were unanimous in thinking the evidence properly rejected. Chief Justice Best in delivering judgment observed, that the admission of hearsay evidence in these questions must be subjected to some limits, otherwise great uncertainty would ensue: that the limitation to the declarations of relatives or members of the family connected by blood or affinity afforded a certain and intelligible rule; and if that were passed, it might be necessary, on every occa-

(1) Duke of Athol *v.* Lord Ashburnham, E.14. Geo. 2. Bull. N. P. 290. Gilb. Evid. 112, S. C. (See a different statement of this case from a MS. of Mr. Wegg, in 2 Selw. N. P. 734, 5th edit., and 9 B. Moore, 192.) Roe d. Bushell *v.* Gore, Lancaster Summer Assizes, 1763, 9 B. Moore, 187, n. Brown *v.* Shelley, E. 1776, 9 B. Moore, 187, n. 190, cited by Mr. Justice Buller, 3 T. R. 719. Walker *v.* Wingfield, 18 Ves. 446.

(2) By Lord Kenyon and Mr. Justice Buller, in Rex *v.* Eriswell, 3 T. R. 719. Mr. Justice Buller cites an authority for admitting declarations of persons not of the family. In Weeks *v.* Sparke, 1 M. & S. 679, Le Blanc says, that evidence of persons connected with the family is received. 13 Ves. 514.

(3) 18 Ves. 446.

(4) Printed report of trial, second issue, pp. 189, 192, cited 9 B. Moore, 188.

(5) 2 Bing. 86. 9 B. Moore, 183, S. C. And see Whitelocke *v.* Baker, 13 Ves. 514. Goodright *v.* Moss, Cowper, 594.

sion, to enter into a long and almost endless inquiry as to the degree of intimacy or confidence which subsisted between the family and the party who had made the declaration. (1) In *Doe* d. *Sutton* v. *Ridgway*, the dying declaration of a servant of a family concerning the family pedigree was rejected. (2) And in *Crease* v. *Barret*, (3) it was said by the court, that in cases of pedigree the hearsay must be derived from relatives by blood, or from the husband with respect to his wife's relationship, and that it was not admissible if it proceeded from servants or friends. The case of *Johnson* v. *Lawson* was referred to as having established a clear and definite rule upon the subject.

Principle of limitation.

The principle upon which the declarations of relatives only are to be received, was pointed out in the case of *Vowles* v. *Young*; (4) namely, that the law resorts to the hearsay of relatives upon the principle of a feeling of interest in the relation from whom the descent is made out, to know the connections of the family; and, therefore, that the opinion of the neighbourhood of what passed among acquaintances would not be admissible. (5) It must be observed, that the interest here spoken of is only an interest to acquire knowledge, and is clearly distinguishable from an interest to make any particular statements respecting the facts.

Declarations of husband admissible.

It seems to be chiefly upon this ground, that the declarations of a deceased husband as to the legitmacy or descent of his wife are admissible, though not related to her by blood; (6) the husband, as was remarked, has an interest in the succession of his wife to real property (to which he might become

(1) 9 B. Moore, 188. The case of Doe *v.* Deakin, 4 Barn. & Ald. 433, does not impugn the doctrine in the text. A presumption of the death of a tenant for life was raised by the testimony of a living witness, who resided near the property, and who spoke to his continued absence from it. This witness was not a member of the family. But he only proved facts within his own observation, and no question arose as to the admissibility of his declarations.

(2) 4 B. & Ald. 53.

(3) 1 Cr., M. & R. 928.

(4) 13 Ves. 140.

(5) 13 Ves. 147.

(6) Vowles *v.* Young, 13 Ves. 140. Doe d. Northey *v.* Harvey, 1 Ry. & Moody, 297. Doe d. Futter *v.* Randall, 2 Moore & Payne, 20.

tenant by the curtesy,) as well as to personal property, (to which he would be wholly entitled).(1) An objection is said to have been taken in one case, that the husband's declarations were inadmissible, because made after the death of the wife, when he was no longer connected with her family, but it was overruled upon the ground that his knowledge must have been acquired at a time when he was married to her.(2)

General reputation of the family.

Besides, however, the declarations of particular members of a family, the general reputation of the family is sometimes admitted upon questions of pedigree. Thus, in *Doe* d. *Banning* v. *Griffin*,(3) in order to prove a person to have died unmarried, a relative was allowed to state, that according to *the repute of the family* he had died in the West Indies, and that she never heard in the family of his being married.

Acknowledgment of the family.

It has been considered, that an instrument of pedigree, which, from the publicity given to it, must be presumed to have been adopted by the family, need not be traced to any particular member of it. Thus it has been observed, that an engraving upon a ring worn publicly, an entry in a Bible open to the family, an inscription upon a tombstone erected or supposed to be erected by the family and open to all, a pedigree hung up publicly in a family mansion, are admissible in evidence, though it does not appear who were the authors of them. But in the absence of such *publicity*, they must be shown to have been made by some particular member of the family.(4)

(1) 13 Ves. 147.

(2) Vowles *v.* Young. This does not appear in the report in Vesey, but was stated by Burrough, J., who was counsel in the cause, 9 B. Moore, 194. That the declarations of a party connected by marriage are receivable; Doe *v.* Randall, 2 M. & P. 20. Doe d. Northey *v.* Harvey, R. & M. 297. That a person need not be connected with both the branches of the family, touching which his declaration is tendered; see 2 Russell & Mylne, 156.

(3) 15 East, 294; and see B.N.P. 295. Stafford peerage case, printed evidence, p. 145. It may be questioned, whether this general repute of the family could be proved by others than members of it. B.N.P. 295.

(4) Monkton *v.* Attorney General, 2 Russell & Mylne, 162. In the Berkeley case of the family Bible, 4 Campb. 401, the handwriting was proved. *Vide supra.*

Declaration of accoucheur or midwife.

The authority of the case of *Higham* v. *Ridgway* is open to much observation. It was decided by that case, that an entry made by an accoucheur in his book of having delivered a woman of a child on a certain day, the charge for which was marked "paid," was admissible as evidence of the birth of the child on that day, on the trial of an issue as to his age at the time of his afterwards suffering a recovery. (1) And an opinion was mentioned, in the course of the judgment, that such an entry, or the declaration of a midwife as to the time of birth, might be admissible, on the ground of having been made of a matter peculiarly within the knowledge of the declarant. (2) But the ground of the judgment seems to have been that the declaration was admissible, because the entry was against the interest of the accoucheur. (3) It is to be observed, that the rule which limits hearsay evidence in matters of pedigree to the declarations of relatives was not, at the time of the decision in question, established; nor was it brought before the notice of the court that such evidence had been rejected in the Irish case of *Annesly* v. *the Earl of Anglesea;* in which case, the question was, whether the plaintiff was Lord Altham's legitimate son, and it became material to inquire whether Lady Altham ever had a child. To prove this, the declaration of a midwife that she had delivered Lady Altham of a child, was offered in evidence, but was held inadmissible. (4) In the same case of *Annesley* v. *the Earl of Anglesea*, the declaration of a deceased lady, that she had stood godmother to the child of Lord Altham, was also after argument rejected. (5)

Of godmother.

Declaration of clergyman as to marriage, not admissible.

On a question of legitimacy depending upon the validity of a marriage, Lord Kenyon admitted evidence of a declaration by the clergyman, that a friend of the wife had forbidden the

(1) Higham *v.* Ridgway, 10 East, 109.

(2) By Le Blanc, J., 10 East, 120.

(3) *Vide infra*, where the subject of declarations against interest is considered; and see the principle of the decision in Higham *v.* Ridgway, stated by B. Bayley, in 1 Cr. & J. 458. Lord Lyndhurst, C. B., in 1 Cr. & J. 456, observes, that none of the Judges in Higham *v.* Ridgway put that case on the ground of pedigree. The case may also, perhaps, be supported, as an entry in the ordinary course of professional business, *vide infra*. The case of Higham *v.* Ridgway, is explained by Bayley, B. in Glendow *v.* Atkin, 1 Cr. & M. 428.

(4) 17 How. St. Tr. 1157.

(5) 17 How. St. Tr. 1160.

banns; but the evidence seems to have been received, on the ground of it's being a confession by the clergyman, that he had married the parties without the banns having been duly published. (1)

A clergyman's declaration as to the fact of marriage, when it was not against his interest, has been held inadmissible. This was in the case of the Berkeley peerage, where it being proposed to give in evidence declarations of a deceased clergyman, who was the domestic chaplain of the Earl of Berkeley when the claimant was born, that he had married the Earl of Berkeley and the claimant's mother in the parish church of which he (the clergyman) was vicar, and also his declaration that the claimant was legitimate, the opinion of the judges was taken on the admissibility of such evidence on the trial of an ejectment in the courts below, and all the judges present agreed that the evidence could not be admitted. (2)

Entry in Register.

Parish registers are not evidence of the *time* or *place* of birth. For as it is not the duty of the minister to register these matters, the register is not admissible, upon the principle (hereafter to be considered) of being a public document, and, as private hearsay upon a matter of pedigree, it does not purport to be derived from the statements of relations. (3)

(1) Standen *v.* Standen, 1 Peake, N. P. C. 34.

(2) Printed Minutes of Evidence, 1811, p. 655. Sir S. Romilly proposed to call Mrs. Tucker, to prove declarations made by the late Mr. Hupsman, first with respect to the legitimacy of the claimant; and secondly, as to his having performed the ceremony of a marriage between the late Earl and the Countess of Berkeley. Counsel having been heard on both sides, the following question was put to the judges: "Upon the trial of an ejectment, in which it became necessary to prove the legitimacy of A. B., the plaintiff offered to give in evidence declarations of a deceased clergyman, who was the domestic chaplain of A. B.'s reputed father at the time of A. B.'s birth, that he had married the reputed father and the mother of A. B. in the parish church of which such chaplain was vicar, and also declarations that A. B. was the legitimate son of his reputed father. According to the practice of the Courts below, would such declarations as to the legitimacy of A. B., or the fact of marriage be received in evidence?" The Lord Chief Baron delivered the unanimous opinion of the Judges present, that such declarations as to the legitimacy of A.B., or the fact of marriage, could not be received in evidence.

(3) It would be necessary to show, that the statement in the register by the minister was made by the direction of relatives; but, with

It appears then that in the cases, the authority of which has not been overruled, where the hearsay of strangers has been admitted, the declarations possessed some distinct ground of admissibility; and if the decision in *Johnson* v. *Lawson* is to be considered conclusive, it seems settled, that, on the footing of hearsay in questions of pedigree, the declarations of persons not relations are inadmissible, even though made respecting facts peculiarly within their knowledge, or under the most solemn circumstances. (1)

Reputation among strangers as to *relationship* generally.

It has been thought, that nothwithstanding the rule laid down for excluding declarations not made by relatives, the evidence of strangers as to general reputation is receivable in matters of pedigree; but that the evidence must be of a general nature, as, that A. was commonly reputed to be the son of B., or the father of C.; the same latitude not being allowed as in the case of family declarations. There does not appear, however, to be any sufficient reason or authority for excepting such evidence from the rule under consideration. It is frequently said, that general reputation and the common opinion of the world are admissible in ordinary cases, to prove the fact of parties being married. But the evidence, usually produced in such cases cannot be properly called *hearsay* evidence, as it consists of original evidence of facts or circumstances; such as evidence of the parties being received into society as man and wife, or of respectable families in the neighbourhood having

this proof, the evidence seems to be admissible. It is to be observed, the evidence of baptism, connected with other evidence, may raise a presumption as to the time of birth: See Withen *v.* Law, 3 St. Ca. 63. Rex *v.* Clapham, 4 C. & P. 29. Rex *v.* North Petherton, 5 B. & C. 508. It has been held, that a baptismal register, in which a party is described as the illegitimate son of his mother, is admissible evidence on the trial of an issue as to his illegitimacy: Cope *v.* Cope, 1 M. & Ro. 269; Morris *v.* Davies, 3 C. & P. 215, 427; which decisions seem not to be governed by the principle adopted in respect of an official statement in registers as to the *time* of birth. The statement as to the *time* of marriage is an official statement. Doe *v.* Barnes, 1 M. & Ro. 389. *Vide infra*, where the evidence of parish registers is more particularly considered.

(1) See Doe d. Sutton *v.* Ridgway, 4 Barn. & Ald. 53, cited *supra*. *Query* as the admissibility of an entry in the books of a public company (stating a person, T. C., to have been admitted to his freedom, as the *son of J. C., deceased*), as evidence, on a question of pedigree, to prove the relationship between T. C. and J. C.; though such an entry is said to have been received at *nisi prius*. Collins *v.* Maule, 6 Car. & P. 502.

visited them, or of the woman being churched after childbirth, &c.; all which circumstances show, that the parties acted or demeaned themselves as if they were married, and not as living in a state of concubinage: and thus the ground of a presumption is afforded, that the parties were actually married.(1) In the case of *Neal* d. *Duke of Atholl* v. *Wilding*, (2) the majority of the judges would not allow a special verdict to be given in evidence to prove a pedigree, on the ground that it was *res inter alios acta*, and because the same evidence might possibly be produceable before the second jury as before the first.

Special verdict.

It has been decided, that before the declaration of a relative can be admitted in evidence, his relationship with the family must be proved *aliunde*, that is, must be established by extrinsic proof, and not out of the declaration itself. Thus, in the Banbury peerage case, the Judges held, upon a question put to them by the House of Lords, that a bill in Chancery, purporting to be filed by the next friend of an infant styling himself the uncle of the infant, and depositions in the same cause made by persons styling themselves relatives, servants, and medical attendants of the family, were not evidence to show that the parties were in fact what they styled themselves, so as to let in the bill and depositions on the footing of declarations (supposing them to be in other respects admissible) in a case where the legitimacy of the infant was in question. (3) And in the late case of the Leigh peerage,

Relationship of declarant to be proved *aliunde*.

(1) *Vide infra*, the chapter on *Presumptive Evidence*. See the summing up of Abbot, C. J., in Beer *v.* Ward, report of trial on second issue, pp. 294, 295. See also the case of Mr. Twisleton claiming the barony of Say and Sele, where, in proof of the marriage of his father and mother, he relied on the fact of their having been visited by C. J. Willes, and several families of respectability. Mr. Serjeant Hill's collection, vol. 26, p. 169. Read *v.* Passer, 1 Esp. 213. Leader *v.* Barry, 1 Esp. 353. 1 Doug. 174. Hervey *v.* Hervey, 2 W. Bl. 877. Rex *v.* Bromley, 6 T. R. 330. Doe d. Fleming *v.* Fleming, 4 Bing. 266. 12 B. Moore, 500, S. C., where the proof of legitimacy depended on the fact of marriage, and where the father was alive. In Evans *v.* Morgan, 2 Cr. & J. 453, a witness stated, that he had heard that A. had married B., and it was held that this was sufficient *primâ facie* evidence of a marriage.

(2) 2 Str. 1151. Wright, J., *contra*. See Bull. N. P. 233.

(3) 2 Selwyn's N. P. 754. By Lord Eldon, in the Berkeley peerage case, 4 Campb. 419. The Banbury and Berkeley peerage cases upon this point were referred to by Mr. B. Bayley in Davies *v.* Morgan, 1 Cr. & J. 591, where it was held, that the character of the evidence must be established, before an entry is

where a witness proved that he had heard the declarant say he was a member of the family, the House of Lords ruled the evidence insufficient, holding that the relationship between the family and the party making the declaration must be first proved upon oath, and that a mere statement of the fact by the party himself was not evidence.(1) But where a person is connected with A. by evidence *dehors*, his declaration touching relationship between A. and B. is admissible, without connecting the declarant with B., otherwise the declaration would be manifestly superfluous, as only proving the very fact already established. (2)

Family acknowledgments presumed.

Where the instrument of pedigree depends for its effect on family acknowledgments,(3) it has been seen that it need not be traced to any particular member of the family. Thus it has been said, that a charter of pedigree hung up in a family mansion need not be proved by evidence *dehors* to have been prepared or written by any member of the family; but that this would be necessary in the case of a pedigree not hung up, though found in the repository of one of the family,—for want

read. In that case, however, the document did not describe the capacity of the person whose declaration was important. See Adamthwaite *v.* Synge, 1 Stark. C. 183, that the custody of records is not to be proved *ex visceribus judicii*. In Doe d. Futter *v.* Randall, Best, C. J., says, with reference to the facts of that case, "If there were no other evidence than the declarations of John to shew that James was a member of the family, they could not have been received; as that would be carrying the rule as to the admissibility of hearsay evidence further than has ever yet been done, and would allow a party to claim an alliance with a family by the bare assertion of it." In Monkton *v.* Attorney General, 2 Russ. & Mylne, 156, the Lord Chancellor says, that "in order to admit hearsay evidence in pedigree, you must by evidence *dehors* the declarations, connect the person making them with the family. See also by Bayley, J., Rex *v.* All Saints, 7 P. & C. 788.

(1) Printed Minutes of Evidence, 1829, p. 307. It would seem, however, that in proving ancient pedigree, the rule which the authorities in the text appear to establish, would be too exclusive, as the relationship of the declarant with the family is often a fact as old, and as difficult to prove, as the relationship itself which is the subject of the declaration. Upon other matters it is common to admit the declarations of copyholders, stewards, collectors, and persons in other capacities, upon the assumption that they stood in the situation in which, upon the face of particular instruments, they purport to stand. *Vide infra*, declarations respecting general rights; and Declarations against Interest.

(2) Monkton *v.* Attorney General, 2 Russ. & M. 157.

(3) *Supra*.

of that publicity which is requisite to establish it's character as an acknowledgment by the family. (1)

Hearsay not contemporaneous.

It is not necessary that the hearsay evidence, which is admitted upon questions of pedigree, should be contemporaneous with the facts to which the evidence relates. This would prevent the evidence from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence. And the rule, if it were so limited, would not answer the exigency for which it was established. (2)

Other rules of hearsay in cases of pedigree.

There are several other rules applicable to hearsay evidence in matters of pedigree, especially with reference to the point of *lis mota*. But as the like rules apply to the subject next to be considered, namely, that of hearsay statements upon matters of public or general rights, it will be convenient to postpone the consideration of them, that they may be illustrated by examples from both classes of cases. It will be sufficient to state here generally, that hearsay declarations upon matters of pedigree are not receivable, unless made *ante litem motam*; but that it is no objection to them, that the persons making them were in *pari jure* with those who tender them in evidence.

Section IV.

Exception to the Rule as to Hearsay in Matters of public or general Interest.

Another subject, on which statements are receivable upon the credit of deceased persons who have neither been sworn to the truth of those statements, nor been cross-examined respecting them, relates to certain matters of public or general interest, of which the origin is in many cases, from their very nature, antecedent to the time of what is called *legal memory*, and, in

(1) Monkton *v.* Attorney General, 2 Russ. & Mylne, 163.

(2) Monkton *v.* Attorney General, *ib.* where the example is put, that the declaration of a person as to the maiden name of his grandmother would be receivable.

Reasons for the exception.

the generality of instances, can be expected only to be found in times beyond the reach of living testimony. The same necessity, therefore, exists for resorting to hearsay evidence, as was pointed out in treating of matters of pedigree. With respect to pedigree, indeed, one reason for admitting hearsay evidence of family incidents is, that a knowledge of them is confined to very few persons,—which cannot be said of public rights. But, it is to be observed, however generally known the origin of matters of public interest may once have been, their usual antiquity and the undefined generality of their nature render it more difficult to discover any testimony relating to them which is not in the nature of hearsay, than where pedigree is the subject of inquiry.

It is proposed to follow the same course as was adopted in treating of matters of pedigree, and in the first place to illustrate by examples the nature of matters of public and general interest; secondly, to treat of the forms in which such hearsay evidence is usually presented; and lastly, of the qualifications with which it is received.

1. *Examples of Matters of public and general Interest.*

On questions respecting a manorial custom, (1) a parochial modus, (2) a boundary between parishes or manors, (3) a custom of a corporation to exclude foreigners from trading within a town, (4) a right claimed by a corporation to collect tolls on a public road, (5) respecting the jurisdiction of a Court, whether it be or be not a Court of record, (6) and the like—in which the public are concerned, as having a community of interest

(1) Denn *v.* Spray, 1 T. R. 466, custom of descent. Roe *v.* Parker, 5 T. R. 26, 31. It is there said, that tradition and received opinion are evidence of the *lex loci*. Doe d. Foster *v.* Jisson, 12 East, 62.

(2) Chapman *v.* Smith, 3 Gwill. 854. 2 Ves. Sen. 512, S. C. Harwood *v.* Sims, 1 Wightw. 112.

(3) Nicholls *v.* Parker, 14 East, 331, n. 1 Maule & Selw. 81. Steel *v.* Pricket, 2 Stark. C. 466. Plaxton *v.* Dare, 10 Barn. & Cress. 17. Coombs *v.* Coether, 1 Mo. & Mal. 398. Barnes *v.* Mawson, 1 Maule & Selw. 81, as to the boundary of *new land* within a manor.

(4) Davies *v.* Morgan, 1 Cromp. & Jerv. 593.

(5) Brett *v.* Beales, 1 Mo. & Mal. 416. City of London *v.* Clarke, Carth. 181. B. N. P. 233.

(6) Braine *v.* Dew, 2 Peake, N. P. C. 204. Rogers *v.* Wood, 2 Barn. & Adolph. 245.

from residing in the same neighbourhood, or being entitled to the same privileges, or being subject to the same liabilities—common reputation and the declarations of deceased persons, asserting or disclaiming the right at issue, are admissible in evidence. From the examples just mentioned it will be seen, that the term *public*, as applied to this subject, is not to be understood in it's literal sense; it has been defined to be synonymous with *general*, that is, what concerns a large number of persons. (1)

Reputation as to general rights.

A leading authority upon this subject is the case of *Weeks* v. *Sparke*, (2) which was an action for a trespass on the plaintiff's close, parcel of a common, &c.; the defendant justified for a prescriptive right of common at all times over the place, and the plaintiff in his replication prescribed to use the place for tillage, &c., qualifying the defendant's general right. To support this prescriptive right of tillage, the plaintiff offered evidence of reputation, which was received at the trial; and the Court of King's Bench were of opinion, that it had been properly received, on the ground that the right claimed by the plaintiff, although claimed by prescription, was yet an abridgment of the general right of common over the waste, and affected a large number of occupiers within the district. Mr. Justice Bayley, in delivering his judgment in this case, said, "I take it that where the term public right is used, it does not mean *public* in the literal sense, but is synonymous with *general*;

(1) By Bayley, J., 1 Maule & Selw. 690, and see Crease *v.* Barrett, 1 Cr., M. & R. 931.

(2) 1 Maule & Selw. 679. It has been questioned whether evidence of reputation be receivable upon a trial concerning the liability of an individual to repair a public bridge *ratione tenure*. Case of Kelham bridge, tried at Lincoln, Spr. Ass. A. D. 1832. There is a *dictum* of Mr. Justice Patteson in Rex *v.* Antrobus, 2 Ad. & Ellis, 794, against the admission of hearsay in such a case. In the case of the City of London *v.* Clarke, Carth. 181, evidence of verdicts was received in a matter affecting only the interests of the owners of west country barges. And see Chapman *v.* Cowlan, 13 East, 8, as to evidence of reputation upon a question of a prescriptive right affecting all the copyholders of a manor. The existence of a manor may be proved by reputation, as by a description in an old deed: Curzon *v.* Lomax, 5 Esp. 60. Steel *v.* Pricket, 2 Stark. C. 466. Evidence of reputation is admissible in the case of tolls: Brett *v.* Beales, 1 Mo. & M. 416, though the right is claimed by grant or prescription. Lord Kenyon appears to have alluded to cases of this description in Reed *v.* Jackson, 1 East, 356, where he speaks of "public prescription."

that is, what concerns a multitude of persons; now this is a general right, exercised by a variety of persons, though not a public right of common." And Mr. Justice Dampier observed, "It is not to be disputed, that in questions of public rights reputation is admissible; and the rule has been extended to other rights which cannot be strictly called public, such as manors, parishes, and a modus. A modus is, strictly speaking, a private right, but it has been considered as public, so far as regards the admissibility of this species of evidence, because it affects a large number of occupiers within a district. Here the right claimed goes to abridge the rights of all the persons concerned over a large district of common: and, therefore, I think evidence of reputation is admissible." (1)

District modus. In the case of *Rudd* v. *Wright*, (2) on a motion for a new trial of an issue from the Court of Exchequer, to try the validity of a modus which was claimed in respect of a district, (not being a legal division of the country, as a hundred, parish, vill, or hamlet,) Lord Lyndhurst was of opinion, that evidence of reputation in favour of the modus was properly received on the trial, upon the authority of the case of *Weeks* v. *Sparke*; (3) the district comprising a great number of farms, and extending over more than two thousand acres, and the questions involving and applying to a great number of persons.

Farm modus. Whether evidence of reputation be admissible upon a question of a farm modus, appears to be a point not perfectly settled.

(1) Hearsay evidence is also admissible upon matters of general history. This subject will be considered in Sect. I., upon *Public Documentary Evidence*, where books of history are noticed. Upon a custom in restraint of trade: Davies *v.* Morgan, 1 Tyrw. 457.

(2) Before Lord Lyndhurst in Equity Ex. 11 July, 1832. On the admission of hearsay evidence to prove moduses, see Robinson *v.* Williamson, 9 Pr. 136, and by Dampier, J., in Weeks *v.* Spark, *supra*, p. 239. Williamson *v.* Thompson, 9 Pr. 186, a township modus. Doninson *v.* Elsley, 1 M'Clel. & Y. 1, a modus for a district consisting of 274 acres. That there is no difference between a modus and any other prescription in lieu of tithes, see 4 Pr. 19, by Wood, B. In Chapman *v.* Smith, 2 Ves. Sen. 506, the Lord Chancellor considered that tradition respecting a modus, as applicable to the *marsh lands* of a parish, would be receivable. In White *v.* Lisle, 4 Madd. 214, in the case of a farm modus, the Vice Chancellor said, that reputation was admissible in cases of private right where a class or district of persons was concerned.

(3) *Supra*, p. 239.

It has been generally understood in the Exchequer, that the evidence is inadmissible. (1) In an ancient case, it was received; and also in some modern cases, where however the point was not much considered. (2)

Hearsay as to private prescriptive rights, whether admissible.

Upon the admissibility of hearsay evidence as proof of prescriptive rights strictly private, and not affecting any public or general interest, there has been considerable difference of opinion. The Court of King's Bench was equally divided upon the point in the case of *Morewood* v. *Wood*, (3) where the question related to a prescriptive right, annexed to a particular estate, of digging stones on a waste. And a book of authority lays it down broadly, that in questions of prescription it is allowable to give hearsay evidence to prove general reputation; and therefore that where the issue was on a right of way over the plaintiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was acknowledged. (4)

(1) By Lord Lyndhurst in Wright *v.* Rudd, *ubi supra.* But he stated that he was willing to hear the question argued. In Wells *v.* Jesus College, 7 C. & P. 284, reputation concerning a farm modus appears to have been rejected. It is to be observed, that an exemption from the liability to which the rest of the parish was subject, would be likely to create general observation and remark.

(2) Webb *v.* Potts, Noy, 44. In White *v.* Lisle, 4 Madd. 214, this case was said to stand alone, and to be too loose to be relied on. The Vice Chancellor added, that there was no necessity to resort to evidence of reputation in the case of a farm modus, because proof of a fixed payment for a long period was evidence of a modus. The same argument would, however, apply to parochial moduses, and other customary payments, where reputation is clearly admissible. In Donnison *v.* Elsley, 3 Eag. & Y., Tithe Cases, 1396, n., evidence of reputation in the case of a farm modus was read *de bene esse*, and similar evidence appears to have been received in Wooley *v.* Brownhill, 1 M'Clel. 317. In Bullen *v.* Mitchel, 4 Dow. P. C., which related to a farm modus, much documentary evidence was adduced, and was treated as evidence of reputation; but most of the documents were of a public nature. In Eagle on Tithes, vol. 2, p. 439, there is a learned argument to prove that evidence of reputation is admissible upon questions of farm moduses.

(3) 14 East, 327. Lord Kenyon, C. J., and Ashurst, J., against the evidence; Buller, J., and Grose, J., for it. It did not appear whether the prescriptive right claimed was in derogation of the rights of common in the copyholders; in which case it would seem that evidence of reputation was admissible. Weeks *v.* Sparke, 1 Maule & Selw. 679.

(4) Bull. N. P. 295, citing Skinner *v.* Lord Bellamont, Worcester, 1744. And see the opinions of Buller, J., and Grose, J., in Morewood *v.* Wood, 14 East, 330, n.; also Grose, J., 3 T. R. 709. In Price *v.* Littlewood, 3 Camp. 288,

But there are many great authorities on the other side.(1) It is to be observed, that the receiving of hearsay evidence is founded on a principle of necessity, in consequence of the antiquity frequently belonging to particular inquiries, and that, although a custom must necessarily be immemorial, it is assuming the question in dispute, to say that a private right of way, or common, and the like, is prescriptive and immemorial. Even supposing a private right to have necessarily originated,

Lord Ellenborough admitted proof of entries in a parish book, as evidence of the reputation of the parish respecting the private right of pew. But he also assigned as a reason for admitting the evidence, that the entries were made by churchwardens, upon a subject within the scope of their official authority. It may be observed, that the right in question affected the general rights of parishioners. In Davies *v.* Lewis, 2 Chitt. 538, hearsay evidence was admitted in a question of private right, as to the point whether a particular place was parcel of a sheep-walk. But that case was compromised and not much argued. In Weeks *v.* Sparke, 1 Maule & Selw. 690, there is an *obiter dictum* of Mr. Justice Bayley, that "in cases of prescription, which must have originated beyond the time of legal memory, and of which it is impossible to establish the claim by evidence of the grant, reputation seems to be admissible." In Barnes *v.* Mawson, 1 Maule & Selw. 77, evidence of reputation was received as to what was *new* land within a manor. In Rogers *v.* Allen, 1 Camp. 310, judgments were admitted in a case of prescriptive right. But the evidence was in the nature of acts of possession, and the like observations may apply to the evidence of court rolls, and the judgment and allowances in Eyre, in Biddulph *v.* Ather, 2 Wils. 23. In Williams *v.* Goodchild, Nov. 23, 1824, 2 Eagle on Tithes, p. 440, Leach, V. C., allowed as evidence in support of an exemption from tithes, claimed for a particular estate, a catalogue, and particulars of sale, and also a map. The Vice Chancellor said, that every fact which is to be carried beyond time of memory may be proved as matter of reputation, on account of the principle, that it is impossible to bring direct evidence as to such a fact; a proposition (it is conceived) much too large. In Anscombe *v.* Shore, 1 Taunt. 262, the right was prescriptive, but related to a matter of general interest to commoners.

(1) Lord Kenyon and Ashurst, J., in Morewood *v.* Wood, 14 East, 329, n. Lord Kenyon, C. J., in Reed *v.* Jackson, 1 East, 357. In Blackett *v.* Lowes, 2 Maule & Sel. 500, where evidence of reputation was tendered as to the right of the tenants of a particular copyhold estate to cut and sell wood, Lord Ellenborough said, that reputation was out of the question, *because the tenants' right could only arise by some grant or deed.* In Richards *v.* Bassett, 10 Barn. & Cress. 663, Littledale, J., said, that it was by no means clear that evidence of reputation was admissible in matters of prescriptive right. He thought it was not admissible to determine whether an individual had a right to the soil itself, or only a right of common over it. In Weeks *v.* Sparke, 1 Maule & Selw. 691, Dampier, J., intimates, that reputation would not be evidence of a private right of way over a particular field. In Reed *v.* Jackson, 1 East, 356, Lord Kenyon appears to confine the admissibility of evidence of reputation to cases of *public* prescription. In White *v.* Lisle, 4 Madd. 214, the Vice Chancellor said, that in late times evidence of reputation had not been tendered in cases of prescription as to individual rights, except as to rights of way.

if at all, before the reign of Richard 1, yet it may reasonably be expected, that in the instance of any private right, the case should be sufficiently established by modern use without recourse to evidence of reputation; whereas a greater latitude may be allowed in the instance of public rights, which it is not the interest of any individual in particular to guard from encroachment.

Hearsay not evidence as to private boundaries.

Where the title to a private right is not prescriptive, the principles, upon which evidence of reputation is admitted, seem more completely to fail; it cannot be said, in the generality of such cases, there is a necessity for resorting to hearsay testimony. The authorities confirm this opinion. Although evidence of reputation is received of the boundaries of parishes or manors, which are generally of remote antiquity, such evidence has been held to be inadmissible for the purpose of proving the boundary of a private estate. (1) The boundaries of private estates are as likely to have been of recent as of ancient date.

In the case of *Thomas* v. *Jenkins*, (2) an action of replevin, where the question was strictly as to the line of boundary between two adjoining estates, the court held that evidence of reputation had been properly admitted. But this was under peculiar circumstances, and in consequence of the course of inquiry allowed by the counsel on both sides. A witness for the defendant, after speaking to the way in which he used to keep cattle on one of the estates, said, that the boundary of the estate was the same as that of the *hamlet*. This was not

(1) Clothier *v.* Chapman, 14 East, 331, n. But in Davies *v.* Lewis, 2 Chitt. 538, such evidence was thought admissible upon a question of private boundary. In Donnison *v.* Elsley, 3 Eag. & Y. Tithe Cases, 1396, the evidence of a witness as to the boundaries, and parcels of an extent, whose information was derived from hearsay and from a map and plan, were rejected.

(2) 6 Ad. & Ell. 525. It was settled by admissions between the parties, that the only question, to be raised at the trial, should be, of which of two sheep-walks the land in dispute was parcel. But the counsel appear to have admitted, and the court to have assumed, that the boundaries of the farm and the hamlet were the same: so that in fact the issue was somewhat varied, and allowed a larger scope to the evidence.

objected to. He was then asked, whether he had heard from old persons, since deceased, what was the boundary of the hamlet. The question was objected to, as an attempt to prove the limits of a private estate by reputation: but the evidence was received. It seems to have been admitted by the counsel, and therefore assumed by the court as an established fact, that the boundaries of the farm and the hamlet were the same. The admission was unwarily made, and strongly pressed: but clearly, upon such an admission, the inference must necessarily be, that any legitimate mode of proving the boundary of the *hamlet* was allowable for proof of the boundary of the *farm*; and therefore that reputation, which is proper evidence of a *hamlet* boundary, must be admitted, in this case, as evidence also of the *farm* boundary. Patteson, J., said, "On this precise question" (meaning the *issue settled* between the parties) "evidence of reputation was clearly not admissible; but such proof is receivable to show the boundary of a *hamlet*; and that being so, I do not see how it could be excluded in the present case, when it was established that the boundaries of the *hamlet* and of the *farm* were the same."

Hearsay not evidence as to private title.

The objection to receiving hearsay testimony upon matters of private right applies with still greater force to those cases which are unsupported by any analogy to matters of public or general interest; as, where the fact sought to be proved is not matter of prescription or of boundary. Thus, in an ejectment, where the lessor of the plaintiff claimed the land as tenant in tail under a will, by which the testator gave his son an estate for life, and the defendant claimed as devisee of the son, the question was, whether the land in dispute was part of the entailed estate, or had been purchased by the son; evidence of reputation, that the land had belonged to Sir J. S., and had been purchased of him by the father, the first testator, was held to be clearly inadmissible. (1)

(1) Doe d. Didsbury *v.* Thomas, 14 East, 323. In this case the evidence may, perhaps, be thought objectionable also as relating merely to a particular fact. The same may be observed in the case of Outram *v.* Morewood, 5 T. R. 123. In Withnell *v.* Gartham, 1 Esp. 322, Lord Kenyon rejected traditionary evidence of usage in electing a schoolmaster, as it related to private right. In Blackett *v.* Lewes, 1 M. & S.

In *Rex* v. *Antrobus*, (1) on the trial of an information against a sheriff of a county, for not executing a convict sentenced to death, it was held, that a witness could not be asked, whether he had heard that it was the custom for the sheriff to be exempt from performing, or for another person to perform, the duty in that particular county, although it had been proved that such other officer had in fact always performed it within living memory. It was said, that this was not a matter of public interest, the public not being interested in the question, which officer was to perform the duty.

Not evidence as to presentation.

It has been said, that in the case of the *Bishop of Meath* v. *Lord Belfield*, (2) in a *quare impedit*, after the plaintiff had given in evidence an entry in the register of the diocese, of the institution of one K. (in which entry there was a blank, where the patron's name was usually inserted), parol evidence of the general reputation of the country was offered, that K. was in by the presentation of one, under whom Lord Belfield claimed; and that on a bill of exceptions the evidence was adjudged to be admissible, on the ground that a presentation may be by parol, and that what commences by parol may be transmitted to posterity by parol; and that this creates a general reputation. But Lord Kenyon, adverting to this case, in the case of *King* v. *Eriswell*, (3) said, he admitted that a presentation might be by parol, and might be proved by parol, that is, by a witness who was present and heard it; but he denied, that in such a case, common reputation could be given in evidence. "If it can," he added, "why might not such evidence decide titles to estates, at least before the Statute of Frauds, when no written instrument was required to make a good feoffment of the greatest landed property in the kingdom."

Hearsay as to particular facts.

It is laid down by many authorities, that hearsay evidence of *particular facts* is not admissible. (4) There seems to be

500, reputation of what must have arisen by private grant from a lord to his copyholders was rejected.

(1) 2 Ad. & Ellis, 794.

(2) Bull. N. P. 295, cited by Buller, J., in Rex v. Eriswell, 3 T. R. 719. S. C. reported 1 Wils. 215.

(3) 3 T. R. 723. Tellard v. Shebbeare, 2 Wils. 366.

(4) By Grose, J., 3 T. R. 709. By Lord Kenyon, C. J., 5 T. R. 123. By Wood, B., Moseley v.

no adequate necessity for admitting hearsay evidence to establish facts, which are not likely from their nature to be the subject of general remark, merely because they may conduce to the proof of matters upon which evidence of reputation is admissible, or merely because, in the particular instance, they are of considerable antiquity. It has been justly observed, that, in general, particular facts are not matters of notoriety, that they are easily misunderstood or misrepresented, and that they are commonly connected with other facts by which their effect ought to be explained and limited. However, some particular facts might perhaps not improperly be the subject of traditional evidence. In matters of *pedigree*, the hearsay evidence relates almost entirely to particular facts; (1) but the facts are of a nature to make a strong impression, and ordinarily incapable of proof by living testimony.

In matters of pedigree.

Hearsay as to payment of a certain sum as modus.

On a question of parochial modus, hearsay evidence that a particular person, since deceased, paid a certain sum in lieu of tithes, would not be admissible: but if the witness says, he has heard from old inhabitants, that so much per acre was always paid in lieu of tithes, or that it had always been the custom to make such payments, that will be good evidence, for it does not consist of hearsay of a particular fact, but comes within the general rule of evidence of reputation. (2)

But though hearsay of a custom to make particular payments is

Davies, 11 Pr. 162. Chatfield *v.* Fryer, 1 Price, 253. Garnons *v.* Bernard, 1 Anstr. 298. By Chief Justice Mansfield, in the Berkeley peerage case, 4 Campb. 415. By Lord Kenyon, Outram *v.* Morewood, 14 East, 330, n. Nichols *v.* Parker, 14 East, 331, n. Cooke *v.* Banks, 2 C. & P. 481. In several of the cases, where this general rule has been laid down, the particular fact in question had no connection with the exercise of any public right, or the performance of any public duty, and was not in itself an object of notoriety.

(1) By Mansfield, C. J., in the Berkeley case, 4 Camp. 416.

(2) Harwood *v.* Sims, 1 Wightw. 112. Macdonald, C. B., said, "The essence of reputation is, that if you prove a fact, as for instance, payment of a sum of money, it must be accompanied with this, that it was so paid in consequence of a reputation. If evidence is confined to the fact of payment, it is inadmissible, unless the tradition that came with it was a reputation that had always been the case." And see Wood, B., in Moseley *v.* Davies, 11 Pr. 162, that the evidence should always be general. And see Wells *v.* Jesus College, Oxford, 7 C. & P. 284, statement of an occupier as to the fact of payment of a modus.

evidence, hearsay that certain lands were formerly given to the vicar in lieu of tithes is not admissible; (1) this being evidence of a particular fact, and being confined to a particular occasion. Again, though reputation is good evidence of the boundaries of a town, it is not admissible to prove that houses once stood where now there are none. (2)

Upon a question whether a part of Lincoln's Inn was part of the parish of St. Andrew Holborn, an ancient book of antiquities, relating to the parish and collected by a churchwarden, was produced, and several entries were tendered in evidence concerning the repairs of pews, and the glazing of windows. But Lord Tenterden refused to receive this evidence, as it related only to particular facts. (3)

Where the question is, whether a road be public or private, the declaration of a deceased person as to a certain fact having been done (as, the planting of a tree) for the purpose of shewing the boundary of the road, is not admissible as evidence of reputation, or as a statement accompanying an act. (4) It might have been shewn, that a tree was planted on the spot, and that persons were accustomed to keep within the line pointed out by it; but a declaration, that it was planted with a particular motive and object, is not evidence. (5)

Perambulations, although they consist of particular acts

Perambulations.

(1) Chatfield *v.* Fryer, 1 Pr. 253. And see Leathes *v.* Newel, 4 Pr. 355, 8 Pr. 562; evidence of reputation of certain lands having been inclosed, in pursuance of an agreement, rejected. In Crease *v.* Barrett, 1 Cr., M. & R. 919, is another example of hearsay evidence of a particular fact being rejected.

(2) Ireland *v.* Powell, Peake's Ev. 14, cited 1 Pr. 256. The circumstance that the reputation related to particular facts was an objection to it's admissibility, in addition to the objection that the matter was not of public interest: as in Doe *v.* Thomas, 14 East, 323, where the reputation was, that the land had belonged to I. S. and was of A. B.

(3) Cooke *v.* Banks, 2 Carr. & P. 481. Lord Tenterden stated that evidence of particular facts was not receivable, unless the party charged himself; the question of the book being a public book or not does not appear to have been much considered. In Price *v.* Littlewood, 3 Camp. 289, similar entries appear to have been admitted; but the question related to a right of pew; and the nature of the book was assigned as one of the grounds of it's admission.

(4) The Queen *v.* Bliss, 7 Ad. & Ell. 550. Prosecution for obstructing a public highway.

(5) *Ibid.*

done (as the making of an ambit, digging turves, putting down posts, &c.), and though they give rise to much hearsay evidence, are, properly speaking, only the exercise of a right. It is, however, usual and perfectly consistent with principle, to admit what old persons since deceased, who accompanied the perambulations, were heard to say on such occasions. But there does not appear to be any authority for admitting hearsay of particular facts as conducive to the proof of boundary, even though it be delivered on the occasion of a perambulation. Lord Ellenborough observed, upon the subject of perambulations, that they are 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,—for that would amount to evidence of ownership,) but evidence of the ambit or survey of a particular place or parish, and of what the persons accompanying the survey have been heard to say, and seen to do, on such occasions. (1) And Le Blanc, J., observed, in the same case, that the evidence of perambulations might be considered in a certain degree as evidence of the exercise of a right; yet that it had been usual to go further, and admit the evidence of what old persons, since deceased, have been heard to say on those occasions. In a late case, (2) perambulations by a lord, of what he considered to be his manor, made in the absence of the party affected by them, were received, as shewing a claim of right and act of ownership, though slight in its effect;—a principle obviously distinct from that at present under consideration.

2. Of the Forms in which the Hearsay is usually presented.

In the next place, according to the course adopted in treating of pedigree, it is proposed to consider the different forms in which evidence of reputation, upon matters of public or general interest, is usually presented to the courts.

(1) In Weeks *v.* Sparke, 1 Maule & Selw. 687, 689. It is to be observed, that perambulations are actually attended by a great number of strangers, as well as by official persons commonly called the spadesmen. Perhaps in giving evidence of the declaration of perambulators, it would be presumed that they were made by persons conversant with the boundary in question: and the occasion of the declaration might be considered as giving them weight.

(2) Woolway *v.* Rowe, 1 A. & E. 118.

Old documents.

Reputation respecting public rights may be shewn by old deeds or other old documents, as well as by the oral declarations of deceased individuals. (1) Thus, where the question was, whether certain land was in the parish of A., or in that of B. where the land was tithe-free, ancient leases granted by the ancestors of the plaintiff's landlord, describing the land as being in the parish of B., were held admissible as evidence of reputation, notwithstanding that such ancestor had a direct interest in describing the land to be situated in that parish. (2)

Leases.

Composition deed.

In the case of the *Cambridge Tolls*, a composition deed between the corporation of Cambridge and the University, regulating the amount of payment of tolls, was received as evidence of reputation of the existence of the tolls. (3) So depositions in ancient suits have frequently been produced to prove reputation. (4)

Manorial documents.

A customary of a manor delivered down with the Court Rolls from steward to steward, and purporting to be *ex assensu omnium tenentium*, although not signed by any person, has been held to be good evidence to prove the course of descent within a manor. (5) So the presentment of a custom of a manor by the homage, entered on the rolls of the manor, is receivable. (6) In *Crease* v. *Barrett*, ancient answers of

(1) This subject will receive further illustration in that part of the work which treats of Public Documents.

(2) Plaxton *v.* Dare, 10 Barn. & Cress. 17. For other instances of similar evidence being received, See Arundell *v.* Lord Falmouth, 2 Maule & Selw. 443. Freeman *v.* Phillipps, 4 Maule & Selw. 486. Coombs *v.* Coethier, 1 Moo. & Mal. 398.

(3) Brett *v.* Beales, 1 Mo. & Mal. 416. It appeared that the deed had not been exactly followed in practice; but it was held that this objection did not apply to it's admissibility.

(4) Freeman *v.* Phillipps, 4 Maule & Selw. 493, and the cases of the Settle and Leeds Mills cited by Lord Ellenborough, *ib.* In Pollard *v.* Scott, Peake, C. 18, upon a question of highway, Lord Kenyon rejected the evidence of a copperplate map, purporting to have been taken by the churchwardens at the time. But there does not appear to be any valid objection to such evidence.

(5) Denn *v.* Spray, 1 T. R. 466. When the instrument containing evidence of reputation is found among the muniments of a manor, the reputation may perhaps be considered as deriving some additional force in the nature of an *admission*, in consequence of the privity of copyholders, and their access to the instrument in question.

(6) Roe *v.* Parker, 5 T. R. 26;

conventionary tenants of a manor, stating the rights of the lord of the manor, and made to interrogatories put to them by commissioners, but which interrogatories were lost, were received in evidence. (1)

A presentment in a manor court, setting forth the boundaries of a manor, has been adjudged to be admissible evidence of boundary; although a part of the document, but not connected with the subject of the particular boundary, appeared to have been cut off. (2) The same case decided, that where an ancient manor-book is offered in evidence, the custody must be proved by a sworn witness.

In an action by a copyholder against a freeholder of the manor for the disturbance of the plaintiff's right of common, by reason of the defendant purchasing the common, (the plaintiff setting up a restricted right), parchment writings produced on the part of the defendant from amongst the muniments of the manor, purporting to be signed by many persons copyholders, and stating an unlimited right of common in the commoners, (which had been found inconvenient, and they had therefore agreed to stock it in a restricted manner,) were held admissible as evidence of reputation respecting the general right at that period, and in disproof that the restricted right originated in prescription; there being no evidence that the plaintiff's tenement belonged to any of those who had signed the writings, so as to render them admissible against him on that ground. (3)

Maps. It would seem that maps, stating the boundaries of manors

and see *ib.* Lord Kenyon's remarks as to the credit due to such presentments. In Arundell *v.* Lord Falmouth, 2 Maule & Selw. 441, presentments by the homage were given in evidence. In Curzon *v.* Lomax, 5 Esp. 60, an old deed describing a place as a manor was given in evidence. In Barnes *v.* Mawson, 1 Maule & Selw. 79, leases of the lord of a manor, and entries of payments and conveyances on the Court Rolls, were received. As to leases, *vide* Clarkson *v.* Woodhouse, 5 T. R. 412, n. 3 Doug. 189. In Bullen *v.* Michel, 4 Dow. P. C. 297, leases are spoken of as evidence of reputation.

(1) 1 Cr., M. & R. 923. See Evans *v.* Taylor, 7 Ad. & Ell. 617.

(2) Evans *v.* Rees, 10 Ad. & Ell. 151, S. C. *infra*.

(3) Chapman *v.* Cowlan, 13 East, 8.

or parishes, would be receivable in evidence to prove such boundaries, provided it appeared that they had been made by persons having adequate knowledge. In the cases, however, where maps have been admitted in evidence, their admissibility has depended on the ground of their being public documents, or of their being in the nature of admissions. Where they relate merely to the boundaries of private property, there is no ground for receiving them, however ancient. (1)

Verdicts.

On questions of immemorial customary rights, and on questions of public or general interest, it seems to be settled that verdicts and decrees, in suits in which the same right was in litigation, are admissible in evidence, although the suits were between other parties.

In the case of *Reed* v. *Jackson*, (2) where, in an action of trespass, issue was joined on a plea of public right of way, the plaintiff was allowed to give in evidence a verdict found in his favour against a different defendant, upon an issue joined as to the existence of the same right of way.

Effect of verdict.

With respect to the *effect* of the evidence supplied by a verdict, Lord Kenyon observed, in this case, that perhaps it was not entitled to much weight, and certainly was not conclusive. It was held, in the same case, that the effect of the verdict, whatever it might be, could not be obviated by any evidence adduced to shew, that the finding of the jury had been indorsed by mistake on the *postea*, and that in fact no evidence

(1) In Pollard *v.* Smith, Peake, 18, such evidence appears to have been rejected upon a question of highway. With respect to private maps, see Doe *v.* Laken, 7 C. & P. 481, Sir J. Bridgeman *v.* Jennings, 1 Lord Raym. 734. Donaldson *v.* Elsley, 2 Eagle & Y. 1396, n. *Infra*, ch. on Admissions. In Alcock *v.* Cook, before Tindal, C. J., at Guildhall, maps of the duchy of Lancaster were received as public documents.

(2) 1 East, 356. Lawrence, J., is reported to have said, "Reputation would have been evidence of the right of way in question; *à fortiori* the finding of twelve men upon their oaths." Though this remark may be just with reference to the comparative weight and effect of these two kinds of proof, it does not explain the principle on which verdicts in such cases are admissible. As to the case of Reed *v.* Jackson, see the judgment of Lord Denman, in Evans *v.* Rees, 10 Ad. & Ell. 155.

had been offered at the former trial under the issue, the finding as to which was relied on.

In an earlier case, where the question discussed was concerning the right of the City of London to take certain tolls upon malt brought to London by west-country-barges, it was held, that verdicts against certain owners of barges were admissible in evidence against their owners who were neither parties nor privies to the former records. (1) The like evidence has been received upon a question respecting the right of electing churchwardens. (2) And the admissibility of verdicts, in cases where evidence of reputation is receivable, seems to be fully established by the authorities relating to the competency of witnesses to give evidence in proof of customs, from the establishment of which customs they might themselves derive a benefit.

Finding of juries under commissions.

In the late case of *Brisco* v. *Lomax*, (3) on a question as to the boundary between two manors (W. and O.), the finding of a jury under an ancient commission from the Duchy Court of Lancaster, for the purpose of determining the boundary between two manors (O. and J.), (4) on a petition of the owners of O. and J. representing that the boundary was uncertain, and that suits were likely to arise between them, was adjudged to be admissible evidence; although the verdict of the jury did not

(1) City of London *v.* Clerke, Carth. 181. In this case Lord Holt rested the admissibility of the verdicts, which were received in evidence, on the ground that as payment of the duties by strangers would have been admissible, so a recovery against a stranger ought to be received. B. N. P. 233, where it is said, that custom or toll is *lex loci*, and in such cases it is not material whether the verdicts be recent or ancient. For other cases see Cost *v.* Birkbeck, 1 Doug. 218, the case of Settle Mills, where a verdict and a *decree* were given in evidence. And the case of the Manchester Mills, 1 Doug. 221, n., where a *decree* was given in evidence. Duke of Somerset *v.* France, 1 Str. 659. In Clarkson *v.* Woodhouse, 5 T. R. 412, a decree seems to have been left to the jury upon a matter of reputation. In Travis *v.* Chaloner, 2 Eag. & Y. Tithe Cases, it was held that upon a question of modus, a verdict between the parson and another occupier was admissible evidence. In Biddulph *v.* Ather, 2 Wils. 23, on a question of prescriptive right to wreck, a judgment and allowances in Eyre were proved.

(2) Berry *v.* Banner, Peake, 157.

(3) 8 Ad. & Ell. 198.

(4) The three manors of W., O., and J. were so situated with reference to each other, that the ascertaining of the boundaries between O. and J. would throw light upon the boundaries between W. and O.

appear to have been followed up by a decree or judgment. "For on a question of manorial boundary between two owners reputation is admissible: and verdicts are evidence where reputation is admissible, between third parties. The necessity of a decree or judgment, to render the verdict admissible, exists only where it is sought to bind the parties conclusively by the finding; but here the verdict is not offered as conclusive evidence, but as evidence in the nature of reputation;" (1) or, as another learned Judge said, "The finding of the jury, in the former proceeding, is as good evidence as reputation." (2)

Decree.

On the trial of an issue, whether the Deputy Oyster Masters of the City of London have an immemorial customary right as claimed by them, a decree of the Court of Exchequer, relative to the matter in issue, has been held to be admissible in evidence upon the same footing as a verdict is admissible on a question of custom. (3) If the decree has a tendency to prove any fact material to the issue, it is admissible. The decree may be read on behalf of the party producing it, without the depositions; the bill and answer will show what were the issues to be tried in the former suit, and these, therefore, must be given in evidence together with the decree. (4)

Order by Duchy Court of L., (interlocutory).

In the case of *Pim* v. *Carroll and others*, (5) in an action for the infringement of a right of ferry, ancient proceedings in the Court of Chancery of the Duchy of Lancaster, containing orders made by the court in the matter of an information relating to the ferry, (the ultimate result of which proceedings did not appear,) were offered in evidence on the part of the plaintiff, and received at the trial; but the Court of Exchequer adjudged the order to be inadmissible, inasmuch as it was a mere interlocutory order, and did not involve any judgment upon the facts or on the rights of the parties.

Decree on question of jurisdiction.

Upon a question respecting the jurisdiction of the Court

(1) By Coleridge, J.

(2) By Littledale, J. The objection against the admission of the verdict, as being *post litem motam*, was satisfactorily answered.

(3) Laybourne *v.* Crisp, 4 Mees. & Wels. 320, 327.

(4) *Ibid.*

(5) 6 Mees. & Wels. 234, 266.

of Session of the county of Chester, an order and decree upon the subject by the Lord High Treasurer and certain other public functionaries of the kingdom (not forming any court known to the laws), was held inadmissible as evidence of reputation, because (as was said by Lord Tenterden) declarations are only evidence of reputation, when made by those who have a personal knowledge of the fact; whereas in the case in question, the persons acting as judges had no knowledge of the fact, except what was derived in the course of the proceeding. (1)

Reputation affirming or denying.

It has been held, that hearsay evidence negativing a public right is admissible no less than that which affirms it. Accordingly, upon an issue whether a certain place situate on the bank of a river was a public landing place, evidence was received of reputation that it was not a public landing place. (2) Mr. Justice Coleridge observed, that there could be no distinction between the evidence of reputation to establish a public right, and such as might be offered to show that the public have not that right. A rule for a new trial in this case was afterwards discharged.

3. Of the Qualifications, with which the Hearsay is received.

According to the same course which was followed in treating of pedigree, it is, in the next place, proposed to consider the qualifications, under which evidence of reputation is receiveable upon matters of public and general interest.

Caution necessary.

Upon this it may be useful to observe, that judges have differed in opinion, concerning the weight to be given to evidence of reputation. There are several judicial remarks of a very strong nature to be met with, which show, at least, that such evidence is open to much observation calculated to weaken its effect. Lord Ellenborough, in *Weeks* v. *Sparke*, (3) observes,

(1) Rogers *v.* Wood, 2 Barn. & Ad. 245.

(2) Drinkwater *v.* Porter, 7 C. & P. 181. And see Reed *v.* Jackson, *supra*.

(3) 1 Maule & Selw. 686. Baron Wood, in Robinson *v.* Williamson, 9 Pr. 136, expressly dissents from Lord Ellenborough's opinion; and says that upon questions of moduses

"Reputation is, in general, weak evidence; and when it is admitted, it is the duty of the judge to impress on 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." And Mr. J. Grose has observed, that this kind of evidence ought to be very cautiously admitted. (1) The force of these observations, as well as the value of the evidence itself, will vary according to the peculiar circumstances of each case.

Competent knowledge in declarant, necessary.

The first qualification to be noticed, with respect to receiving evidence of reputation upon matters of public and general interest, is the same as that which applies to the reception of hearsay evidence in matters of pedigree; *viz.* that the statements should have been made by persons likely to possess a competent knowledge of the facts to which their statements relate. It has been supposed that this qualification must necessarily be satisfied, where the matter is of public interest, because, as Lord Kenyon observes, "all mankind being interested therein, it is natural to suppose that they may be conversant with the subject, and that they should discourse together about it, having all the same means of information." (2) And Lord Ellenborough, in *Weeks* v. *Sparke*, states it as being the general understanding, upon which the decisions of the courts have proceeded, "that upon questions of public right all are interested, and must be presumed conversant with them." (3)

In the case of *Crease* v. *Barrett*, (4) the court observed, it was clear that hearsay evidence upon some subjects could not be received, unless with a qualification, that it came from persons who had a special interest to inquire; that in cases of pedigree the line was clearly defined; and that in

reputation was entitled to great weight; and Richards, C. B., in Moseley *v.* Davies, 11 Pr. 162, speaks of reputation as having great weight and effect.

(1) In Morewood *v.* Wood, 14 East, 330. Lord Ellenborough, in Weeks *v.* Sparke, 1 Maule & Selw. 686, professes himself at a loss to understand, why, even in matters of public right, reputation was ever deemed admissible evidence.

(2) By Lord Kenyon, in Morewood *v.* Wood, 14 East, 329, n. In the Berkeley peerage case, 4 Camp. 416, Chief Justice Mansfield says, "general rights are naturally talked of in the neighbourhood, and what is thus dropped in conversation upon such subjects may be presumed to be true."

(3) In Weeks *v.* Sparke, 1 Maule & Selw. 686.

(4) 1 Cr., M. & R. 927.

cases of rights or customs,—which are not, properly speaking, public, but of a general nature, and concern a multitude of persons, (as questions with respect to boundaries and customs of particular districts,)—though the rule is not so clearly laid down, it seems that hearsay evidence is not admissible, unless it is derived from persons conversant with the neighbourhood. The court further observed, that where the right is really public, (a claim of highway for instance, in which all the king's subjects are interested,) it seems difficult to say, that there ought to be any such limitation, and the court were not aware that there was any case in which it had been laid down, that such a limitation existed; that in a matter in which all were concerned, reputation from any one appeared to be receivable; but of course it would be almost worthless, unless it came from persons who were shown to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. And in that particular case, which related to a custom in which all the king's subjects had not an interest, but only such as chose to become adventurers in mines within a certain district, it was said that hearsay from persons wholly unconnected with the place in which the mines were found, would be of no value, and probably altogether inadmissible. But it was held that the hearsay of persons under whose estates the minerals lay, with respect to which the custom existed, was admissible; inasmuch as they were sufficiently connected with the subject, though not concerned in mining, nor receiving the dues of mines.

In *Rogers* v. *Wood* (1) before cited, we have seen that a document, purporting to be a decree of certain persons, (the Lord High Treasurer, Chancellor of the Exchequer, and Under Treasurer, Chief Baron, and Attorney and Solicitor General, who had no authority as a court,) was held to be inadmissible as evidence of reputation, on a question whether the city of Chester, before it was made a county of itself, formed a part of the county palatine; because those persons from their situations had no peculiar knowledge of the fact.

(1) 2 Bing. 86.

In *Weeks* v. *Sparke*, (1) Mr. J. Le Blanc lays stress upon the circumstance, that the evidence of reputation in that case proceeded from persons who had been conversant with the neighbourhood, where the waste lay to which their statements referred; and that no evidence was received, except from persons connected with the district then in question. However, actual inhabitancy in the place, of which the boundaries are in dispute, is unnecessary. In the case of *The Duke of Newcastle* v. *the Hundred of Broxtowe*, (2) justices of the peace, at the sessions of the county, within which the district was alleged to be, were considered, on account of the character and nature of their office, without proof of their being residents, to have sufficient connection with the subjects in dispute, to render the statements in their orders admissible evidence of reputation.

Competent knowledge in the declarant, necessary.

The probable want of competent knowledge in the person whose hearsay is admitted, is usually alleged as the ground for rejecting such evidence respecting matters of private interest. "How is it possible for strangers," said Lord Kenyon, "to know anything of what concerns only private titles?" (3) Even if the evidence were confined to statements of persons immediately interested in the private rights in question, it may be observed, that in cases of private right incorrect statements would be less likely to be checked and contradicted at the time, than where (as in matters of general interest) they are supposed to be addressed to persons conversant with the subject, who have an interest to inquire into it, with the means of investigation in their power. (4) In *Talbot* v. *Lewis*, (5) the answer

(1) 1 Maule & Selw. 688, 689.

(2) 4 B. & Ad. 273. The orders which contained a statement that Nottingham Castle was within the Hundred, were received as evidence of reputation, not as orders upon matters of which the magistrates had jurisdiction.

(3) By Lord Kenyon, in Morewood *v.* Wood, 14 East, 329, n. Lord Kenyon applies this observation also to private *customs*. Lord Ellenborough, in Weeks *v.* Sparke, 1 Maule & Selw. 686, observes, "It is said, 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."

(4) It will be seen, afterwards (p. 271), that no objection arises from the circumstance of the declarant being in *pari jure* with the person afterwards using the declaration.

(5) 1 Cr., M., & R. 497.

of tenants of a manor to a commission issued by the lord of the manor, in which answer it was stated that the lord was entitled to wreck, was rejected, on the ground that the right was a private right, of which the parties making the declarations possessed no peculiar means of knowledge.

Ancient proceedings.

Where proceedings in an ancient suit are produced as evidence of reputation upon matters of public or general interest, it may generally be presumed that the parties to the suit and the witnesses were actually in the respective capacities which they purport to have been, without proving this by evidence *dehors* the proceedings themselves. (1) Thus, in *Freeman* v. *Phillipps*, (2) an action by a copyholder against the lord of a manor, in which the defendant gave in evidence the proceedings in a suit in Equity in the time of King William 3, brought by a copyholder of the same manor against the then lord, it was held that no evidence *aliunde* was requisite to make the proceedings admissible. Mr. Justice Bayley says, "We must assume at this time of day that the bill was not a mere fabrication, but was really filed by such a copyholder against the lord, and that the trial was had, and the depositions made between such parties, as were really litigating their rights in the characters claimed and disclosed on the record." And with respect to the depositions, the same Judge observes, "These I do not look upon merely as the declarations of persons unconnected with the subject, but as the depositions of persons, made by them in the character of witnesses brought forward by the copyholder, whose interest it was to put foremost such witnesses as were best able to depose to the matter in dispute. Why am I to assume that the copyholder brought forward witnesses who were ignorant? I do not agree that it was necessary to prove the witnesses to have been copyholders, in order to let in their testimony. The plaintiff's witnesses in the last trial do not all appear to be

Position of parties presumed to be as stated.

(1) A stricter rule has been laid down in some pedigree cases, *vide supra*, sect. 1. Banbury and Berkeley peerage cases. The same point occurs in regard to declarations against interest, *infra*. Davies *v.* Morgan, 1 Cr. & J. 591. See Adamthwaite *v.* Synge, 1 St. C. 189.

(2) 4 Maule & Selw. 495.

copyholders, yet as they were present at the holding of Courts, and, therefore, knew what passed, they were competent to speak to that. So in the former suit, I cannot infer that they were incompetent to have a knowledge of the facts they deposed to; on the contrary, it is to be presumed they had a competent knowledge, being brought forward as witnesses by a copyholder." Lord Ellenborough, in the same case, observes, "Considering the depositions as made in a suit, which may now be said to be lost in remote antiquity, we should give this record but very little effect, if we did not attribute to it verity in many of the particular matters which it contains; such as that the parties litigant were clothed with the rights in which they profess to stand, and were agitating the claim put forward on the record."

Proof of modern exercise of right.

Another qualification, or cautionary rule, in receiving hearsay evidence in matter of public or general interest, has been supposed to be, at least where the nature of the case admits, that a foundation for it should be laid by proving acts of modern enjoyment. Mr. Justice Le Blanc, in speaking of the manner in which matters of this nature are to be proved, says, (1) "First, they are to be proved by acts of enjoyment within the period of living memory; and when that foundation is laid, then inasmuch as there cannot be any witnesses to speak to acts of enjoyment beyond the time of living memory, evidence is to be admitted from old persons of what they have heard other persons of the same neighbourhood, since deceased, say respecting the right." Again, "after a foundation is once laid for the right by proving acts of ownership the evidence of reputation becomes admissible." And Mr. Justice Buller observes, in *Morewood* v. *Wood*, (2) "Thus far I agree with Lord Kenyon and Mr. Justice Ashurst, that in no case ought evidence of reputation to be received, except a foundation be laid, by other evidence, of the right."

(1) In Weeks *v.* Sparke, 1 Maule & Selw. 688.

(2) 14 East, 330, n., and see Ratcliff *v.* Chapman, 4 Leon. 242, commented on in 5 T. R. 32. In White *v.* Lisle, 4 Madd. 214, the Vice Chancellor says, that evidence of reputation was only admitted in confirmation of actual enjoyment, and not against it.

But in the late case of *Crease* v. *Barrett* (1) in answer to an observation, that all evidence of reputation was inadmissible, unless confirmed by proof of facts, it was said that such proof was not an essential condition of its reception; but that it was only material as affected the value of the evidence when received.

Where the subject matter of the question does not, from its nature, admit of acts of enjoyment, as in a question of parochiality, proof of reputation, unaccompanied by evidence of acts done, is admissible. On a question respecting the custom of descent within a manor, it has been held, that reputation is admissible, without shewing any instances of it's having been put in use. (2) For were it otherwise, if no instances were to happen within the memory of man, and the old Court Rolls were to be lost, the custom itself would be entirely destroyed; (3) and in *Steele* v. *Prickett*, Lord Tenterden intimated an opinion, that the existence of a manor might be proved by reputation alone, without evidence of the exercise of any manorial rights. (4)

Rule with reference to the *lis mota*.

The next qualification, in receiving hearsay evidence of matters of public or general interest, is one which equally applies to hearsay evidence in matters of pedigree; the consideration of it has consequently been postponed, until it could be illustrated by examples drawn from both subjects. (5) This qualification is commonly expressed by saying that declarations, to be receivable, must have been made *ante litem motam*. The phrase is borrowed from the civil law, the commentators upon

(1) 1 Cr. M. & R. There was however sufficient proof of enjoyment given in the case.

(2) Beebee *v.* Parker, 5 T. R. 26, 31. Doe d. Foster *v.* Sisson, 12 East, 62. In this case, however, some particular instances of a more confined custom were proved; which Lord Ellenborough described as branching out of the same root.

(3) By Grose, J., 5 T. R. 32. For this reason a single instance is allowed to be evidence of a custom. Ros *v.* Jeffery, 2 Maule & Selw. 92. Doe *v.* Mason, 3 Wils. 63. In Godb. 55, it is said, that in the prescription of Gavelkind, it must be shewn that the land is partible and has been parted, but this is denied to be law, unless it be confined to such lands of this nature as lie out of the county of Kent. Robins. on Gavelkind.

(4) 2 Stark. C. 466. This was ruled by Lord Kenyon in Curzon *v.* Læmon, 5 Esp. 60.

(5) *Vide supra*, as to hearsay in questions of pedigree.

which had made the declarations in question the subject of learned remarks, long before they became a matter of attention to English lawyers.

Declarations *post litem motam* not evidence.

The first case, in which the precise time of making the declarations became the subject of particular inquiry and consideration, was the Berkeley peerage case.(1) This case came before the House of Lords, A.D. 1811; the only matter of controversy depended on the reality of the first marriage alleged to have taken place between the parents of the claimant. A question was, on that occasion, proposed to the Judges, in the following terms: (2) "Upon the trial of an ejectment respecting Black Acre between A. and B. (in which it was necessary for A. to prove that he was the legitimate son of J. S.) A., after proving by other evidence that J. S. was his reputed father, offered to give in evidence a deposition made by J. S. in a cause in Chancery, instituted by A. against C. D., in order to perpetuate testimony to the alleged fact (disputed by C. D.), that he was the legitimate son of J. S., in which character he claimed an estate in remainder in White Acre, which was also claimed in remainder by C. D.; B., the defendant, in the ejectment, did not claim Black Acre under either A. or C. D., the plaintiff and defendant in the Chancery suit. According to law, could the deposition of J. S. be received in evidence upon the trial of such ejectment against B., as evidence of declarations of J. S. the alleged father, in matters of pedigree?" The Judges who were present afterwards stated their opinions at length, and with only one dissentient voice, agreed in considering the deposition of J. S. to be inadmissible. Mr. Justice Lawrence delivered his opinion in the following terms: (3) "The declarations of members of the family, in matters of pedigree, are generally admitted, from the necessity of the case; but the admi-

Berkeley peerage case.

(1) 4 Camp. 491. The earlier cases on the subject were contradictory. But the question cannot be considered as having been maturely discussed before the Berkeley peerage case. The authorities prior to that case were Vin. Abr. T. b. 91. Haywood *v.* Firmin, Sitt. after Trin. Term, 1766, cited by Lawrence, J., in the Berkeley peerage case. Goodright *v.* Moss, Cowp. 594. Lord Camden had ruled for receiving the evidence: Chief Baron Reynolds and Mr. Justice Eyre for rejecting it. See Slaney *v.* Wade, 1 Myl. & Cr. 338, *supra*, as to copies *post litem motam* of an ancient monumental inscription.

(2) May 2, 1811, MS.

(3) 4 Campb. 409.

nistration of justice would be perverted, if such declarations could be admitted, which have not a presumption in their favour, that they are consistent with truth. Where the relater had no interest to serve, and there is no ground for supposing that his mind stood otherwise than even upon the subject (which may be fairly infered before any dispute upon it has arisen) we may reasonably suppose, that he neither stops short, nor goes beyond the limits of truth, in his spontaneous declarations respecting his relations and the state of his family. The receiving of these declarations, therefore, though made without the sanction of an oath, and without any opportunity of cross-examination, may not be attended with such mischief as the rejection of such evidence, which in matters of pedigree would often be the rejection of all the evidence that could be offered. But mischievous indeed would be the consequence of receiving an *ex parte* statement of a deceased witness, although upon oath, procured by the party who would take advantage of it, and delivered under that bias which may naturally operate on the mind in the course of a controversy upon the subject. Notwithstanding what is said in the case of *Stevens* v. *Moss*, I cannot think that Lord Mansfield would have held, that declarations in matters of pedigree, made after the controversy had arisen, ought to be submitted to the jury. They stand precisely on the same footing as declarations on questions of rights of way, rights of common, and other matters depending upon usage; and although I cannot call to mind the ruling of any particular Judge upon the subject, yet I know that according to my experience of the practice (an experience of nearly forty years), whenever a witness has admitted, that what he was going to state he had heard after the beginning of a controversy, his testimony has been uniformly rejected. If the danger of fabrication and falsehood be a reason for rejecting such evidence in the cases of prescription, that will equally apply in cases of pedigree, where the stake is generally of much greater value."

Then, after referring to the decided cases, the learned Judge added,—" The authorities being thus balanced, I think the point must be considered as without any decision, and we

must resort to principle and the uniform practice, which has obtained in questions of prescription. Hardships may arise in rejecting declarations made between the commencement of the suit and the time of the trial; but such hardships are not confined to the case of pedigree. In other cases, if witnesses die before the trial of the cause, the party who relied upon their testimony must sustain the loss. For avoiding uncertainty in judicial proceedings, general rules must be laid down and adhered to, without regard to our feelings or our wishes on particular occasions. Besides, the hardship may generally be avoided by a bill to perpetuate testimony. Although the exclusion of declarations made in the course of the controversy may prejudice some individuals, it is better to submit to this inconvenience than expose courts of justice to the frauds which would be practised upon them if a contrary rule were to prevail. That this is not an imaginary apprehension, will appear from what happened in the Douglas and Anglesea causes; in the first of which, fabricated letters were given in evidence; and in the second, false declarations. Notwithstanding the danger of incurring the penalties of the crime of perjury, there is scarce an assize or sittings in which witnesses are not produced, who swear in direct contradiction, the one to the other: and it may be feared, that persons, who have as little regard to truth, may be induced to make false declarations, when they run no risk of punishment in this world, as no use can be made of their evidence till after their death. We know that passion, prejudice, party, and even good-will, tempt many who preserve a fair character with the world, to deviate from the truth in the laxity of conversation. Can it be presumed that a man stands perfectly indifferent, upon an existing dispute respecting his kindred? His declartions *post litem motam*, —not merely after the commencement of the lawsuit, but *after the dispute has arisen*, for that is the primary meaning of the word *lis*,—are evidently more likely to mislead the jury, than to direct them to a right conclusion, and, therefore, ought not to be received in evidence. I am likewise of opinion, that no deposition can be received in evidence as a declaration, to prove a fact which it was the object of that deposition to establish. A deposition is the answer of the witness to such interrogatories

as it is thought expedient to put to him to establish certain facts which the plaintiff alleges, and on which the case depends. Consequently, a deposition is considered a partial representation of facts, as to all persons who have no opportunity of bringing out the whole truth by cross-examination; and on that account all admit, that, against a stranger, it cannot be received in evidence as a deposition. How then shall it be received as a declaration? In that case, the circumstance of it's being upon oath cannot be regarded. To consider it a declaration on oath would be to receive it as deposition. As a declaration, it is still subject to the same vice and infirmity, of being an answer to particular questions artfully put, with an interested view, by one party behind the back of another. All the objections, by which it is allowed that this document cannot be received as a declaration, apply, with at least equal strength, to receiving it as a deposition.

The summary of the doctrine is given by Lord Eldon in a pedigree case, where he says, that "the admissibility of traditionary evidence is founded upon the presumption, that the words given in evidence are the natural effusion of the party, upon an occasion when his mind stands even, without bias to exceed the truth or to fall short of it." (1)

Lis mota defined.

With respect to the particular meaning of the term *lis mota*, it has been seen that Mr. Justice Lawrence says, that "declarations *post litem motam*—not merely after the commencement of the lawsuit, but *after the dispute has arisen*, for that is the primary meaning of the word *lis*—ought not to be received in evidence." And in the case of *Monkton* v. *the Attorney General*, (2) also a case of pedigree, the Lord Chancellor says, "Shew me that the pedigree in question was prepared with a

(1) Whitelock *v.* Baker, 13 Ves. 511. In Freeman *v.* Phillips, Mr. Justice Bayley says, "where there is a *lis mota*, you cannot be sure, that in admitting the depositions of witnesses selected and brought forward on a particular side of the question, who embark to a certain degree with the feelings and prejudices belonging to that particular side, you are drawing evidence from perfectly unpolluted sources. The Lord Chancellor, in Monckton *v.* Atty. Gen., 2 Russ. & Myl. 161, says, that in the Berkeley peerage case Mr. Justice Lawrence adopts almost the very language of Lord Eldon in Whitelocke *v.* Baker.

(2) 2 Russ. & Myl. 161.

view of profiting the maker of it, or those in whom he is interested; bring it within the rule either of *Whitelocke* v. *Baker* or the Berkeley peerage case; prove that it was made *post litem motam*—not meaning thereby a suit actually pending, but a controversy existing—and that the person making or concocting the declaration took part in the controversy; shew me even that there was a contemplation of legal proceedings, with a view to which the pedigree was manufactured, and I shall then hold, that it comes within the rule which rejects evidence fabricated for a purpose by a man who has an interest of his own to serve. The question, then, always will be, was the evidence in the particular circumstances manufactured, or was it spontaneous and natural?"

Where a person died possessed of property, to recover which many years afterwards another person commenced a suit, and, in a year after the first person's death, a relation of the second person made a declaration, the effect of which was to prove that he was the heir and next of kin of the first person, it was held that the second person could not avail himself of such a declaration in evidence. It was argued, that if the existence of a controversy were essential to the exclusion of the evidence, a party might lie by and make no controversy, till he had got a sufficient body of such evidence. The evidence was rejected by Alderson, B., on the principle that the commencement of the controversy must be taken to be the arising of that state of facts on which the claim is founded without any thing more. (1)

Knowledge of *lis mota* by declarant.

Chief Justice Mansfield, in his judgment in the Berkeley peerage case, after giving the same definition of *lis mota*, saying, that the line of distinction was the *origin of the controversy* and not the *commencement* of the *suit*, expressed his opinion that all declarations are to be excluded after the controversy has originated, whether it was or was not *known to the witness*; he said, if an inquiry were to be instituted in each instance, whether the existence of the controversy was known

(1) Walker v. Beauchamp, 6 C. & P. 552.

at the time of the declartion, much time would be wasted and great confusion produced. (1)

In one case, (2) upon a question of *boundary* between two parishes and manors, declarations were admitted, although the boundary had been long in dispute between the respective parishes and manors, and intersecting perambulations had been made both before and after the declarations, there being no litigation actually pending at the time. The rule respecting *lis mota* does not, however, appear to have been then settled, and it may be doubted whether such evidence would now be admitted.

Award not evidence.

In a case at *nisi prius*, where the question was, whether the occupier of a particular farm was liable to the repair of a public road, and to prove the affirmative an award was produced, which had been made some years before, when the same question was the subject of dispute between a former occupier and the township where the lands were situated, the evidence was rejected as inadmissible. (3) "The very submission," observed

(1) 4 Campb. 417. By Alderson, B., in Walker *v.* Beauchamp, 6 C. & P. 560. Among the civilians the following distinction prevailed upon this subject. The general rule was, as with us, that hearsay *post litem motam* was inadmissible in questions of consanguinity, as well as of boundary; but if the witness proved that he heard the fact in a place very far distant from that *ubi res agitur*, even though *post litem motam*, his evidence was to be admitted. In *Mascardus de Probationibus* (which is in all likelihood the same book as that to which Chief Justice Mansfield refers, (4 Campb. 417,) as being a treatise of great learning, entitled *De Probationibus*,) in which the distinction between *ante litem motam* and *post litem motam* is taken, after a statement of the general rule, this exception and the reason for it are thus mentioned: "Istud autem quod diximus, debere testes deponere *ante litem motam*, sic est accipiendum ut verum sit, si ibidem, ubi res agitur, audierit: at si alibi, in loco qui longissime distaret, sic intellexerit, etiam *post litem motam*, testes de auditu admittuntur. Longinquitas enim loci in causâ est, ut omnis suspicio abesse videatur, quæ quidem suspicio adesse potest, quando testis de auditu post litem motam ibidem, ubi res agitur, deponit." *Mascardus Conclus.* 410, n. 5.

(2) Nicholls *v.* Parker, Exeter Summer Assizes, 1805, 14 East, 331, n. Le Blanc, J., in this case says, "that there was no dispute at the time respecting the right of the old persons making the declarations, at least no litigation pending; so that these persons could not be considered as having it in view to make evidence for themselves at the time." The principle was admitted; but doubts may be entertained as to it's having been properly applied.

(3) Rex *v.* Cotton, 3 Campb. 444. In the first trial of the Cambridge toll case, an award was rejected as evidence of the reputation of tolls;

Mr. Justice Dampier, "shews, that the question was then agitated between the township and the occupier;" and as the account, which deceased witnesses might have given to the arbitrator on that occasion, could not have been received, because the declarations were made *post litem motam*, so the opinion of the arbitrator formed upon such testimony could be entitled to no more credit.

The late decision in *Evans* v. *Rees* (1) has settled the question as to the evidence of awards in such cases. The Court of Queen's Bench there determined, on an issue respecting the boundary of a parish and county, that an award in a suit *inter alios*, in which the arbitrator set out the boundary as proved before him, and directed the verdict to be entered accordingly, is not admissible as evidence of such boundary. "The authority of an arbitrator," said Lord Denman, delivering the judgment of the court, "is entirely derived from the consent of the parties to the reference; his award has no force except by reason of that consent, and no instance can be proved in which strangers have been held in any way to be affected in their rights by an award, either as evidence of right or of reputation. The award is but the opinion of the arbitrator, formed, not upon his own knowledge, as declarations used by way of reputation commonly are, but upon the result of evidence laid before him, most probably in private, and formed also *post litem motam*, thus having none of the qualities upon which evidence of reputation rests. It may be said, that the verdict of a jury is equally defective in such qualities. Whether it be so or not, it is sufficient to say that the admissibility of a verdict as evidence of reputation is established by too many authorities to be now questioned, but that the principle of those authorities is not clear enough to embrace an award."

Presentment by homage.

In a case, where an ancient presentment of a homage was produced, according to which the jurors purporting on their

and also another award was rejected on the second trial. But a composition deed, reciting the award, was received: Brett *v.* Beales, 1 Mo. & M. 418. It has been seen, that verdicts are evidence in matters of reputation, notwithstanding they necessarily occur *post litem motam*.

(1) 10 Ad. & Ell. 151.

oaths to have considered and negatived the claim of a freeholder of the manor after hearing the evidence produced by him, the presentment was held to be inadmissible, on the ground, that it appeared upon it's face to have been made *post litem motam*. (1)

Ancient proceedings where the controversy different.

In the case of *Freeman* v. *Phillipps*, (2) an action was brought by a copyholder against the lord of a manor, in which the copyholder relied upon a custom, that the lord could not assess a fine on filling up lives in copyholds held for life, without the intervention of the homage. The lord gave in evidence the proceedings in an ancient suit brought by a copyholder against the then lord, in which the copyholder insisted on a particular custom relative to the filling up of lives, not being that which was in dispute in the latter suit, and throughout the former suit no mention was made of the approbation of the homage being necessary. The court held, that there was no good reason for not admitting the proceedings in evidence, on the ground of the objection that the litigation was not on the very same point; and that the proceedings were not evidence of any thing *affirmed* by the witnesses, but were material on account of what the witnesses *omitted* to affirm, that is to say, that where a dispute existed concerning the copyholder's right to renew on some terms, it was never made a term that the fine should be assessed by the homage.

Order of magistrates.

In the case of the *Duke of Newcastle* v. *The Hundred of Broxlowe*, (3) orders of magistrate at sessions were received as evidence of reputation whether Nottingham Castle was situated within the hundred; for although they were made upon controverted matters, there was no controversy upon that particular question.

Statement in contemplation of litigation.

In a late claim of peerage, a private pedigree compiled by the father of the claimant with a view to support a claim to certain estates, and laid before counsel for that purpose, was held inadmissible by the House of Lords, as

(1) Richards v. Bassett, 10 Barn. & Cress. 657.

(2) 4 Maule & Selw. 493.

(3) 4 B & Ad. 279.

not being a spontaneous effusion, but made for a particular object, and in contemplation of litigation. (1) The peerage in this case was claimed through the mother of the claimant, and not only were the controversies therefore different, but the father, who compiled the pedigree, never could have had an interest in the present claim. It also appeared, that when the claim was made to the estates, the descent was taken for granted on both sides; but their lordships held, that this made no difference in the cases, as it might be equally for the interest of each to admit a particular statement though contrary to truth. Peerage case.

The distinction between this case and that of *Freeman* v. *Phillipps*, seems to be that here, although the two claims were essentially different, yet the pedigree or subject-matter of the declaration was a matter litigated in both; whereas in the other case the customs, respecting which the declarations were made, were not only different in the different suits, but in the ancient suit the qualifications of the lord's right by the intervention of the homage appeared not to have been in dispute, but to have been tacitly negatived in the understanding of both plaintiff and defendant.

(1) Slane peerage case, printed minutes, 1830, part 2, p. 35, and part 3, p. 6. A private pedigree found among the papers of the claimant's family, was offered in evidence; but it appeared that it had been compiled by the father of the claimant, with a view to support a claim to certain estates. The counsel were informed that a pedigree, to be receivable, must be a spontaneous effusion; that if made for a particular object in contemplation of litigation, it was not receivable in evidence. It was stated, that the father of the claimant who made out the pedigree, could have had no interest in this question, as he never could have made this claim, because the claimant claimed through his mother, and that there had not then been any proceedings instituted of which they had any knowledge. The counsel were informed, that it appeared to their lordships that this could be received only *de bene esse*, the matter requiring further consideration that it must be made clear that the party was at the time perfectly independent as to any matter which might be decided by it. It afterwards, however, was proved that this pedigree was drawn up in order to lay claim to property, and had been laid before counsel; and it was stated that the descent was taken for granted on both sides; counsel were informed by their lordships, that where a person with the prospect of a contest for property sat down to compile such a paper, the paper had never been received; that the parties agreeing in the statement did not make any difference as it might be equally for the interest of each party to admit a particular fact, though contrary to truth; and that it appeared to their lordships, this paper could not be received as evidence.

Statement made for preventing disputes.

The rule before mentioned, that "the words given in evidence are to be the natural effusion of the party, upon an occasion where his mind stands even, without bias, to exceed the truth or to fall short of it" must be received with certain limitations. (1) In the first place, declarations will not be invalidated, though made for the express purpose of preventing disputes in a family. Thus, Lord Mansfield observes, "I have known advice given to a father and mother to make attested declarations in writing under their hand, of the precise time of the birth of the bastard *eigne* and the subsequent marriage, to prevent controversy in the family touching the inheritance." (2) And the judges, in their answer to the third query in the Berkeley peerage case, say that "an entry in a Bible or any other book, or any other piece of paper would be admissible, notwithstanding it was proved that such entry was made by a parent for the express purpose of establishing the legitimacy of his son, and the time of birth, in case the same should be called in question after his father's death." They add, that the *particularity* of the entry would be a strong circumstance of suspicion; but still it would be receivable, whatever the credit might be to which it was entitled. (3)

Upon this subject Lord Chancellor Brougham observes forcibly in *Monkton* v. *Attorney General*, (4) that Lord Mansfield's remarks in *Goodright* v. *Moss* sanction the doctrine, that the having a distinct object in view in making a declaration, by parol or in writing, even though the object can only be gained by afterwards using the declaration in evidence, is not sufficient to exclude the declaration. If the father or mother make a pedigree for the purpose of preventing disputes in the family, Lord Mansfield said *in effect* that he would admit that pedigree in evidence, even when those very disputes arise; because it was not made with a view to their own interest, but to preserve a *constat*, as it were, on record, of facts peculiarly within their

(1) 2 Russ. & Myl. 159.

(2) In Goodright *v.* Moss, 591. And see Monkton *v.* Att. Gen. 2 Russ. & Myl. 164.

(3) 4 Camp. 418.

(4) 2 Russ. & Myl. 164. In Slaney *v.* Wade, 1 Myl. & Cr., *supra*, copies of a mural inscription were held not objectionable on the ground that, because at the time they were made, the possibility of a controversy at some future period was contemplated.

knowledge (which is one of the main grounds of admitting such hearsay evidence), and that the observation—that it was made for the purpose of settling family disputes, and may not have been so spontaneous and natural as some of the *dicta* of the judges would seem to require,—shall only go to its weight and credit with the jury, and shall not preclude its admission by the court.

Declarations of persons *in pari jure.*

It is not a valid objection to this kind of evidence, that the party making the declaration may have stood, or thought he stood, *in pari jure* with the party tendering the declaration, and therefore might be under a bias. Although the party, if he had been living, might have stood in the very situation of the person who tenders his declaration in evidence, that circumstance is not sufficient to exclude it. (1) The reason of admitting the evidence in these cases appears to be, that since competent knowledge is required to make hearsay receivable in matters of tradition, and a probability also of the declarations having occurred naturally in the course of familiar intercourse, it would almost dry up such sources of information, to require further an absence of all bias on the subject of the declarations. It has been thought to be some safeguard, sufficient at least to warrant the admissibility of the evidence upon points where no better evidence can commonly be expected, that the declarant could derive no advantage from his own statements, and that there was at the time no exciting cause to induce him to depart from the truth. (2)

In pedigree cases.

Thus the declarations of a person entitled in remainder, stating the extinction of the issue of persons standing in the line of entail between her and the then possessor of the estate,

(1) By the Lord Chancellor, in Monkton *v.* Att. Gen., 2 Russ. & Myl. 159, 160.

(2) It is said by the court, in Harwood *v.* Sims, Wightw. 112, that the rejecting of evidence of persons *in pari jure*, would cut up entirely all evidence of reputation. And see the reasons of the Court of Exchequer in Moseley *v.* Davies, 11 Pr. 162, and of Graham, B., in 13 Pr. 236. From the circumstance that there was no interest in the matter, and no excitement of litigation, the testimony is likely to be less suspicious than that which is generally given on a trial. And where there is not an open examination, (as in the proceedings of courts of equity,) it seems entitled to nearly equal weight.

were held admissible for the plaintiff claiming through her. (1) And in a peerage case before the House of Lords, a widow was allowed to prove the declarations of her deceased husband, in support of her son's title; though the husband, if living, would have had the right which the declaration tended to establish. (2) But in the claim of Sir Cecil Bishopp to the barony of Zouch, some private papers, purporting to be the pedigree of Lord Zouch, which had been in the possession of a deceased lady, who was a branch of the family, were held inadmissible by the House of Lords, it appearing that this lady had conceived herself entitled to the peerage which the petitioner claimed. (3) It is probable, however, that the true ground of rejection was, that the pedigree was compiled in contemplation of a claim.

On questions of boundary, modus, &c.

On a question of parochial or manorial boundary, the declarations of old persons, deceased, are admissible, though they were parishioners, and claimed rights of common on the wastes which their declarations had a tendency to enlarge. (4) And on a question of parochial *modus*, it is allowable to give in evidence the declarations of deceased parishioners and occupiers of lands in the parish, who were liable to pay tithe. (5) For although the *testimony* of these persons, as witnesses, if they had been called, would have been inadmissible on the ground of interest, this objection does not apply to their *declarations*, since they are not used in evidence, till after they have become unavailable for the persons themselves. (6) In *Crease* v. *Barrett*, certain answers of conventionary tenants were objected to, as not being admissible against the freeholders of a manor, to whom it was said they had an adverse interest, and it was contended that all the cases in which the hearsay of copyholders had been received, related to questions between lord

(1) Doe d. Tilman *v.* Tarver, Ry. & Moo. 141.

(2) By Lord Tenterden, C. J., Ry. & Moo. 142. Of this case the Lord Chancellor observes, in Monkton *v.* Att. Gen., 2 Russ. & Myl. 160, "A stronger instance of similarity of situation can hardly be conceived, and this case certainly seems to go a great way."

(3) Zouch of Haryngworth peerage printed minutes, 1804, p. 207.

(4) Nicholls *v.* Parker, 14 East, 331, n.

(5) Harwood *v.* Sims, 1 Wightw. 112. Moseley *v.* Davies, 11 Pr. 162, 180. Deade *v.* Hancock, 13 Pr. 226.

(6) See what is said by Graham, B., in 13 Pr. 236.

and copyholder, or copyholder and copyholder. The answers, however, were held to be admissible evidence.

Declarations of deceased persons.

Lastly, it is a qualification to which evidence of reputation is subject, that it cannot be received so long as the declarant is alive. This is in conformity with the rule which requires the best evidence to be produced. The examination of this rule, in a subsequent chapter, will afford further illustrations of the present subject.

Section V.

Exceptions to the General Rule as to Hearsay, with reference to Ancient Possession.

Ancient documents, evidence of possession.

It has been seen, that hearsay evidence, in matters of private interest, not affecting any public or general interest, is inadmissible, especially where the matters do not involve any prescriptive right. But the admissibility of ancient documents, purporting to constitute a part of transactions themselves (as being acts of ownership, or an exercise of right), stands upon a different principle. Such documents are often the only attainable evidence of ancient acts of possession, which may be of great weight in the investigation of titles; and they naturally accompany and constitute a part of such acts.

Ancient documents, therefore, purporting to be a part of transactions, and not a mere narrative of them, are, under certain qualifications which will be noticed, receivable as evidence that those transactions really occurred. And, in this sense, the documents may be called hearsay evidence of ancient possession. Such evidence is very commonly adduced in practice to corroborate modern use or possession.

Old leases.

Thus, upon a question as to the right of a lord of a manor to hold certain land within the manor free from common, several counterparts of leases found among the muniments of the lord of the manor, from which it appeared that the land had been

demised by the lord free from common, were held to be receivable in evidence. (1) In an action of trespass, upon issue joined on a plea of justification by virtue of a prescriptive right of fishery appurtenant to a manor, old licenses on the court rolls, and leases granted by the lords of the manor, in consideration of certain rents, to fish in the *locus in quo*, were held to be receivable evidence. Mr. Justice Heath in this case observed, that he could not distinguish the licenses from old leases, which were always received in evidence, in favour of those claiming under the lessors. (2) And rent rolls, where payments have been made, are good evidence. (3)

Old licenses.

Rent-rolls.

Ancient documents, evidence of boundary.

It has been questioned, however, whether ancient leases are proper evidence against strangers, of the boundary of the property conveyed. In *Clarkson* v. *Woodhouse*, (4) Lord Kenyon said, that the case before him, in which it was determined that old leases were receivable to prove the fact of the lord of a manor granting certain land free from common, differed from the case of *Lord Pomfret* v. *Smith*, where Lord Pomfret offered a lease

(1) Clarkson *v.* Woodhouse, 5 T. R. 412, n. 3 Dougl. 189. The lord's right as affecting the copyholders would, it is conceived, have been proveable by reputation. Similar leases were treated as evidence of reputation in Barnes *v.* Mawson, 1 Maule & Selw. 78, *supra*. In Leathes *v.* Newit, 4 Pr. 355. 8 Pr. 562, numerous leases were read, in order to shew what tithes had been demised as belonging to the rector; and see as to the recitals in leases Fisher *v.* Graves, 3 Eag. & Y. Tithe Cases, 1180.

(2) Rogers *v.* Allen, 1 Campb. 309. In this case, though the claim was instituted by a lord of the manor, and the licenses were found on the court rolls, it does not appear that the right claimed affected any matter of general interest, or that the evidence derived any weight from being used against copyholders who might be bound by the contents of the rolls. In Biddulph *v.* Ather, 2 Wils. 23, the lord proved his prescriptive right to wreck partly by evidence of old court rolls.

(3) Woodnorth *v.* Lord Cobham, Bunb. 180. 1 Eag. & Y. Tithe Cases, 802. In Newburgh *v.* Newburgh, 12 Vin. Abr. T. b. 43, it was held, that old rent rolls were admissible evidence to prove fee farm rents; for as they were very ancient, it could not be supposed that they were made with a view to serve the present purpose. In 12 Vin. Abr. A. b. 66, it is said, a rental is but weak evidence, unless payment is also proved, and not sufficient *per se;* and by Comyns, B., 12 Vin. Abr. 90, pl. 14, rentals, without money received and paid upon them, are nothing. In Lancum *v.* Lovell, 6 C. & P. 141, an ancient counterpart of feoffment produced from corporation muniments was rejected, because no rent had been received in respect of the property.

(4) 5 T. R. 413, n. It has been seen, however, that parochial descriptions in leases are evidence upon questions of public right, where reputation is admissible, Plaxton *v.* Dare, 10 Barn. & Cress. 17.

by himself or his predecessor, describing the premises in dispute as lying within the limits of Lord Pomfret's estate, the question being on the boundaries. (1) But on reference to the report of that case, it would seem that no part of the lease, upon the admissibility of which the principal question arose, applied to the place in dispute, but only the words of an exception contained in it; and, therefore, it was contended that the lease, not containing a demise of the lands in question, was not evidence of an act of ownership, but only shewed that the lands were excepted by a description injurious to the right of a stranger, against whom that description was attempted to be used. It would seem that an ancient lease was, under the qualifications to be mentioned, evidence of an act of ownership over every parcel of property contained within the description of the lease; though, from the nature of documents of this description, the evidence which such a lease afforded as to boundary might be entitled to less weight than the evidence to be derived from it upon other points; as, for example, that the land was not subject to a right of common.

A map annexed to a deed seems to stand on the same footing as a description contained in the deed itself, and to be admissible in evidence, where it is part of the act by which property is to be conveyed. (2) Maps.

(1) The case of Lord Pomfret *v.* Smith, is reported in 6 Bro. P. C. 440. The only judgment there reported is an award of a trial at bar; the order, however, perhaps implied that their lordships were dissatisfied with the leases having been received upon a former trial. The lease adverted to in the text, was dated, A. D. 1748; and the trial took place in 1770. The description being contained in an exception only, proof of possession was out of the question. In Prescott *v.* Philips, briefly noticed in 2 Evans's Pothier, 292, the Court of King's Bench appears to have rejected evidence of the description of lands contained in an old deed. Sir D. Evans argued, apparently with reason, that the presumption ought to have been against the supposition of a fictitious description being inserted of a co-existing subject, which at the time would speak for itself.

(2) Gilb. Evid. 3d edit. 78, cites Yates *v.* Harris, Hil. Ass. 1702, where an old map of lands was allowed in evidence, which came along with the writings, and agreed with the boundaries in an ancient purchase. See also 1 Str. 95, n., last ed. 4 Nev. & M. 81. 1 Lord Raym. 734. The case as stated in Gilbert is involved in considerable obscurity. See Doe *v.* Lukin, 7 C. & P. 481. Wakeman *v.* West, 7 C. & P. 479.

But where a map or survey is not connected with any act of ownership, it appears to be inadmissible evidence to prove the parcels of an estate; at least so far as respects the principle of evidence under consideration. (1)

Proof of acting with respect to the documents.

Evidence of the description above mentioned can only be received subject to several qualifications. In the first place, some act done with reference to the documents is required to be shewn, if the nature of the case admits of it. In the case of *Clarkson* v. *Woodhouse*, (2) the trial of which took place A. D. 1793, three leases were produced, which were respectively of the dates A. D. 1670, 1702, 1730: as to the two oldest of them, the court ruled that their antiquity rendered it unnecessary to prove acts done, because it was not likely to be practicable to prove possession under them: the most recent lease was rejected at the trial. In *Rogers* v. *Allen*, (3) leases were produced, which bore date from the year 1661 downwards to the end of the seventeenth century, and the cause was tried A. D. 1808: Heath, J., ruled that it was not necessary to prove payment under the licenses, because, as they were of such an ancient date, it could not reasonably be supposed that evidence of such payments was still preserved.

Proof of possession.

There appears to be a material distinction between evidence of possession by lessees under leases, and evidence of payment of rent. This distinction is sometimes very important, where subsequent inquiries are made respecting the parcels of the lease. Thus, where leases of rectories include tithes claimed by the vicar, it seems to make an important difference, whether the lessee has enjoyed the tithes claimed by the vicar,

(1) *Anon.* 1 Str. 95. Bridgman *v.* Jennings, 1 Lord Raym. 734. B. N. P. 283. Pollard *v.* Scott, Peake, 18, by Lord Kenyon. See Wakeman *v.* West, 7 C. & P. 479. Doe *v.* Laken, 7 C. & P. 481. Doe *v.* Seaton, 1 N. & M. 81. Dennison *v.* Elsley, 2 Eag. & Y., Tithe Cases, 1396, n., evidence derived from a map rejected, 12 Vin. Abr. 90, pl. 12. Ancient survey-books of a manor, unless signed by the tenants, or unless they appear to be made at a court of survey, are only private memorials. Maps are sometimes admissible as public documentary evidence, or in the nature of admissions by parties who are privies to the makers, or upon the ground of their relating to matters of public interest.

(2) 3 Doug. 5 T. R. 413, n. *supra.*

(3) 1 Campb. 311.

or whether he has only paid rent generally on his lease. For it would be the interest of the lessee, as well as of the lessor, to have the parcels stated as amply as possible; and where the rights are often so intermingled as those of rector and vicar, the leases of the rectory may often, in general terms, include vicarial tithes, without any imputation of fraud, especially where common forms and precedents are often followed, as in leases of crown rectories. In tithe suits, however, ancient leases of rectories have frequently been admitted as evidence of the parcels, merely upon proof of rent being received, as appearing by the minister's accounts. (1)

Where unexceptionable evidence of possession, referrible to the document, may reasonably be expected to be found, it is required to be shewn. (2) And proof of acting with respect to the documents, which are produced as evidence of acts of ownership, is always scrupulously required, (even in cases where traditionary evidence is receivable,) if the document purport to have been made *post litem motam*. Thus, upon a question concerning the right of the corporation of Cambridge to receive toll, an award, whereby the freemen of Northampton were discharged of toll at Cambridge, in consideration of an annual payment by the corporation of Northampton to the corporation of Cambridge, was considered as inadmissibible in evidence, on

(1) Collins *v.* Gresley, by Park, J., Derby Sum. Ass. 1833. By Lyndhurst, C. B., on motion for a new trial.

(2) In Alcock *v.* Cook, tried before Tindal, C. J., at Guildhall, it was sought to prove a particular district parcel of a certain manor, and evidence was given from the rates of certain persons within that district having been fined and presented; but the Chief Justice rejected the evidence, because it was not proved by the steward's entry, that the fines had been paid. In Plaxton *v.* Dare, 10 Barn. & Cress. 19, where, in order to prove parochiality, certain rates were given in evidence, Lord Tenterden observed, "assuming that it was necessary to prove payment of the rates, there was evidence of such payment." In the case of private leases, evidence of the receipt of rent, shewn by the entries of the lessor, appears to have been excluded in the case of Outram *v.* Morewood, 5 T. R. 121. And it would seem, that entries of payments by a corporation in their own books, are equally excluded, (Marriage *v.* Lawrence, 3 B. & A. 142); as entries that certain persons had been fined, and had paid their fines. On the first trial of the Cambridge toll case, an ancient schedule, produced from among the muniments of the corporation of Cambridge, was held to be inadmissible, because it was not properly connected with the actual collection of the tolls. This defect was supplied upon the second trial. Brett *v.* Beales, 1 M. & M. 419.

the ground that payment of the composition had not been proved. (1)

Proof of modern possession.

But where it cannot be expected, that proof of acting with reference to the documents should be afforded, it is required that some acts in modern times with reference to similar documents, should be proved, or that modern possession or user should be corroborative of the ancient documents. In the case of *Clarkson* v. *Woodhouse* (2) before mentioned, other evidence of title was given besides the leases. And in *Rogers* v. *Allen*, above stated, (3) Health, J., observed, that to give any weight to the licenses produced in that case, it must be shown that, in later times, payments had been made under licenses of the same kind, or that the lords of the manor had exercised other acts of ownership over the fishery, which had been acquiesced in.

Custody of documents.

Another qualification, to which the admissibility of this species of evidence is subject, relates to the custody of the documents. This will be more properly considered in treating of the proof of written instruments. (4)

(1) Brett *v.* Beales, 1 M. & M. 418. On the production of the corporation books, it appeared that the treasurer of the corporation had not charged himself with the receipt of the money, bnt had only returned it in arrear. On a previous trial of the same case, an award was rejected, because it had not been acted on. 1 M. & M. p. 416.

(2) 5 T. R. 412, n.

(3) 1 Camp. 309; payment of rent under leases for the last forty years was proved in this case. As to the point that entries in ancient corporation books are not generally evidence against strangers: see Attorney General *v.* Corporation of Warwick, 4 Russ. 222. Lancum *v.* Lovell, 6 C. & P. 441. Marriage *v.* Lawrence, 3 B. & A. 142. Hill *v.* Manchester W. W. 5 B. & Ad. 875. As to the imputation of manufacturing evidence in their own favour, see R. *v.* Debenham, 2 B. & Ad. 186. Glynn *v.* Bank of England, 2 Ves. 43.

(4) *Post*, part 2. Clarkson *v.* Woodhouse, 5 T. R. 412, n. 3. Doug. 189.

Section VI.

Exceptions to the General Rule as to Hearsay, in the case of Dying Declarations.

The rule which excludes hearsay evidence has been relaxed, in certain cases, where the information has been given by a deceased person under the immediate apprehension of death. It seems formerly to have been considered, that such evidence was admissible on the ground that the circumstances, under which the information was imparted, were a guarantee of its truth, sufficient to make it safe for juries to derive their conclusions from such a source.

Dying declarations.

"Dying declarations," said Lord Chief Justice Eyre, "are made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, he observed, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." (1)

Seem not to be addmissible in *civil* cases.

It is obvious that this principle would apply, though perhaps with unequal force, whatever were the subject matter of the declaration; but according to later authorities, it is now established, that dying declarations are receivable only upon some particular subjects of inquiry. In a recent case in the Court of Exchequer, which has been before noticed, (2) and in which it was held that evidence could not be given of the declarations of a subscribing witness to a deed, tending to show

(1) In Woodcock's case, 1 Leach, 502. And the court in Drummond's case, 1 Leach, 337, said, "The principle on which this species of evidence is received is, that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon oath."

(2) Stobart *v.* Dryden, 1 M. & Wel. 615. *Vide supra*, p. 210.

that he had forged or fraudulently altered the deed, the authorities for admitting dying declarations were much considered. These authorities are two only in number, and although they had been spoken of by Judges occasionally with approbation, they do not appear to be supported by the deliberate judgment of any court. Upon a review of the circumstances and grounds of those decisions, as pointed out in the judgment of the Court of Exchequer, and with regard also to the manner in which their authority is impugned by that judgment, it may be considered at least very doubtful whether dying declarations would at the present day be receivable in any civil case.

Previously to this case, it had been the leaning of the courts in later times to pay regard to the subject matter of dying declarations, and to confine the admissibility of dying declarations to the narrowest principles, upon which the two authorities referred to could be rested. In one of these cases the declaration of a subscribing witness to a bond, who in his dying moments begged pardon of Heaven for having been concerned in forging the bond, was admitted by Mr. Justice Heath (1) as evidence of the forgery, on the authority of *Wright* on the demise of *Clymer* v. *Littler*, (2) where similar evidence of a dying confession by a subscribing witness to a will had been received by Chief Justice Willes, and afterwards approved of by the Court of King's Bench. But in an action of ejectment, it was determined that the dying declarations of a person as to the relationship between the lessor of the plaintiff and the person last seised of the premises in question, (the deceased not being a relation of the parties,) could not be received in evidence. (3) Mr. Justice Heath is said to have admitted the evidence in the first mentioned of the above cases, on the ground that "if the subscribing witness could have been produced on the trial to prove his handwriting to the bond, he might have been cross-examined as to the fact; so his declaration as to the fact might also be

Dying declarations by subscribing witnesses.

Doe v. *Ridgway.*

(1) Cited by Lord Ellenborough, in Aveson *v.* Lord Kinnaird, 6 East, 195.

(2) Wright d. Clymer *v.* Littler, 3 Burr. 1244. 1W. Black. 346, S.C. See 4 Barn. & Ald. 54. The state of mind of the deceased as to his hopes of recovery was not much inquired into; the declaration was made three weeks before his death.

(3) Doe d. Sutton *v.* Ridgway, 4 Barn. & Ald. 53.

proved in contradiction to a presumption of the due execution of the bond from the proof of his handwriting as a subscribing witness."(1)

Lord Mansfield, in the case of *Wright* v. *Littler* above cited, observed, that the fact came out of the defendants' own examination, to discredit their own evidence, arising from the proof of the deceased's handwriting, and that they made no objection to it at the trial: but that even though it had been upon the examination by the plaintiff (especially as the instrument was all written and witnessed by him, and it gave the premises in question to his wife), as the account was a confession of great iniquity, and as he could be under no temptation to say it, but to do justice and ease his conscience, the evidence was proper to be left to the jury. *Wright* v. *Littler.*

Abbott, C. J., in commenting upon these two decisions, observed, that the declarations amounted to a confession by the party himself of a very heinous offence which he had committed, and drew a distinction between it and the case before him, (*Rex* v. *Mead*) when the dying declaration of the prosecutor was for the purpose, not of accusing, but of clearing himself. (2) And Mr. Justice Bayley in commenting upon the same decisions, observed, " that the admissibility of the evidence in those cases seemed to be founded on the circumstance, that the deceased must have been called as a witness if he had been alive, and it would then have been competent to prove, by cross-examination, his declarations; and that the party ought not, by the death of the witness, to be deprived of obtaining the advantage of such evidence."(3)

(1) See 6 East, 195.

(2) 2 Barn. & Cress. 607. In a criminal case, where the declaration related to the declarant's own death, it has been received, though its tendency was to exculpate the deceased from a crime. Tinkler's case, 1 East's P. C. 356. Formerly the dying declaration of a pauper respecting his settlement (though a question involving law as well as fact) was held admissible by the King's Bench, but at that period general declarations as to this fact seem to have been allowed. Rex *v.* Bury, Cald. 486. Appotun *v.* Dunswell, 2 Bott. 80. The rule is now established that such declarations are inadmissible. Rex *v.* Ferry Frystone, 2 East, 54. Rex *v.* Chadderton, *ib.* 27. Rex *v.* Abergwilly, *ib.* 63.

(3) In Doe *v.* Ridgway, 1 Barn. & Ald. 55, and see by Bayley, B., in Chambers *v.* Bernasconi, 1 Cr. & J. 457.

Limitation of the rule in criminal cases.

Of late years, the courts have shown a disposition to restrict the admissibility of dying declarations even in criminal cases; and a principle appears to have been gradually established, which is apparently founded on the *necessity* of resorting to this species of evidence, where the injury inflicted on a party occasions his death; it being commonly found. that in such cases there is little other available evidence to be discovered.

R. v. Mead.

A rule has been accordingly laid down, that dying declarations are admissible only where the death of the person, who made the declaration, is the subject of the charge, and where the circumstances of the death are the subject of the dying declaration. (1) It may be observed that, independently of the solemnity of the occasion upon which the communication is made, the subject in such cases is one upon which the declarant has peculiar means of knowledge, and the declaration in many instances is similar in it's nature to those verbal statements which are admissible as original evidence. (2)

Where a prosecution was for administering drugs to a woman pregnant but not quick with child, with intent to procure abortion, her dying declarations were held admissible. (3) Here the criminal act occasioned death. In the cases next cited, it was otherwise: and the decision was different. In trials for robbery the dying declarations of the party robbed have been rejected. (4) And in an indictment for

(1) By Lord Tenterden, in Rex *v.* Mead, 2 Barn. &-Cress. 607. If a party accused himself by his dying declaration, that declaration would, perhaps, be evidence in criminal or even civil proceedings. See by Lord Tenterden, *ib.* Bayley, J., remarks, that in Tinkler's case, *infra*, p. 283, the dying declarations were those of the party who had received poison. 4 Barn. & Ald. 55.

(2) See R. *v.* Foster, 6 C. & P. 325.

(3) By Bayley, J., Rex *v.* Hutchinson, 2 Barn. & Cress. 608, n. (*a.*)

(4) By Bayley, J., on the Northern Spring Circuit, 1822. By Best, C. J., on the Midland Spring Circuit, 1822, and by Bolland, B., Rex *v.* Lloyd, 4 Carr. & Payne, 233. The rule, however, has only been settled of late years. In Drummond's case, 1 Leach, 378, the prisoner was charged with robbery, and it does not seem to have been thought that the declaration was inadmissible on this account, as it formed no part of the ground of rejection; the declaration, however, of the convict, went to accuse himself, *vide supra*, n. 1. In Scotland, on a charge of abduction, the dying declaration of the woman as to the offender, was admitted both on his trial and afterwards on that of his accomplice. Hume's Commentaries, vol. 2, p. 228, *et seq.* extracts from which are given in 16 Howell's St. Tr. 27, n.

perjury, it was held that the dying declarations of the prosecutor could not be used in showing cause against a motion for a new trial; nor could they have been received in evidence at the trial. (1)

Favourable to prisoner.

The dying declarations of the deceased person in favour of a prisoner charged with his death, seem to be as admissible for him, as they would be against him, if unfavourable. (2)

Declaration of attainted convict.

Upon the ground that dying declarations are said to be receivable, as being (from the circumstances under which they are delivered) equivalent to the evidence of a living witness upon oath, the dying declarations of an attainted convict have been rejected, as he could not have been admitted to give evidence, if he had been living. (3)

Declaration of accomplice.

As the evidence of an accomplice is admissible against a person indicted for the crime in which he has participated, the dying declarations of a woman *particeps criminis* in an act which occasioned her own death, were received in evidence, upon an indictment for murder against a person as principal, and also as accessary before the fact. (4)

Preliminary inquiry as to the state of the person.

The preliminary inquiry, before dying declarations can be received in evidence, is "whether the deceased appre-

(1) Rex *v.* Mead, 2 Barn. & Cress. 605.

(2) Rex *v.* Scaife, 1 M. & Ro. 551.

(3) Drummond's case, 1 Leach, 337.

(4) Tinkler's case, 1 East's P. C. 354. The death of the deceased was occasioned by instruments used for procuring abortion. There was a difference of opinion among the judges as to the point whether the declarations required confirmation; as to which *vide supra*, on Confirmation of Accomplices. Nares, J., at the trial, thought that the objection of the deceased being a *particeps criminis* did not hold as to the count, in which the prisoner was charged as principal, and expressed himself with some doubt as to its validity, as it related to the proof of the count, in which the prisoner was charged as accessary. The prisoner was convicted upon that count. But the judges overruled the objection as to the prisoner being *particeps criminis*, on the ground stated in the text. In fact, the question, whether the prisoner was principal or accessary, chiefly depended on the declarations, and the tendency of the declarations was to exculpate the deceased from any criminal participation. In the early state trials, it was very common to give in evidence the confessions of convicted traitors against a prisoner. See Foster's Crown Law, p. 234.

hended, that he was in such a state of mortality as would inevitably oblige him soon to answer before his Maker for the truth or falsehood of his assertions." (1) In arriving at a conclusion upon this inquiry as to the admissibility of the proposed evidence, it is not necessary that the deceased should have explained by any expressions, whether he thought himself likely to live or die. In *Woodcock's* case, it was deemed sufficient to give credit to the declarations, that the deceased had been mortally wounded, and was in a condition which rendered almost immediate death inevitable; and that she was thought by every person about her to be dying. It was considered a proper inference from such circumstances, that she must have felt the hand of death, and must have considered herself as a dying woman. (2) The same doctrine was held in *John's* case, (3) the court being of opinion, that if it might reasonably be inferred from the wound or state of illness of a dying person, that he was sensible of his danger, his declaration would be good evidence. And in *Rex* v. *Bonner*, (4) Patteson, J., said, that it is not necessary to prove expressions of apprehension of immediate danger.

Prospect of impending death.

Woodcock's case.

John's case.

Bonner's case.

Spilsbury's case.

In the case of *Rex* v. *Spilsbury and others*, (5) it was proposed to give in evidence the dying declaration of a deceased person, and it was proved that, about the time of making the declaration, the deceased was asked, if he thought he should recover, and how he was; to which he answered, that he thought he should not recover, as he was so very ill. He had

(1) By Eyre, Ch. B., in Woodcock's case, 1 Leach, 503. This inquiry seems not to have been very strictly pursued in the earlier criminal trials. See Lord Pembroke's case, 6 Howell, 1325. Lord Mohun's case, 12 Howell, 967. Bambridge's case, 14 Howell, 417. 12 Vin. Abr.

(2) *Ibid.* The deceased died in forty-eight hours after making a formal declaration to a magistrate; but she repeated the substance of it till the time of her death. The surgeons, from the first moment of their being called in, thought it impossible that she could live. She retained her senses till the last moment.

(3) 1 East's P. C. 357. In this case, however, the majority of the judges thought, there was no foundation for supposing, that the deceased considered herself in any danger. See also Dingler's case, 1 Leach, 504, n.

(4) 6 C. & P. 386.

(5) 7 C. & P. 187. See also R. v. Megson, 9 C. & P. 418, where the statement was rejected, the abandonment of all hope of recovery not being proved satisfactorily to the judge.

been previously insensible, but remained sensible for an hour, and died the next day. The evidence was rejected, on the ground that the judge did not feel fully convinced, that the deceased had no hope of recovering. The learned judge observed, that people very often use expressions, to the effect that they shall not recover, who have no conviction that their death is near approaching; and that if the deceased had felt that his end was drawing very near, he should have expected him to say something of his affairs or of those who were to have his property, or to give some directions as to his funeral, or that he would have used some other expressions, shewing a feeling or conviction that his death was at hand. This decision must, it is conceived, be considered only with reference to the peculiar circumstances of the individual case; but it may properly be regarded as an authority to this extent, that in general the conduct and demeanor of the deceased, and not merely what he says respecting his condition, may be considered for the purpose of determining whether it is proper to receive his declarations.

Interval before death.

With respect to the interval of time, which may have elapsed between the uttering of dying declarations and the moment of death, there appears to be no rule founded on this circumstance alone: nor is it consistent with the principle, upon which dying declarations are received in evidence, (which, as we have seen, depends upon the state of the declarant's mind,) that such declarations should be excluded, if not made within any precise limits of time. It ought, however, to appear that the deceased believed his dissolution to be impending. And unquestionably the length of time may be a material consideration, in forming an inference as to the state of mind of the deceased with respect to his expectation of death at the time of making a declaration, especially if the deceased has not expressed his sense of his own situation.

Woodcock's case.

In *Woodcock's* case, (1) Chief Baron Eyre lays stress on the circumstance, that the deceased was in a situation which ren-

(1) Woodcock's case, 1 Leach, 502.

dered almost immediate death inevitable. And in *Rex* v. *Van Butchell*, (1) Hullock, B., rejected a declaration made on the 10th of May, the deceased having died on the 17th of May, and having stated, before making the declaration in question, that he felt satisfied he should never recover. Baron Hullock is reported to have said, that "the principle, on which declarations *in articulo mortis* are admitted in evidence, is, that they are under an impression of almost immediate dissolution. A man may receive an injury, from which he may think he shall *ultimately* never recover, but still that would not be sufficient to dispense with an oath." (2) But in *Rex* v. *Bonner*, (3) dying declarations of a person were received, which were made on a particular day, when the deceased thought he might have died, and it was said, that the circumstance of his having lived three days longer did not alter the state of things on the day when the statement was made.

Van Butchell's case.

Bonner's case.

Expressions of deceased.

Upon an inquiry as to the admissibility of a dying declaration, it is necessary to hear all that the deceased has said relative to his situation, in order to ascertain whether he had that impression upon his mind, which will make his declarations admissible in evidence. (4) In *Rex* v. *Crockett*, (5) notwithstanding a surgeon told the deceased that there was no chance of her recovery, yet as she said, that she hoped the sur-

Crockett's case.

(1) 3 Car. & P. 631. The expression "almost immediate," is used by Bosanquet, J., in Rex *v.* Crockett, 4 Car. & P. 544.

(2) In this case the surgeon, at the time when the deceased expressed his belief that he should never recover, did not himself think that there was danger of death, and endeavoured to encourage the deceased. In Woodcock's case, 1 Leach, 503, the deceased died in forty-eight hours after making before the magistrate the declaration which was received in evidence. In Clymer *v.* Littler, 3 Burr. 1247, the declaration was in the last illness of the deceased, but three weeks before his death. In Tinckler's case, 1 Leach, 354, some of the declarations were made on the 12th of July, and the deceased lingered till the 23d, and at one time during this period the deceased thought herself better. In Mosley's case, Moody's Cr. C. 97, declarations were received in evidence, which had been made eleven days before the death of the deceased.

(3) 6 C. & P. 386.

(4) By Hullock, B., 3 Car. & P. 631. And see the expressions used in Tinkler's case, 1 East's P. C. 354. And Rex *v.* Mosley, 1 R. & M. C. C. 97.

(5) 4 Carr. & P. 544. The circumstance of a deceased having sent for more medicine after making a declaration, may be considered material, with reference to the inquiry concerning his hopes and apprehensions.

geon would do what he could for her for the sake of her family, the judge rejected the declarations of the deceased, saying, that her expressions showed a degree of hope in her mind. In *Rex* v. *Fagent*, (1) it appeared that the deceased had expressed an opinion that she should not recover, and after that she made a declaration, but subsequently on the same day, she asked her nephew if he thought she would "rise again." It was considered that the declaration was not receivable, because the subsequent question showed, that she entertained hopes of recovery.

Fagent's case.

Representations made to the deceased are often of importance, in inquiring as to the opinions he entertained of his own danger. Upon the trial of Henry Welborn for the murder of Elizabeth Page, by inducing her to take poison, the declaration of the deceased was made to an apothecary within an hour of her death, in consequence of the apothecary telling her, that he must know what she had done, and that she would not live twenty-four hours, unless proper relief was afforded. The majority of the judges were of opinion that the declaration was inadmissible, because the deceased was given to understand, that if she told what was the matter with her, she might have relief and recover. (2) So in the case of *Rex* v. *Christie*, where the deceased asked his surgeon, if the wound was necessarily mortal, and was told in answer, that persons had recovered under like circumstances, but that the case was one of extreme danger: a statement made immediately after this conversation was rejected by Chief Justice Abbott and Parke, J., on the ground, that the language of the surgeon was calculated to keep up in the mind of the deceased some expectation of recovery. (3)

Representations to deceased.

Welborn's case.

Christie's case.

In the case of *Rex* v. *Mosley and another*, the deceased received the injury of which he died, on the evening of the

Mosley's case.

(1) 7 C. & P. 238.

(2) 1 East's P. C. 358. The judges thought the apothecary's examination of no importance, wherein he stated that at the time the declaration was made, he believed that the deceased thought she was getting well, from being so free from pain in consequence of mortification; this being, it was said, "mere opinion, unwarranted by fact."

(3) See a brief report of this point in 2 Russel on Crimes, p. 685.

30th of September, and died on the evening of the 10th of October following. On the first evening, and every day until his death, he complained to the nurse who attended him, that he should never get better. But during his illness he never expressed any opinion either of hope or apprehension to his surgeon. The surgeon informed him, that his case was hopeless, for the first time, on the morning of the 10th of October. The surgeon did not himself consider the case quite hopeless till that day, and had always previously told the deceased, that there was danger, but that there were hopes of his being better. The judges were unanimously of opinion, that the declarations of the deceased made by him after he was brought home the first evening, after he had said that he should not get better, and also at different times during his illness, and previous to the surgeon's communications to him of his hopeless state, were properly received in evidence.(1) "It may be observed, this case is distinguishable from the two preceding, on the ground that there was positive evidence that the conviction of the deceased, as to his own impending death, had not been altered by the representations of the surgeon."

Hayward's case.

In the case of *Rex* v. *Hayward*,(2) after a surgeon had examined the wound of the deceased, the deceased inquired whether he was in danger; to which the surgeon answered, that he was, and that the only chance of his living was keeping himself quiet; upon which it was contended, that the declarations made by the deceased, were not made at a time when every hope in this world was gone, and when the party was aware, that he must inevitably answer soon for the truth or falsehood of his statements; but that, upon the surgeon's statement, he must be taken to have had some hope of recovery. On this the Lord Chief Justice observed, that any hope of recovery, however slight, existing in the mind of the deceased at

(1) Mosley's case, Moody's C. C. 27, *vide ib.* the particulars of the examinations which run to a considerable length. See Rex v. Crockett, *supra*, p. 286, where the deceased appeared to have entertained hopes, notwithstanding the surgeon's representations. The surgeon's own opinion does not appear of much consequence in such cases. *Vide supra*, Welborne's case, p. 287.

(2) 6 C. & P. 160.

the time of making the declarations, would undoubtedly render the proof of such declarations inadmissible. But upon the further examination of the surgeon, it appeared that before the declarations were made on the following evening, the deceased knew that he must die, and that the magistrate, previously to the receiving of his declarations, desired him, as a dying man, to tell the truth; and that the deceased replied, he would. Upon this further evidence the declarations of the deceased were held to be admissible, and were laid before the jury.

Belief of future state, implied.

Although it appear that the deceased contemplated the prospect of inevitable and almost immediate death, yet if it also appear that he had not an idea of a future state, his declarations will be inadmissible; for a principal ground of the admissibility of such evidence is the supposed deep impression of having shortly to render up an account to his Maker. (1) Accordingly the dying declaration of a child, aged four years, was rejected, because it was considered that however precocious her mind, she could not possibly have any idea of a future state. (2) Upon the same principle, it would seem to be allowable to show, that the deceased was not of a character likely to be impressed by a religious sense of approaching death.

Pike's case.

If a child is too young to be capable of feeling the religious obligation of an oath, the dying declaration will be rejected, as in *Pike's* case, just mentioned. But when the statement is made by a child of intelligent mind, impressed with the nature of an oath, and expecting to die, the statement may be received. (3)

Perkin's case.

Manner of making declarations.

With regard to the manner, in which a dying declaration may become the subject of legal evidence, it may be observed that in *Woodcock's* case, (4) an examination taken on oath by a magistrate, and signed by the deceased and by the magistrate, was received in evidence as of the same effect, in point of admissibility, with her declarations not made with the same solemnity.

Woodcock's case.

(1) By Park, J., in Rex *v.* Pike, 3 Carr. & P. 598.

(2) Rex *v.* Pike, 3 Carr. & P. 598, by Park, J., and Parke, J.

(3) R. *v.* Perkins, 2 Mood. C. C. 135: the child was ten years old.

(4) 1 Leach, 500.

It is no objection in point of law to a dying declaration, that it was made in answer to questions. (1)

Declarations reduced to writing.

Dying declarations have been admitted in evidence, although it appeared that the deceased made a subsequent statement which had been taken in writing before a magistrate, but which written examination was not ready to be produced at the trial. This point was much discussed on the trial of *Reason* and *Tranter*, under the following circumstances. (2)

Reason and *Tranter's* case.

The deceased stated the particulars of the injury which occasioned his death, at three several times in the course of the same day, with an interval of about an hour between each; the first and last account had not been written; the second was reduced into writing in the presence of a magistrate by the same person, to whom the former account had been given; this written statement was retained by the magistrate, but as he had removed to a distant part of the country, and it was not known to what place, the original was not produced, and an examined copy was rejected. An argument then ensued with respect to the admissibility of the first and third statements of the deceased. The Chief Justice, Sir John Pratt, was of opinion, that evidence of the first and third statements ought not to be received, considering all of them as statements to the same effect, and forming one entire narration, of which the written examination was the best proof. But the other judges, (3) were of a different opinion; they held, that the three accounts given by the deceased were distinct facts, and that there was no reason to exclude the evidence as to the first

(1) Rex *v.* Fagent, 7 C. & P. 238. It appears from the case of Rex *v.* Woodcock, that the declaration may be admissible, though obtained by pressing and by questions. The same appears from Rex *v.* Reason and Tranter, 1 Str. 499. But such solicitations must naturally weaken the effect of the evidence.

(2) 6 St. Tr. 202, 205, S. C. 16 Howell, St. Tr. 31. 1 Stra. 499, S. C.

(3) 1 Stra. 500. The reporter was one of the counsel for the prosecution. From the report in the state trials it would appear, that the Chief Justice and Mr. Justice Fowis were against receiving the evidence, and Mr. Justice Eyre and Mr. Justice Fortescue for receiving it. The evidence, however, according to that report, was at last received. At the time of this trial it does not appear to have been settled that an examination by justices of the peace in the absence of the prisoner was extra-judicial, see Woodcock's case, 1 Leach, 502. As a consequence of the examination being extra-judicial, it would follow that it would not be admissible itself in evidence, at least unless it were signed by the deceased.

and third declarations, because the prosecutor was disabled from giving an account of the second. The witness was therefore directed to repeat his evidence, leaving the examination before the justices out of the case; and the first as well as the third statement was admitted.

Declaration signed by deceased.

When the declaration has been taken down in writing and signed by the deceased; it has been held, that neither a copy of the writing nor parol evidence of it can be received. (1)

Declaration only as to facts.

The statement made by the deceased must be such as would be receivable, if he were alive and could be examined as a witness; any declaration therefore upon matters of opinion, as distinguished from facts, would not be receivable. (2)

Admissibility of declarations, a question of law.

It has been laid down, that when a declaration has been made by a party *in articulo mortis*, the question, whether, under all the circumstances of the case, the declaration is admissible in evidence, is a question exclusively for the consideration of the court. (3) The question whether any particular piece of evidence be admissible, is, upon principle, always to be determined by the judge. But in the case under consideration, that question depends on a difficult preliminary investigation of fact, much more within the ordinary province of juries than of judges; and where the evidence is admitted, it is scarcely to be expected, that juries will pay implicit obedience to the decision of the judge, founded as it is on a conclusion of fact,—a subject, upon which the constitution regards them as peculiarly competent to form a right opinion. (4)

(1) Rex *v.* Gay, 7 C. & P. 230, and see Trowter's case, 12 Vin. Ab. 118. East's P. C. The correctness of these decisions will be better examined after a consideration of the authorities in the chapter upon *Secondary Evidence*, to which they more properly belong.

(2) Rex *v.* Sellers, Carr. Cr. L. 233.

(3) By Lord Ellenborough, in Rex *v.* Hucks, 1 Stark. C. 523. Lord Ellenborough said, that this point had been considered by the judges, on a question proposed to them by the judges of Ireland; and such was their unanimous opinion. By all the judges in John's case, 1 East's P. C. 357, and in Welborn's case, 1 East's P. C. 366. And see Rex *v.* Van Butchell, 3 Carr. & P. 631. Rex *v.* Crockett, 4 Carr. & P. 544, and all the more modern cases.

(4) The matter has been spoken of as a painful one for the judge to decide upon; see 7 C. & P. 190. The question was left to the jury by Chief Baron Eyre, in Woodcock's case, 1 Leach, 502. But the judge so far decided the point of

Effect of dying declarations.

With respect to the effect of dying declarations, it is to be observed, that although there may have been an utter abandonment of all hope of recovery, it will often happen, that the particulars of the violence, to which the deceased has spoken, were likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The consequences also of the violence may occasion an injury to the mind, and an indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Such evidence therefore is liable to be very incomplete. He may naturally also be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill-will. But, it cannot be concealed, animosity and resentment are not unlikely to be felt in such a situation. The passion of anger once excited may not have been entirely extinguished, even when all hope of life is lost. Such considerations shew the necessity of caution in receiving impressions from accounts given by persons in a dying state; more especially when it is considered that they cannot be subjected to the power of cross-examination,—a power, quite as necessary for securing the truth, as the religious obligation of an oath can be. (1)

admissibility, as to receive the evidence, directing the jury to reject it, if they came to a particular conclusion respecting certain facts. Sir D. Evans, 2 Pothier, 293, contends for the propriety of leaving the whole question of the admissibility and effect of dying declarations to the jury. He says, "The inquiries connected with the evidence of dying declarations, are, First, whether the deceased was really under such circumstances, or used such expressions, from which the apprehension in question is correctly inferred: Secondly, Whether the deceased did make the declarations alleged against the accused: Thirdly, Whether the declarations are to be admitted as sincere and accurate. It may be observed, that this is not the only instance where it is the province of the judge to decide complicated questions of fact, as preliminary to the admission of evidence. It is said in 1 Tyrw. 806, that the judge, in such cases, is not to stop the cause for the purpose of having the preliminary question of fact decided by the jury. The question in that case was one of identity.

(1) Richard Coleman, A. D. 1749, was executed for the rape and murder of Anne Green. The conviction proceeded on the dying declaration of the prosecutrix. But Coleman's innocence was established two years afterwards, when another person was executed for the same offence upon the clearest evidence. See Mr. Fox's observations in his history of the reign of James II., upon the dying declaration of Rumbold in 1685, that he had not been concerned in any project for assassinating the King or Duke of York in the Rye House Plot.

The remark before made on verbal statements, which have been heard and reported by witnesses, applies equally to dying declarations, namely, that they are liable to be misunderstood and misreported from inattention, from misunderstanding, or from infirmity of memory. In one of the latest cases upon the subject, this species of proof is spoken of as an anomaly, and contrary to all the general rules of evidence, yet as having, where it is received, the greatest weight with juries. (1)

Section VII.

Exceptions to the General Rule as to Hearsay, in cases where Declarations have been made by Persons, since deceased, against their Interest.

An exception to the rule excluding hearsay evidence has been established in modern times, in the case of certain declarations and entries made by persons since deceased. This exception applies to a description of facts, the evidence of which, being usually confined to the knowledge of a few persons, would frequently be lost, if the strict rule, which excludes hearsay evidence, were enforced. And it will be seen, that by the qualifications under which this kind of evidence is admitted, many of the general objections to hearsay evidence are obviated. This subject will be conveniently discussed, by considering, first, those declarations and entries, which are receivable on the ground of their operating against the interest of the persons making them; and, secondly, those which are receivable on the ground of their being contemporaneous entries in the ordinary course of duty or employment. The two divisions, however, are intimately connected with each other.

General rule.

It is a rule of evidence clearly established, that declarations of persons since deceased (under which term of declarations, all written statements and entries are intended to be comprehended), are admissible, where those persons are to be presumed conusant of the subject matter of the declarations, and where the declarations apparently operate against their own

(1) By Coleridge, J., in Rex *v.* Spilsbury, 7 C. & P. 196.

Principle of admission.

interest. (1) It is presumed where declarations are made under these circumstances, that they are entitled to credit, because the regard, which men pay to their own interest, may safely be considered as a sufficient guarantee against their prejudicing themselves by any erroneous statement, and the assumed tendency of the declarations precludes the possibility of any fraudulent statement. Indeed the apprehension of fraud in such cases is in a great measure removed, without reference to the fact of the declarations being against interest, when it is considered that declarations are not receivable during the life-time of the authors of them; and that it is always competent for the party, against whom they are produced, to point out any sinister motive for making them. It is true, the great test of the fidelity, accuracy, and completeness of judicial evidence, are here wanting. But the inconveniences which would result from the extinction of evidence are considered as outweighing, in the generality of cases, the inconvenience of admitting such hearsay declarations, under the limitations and securities above mentioned.

It will perhaps be thought, in many of the decisions respecting the rule under consideration, that the interest of the party was so slight as to produce little, if any effect. And it would seem that the judges, from an apprehension of extinguishing the truth by rejecting evidence, have, in many instances, been contented with very unsatisfactory presumptions, as to the fact of the party's interest being opposed to his declaration.

(1) By the Master of the Rolls, in Short *v.* Lee, 2 Jac. & W. 464. By Bayley, J., in Roe *v.* Robson, 15 East, 34. By Parke, J., in Middleton *v.* Melton, 10 Barn. & Cress. 328. The *dicta* of the judges do not seem to require *peculiar* means of knowledge in the declarants; nor to point out a necessity, that the declarations should be connected with the facts to which they relate,—as the possession of land, or some course of business, or the performance of some ordinary duty; though these circumstances are generally to be found in the cases. Nor does it seem requisite, that the declarations should have been made by persons in the course of any business or employment; and it seems that declarations against interest need not be contemporaneous with the facts to which they relate. By Parke, J., in Doe *v.* Turford, 3 Barn. & Ad. 890. By the Master of the Rolls, in Short *v.* Lee, 2 Jac. & W. 464, where it was said that it is not necessary, in the case of collectors' books, to produce the very paper by which they collected. That the declaration of a living person against interest cannot be received; see Spargo *v.* Brown, 9 B. & C. 935.

In some cases, the courts appear to have considered declarations to be admissible, without proof that the party making them had any actually existing interest, which could be lessened or endangered. (1) Hence, a declaration, accompanied by an admission apparently against interest, would be receivable, although, in point of fact, the author of the declaration did not compromise his interest at all, but only made an admission apparently against interest, and without any real transaction to which it could relate. In several of the cases decided upon this subject, the inference, of the delarations being against interest, appears to have been on the unwarrantable assumption of the existence of real facts as a foundation for the statement; and the accuracy of the declarations has been inferred from a supposition, that the persons making an entry must have been particularly cautious in the statement of all it's details, as precluding themselves from afterwards attempting to set up an unfounded demand.

The courts have in numerous instances been satisfied that declarations were against interest, where they have been made in private books retained within the custody of their owners, and not, as in the case of receivers' accounts, subjected to the inspection of others. (2) In such cases, the declarations could

(1) See the cases collected in Barker *v.* Ray, 2 Russ. 67, n. In a few cases, where the facts admitted of it, the judges have laid stress on the circumstance, that the entry was proved by extrinsic evidence to have been made against interest. Thus, in Higham *v.* Ridgway, 10 East, 109, Lord Ellenborough observes, that the midwife had an interest not to discharge a claim, which, it appears *from other evidence*, he was entitled to. And in Doe *v.* Vowles, 1 Mo. & Rob. Littledale, J., rejected a tradesman's receipt, apparently on the ground that it did not appear *aliunde* that he was entitled to make a charge. In Crease *v.* Barrett, 1 Cr. M. & R. 919, it was considered necessary to prove a person in possession of land, before his declaration could be used as being against the interest of the occupier.

(2) As in Higham *v.* Ridgway, 10 East, 109, *infra*, p. 326. In Middleton *v.* Melton, 10 Barn. & Cress. 328, *infra*, p. 311, the collector collected by the book in question, from which it might have become notorious that he had such a book; but this circumstance was not noticed by the court. The remark in the text does not apply to the books or accounts of receivers and stewards, which are ordinarily submitted for the inspection of their employers, and according to the entries in which they engage to account, and frequently appear to have accounted: nor to the accounts of public officers, as churchwardens. Stead *v.* Heaton, *infra*.

only have been available against interest in the event of accident or mistake, or possibly in case of receiving notice to produce books on a trial. (1) Under such circumstances, a regard to self-interest appears to be not a sufficient guarantee against fraud, and a very inadequate one against negligence or mistake.

Although it is true, that a person is not allowed to avail himself of his own declarations in evidence, and that the cases may be few and peculiar in which they can be available for his representatives, yet there may be a strong suspicion of bias, at least, when the entries may be made available for parties standing in *pari jure* with the declarant. And where no motive of interest can be suggested, yet the declarations may be influenced by feelings equally likely to occasion misrepresentation. The circumstance, that the declarations are against a person's own interest, affords a very insufficient guarantee of fidelity and accuracy, unless it clearly appear, not only that a particular fact stated in the declaration, but the whole declaration, in every view of it, is prejudicial to the interest of the maker; and unless it appear, further, that the means will be afforded to others of using the declaration against him, and that others will probably have occasion so to use it.

The doctrine concerning declarations against interest appears to have been extended somewhat beyond the reason upon which it is founded, in those cases where they have been received on the ground, that the person making the declaration could not have promised himself any advantage, either by omitting to make it, or by stating it in a different way. It will appear, in many of the cases, that no sacrifice of interest was incurred by making the declaration, and that the only prejudice which could have accrued to the maker, consisted in affording the possible but very improbable means, of confuting an unjust claim not

(1) In Roe *v.* Rawlins, 7 East, 290, Lord Ellenborough says, "If this paper *had ever met the eye*, it might have been used adversely." It may be observed on the other hand, that the probability of a private book meeting the eye, might operate to induce a person to give a colour to the circumstances connected with a receipt, where the receipt could not be denied.

likely to be set up. It may be observed, that, whether the circumstance, of a declaration being against interest, be a fit criterion or not for it's admissibility, the credit and weight due to such a declaration will materially depend on it's having been made in the course of business.

Entries as to receipt of money.

The occasion, upon which the exception to the rule for the exclusion of hearsay testimony has been most commonly applied, is where the evidence consists of entries of the receipt of money, whereby the deceased person has charged himself as being accountable for the money received. Entries, so made, are evidence of the fact of the receipt of such money. Thus, where an entry was made by a deceased collector of taxes, though in a private book kept by him for his own convenience, whereby he charged himself with the receipt of sums of money, the entry was held to be admissible evidence to prove the fact of the receipt of the money in an action between third persons, agreeably to the general rule above stated. (1)

(1) Middleton v. Melton, 10 Barn. & Cress. 317, referred to by Bayley, B., 1 Cr. & J. 456. The action was brought against the surety of the collector, on a bond conditioned for the due payment of taxes by the collector. But the court decided the case on the ground of the general rule in the text, disregarding all reference to the circumstance of any privity between the deceased and the defendant. In Goss v. Watlington, 8 Barn. & Cress. 556. Whitnash *v.* George, 3 Brod. & Bing.132, the judgments proceeded on the ground, that entries had been made in a book, which it was the duty of the principal to keep, and for the performance of which duty the defendant had become surety; and the decisions in those cases were founded principally on that circumstance. In Middleton *v* Melton, the entries were in a private book kept for the collector's own convenience. And the court, in the latter case, observed, that they thought the two former decisions might be supported on the more general principle. In Middleton *v.* Melton, the act was incomplete from there being no entry in the public book, whereas, in the other cases upon this subject, the entries were all that was intended to be done by the parties making them. But this circumstance, it was considered, did not affect the principle, on which the entries were admitted. By Littledale, J., 10 Barn. & Cress. 326. The entries of the names of persons and sums assessed in the private book were copied from a duplicate assessment; and it was the collector's practice to collect by that private book, and to mark with ticks all the sums he received; he then entered receipts into the duplicate assessment; but the receipt of the sums, for which the action was brought, though noticed in the private book, had not been entered in the duplicate assessment. The evidence is not receivable on the ground of it's being an admission, and therefore it would not be evidence except in the case of the death of the person making the entry. Smith *v.* Whittingham, 6 C. & P. 78. Spargo *v.* Brown, 9 B. & C. 935.

Stewards' books.

The acknowledgments by deceased stewards, reeves, and bailiffs in their books, of the receipt of money for which they have been accountable, are very frequently adduced in evidence by their employers, or those claiming under them, or by strangers. (1)

Entry charging the maker.

But it ought clearly to appear, that the effect of the entries was to charge the bailiff or steward. In an action for copyhold fines, the book of a deceased steward of a manor was tendered in evidence, containing entries of assessment of fines, as well those which had been paid as those which had not; and it appeared, that the steward made up a book at the end of each year, in which book he put down the fines that had been actually paid. The former book was rejected, on the ground, that it did not appear to contain any evidence that the steward had charged himself. (2)

(1) See the case of Barry *v.* Bebbington, 4 T. R, 514, stated *infra*. Edwards *v.* Rees, 7 C. & P. 340. Manning *v.* Lechmere, 1 Atk. 453. Entries by bailiffs or stewards often acquire additional credit from the circumstance, that such entries would, in the ordinary course of business, be expected to be kept, and that the fact recorded is in some measure to be presumed from the existence of the entry. And the account of stewards seem to be of greater credit than entries in private books, inasmuch as they are usually subjected to inspection, and are the foundation of transactions between the steward and his employer. That this is a usual mode of proving payments under old leases and licenses see 1 Camp. 310, respecting receipts of tithe collectors. Wynne *v.* Tyrwhit, 4 Barn. & Ald. 376. Manning *v.* Lechmere, 1 Atk. 453. By Lord Ellenborough, in Higham *v.* Ridgway, 10 East, 116. Harper *v.* Brooke, 3 Woodeson's Lect. 332. Vin. Ab. Ev. A. b. 15. Bullen *v.* Michel, 2 Pr. 413, in which case the accounts were accounts of the reeve of an abbey, allowed by the bailiff of an abbey, and Chief Justice Gibbs observed, that the charging side was against the interest of the reeve, and the discharging side against the interest of the bailiff. He seems also to have thought, that the discharging side could also have been evidence as part of the same account. In Finch *v.* Messing, cited in Short *v.* Leigh, 2 Jac. & W. 464, the accounts of a sequestrator were given in evidence, which contained a charge and discharge. Bree *v.* Beck, 1 Younge's Ex. Ca. 225, 239. Doe *v.* Tyler, 6 Bing. 562.

(2) Dean and Chapter of Ely *v.* Caldecott, 7 Bing. 434. It would seem probable that the steward, by entering an assessment of a fine, without stating it to be paid, prejudiced his interest by supplying evidence of an obligation on himself to collect the fine. But then the entry would merely prove the fact of assessment which would not be material unless the fine were paid. In Brett *v.* Beales, 1 M. & M. 418, where the treasurer of a corporation had returned money in arrear, the entries were rejected, because he had not charged himself with the receipt of the money.

As to custody of accounts.

Accounts of this nature are commonly produced from the muniments of the persons to whom the accounts were rendered, and when this is the case, they amount to proof, that the person rendering them has actually put it into the power of his employer to use them against him, as evidence of money had and received to the employer's use. This circumstance appears to entitle them to much greater credit than is due to entries in private books, which have never passed into the custody of persons interested to make use of them against the makers of the entries. (1) Such a test of the authenticity and accuracy of the entries is, however, not essential to their being admitted in evidence, as appears by the preceding cases, and others which will be presently cited. As far indeed as regards the entries to be found in the books of some particular classes of persons, (for example, the books of attornies,) (2) they may derive some additional weight from the circumstance, that the parties would be expected to keep books, and to produce them upon notice.

Receipts.

Conformably with this rule, receipts for the payment of money, given to the person making the payment, appear to be admissible, after the death of the receiver of the money, to prove the fact of its having been received, though there exist no privity between the deceased and the party against whom the evidence is tendered. In the case of *Middleton* v. *Melton*, (3) the Judges of the King's Bench were of this

(1) The like observations apply to the cases of the accounts of public officers, as churchwardens. Stead *v.* Hutton, 4 T. R. 669.

(2) See Warren *v.* Greenville and Doe *v.* Robson, *infra*. Rowcroft *v.* Bassett, Peake's Add. Cases, 199. Gale *v.* Packington, M'Cl. & Y. 357.

(3) 10 Barn. & Cres. 321. In Harrison *v.* Blades, 3 Camp. 458, Lord Ellenborough said, that a tax-gatherer's *receipts* would be evidence after his death to prove who was the occupier of certain premises. It is said, by Scarlett, arg. in Barker *v.* Ray, 2 Russ. 70, that the constant practice of Nisi Prius shows, that receipts by persons who are dead are not evidence as between third parties, that money was paid. And see an argument in Chambers *v.* Bernasconi, 1 Cr. & J. 456, that receipts of deceased persons are only evidence, where those persons were accountable for what they received. In Harrison *v.* Blades, 3 Camp. 458, where a tax-gatherer's receipts were rejected, because he was not dead, but only ill, Lord Ellenborough appears to have entertained no doubt, but that they would have been evidence to prove occupation, after the tax-gatherer's death, see Manning *v.* Lechmere, 1 Atk. 453. In Doe *v.* Vowles, 1 Mo. & Rob. 161, Littledale, J., rejected a deceased tradesman's bill for repairs, with a receipt thereon; the question being one of adverse possession between mortgagor and mortgagee, and the receipt having

opinion, though the decision in that case was rested upon other grounds. In a previous case, however, of *Goss* v. *Watlington*, (1) the Court of Common Pleas appear to have been of a different opinion upon this point, under similar circumstances. In tithe suits, the receipts of collectors of former incumbents are considered very strong evidence of the facts they record. (2)

Rate books.

The occupation of premises by a particular individual at a certain period has been allowed to be proved by entries in a land-tax-collector's book, stating that individual to have been rated for the premises in question, and to have paid the rate, —on the ground that the entry of payment was made against the interest of the collector. (3) In *Plaxton* v. *Dare*, (4) upon

come from the papers of the mortgagee. He said that the cases had gone quite far enough. Receipts appear to be much less objectionable testimonies than entries in private books, from the circumstance of their having been given to persons interested to preserve them as evidence against the makers.

(1) 3 Br. & B. 138. This point, however, was not very material in the case in the text, as the court decided that the collector's books were receivable. The court appear to have directed their attention solely to the grounds on which the declarations of agents are receivable or not against their principals. This decision as to the receipts was adverted to in Middleton v. Melton, 10 Barn. & Cress. 328, and the propriety of it doubted.

(2) These receipts, on account of the want of privity, cannot perhaps be strictly considered as in the nature of admissions; though they are very analogous to some cases, in which judgments or admissions are admissible, on account of a privity of estate, especially as a judgment against a rector or vicar would be admissible against his successor, *vide infra*, part 2. The receipts are made by persons *in eodem jure*. The principal cases respecting tithe receipts are Lake v. Skinner, Gw. 1931, 3 E. & Y. 976. Jones v. Carrington, 1 Carr. 327, 497. Ekins v. Dormer, 3 Atk. 534. Chapman v. Smith, 2 Ves. 511, in which two latter cases, Lord Hardwicke remarks as to practice of parsons abstaining from the use of the term *modus* in their receipts: and the like observations on the language and effect of receipts will be found in Manby v. Lodge, 9 Pr. 231. White v. Lisle, 4 Madd. 214. Duffield v. Orrel, 6 Pr. 324. Deacle v. Hancock, M'Clel. 18. Taylor v. Fox, 4 Wood. 322. Chapman v. Smith, 2 E. & Y. 141. On discrepancies between early and late receipts, see Manby v. Lodge, 9 Pr. 231; on receipts of churchwardens for a tributary modus, see Atkins v. Drake, 1 M'Clel. & Y. 217. It is said by Baron Wood, in Robinson v. Williamson, 9 Pr. 136, that receipts are stronger evidence than vicars' books, 1 Younge's Ex Ca. 165. The absence of receipts is not a circumstance of great weight against the existence of a modus, see Wooley v. Brownhill, M'Clel. 335.

(3) Doe d. Smith v. Cartwright, R. & M. 62. It would seem from this case, that the rate alone (though of the nature of public documentary evidence), was not evidence of occupation; and see Harrison v. Blades, 3 Camp. 458, Tax-gatherer's Receipts.

(4) 10 Barn. & Cress. 19, *vide ib.*, as to the necessity of proving

a question whether premises were situate in a particular parish, the accounts of deceased overseers, in which there were crosses made against the names for which the tenants of the premises had been assessed, were held to be evidence of actual payment of the rates.

Declarations as to right to property.

Not only declarations of the receipt of money, but declarations of a variety of descriptions, made against interest, have been received in evidence. (1) Thus, upon an issue whether A. B. died possessed of certain farming stock; it has been held, that evidence might be given of a conversation in which A. B. stated that she had retired from business, and had given up her farming stock to her son-in-law. (2) A bill of lading signed by a master of a vessel, since deceased, for goods to be delivered to a consignee or his assigns on payment of freight, has been held to be admissible evidence of the consignee having an insurable interest in the goods. (3)

Declarations by occupiers.

In several cases the declarations have been made by tenants, where they have stated that they paid rent to particular

payment in such a case. It was said, that the making of crosses was a common mode of denoting payment.

(1) See the cases collected in the note to Barker *v.* Ray, 2 Russ. 67. See also the next section for cases respecting indorsements of payment of interest upon bonds and notes.

(2) Ivat *v.* Finch, 1 Taunt. 142. On a motion for a new trial, it appeared that the judge at nisi prius, had rejected the evidence, on the ground that the declaration was not accompanied by any act relative to the management of the farm. It would seem that although declarations accompanying acts may be explanatory of the acts, they do not derive additional credit from that circumstance as to matters totally unconnected with the acts which they accompany, except so far as they may be thought more deliberate. Perhaps the case may in some measure be considered as resting on the doctrine of admissions, on account of the privity between the lord of the manor and his tenant. Chief Justice Mansfield, after stating that the admission was against interest, concludes his judgment by saying, "It ought, *therefore*, to have been received; *because* the right of the lord of the manor depended upon her title."

(3) Haddow *v.* Parry, 3 Taunt. 303; see the opinions of the judges in the course of the argument. In this case, it appeared, on further inspection of the bill of lading, that it contained in the margin, the words "contents unknown," and it was considered that, by the insertion of these words, the master could not charge himself with any thing, and would not be accountable. In general, an invoice is only evidence against parties privy to the contents. Shendom *v.* Thompson, 1 St. C. 316. Dicken *v.* Lodge, 1 St. C. 226.

persons. In these cases, the declarations have been considered as made against interest, inasmuch as possession is *primâ facie* evidence of a seisin in fee, and therefore, the declaration of the possessor, that he is tenant to another, makes against his interest. (1)

Thus in *Davies* v. *Pierce,* (2) upon a question whether the place in dispute was parcel of a particular tenement, the declarations of deceased persons, during their occupation of the place in dispute, that they paid rent for the premises to a particular individual, were held to be receivable in evidence.

In *Peaceable* v. *Watson,* (3) it was held, that in order to

(1) By Chief Justice Mansfield, in Peaceable *v.* Watson, 4 Taunt. 16, "Possession is *primâ facie* evidence of ownership, and a tenant's declaration is evidence, as cutting down the fee." It would seem that these declarations of occupiers were admissible, also, as explanatory of the fact of occupation. See Doe *v.* Pettett, 5 Barn. & Ald. 223, by Lord Tenterden;—though,perhaps, in that case the declaration of the occupier went to cut down the fee. And see the argument of counsel in Chambers *v.* Bernasconi, 1 Cr. & J. 457. In Garnem *v.* Barnard, Anstr. 298, Macdonald, C. B., seems to have considered that the admissibility of the declarations of deceased persons was chiefly confined to the case of tenants making statements concerning the nature of their holdings.

(2) 2 T. R. 53. Ashurst, J., decided the case on the ground, that proof had been rejected, of the occupier having in one instance prevented a person from cutting rushes, threatening at the same time, to tell (his landlord) the individual in question,—and having in another instance seized rushes cut upon the place in dispute, saying at the same time that they belonged to that individual. Mr. Justice Buller, the only other judge who delivered an opinion, said, the question, relative to the tenant declaring that *he paid rent* for the premises in question, had been determined by the cases of Holloway *v.* Rakes, which he cited from MS., and Doe *v.* Williams, Cowp. 621. Mr. Justice Buller did not advert to the particular terms of the declarations in Davies *v.* Pierce, or to the circumstance that they accompanied acts done. The case of Holloway *v.* Rakes would seem to have been a case of admissions. In the case of Doe *v.* Williams, upon a question, whether A. B. deceased was seised of premises at the time of a fine levied, a conversation between him and a living tenant was given in evidence, wherein the one admitted the payment and the other the receipt of rent. The jury and the court decided, upon the general merits, against the party producing evidence of this conversation, and the point of the admissibility of the evidence appears to have undergone but little consideration. In Strode *v.* Winchester, 1 Dick. 397, parol evidence of the declarations of a devisee were admitted, to prove her being only a trustee. In Walker *v.* Broadstock, 1 Esp. 485, the declaration of an occupier, that his cattle had been impounded in a particular place was received. And it was said, that the declarations of occupiers against their own rights were admissible. And see Doe *v.* Green, Gow. 227.

(3) 4 Taunt. 16.

prove seisin of certain premises in a particular individual, it was competent to ask a witness, whether a deceased person in occupation of the premises had been heard to say, of whom he rented them.

In *Doe* d. *Baggaley* v. *Jones*, (1) in an action of ejectment brought for the recovery of a garden, where the question was whether the ground in dispute was parcel of certain freehold property, or of a certain copyhold tenement, a paper signed by a deceased owner of the copyhold tenement, (who was also in the occupation of the ground in dispute,) in which paper he stated that no part of the garden was copyhold, and that he paid rent for it, was held to be admissible evidence to prove that the garden was not copyhold. Lord Ellenborough observed, that the representation was against the interest of the maker of it, as he charged himself with the payment of rent, to which he would not have been liable, had the garden been parcel of his own tenement. (2)

In the case of *Barker* v. *Ray*, (3) the declarations of a wife during coverture were adduced, after the death of her husband; they were to the effect that her husband was not seised in fee of certain premises in dispute, of which he was then in possession; and that upon a certain event they were to go over to another branch of the family. The declarations were rejected at *nisi prius*, and it was contended, upon appeal to the Lord Chancellor, that the declarations were against interest, as their tendency, by shewing that the husband was not seised in fee, was to prejudice any claim that the wife might make to

(1) 1 Camp. 367.

(2) In the case of Walker *v.* Bradstock, 1 Esp. 458, it was stated by Lord Kenyon, that the declarations of occupiers were evidence against their own rights. This case may be supported on the ground of the declarations of occupiers being admissible as explanatory of the fact of possession, or, perhaps, more satisfactorily on the ground of the admissions being made by privies in estate, *vide infra*. It seems difficult to support it on the broad principle stated by Lord Kenyon; for one of the declarants was alive. The question was concerning the existence of a prescriptive right of common, and a deceased occupier of the plaintiff's property had, during his occupation, said, that his cattle had been impounded on the place in dispute; and a living occupier had, during his enjoyment, declared, he believed that no right of common belonged to the property.

(3) 2 Russ. 77.

dower. The Lord Chancellor refused a new trial, not expressing any decided opinion as to the admissibility of the evidence. (1)

Particulars of estate recognised by tenant for life.

In the case of *Roe* d. *Brune* v. *Rawlins*, (2) upon a question whether the lease of a tenant for life, having a limited power of leasing, was void, in consequence of the ancient rent not being reserved, the particulars of a certain estate were received in evidence under the following circumstances. The contents of the paper containing the particulars shewed, that it had been written by a person having an intimate knowledge of the property in question, and who was in the confidential employ of the person to whom the paper was addressed. The paper was in some degree recognised as authentic by the person to whom it was addressed, by his indorsement written upon it "from Hobart, a particular of my estate in Cornwall." It shewed the existing rent of a particular tenement, the ancient rent of which was the subject in dispute. The paper was addressed to the person who was tenant for life of the property, with a leasing power upon condition of reserving the ancient rent, being the like power to that under which the lease in issue had been made. The paper was preserved among the muniments of the estate by the person to whom it was addressed, and from him it came to the tenant for life whose lease was in issue, and upon his death it passed with the other muniments of the estate to the succeeding proprietor, who questioned the validity of the lease. Lord Ellenborough, in delivering the judgment of the court, said, the contents of the paper were adverse to the tenant for life to whom it was addressed, and who had authenticated it and preserved it among his muniments,—for it diminished his interest in the renewal, in the same

(1) 2 Russ. 77 It was contended on the other hand, that the wife did not appear to have had a competent knowledge of her husband's title; nor was it her duty to know it, and that she had no actual title to dower.

(2) 7 East, 279. Lord Ellenborough observed, that if the tenant for life who disputed the lease, had derived his title from the person by whom the indorsement was made, the case would have been quite clear. It is presumed, this was said with reference to the doctrine of admissions by parties in privity. In the judgment, a broader ground is taken for the reception of the evidence, *viz.* peculiar means of knowledge, and an absence of interest.

proportion as it raised the rent to be reserved,—and it could not have been evidence in his favour; he could not, therefore, have had any undue motive for preserving it: consequently it was proper evidence, to be left to the jury, of the amount of the ancient rent received.

In the late case of *Carne* v. *Needle*, (1) it was considered an established doctrine of evidence, that declarations by a person in possession of premises, tending to cut down his own title, (as, in that case, by stating the party under whom he held,) were admissible in evidence.

In *Crease* v. *Barrett*, (2) it was observed, that an occupier, proved to be in possession of a piece of land, is *primâ facie* presumed to be owner in fee, and his declaration is receivable in evidence, when it shews that he was only tenant for life or years.

Occupation determined.

But the declarations of a person who has parted with his interest in land, (as, by executing a settlement,) cannot be adduced for the purpose of impairing the rights of persons acquired under the settlement, (3) merely because they affect the title to the land.

Proof of occupation.

It seems necessary, in order to make the declaration of a deceased person admissible as being an occupier of land, to prove the fact of his occupation; it is not enough that the declaration purport to be against the interest of the maker. (4)

Balance of interest.

It seems not to be sufficient that a declaration, in one or

(1) 1 Bing. N. C. 430, and see by Lord Lyndhurst, in Chambers *v.* Bernasconi, 1 Cr. & J. 451.

(2) 1 Cr., M., & R. 931.

(3) Doe *v.* Webber, 1 A. & E. 740, and see the cases of declarations by persons whilst in possession of bills of exchange. *Infra*, Ch. on *Admissons*. In Doe *v.* Webber, the declaration would appear to have been against interest, independently of it's affecting the title to the land; the evidence was, however, rejected.

(4) Crease *v.* Barret, 1 Cr., M., & R. 931. Slight evidence (as of felling timber) has been held sufficient. 5 C. & P. 575. This principle does not appear to have been uniformly acted upon; see the cases collected in Barker *v.* Ray, 2 Russ. 67, n.

more points of view, may be against interest, if it appear upon the whole that the interest of the declarant would be rather promoted than prejudiced by the declaration. Thus, in *Outram* v. *Morewood*, (1) an action of trespass for breaking and entering a particular close, it became material to identify the close (in which the dispute concerning the right of digging coals arose,) as being parcel of an estate, out of which certain ancient rents had been reserved in an ancient conveyance. The party who sought to do this, produced the books of a person under whom he derived title to those ancient rents, in which that person acknowledged the receipt of rents from the person who had conveyed the close to the plaintiffs, which rents corresponded with the rents that had been anciently reserved. (2) This evidence was held to be inadmissible by the Court of King's Bench. It may be observed, (even supposing according to the authorities that there was reasonable probability of the entry being used against the maker, for the purpose of proving the payment,) still if it could be used by the representative of the maker to prove title to the land, the entry might, upon the whole, be in favour of the maker's interest. (3)

Entry by one under whom title derived.

Entries of receipt of rent, made by a deceased executor, who had an interest in land which was claimed, have been held admissible evidence for a person claiming the land under him, where the rent has been received and accounted for by the

Entry by executor.

(1) 5 T. R. 121.

(2) The justification was that of having a right to dig coals in the *locus in quo*, and the ancient conveyance reserved coals as well as rents; the defendant derived title to the rents, but not to the coals, from the person whose book was produced.

(3) The court does not appear to have treated this case as one of a balance of interest,—though in fact it was so, according to the numerous authorities, in which private memoranda containing receipts of money have been received in evidence. Nor does the court appear to have considered, whether the evidence could be received as a contemporary entry in the course of business,—nor whether the book would have been admissible, if produced by a party not claiming under the person making the entries. The case is certainly distinguishable from most of the former decisions, on the ground that the entries *might* have promoted the interest of persons claiming under the makers of them, though, in some of the preceding cases, this view of the subject has been overlooked. The court appear to have directed their attention principally to the distinguishing of the case from the decisions respecting hearsay evidence of general rights.

deceased in his capacity of executor, the entries not having been made by him in his character of landlord. (1)

Where certain entries of receipt of money, made by proctors, who were members of an ecclesiastical corporation, were adduced in evidence by that corporation, in a suit commenced by them for tithes, it was held that the proctors were interested against the entries, because they charged themselves with the whole amount, whereas as members of the corporation they had only an interest in a proportionate share of the monies receivable. (2) Entries by proctors.

It frequently happens, that an entry purports, in the first place, to charge a deceased person, and afterwards to discharge him. In such a case, the entry cannot be used against the maker of it, unless the whole is read in evidence. But still if the whole were read, the jury would most probably attribute greater weight to the part which was against the interest of the maker, than to that which was in his favour. In several of the cases which have been cited, the entry consisted of a memorandum of payment for work or services performed, and therefore may be said to have been, to a certain extent, in favour of the person making the entry. Charge and discharge.

There is a very remarkable class of cases, according to which, Clerical books.

(1) 9 Bing. 690.

(2) Short *v.* Lee, 2 Jac. & Walk. 464, and a MS. ruling of Lord Ellenborough there cited. The Master of the Rolls asks, "Could the proctors be suspected of wrongly setting down what they had not received, in order that they might, by charging themselves with 24*l.* receive 1*l.* back again?" It may be observed, however, that the effect of the evidence was to make the 24*l.* payable annually *in perpetuum*. And it would be the interest of the corporation to connive at one of their body fabricating such entries; in which case, he would receive no real prejudice, but perhaps an actual benefit, and the permanent interests of the body would be promoted. But the entries could not be used during the life of the proctor making them, and his personal representatives would have no interest after his death. *Vide ib.*, as to the mode of allowance of stewards' accounts. That bursars' books have been received: *Anon.* Lord Raym. 745: By Holt, in Smart *v.* Williams, Comb. 249: 12 Vin. 88. The general rule is, that corporation books are not evidence for the corporation, 3 B. & A. 142; 2 B. & A. 189; 4 Russ. 222; 1 M. & M. 417. The case of Marriage *v.* Lawrence, 3 B. & A. 142, related to an entry of payment.

entries made by a deceased parson, of the receipt of ecclesiastical dues, have been received in favour of parties claiming the same interest which the maker of the entries had. Thus, the books of a deceased rector or vicar have been frequently admitted as evidence for his successor. (1) After it had been determined, that evidence might be admitted of receipts of payment, entered in private books by persons not obliged to keep such books, nor to account to any one for the sums received, it does not seem to have been contrary to principle to admit evidence of rectors' or vicars' books. For the entries cannot be used by the parsons themselves, and there is no legal privity of interest betweem them and their successors. (2) General

Rector's and vicar's books.

(1) Armstrong *v.* Hewitt, 4 Pr. 216: entries of payments for tithe hay: the books are spoken of by the court as strong evidence. Parsons *v.* Bellamy, 4 Pr. 190, where the memorandum contained a long detail of facts incident to a receipt of payment of a demand with costs, and the court said that the memorandum was admissible, because it had the effect of making the vicar charge himself with the receipt of money. Walker *v.* Holman, 2 Price, 171, where the receipts shewed that the money payments were regulated by the poors' rate. Perigal *v.* Nicholson, Wightw. 63, where a rector's entry in a parish register was received. The entry was not of the receipt of money, but it was considered as abridging the vicar's rights, being a statement of moduses due. Lord Arundel's case, 12 Vin. Ab. 255, pl. 3. Drake *v.* Smith, 5 Pr. 369; receipts of tithe-money signed by a vicar, in an entry purporting to be a terrier, contained in a book kept in the parish chest. The evidence appears to have been admitted principally on the ground of the credit due to public books.

(2) There is no legal privity of interest; but in point of fact, commonly a strong leaning in favour of the rights of the church, and often a disposition to state those rights most favourably for themselves (as indeed may be said of all declarants) in their own books. It is rare, for example, to find a payment set down as for a modus, in the books of incumbents. In Parsons *v.* Bellamy, 4 Pr. 190, the Chief Baron says, "As to vicars making evidence for their successors, that is what I cannot listen to. This court knows they do not do so, and the books of a vicar are as good evidence as the books of a steward." In Robinson *v.* Williamson, 9 Pr. 136, it was said by Baron Wood, that vicar's books which are made by, and remain in the power of the party himself, are liable to a suspicion, which cannot attach to receipts, made by the person against whom they are to be used. Although there be no privity between an incumbent and his successor, yet they stand *in pari jure;* and in the case of admissions and judgments, which are only evidence against parties and privies, successive incumbents are, as far as concerns the admissibility of the evidence (though not for the purpose of estoppel) regarded as privies. See by Tindal, Ch. J., in Maddison *v.* Nuttal, 6 Bing. 226. The admission, however, of the books of rectors and vicars, has been thought an anomaly in the law of evidence, and various grounds have been assigned for it,—such, as the peculiar nature of tithes—the protection due to the clergy—and the *cursus scaccarii:*

observations have been occasionally used respecting the admission of rectors' or vicars' books, which might be supposed to authorize the admission of any kind of statement contained in them. But such books are not admissible, except where the entries contain receipts of money or ecclesiastical dues, or where they are in other respects apparently prejudicial to the interests of the makers, in like manner as entries are so considered in analogous cases.

The entry of a deceased lessee of an impropriate rectory, whose interest had expired, has been held to be receivable in evidence. (1) And it is obvious, that the entries of collectors of tithes stand upon the same footing as those of other receivers and bailiffs. (2)

See by the Master of the Rolls, in Short *v.* Lee, 2 Jac. & Walk. 464: By Lord Kenyon, in Outram *v.* Morewood, 5 T. R. 123: By Baron Wood, in Perigal *v.* Nicholson, Wightw. 63: By Price, B., in Woodnorth *v.* Lord Cobham, 2 Gwill. 653: By King, C. J., Vin. Ab. Ev. T. b. 73: By Lord Hardwicke, 2 Ves. 43, the first trial in the case of Le Gros *v.* Levemore, Gw. 59. 1 E. & Y. 521. Lord Ellenborough, in Roe *v.* Rawlins, 7 East, 290, puts the admissibility of vicar's books simply on the ground of absence of interest. In Short *v.* Lee, 2 Jac. & W. 464, the Master of the Rolls refers to the analogous decisions respecting prescriptions *in non decimando*, when set up against lay impropriators. In Glynn *v.* the Bank of England, 2 Ves. 43, Lord Hardwicke, after observing that the decisions in the case of rectors' books went a great way, lays down a very broad principle for their admission, "That the person making these entries, must know that they cannot benefit himself or his property, his representatives having nothing to do with the living, but his successor, who stands indifferent to him,—and therefore, that it is not to be presumed that false entries would be made by him for his successor." But it would seem, at least according to the doctrine of the courts in analogous cases, that the circumstance of the declaration being *against* interest, was essential to guarantee it's accuracy, if not it's fidelity.

(1) Illingworth *v.* Leigh, Gwill. 1615. 3 E. & Y. 1385: apparently on the same principle as that according to which rectors' books are received, namely, that he had no privity of interest with any succeeding tenant, and the entry could not have been used for himself or his assignee. This doctrine, however, introduces a new qualification of the rule, *viz.* that the entry would not be evidence for the assignee or representatives of the tenant, after his death and during the continuance of his term. It does not satisfactorily appear, that the privity between the tenant and his lessor ought to have been disregarded in this case; there was at least, a temptation for connivance between them.

(2) Jones *v.* Waller, Gwill. 847. Short *v.* Lee, 2 Jac. & W. 490. Woodnoth *v.* Lord Cobham, Bunb. 180: the receiver of a lay impropriator. Bullen *v.* Mitchell, 2 Pr. 399; accounts of the reeve of an abbey. Morgan *v.* Tyler, cited in Short *v.* Lee, 2 Jac. & W. 464, accounts of bailiffs of New College, Oxford. Finch *v.* Messing, cited *ibid.*

Impropriator's books.

According to some authorities, though not of very great weight, the doctrine, according to which entries in rectors' or vicars' books have been held to be admissible in evidence, has been extended, by a supposed analogy, to the case of the books of a lay impropriator.(1) The analogy, however, entirely fails, so far as the doctrine in question may be considered as depending on the circumstance that the entries are against interest; inasmuch as they are available for the representatives of the party making them.(2) In the case of *Short* v. *Lee*, (3) the Master of the Rolls was of opinion that entries in the books of an ecclesiastical corporation entitled to a rectory were admissible evidence for the corporation in suits for tithes brought by them.

Verbal declarations.

In the cases which have been referred to, it will have been noticed that the declarations have in most instances consisted of memoranda or entries; but from several of the examples it may be collected, that verbal declarations are admissible, though unaccompanied by any writing or by any act done.(4) Where, indeed, declarations against interest accompany acts, they are frequently admissible without reference to the circumstance of their being contrary to interest. (5)

It is a question of considerable importance, how far decla-

(1) *Anon.* Bunb. 46, a demand for mortuaries. *Anon.* Vin. Abr. Ev. T. b. 73, T. b. 117. See observations on these cases by the Master of the Rolls in Short v. Lee, 2 Jac. & W. 464. It has been suggested, *ib.* that the cases in Bunbury and Viner relate to the same suit,—that the case in Bunbury is the report of the trial at *nisi prius*,—and the case in Viner a note of the hearing in the Exchequer.

(2) They fall precisely within the rule laid down in Outram v. Morewood, *supra*, p. 306.

(3) 2 Jac. & W. 464. The Master of the Rolls expressed himself strongly in favour of another ground, which was sufficient for the admission of the evidence.

(4) See the cases collected in the note to Barker v. Ray, 2 Russ. 67. Doe v. Williams, Cowp. 621. Holloway v. Raikes, 2 T. R. 55. Ivat v. Finch, 1 Taunt. 141. Doe v. Jones, 1 Camp. 367. Doe v. Pettet, 5 Barn. & Ald. 220. Davies v. Pierce, 2 T. R. 53. Strode v. Winchester, 1 Dick. 397. Verbal declarations may be thought of inferior weight to those written, as being more carelessly made, and being often unfaithfully reported; they are besides less frequently connected with any course of business.

(5) Stanley v. White, 14 East, 339, where the declarations accompanied acts of forbearance. The declarations in Davies v. Pierce, 2 T. R. 53, cited *supra*, appear to be admissible as part of the *res gestæ*.

rations against interest are receivable in respect of matters forming a part of the declarations, but not in themselves affecting the interest of the declarant. Where declarations of deceased persons acknowledging the receipt of money have been admitted, it appears that they have often been admitted as evidence not merely of the fact of the deceased having received the money, but also of the circumstances stated as the occasion of the payment. (1)

Entries (against interest), evidence of facts therein stated, immediately connected.

In *Warren* v. *Greenville*, (2) upon a question whether a surrender to a recovery could be presumed, the book of a deceased attorney was produced, which contained a charge of a sum for suffering a recovery, two items of which related to the drawing of a surrender, and it appeared by the book that the bill was paid. The court held that the entries were admissible evidence, and material upon the inquiry into the reasonableness of presuming a surrender.

Examples.

In *Barry* v. *Beddington*, before cited, (3) upon a question of the soil and freehold of the defendant, entries by a deceased steward of a person under whom the plaintiff claimed, ac-

(1) See the cases collected in the note to Barker *v.* Ray, 2 Russ. 67.

(2) 2 Str. 1129. Independently of the credit due to the collateral statement, there was a presumption that the surrender must have been made before the money was paid. See observations on this case by Lord Ellenborough, in Higham *v.* Ridgway, 10 East, 117. In Doe *v.* Robson, 15 East, 32, on a question whether a lease had really been granted in possession, and not in reversion, entry of charges in an attorney's book, shewing the time when a certain lease was prepared, and which charges were shewn (as it would seem by the same book) to have been paid, were held to be evidence after the attorney's death, that the lease was prepared subsequently to the time when it bore date, and at a period when it would have been a lease in possession. It has been observed, that in such cases of entries in the books of deceased attornies, the entries do not deserve much additional credit from the circumstances of the fact of payment being added. For it would not be probable, that fictitious instructions would, without an assignable motive, be inserted in the attorney's book; or if such a motive existed, the adding of the fact of payment would not remove the suspicion attached to the entry. In Shipwith *v.* Shirley, 11 Ves. 65, where an attorney's book was adduced along with other evidence in proof of a lost deed, it does not appear that the charges were entered as paid. Blaikeler *v.* Crofts, Comb. 348. 12 Vin. Ab. 85. See observations on the case of Warren *v.* Greenville, by Lord Mansfield in Goodtitle *v.* Duke of Chandos, 2 Burr. 1071; and remarks of Lord Ellenborough upon these observations in Higham *v.* Ridgway, 10 East, 117.

(3) 4 T. R. 514. In this case the steward's accounts were in his handwriting, but not signed by him.

knowledging the receipt of monies on account of trespasses committed on the place in dispute, were held to be admissible evidence to disprove the defendant's title, and to establish that of the plaintiff.

In *Higham* v. *Ridgway*, (1) upon a question respecting the age of a person suffering a recovery, an entry made by a deceased accoucheur in his book, of having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, and marked the charge as *paid*, was held admissible evidence of the time of the child's birth. And Lord Kenyon, in speaking of the evidence of stewards' books, observes, that "such books may be read, not only to charge the steward with the amount, but to shew on behalf of the tenants that rents have been received, and also to shew, in cases where it might become a question, what kind of rents were payable out of particular estates." (2)

In the case of *Stead* v. *Heaton*, (3) the principle of the admissibility of declarations against interest, for the purpose of proving every thing contained in them, was carried still further. In that case, which respected the existence of a customary payment for the reparation of a parish church, churchwardens' accounts were produced, in which were the following entries,—"Received of Haworth, who this year disputed this our ancient custom, but after we had sued him, paid it accordingly, 8*l.* and 1*l.* costs;" and, at the head of the same page was written, "It is an ancient custom thus to proportion church-lay: 1st. The chapelry of Haworth pay one-fifth, Bradford a third of the

(1) 10 East, 109. Lord Ellenborough said, "it was idle that the word *paid* only should be admitted in evidence, without the context which explains to what it refers. We must, therefore, look to the rest of the entry, to see what the demand was, which he thereby admitted to have discharged. By the reference to the ledger, the entry there is virtually incorporated with, and made a part of the other entry, of which it is explanatory." For other instances, see Roe *v.* Rawlins, 7 East,291, receipt of rent in account-book of tenant for life, to shew the amount of ancient rent. Doe d. Powell *v.* Hill,(cited by Taunton, J., in Chambers *v.* Bernasconi, 1 Cr., M., & R.) where Richards, B., said, that he could not divide the entry into two.

(2) In Calvert *v.* Archbishop of Canterbury, 2 Esp. 646.

(3) 4 T. R. 669. See, further, concerning entries in churchwardens' books, Cook *v.* Bankes, 2 C. & P. p. 481, cited *supra*.

remainder, and the rest to be legally divided according to the churchwardens of the several other townships in the parish." The court were of opinion, that the entry of payment was clearly admissible, because the officers thereby charged themselves with the receipt; and that the other entry was admissible, because immediately referred to, and that both of them, being written on the same page and on the same subject, must be taken into consideration together; that they were both parts of one and the same transaction, each explaining the other.

In the case of *Marks* v. *Lahee*, (1) an entry of tender and refusal of money, made by a deceased clerk of an attorney in a day-book kept for the purpose of entering his daily transactions, was held to be admissible evidence to prove the tender; it's admissibility was rested on the ground of it's shewing, that the clerk had received the money and had not disposed of it according to his instructions,—so that it rendered him subject to a pecuniary demand.

Entry, whether evidence of collateral facts.

But it may be thought that there is a distinction between cases, where the admission against interest is part of one entire transaction with the rest of the declaration, (as in the instance of stewards' entries, where the entry might mean nothing unless the whole of it were read,) and cases where declarations embrace matters perfectly collateral. (2) This point was discussed in the case of *Chambers* v. *Bernasconi*, (3) where one of the questions was, whether the certificate of a capture by a sheriff's officer, stating the *place* of arrest, was evidence that the plaintiff had been arrested at the place stated. Mr. Baron Bayley

(1) 3 Bing. N. C. 408.

(2) See the argument of counsel in Chambers *v.* Bernasconi, 1 Cr. & J. 456, who explain the use of the evidence, in the above cases, for other purposes than those for which the entry was originally made, on the ground that the statements received were part of the *res gestæ* with the payment or other matter against interest. It may often, however, happen that an entire statement must be read, and the jury directed not to consider part of it as evidence of the facts related: See Willis *v.* Bernard, 8 Bing. 376: Manning *v.* Clement, 7 Bing. 362. And the cases of confessions of prisoners put by Park, J., 8 Bing. 384. Salte *v.* Thomas, 3 Bos. & Pul. 188, where a prison-book was held admissible to prove the period of commitment and discharge of the prisoner, but not the cause of the commitment.

(3) 1 Cr. & J. 456; stated *infra*..

expressed an opinion, that supposing the certificate was admissible for any purpose (as being a declaration against interest, or rather as made in the course of official duty), it was not admissible to prove the *place* of arrest. (1)

In the case of *Rudd* v. *Wright*, a survey was tendered in evidence, which had been made for the use of Trinity College, Cambridge, the impropriators of a living of which the plaintiff was vicar, and in this survey certain closes were stated as being titheable to the vicar. (2) Lord Lyndhurst observed, that although this document would be evidence against the college in a suit between them and the vicar, it would admit of some consideration, whether it was admissible in evidence against a third person; but that it was unnecessary to decide that question, because the object of producing the survey in evidence arose out of a marginal note to the survey. He

(1) Mr. Baron Bayley seems to have treated the question as being clear, that the declaration was not against interest; and he considered that it appeared from the facts of the case, that it was not a necessary part of the officer's duty to state the particular place of arrest. The case involved two other questions besides that noticed in the text; *viz.* whether the declaration was against interest; and whether it was receivable at all, as being made in the course of official duty. The Court of Exchequer thought the admissibility of the evidence a question of so much importance, that they wished the parties to have an opportunity of putting it on the record. See the decision on the same case in the Court of Error, *infra*.

(2) Before Lord Lyndhurst, Exch. 11 July, 1832. The marginal note to the survey stated that the closes, which had been specified as titheable to the vicar, formed part of a certain close mentioned in the terriers; and if so, they broke in upon the entirety of a district, for which the modus was claimed. It is to be observed, that although the interests of the rector and vicar were opposed to each other, yet as the college had the patronage of the vicarage, it was for their interest, that whatever tithes were clearly payable to the vicar and not to them, should be payable in kind, and not by a modus. And if it was clear by other evidence, that they had no right to the tithes of a particular close in any shape, they would not be prejudicing but promoting their interest, by admitting this acknowledged fact, and by inserting as part of the same entry a declaration tending to shew that the tithes were payable in kind. In this case also, it would have been very questionable, whether an entry on the part of a corporation could be received in evidence against strangers, on the ground of its being against interest. The case of Short *v.* Lee, before cited, is no authority for this position, as the person, whose interest was affected by the entry, was deceased. The death of the person making the survey had nothing to do with the question of its admissibility in the present case. It was not argued that the evidence was against his interest, or admissible on the ground of reputation. The evidence was rejected by Littledale, J., at the trial.

thought the marginal note could not be received in evidence, inasmuch as it was in the nature of a collateral and incidental observation made by the person who framed the survey; and that it did not follow, because a document is received in evidence in which there are entries against the interest of a party, that therefore collateral and independent matter, which is not a necessary part of such entries, ought to be received.

Entry by one who might not have been a competent witness

In order to render declarations against interest available, it is not essential that the deceased person, who made the entries, should have been a competent witness whilst living, to prove the facts contained in the declaration. (1) This has been expressly ruled in the case of *Short* v. *Lee*, where the entries of a deceased member of an ecclesiastical corporation were admitted on behalf of that corporation in a suit brought by them for tithes. (2)

Entry, where other proof may be had.

The declaration of deceased persons against their own interest are not the less admissible in evidence, because the facts, to which the declarations relate, may be proved by evidence of another kind,—as, for instance, by a living witness. This rule may be founded, partly on the great credit due to declarations against interest, and partly on the inconvenience of proving the failure of other evidence. (3) It was held, in

(1) Though such a qualification of the rule is stated by Mr. Justice Bayley, in Higham *v.* Ridgway, 10 East, 109, yet none of the other judges advert to it. The same judge lays down the rule in more unqualified terms, in Doe *v.* Robson, 15 East. See the observations of the Master of the Rolls, as to the observations of Mr. Justice Bayley, in Short *v.* Lee, 2 Jac. & W. 464. See an argument relative to this point in Barker *v.* Ray, 2 Russ. 71. In Warren *v.* Greenville, 2 Str. 1129, above cited, it was said by the court, as a reason for receiving an attorney's books, that he might have been examined if living, and his books were, after his decease, the best evidence. In Gleadon *v.* Atkin, 1 Cr. & M. 420. Bayley, B., repudiates the doctrine, that declarations cannot be received, except where the declarant might have been examined in his life-time, and refers to Middleton *v.* Melton, 10 B. & C. 326; Doe *v.* Robson, 15 East, 32; Bosworth *v.* Cotchett, cited *infra*, as shewing that no such qualification exists.

(2) 2 Jac. & W. 464. The rule is there laid down in general terms. In that case the declarant would have been incompetent, on the ground of being a party to the suit, to have been examined in favour of the corporation. But he might have been examined, if he had raised no objection against the corporation to prove the fact for which his entry was used, *viz.* payment.

(3) It will be seen, *infra*, that the admission of the evidence does not impugn the principles on which

Middleton v. *Melton*, (1) that the entry made by a deceased collector was proof of the fact of the money having been paid, without calling the persons who paid it, or showing that they were dead. And it appears from the facts of earlier cases, that the same understanding of the courts as to this point is to be implied from them. (2)

Proof of declarant's situation, *aliunde*.

In order to use in evidence entries on the ground of having been made against interest, it will be necessary to show, by testimony *dehors* the entries, that the person making the entry was in the situation in which he purports to be. The character of the evidence must be established before the entry is read. (3) Thus, in the case of *De Rutzen* v. *Farr* (4) it was held, that accounts of rent, signed by a person styling himself clerk to a steward, but not shown to have been employed by such steward otherwise than by the accounts themselves, were not evidence to prove that the rent had been received.

Where the entries are produced in evidence, as being those of receivers of private individuals, it has been ruled, that it should appear by evidence *aliunde*, that the persons making the entries filled that character at the time when the entries were made. Thus, in the case of *Short* v. *Lee*, (5) where the accounts of a tithe collector were produced in evidence, it was held to be necessary to prove *aliunde*, that the person whose book was produced was authorized to collect the tithes. (6)

secondary evidence of facts is excluded.

(1) 10 Barn. & Cress. 317, and See Poole *v.* Dicas, cited *infra*.

(2) See observations of Parke, J., in Middleton *v.* Melton, 10 Barn. & Cress. 328. In the case of Barry *v.* Bebbington, 4 T. R. 514, which was tried in 1791, one of the memoranda was a receipt of a sum of money in 1785.

(3) See by Lord Lyndhurst, and Bayley, B., in Davies *v.* Morgan, 1 Cr. & J. 590. It does not appear in that case whether the entries purported to be made by corporators or by strangers.

(4) 4 Ad. & E. 53. The accounts were found among the family muniments, which might seem to afford a reasonable presumption of their being genuine. And see Short *v.* Lee, 2 Jac. & W. 464, 467.

(5) 2 Jac. & W. 464. See Manby *v.* Curtis, 1 Pr. 225; where proof of agency was required in the case of a receipt for tithes fifty years old.

(6) It is to be observed, that it would be very difficult to prove the appointment of reeves or bailiffs, when their accounts are of great antiquity; and they have certainly in practice been often admitted without such previous proof, when produced from the proper custody. The internal evidence in such cases leaves no reasonable ground for doubt. The handwriting of a de-

In the same case, account-books from the possession of a corporation entitled to an impropriate rectory, purporting to be accounts of their collector of tithes, were received, without proof *aliunde*, that the accounting party was really the collector; on the ground that, by the charter of the corporation, it was their duty to appoint proctors to receive the tithes, and a corporation could have received the tithes themselves. The point was said to be not dissimilar to that decided in regard to collectors of incumbents in general, they being persons whose character depends on the pleasure of a private individual, who might or might not appoint.

In *Doe* v. *Lord George Thynne*, (1) upon a question whether certain ancient books, produced from the archives of the Dean and and Chapter of Exeter, were the books of receivers debiting themselves with the receipt of money, and on that account admissible in evidence, it was held, that the similitude which the entries bore to the books of receivers of the same body in modern times, was not a safe and adequate ground for presuming that the ancient books were kept by persons of the same character and description, and accounted upon as such. But, on it's appearing that some of the entries in the ancient books (not relating to the matter in question) imported that one A. B. was therein accounting to the dean and chapter for money paid to himself, with the receipt of which he therein debited himself in such forms as *solvit mihi*, *solvit per me*, the court thought that this was strong internal evidence, that the books were actually receivers' books.

ceased steward, need not be proved after thirty years, *vide infra*. Wynne *v.* Tyrwhit, 4 B. & A. 376. Jones *v* Waller, Gwill. 847. 2 E. & Y. 141. See Manby *v.* Curtis, 1 Pr. 225, *contra*. The accounts in Short *v.* Leigh, were of the dates 1752, 1753, 1754, and the cause was heard in 1821. See Jones *v.* Carrington, 3 E. & Y. 1131, proof of tithe receipts by a lessee, without producing the lease. Yates *v.* Leigh, Gwill. 861. 2 E. & Y. 151, where receipts purporting to be signed by a receiver, but appearing to have been in fact signed by his deputy, were rejected.

(1) 10 East, 208. The similitude between the ancient and modern books seems to be one reasonable mode of inferring the nature of the former. If the entries are signed by a deceased agent, though not in his handwriting, it is sufficient: Doe *v.* Stacey, 6 C. & P. 139.

Section VIII.

Exception to the General Rule as to Hearsay, in cases where Declarations or Entries have been made in the course of Office or Business.

According to the observations of several judges on different occasions, it might seem that where there is a competency of knowledge, or at least peculiar means of knowledge in an individual making a declaration, and a total absence of interest to pervert the facts to which he has spoken, his declarations would be admissible evidence after his death, even though the declarations did not operate against his interest. (1) But these observations are too loose, and too much at variance with the principle of the cases which have been just considered, to be regarded as establishing any rule less rigid than that above laid down, which requires the declaration to be against the interest of the person making it, before it can be received in evidence.

Declarations (entries, &c.) in the ordinary course of business.

There seems, however, to be more reason for considering that a rule exists, which allows of declarations of deceased persons being received in evidence, even though not made against their interest, provided that in addition to a peculiar knowledge of the facts, and the absence of all interest to pervert them, the declarations appear to have been made in the ordinary course of official, professional, or other business or duty, and to have been immediately connected with the transacting or discharging of such business or duty, and to be contemporaneous, or nearly contemporaneous, with the transaction to which they relate.

(1) See statement by Bayley, B., of the principle of the case of Roe *v.* Rawlins, in Gleadon *v.* Atkin, 1 Cr. & M. 420. The declaration of a person having peculiar means of knowing a fact, and no interest in misrepresenting it, is admissible to prove the fact; *a fortiori*, if it were against his interest: by Lord Ellenborough, in speaking of vicars' books, in Roe *v.* Rawlins, 7 East, 290. See also by Lord Ellenborough, Doe *v.* Robson, 15 East, 34. But see by Bayley, J., *ibid.*; and again, when speaking of that case in 1 Cr. & J. 458. By Le Blanc, in Higham *v.* Ridgway, 10 East. (But subsequent authorities have treated the case of Higham *v.* Ridgway as decided, on the ground of interest.) By Littledale and Park, J., 10 Barn. & Cress. 326, 327. By Lord Lyndhurst, C. B., Bayley, B., 1 Cr. & J. 456, 457. By Bayley, B., in Glendon *v.* Atkin, 1 Cr. & M. 420.

It appears to be a legitimate ground for admitting such declarations in evidence, that it would be contrary to the experience of mankind, if, in the generality of instances at least, they were not exempt from the suspicion of fraud or carelessness: it is of course presumed that no temptation to deceive can be suggested; and it is no unimportant guarantee against fraud, that the declarations cannot be available for the author of them during his lifetime. By the restriction which requires that the declarations should have been made in the course of ordinary business, and not only connected with the transactions to which they relate, but also contemporaneous with them, a reasonable ground is laid for presuming that they are accurate. An additional reason for the admissibility of such evidence is, that the weight attached to the evidence is not founded merely on the presumption of the credit due, under the circumstances, to the authors of the declarations, but also on the presumption, that in the ordinary course of business such declarations would have been made, if the principal fact to be proved had really taken place. Further, it may be thought, that as transactions in business are frequently confined to the knowledge of a few persons, there is some reason, on the ground of general convenience, for enlarging the rule, as far as can safely be done, and for adapting it to the exigencies of the community.

The earlier cases on this subject will be first noticed; and afterwards the recent cases of *Doe* v. *Turford*, and *Poole* v. *Dicas*.

Price v. *Lord Torrington.*

In the case of *Price* v. *Lord Torrington*, (1) the plaintiff, who was a brewer, brought an action against Lord Torrington for beer sold and delivered; the evidence given to charge the defendant was, that, according to the usual course of the plaintiff's dealing, the draymen came every night to the clerk of the brewhouse, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen signed their names; the drayman, whose name appeared to be signed to an entry stating the

(1) 1 Salk. 285. 2 Lord Raym. 873. Holt, 300, S. C. B. N. P. 282.

delivery of the beer in question, was dead; and the signature was proved to be his. It was ruled, that this was good evidence of a delivery.

Pitman v. *Maddox.*

In *Pitman* v. *Maddox*, (1) in an action on a tradesman's bill, a shop-book was admitted by Chief Justice Holt as evidence to prove the delivery of goods, it being proved that the servant who kept the book was dead, that the entries were in his handwriting, and that he was accustomed to make the entries.

Smartle v. *Williams.*

In the case of *Smartle* v. *Williams*, (2) where the question was, whether mortgage-money had been really paid, the book of accounts of a deceased scrivener was held to be good evidence of payment. In this case it does not appear, that the scrivener charged himself by the entry.

Evans v. *Lake.*

In the case of *Evans* v. *Lake*, upon an issue out of Chancery to try whether eight parcels of Hudson's Bay stock, bought in the name of Lake, were in trust for Sir Stephen Evans, Sir Stephen Evans' assignees (the plaintiffs) shewed, first, that there was no entry in the books of Lake relating to the transaction; secondly, six of the receipts were in the hands of Sir Stephen Evans, and there was a reference on the back of them, by a deceased book-keeper of Sir Stephen Evans, to a certain shop-book of Sir Stephen, in which there was an entry for the payment of money for the whole of the goods. The question, upon a trial at bar, was, whether entries of the payment of the money, contained in the book referred to, should be read. The Court of King's Bench admitted entries from the book in question to be read, as well such as related to the above mentioned six receipts, as also some which related to two other receipts in the possession of the son of Lake. (3)

(1) 2 Salk. 690. Lord Raym. 732, S. C. B. N. P. 282.

(2) B.N.P. 283. The case appears to be the same as that of Smart *v.* Williams, Comb. 257, of which a note is given in 12 Vin. Abr. 88. A. b. 15.

(3) Evans *v.* Lake, B. N. P. 282. This case is referred to by Lord Hardwicke in Glynn *v.* Bank of England, 2 Ves. 43; and in Lefebure *v.* Warden, 2 Ves. 54. See Clerk *v.* Bedford, Bull. N. P. 382; and Cooper *v.* Marsden, 1 Esp. C. 1.*

* In Clerk *v.* Bedford (B. N. P. 382), where the plaintiff, to prove delivery of wine to the defendant, produced a book belonging to his cooper

In *Pritt* v. *Fairclough*, (1) an entry by a deceased clerk, in a letter-book, professing to be the copy of a letter of the same date, made according to the course of business, was received in evidence. *Pritt* v. *Fairclough*

In *Hagedorn* v. *Reid*, (2) a memorandum of a deceased clerk, written on a copy of a license, stating that the original had been sent to a particular person, was held to be evidence of that fact, upon proof of the course of business followed by the clerks in the office. (3) *Hagedorn* v. *Reid*.

In *Champneys* v. *Peck*, (4) upon a question whether an attorney's bill had been delivered within a month before the commencement of the action, an indorsement upon the bill, in the handwriting of a deceased clerk, was received in evidence. The indorsement was in these terms: "March 4th, 1815, delivered a copy to Mr. Peck." Upon this indorsement being produced, and evidence being given that it was the duty of the particular clerk to deliver the bill, and that such an indorsement was usually made in the common course of business upon the copy kept, Lord Ellenborough ruled, that the indorsement was *primâ facie* evidence of the delivery of the bill. *Champneys* v. *Peck*.

The recent cases of *Doe* d. *Pattershall* v. *Turford*, and *Poole*

(1) 3 Camp. 307.

(2) 3 Camp. 379.

(3) The case of Digby *v.* Steadman, 1 Esp. 327, is sometimes considered as belonging to this class of cases. There, in an action of trover, the plaintiff's shopman, who proved the delivery, was allowed by Lord Kenyon to produce the shop-book, containing an entry of the delivery in the handwriting of his master, and seen by himself within a short time after it was made. It would seem, that, in the present day, a question of this kind could only arise, upon the question as to the means by which a witness might refresh his memory. In Cooper *v.* Marsden, 1 Esp. 1, the same notion appears to have prevailed, of entries in banker's books by a clerk produced as a witness, being substantive evidence.

(4) 1 Stark. C. 404. The cause was undefended.

(since dead,) whose name was subscribed several articles; after proof of the handwriting, it was proposed to read the articles so subscribed; but Lord Raymond would not admit the evidence, saying it differed from Lord Torrington's case, because there the witness saw the drayman sign the book every night. In the case of Calvert *v.* Archbishop of Canterbury (2 Esp. C. 646), for the hire of a pair of horses, Lord Kenyon ruled, that an entry by the plaintiff's servant (since dead), stating the terms of the agreement with the defendant, ought not to be admitted.

v. *Dicas*, next to be mentioned, have settled the principle upon this subject.

Entry, made in course of business, when admissible.

In *Doe* d. *Pattershall* v. *Turford*, (1) the question was, whether a notice to quit had been served on a tenant by an attorney. It was shewn to be the usual practice in the 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; 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 service on the tenant; two of them were proved to have been delivered by him on that occasion. (2) The question at the trial was, whether the indorsement made by him on the duplicate of the third notice, could be received after his death as evidence to prove the service of that notice. Littledale, J., received it; and the Court of King's Bench held, that it had been properly received. The cases before cited were referred to as authorities for the admissibility of the evidence.—Lord Tenterden first adverted to the practice in the office as to service of notices by the clerks, and observed, that though they were regularly served by the clerks, and not by the principals, yet, that a principal might occasionally serve such a notice, and that the Court must assume, that when a principal served the notice, he would do what he required his clerk to do. "The indorsement, then," (added the Lord Ch. J., in conclusion) "having been made in the discharge of his duty is, according to the authorities cited, admissible evidence of the fact of the service of the original."—Littledale, J., said, "If the notice in question had been served by a deceased clerk, his indorsement on the duplicate, coupled with proof of the practice of the office, would have been sufficient evidence of the service. Then, is the indorsement of the attorney tantamount to a clerk's? I think it is; for it must be assumed, that he would do what he re-

(1) A. D. 1832. 3 B. & Add. 890.

(2) This statement of the facts of the case was made by Tindal, C. J., in Poole *v.* Dicas, 1 Bing. N. C. 653.

quired his clerk to do."—Parke, J., pointed out the several facts of the case, which were strong circumstantial evidence, that the notice in question had been delivered at the time stated in the memorandum indorsed on the duplicate. Then adverting to the practice of the office as proved, he remarked that it must be presumed that the attorney (one of the principals in the office) observed the rule of the office as well as the clerks. He then said, (referring to the argument of counsel) the indorsement in question was not to be considered within the rule which would make it admissible, as an *admission against interest:* in that case, proof of the party's handwriting and of his death would be enough to authorize its reception, and, at whatever time made, it would be admissible; but in a case like the present, it is essential to prove, that the entry was made at the time it purports to be made; it must be a contemporaneous entry. It was on this ground, as he conceived, that similar evidence was received in Lord Torrington's case, and the other cases cited of the same nature.—Taunton, J., said, "a minute in writing, like the present, made at the time when the fact it records took place, by a person (since deceased) in the ordinary course of his business, corroborated by other circumstances which render it probable that that fact occurred, is admissible in evidence. Those corroborating circumstances must be proved; and here many such circumstances did appear."—Thus, a principle, which till then had been in a very unsettled and undefined state, was by this decision, after much argument and consideration, clearly laid down and established. The principle is, that entries on matters of business, made by persons (since deceased) employed in the business, and made by them in the ordinary and regular course of the business, contemporaneously with the fact or business stated therein to have been done by them, are evidence that the fact took place, and that the business was done as stated. It is manifest, that this principle does not extend to any entries other than such as were made in the ordinary and regular course of business—nor to entries by any persons other than such as were employed in the business—nor to any entries by those persons other than such as were made contemporaneously with the act done. The principle, as laid down by the judges, is evidently, for all

practical purposes, of great value and importance; it is the more valuable from being expressed in terms so clear and comprehensive.

In stating the principle deducible from this decision, it will be observed, nothing has been said respecting the limitation or qualification which Mr. Justice Taunton (if the report of his opirion is correct), annexed to the principle;—a limitation, certainly not required by any of the other judges. His words, as reported, are,—"A minute in writing like the present, made at the time when the fact it records (that is, the fact of *delivery of notice*) took place, by a person since deceased, in the ordinary course of his business, *corroborated by other circumstances which render it probable that that fact occurred*, is admissible in evidence." Corroborating circumstances (it is conceived) were not necessary for proving that the fact, *of the delivery of the notice*, occurred: but to prove that the making of the entry was *contemporaneous with the fact of delivery*, circumstancial evidence would be necessary,—this was very clearly shewn by Mr. Justice Parke. The entry was in itself evidence of the fact of the notice having been delivered, and needed no corroborating circumstances as to that fact: corroborating evidence might add to the *effect* or *value* of the entry as proof of delivery, but could not be essential to its *admissibility*, and might not be wanted even for confirmation. It is not improbable, that two or three words may have dropped out of the report: it is conceived, that if the proposition had been written thus,—"A minute in writing like the present, made at the time when the fact it records took place, by a person (since deceased) in the ordinary course of his business, corroborated by other circumstances, which render it probable that *the entry was made* when that fact occurred, is admissible in evidence,"—it would have been more in accordance with the opinions of the other judges.

The case of *Poole* v. *Dicas*, (1) next to be stated, recognises and confirms the last mentioned case of *Doe* v. *Turford* to its

(1) A. D. 1835. 1 Bing. N. C. 649.

full extent. The question there was on the admissibility of an entry in a notary's book, as evidence of the dishonour of a bill. A notary's clerk stated at the trial, that when the bill became due (in June 1833), it was left by the plaintiff with the notary, to demand payment. A copy of the bill was made in a book kept by the notary for that purpose, and one of his clerks (since dead) went out on a Saturday evening to demand payment of the acceptor: in a short time he returned, and in the margin of the book containing the copy of the bill, wrote by the side of the copy "No effects." This entry was produced, and proved to be in the deceased clerk's handwriting. Another clerk made a similar entry from the deceased clerk's dictation in a separate book, which contained the protest for non-payment. All this was done in the regular course of the notary's business. The entry was received by Tindal, C. J., at the trial, and, as the Court of Common Pleas determined, properly received. After the argument, the Chief Justice said, "We think the evidence in question was admissible, on the ground that it was an entry made at the time of the transaction, and made in the usual course and routine of business by a person who had no interest to misstate what had occurred. This does not carry the law further than the principle established in *Doe* v. *Turford*.—The entry was made at the time: and all was done in the ordinary course of business. The clerk had no interest to make a false entry: if he had any interest, it was rather to make a true entry:—a false entry would be likely to bring him into disgrace with his employer." The Chief Justice then proceeded to point out accompanying circumstances tending to confirm the correctness of the entry: and continued thus: "It has been argued that the decision in *Doe* v. *Turford*, can only be supported on the supposition that no other evidence could have been given but that which was received. But that is carrying the case further than the facts warrant: for there might have been persons present when the notice was served. In the present case, it would operate as a great hardship to require the testimony of persons who might have been present. The clerk who presented the bill could scarcely, at the distance of two years, point out who it was that answered his application: and if it were necessary to call the persons who resided at the

place of presentment, the expense and inconvenience would be enormous." Park, J., was of the same opinion, and rested the admissibility of the entries on the ground that they were made in the ordinary course of business, and at the time when the act recorded was done.

Chambers v. *Bernasconi.*

The case of *Chambers* v. *Bernasconi,* (1) which was tried after the case of *Doe* v. *Turford,* and before the last mentioned case of *Poole* v. *Dicas,* shews that where one of the terms of the definition of the principle above stated fails, the principle will not apply, and the entry cannot be received: as, where an entry is tendered in evidence to prove a particular fact, (for instance, to prove an arrest in a particular place,) and that place is mentioned in the entry as the place of arrest,—if it was no part of the duty of the person making the entry to record or certify the *place,* the entry is not admissible for the purpose of proving the place.

In this case the question was, whether the plaintiff had committed an act of bankruptcy, and that principally depended upon the *place* where the plaintiff was arrested on the 9th November,—whether at the plaintiff's residence at Paddington, or in South Molton Street; the alleged act of bankruptcy being the keeping house by the plaintiff, and denying himself to his creditors at his residence at Paddington. To prove the place of arrest, the deputy-under-sheriff produced a certificate signed by a sheriff's officer (since deceased) who made the arrest, and afterwards sent the certificate to the sheriff's office: the witness stated, that the officers are always required to give in such certificates immediately after the caption; that the certificates are the foundation of the writs, and that the officers are charged by their certificates of the caption, and are required to insert in the certificates the place of arrest. The certificate bore date on the day of the arrest, and was as follows: "9th November, 1825, arrested A. H. Chambers, in South Molton Street, at the suit of William Brereton." (Signed) "Thomas

(1) A.D. 1831. 1 Cr. & J. 451; 1 Tyr. 335.

Wright." Lord Lyndhurst, C. B., who tried the cause, received the evidence: but upon a motion for a new trial, the Court of Exchequer thought the question of the admissibility of the evidence of such importance, that they wished the parties to have an opportunity of putting it on the record. The question of the admissibility of the evidence involved several points which have been before noticed. But in reference to the point under consideration, Mr. Baron Bayley expressed his opinion, that supposing the entry admissible at all, on the ground that it was the duty of the sheriff's officer to make the return; still that the return was not evidence as to the *place* of arrest; it not being, (at least at the time when the arrest was made) a necessary part of the officer's duty to state the *place* of arrest.

The Court of Exchequer granted a new trial, and the cause was again tried before Lord Lyndhurst, who refused the evidence before mentioned, which was then tendered; upon which a bill of exceptions was tendered, and the exceptions came on for argument in the Exchequer Chamber. (1) The bill of exceptions stated, among other things, that the under-sheriff proved, it was part of the course of the sheriff's office to require a return in writing of the arrest, and of the place where the arrest is made, under the hand of the sheriff's officer making the arrest; that the sheriff acted on these certificates in making the return, that the certificate produced was annexed to the writ issued against the plaintiff, &c.

Same case in error.

Lord Denman delivered the judgment of the court, (2) and observed, that the ground upon which the argument was first rested, *viz.*, that the certificate was an admission against the interest of the party making it, because it made him liable for the body arrested, was not much relied on: but recourse was had to a much broader principle, *viz.*, that an entry written by a person in the course of his duty, where he had no interest in stating an untruth, is to be received

(1) Tr. T. 1834. 1 Cr., M. & R. 347.

(2) Chambers *v.* Bernasconi, 1 Cr., M. & R. 367. See Smith's Selection of Leading Cases, vol. 1, p. 141.

after his death as evidence of the fact stated in the entry, and of every circumstance therein described, which would naturally accompany the fact itself. "We are all of opinion," said Lord Denman, "that whatever effect might be due to an entry made in the course of any office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they might be thought to find a place in the narrative, would be no proof of those circumstances. Admitting, for the sake of argument, that the entry tendered was evidence of the fact, and even of the day when the arrest was made (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion, that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done."

The case of *Chambers* v. *Bernasconi* must be considered, then, as having been decided on the ground that it was no part of the officer's duty to certify as to the *place* of arrest; consequently, the certificate was not entitled to credit as an entry made in the regular course of business. The sheriff's officer was going beyond the sphere of his duty, when he made an entry of the *place* of arrest, and the entry therefore had no claim to be received as evidence of that fact. (1)

Another term in the definition of the principle before stated, is, that the entry or written memorandum, offered in evidence, must have been made contemporaneously with the doing of the act therein recorded; that is (it is conceived), made in point of time so nearly after the act done, as to be reasonably considered a part of the same transaction, according to the ordinary and regular course of business. In *Lord Torrington's* case, the entry was made at night, in the usual course,—the delivery of goods (for the proof of which the entry was wanted) having taken place, if at all, in the same day. In *Doe* v. *Turford*, the entry (an indorsement on a duplicate of notice) was made after the conclusion

(1) See by Tindal, C. J., and by Parke, J., in Poole *v.* Dicas, 1 Bing. N. C. 651, 655.

of the business, at the latest in the evening of the same day, if not earlier. In *Poole* v. *Dicas* the entry was made in the regular mode, on the return of the clerk from the business in which he had been employed. In *Chambers* v. *Bernasconi*, the entry would have been made (according to the usual course) immediately after the caption.—There was no difficulty in any of these cases upon the point, whether the entry was made regularly in point of time, and contemporaneously with the transaction recorded. But in *Clerk* v. *Bedford*, before cited, (1) there was an entire failure with respect to that term of the definition, which requires the entry to be contemporaneous with the fact recorded in the entry; and upon that ground the case was distinguishable from *Price* v. *Lord Torrington*. The same defect of preliminary proof appears in the case of *Calvert* v. *The Archbishop of Canterbury*,—where there were also other objections to the admissibility of the evidence. In *Champneys* v. *Peck*, (2) mentioned in a former page, Lord Ellenborough was not satisfied with the evidence of the indorsement of a deceased clerk for proof of the time of the delivery of an attorney's bill, until it had been shewn by extrinsic evidence, that the indorsement existed at the time when, according to its purport, the bill had been delivered.

In the case of *Pyke* v. *Crouch*, (3) on a trial at bar, it was resolved, that if the duplicate of a will be written by the direction of a testator, and be sent by him to a stranger to keep it safely, and the stranger sends back a letter to the testator, in which he makes mention that he has received the will, such letter may be read after the death of the stranger as circumstantial evidence, to prove that such a duplicate of a will was sent by the testator to the stranger. It does not appear in this case, (which was decided at a time when the principle applicable to cases of this description had not been well considered) that the transaction was according to the ordinary and regular course of business: from the nature of the transaction the contrary might be inferred; and if so, the case could not be brought within the principle above stated. *Pyke* v. *Crouch.*

(1) P. 320, in note.
(2) 1 Stark. C. 404.
(3) Lord Raym. 738.

Entries not evidence for parties in privity.

Entries and memoranda, of the nature under consideration, seem not to be admissible for parties *in privity* with the persons who made them. For although the principle, on which such declarations are received, does not depend on the future use of the declaration, still the actual event of it's being made available for persons in privity with the maker, would, it is conceived, in general, be regarded as proof of an existing motive of interest, sufficient, according to the terms of the rule, to exclude the evidence. It has been seen, in the case of *Outram* v. *Morewood*, that entries, admitting a fact adverse to the interest of the person making them, were not allowed to be used for the benefit of persons claiming under the maker. Although no general rule has been laid down by the courts on the subject, even as regards declarations against interest, and although the admissibility of that species of evidence rests on a different kind of presumption from the evidence under consideration, yet it is conceived that, in both instances the declarations can only be made use of by strangers in interest.

Indorsements on bonds.

There are two remarkable decisions respecting indorsements of interest on bonds and notes, in which it has been held that indorsements, as having been made in the course of business, were admissible in evidence for a party claiming under the obligor, payee, or party succeeding to his representative title, though it did not appear by negative evidence, but that the declarations might have been made at a time when they would have promoted the interest of the representatives. It is proper to observe, however, that the indorsements in these cases have been represented, by great authorities, simply as declarations against interest.

Searle v. *Lord Barrington.*

In an action on a bond, (1) brought by the plaintiff as

(1) Searle *v.* Lord Barrington, 2 Str. 126. 8 Mod. 279, S. C. 2 Lord Raym. 1370, S. C. 3 Brown, P. C. 535, S. C. 3 P. Wms. 397. 2 Eq. Ca. Ab. 414, n. to Ca. 16. 12 Vin. Ab. p. 85. With reference to this case, the reader is referred to Glynn *v.* Bank of England, 2 Ves. 42: Turner *v.* Crisp, 2 Str. 827: Rose *v.* Bryant, 2 Campb. 323: Bosworth *v.* Cotchett, and Gleadon *v.* Atkin, *infra*. The dates will be found to be as follow:—The bond was dated in June, 1697; the obligor died in 1710; the plaintiff's letters of administration were ob-

administratrix of her deceased husband (the obligee) against the defendant as administrator of the obligor, the defendant insisted on the length of time that had elapsed between the date of the bond and the commencement of the action, which was about twenty-seven years, as raising a presumption that the money had been paid: in answer to this, the plaintiff offered in evidence two indorsements on the bond, (1) in the handwriting of the obligee, one dated in December, 1699, the other in March, 1707, purporting that the whole of the interest had been paid up to the time of these dates. The Chief Justice Pratt, before whom the action was first tried, rejected the evidence, (2) on account of the inconvenience which would arise from allowing the obligee, in whose custody the bond always remains, to make such indorsements, whenever he might think proper. The plaintiff was accordingly nonsuited. But after an argument in the Court of King's Bench on a case stated for the opinion of that court, the other three judges held, (3) that the indorsements in question ought to have been left to the consideration of the jury; "for the jury (as the report in Strange states) *might have reason to believe*, that it was done with the privity of the obligor; and the *constant practice* is 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." The report in the 8th Mod. Rep. is full and strong to the same effect. "It is the *daily practice* (says that report) to make such indorsements on bonds, and generally at the request of the obligor; and this is the best and surest evidence of the payment of the money, because acquittances and notes may be lost, whereas indorsements will continue as so many brands on the bond, into

tained in July, 1723; the first action was tried before Pratt, C. J., in 1724; the second action, before Raymond, C. J., in 1726. The writ of error in the Exchequer Chamber was in 1729; and the judgment of the Exchequer Chamber was affirmed on appeal to the House of Lords in 1730. (See the Reports in Strange & Brown.) The time of the *obligee's* death is not stated in any of the reports; but it appears that administration of his effects was sued out in 1723, which was about twenty-six years after the date of the bond.

(1) See 3 Brown, P. C. 593, and 2 Lord Raym. 1370.

(2) See the Reports in Strange, and 8 Mod.

(3) See Report in Strange.

whose hands soever it falls, as long as the original, which creates the charge, shall continue." The nonsuit was not set aside, because at that time there was a prevailing notion, that as the plaintiff had been put out of court by the nonsuit, the court could not order a new trial. The plaintiff afterwards brought a new action, which was tried before Lord Raymond; and the same indorsements were again offered in evidence, to repel the presumption of payment of the principal. The counsel for the defendant objected to the evidence, (1) on the ground, that it did not appear when those indorsements were made, otherwise than by the indorsements themselves. But Lord Raymond was of opinion, that the indorsements were evidence to be left to the consideration of the jury, and therefore allowed them to be read; and (as one report states), *other circumstantial evidence* being given to induce the jury to believe that the bond had not been satisfied, (2) the plaintiff had a verdict. The defendant's counsel tendered a bill of exceptions, which was sealed by the Chief Justice; and a writ of error was brought in the Exchequer Chamber. The errors were twice argued in the Exchequer Chamber, and the judgment of the Court of King's Bench was affirmed. (3) A writ of error was then brought in the House of Lords; and after counsel had been heard on this writ of error, and the judges had delivered their opinions *seriatim*, the House of Lords affirmed the judgment of the Exchequer Chamber. The grounds of the decision in the Exchequer Chamber, and in the House of Lords, do not appear in any of the reports. (4)

(1) See Report in Brown.

(2) See Brown's Report.

(3) According to the Report in Strange, five judges thought the evidence admissible,—two were of the contrary opinion. The Report in Brown states, that the judgment was affirmed by the opinion of all the judges.

(4) Upon the argument in the case of Bosworth *v.* Cotchett, Lord Eldon directed the record in Searle *v.* Lord Barrington to be examined, and it appeared that there was no mention of any circumstances to shew, that the indorsements were made before the presumption of payment could have arisen. The time of the death of the obligee does not appear to have been proved. It appears from a note in Brown's Reports, that Mr. B. Comyns was for revising the judgment; and that Lord Raymond, Ch. J., Mr. Justice Eyre, and Mr. Justice Probyn, were absent. The observation of the court, that the jury might have reason to believe that the indorsement was made with the privity of the obligor, shews the loose ideas

The case of *Searle* v. *Lord Barrington*, has been followed by that of *Bosworth* and *Parr* v. *Cotchett*, determined in the House of Lords. (1) It that case the payee of a promissory note had written indorsements of the half-yearly payment of interest, from the time of making the note till his death (which happened within six years of the date of the note), and the like indorsements had been written by his executor (who died before the commencement of the action); and it was adjudged, that these indorsements were admissible in evidence, in answer to a plea of the Statute of Limitations; though there was no extrinsic evidence offered of the time when the indorsements were made, and though more than six years had elapsed between the death of the maker of the note, and that of the executor.

Indorsements on note. *Bosworth* v. *Cotchett*.

In the case of *Gleadon* v. *Atkin*, (2) it was held, that an

Indorsement on bond.

on the subject of evidence which prevailed at the period of the decision. In Glynn *v.* Bank of England, 2 Ves. 43, Lord Hardwicke states, that he considers, that, in Searle *v.* Lord Barrington, the indorsements were made within the twenty years. Some credit appears to have been given to a presumption, that the indorsements were within time, from the fact of their appearing to be so by their date, *vide* by Lord Hardwicke, *ib.*, and Turner *v.* Crisp, 2 Str. 827. But if there had been no date at all, the probability of a person fabricating the entry would not have been stronger than that of a person fabricating a date. Lord Hardwicke, 2 Ves. 43, seems to have considered that the declarations of an individual might be available for his representatives, when they were originally against his interest; and when it is only by the consequential use of them, that his property is benefited. But this assumes a positive sacrifice of interest to be proved in the first instance, and in the next place an absence of any contemplation of a greater future benefit. Lord Hardwicke, however, lays it down as a fundamental rule, that a man shall not be permitted to make evidence for himself: and on this ground, that a list of bank notes, in the testator's handwriting, was inadmissible for his representatives, to prove the fact of his having been formerly in possession of the notes.

(1) Tried at Leicester Sum. Ass. 1819, before Richards, Ch. B.; judgment in the House of Lords, 6th May, 1824. By the stat. 9 Geo. 4, c. 14, it is enacted, that "no indorsement or memorandum of payment, written or made, by or on behalf of the party to whom such payment should be made, shall be deemed sufficient proof of such payment, so as to take the case out of the Statute of Limitations." In this case and in that of Searle *v.* Lord Barrington, the ground of the decisions appears to have been the inference to be drawn from the ordinary course of business. The usual course of business, indeed, proves, that when interest is paid, such is the usual way of receipting it, and that is all. In the absence of all evidence to the contrary, an indorsement on a promissory note, admitting the receipt of interest, will be presumed to have been made at the time it bears date; see Smith *v.* Battey, 1 M. & Ro. 341.

St. 9 G. 4, c. 14.

(2) 1 Cr. & M. 410.

Gleadon v. *Atkin.*

indorsement upon a bond in the handwriting of the obligee, which appeared to have been made at or about the time when the bond was executed, but which was not proved to have been ever seen by the obligor, stating that the bond was given to the obligee in trust for a third person, was admissible in evidence to connect the payments of interest with the bond, the bond being upwards of twenty years old, but interest having been paid within twenty years by the obligor to the third person. The authorities of *Searle* v. *Lord Barrington* and *Bosworth* and *Cotchett* were relied on in the decision of the court, and Bayley, B., observed, that he had discovered by his own research, that in *Searle* v. *Lord Barrington* evidence was given of the time when the indorsements were made, though it is not stated in the reports. The court appears to have considered these two decisions as well as the case before them to fall within the principle before mentioned, namely, that the declarations of a person having peculiar means of knowledge, having no interest to misrepresent, and making a declaration against his interest, are admissible in evidence after his death.

It has been held, that where indorsements of receipts of part of a bond were proved to have been made *after* the presumption of payment had taken place, they are inadmissible. (1) And further, if the defendant produces direct evidence of payment of a principal sum and interest at a certain time *within* twenty years, the plaintiff cannot be allowed to encounter that evidence by an indorsement in the handwriting of the obligee, purporting that interest and part of the principal were paid at a subsequent time; on the ground, that supposing the fact to be true that the bond had been satisfied by payment, it would obviously be to the advantage of the obligee to make such an indorsement, which might afterwards be used as evidence in an action on the bond. (2) Lord Ellen-

(1) Turner *v.* Crisp, 2 Str. 827: the Chief Justice saying, that it differed from the case of Searle *v.* Lord Barrington, where the indorsements appear to have been made, before they could be thought necessary to be made use of to encounter the presumption. And see by Lord Hardwicke, in Glynn *v.* Bank of England, 2 Ves. 43.

(2) Rose *v.* Bryant, 2 Camp. 321.

borough in this case observed, he was at a loss to see the principle on which such receipts in the handwriting of a creditor had sometimes been admitted as evidence against the debtor; and that he was of opinion, they could not properly be admitted, unless they were proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest. (1)

Shop-book. 7 J. 1, c. 12.

The statute 7 Jac. 1, c. 12, enacts, that the shop-book of a tradesman shall not be evidence in any action for wares delivered, or work done, above one year after the bringing of the action, except the tradesman or executor shall have obtained a bill of debt or obligation of the debtor for the said debt, or shall have brought against him some action, within a year next after the delivery of the wares or work done. And the second section provides that nothing in the act shall extend to the mutual trading and merchandize between tradesman and tradesman.—At the time of making that act of parliament, there was an opinion growing up, that after a certain length of time, a man's shop-books would be evidence for him after the year, to prevent which the act was made. (2) But it appears by several authorities, that shop-books alone, unless under the circumstances which have been noticed, are not admissible evidence either within or after the year. (3)

Entry by person *deceased.*

It will appear, in the cases before mentioned, relative to declarations against interest, and in the cases which have been considered in this section, that the declarations were those of persons deceased; the necessity of proving the declarant's

(1) Lord Ellenborough appears to have considered that such indorsements were only evidence as declarations *against interest*. The limitation of actions on bonds is now provided for by stat. 3 & 4 W. 4, ch. 42, sect. 3.

(2) By Lord Hardwicke, 2 Ves. 43.

(3) B. N. P. 232. Pitman *v.* Maddox, 2 Salk. 69. Price *v.* Lord Torrington, 1 Salk. 285. Lord Raym. 732, 745. Sikes *v.* Marshall, 2 Esp. 705, 745. See further respecting shop-books, 12 Vin. Ab. Ev. 88. A. b. 15, "Books:" Smartle *v.* Williams, Comb. 249: Blackeln *v.* Crofts, Comb. 348: Lee *v.* Lee, Keb. 27, in pl. 68: Cary's Rep. 45: Crouch *v.* Drury, Keb. 27, pl. 78. And as to tradesmen's books, Digby *v.* Stedman, 1 Esp. 328: Cooper *v.* Marsden, 1 Esp. 1.

death will be considered more particularly in that part of the work which treats of the subject of primary and secondary evidence. (1) It has been held, that entries made by a person still living are not evidence between other parties, though it be shewn that he has absconded and gone abroad under apprehension of a criminal charge, and though it be altogether out of the power of the party to produce him as a witness. (2) It is also requisite, where the declarations are in the nature of written entries, that they should be produced from the proper custody. This circumstance, which is essential for their authentication, is particularly considered in that part of the work which treats of the proof of written evidence.

Writings from proper *custody.*

(1) The necessity for proving the death of the declarant is a criterion for distinguishing declarations against interest, or in the course of business, from declarations which are part of the *res gestæ*, or such as are in the nature of admissions, —between which it is often difficult to discriminate; see Wooley *v.* Roe, 1 N. & Glen. 114. In Furness *v.* Cope, 5 Bing. 114, a banker's ledger was received in evidence, to shew that a customer had no funds in his (the banker's) hands, on account of the inconvenience of calling all the clerks of the house; it was said that it might not be admissible to prove the affirmative.

(2) Stephen *v.* Gwenap, 1 M. & Ro. 120. And see Harrison *v.* Blades, 3 Camp. 457; Manby *v.* Curtis, 1 Price, 282; Cooper *v.* Marsden, 1 Esp. 2.

Section IX.

Exception to the general Rule as to Hearsay, where Witnesses, since deceased, have given Evidence in a former Trial.

It has been held that the testimony of a deceased witness, who has been examined upon oath on the trial of a former action between the same parties, and where the point in issue was the same as in the second action, is admissible on the trial of the second action, and may be proved by one who heard him give evidence. (1) And, where a person, who had been sworn on a former trial between the same parties on the same issue, and subpœnaed to appear as a witness at a second trial, did not appear in obedience to the writ, the Court of King's Bench, seeing reason to believe that he had been kept away by the contrivance of the adverse party, admitted other witnesses to prove what he had sworn on the former occasion. (2)

It has also recently been held, that where a witness has been examined in a suit in which A. and others were plaintiffs, and B. defendant, his examination, after his decease, may be adduced by B. in an ejectment brought by him against A. alone; for the lessor of the plaintiff is the real party in an ejectment, and A. had the same power at the former trial of objecting to the com-

(1) Rex v. Carpenter, 2 Show. 47. Buckworth's case, Sir T. Raym. 170. Vin. Ab. Evidence (T. b. 88, pl. 4.) Coker v. Farewell, 2 P. Wms. 569. Pike v. Crouch, 1 Lord Raym. 730. By Lord Kenyon, 4 T. R. 290. Mayor of Doncaster v. Day, 3 Taunt. 262. Strutt v. Bovington, 5 Esp. 57. 1 Starkie, C. 211, n. Todd v. Winchelsea, 3 C. & P. 387. See Doe d. Lloyd v. Passingham, 2 C. & P. 440. That the short-handwriter's notes of the evidence of living witnesses is not receivable; see Williams v. Taylor, 3 M. & P. 350. As to the judge's notes, see Crease v. Barret, 1 Tyr. & Gr. 112.

(2) Green v. Gaturk, B. N. P. 243.

petency of the witness, and the same right of cross-examination and of calling witnesses to contradict or discredit his testimony, as he would have had, if the witness had been alive and subpœnaed on the second trial. It was also held, that the evidence was producible in the cause for the same purpose and to the same extent, as if the witness had been alive and had given his evidence; consequently, that where the witness was one of the attesting witnesses to a will, his evidence at the former trial was sufficient proof of the will, and the evidence of the surviving witness was not better evidence. (1)

It seems that the same rule would apply, where the parties to the first trial were represented on the second occasion by persons who had succeeded to them by privity of law, of blood, or of estate; and that the rule upon the subject is in this respect analagous to tha. which prevails as to estoppels by judgment, the admissibility of verdicts, and the effect of admissions. (2)

It has been said, that the person, called to prove what a deceased witness said on the former trial, must undertake to repeat precisely his very words, and not merely to swear to their effect. (3) This, it is conceived, can only mean, at the furthest, that he must be able to speak to the identical words of the former witness, when it is essential that the very identical words should be known. In some cases, proof of the substance of the former evidence may be as satisfactory as proof of the identical words,—unless the witness can undertake (what is not possible) to deliver the same words precisely with the same manner and in the same tone. (4)

(1) Wright *v.* Doe d. Tatham, 1 Ad. & Ell. 21.

(2) See Doe d. Foster *v.* Earl of Derby, 1 Ad. & Ell. 790, where the evidence was rejected on the ground that the two trials were not substantially between the same parties. The decisions as to depositions, and as to verdicts and admissions, *infra*.

(3) Lord Palmerston's case, cited by Lord Kenyon, in Rex *v.* Joliffe, 4 T. R. 296. Ennis *v.* Donnisthorne, Corn. Sum. Ass. 1789, by Lord Kenyon, citing Rex *v.* Deboragh from one of his own notes.

(4) On an indictment for perjury, it is sufficient if a witness states from recollection the evidence which the defendant gave, though

The evidence in the cases above mentioned is of a different character from any which has been hitherto considered; for not only is it free from the objection of being extra-judicial, or of being without oath, but the party, to be affected by it, had the power of cross-examining the witness, under the same circumstances as on the subsequent trial. Still the jury have not the means of judging of the demeanor of the witness, which is very important for the discovery of truth. That particular safeguard, however, has been relinquished by the Legislature, and by the courts on several occasions, where the requiring of it would be likely to occasion a failure of justice. (1)

The rule in question applies to depositions taken in Chancery or before magistrates, and receives much illustration from the decisions respecting those kinds of documents. It will, therefore, be further considered in that part of the work which treats of written evidence.

Section X.

Exception to the General Rule as to Hearsay, in the case of Admissions by Parties to the Suit.

Exceptions to the rule respecting hearsay evidence are made in the case of admissions by parties to the suit, and in the case of confessions by prisoners. The principle on which they are received, is founded chiefly on the reasonable presumption in favour of the truth of a statement, when it is against the interest of the person who makes it. This species of evidence is of a nature, which renders it unnecessary to call the author of the

he cannot say with certainty, that it was all the evidence the defendant gave,—if he can say with certainty, that it was all he gave on that point, and that there was nothing to qualify it. Rex v. Rowley, 1 Mo. Cr. Ca. 111, and cases, *ib.*

(1) See *infra*, the statutes relating to the examination of witnesses under commissions, before justices, or otherwise: also the decisions respecting the reading of depositions taken before justices or coroners.

statement as a witness, even where he is capable of being called.

It is obvious, that the evidence, which is the subject of these exceptions, is liable to many of the objections attaching to hearsay evidence in general. Other objections are of a peculiar nature, especially in the instance of confessions. And in the instances in which persons are liable to be affected by the admissions of others, (on the alleged ground of being identified with them,) the principles, upon which the exceptions under consideration are founded, lose a considerable part of their effect. Hence, these exceptions are subjected to certain restrictions and qualifications,—which it is proposed to treat of, First, as they regard the law of admissions,—Secondly, as they regard the law of confessions.

The following section treats of admissions; the next section of confessions.

1. *Of Admissions by a Party to the Suit, or by one for whose benefit the Suit is brought.*

Whole of admission to be received.

On the subject of admissions, it may be laid down as a first principle, that the whole of the statement containing the admission is to be received together. (1) This is necessary, in order to enable the court to judge of the true meaning and extent of the admission, which, when taken entire, will often have a different import from that which a partial account might convey. (2)

Whole of a conversation.

If part of a conversation is given in evidence against a party as an admission, he is entitled to have the whole conversation repeated. (3) "If a counsel chooses to ask a witness as to

(1) See cases collected in note to Roe *v.* Ferrars, 2 B. & P. 548. Earl of Bath *v.* Battersea, 5 Mod. 9. 3 Salk. 153. Countess of Dartmouth *v.* Roberts, 16 East, 334. Barne *v.* Whitmore, Bac. Ab. Ev. 622. B. N. P. 237. Salk. 286. The whole of a recital in a deed must be taken, 2 Ventr. 171. 1 Com. Dig. Ev. b. 5.

(2) By Lord Tenterden, in the Queen's case, 2 Br. & Bing. 287. In Thompson *v.* Austin, 2 D. & R. 361.

(3) Holland *v.* Reeves, 7 C. & P. 38. The paper, which was the machine-copy of a letter, was not annexed to the examination.

anything which may have been said by an adverse party, the counsel for that party has a right to lay before the Court the whole which was said by him in the same conversation, not only so much as may explain or qualify the matter introduced upon 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 to the party at the same time the benefit of the entire residue of what he said on the same occasion." (1)

Same rule as to writings.

The same principle applies equally to statements in writing; if a portion of the statement is used against a party as an admission, the counsel for the party may insist on having the whole read.

Answer in Chancery.

If a part of an answer in Chancery is read in evidence, the other party is entitled to have the whole read; (2) and if, on exceptions taken, a second answer is put in, the defendant may insist upon having that also read, to explain what he swore in his first answer. (3)

Documents referred to.

If a person, in making an admission against his own interest, refers to a written paper, without which the admission is not complete, the contents of the paper ought to be shewn, before the statement can be used as evidence against the party. (4)

(1) By Lord Tenterden, delivering the opinion of the judges in the Queen's case, 2 Br. & Bing. 298.

(2) By Holt, C. J., in Lynch *v.* Clarke, 3 Salk. 153. Earl of Bath *v.* Battersea, 5 Mod. 9. Gilb. Ev. 44. It is said that this rule does not hold, when an answer is put in for the purpose of shewing the incompetency of a witness, who has, in his answer, admitted himself interested in the event of the cause. Sprain *v.* Drax, trial at bar, B. N. P. 32. But besides that part of the answer which admits the witness's interest, any other part relevant thereto and explanatory, ought to be read: that the party may not be taken to have admitted more than he intended.

(3) Rex *v.* Carr, 1 Sid. 418. B. N. P. 237. Gilb. Ev. 50.

(4) See Jacob *v.* Lindsay, 1 East, 462. Smith *v.* Young, 1 Campb. 439. Lord Barrymore *v.* Taylor, 1 Esp. 325. Collet *v.* Lord Keith, 4 Esp. 212. Randle *v.* Blackburn, 5 Taunt. 245. Boardman *v.* Jackson, 2 Ball & Bea. 386. See Falconer *v.* Hanson, 1 Campb. 171, where a log-book was referred to in a deposition: Dagleish *v.* Dodd, 5 C. & P. 238, where a letter, written by the defendant, was put in, and it was held, that the defendant had a right to have read what was written on the back by the plaintiff. But where a plaintiff put in evidence the copy of a writ, it was

Where commissioners in bankruptcy send for a party, and compel him to produce documents and answer questions, secondary evidence of the documents cannot be given, without proof of the examination which accompanied their production.

What limits to this rule.

It is proposed to consider whether any limits have been imposed on the reception of hearsay evidence of a party in his own favour, upon the ground of it's accompanying an admission.

Where distinct writings.

It has been decided, that although a defendant is entitled to have the whole of a particular entry in a book read, where part of it is used against him, yet he cannot insist upon reading distinct entries in different parts of the books. (1) Letters written by a party are evidence against him without producing those to which such letters are answers. (2)

The examination of a party, signed by him before commissioners of bankrupt, is evidence against him, though part only of his deposition was noted down. (3) And testimony given in Court, admitting a particular fact, may be used as an admission of the fact, though the person examined was prevented from entering into an explanation of the circumstances under which the fact took place, because it was irrelevant to the matter in issue upon the former occasion. (4)

Other parts of judicial proceedings.

When an answer or depositions in Chancery are offered in evidence, as admissions of a party upon oath, or for the purpose of contradicting a witness, it appears not to be neces-

held that the defendant had no right to have the sheriff's return read, which formed no part of the document in evidence. Adey *v.* Bridges, 2 Stark. C. 189. Where a letter produced refers to other letters, those letters should be produced: *secus*, if the letter merely states that others are enclosed under it's cover; Johnson *v.* Gilson, 4 Esp. C. 21. The same rule as to an interrogatory referring to a letter; so that, if the interrogating party refuse to produce the letter, he must abandon the whole of the interrogatories; Wheeler *v.* Atkins, 5 Esp. 246.

(1) Catt *v.* Howard, 3 St. Ca. 6, where it was said to be the constant practice *in quo warrantos*. Sturge *v.* Buchanan, 10 Ad. & Ell. 598.

(2) Lord Barrymore *v.* Taylor, 1 Esp. 326.

(3) Milward *v.* Forbes, 4 Esp. 172.

(4) Collet *v.* Lord Keith, 4 Esp. 212.

sary to produce any of the other proceedings, (as the bill, answer, or decree,) for the purpose of elucidating the admission. (1) But where a bill of discovery had been filed, upon which there had been a decree and order for bringing into Court certain letters, it was held that these letters could not be read in an action at law between the parties to the Chancery suit, without first putting in the bill and answer; (2) for, it was said, the answer might contain such a contradiction or explanation of parts of the letters, as might wholly neutralize their effect.

In the case of *Long* v. *Champion*, (3) on a trial of an action at law, a copy of a letter written by the plaintiff's agent, and referred to by the plaintiff in his answer to a bill in Chancery, and the original of which letter, instead of being filed in the Master's Office, had, by consent of parties, been deposited for inspection with the plaintiff's clerk in Court in the Chancery suit, was held to be admissible evidence on the part of the defendant at law, without reading the answer in Chancery. Lord Tenterden, in his judgment in this case, observed, "Whether it is necessary in every instance to read an answer in Chancery, for the purpose of making any documents evidence which may be annexed to it, we do not now decide. I should at present think it a very strong proposition to say, that the answer must at all events be read, though having no connection with the case in which the documents are produced. But here, at least, we think the copy in question was admissible without the answer." Lord Tenterden also observed, that the letter was not regularly before the Court of Chancery in the suit there, as it would have been, if it had been produced in the Court of Chancery and had been filed in the Master's Office.

(1) Lady Dartmouth *v.* Roberts, 16 East, 334. Salter *v.* Turner, 2 Campb. 87. 3 Campb. 401. Ewer *v.* Ambrose, 4 B. & C. 25. In general, an anwer to a question cannot be read without shewing the question to which it relates. Rex *v.* Picton, Howell's St. Tr. vol. 30, p. 466.

(2) Hewitt *v.* Piggot, 5 C. & P. 77. The letters in question were not written by the plaintiff, but were used against him, as having been in his possession for a long time, by which a presumption was afforded of his having acted upon them. It was held, that the order was admissible of itself, being an act of court, not affecting the rights of either of the parties. See Temperley *v.* Scott, 5 C. & P. 341, as to reading cross-interrogatories which are part of a case.

(3) 2 B. & Ad. 284.

Effect of receiving the whole admission.

Where the whole of admissions are received, it often happens that they contain statements favourable to the party against whom the admissions are used, and in many instances they are found to contain hearsay evidence of facts. The principal ground for receiving the whole admission appears to be, that, by comparison of the several parts with each other, the true meaning and extent of the admission may be more clearly understood. On this ground, there does not appear to be any sufficient reason why those parts of the admission in favour of the party should be applied to any other purpose by the jury, than that of explaining the parts used against him.

Favourable parts of admission.

But although the principal ground upon which admissions are received in evidence is, because it may be presumed that a person would not speak or make a statement, if not true, against his own interest; and though the reason for receiving the whole admission is only for the purpose of ascertaining whether the person has in fact spoken against his own interest, and, if so, to what extent, and with what qualifications: yet, it may be collected from authorities, that the effect of receiving the whole admission amounts to something more. The admission seems to have been sometimes considered as a waiver of any objection to the testimony of the party making it, as to all matters contained in it. (1) The presumption or probability that those parts of a party's statement, which are against interest, are true, is supposed to give credit to other parts of the same statement, with respect to which there is no such presumption, but perhaps a contrary presumption. A statement, therefore, received for the purpose of proving facts stated in those parts which are against interest, are not to be excluded with respect to other facts which may be stated in the party's favour. It is, however, understood, that the several parts of a statement are not necessarily entitled to equal credit; the jury may believe one, and reject the other. (2)

In *Smith* v. *Blandy*, (3) in an action for goods sold and

(1) Answer of the judges in the Queen's case, 2 Br. & B. 298. Randle *v.* Blackburn, 5 Taunt. 245. Smith *v.* Blandy, R. & M. 257. See by Chambre, J., in Roe *v.* Ferrars, 2 B. & P. 542, *infra*, and see *infra*, tit. *Confessions*.

(2) R. *v.* Clewes, 4 C. & P. 225.

(3) Ry. & Mo. 257. Cray *v.* Halls, cited *ib.*, where Lord Ten-

delivered, one of the plaintiff's witnesses stated, upon cross-examination, he had heard the plaintiff say, that the goods were sold under a written contract, which the plaintiff at the time shewed the witness: a broker's note was then produced by the plaintiff's counsel, which the witness said was the paper spoken of. It was objected, that the broker's note ought not to be received as evidence of the contract, unless the broker was called to prove it. But the objection was overruled, and it was held by Best, C. J., that the whole of what a party says at the same time must be given in evidence, though what he says in his favour must not on that account be taken as true, but must be left, with all the circumstances, for the jury to consider whether they believe it or not. And in *Randle* v. *Blackburn*, (1) it was held, that where a person admitted a claim, but at the same time set up a counter claim, the statement of the counter claim was admissible to prove not only it's existence but it's truth and correctness.

Admission containing hearsay.

With respect to the case of an admission containing hearsay evidence, some remarks were made on the subject in the case of *Roe on the demise of Pellat and others* v. *Ferrars*, (2) where the defendant gave in evidence an answer in Chancery by the lessors of the plaintiff. Mr. Justice Chambre, observing upon the degree of positive proof which the lessors of the plaintiff had drawn from the answer in their own favour, expressed himself thus:—"It is true that the answer was introduced into the cause by the defendant, on whose behalf some parts of it were read: but in those parts on which the lessors relied, they speak only to 'what they have *heard* as truth.' I

terden left the whole of a conversation to a jury, to consider whether the facts, asserted by a party in his own favour, were not true, as well as those against him. And see Remmie *v.* Hall, Manning's Index, 2d ed. 376.

(1) Randle *v.* Blackburn, 5 Taunt. 245. The plaintiff was only allowed to recover the balance between the claim admitted, and the amount of the counter claim. And see Thompson *v.* Austen, 2 D. & R. 361. Fletcher *v.* Froggatt, 2 C. & P. 569, where undue weight appears to have been given to the statement in the defendant's favour. Green *v.* Dunn, 3 Campb. 215. Smith *v.* Young, 1 Campb. 439. Barrymore *v.* Taylor, 1 Esp. 325. Com. Dig. Ev. B. 5. 12 Vin. Ab. Ev. A. 23. 2 Ventr. 171. Cooper *v.* Smith, 15 East, 103.

(2) 2 Bos. & Pull. 548. See also the remark of Lord Mansfield in Bermon *v.* Woodbridge, 2 Doug. 788.

think that was not admissible evidence; for it appears to me, that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and that he does not thereby admit, as evidence, all the facts which may happen to have been stated, by way of hearsay only, in the course of the answer to a bill filed for discovery. This point, he added, does not indeed appear to have been contested at the trial; had it been contested, I should have thought the court bound to send the case down for a new trial."

Admission as to contents of writings.

There appears to have been some difference of opinion at *Nisi Prius* upon the point, whether an admission as to the contents of a written instrument may be given in evidence against the admitting party, without proof of notice to produce the instrument. In *Bloxam* v. *Elsee*, (1) Lord Tenterden is said to have held, that a witness could not be asked, what a party to a suit has said as to the contents of deeds executed by himself, without giving the party notice to produce the deeds, or accounting for their non-production. On the other hand, in *Earle* v. *Picken*, (2) where a witness was asked whether he had not heard the defendant say, that an individual named had agreed to give a certain sum of money for an estate in question, Mr. Justice Parke is reported to have ruled, upon objection taken to the question, that what a party to a suit says is evidence against himself, whether it relates to the contents of a written instrument or to anything else. And in a more recent case, where the defendant put in evidence the

Notice to produce not necessary.

(1) Bloxam *v.* Elsee, 1 C. & P. 558. R. & M. 187.

(2) Earl *v.* Picken, 5 C. & P. 542. Sewell *v.* Stubbs, 1 C. & P. 73, where the plaintiff's admission as to the contents of a note was received. Doe *v.* Miles, 1 St. Ca. 181, notice by partners that partnership has been dissolved, evidence of a dissolution, though the partnership was by deed. Doe *v.* Watson, 2 St. Ca. 230, where a landlord's admission of the assignment of his reversion was received. Parol proof of a partnership, which was constituted by deed; Alderson *v.* Clay, 1 St. 403. Harvey *v.* Key, 9 B. & C. 356. In Newman *v.* Sketch, 1 M. & M. 338, it was held, that a declaration of a bankrupt, that he departed his house in order to avoid a writ, is evidence of an act of bankruptcy, without proof of the writ, or of a debt, or of the existence of creditors.

plaintiff's answer to a bill in Equity, in which answer the plaintiff stated that he had conveyed certain property by deeds of lease and release, it was held, that the answer was evidence of the conveyance, without notice being required to produce the deeds. (1) It will be seen that when it is proposed to prove an actual conveyance, an admission of it's execution, even made upon oath in an answer in Chancery, will not dispense with calling the subscribing witness; this, however, depends on the principle, that the subscribing witness may be acquainted with facts not within the recollection of the parties to an instrument. (2)

A parol admission is not receivable for the purpose of contradicting documentary evidence. Thus, where a person was proved to be seised of certain lands by documents produced in the cause, his declarations, to the effect that he had a less estate than a fee-simple, were rejected. (3)

Where admission relates to records.

A parol admission will not dispense with the production of a record; as where, to prove the discharge of the plaintiff under an insolvent act, it was proposed to give in evidence his admission to that effect; the evidence was held to be insufficient, and it was thought necessary to call the clerk of the peace, and to give in evidence the order of the Quarter Sessions, by which the discharge was effected. (4) So it has been seen, that, in order to prove the incompetency of a witness on the ground of infamy, his own admission of having been convicted is not sufficient, and an examined copy of the record of his conviction must be produced.

Where admission is during treaty.

Another rule, defining the legal nature of an admission, is that an offer by a party, either verbal or in writing, expressly

(1) Ashmore *v.* Hardy, 7 C. & P. 504.

(2) By Le Blanc, J., Call *v.* Dunning, 4 East, 53. Abbot *v.* Plumbe, Doug. 216. Cunliffe *v.* Sefton, 2 East, 183. Bowles *v.* Langworthy, 5 T. R. 366.

(3) Harrison and Wife *v.* Moore, Nott. Spr. Ass. 1837; by Littledale, J., who observed, that in the cases where such declarations had been received, the declarant's title had rested merely on the fact of possession.

(4) Scott *v.* Clare, 3 Campb. 236.

stated to be made without prejudice,(1) to pay money by way of compromise, and with a view to buy peace, is not evidence of a debt by way of admission. (2) Where a communcation, without prejudice, had taken place between the attornies of plaintiff and defendant, and the plaintiff's attorney three months' afterwards called on the defendant to explain why an earlier answer was not given to a proposition made in the course of the prior communication, it was held that the evidence of what passed on the second occasion was inadmissible. (3)

The rule under consideration does not apply, where admissions are made not under condition of there being *without prejudice*, (4) or where an agreement, though purporting to be a compromise, has been finally concluded, (as, where it has been signed by the parties and executed,) (5) or where the admissions were made before an arbitrator. (6) In this last case, though the proceedings are said to have been before a domestic forum, yet the parties were at the time adversely contesting their rights. The fact of a person having made an offer to

(1) Wallace *v.* Small, 1 M. & M. 449, where Lord Tenterden said, that an offer to compromise might be very well made, without any restriction as to confidence. And see Watts *v.* Lawson, *ib.* 447, n. Nicholson *v.* Smith, 3 St. Ca. 129, where the defendant offered a sum of money to settle the action.

(2) Cory *v.* Bretton, 4 C. & P. 462. By Lord Kenyon, in Gregory *v.* Howard, 3 Esp. 113. See by Lord Kenyon, in Waldridge *v.* Kennison, 1 Esp. 143, and in Turner *v.* Railton, 2 Esp. 474. B. N. P. 236. Harman. *v.* Vanhatton, 2 Vern. 717. Turton *v.* Benson, 1 P. Wms. 497. The ground for the rejection of the evidence does not seem very clear. It is generally considered that an admission made *without prejudice* is not receivable, on the ground of policy, in protecting such confidential overtures. In B. N. P. 236, it is said, "If A. sue B. for 100*l.*, and B. offer to pay him 20*l.*, it shall not be received in evidence, for this neither admits nor ascertains any debt, and is no more than saying he would get rid of the action:" but this reason seems to apply rather to the *effect* of such evidence, than to it's *admissibility*. In Rouse *v.* Redwood, 1 Esp. 155, Lord Kenyon rejected an admission, as being made to a bailiff on the arrest of the party. Hill *v.* Elliot, 5 C. & P. 436. On the distinction between an offer to purchase peace, and an account stated, see Wayman *v.* Hilliard, 7 Bing. 101.

(3) Collin's Ex. *v.* Wright, Midl. Spr. Cir. 1837; by Lord Abinger

(4) Wallace *v.* Small, 1 M. & M. 446.

(5) Frognell *v.* Lewelyn, 9 Pr. 122, 128.

(6) Westlake *v.* Collard, B. N. P. 236. 1 P. Wms. 497. Slack *v.* Buchanan, Peake, 5. See B. N. P. 236. Harman *v.* Van Hatton, 2 Vern. 717. 1 P. Wms. 497. Waldridge *v.* Kenneson, 1 Esp. 143. Doe *v.* Evans, 3 C. & P. 220, where it is said that matters come as ad-

compromise a suit, is admissible in evidence, and may be material, although it may not be proper to inquire into the terms offered. (1)

Admission of collateral facts during treaty.

A distinction also is to be made, on this subject, between an admission of some fact connected with the merits of the cause, and an admission of an indifferent fact, (as of the handwriting of a party). Thus, on the trial of an action, which had been once withdrawn under a treaty between the parties, Lord Kenyon allowed proof of the defendant's having admitted his acceptance on a bill of exchange, though the admission had been made during the treaty (2); he held, that any admission by the party respecting the subject matter of the action, pending a treaty on the faith of which it was made, could not be received to his prejudice: but added, that such a fact as that of the party's handwriting, not being connected with the merits of the cause, and capable of being easily proved, stood on different grounds, and that an admission of this fact might be received.

Admissions on examinations.

Receivable in civil cases.

With respect to the question, whether the legal nature of an admission requires it to be voluntary, there appears to be a distinction between civil and criminal cases. It has been considered, that on the trial of civil actions, admissions are receivable in evidence, provided the compulsion, under which they are given, be legal, and the party was not imposed upon, or under duress. (3) Thus it has been held, that an examina-

versely before an arbitrator as before any other tribunal. The admissions may be proved by the arbitrator; Gregory *v.* Howard, 3 Esp. 113. See Thompson *v.* Austen, 2 D. & R. 358, where it was said by Mr. Justice Bayley, that the essence of an offer of compromise is, that the party making that offer is willing to submit to a sacrifice, and to make a concession. Lord Kenyon said, that he should receive all such admissions before an arbitrator, which a party would be compelled to make by a bill of discovery; Slack *v.* Buchanan, Peake, 5. Gregory *v.* Howard, 3 Esp. 113.

(1) Harding *v.* Jones, 1 T. & G. 135, where the fact of a person having called for the purpose of compromising, was material, on a question of disputed handwriting.

(2) Waldridge *v.* Kennison, 1 Esp. N. P. C. 143. Bayley on Bills, 379, 4th edit.

(3) See by Lord Ellenborough, in Slack *v.* Buchanan, Peake, 5. Collet *v.* Keith, 4 Esp. 2112, where the witness was examined on a trial, and was stopped before he had concluded his testimony. Stockfleth *v.* De Tastet, 4 Camp. 10.

tion before commissioners of bankrupt was evidence against the party making it;—and this, notwithstanding the party might have demurred to the questions, as exposing him to penalties. (1)

Whether receivable in criminal.

With regard to criminal trials, it has been ruled, that an examination before a committee of the House of Commons was evidence in the trial of a misdemeanor; (2) though it was objected, that the party, against whom the admission was used, could not have refused to answer the question, without being punished as for a contempt of the House. And in a prosecution for forgery, a deposition by the prisoner taken on oath before commissioners of bankrupt has been adjudged to be admissible in evidence against him. (3) In prosecutions for perjury, the statements of the prisoner on oath are constantly used against him. But, in a late case, it was held, that the balance sheet of a bankrupt, given on oath under his commission, was not admissible against him upon a criminal charge for concealing his effects. (4)

R. v. Britton.

Indirect or implied admissions.

There is a species of admission, wherein the existence and truth of the fact to be proved is assumed in the expressions which are given in evidence. The expressions, in such cases, are received as an admission of the fact, though they were used for some other purpose, and though the admission is only implied; and, as an admission, they are allowed to supersede the necessity of producing more explicit evidence.

Vide infra, on the obligation of witnesses to answer questions subjecting them to civil actions. The statute, which compels them to answer, appears to presume, that the answer of witnesses, though compulsory, may be used against them as admissions. In another statute 7 & 8 G. 4, c. 29, compulsory examinations are rendered inadmissible upon indictments for the offences thereby created.

(1) Stockfleth *v.* De Tastet, 4 Camp. 10. Robson *v.* Alexander, 1 B. & P. 448. Smith *v.* Beadnell, 1 Camp. 30. Milward *v.* Forbes, 4 Esp. 172. Such an examination, it seems, could not be used as evidence of an account stated, Tucker *v.* Barrow, 7 B. & C. 624. See Smith *v.* Beadnal, 1 Camp. 50.

(2) Rex *v.* Merceron, 2 Stark. C. 366. The evidence was admitted upon an indictment for a misdemeanor. The defendant had been compelled to appear before the committee.

(3) Wheater's case, 2 Lewin's C. C. 157; by the judges, on a point reserved, 1838.

(4) Rex *v.* Britton, 1 M. & Ro. 297, by Patteson, J., and Alderson, J.

In an action against the acceptor of a bill, his attorney gave notice to produce "all papers relating to a bill," (described as in the declaration) "accepted by the defendant;" this notice to produce was held to furnish *primâ facie* evidence of the acceptance of the bill. (1) Where an auctioneer advertised for sale the property of J. S., a *bankrupt*, this was held to be evidence of the title of the assignees in an action against the auctioneer. (2) An undertaking by an attorney on the record to appear for two persons, described in the undertaking as joint owners of a ship, is evidence of joint ownership. (3)

Of relation or character.

There is another species of implied admission,—where a party has assumed a particular character, or where by his conduct or language in the transaction in question, or in previous transactions of a similar nature, he has assumed the existence of the title upon which the opposite party relies. In speaking of cases of this latter description, Lord Ellenborough observes, in *Dickenson* v. *Coward*, (4) "I take it to be quite clear that any recognition of a person standing in a given relation to others, is *primâ facie* evidence, against the person making the recognition, that such relation exists."

Implied from acting or conduct.

On an information against a military officer for making false returns, it is sufficient to prove that he acted in the character alleged in the charge, without adducing direct evidence of his appointment. (5) In an action for penalties against a collector

(1) Hill *v.* Squire, R. & M. 282.

(2) Maltby *v.* Christie, 1 Esp. 340. commented on in 16 East, 193; the evidence was said to be conclusive, on the ground that it imported an authority from the assignees; for the bankruptcy would have put an end to every authority, which the bankrupt might have given to sell the goods.

(3) Marshall *v.* Cliff, 4 Camp. 133. To state upon an appeal, that those, against whose acts the complaint is made, are justices, is an admission of their jurisdiction: Rex *v.* Fisher, Cald. 135.

(4) 1 B. & A. 679, recognised by Lord Lyndhurst, in Inglis *v.* Spence, 1 Cr., M. & R. 436. It has been said that payment of money is evidence against the payer of the title of the party receiving it, but is not evidence against the receiver that the payer was the party bound to pay it; James *v.* Birn, 2 Sim. & Stu. 606.

(5) Rex *v.* Gardner, 2 Camp. 513. The fact of acting appeared from the returns themselves, in which the defendant described himself as Major-Commandant.

of taxes, proof of his collecting the taxes is sufficient evidence of his being collector, though his appointment is by warrant under an act of Parliament. (1) In an action against a clergyman for non-residence, the acts of the defendant as parson, and his receipt of the emoluments of the church, have been considered good evidence against him of his being parson, without formal proof of his title. (2) Upon an indictment for embezzlement against a letter-carrier, proof that he acted as such was held sufficient, without shewing his appointment. (3)

In an action for penalties under the Post-horse Act, brought by the plaintiff as farmer-general, proof of his appointment was dispensed with, because the defendant had previously accounted with him as farmer-general. (4) In an action for subtraction of tithes, proof of the defendant's former acknowledgment of the plaintiff's title to the tithes, was thought to be sufficient evidence of title, as against the defendant a wrong doer. (5) In an action by the clerk of the trustees of a turnpike road, brought against one of the trustees, the fact that the plaintiff had acted as clerk, and that the defendant had acknowledged him as such, is evidence of the plaintiff's appointment. (6) In an action by the assignee of a bankrupt, proof that the defend-

Exhibiting an account before commissioners.

(1) Lister, q. t. *v.* Priestley, Whitew. 67.

(2) By Chambre, J., 1 N. R. 210. Bevan, q. t. *v.* Williams, 3 T. R. 635, n. (*a*); the evidence is spoken of by Lord Kenyon as *decisive*. See Rex *v.* Kerne, 2 St. Tr. 964. Rex *v.* Bromwich, 2 St. Tr. 966, proof of officiating as a Romish priest, held to be evidence of taking orders. And see Rex *v.* Topham, 4 T. R. 126; proof that A. B., as the proprietor of a newspaper, had given security for the payment of duties on advertisements, and had from time to time applied to the stamp office concerning duties on the paper, was held to be evidence of his being the publisher.

(3) Barrett's case, 6 C. & P. 124.

(4) Radford, q. t. *v.* Mackintosh, 3 T. R. 632. See Cross *v.* Kaye, 6 T. R. 663. 1 N. R. 205, 211. Peacock *v.* Harris, 10 East, 105. In Smith *v.* Taylor, 1 N. R. 211, Chambre, J., appears to have considered the case of Radford *v.* Macintosh, as deciding that the evidence was an *estoppel;* he said, he thought the principle was pushed too far in that decision; and that it would have been just, *if the evidence had been decided as enough to put the defendant upon proof of a negative.*—As to the effect of admissions, whether they are conclusive by way of estoppel, or only *primâ facie* evidence, *vide infra.*

(5) 1 N. R. 210. 3 T. R. 635. 4 T. R. 366. Chapman *v.* Beard, 3 Anstr. 492.

(6) Pritchard *v.* Walker, 3 C. & P. 212.

ant had attended a meeting of the commissioners, and exhibited an account between him and the bankrupt, claiming certain deductions, and that he afterwards made a part-payment to the plaintiff, was held to be *primâ facie* evidence of the plaintiff's title to sue as assignee; but the court observed, that it certainly was not conclusive. (1)

Admission of professional qualification.

In an action against the defendant for slander in charging the plaintiff with being a swindler, and threatening that he would have him struck off the roll of attornies, the court was of opinion that the defendant's threat amounted to a distinct acknowledgement that the plaintiff was an attorney, and dispensed with further proof. (2)

Upon the principle of the above mentioned cases, two of the Judges of the Court of Common Pleas were of opinion, that the plaintiff was entitled to recover in the case of *Smith* v. *Taylor*. (3) That was an action for defamation, in which the plaintiff averred, that he was a physician, and exercised the profession, and that the words were spoken concerning him as a physician. It appeared, that the words did not impute want of *qualification* by degree, but only want of *skill* in practice; and that the defendant called the plaintiff "*Dr. S.*,"

(1) Dickenson *v.* Coward, 1 B. & A. 679. Inglis *v.* Spence, 1 Cr., M. & R. 432, admission of title in letters to solicitor of commission. See Crofton *v.* Poole, 1 B. & Ad. 568. Rex *v.* Barnes, 1 Stark. C. 243. Clarke *v.* Clarke, 6 Esp. 61. Leke *v.* Howe, 6 Esp. 20. Mercer *v.* Wise, 3 Esp. 219. Havelock *v.* Cook, 5 T. R. 655. Pope *v.* Monk, 2 C. & P. 112. Walker *v.* Burnell, Doug. 303. And see Mott *v.* Mills, 3 C. & P. 197, on the effect of 6 Geo. 4, c. 16, as to bankrupt petitioning for his discharge. Further on the effect of admissions in bankruptcy, *vide infra*.

(2) Berryman *v.* Wise, 4 T. R. 366, recognised in Pearce *v.* Whale, 5 B. & C. 39, thereby superseding the necessity of proving the admission as an attorney, or a copy of the Roll. In an action for bribing one who had a vote at an election, the very offer to bribe is evidence against the defendant, that the party solicited had a right to vote, Combe *v.* Pitt, Burr. 1586. Regg *v.* Cargenven, 2 Wils. 395. In both these cases the person bribed had been admitted to vote. Lord Mansfield and the rest of the court held, that a man who had given money to another for his vote, should not be admitted to say that he had no vote.

(3) 1 New Rep. 196, by Mansfield, C. J., and Heath, J.; but Rook, J., and Chambre, J., were of opinion, that the words did not admit the qualification.

when he spoke the words: and, further, the defendant, as an apothecary, had followed the directions of the plaintiff as a physician, in the business out of which the cause of action arose. These circumstances were considered by two of the Judges, against the opinion of the other two, as sufficient *primâ facie* evidence of the plaintiff's qualification. On the other hand, if the words imply a charge that the plaintiff was not qualified to act in the particular character which he assumed, it has been held that the qualification ought to be proved, and that it will not be sufficient to show his acting in that capacity. (1)

In the preceding cases, the admissions were in the form of written or verbal statements made by the parties, or of acts done by them. In some cases, it is allowable to give evi-

Admissions by demeanor, &c.

dence of written or verbal statements, or of acts done by others, and then to shew how the party who heard or saw them was affected by them,—for the purpose of using his conduct, expressions, or demeanor, as evidence against him by way of admission. The evidence in such cases is altogether presumptive in it's quality and character.

It very commonly happens, that evidence of the description referred to has the effect of misleading juries, who are frequently influenced by it, in consequence of giving credit to it as hearsay testimony, and are unable, notwithstanding any directions from a Judge, to regard it solely as exhibiting demeanor and conduct. In many instances, especially where no observation has been made by the party on hearing it, the evidence is particularly liable to produce erroneous conclusions. An acquiescence in the truth of the statement is

Acquiescence, as an admission.

(1) See the judgment of Mansfield, C. J., in 1 New Rep. 204, 207; Pickford *v.* Gutch, 8 T. R. 395, n. (*a*); Moises *v.* Thornton, 8 T. R. 303. Where the words imply mere negligence or ignorance, without admitting the plaintiff to be qualified, and th plaintiff avers that he is qualifieu, he will be bound to prove his qualification, 1 N. R. 204, 207. And see Collins *v.* Carnegie, 1 Ad. & E. 703, where it is said that a person, complaining of slander upon him in a particular character, must prove that he possesses that character, when the slander does not admit it.

frequently inferred, though the inference may, from a variety of causes, be incorrect. (1) Thus the evidence is not only fallacious with reference to it's object, but in its collateral defect is prejudicial to the investigation of truth. The acquiescence of a party is still less entitled to consideration, where he has no means of personally knowing the truth or falsehood of a statement. (2)

Receipt of notice to quit, without objection.

A notice to quit at a certain time is evidence that the tenancy commenced at that period, if the notice was served personally on the tenant, and if he made no objection to the time of quitting mentioned in the notice. (3) The circumstance of his not making such an objection has been considered as *primâ facie* evidence of admission and acquiescence.

Admission by bankrupt.

The demeanor and conduct of a bankrupt, pending the investigation of his accounts before commissioners of bankrupt, may amount to an admission of a petitioning creditor's debt, though what was done before the commissioners did not derive any authority from it's being done before them as commissioners or as arbitrators. (4)

Admission from forbearance.

The forbearing from acts of ownership, and neglecting to interpose, whilst another person exercises such acts, or incurs

(1) This species of evidence is very commonly used in criminal cases, although it appears to be somewhat inconsistent to hold, that the prisoner's silence on hearing an accusation is evidence against him, when his denial of the charge upon such an occasion would not be evidence for him. On the principle that the evidence is received, not on the ground of credit given to the hearsay narrative, but on the ground of it's apparent effect in the prisoner's demeanor, it has been held, that what is said in the presence of a prisoner, by his wife, is receivable in evidence against him. Rex *v.* Smithies, 5 C. & P. 332. See Rex *v.* Swatkins, 4 C. & P. 548. 1 East's P. C. 357. B. N. P. 28.

(2) See by Parke, J., in Hayslep *v.* Gymer, 1 Ad. & E. 165, and by Patteson, J., *ib.*

(3) Doe d. Clarges *v.* Foster, 13 East, 405. Doe d. Leicester *v.* Biggs, 2 Taunt. 109. Doe d. Baker *v.* Woombwell, 2 Camp. 559. If the tenant did not look at the notice or could not read, the presumption of acquiescence will be repelled. Thomas d. Jones *v.* Thomas, 2 Camp. 647. Doe *v.* Forster, 13 East, 405. Doe *v.* Briggs, 2 Taunt. 109.

(4) Jarrat *v.* Leonard, 2 M. & S. 269, and see Smith *v.* Moon, 1 M. & M. 460. See Key *v.* Shaw, 8 Bing. 320, that a trader hearing himself denied, and not coming forward, may thereby commit an act of bankruptcy.

expenses in buildings or alterations inconsistent with a title afterwards claimed, is evidence for the jury in the nature of an admission. (1)

Acquiescence inferred.

In an action brought to recover back notes delivered to the defendant by the plaintiff, the plaintiff proved that the defendant, who was the executor of a deceased person, having questioned the plaintiff as to her having possession of some property belonging to the deceased, the plaintiff handed over the notes to the defendant, stating that the deceased had given them to her: the defendant did not deny the statement, but had no means of knowing it's truth or falsehood: it was held, that although such evidence of acquiescence in the truth of the statement was an admission entitled to very little weight, yet that it was properly submitted to a jury. (2)

In *Fairlie* v. *Denton*, (3) it was held by Lord Tenterden, that if the plaintiff write a letter to the defendant, which the defendant does not answer, the plaintiff has no right to have the contents read at the trial, as an admission from acquiescence. It was stated by Chief Justice Best, in *Child* v. *Grace*, (4) to be a rule applicable to this subject, that what is said by a party to a suit to the opposite party may sometimes

(1) Doe *v.* Pye, 1 Esp. 364. Neale *v.* Parkin, 1 Esp. 229. Hollis *v.* Goldfinch, 1 B. & C. 222. Steel *v.* Prickett, 2 St. 471. Stanley *v.* White, 14 East, 332. 4 T. R. 516. 1 B. & C. 222. Jarret *v.* Leonard, 2 M. & S. 265. Morris *v.* Burdett, 1 Camp. 218. Doe *v.* Allen, 3 Taunt. 78. Concerning acts amounting to a recoguition of lawful occupancy, such as will be a defence upon an ejectment; Doe *v.* Cadwallader, 2 B. & Ad. 473, in which Doe *v.* Hales, 7 Bing. 322, is doubted. As to cases between landlord and tenant, where subsequent acts amount to a waiver of a notice to quit; 1 H. Bl. 311. Cowp. 243. 6 T. R. 219. 16 East, 53. Acts of ownership are admissible independently of acquiescence; by Parke, B., in Jones *v.* Williams, 2 M. & W. 327.

(2) Hayslep *v.* Gymer, 1 Ad. & E. 162.

(3) 3 C. & P. 103. Lord Tenterden observed, that what is said to a man before his face, he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering a letter is quite different; and it is too much to say, that a man, by omitting to answer a letter, admits the truth of the statements which the letter contains. It was held in the same case, that a line of the letter might be read which contained a demand of a certain amount, but not any other part which stated any supposed fact or facts. See Rex *v.* Plumer, R. & R. 264, that a letter found in the possession of a prisoner is not evidence of it's contents; as, for instance, to shew that a bill was inclosed in it.

(4) 2 C. & P. 193, action for an assault. The evidence tendered

be evidence, but not what is said by a stranger, unless it draws forth an answer: and added, that the same distinction had been made by Chief Justice Gibbs.

Admission of entries in books, where power of access to them.

In some cases the possession of documents, or the circumstance that a party has access to them, has been considered as a ground for affecting him with the admission of the facts stated in them. Thus, in an action against a tavern-keeper, it appeared that the defendant belonged to a club, which was held at the plaintiff's house, and that in a room where the club met, a book used regularly to be kept open, in which the plaintiff's servants entered the articles, as they were ordered by the members of the club, who had hereby an opportunity of inspecting and correcting the account: Lord Kenyon admitted the book as evidence of the delivery, though it was not proved, that the servants who made the entry were dead, nor was their absence accounted for, and only their handwriting was proved. The daily account in the book was in this case considered as tantamount to a bill delivered and admitted by the defendant. (1) And apparently upon the same principle it was held, that an entry in the books of the South Sea Company, of the minutes of a license granted by them, was admissible in evidence, without calling as a witness the officer who made the entry. (2)

How far manor-rolls are evidence against tenants.

Though the rolls of a manor are accessible to all the copyholders, yet in questions between them and the lord of the manor, it would seem that entries on the rolls of the manor are not generally evidence against them by way of admis-

was, what a magistrate at a police office had said, in the presence of the defendant, respecting the assault. The like evidence as to what a judge has said upon the trial of an indictment, has been admitted upon an action for a malicious prosecution, on the ground that what the judge said, was in the hearsay of the prosecutor. But as the prosecutor had no power to interpose, it would seem that the reason failed.

(1) Wiltzie *v.* Adamson, K. B. Sitt. after Mich. Term, 1789. And see Alderson *v.* Clay, 1 Stark. Ca. 405. After a person was proved to be a member of a society, the entries in a book containing a record of the proceedings of the society, (the book being produced at the meetings, and open to the inspection of all the members,) were admissible against him. Raggett *v.* Musgrove, 2 C. & P. 556.

(2) Hodgson *v.* Fullarton, 4 Taunt. 787. And see Hewitt *v.* Piggot, 5 C. & P. 77, possession of letters. Roe *v.* Rawlins, 7 East, 290, possession of survey.

sion. (1) But in questions as to manorial customs between copyholders, or between copyholders and strangers, it seems that entries on the rolls of the manor, besides being evidence of reputation, independently of any weight they may derive from being admissions, are also upon this ground entitled to some additional force. (2)

Writings in possession of prisoner.

The possession of letters and written papers by prisoners may affect them with the imputation of approving or acting in the matters contained in them. But for this purpose it is necessary, that the jury should be satisfied that the letters or other writings were in the possession of the prisoners previous to their apprehension. (3)

Books of assignees.

In an action by a bankrupt against his assignees, depositions of persons enrolled by the assignees are not evidence against them as admissions, by reason of the enrolment. (4)

Partnership-books.

Although partnership books are evidence against partners as their acts and declarations, (the books having been under their superintendence,) yet the books of a corporate company are not admissible against a member of the company, as evidence of his contracting with the company: in that respect, he is to be regarded as a stranger. (5)

Admission by conduct.

The conduct of parties frequently affords evidence in the nature of an admission, when their conduct is inconsistent with the claims asserted by them, although it be not (as in the cases before noticed) to be taken as an acquiescence in the acts of another person. Thus, in an action of debt, evidence that the plaintiff has taken the benefit of the insolvent act, and has not inserted

(1) Dean and Chapter of Ely *v.* Caldecott, 7 Bing. 433. An ancient steward's-book of assessment of fines, not admitted in an action by the lord for copyhold fines.

(2) *Vide infra*, as to admissions of persons, in *pari jure*. See Gilb. L. Ev. 235. 4 T. R. 670. 5 T. R. 26. 2 M. & S. 92. 13 East, 10. 3 Wils. 63. 3 T. R. 162. 1 T. R. 466.

(3) See Horne Tooke's case, 25 Howell, 123. Watson's case, 2 St. 140.

(4) Chambers *v.* Bernasconi, 1 Cr. M. & R. 347. A feoffment having an indorsement of livery of seisin is not evidence of the fact against the person producing the deed from his custody: Doe d. Wilkins *v.* Lord Cleveland, 9 B. & C. 870.

(5) Hill *v.* Manchester W. W., 5 B. & Ad. 875.

the debt in question in his schedule, is an admission of it's not being due. (1) Where a tradesman makes out an account for goods sold, in the name of a particular person, it must be taken that they were furnished upon the credit of such person, unless it be shewn, by unequivocal evidence, that the credit was in fact given to another. (2)

Conduct of party accused.

When the conduct or demeanor of a person is pressed against him as evidence of his admission or acquiescence, the situation in which he stood, and all the circumstances, must be taken into account. When a person is charged with a crime, and hears a deposition made against him, his silence is not evidence against him. In investigations of this nature, the person charged has not the same facility of interposing, as he would have in a common conversation; and therefore, the same inferences cannot be drawn from his silence or his conduct. (3)

Admission not implied.

When the matter involves *law* as well as *fact*.

Where admissions involve matters of law as well as matters of fact, they are obviously, in many instances, entitled to very little weight, and in some cases they have been altogether rejected. Thus it has been held, that the discharge of a defendant by a court of quarter sessions, under an insolvent act, could not be established by proof of an acknowledgment of the discharge by the plaintiff himself; for the discharge might have been irregular and void, or might have been mistaken by the plaintiff. (4)

(1) Nicholls *v.* Downes, 1 M. & Ro. 13.

(2) Storr *v.* Scott, 6 C. & P. 241. Thompson *v.* Davenport, 9 B. & C. 86.

(3) Melun *v.* Andrewes, 1 M. & M. 337. 2 C. & P. 193. Rex *v.* Appleby, 3 Stark. Ca. 33. See Finden *v.* Westlake, 1 M. & M. 461.

(4) Scott *v.* Clare, 3 Camp. 236. Summerset *v.* Adamson, 1 Bing. 73, to the like effect. An admission by a defendant, on being arrested, and when he was ignorant whether he was bound by law to make the payment or not, was held inadmissible, by Lord Kenyon, Rouse *v.* Redwood, 1 Esp. 155. It seems to have been considered in Morris *v.* Miller, Burr. 2057, (see Dr. Smith *v.* Miller, cited 2 Wils. 399,) that in an action for criminal conversation, an acknowledgment that the defendant had committed adultery with the wife of the plaintiff was not sufficient, without proof of a marriage in fact. In a subsequent case, 2 Wils. 399, it was said, "that a defendant saying in jest or in a loose rambling talk, that he had laid with the plaintiff's wife, would not be sufficient alone to convict him in that action; but if the defendant had seriously and solemnly recognised, that he knew the woman he had laid with was the plaintiff's wife, we think it would be evidence proper to be left to the jury, without

Effect of admissions.

With respect to the effect to be attributed to admissions, it is to be observed that proof of a party to the suit having made representations of facts for particular purposes and on particular occasions, may preclude him from relying on a case which is inconsistent with those representations; thus operating as an estoppel. The kind of representations which have been held to have this effect, seems for the most part to be, where on the faith of them a court of justice has been induced to adopt a particular course of proceeding, or where other persons have on the faith of the representations been led to alter their condition. In some of the cases, the courts appear to have considered, that the general rules respecting the qualities of estoppels did not apply to representations of the nature in question. In others, the representations have been treated, for some purposes at least, as a branch of estoppels properly so called, and it has been held that, as being estoppels, they were not receivable in evidence except between parties and privies. (1)

Admissions, when estoppels.

In *Heane* v. *Rogers*, (2) the rule upon the subject was laid down in these terms:—"The express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him; but he is at liberty to prove, that such admissions were mistaken or were untrue, and he is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case a party is estopped from disputing their truth, with respect to that person and those claiming under him; but as to third persons he is not bound."

Admission by party as to bankruptcy.

In *Watson* v. *Wace*, (3) an action of trespass to try the validity of a commission of bankruptcy issued against the plaintiff,

proving the marriage." See Freeman's case, East's P. C. 470. In Norwood's case, East's P. C. 470, confessions and cohabitation were admitted to prove the relation of husband and wife in a case of petit treason. In Wilson *v.* Mitchell, 3 Camp. 393, Lord Ellenborough held, that an acknowledgment by a plaintiff, that she was married to a particular individual, was not sufficient to support a defence of coverture, without evidence of an actual marriage.

(1) See Watson *v.* Wace, 5 B. & C. 155, and Heane *v.* Rogers, 9 B. & C. 586.

(2) 9 B. & C. 586, by Bayley, J. The case determined that a bankrupt was not estopped from bringing an action against his assignees, by having given up his lease to his lessors, on the ground that the assignees were not parties or privies to the transaction.

(3) See *supra* (1).

where it was proved by the defendants that the commission issued against the plaintiff in custody at the suit of the petitioning creditor, who was one of the defendants, and that the plaintiff had afterwards applied to the Court of King's Bench under the 49 Geo. 3, c. 121, s. 14, on the ground that he had become bankrupt, and that his detaining creditor had proved under the commission, it was held, that the plaintiff could not dispute the validity of the commission. Lord Tenterden said, that, "the estoppel arose by matter of evidence, and the question was, whether a party having availed himself of the commission for one purpose, can afterwards be allowed to assert to the same Judges, before whom he took the benefit of the commission, that the commission was invalid. Lord Ellenborough (1) gave his opinion to the contrary, and that has never since been questioned."

Admission by petitioning creditor.

A petitioning creditor, who had sued out a commission of bankruptcy upon an affidavit stating the fact of bankruptcy, has been held to be afterwards estopped from questioning that fact. And it was said by the court, that those who had treated a party as a bankrupt, should not afterwards be allowed to gainsay their own assertions. (2)

Accounting with collector.

In an action for tolls, where a defendant had accounted with the plaintiff, and received credit from him as collector of certain turnpike tolls, though he had not been legally appointed, it was held that, after such an admission of the plaintiff being a person to be accounted with for the tolls, the defendant should not be permitted to dispute his title to recover the balance of the account. (3)

(1) In Goldie *v.* Gunston, 4 Camp. 381.

(2) Ledbetter *v.* Salt, 4 Bing. 626. The action was brought by the assignee under the second commission. There does not appear to have been any mutuality in the estoppel, nor was it pleaded. And see Groves *v.* Western Canal Company, 5 M. & S. 76. Harmar *v.* Davis, 7 Taunt. 577, estoppels of petitioning creditors. In Dowden *v.* Fowle, 4 Camp. 38, an admission of a petitioning creditor, who was also assignee of a bankrupt, was used *against* himself and his co-assignees, though it was contrary to his affidavit.

(3) Peacock *v.* Harris, 10 East, 106, the action was by the administratrix of the collector. The case was compared by Lord Ellenborough to that of a tenant disputing his landlord's title. The collector

Other examples.

A person who has decribed himself as a physician cannot afterwards maintain an action for fees. (1) A vendee of goods, who has given to the vendor a bill of exchange in payment, cannot afterwards dispute the reasonableness of the charge. (2) If a man hold out a woman as his wife, he cannot set up as a defence to an action for necessaries, that she was not his wife. (3) In like manner, a person may sometimes be estopped from taking advantage of a misnomer in process. (4)

A person holding himself out as partner.

Where a person has held himself out as a partner to a particular individual, or under such circumstances of publicity that the individual may be presumed to have acted on the faith of his being a partner, he will be precluded from disputing his liability as a partner. (5) Thus, where a person allows his name to remain in a firm, either exposed to the public over a shop door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, he is estopped from disputing his liability as a partner. (6)

On the same principle is founded the rule, that a tenant can-

having sent his bill to the defendant, the defendant sent back 5*l.*, with a message, that the remainder should be paid in the next week. In Dickenson *v.* Coward, 1 B. & A. 679, the court appear to have considered, that accounting and paying to a person in a particular capacity was only *primâ facie* evidence of his title.

(1) Chorley *v.* Bolcott, 4 T. R. 317. Lipscombe *v.* Holmes, 2 Camp. 441.

(2) Nash *v.* Turner, 1 Esp. 217. Solomon *v.* Turner, 1 St. 51. Knox *v.* Walley, 1 Esp. 159.

(3) Robinson *v.* Nahon, 1 Camp. 245. Watson *v.* Threlkeld, 2 Esp. 637. See Munro *v.* De Chemant, 4 Camp. 215. That the estoppel ceases on separation, by Best, C. J., in Batthews *v.* Galindo, 4 Bing. 614. But a person holding out a woman as his wife may afterwards call her as a witness. Batthews *v.* Galendo, 4 Bing. 614, overruling Lord Kenyon's decision in Adey's case, Leach, 245, though Park, J., appears to have considered the decisions as reconcileable, inasmuch as in Adey's case, the prisoner had called the woman his wife in his address to the jury. In Mace *v.* Cadell, Cowp. 233, (cited by Gazelee, J., 4 Bing. 613,) after a woman had been entered in excise books as "married," she was not allowed to claim goods as her sole property, against assignees of the person for whose wife she passed.

(4) Reeves *v.* Slater, 7 B. & C. 487. Gould *v.* Barnes, 3 Taunt. 488. Price *v.* Harwood, 3 Camp. 108. Morgan *v.* Bridges, 2 Stark. C. 314.

(5) By Parke, J., Dickenson *v.* Valpy, 10 B. & C. 140. By Lord Kenyon, De Bertram *v.* Smith, 1 Esp. 29. Kell *v.* Rainby, 10 B. & C. 21. Genden *v.* Robson, 2 Camp. 302.

(6) By Tindal, C. J., in Fox *v.* Clifton, 6 Bing. 794. The knowledge and assent of the partner is essential in such cases *ib.* Mewsome *v.* Coles, 2 Camp. 617.

not dispute his landlord's title. Where a tenancy is created by a lease by deed indented, the tenant may be estopped from saying any thing repugnant to it, according to the strict law of estoppels as applicable to deeds. (1) Where the lease is not by deed, the tenant or any person claiming under him is precluded from objecting to the title of a landlord from whom he has received possession, or to the title of any party claiming under his landlord. (2) But a mere attornment without payment of rent, amounting to a bare assent, does not create an estoppel. (3) And payment of rent to another party than him under whom the tenant came originally into possession, may be shewn to have been done under a misrepresentation, or under other circumstances not entitling the party to receive it. (4) The tenant is not precluded from shewing, that his landlord's title is determined (5) either by act of law, or by his own act, or by efflux of time.

Tenant estopped from disputing his landlord's title.

Upon the same principle, it seems, a party accepting a ne-

(1) Co. Litt. 47 b. Strowd *v.* Willis, Cro. Eliz. 362. Brudenell *v.* Roberts, 2 Wils. 143. Syivan *v.* Stradling, *ib.* 208. Wilkins *v.* Wingate, 6 T. R. 62. Parker *v.* Manning, 7 T. R. 537. Blake *v.* Foster, 8 T. R. 187, that the lessor had an equitable estate. Cook *v.* Loxley, 5 T. R. 4. Brooksby *v.* Watts, 6 Taunt. 333. Frogmorton *v.* Scott, 2 East. 467, illegal possession. Hodson *v.* Sharpe, 10 East, 350, informal lease. A lease by deed poll is not an estoppel. Co. Litt. 369 b. Bac. Ab. *Leases*, O. A lease from a *feme covert*, infant, or from the crown, is not an estoppel, for want of mutuality. Bac. Ab. *Leases*, O. Co. Litt. 352. Cro. Eliz. 36. Say. 13. Morgan *v.* Ambrose, Peake, Ev. 242. B. N. P. 139, 2 Ves, Jun. 696, 11 Ves. 344. Palmer *v.* Ekins, Lord Raym. 1552. Atkinson *v.* Pierrepoint, Esp. Dig. 30. Phipps *v.* Sculthorpe, 1 B. & A. 50. Parry *v.* House, Holt, C. 489.

(2) Doe d. Manton *v.* Austin, 9 Bing. 45. Doe d. Smythe, 4 M. & S. 237. Doe d. Bristow *v.* Pegge, 1 T. R. 760, n. Parry *v.* House, where the title was founded on fraud. Holt, 489. Cooke *v.* Loxley, 5 T. R. 4. Phipps *v.* Sculthorpe, 1 B. & A. 50. Hull *v.* Vaughan, 6 Pr. 157. Fleming *v.* Gooding, 10 Bing. 549. Rennie *v.* Robinson, 1 Bing. 147. In like manner a copyholder who has been admitted and done fealty, cannot dispute the title of the lord. Doe d. Nepean *v.* Budden, 3 B. & A. 626.

(3) Shep. Touch. 254. Cornish *v.* Searall, 8 B. & C. 471. Gravenor *v.* Woodhouse, 1 Bing. 38. By Buller, J., in Williams *v.* Bartholemew, 1 B. & P. 326.

(4) Rogers *v.* Pitcher, 6 Taunt. 202. Williams *v.* Bartholomew, 1 B. & P. 326. Gregory *v.* Doidge, 3 Bing. 474. Gravenor *v.* Woodhouse, 1 Bing. 38.

(5) England d. Syburn *v.* Slade, 4 T. R. 682. Doe d. Marriott *v.* Edwards, 5 B. & Ad. 1065. Doe d. Jackson *v.* Ramsbottom, 3 M. & S. 516. Doe *v.* Watson, 2 St. 230. Blake *v.* Foster, 8 T. R. 487. Brudenell *v.* Roberts, 2 Wils. 143. Hill *v.* Saunders, 2 Bing. 112. 4 B. & C. 529.

Effect of acceptance as an admission.

gociable instrument is precluded from disputing the handwriting of the drawer; and although he may in general dispute the handwriting of the indorser, yet where the drawer is a fictitious person, the acceptor is bound to pay to the signature of the same person that signed for the drawer. (1)

Agent when bound by his account.

When an agent, who is employed to receive money, and bound by his duty to his principal from time to time to communicate to him whether the money is received or not, renders an account from time to time, containing a statement that the money is received, he is bound by that account, unless he can shew that the statement was made unintentionally, or by mistake. (2)

Wharfinger's acknowledgment of bailor's title.

It is an established rule, that where wharfingers acknowledge the title of a person for whom they hold property, it is considered as an attornment, and they are conclusively estopped from disputing such title, whatever may be the claim of a third person, at least, if they were fully acquainted with the nature of such claim, when they made the admissions. (3)

But in general, a person's conduct and language have not

(1) Cooper *v.* Meyer, 10 B. & C. 468. Robinson *v.* Yarrow, 7 Taunt. 455. Wilkinson *v.* Lutwidge, 1 Str. 648. Smith *v.* Chester, 1 T. R. 654. Jenys *v.* Fawler, 2 Str. 946. Leach *v.* Buchanan, 4 Esp. 226. Price *v.* Neale, 3 Burr. 1354. Smith *v.* Mercer, 6 Taunt. 76, though the bill be forged. That the acceptance admits authority of agent purporting to draw as such, Porthouse *v.* Parker, 1 Camp. 82. Robinson *v.* Yarrow, 7 Taunt. 455. That it admits style of firm, Bass *v.* Clive, 4 M. & S. 13; and drawer's ability, Taylor *v.* Croker, 4 Esp. 187, cited 2 B. & C. 299; admits competency of drawer to indorse, Drayton *v.* Dale, 2 B. & C. 299. Concerning the admission of indorsements by acceptor or indorser, see further Hankey *v.* Wilson, Sayer, 223. Bosanquet *v.* Anderson, 6 Esp. 43. Sedford *v.* Chambers, 1 St. 326. Hemmings *v.* Robinson, Barnes, 436. Macpherson *v.* Thoytes, Peake, 20. Jones *v.* Radford, 1 Camp. 83. Carrick *v.* Vicary, Doug. 630. Duncan *v.* Scott, 1 Camp. 101. Lambert *v.* Oakes, 1 Lord Raym. 433. Critchlow *v.* Parry, 2 Camp. 182. Chaters *v.* Bell, 4 Esp. 210. Lambert *v.* Pack, 1 Salk. 127.

(2) Shaw *v.* Picton, 4 B. & C. 729.

(3) Gosling *v.* Birnie, 7 Bing. 345. The rule is laid down with the limitation in the text by Alderson, J. But the other judges lay it down in a more unqualified way. See Stonard *v.* Dunkin, 2 Camp. 344. Hawes *v.* Watson, 2 B. & C. 541. Dixon *v.* Hammond, 5 B. & A. 310. Ogle *v.* Atkinson, 5 Taunt. 750. Barton *v.* Boddington, 1 C. & P. 207.

the effect of operating against him by way of estoppel. (1) Accordingly we have seen, that in the instances in which the party has assumed a particular character, or has recognised a particular character as belonging to another person, his conduct and language have, in general, not been deemed conclusive against him. (2)

Admissions (from conduct) generally not conclusive.

It has been held, that a person is not concluded, as to the amount of his property, by an oath taken before commissioners under the property tax acts. (3) An insolvent's omission of a particular debt in his schedule, to which he was sworn, will not preclude him from afterwards recovering the debt. (4) An entry at the Custom House in the names of a firm is not conclusive against the person making the entry, except as between him and the crown. (5)

A person who had given notice to his landlord that he had become bankrupt, in consequence of which his landlord accepted possession of the demised premises, is not estopped from disputing the fact of his bankruptcy, in an action brought by him against his assignees, the assignees not having been parties or privies to the transaction between himself and his landlord. (6) Nor would such a person be precluded from disputing his commission by surrendering, or by petioning the Chancellor to enlarge the time for surrendering. (7)

Admission on oath.

With respect to the relative credit and weight of admissions which are not conclusive, it may be observed, that the admissions, which may be considered as having the greatest force, are those which are delivered on the oath of the party.

Admissions in answers.

Thus answers in Chancery are very strong evidence, by way of admission, in courts of law. (8) Where a bill was filed by

(1) By Chambre, J., in Smith *v.* Taylor, 1 N. R. 210.
(2) *Vide supra.*
(3) Rex *v.* Clark, 8 T. R. 220.
(4) Hart *v.* Newman, 3 Camp. 13.
(5) Ellis *v.* Watson, 2 Stark. C. 453.
(6) Herne *v.* Rogers, 9 B. & C. 577.
(7) Mercer *v.* Wise, Esp. 219.
(8) B. N. P. 237. Earl of Sussex *v.* Temple, Lord Raym. 310. Doe *d.* Digby *v.* Steel, 3 Camp. 115, where the statement in the answer was as to *belief*. Salter *v.* Turner, 2 Camp. 87. 3 Camp. 401. Lady Dartmouth *v.* Roberts,

the plaintiff as lessee of the dean and chapter of Carlisle, and the defendant offered in evidence an answer of the dean and chapter in a former suit, in which they admitted the existence of a modus, it was held to be not only admissible, but strong evidence to prove the modus; and an issue having been directed, Mr. Justice Bayley, at the trial, laid great stress upon the answer, as being cogent evidence against the defendant in the issue; observing that it was much stronger, than if it had been the answer of an individual.(1) A person's answer in Chancery is evidence against him by way of admission, in favour of a person who was no party to the Chancery suit; (2) for the statement being upon oath cannot be considered as conventional merely.

Admissions, by making or using affidavits.

A voluntary affidavit is evidence as an admission against the party who makes use of it. (3) The making use of an affidavit is an admission, which supersedes the necessity of proving that it has been sworn or signed. (4)

The affidavit of an agent, used by the defendant for the purpose of putting off a trial, may be used against the defendant. (5) And it may be laid down in general terms, that if a party, on a motion before a judge, use the affidavit of another person, such affidavit is on any subsequent occasion admissible as evidence against him who so used it. (6) A deposition, as to an act of bankruptcy, made by a person employed by the defendant's solicitor, and upon which the fiat issued, is admissible against the defendant (the petitioning creditor) in an action

16 East, 334. Rumney *v.* Beale, Gwil. 1861. Gully *v.* Bishop of Exeter, 5 Bing. 171. Grant *v.* Jackson, Peake, 203, where an answer of a partner who had been joined as a defendant in a suit, but as to whom a *nolle prosequi* had been entered to a bill in Chancery filed by persons not parties to the record, was received, not as a judicial proceeding, but as a naked admission. See 5 Pr. 485. 12 Vin. Ab. 93. Studdy *v.* Sanders, 2 D. & R. 347, answer by two defendants to a bill of a third defendant, charging them as partners.

(1) De Whelpdale *v.* Milburn, 5 Pr. 485.

(2) Ashmore *v.* Hardy, 7 C. & P. 505, and see Grant *v.* Jackson, Peake 203, *supra*, p. 365, n. 8.

(3) Style, 446. Sacheverell *v.* Sacheverell, Bac. Ab. Ev. 628. Vicary's case, Bac. Ab. Ev. 623. Voluntary affidavit of joint covenantee, B. N. N. P. 238.

(4) Cameron *v.* Lightfoot, 2 Bl. Rep. 1191. B. N. P. 238. R. *v.* James, 1 Shaw, 97.

(5) Johnson *v.* Ward, 6 Esp. 47.

(6) Brickell *v.* Hulse, 7 Ad. & Ell. 454, Marg. Abstr.

by the assignees of the bankrupt. (1) The deposition is evidence, as much as if it had been made by the defendants themselves; they sent the person for the purpose of making it, and they adopted it. (2)

Admissions in deeds.

Admissions of a party by deed under seal are entitled to great weight, on account of the deliberation implied by the nature of the instrument, if they do not even exclude any contrary statement. Between the parties to the deed, at least, they may be pleaded by way of estoppel, and, though not so pleaded, would generally, as between such parties, have the effect of an estoppel. (3)

It has been held, in an action of trespass against a sheriff for taking the property of the plaintiff, that the plaintiff may give in evidence a deed executed by the sheriff to a purchaser of the property, reciting the writ and the seisure and sale of the property under it, and that the deed so produced is *primâ facie* evidence of the facts recited in it. (4)

It has been laid down,—apparently without sufficiently adverting to the circumstance of the deed being used by a party to it, or to the fact of it's being pleaded by way of estoppel or not,—that a party who executes a deed is pre-precluded from saying, that the facts stated in the deed are

(1) Gardner *v.* Moult and others, 10 Ad. & Ell. 464.

(2) By Littledale, J., S. C.

(3) See Doe d. Pritchard *v.* Dodd. 2 Nev. & M. 45. Com. Dig. Ev. B. 5, Lainson *v.* Tremere, 1 Ad. & Ell. 792. Bowman *v.* Taylor, 2 Ad. & Ell. 278. Fort *v.* Clarke, 1 Russ. 604.

(4) Woodward *v.* Larking, 3 Esp. 286. Mayor of Carlisle *v.* Blamire, 8 East, 493, name of a corporation. The recital of a lease in a release is evidence of the release. Ford *v.* Grey, 1 Salk. 286. The recital of an ancient charter in a modern charter is evidence, by Abbot, J., Gervis *v.* Grand Western Canal Company. 5 M. & S. 78. The recitals in a deed may confine the effect of other admissions in the same document; as, of the receipt of purchase money: Lampon *v.* Corke, 5 B. & A. 607. Ford *v.* Lord Grey, 6 Mod. 44. Salk. 285. Cragg *v.* Norfolk, 2 Lev. 108. Fitzgerald *v.* Eustace, Gilb. L. Ev. 100. Hardr. 123. Date of lease is evidence of its execution on same day, 1 Salk. 485. See further, Ingleby *v.* Smith, 10 Bing. 84. B. N. P. 298. Cossens *v.* Cossens, Willis, 25. Shelley *v.* Wright, Willis, 9. 2 Ventr. 171. Marchioness of Annandale *v.* Harris, 2 P. Wms. 432. Burleigh *v.* Stibbs, 1 T. R. 465.

not truly stated. (1) But it seems that a party to a deed may contradict it, in an action between himself and a stranger to it: if it is not pleaded by way of estoppel, there can be no estoppel, as there is no mutuality.

In a recent case, where a plea contained new matter of justification, upon which issued was joined, and a deed was given in evidence, the recital of which directly contradicted the new matter alleged in the plea, it was held nevertheless, that the defendant was not precluded from submitting matter of defence to the jury, and that the recital in the deed ought not to have been treated as conclusive upon the trial of the issue, the recital not having been pleaded by way of estoppel. (2)

Where a deed is used as an admission against a party to it by a person who is not a party, it seems material to consider that an admission of a fact, not made upon oath, may have been entered into between persons from various causes, besides that of a conviction of the truth of the facts contained in it. The evidence may have been of a conventional nature merely; and the only question seems to be, whether it is admissible at all as between a party to a deed and a stranger to it. (3)

Admissions in other writings.

After admissions under oath and by deed, those next in order, with regard to credit and importance, are admissions by writing not under seal.

Receipt.

A receipt for money is an admission of great weight against a party, but not conclusive; and there is no legal objection to his shewing, if he can, that the money was not received, or that he gave the receipt under a misrepresentation. (4) An indorse-

(1) By Bayley, J., in Baker *v.* Dewey, 1 B. & C. 707. And see Rowntree *v.* Jacob, 2 Taunt. 128. Lampon *v.* Cooke, 5 B. & A. 606.

(2) Bowman *v.* Rostron, 2 Ad. & El. 295.

(3) Slaney *v.* Wade, 1 Mylne & Craig, 338. Fort *v.* Clarke, 1 Russ. 604. Rex *v.* Scammonden, 3 T. R. 474. Rex v. Laindon, 8 T. R. 179.

(4) Stratton *v.* Rustal, 2 T. R. 366. Benson *v.* Bennet, 1 Camp. 394, n. Attorney General *v.* Randall, 2 Eq. Ca. Ab. cited and approved of, 2 T. R. 369. In Alner *v.* George, 1 Camp. 392, Lord Ellenborough says, there can be no doubt that a receipt in full, where the person who gave it was under no misapprehension, and can complain of no fraud or imposition, is

ment on a deed of the receipt of sums of money, not being under seal, cannot amount to an estoppel, and is only evidence for a jury, capable of being rebutted by other circumstances in the case. (1) A receipt upon a negociable instrument may be explained in the same manner as any other receipt. (2)

Adjustment.

An adjustment on a policy, though *primâ facie* evidence against a person signing it, does not bind him, unless there was a full disclosure of the circumstances of the case. (3) In cases of fraud, or where the underwriter is mistaken in the law or in a material fact, the adjustment has been held not to be conclusive. (4)

Inventory.

An inventory, exhibited for the purpose of obtaining probate in the Ecclesiastical Court, seems not to be, in general, presumptive evidence of assets to the amount stated; (5) and a probate-stamp seems not to be *primâ facie* evidence of the receipt of assets to the amount covered by the stamp. (6)

Probate stamp.

binding upon him. And as between underwriter and insured, the acknowledgment of receipt of premium is conclusive; by Lord Kenyon, in Bristow *v.* Eastman, 1 Esp. 172. Dalzel *v.* Main, 1 Camp. 532. De Gaminde *v.* Pigou, 4 Taunt. 246. If a man give a receipt for the last rent, the former is presumed to be paid, Gilb. Ev. 142. A receipt on the back of a bill of exchange is *primâ facie* evidence of payment by the acceptor, Peake, 25. The giving a receipt does not exclude parol evidence of payment, Rambert *v.* Cohen, 4 Esp. 214.

(1) Skaife *v.* Jackson, 2 B. & C. 421. By Holroyd, J., 5 B. & A. 611. Graves *v.* Key, 3 B. & Ad. 318. It is otherwise, if the deed itself, or any other deed, state such receipt, for then the doctrine of estoppels may apply. Rowntree *v.* Jacob, 2 Taunt. 144. See Lampon *v.* Cooke, 5 B. & A. 609. Baker *v.* Dewey, 1 B. & C. 704. Co. Litt. 512.

(2) By the court, in Graves *v.* Key, 3 B. & Ad. 318. Stratton *v.* Rastal, 2 T. R. 366. Wyatt *v.* Marquis of Hertford, 3 East, 147. Hearne *v.* Rogers, 9 B. & C. 586. Lord Kenyon, in Scholey *v.* Walsby, 1 Peake, 34, was of opinion that a receipt on the back of a bill might be explained by parol evidence to be a receipt from the drawer, and not the acceptor. In Fairmanner *v.* Budd, 7 Bing. 574, a receipt, "received 10*l.* for a colt warranted sound," signed by an illiterate man, was held not conclusive of the contract.

(3) Shepherd *v.* Chewther, 1 Camp. 274. An adjustment and the striking out the name from a policy does not prove payment, Adams *v.* Sanders, 1 M. & M. 373. See Rayner *v.* Hall, 4 Taunt. 725.

(4) Christian *v.* Coombe, 2 Esp. 487. In the absence of invalidating circumstances, adjustments have been spoken of by the judges, as conclusive, by which, it is conceived, is only meant, that such would be the natural effect of the evidence upon the minds of a jury.

(5) Stearn *v.* Mills, 4 B. & Ad. 657. It was held, in Hickey *v.* Hayter, 1 Esp. 313, that an inventory exhibited by an administrator was *primâ facie* evidence of assets.

(6) By Littledale and Parke, J., in Stearn *v.* Mills, 4 B. & Ad. 657, where it was said that Foster *v.*

Invoice.

In *Bacon* v. *Chesney*, (1) it was held that it was competent to shew a mistake in an *invoice*, though it was in the same case considered that, if it had been delivered with the goods, or under a judge's order, the party would have been bound by it.

Bill delivered.

A bill delivered by an attorney to his client, for business done during a certain period, is strong presumptive evidence against any additional item within the same period; but the bill is not like a deed to operate as an estoppel, and the party will be at liberty to prove the fact of having transacted other business for the defendant. (2)

Using a name.

The inscription on a stage coach, of the name of the party licensed to use it, is evidence of ownership against the person so named who uses the coach, as well in an action as on summary proceedings. (3)

Admission of debt.

It has been held, that where a defendant signed an admission of a debt, to enable an attorney to prove it under a commission ‹ bankruptcy then subsisting against him, it was not an admission of the delivery of a signed bill, and did not dispense with the necessity of proof of the delivery of such a bill, in an action subsequently brought for the same claim; (4) because the bill might have been proved under the commission without being delivered. A parish certificate is conclusive upon the

Certificate.

Blakelock, 5 B. & C. 328, had not been much considered as to this point. In Mann *v.* Long, 3 A. & E. 702, the probate was held to be admissible evidence in an issue of *plene administravit*, but it was considered as not being of itself *primâ facie* evidence of assets actually come to the hands of the executors, though it might be of future assets, —unless, perhaps, where there had been long acquiescence.

(1) Bacon *v.* Chesney, 1 St. 193. The mistake was in the time of credit allowed for payment.

(2) Loveridge *v.* Botham, 1 Bos. & Pul. 49. It is there stated that an attorney's bill furnishes conclusive evidence against an increase of charge on any of the items contained in it. But there does not appear to be any ground for this distinction, except, perhaps, that possibly the client might be supposed aware of the omission of an item, but would naturally act in confidence, that the charges, of which he might not be an adequate judge, were correct. On the effect of a bill delivered by the plaintiff in support of a plea of abatement for non-joinder of parties, see 1 Stark. Ca. 296.

(3) Barford *v.* Nelson, 1 B. & Ad. 571. Whatever is written by a party may be used as an admission against him, though it be not signed by him, 1 C. & P. 288.

(4) Eicke *v.* Nokes, 1 M. & M. 303.

parish granting it, with respect to that parish to which it is granted, and *primâ facie* evidence with respect to other parishes. (1) A paper written by a party is evidence against him by way of admission, although it is signed by another person. (2) Signature.

It was laid down by Lord Kenyon, that a bill in Chancery is not evidence of any fact contained in it, but was to be taken merely as the suggestion of counsel. (3) In the Banbury peerage case, a question was proposed to the judges, "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 as filed in Chancery;" to which the judges answered 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 as filed. But whether any possible case may be put, which would form an exception to such general rule, they cannot undertake to say." (4) It will be observed, that the answer of the judges does not pointedly negative the admissibility of a bill in Chancery when produced by way of an admission; and there are authorities in favour of Bill in Chancery.

(1) Rex *v.* Lubbenham, 4 T. R. 251. A certificate has been said to be mighty evidence as to other parishes; see by Buller, J., citing the words of Lord Holt. *ib.*

(2) Alexander *v.* Brown, 1 C. & P. 288. As to the effect of a signature as evidence of notice of the contents of a written instrument, Harding *v.* Crethern, 1 Esp. 57. *Vide infra*, as to signatures by prisoners of their examinations.

(3) Doe d. Bowerman *v.* Sybourn, 7 T. R. 3. The bill was offered in evidence by the lessor of the plaintiff, to prove an admission by the defendant,—the allegations in the bill, which was filed by the defendant and another person, being inconsistent with the fact of a legal estate being in the person, in whom the defendant contended that it was vested.

(4) Le Marchant's Gardiner peerage, App. 413. 2 Selw. N. P. 714. And see Ferrers *v.* Shirley, Fitzg. 197. 1 Wightw. 325. Woollett *v.* Roberts, 1 Ch. Ca. 64. Two other questions were put to the judges as to the admissibility of a bill in Chancery, and of depositions under particular circumstances. The judges held, that they were neither evidence of pedigree or of particular facts deposed to. But, it would seem that the answers to these two latter questions were founded on the reasoning, that the declarations being *post litem motam* could not be evidence in matters of pedigree, and that the statements in the bill or depositions could not be evidence against a person not being party or privy to the proceedings; it may be doubted, how far the question, of a bill in Chancery being evidence by way of an *admission*, was under the consideration of the judges, in the answer stated in the text.

such evidence being received. (1) The investigation of truth would probably be best promoted by receiving the evidence, subject to such observations as might be called for in regard to the usual manner in which bills of Chancery are prepared.

Verbal admissions.

With respect to verbal admissions, it may be observed, that they ought to be received with a great deal of caution. It may be a correct principle that the statement of a person to the prejudice of his own interest is so far entitled as to be admissible in evidence against him. Still the repetition of oral statements is always subject to great imperfections. The party from whom they proceed may probably not have correctly expressed his meaning; this meaning, if correctly expressed, may have been misunderstood; a slight alteration of the words, without any design of intentional misrepresentation, may entirely vary the effect of his statement. (2)

Admissions by a party.

Admissions must in all cases be brought home to the party in a suit, against whom they are used, or to some person who is identified in interest with him; and it is not a sufficient ground for receiving the admission, that it might have been used to the prejudice of the person from whom it proceeds. Thus, in an action of trover brought to recover the value of goods distrained, on the ground that the defendant was not the plaintiff's landlord, the plaintiff's case was, that he had paid rent to another person, and it was held, that the statement of that person respecting the receipt of rent was not evidence without calling him. (3)

Admissions are clearly evidence against a party to the record who has made them. But some questions have arisen as to

(1) B. N. P. 235. Snow *v.* Philips, 1 Sid. 221. Taylor *v.* Cole, 7 T. R. 3, n.

(2) See by Mr. Justice J. Parke, note to Earl *v.* Picken, 5 C. & P. 542. Burr. 2057. 2 Wils. 399. By Lord Ellenborough, 1 M. & S. 636. By Alderson, B., Rex *v.* Simons, 6 C. & P. 540. On the effect of admissions in the Ecclesiastical Courts, by Lord Stowell, 1 Hagg. 304.

(3) Spargo *v.* Brown, 9 B. & C. 935. See Bernasconi *v.* Farebrother, 3 B. & Ad. 372, and by Holroyd, J., in Barough *v.* White, 4 B. & C. 325. Phillips *v.* Cole, 10 Ad. & Ell. 106.

what persons are to be deemed parties; the circumstance giving rise to these questions being, when one person is named a party on the record, who is only nominally a party, while another is the person really interested. On this subject, it has been held, that admissions are evidence in favour of the other side, whether made by a nominal party on the record, who sues as a trustee for the benefit of another, (1) or whether made by the party who is really interested in the suit, though not named on the record. (2) The following examples will illustratrate the several parts of this rule.

Who a party within the rule.

In the case of *Bauerman and another* v. *Radenius*, (3) which was an action by the shippers of goods against the captain of a ship, for not delivering the goods in proper condition, a letter written by the plaintiffs was given in evidence on the part of the defendant, in which they entirely exculpated the defendant from all misconduct; and it appeared also from the letter, that the goods were shipped on the risk of third persons, and that the plaintiffs were not really interested in the suit; the counsel on the other side contended, that the parties really interested ought not to be concluded by the admission of the plaintiffs, who were merely nominal parties in the action; Lord Kenyon was of a different opinion, and the plaintiffs were nonsuited. The Court of King's Bench afterwards affirmed the nonsuit. Mr. Justice Lawrence, on that occasion said, "Van Dyck and Co., the persons on whose risk the goods were shipped, are in this difficulty; the present plaintiffs either have or have not an interest; but it must be considered that they have an interest, in order to support the action; and if they have, an admission made by them, that they have no cause of action, is admissible evidence. I have looked into

Admission by party suing for benefit of another.

(1) Bauerman v. Radenius, 7 T. R. 664. Craib v. D'Aeth, *ib.* 670, n., admission by obligee of an assigned bond. And this, notwithstanding the absence of any beneficial interest appearing (as in Bauerman v. Radenius,) from the admission itself. B. N. P. 237, *contra.* Salk. 260. Where a nominal party gives a release, the courts will sometimes order it to be delivered up. Payne v. Rogers, Doug. 391. 1 Chitt. 390. Tidd. 677.

(2) Rex v. Hardwick, 11 East, 578, 589. An attorney conducting a cause in court may be called as a witness by the opposite side, and be asked who employs him, in order to shew the real party, and so let in his declarations, Levy v. Pope, 1 M. & M. 410.

(3) 7 T. R. 664.

the books, to see if I could find any case in which it has been holden, that an admission of a plaintiff on the record was not evidence, but have found none."(1)

In *Alner* v. *George*, (2) it was held, that a receipt in full, given by the plaintiff on the record, could not be invalidated, by shewing that the plaintiff had assigned all his interest, and was a mere trustee, and that the receipt was fraudulently given.

Admission by person interested, though not party to the record.

Cestui que trust of bond.

In an action of debt upon a bond conditioned to pay money to L. D., for whose benefit the action was brought the defendant proved that L. D. had said, in a conversation respecting this bond, that the defendant owed nothing; upon which the jury found for the defendant. On a motion for a new trial, it was argued, that the declarations of L. D., who was not a party to the action, ought not to affect the plaintiff; but the court said, that the case was to be considered as if L. D. was the plaintiff, the action being for L. D.'s benefit. (3)

Admission by person interested in policy.

An action upon a policy may be brought in the name of the person who effected it, though he be not the person interested; yet the persons interested are so far looked upon as parties to the suit, that the declarations of any of them are admissible in evidence against the plaintiff. (4)

(1) In Davies *v.* Ridge, 3 Esp. 101, in an action against trustees for trust-money received, Lord Eldon refused to allow evidence of the admission of one of the trustees, of the receipt of trust-money. In Tullock *v.* Dunn, R. & M. 416, it was held, that a promise by one of several executors is not sufficient to take a case out of the statute of limitations. And see Atkins *v.* Tredgold, 2 B. & C. 28, that a payment by one of several *alieno jure*, does not raise an assumpsit in all. In Dowden *v.* Fowle, 4 Camp. 38, an admissionby one ofseveral assignees of a bankrupt was received, in an action in which the assignees were the real parties. But the person making the admission was also petitioning creditor, and the admission related to his debt. See Young *v.* Smith, 1 Esp. 121.

(2) 1 Camp. 392. See Gibson *v.* Winter, 5 B. & Ad. 96. The proper remedy is by application to the equitable jurisdiction of the court; by Lord Ellenborough, *ib.* Legh *v.* Legh, 1 B. & P. 447. Payne *v.* Rogers, Doug. 407.

(3) Hanson *v.* Parker, 1 Wils. 257. Where it appeared that the agreement which was the subject of the suit, was made on behalf of the plaintiff and the other proprietors of a theatre, the declarations of the other proprietors were received; Kemble *v.* Farren, 3 C. & P. 623. See Davis *v.* Dinwoody, 4 T. R. 678, where the court looked into the relation of trustee and *cestui que trust*, for the purpose of disqualifying a witness on the ground of interest.

(4) By Lord Ellenborough,in Bell *v.* Ansley, 16 East, 143. See also

Or by a person interested in freight.

In an action by the master of a ship for freight, the declarations of the owner of the ship are admissible against the plaintiff, as the action is brought for the owner's benefit. (1)

By rated parishioners.

With respect to admissions by rated parishioners, it seems that upon an appeal against an order of removal, the declarations of a rated inhabitant of the appellant parish are evidence against that parish, without calling the inhabitant, and shewing that he refused to be examined. (2)

By party indemnifying.

A creditor who has indemnified a sheriff, for making a seizure

the case of Duke *v.* Aldridge, cited by Counsel in Bauerman *v.* Radenius, 7 T. R. 665, and Bell *v.* Smith, 5 B. & C. 188.

(1) Smith *v.* Lyon, 3 Camp. 465. See Robson *v.* Andrade, 1 Stark. Ca. 372. Harrison *v.* Vallance, 1 Bing. 45, where the defendant had admitted that he had detained a deed for the detention of which the action was brought, at the request of the person whose declarations were received, and who was substantially interested in the detention of it. Mr. Justice Bayley, in Spargo *v.* Brown, 9 B. & C. 938, says, that the parties in Harrison *v.* Vallance, were identified. The case of Hart *v.* Horn, 2 Camp. 92, seems opposed to the preceding cases; in that case, in replevin, the declarations of the person under whom the defendant made cognizance were held not to be admissible for the plaintiff. It did not appear that the person making cognizance was indemnified. But in Hancock *v.* Welsh, 1 Stark. Ca. 347, in an action of assumpsit by A. B. against the assignees of a bankrupt for rent due from them as tenants, a verdict against the assignees in a replevin suit brought by the assignees against the bailiff of A. B., and in which the bailiff made cognizance, was held to be admissible for A. B. in the action of assumpsit; the issue found upon the cognizance being that the assignees were tenants of A. B. *Vide supra,* as to the incompetency of witnesses on the ground of being substantially parties. For other cases see 1 Wils. 257: 11 East, 578: 1 Bing. 45: 1 Stark. Ca. 372: Lord Raym. 190: 4 Camp. 38: 6 Esp. 121: 16 East, 143: 1 Esp. 390: 11 East, 584, n.: Duke *v.* Aldridge, cited 7 T. R. 665: 1 Ventr. 350: 1 Esp. 395.

(2) Rex *v.* Whitley Lower, 1 M. & S. 636. In Rex *v.* Hardwick, 11 East, 578, the party had refused to be examined. Rex *v.* Wobourn, 10 East, 395, 402. Before the 54 Geo. 3, c. 170, the admissions of rated parishioners were received on account of their being parties to the suit, and it would seem that the statute which renders parishioners competent witnesses, does not interfere with the rule of evidence respecting admissions. The power of calling the inhabitant, even if he be compellable to become a witness, may often not compensate for the loss of his admission. In the case of the corporation of London *v.* Long, 1 Camp. 22, where the question related to the powers of a city officer, Lord Ellenborough held, that the declarations of an indifferent individual of the corporation were not admissible, but that he would admit what the officer himself had been heard to say upon the subject. Mayor of London *v.* Joliffe, 2 Keb. 295. Lord Dorset *v.* Carter, 3 Keb. 300. Rex *v.* City of London, 1 Ventr. 351. 2 Lev. 231. 1 Ventr. 254. 2 Vern. 351. 11 East, 584, n. 7 T. R. 665.

under a writ of execution, is considered as substantially the defendant, in an action brought against the sheriff on account of the seizure; (1) on the ground, that the sheriff, by his conduct, substitutes himself for the original defendant. (2)

By petitioning creditor.

But in a late case it was held, that the declarations of a deceased petitioning creditor, made after the commission, are not evidence against the assignees, in an issue to try whether the commission was concerted between the petitioning creditor, the bankrupt, and the attorney; (3) the petitioning creditor, it was said, could not be taken to be the real party interested in the cause; and the result of the trial, if the verdict were for the plaintiff, would not necessarily be the superseding of the commission, the issue being merely a proceeding to satisfy the Chancellor's conscience.

Issue on liability of a third person—his admissions when admissible.

Admissions made by strangers to a suit are sometimes received in evidence, where the question in the suit is whether a particular claim might have been enforced as against those strangers. Thus it has been held, that on a plea in abatement for the non-joinder of A. B. as a defendant, his declarations before action brought were evidence in support of the plea; (4) on the ground, that whatever would be evidence in an action brought against him to prove him liable, might be received to prove his liability on this issue.

Admission by bankrupt, when admissible.

Apparently, on the same principle, the admissions of bankrupts, or entries in their books, made before the act of bankruptcy, are receivable in evidence, to prove the petitioning creditor's debt. (5) And the admission of a petioning creditor,

By petitioning creditor.

(1) Dyke *v.* Aldridge, cited 7 T. R. 665, see Dowden *v.* Fowle, 4 Camp. 38. Young *v.* Smith, 6 Esp. 121.

(2) By Richardson, J., 3 B. & B. 136. The circumstance that a person indemnifies a party to the record, does not seem in all cases sufficient to let in his admissions, Drake *v.* Sykes, 7 T. R. 117. That an admission which would be evidence against the party is evidence against the sheriff, Gibbon *v.* Coggan, 2 Camp. 188. Slomon *v.* Herne, 2 Esp. 695. Williams *v.* Bridges, 2 Stark. Ca. 42.

(3) Harwood *v.* Keys, 1 M. & R. 204. See Gardiner *v.* Mould, cited *infra*.

(4) Clay *v.* Langslow, 1 M. & M. 45.

(5) Watts *v.* Thorpe, 1 Camp. 376, entry in books. Hoare *v.* Coryton, 4 Taunt. 560, a signed account. Taylor *v.* Kinloch, 1 Stark. Ca. 176. Ewer *v.* Preston, Rep.

made before the commission, as to the amount of his debt, is on a similar ground, receivable in evidence against the assignees of a bankrupt.(1) In cases of this description the issue appears to be, what were the mutual rights of two persons, (one or both being strangers to the suit,) at a particular period; which inquiry seems to let in such evidence as would have been receivable between those persons. In the last example, however, it is not clear, that the decision did not turn on the point, that the assignees were liable to be affected by admissions of the petitioning creditor, because he was a privy in estate.

Admission by party in different capacity.

An admission may have been made by a party to a record, when in a different capacity from that in which he is concerned as regards the suit; and it seems to have been considered, in such a case, that his former admission ought not to be evidence against him. For the change which has taken place in his interest, his means of knowledge, and his powers of acting, shew that his former admission is not a safe criterion of the

temp. Hard. 378. See Evans v. Lake, B. N. P. 282. In Parker v. Barker, 1 Br. & B. 9, a bankrupt's admissions that he was in partnership with a trader were received as proof of the *trading*. But the propriety of this decision was doubted in Bromley v. King, R. & M. 228. It may be observed, that in an action by assignees, the question as to the petitioning creditor's debt is, whether it could have been enforced against the bankrupt, which point the admission clearly establishes. The bankrupt's declarations before the act of bankruptcy may be used against the assignees to shew collusion, as part of the *res gestæ*: Thompson *v.* Bridges, 8 Taunt. 336. After the bankruptcy, though before the commission or fiat, the admissions of the bankrupt are, it seems, not receivable; (Smallcombe *v.* Bruges, 13 Pr. 136. Taylor *v.* Kinloch, 1 St. 176. Sanderson *v.* Laforest, 1 C. & P. 46,) though a bankrupt's declaration, that a bill would not be paid, has been admitted, to supply proof of notice, where the admission was made after bankruptcy and before the issuing of the commission. Brett *v.* Levett, 13 E. 213, cited in Taylor *v.* Kinloch, 1 Stark. Ca. 176. But at the period of that decision, (as appears from the case of Dowton *v.* Cross, 1 Esp. 168, there cited,) a bankrupt's declarations were admitted, to prove the petitioning creditor's debt, if made at any time before the commission issued. See Schooling *v.* Lee, 3 Stark. Ca. 151. Marsh *v.* Meager, 3 Stark. Ca. 353. Bernasconi *v.* Farebrother, 3 B. & Ad. 372. An admission made after an act of bankruptcy, is evidence against the bankrupt himself in an action brought by him against an assignee, to try the validity of the commission, Jarrat *v.* Leonard, 2 265. M. & S.

(1) Smith *v.* Young, 6 Esp. 121. Of this case, Mr. Justice Patteson, in Harwood *v.* Keys, 1 M. & Rob. 205, observed, that it was loosely stated, and that he could not but think that the declarations must have been made before the commission. See Gardner *v.* Mould, cited *infra*.

truth of the claim or defence, which he is at present setting up. And the injustice of allowing his former admission to be used against him may appear to be the greater, where by the change of his situation he has become the representative of the interest of others, with whom in his former situation he had no privity.

Thus it has been held, that the declarations of a person, made before he became assignee of a bankrupt, are not evidence against him, when suing as such assignee. (1) And the declarations of a *prochein ami*, made before action brought, are not admissible for the defendant. (2)

Admission by one party, evidence against another, jointly interested.

It appears to be a general principle, that in a civil suit by or against several persons, who are proved to have a joint interest in the decision, a declaration made by one of those persons, concerning a material fact within his knowledge, is evidence against him, and against all who are parties with him in the suit. (3) In an action of covenant against two defendants, the affidavit of one of them was held to be evidence against both. (4) But unless there be a joint interest in the decision, the admission of one defendant will not be receivable against a co-defendant. (5) In actions of tort, the admission of one co-defendant will not affect another co-defendant. (6) The rule is clear against the reception of such evidence, in the case of persons jointly indicted. (7)

Otherwise in torts.

(1) Fenwick *v.* Thornton, 1 M. & M. 51.

(2) Webb *v.* Smith, R. & M. 106. This rule is illustrated by the doctrine of estoppels. A woman is not estopped, after coverture, by an admission upon record by her husband and herself during coverture. An heir claiming as heir of his father is not estopped by an estoppel upon him as heir to his mother. A party suing as executor, in an action of debt upon a bond, is not estopped by having been barred by an action on the same bond when he sued as administrator. Robinson's case, 5 Co. 32 b. Com. Dig. Estoppel, C. Wrottesley *v.* Bendert, 3 P. W. 237. Barron *v.* Grellard, 3 V. & B. 166.

(3) 11 East, 589

(4) Vicary's case, Gilb. Ev. 51.

(5) This has been held with respect to the *answers* of co-defendants, on the ground that, if it were allowed, a plaintiff might make one of his friends a defendant. Wych *v.* Meale, 3 P. Wms. 311, 12 Ves. 361.

(6) The lax expressions of Lord Ellenborough, in Rex *v.* Hardwick, 11 East, 585, are qualified by Chief Justice Tindal, in Daniels *v.* Potter, 1 M. & M 502. *Vide supra.*

(7) By Lord Kenyon, in Grant *v.* Jackson, Peake, 204. *Vide infra, Confessions; supra, Declarations* part of the *res gestæ.*

By partner, a party to the suit.

In an action against persons as partners, when the partnership is first proved, an admission by one of the defendants is admissible against all. (1) Thus, in an action by several partners against the defendant for the non-performance of an agreement, a declaration by one of the partners suing, that the goods, to which the agreement related, were his separate property, is evidence against all the plaintiffs suing as upon a joint contract. (2) An admission by one defendant, of his partnership with the co-defendants, who were sued with him as acceptors of a bill of exchange, and who had been outlawed, has been received as proof against him of a joint promise by all. (3)

By partner, not a party.

The rule with regard to the admission of partners is not confined to cases, where they are parties to the same suit. The admission of a partner, though not a party to a suit, is evidence against another partner, who is sued as to joint contracts during the partnership; and this, whether the admission be made before the determination of the partnership or afterwards. (4) But the statement of one, who has been admitted into partnership subsequently to the transaction in question, is clearly not admissible in evidence as to such antecedent transaction. (5) An admission by a part owner of a ship, upon a subject of co-partnership, is not evidence against another part-owner. (6)

By part-owner.

(1) Nicholls *v.* Dowding and Kemp, 1 Stark. Ca. 81. Grant *v.* Jackson, Peake, 204.

(2) Lucas and others *v.* De la Cour, 1 Maule & Selw. 249.

(3) Sangster *v.* Mazarredo and others, 1 Stark. Ca. 161.

(4) Wood *v.* Braddock, 1 Taunt. 104. In Graul *v.* Jackson, Peake, 203, the *answer* of a partner, against whom a *nolle prosequi* had been entered, was received as an admission against his co-partners. And see Thwaites *v.* Richardson, Peake, 16, where Lord Kenyon thought that the admission of a party not a partner to the suit was not receivable in evidence. Pelerick *v.* Turner, cited 1 Taunt. 104. Hodenpyl *v.* Vingerhood, *Chitty on Bills*, 361, admission of an acceptance by a partner. Henderson *v.* Wild, 2 Camp. 562, fraudulent receipts of a partner. And see, Booth *v*, Jaunce, 7 Price, 198. Holme *v.* Green, 1 Stark. Ca. 488. Ellis *v.* Watson, 2 Stark. Ca. 453. 1 Esp. 29. 2 Esp. 608. Bust *v.* Palmer, 5 Esp. 145. Sangster *v.* Mazzaredo, 1 Stark. Ca. 161, admission by partner as to partnership.

(5) Catt *v.* Howard, 3 Stark. C. 5. Pritchard *v.* Draper, 1 Russ. & Myl. 191, admission after the dissolution of partnership to prove payments made after such dissolution.

(6) Jaggers *v.* Binnings, 1 Stark, C. 64.

Admission of parties to negotiable instruments.

In *Whitcomb* v. *Whiting*, (1) which was an action on a joint and several promissory note, given by the defendant and others, to which action the defendant pleaded the general issue and the Statute of Limitations, the Court of King's Bench determined, that proof of payment of interest and part of the principal within six years, by one of the others, who was not sued, would take the case out of the statute. Lord Mansfield said, "payment by one is payment by all, the one acting virtually as agent for the rest; and in the same manner an admission by one is an admission by all." Different opinions have been expressed respecting the propriety of the decision in this case: but the doctrine contained in it appears to be now clearly established, though it is only an authority for cases, where the admissions are made by a party originally liable upon the instrument. (2)

2. *Of Declarations by the Agent of a Party.*

We proceed next to consider the subject of admissions by agents. Such admissions appear to be liable to greater objections, than the admissions of the parties themselves. Chief Justice Tindal has observed, (3) "It is dangerous to open

(1) 2 Dougl. 661.

(2) In Parham *v.* Raynal, 2 Bing. 306, (where the admission was used against a surety,) Whitcomb *v.* Whiting was confirmed. In Burleigh *v.* Stott, 8 B. & C. 41, Whitcomb *v.* Whiting, and Jackson *v.* Fairbank were confirmed, and see Chippendale *v.* Thurston, M. & M. 411. In the previous case of Atkins *v.* Tredgold, 2 B. & C. 29, it was doubted, and was held at all events not to apply to persons liable *alieno jure*, and see Rullock *v.* Dunn, R. & M. 416. Brandram *v.* Wharton, 1 B. & A. 470, where the acknowledgment was not express, and where Jackson *v.* Fairbank, 2 H. B. 340, was doubted, on the ground that the admission was not made by a person liable to contribute, see Pittam *v.* Foster, 1 B. & C. 248. In Gray *v.* Palmer, 1 Esp. 135, it was held, that where the plaintiff declared against several defendants on a joint and several note, and the defendants severed in their pleas, and one of them by his plea admitted the handwriting of the note, the handwriting must nevertheless be proved against the other defendants. But this case was apparently decided on the ground, that an admission in one plea cannot be used to disprove another plea.—After the death of one maker of a joint and several promissory note signed by two, a payment upon it by the executor of the deceased party will not take the debt out of the statute as against the survivor, Slater *v.* Lawson, 1 B. & Ad. 396.—See 9 Geo. 4, c. 14, as to new promises by joint contractors, executors, or administrators. Halliday *v.* Ward, 3 Camp. 32. Mantstephen *v.* Brooke, 3 B. & Ad. 141. Clarke *v.* Hougham, 2 B & C. 149. Holme *v.* Green, 1 Stark. C. 488.

(3) In Garth *v.* Howard, 8 Bing. 453.

the door to declarations of agents, beyond what the cases have already done. The declaration itself is evidence against the principal, though not given on oath; it is made in his absence, when he has no opportunity to dispute or correct it by any observation or by any question put to the agent, and it is frequently brought before the court and jury after a long interval of time. It is liable therefore to suspicion originally, from carelessness or misapprehension in the original bearer, and to still further suspicion from the faithlessness of memory in the reporter, and from the facility with which he may give an untrue account. Evidence therefore of such a nature ought always to be kept within the strictest rules, to which the cases have confined it." There is less necessity for resorting to such evidence in the case of living agents, than where proof is given of the admissions of parties, who may refuse to be examined; and perhaps the admissions of agents may be considered not so likely, as those of the parties, to contain an accurate and complete statement of circumstances.

General rule.

Numerous questions have arisen respecting the point, how far the admissions of agents may affect their principals. The statement or representation of an agent, at the time of a transaction which is within the scope of his authority, is evidence against the principal himself, in consequence of the legal relation between principal and agent. It is in the nature of original evidence and not of hearsay, the representation or statement of the agent in such cases being the ultimate fact to be proved, and not an admission of some other fact. Thus, what an agent says at the time of a sale, which he is employed to make, is evidence as part of the transaction of selling; and in order to prove what was said, it cannot be necessary, that the agent himself should be called. (1)

When the declaration is made in the course of the business.

But where an agent has said or written anything relative to

(1) See the judgment of Sir W. Grant, Master of the Rolls, in Fairlie *v.* Hastings, 10 Ves. 127. Kahl *v.* Johnson, 4 Taunt. 565. Langhorn *v.* Allnut, 4 Taunt. 511. Helyar *v.* Hawke, 5 Esp. 74. Betham *v.* Bonson, Gow, 45. Alexander *v.* Gibson, 2 Camp. 555. Irving *v.* Motley, 7 Bing. 553. Peyton *v.* Governors of St. Thomas's Hos-

Where it is not so made.

a transaction which is past and completed, the question of the admissibility of the agent's declaration, without calling the agent, depends on the point whether the making of such a statement was within the scope of the agent's authority. Thus, in *Fairlie* v. *Hastings*, (1) where the fact sought to be established was, that a bond had been executed by the defendant to the plaintiff, which the defendant had got possession of, the Master of the Rolls refused to admit, as evidence of this fact, the declaration of the defendant's agent, who had been employed to keep the bond for the plaintiff's benefit, and who, on it's being demanded by the plaintiff, informed him that it had been delivered to the defendant. The declaration of a servant employed to sell a horse is evidence to charge the master with a warranty, if made at the time of sale; but the servant's admission of a warranty, made at any other time, is not receivable. (2)

Fairlie v. *Hastings.*

In *Garth* v. *Howard*, (3) it was held the declarations of a pawnbroker's shopman were not admissible against his employer. It was said by Chief Justice Tindal, that if the transaction, out of which the suit arose, had been one in the ordinary trade or business of the pawnbroker, a declaration of the shopman, that his master had received goods, might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an

pital, 9 B. & C. 725. Prideaux *v.* Collier, 2 Stark. C. 57. Drake *v.* Marryat, 1 B. & C. 473. Peto *v.* Hague, 5 Esp. 134. Shumack *v.* Lock, 10 B. Moore, 39. Powell *v.* Hodgetts, 2 C. & P. 432. Peyton *v.* Governors of St. Thomas's Hospital, 3 C. & P. 363. Irving *v.* Motley, 7 Bing. 550. Hazard *v.* Treadwell, 1 Str. 506. Shumack *v.* Lock, 10 B. Moore, 39. In Coates *v.* Bainbridge, 5 Bing. 58, the letters of the agent were received, because adopted by the answers of the principal.

(1) 10 Ves. 128. This is referred to by Tindal, C. J., in Garth *v.* Howard, 8 Bing. 452, as being the leading case on the subject. The Master of the Rolls there lays down the rule respecting the statements of agents to be, that they are inadmissible, unless made by them either at the time of their making an agreement about which they are employed, or in acting within the scope of their authority. But it seems to be a more simple rule with respect to admissions, that they are only receivable when there is an authority to make them. Garth *v.* Howard, 8 Bing. 452. Maesters *v.* Abraham, 1 Esp. 375. Helyar *v.* Hawke, 5 Esp. 74.

(2) Helyer *v.* Hawke, 5 Esp. 72. See Peto *v.* Hague, 5 Esp. 134.

(3) 8 Bing. 451, see Shumack *v.* Lock, 10 B. Moore, 39.

answer to such an inquiry, made by any person interested in the goods deposited with the pawnbroker. But the transaction appeared to have been a transaction unconnected with the business of the shop, and there was no evidence to show the agency of the shopman in such transactions.

In the case of *Maester* v. *Abraham*, (1) Lord Kenyon, C. J., refused to admit the letter of an agent (respecting a contract made by him as agent) as evidence of the agreement against the principal, and ruled that the agent himself ought to be examined. Sir W. Grant, adverting to this case, said, "If the agreement was contained in the letter, I should have thought it sufficient to prove that the letter was written by the agent: but if the letter was offered as proof of the contents of a pre-existing agreement, then it was properly rejected." (2) And the Court of Common Pleas determined, after much argument, in the cases of *Kahl* v. *Jansen*, (3) and *Langhorn* v. *Allnut*, (4) that the letters of an agent abroad to his principal, containing a narrative of the transaction in which he had been employed, were not admissible in evidence against the principal, as the mere representation of the agent. The general rule on the subject was there fully recognised and confirmed. "When it is proved," said Mr. Justice Gibbs, "that A. is agent to B., whatever A. does, or says, or writes, in the making of a contract as agent of B., is admissible in evidence, because it is part of the contract, which he makes for B., and which therefore binds him, but it is not admissible as the agent's account of what passed." (5) When the declarations of an agent are admitted in evidence, they are received not for the purpose of establishing the truth of the fact stated, but as representations by which the principal is as much bound as if he

General rule.

(1) 1 Esp. N. P. C. 375.

(2) In Fairlie *v.* Hastings, 10 Ves. 127.

(3) 4 Taunt. 565.

(4) 4 Taunt. 511. Reyner *v.* Pearson, 4 Taunt. 663. S. P.

(5) 4 Taunt. 519, where an agent's letters were adopted and acted on by his principal, that circumstance was considered as shewing that the letters were acts within the scope of the agent's authority, Coates *v.* Bainbridge, 5 Bing. 62. The letters seem to have been connected with, and necessary to the explanation of the defendant's own letters.

had made them himself, and which are equally binding whether the fact stated be true or false.

Authority of agent.

An agent's admission will be binding on his principal, where the making of the admission is within the scope of the agent's authority; and the authority of an agent to make admissions may be either express, or implied from circumstances. Thus, if one party refers another on a disputed fact to a third person as authorized to answer for him, (1) or employs an agent to make certain propositions respecting a transaction between himself and another, (2) he is bound by what his agent says or does within the scope of his authority, as much as if it had been done or said by himself. For example, in an action for goods sold and delivered, where it appeared at the trial, that in a conversation between the plaintiff and defendant, the former asserted that he had delivered the goods by one C., and the defendant replied, "If C. will say he did deliver the goods, I will pay for them," the plaintiff was allowed to give in evidence C.'s answer respecting the matter referred to him. (3)

A person was employed by the defendant's solicitor to make a deposition before commissioners as to an act of bankruptcy; his deposition is admissible as evidence of such act against the defendant (the petitioning creditor), in an action by the assignees of the bankrupt. It is evidence against him as much as if it had been made by himself: he sent his solicitor for the purpose of making it, and adopted it when made. (4)

Wife as agent.

Though a husband will not in general be bound by any admissions made by his wife, even where he is suing in *jure uxoris*, (5)

(1) Daniell *v.* Pitt, 1 Camp. 366. Lloyd *v.* Willan, 1 Esp. N. P. C. 178.

(2) Gainsford *v.* Grammar, 2 Campb. 9.

(3) Daniell *v.* Pitt, 1 Campb. 366. 6 Esp. N. P. C. 74, S. C. Williams *v.* Innes, 1 Campb. 364. Price *v.* Hollis, 1 M. & S. 105. Brock *v.* Kent, *ib.* n. 366. Burt *v.* Palmer, 5 Esp. N. P. C. 145. Garnet *v.* Ball, 3 Stark. N. P. C. 160. Bretton *v.* Prettiman, Sir T. Raym. 153. Brayne *v.* Veale, 3 Lev. 241. Hood *v.* Reeve, 3 C. & P. 284. Godb. 291. 3 Camp. 366. 1 Esp. 178.

(4) Gardner *v.* Moult and others, 10 Ad. & Ell. 464.

(5) Alban *v.* Pritchett, 6 T. R. 680, wife's receipt for wages earned by her, not receivable. Hill *v.* Hill, 2 Str. 1094. See *Anon.* 1 Str. 527. Kerslake *v.* Shepherd,

yet a wife's admissions will be binding on the husband, if an authority to make them can be inferred. Thus it was held, in *Gregory* v. *Parker*, (1) that where goods had been furnished for the wife's accommodation, while her husband occasionally visited her, she might be regarded as her husband's agent respecting them; and that her letters, containing an admission of the price of the goods being unpaid, were evidence to take the case out of the Statute of Limitations. The authority of a wife to bind her husband by her admissions seems to have been inferred in a more unobjectionable manner, in the case of *Palethorp* v. *Furnish*,(2) where it was proved that the wife managed her husband's business, and generally gave orders and paid for goods.

Interpreter, as agent.

In the case of *Fabrigas* v. *Mostyn*, a point arose, which may serve as another example to illustrate the rule here laid down. (3) There a witness, who had been employed by the defendant to convey certain proposals to the plaintiff, explained them to him by an interpreter, from whom also he received the answer: the question was, whether the words of the interpreter could be given in evidence by the witness, as the answer of the plaintiff: or whether the interpreter himself ought to be called, as the witness understood neither the ques-

Esp. Dig. N. P. 741. Denn *v.* White, 7 Esp. 112. Wife's admission of a trespass, 3 P. Wms. 238; Salk. 350. Vern. 60, 109, 110; answer of wife in equity.

(1) 1 Campb. 395. It seems to be a strong decision, that the wife had an authority to make an admission years after the time when the goods were furnished.

2 Esp. 511, n. And see
l v. Burton, 1 Bing. 199.
loore, S. C., where the wife
d to settle a demand for goods
livered at her husband's shop
in which she served, and the business of which she was in the habit of conducting. In Emerson *v.* Blonden, 1 Esp. 141, the wife agreed for apartments which were occupied by herself and her husband, and Lord Kenyon received the wife's acknowledgments as to the amount of rent due. It would seem, that it could not be inferred from the wife having authority to make the agreement, that she had authority to make the admission. In these cases respecting a wife's agency, the courts appear to have been led away from defining the limits of her agency, by considering the point whether she could be an agent or not. See further Anderson *v.* Sanderson, 2 Stark. C. 204. Holt, 591. S. C. Willes, 577; 7 T. R. 112; 6 T. R. 176; 4 Campb. 70, 92; 5 Esp. 145. Petty *v.* Anderson, 3 Bing. 170. Barlow *v.* Bishop, 1 East, 432. Cotes *v.* Davis, 1 Camp. 485. Barker *v.* Wray, 2 Russ. Ch. C. 70. B. N. P 28. As to facts from which the wife's agency may be inferred, see Palmer *v.* Sells, 3 Nev. & M. 422.

(3) 11 St. Tr. 171.

tions put to the plaintiff, nor the answer made by him. Mr. Justice Gould ruled, that the evidence of the witness was clearly admissible and sufficient. Here the interpreter was the accredited agent of the parties, acting within the scope of his authority, and in the execution of his agency.

Admissions by counsel.

With respect to admissions by counsel, it has been held, that a *special case*, signed by the counsel on both sides, for the opinion of the court above, and stating facts proved at the trial of the cause, is admissible as evidence of those facts on a new trial. (1) But admissions by the defendant's counsel on a former trial have been rejected as evidence against the client on a new trial. (2)

Admission of agent in a criminal case.

Evidence of facts, by the admissions of agents, is receivable in criminal as well as in civil cases. Thus, on the impeachment of Lord Melville, (3) the House of Lords decided that a receipt given in the regular and official form by Mr. Douglas (who, as it was proved, had been appointed by Lord Melville to be his attorney, to transact the business of his office of treasurer of the navy, and to receive all necessary sums of money, and sign receipts for the same) was admissible as evidence against Lord Melville, to establish this single fact, that a person appointed by him, as his paymaster, did receive from the Exchequer a certain sum of money, in the ordinary course of business. "The first step in the proof of the charge," said the Lord Chancellor, "must advance by evidence applicable alike to civil and to criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a civil or criminal consequence, but it is totally a different question, in the consideration of criminal justice, as distinguished from civil, how the noble person, now on trial, may be affected by the fact, when so established. The receipt by the paymaster

(1) Vant Wort *v.* Wolley, R. & M. 4. In equity a party has been obliged to produce cases submitted for the opinion of counsel, but not the opinions. Preston *v.* Carr, 1 Y. & J. 175. See Bolton *v.* Corporation of Liverpool, 1 P. Coop. 22, that a statement prepared by an attorney for the opinion of counsel, is evidence against a party, or those identified in interest with him. See Bishop Meath *v.* Marquis of Winchester, 3 Bing. N. C. 211.

(2) See Colledge *v.* Horn, 3 Bing. 119.

(3) 29 Howell's St. Tr. 746, 763.

would, in itself, involve him civilly, but could, by no possibility, convict him of a crime."

In a case where it was proved, that the defendant had said that if another jury were called, and they should find a particular fact, he would pay a sum of money, it was held that this finding of the jury, coupled with the declaration, was evidence against the defendant, upon the principle of the authorities, which make the declarations of persons referred to equivalent to their own admissions; for the jury were to be considered in the nature of accredited agents. (1) Decision by referees as to matter referred.

3. *Of Admissions by Under-Sheriff, Bailiff, Guardian, Attorneys, &c.*

The admissions of an under-sheriff are not admissible in evidence against the sheriff, unless they tend to charge himself where he is the real party in the cause; as, in an action for an escape. In an action against the sheriff for taking illegal poundage, declarations of the under-sheriff, after he was out of office, were held not to be admissible to prove, that the bailiff, charged with having committed the extortion, was the sheriff's authorized agent. (2) Where, indeed, the declarations of the under-sheriff accompany official acts, they are in the nature of original evidence; (3) though the admissions of a bailiff or sheriff's officer, where the authority is limited to the particular duties specified in his warrant, are not evidence against the sheriff. (4) What a bailiff says whilst he has a party in Implied authority. Under-sheriff. Bailiff.

(1) Sybray *v.* White, 1 M. & Wel. 441. It does not appear to have been necessary to determine in the cases above mentioned, whether the party making the reference would have been concluded by the result. In Lloyd *v.* Willan, 1 Esp. 178, the evidence appears to have been thought conclusive. In Garnet *v.* Ball, 3 Stark. C. 160, it was said, that to make such evidence conclusive, it ought to be very clear. See Whitehead *v.* Tattersall, 1 Ad. & E. 491. Stevens *v.* Thacker, Peake, 187. Doe d. Morris *v.* Rosser, 3 East, 15. Hunter *v.* Rice, 15 East, 100.

(2) Snowball *v.* Goodricke, 4 B. & Ad. 541. The decision impugns the general doctrine of Lord Kenyon in Drake *v.* Sykes, as to the sheriff being identified with the under-sheriff to all intents.

(3) Yabsley *v.* Doble, 1 Lord Raym. 190. Drake *v.* Sykes, 7 T. R. 117. See Kempland *v.* Macauley, Peake, 65, where it was considered that the circumstance of the bailiff giving a bond of indemnity (which was relied on in Yabsley *v.* Doble, with regard to the under-sheriff,) did not make a bailiff's admission receivable.

(4) Drake *v.* Sykes, 7 T. R. 117. Said by Lord Ellenborough, in

custody, (1) concerning the circumstances of the arrest may be admissible against the sheriff as part of the act for which he is responsible. And it has been held, that the relation of sheriff and officer continues whilst the writ is in course of execution, and therefore that the sheriff may be affected by the officer's declarations after the return of a *fieri facias*, and before a warrant is made for sale, so long as the goods are in the hands of the officer. (2) In such cases the declarations of the officer are properly original evidence, and not in the nature of hearsay or admission.

Guardians. The declarations of a guardian are not admissible in evidence against a minor who sues by his guardian. (3) And the infant's answer in Chancery by his guardian cannot be read in evidence against the infant; for the guardian is sworn and not the infant, and the guardian has not authority to prejudice the infant by his admissions. (4)

Attorneys. With respect to admissions made by attorneys, they are considered as having an implied authority to make any admission

North *v.* Miles, 1 Camp. 389, that a bailiff's *general conversation* with an indifferent person is not evidence against the sheriff. The bailiff's authority must be proved in every particular case, *ib.*

(1) Bowcher *v.* Calley, 1 Camp. 391, n. In North *v.* Miles, 1 Camp. 389, it was held, that what was said by a bailiff, when asked by the plaintiff's attorney before the return of the writ, why he did not execute it, was evidence against the sheriff. The action was for a false return of *non est inventus*. Lord Ellenborough said, that the conversation must be considered as *part of the* act touching the execution of the writ. And he observed that where a thing is carried on by one as a *quasi* principal, what he says in the course of the transaction has been held, on great consideration, to be evidence against those he represents. On the subject of the proof of the bailiff's authority, upon which there have been many conflicting decisions, it has been recently held sufficient to prove an examined copy of the writ on which the bailiff's name was indorsed, and that a person of that name actually executed the writ, and that the course of the sheriff's office was, that the name of the bailiff to whom the warrant was granted, was usually indorsed on the writ. Scott *v.* Marshall, 2 Cr. & J. 238.

Proof of bailiff's authority.

(2) Jacobs *v.* Humphrey, 2 Cr. & M. 413. 4 Tyr. 272.

(3) Cowling *v.* Ely, 2 Stark. C. 366. Webb *v.* Smith, R. & M. 106, declarations of a *prochein amy* before action brought. Eggleston *v.* Speke, 3 Mod. 258. See James *v.* Hatfield, 1 Str. 548.

(4) Eccleston *v.* Petty, Carth. 79. Gilb. Ev. 44. 3 P. Wms. 237, n. E. An answer, purporting to be the answer of a minor by his mother and guardian, may be read against the mother in another cause, in which she is defendant in her own capacity. Beasley *v.* Magrath, 2 Sch. & Lef. 34.

for the purpose of obviating the necessity of proving any fact upon a trial; as where an attorney gives a formal admission of the execution of a deed, or of a dishonour of a bill, or where he makes propositions on behalf of his client. But whatever an attorney may happen to state in the course of conversation is not evidence in the cause. (1) As to the proof of a person being attorney in the cause (so that his admission may bind the party,) it will be sufficient, in general, to prove that he is the attorney upon the record; (2) yet it has been held, that a letter written to a plaintiff's attorney before action brought, by the attorney who afterwards appears in the cause for the defendant, is not evidence of a fact admitted therein without further proof, that the defendant authorized the communication. (3) An admission for the purpose of the trial of a cause may be used upon a new trial. (4)

(1) Young *v.* Wright, 1 Campb. 141. Griffith *v.* Williams, 1 T. R. 610. 1 East, 568. Truslove *v.* Burton, 9 B. Moore, 64. Goldie *v.* Shuttleworth, 1 Campb. 70, where it was held that the admission by the attorney, of the execution of a deed, did not preclude an objection on the ground of variance. Milward *v.* Temple, 1 Campb. 375, where it was held, that the admission of the handwriting of a person attesting a deed, was tantamount to an admission of the execution by the defendant. Marshall *v.* Clift, 4 Campb. 133. Holt *v.* Squire, R. & M. 282. That an attorney has an implied authority to make propositions, either before or after the commencement of a suit, see Gainsford *v.* Grammar, 2 Campb. 9. See Roe *v.* Wilkins, 3 Bing. N. C. 86, admission by attorney that his client claimed under a particular deed, by way of statement. In Young *v.* Wright, 1 Campb. 141, Lord Ellenborough says, "it is clear, that whatever the attorney says in the course of conversation, is not evidence in the cause;" the witness had been asked, whether he had not been told by the attorney for the plaintiff, that the bill, which was the subject of the action, was an accommodation bill. Wilson *v.* Turner, 1 Taunt. 30. In Perkins *v.* Hawkshaw, 2 Stark. C. 240, Holroyd, J., held, that matter of conversation with an attorney could not be evidence against his client; the conversation in question amounted to an admission of the signature of a deed.

(2) Marshall *v.* Cliff, 4 Campb. 133, as to admissions by clerks of attornies being given in evidence. Standage *v.* Creighton, 5 C. & P. 406. By Lord Tenterden, in Taylor *v.* Williams, 2 B. & Ad. 656. Admissions by agents of attornies, Truslove *v.* Burton, 9 B. Moore, 64. See Meyer *v.* Sefton, 2 St. 274, as to letter of attorney with client's signature.

(3) Wagstaff *v.* Wilson, 4 B. & Ad. 339. And see Burghart *v.* Angerstein, 6 C. & P. 695. In Marshall *v.* Cliff, 4 Camp. 133, the attorney's letter, relied upon to prove the joint-ownership, contained an undertaking to appear for them, which was a step in the cause. In Roberts *v.* Lady Gresley, 3 C. & P. 380, the party, whose letter was produced, had already acted as agent for the defendant. If an attorney leaves the conduct of a cause to his clerk, what the latter does therein binds the party; by Lord Tenterden, in Taylor *v.* Williams, 2 B. & Ad. 856.

(4) Elton *v.* Larkins, 1 M. & Ro.

Admission by principal not evidence against surety.

It would seem that a surety cannot, in general, be affected by an admission made by his principal. Thus, in an action upon a guarantee to pay for goods sold and delivered to a third person, what such person has admitted respecting the delivery of the goods is not evidence to charge the person giving the guarantee. (1) In an action for contribution brought by one surety against a co-surety, where a defence was set up, that the party for whom they had become sureties had discharged the bond, for the due payment of which they were responsible, the declarations of the obligee, as to the account upon which he received the money, and proof of the way in which he applied it, were held to be inadmissible, the declarations not appearing to have been made at the time of payment. (2) Where a party had become surety by a bond for the faithful conduct of a clerk, it was held, in an action upon such bond, that an admission by the clerk, made after he was discharged, of various sums which he had embezzled, was not receivable in evidence against the surety. (3)

Admissions are not only receivable against the parties, who

196. Langley *v.* Earl of Oxford, 1 M. & Wel. 508, where there had been an alteration in the pleadings. Doe d. Wetherall *v.* Bird, 7 C. & P. 6; a summons may be taken out to withdraw the admissions.

(1) Evans *v.* Beattie, 5 Esp. 26. In Perchard *v.* Hamilton, 1 Esp. 394, an action by a sheriff upon a bond to indemnify him against defaults of his bailiff. A written admission by the bailiff of having received levy-money, was held by Lord Kenyon to be admissible against the defendant, on the ground that the bailiff was in fact the defendant in the action. It does not appear that there was any evidence to shew that the defendant was indemnified by the bailiff. But in a trial at Warwick, Bayley, B., held that a written admission of sums received by a clerk was not evidence against a surety in an action brought by the master upon a bond of indemnity. The case of Perchard *v.* Hamilton was cited, but was thought by Bayley, B., not to apply. It would seem, however, to be in point. In Goss *v.* Watlington, 3 B. & B. 136. Witnash *v.* George, 8 B. & C. 556, the entries of deceased principals were received on the ground that they were made in accounts, which the sureties had contracted to keep faithfully. In Cutler *v.* Newling, Manning's Dig. Privies, 137, on the execution of a writ of inquiry on an indemnity bond, an admission by the principal of the amount of damnification was considered by Holroyd, J., inadmissible. See Bacon *v.* Chesney, 1 Stark. C. 192, that the subsequent declarations of a principal are not admissible to prove the terms of the original contract.

(2) Dunn *v.* Slee, Holt, 401. Such a declaration made at the time of payment, would seem to be admissible as part of the *res gestæ*, *ib.*

(3) Smith *v.* Whittingham, 6 C. & P. 78. See McGahey *v.* Alston, 2 M. & Wel. 213. Goss *v.* Watlington, 3 Br. & B. 132. Middleton *v.* Melton, 10 B. & C. 317.

make or authorize them, but also against persons identified in interest with those parties. The rules for the admissibility of such evidence are analogous to those which are found in the doctrine of estoppels, and which govern the admissibility of verdicts, judgments, and depositions. The reader is therefore referred to the second part of this Work, which treats of written evidence, for considerable illustration of the present subject. It has, indeed, been necessary to anticipate some portion of what would properly belong to the second part of the Work, (particularly as regards answers in Chancery,) for the elucidation of the points which belong to the present Chapter.

Admissions, evidence against privies.

Thus, with regard to privies in blood and privies in law, the declarations of a deceased occupier of land, that he rented it under a certain person, are evidence of that person's seisin against a party claiming as the heir at law of such occupier, to explain the nature of the occupation, and to shew that it was not adverse. (1) The declarations of an intestate are evidence against his administrator. (2)

Privies in blood.

In law.

With respect to admissions made by persons who have been privies in estate to the parties, against whom the admissions are used, the evidence, when the parties are deceased, is generally admissible on a different principle, as being a declaration against interest. And when the parties are alive, the evidence may perhaps be admissible, as explanatory of acts done or forborne, or of the fact of possession. But without reference to either of these principles, it would seem that an admission by a proprietor or occupier possessing any interest, would be

In estate.

(1) Doe d. Human *v.* Pettett, 3 B. & A. 223. If this case is to be treated as a case of admissions, it would be immaterial that the declarant was deceased. But the evidence may be considered also as a declaration explanatory of possession, or as a declaration against interest. See Peaceable *v.* Watson, 4 Taunt. 16. Doe *v.* Jones, 1 Campb. 367. These points are illustrated by the doctrine concerning the admissibility of verdicts against privies in law and in blood; See vol. 2. Locke *v.* Norbonne, 3 Mod. 141. Outram *v.* Morewood, 3 East, 346. Co. Litt. 352, *a.* Com. Dig. Estoppel, B., 3 T. R. 365.

(2) Smith *v.* Smith, 3 Bing. N. C. 32. The plaintiff was regarded as claiming under the intestate, though, in fact, he need not have done so.

Examples.

evidence as to the nature and extent of that interest, against a party who was in privity of estate with him. (1) The receipts for a modus, given by a vicar's lessee, are evidence against the vicar, by reason of the privity of estate. (2) An answer in Chancery is admissible in evidence against a privy in estate. (3) A statement in a lease by a landlord has been held admissible against a person who claims under a subsequent lease of the same land. (4) A letter written by a vicar in respect of the property of the vicarage, is evidence against his successor. (5) An admission by a tenant in possession, defendant in an action of ejectment, is evidence against a co-defendant, who defends as landlord. (6)

It has been held, upon an issue between two persons, whether a third person died possessed of certain property, that evidence might be given of a declaration, made by that third person, that he had assigned the property; the party, against whom the declarations were adduced, claiming under that person. (7) A case stated for the opinion of counsel, touching the right of presentation to a living by a bishop, was held to be evidence against a subsequent bishop of the same see, on

(1) Doe d. Manton *v.* Thrupp, 9 Bing. 41. Walker *v.* Bradstock, 1 Esp. 458. Davis *v.* Pierce, 2 T. R. 53. Baggaley *v.* Jones, 1 Campb. 367. Doe *v.* Pettet, 5 B. & A. 223. Doe *v.* Rickerby, 5 Esp. 4. 12 Vin Ab. A. b. 38, pl. 10. Tindal *v.* Whitrow, 1 C. & P. 22. With respect to the amount of requisite interest in a person whose declaration can bind another by reason of privity of estate, see *infra*, as to *Verdicts*, in this respect. As to the effect of declarations by tenants against the interest of their reversioners, see by Patteson, J., Tickle *v.* Brown, 4 Ad. & E. 378.

(2) Jones *v.* Carrington, 1 C. & P. 329. So although the party giving the receipts be entitled only under an agreement for a lease, *ib.* It would seem that the receipts were admissible on a more general ground, as being declarations by persons (deceased) against interest.

(3) Earl of Sussex *v.* Temple, Lord Raym. 310. In this case the court went too far in determining, that the answer might be read against persons in occupation of property, on proof that it was the reputation of the county, that the lands had belonged to the person making the answer.

(4) Crease *v.* Barret, 1 Cr., M. R. 932.

(5) Doe d. Coyle *v.* Cole, 6 C. & P. 359.

(6) Doe d. Mee *v.* Litherland, 4 Ad. & Ell. 784.

(7) Ivat *v.* Finch, 1 Taunt. 141. The judgment also proceeded on the ground of a declaration against interest; which seems to be a safer ground, as the third person had parted with the possession before the declaration was made. *Vide infra*.

a question touching the right of presentation to the same living. (1)

An ancient statement, concerning the payment of tithes of a parish by a modus signed by the rector for the time being, is evidence against a succeeding rector. (2) An answer to a bill filed in the Court of Exchequer, in a suit instituted for tithe-hay by a vicar against the rector and others (owners of lands in the parish), in which answer the defendants disputed the vicar's claim, and declared that the tithes in question belonged to the rector, will be evidence, in an action for tithes by a succeeding rector against owners or occupiers of the same lands, for the tithes of which the former suit was instituted. (3) "This appears to me," said Lord Ellenborough, "not to be *res inter alios acta*, 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 by legal obligation, as the former occupier of the same land; and that former owner, upon 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 were now claimed,) is deraigning the title of the rector in favour of the vicar."

Surveys, in case of privity of estate.

Although ancient books of survey and maps, when they are not in the nature of public documents, (4) have been in some cases considered as not being legitimate evidence of boundary, even where they might seem, upon principle, to be receivable on the ground that the boundary was a matter of

(1) Bishop of Meath *v.* Marquis of Winchester, 3 Bing. N. C. 183. The decision was also rested on the ground of the statement being against interest. There was no personal knowledge of the facts contained in the statement, but they were all evidenced by written documents.

(2) Maddison *v.* Nuttal, 6 Bing. 226. Receipts of incumbents have beeen received upon the same ground, though it would seem that in both cases, the declaration was admissible as being against interest.

(3) Lady Dartmouth *v.* Roberts, 16 East, 334. The suit was abandoned by the vicar, who from that time had acquiesced. See also Travis *v.* Chaloner, 3 Gwill. 1237. Ashby *v.* Power, 3 Gwill. 1239. Benson *v.* Olive, 2 Gwill. 701. Earl of Sussex *v.* Temple, 1 Lord Raym. 310.

(4) *Vide supra.*

public interest and concern, (1) yet this species of evidence is frequently available by way of admission, where there is a privity of estate between the person against whom the survey or map is used, and the person directing it to be made. Thus it was ruled by Lord Holt, that if A. be seised of the manors of B. and C. and, during his seisin of both, he causes a survey to be taken of the manor of B., and aftewards the manor of B. is conveyed to E., and afterwards there are disputes between the lords of the manors of B. and C., about their boundaries, this old survey may be given in evidence. (2) In like manner entries of receipt of rents by a deceased steward have been admitted, in a suit between two persons who both claimed under the employer of that steward. (3)

Admissions by prior holders of negociable securities.

With respect to admissions by persons in possession of chattels or negociable securities against subsequent proprietors, which may be thought analogous to admissions by privies in estate, it appears to be a rule, that where a person must recover through the title of another, he is bound by the declaration of the party through whom he claims. Thus, if a person bring an action upon a bill of exchange, the declaration of a person, who, at the time when such declaration was made, was holder of the bill, and who had not parted with it till after it was due, is evidence against the plaintiff, being made by one according to whose title his own must stand or fall. (4)

Limitation of the last rule.

But it seems that the analogy with respect to the admissions of privies in estate is not adhered to, where title to negociable instruments is derived from persons who have made admissions,

(1) *Vide supra*, case of parish map.

(2) Bridgman *v.* Jennings, 1 Lord Raym. 734. And see Davies *v.* Pierce, 2 T. R. 53. Allott *v.* Wilkinson, 4 Gwill. 1585; 2 E. & Y. 293; B. N. P. 283. That such a survey is not evidence against a stranger, by Lord Holt, *ib. Anon.* 1 Str. 95; 1 Lord Raym. 734; 5 T. R. 123; 12 Vin. Ab. 90, pl. 12. It has been said, that an old map has been allowed in evidence, where it came along with the writings, and agreed with the boundaries adjusted in an ancient purchase, Gilb. Ev. 78.

(3) Cases where the evidence would have been receivable as a declaration against interest, have sometimes been determined on the principle under consideration. Doe d. Strode *v.* Seaton, 2 Ad. & Ell. 171. As to tithe receipts, see 3 E. & Y., Tithe Cases, 1129, 1131.

(4) Benson *v.* Marshall, cited in Shaw *v.* Broom, 4 Dow. & R. 731.

but where there is not any existing identity of interest. In such cases, the right of a person holding by a good title is not to be cut down, by the acknowledgment of a former holder that he had no title. Thus, in an action by the indorsee against the maker of a promissory note payable with interest on demand, the declarations made by the payee, whilst the note was in his possession, to the effect that he gave no consideration for it to the maker, were held inadmissible for the defendant, on the ground that the plaintiff could not be identified with the payee, the bill not being overdue at the time of the indorsement. (1) The declarations were not those of a person who held the negociable security under the same circumstances as the party to the action.

In *Beauchamp* v. *Vassey*, it was held, that as the indorsee of a promissory note does not claim by the title of the indorser, but has a title of his own as indorsee, he ought not to be affected by any declarations of the indorser and payee,—the note not being taken without consideration, or after it was due,—notwithstanding the declarations were made whilst the payee and indorser were in the possession of the note. (2)

When privity of estate determined, declarations not admissible.

But as a person cannot be regarded a privy in estate with a subsequent possessor of the estate, except during the time when the estate was in his own possession, it has been held, that an answer in Chancery respecting the title to an advowson, filed by one who had been formerly seised of the advowson, but who had conveyed it away twenty years before the answer, was not

(1) Barough *v.* White, 4 B. & C. 327. See also Beauchamp *v.* Parry, 1 B. & Ad. 89. Phillips *v.* Cole, 10 Ad. & Ell. 106. Woolway *v.* Rowe, 1 Ad. & Ell. 116.

(2) 1 B. & Ad. 91. An exception is there made as to declarations contemporaneous with the making of an instrument, and the case of Kent *v.* Lowen was referred to, where letters from the payee to the maker were admitted, which stated an usurious consideration for the note. It was said, that if the declarations had been made (as in the case of Kent *v.* Lowen,) at the time of the contract, the case might be different. It is to be observed, that in Kent *v.* Lowen, the letters were the usurious contract itself, and it can make no difference whether an act consist of oral declarations or not. Some confusion is, however, introduced into the case by Lord Ellenborough stating, that evidence of an act done was admissible against persons claiming under those who did the act, —whereas the admissibility of the evidence does not appear to depend on the privity of the parties.

admissible against a person claiming the advowson through him. (1) And admissions by a mortgagor, made after he had parted with his interest by a settlement, have been held not to be admissible on behalf of a mortgagee, to shew that the money had actually been advanced on the mortgage, the mortgagee seeking to avoid the settlement as being voluntary. (2) An admission made by a person who takes a bankrupt's goods in execution, that he knew an act of bankruptcy had been committed, is not evidence against a person who takes the goods by assignment from the sheriff, where the admission is subsequent to the assignment. (3) It has been held, that the declaration by a prior owner of property whilst in possession, as to the person who was to be entitled to his property after his death, was not receivable against a subsequent owner of the same property; though we have seen that upon more than one ground, a declaration of such prior owner, to the effect that he had only a life estate, is admissible. (4)

Author of admission not called.

Admissions respecting the subject matter of a cause, by a person who at the time of making them had the same interest in such matter as one of the parties to the cause, are admissible in evidence against that party, though the person who made the admissions is alive and might be called as a witness. (5) The same rule seems to apply to such admissions of agents as are receivable. There is perhaps some reason for the distinction between the rule which prevails in such cases, and that which governs declarations against interest, inasmuch as in the latter case, the party to the suit is to be affected by the declaration of a person with whom he has no community of interest, and for whose assertions he is not responsible.

(1) Gully *v.* Bishop of Exeter, 5 Bing. 171.
(2) Doe d. Sweetland *v.* Webber, 1 Ad. & Ell. 733.
(3) Deady *v.* Harrison, 1 Stark. C. 60.
(4) Harrison and Wife *v.* Moore, Nott. Spr. Ass. 1837, by Littledale, J.
(5) Woolway *v.* Rowe, 1 Ad. & Ell. 114.

Section XI.

Exception to the General Rule as to Hearsay, in case of Confessions made by Prisoners.

General principle.

The confessions of prisoners are received in evidence on the same principle upon which admissions in civil suits are received, *viz.* the presumption that a person will not make an untrue statement against his own interest. In criminal cases, a confession carries with it a greater probability of truth than an admission in civil cases, the consequence being more serious and penal; "*habemus optimum testem, confitentem reum.*" (1) But it is to be observed, there may not unfrequently be motives of hope and fear inducing a person to make an untrue confession, which seldom operate in the case of admissions. (2) And, further, in consequence of the universal eagerness and zeal which prevail for the detection of guilt, when offences occur of an aggravated character,—in consequence also of the necessity of using testimony of suspicious witnesses for the discovery of secret crimes,—the evidence of confessions is subject, in a very remarkable degree, to the imperfections attaching generally to hearsay evidence. (3) For these reasons, the statements of

(1) Confessions have been treated as the highest and most satisfactory evidence of guilt. Grose, J., delivering the opinion of the judges in Lambe's case, 2 Leach, 554. Gilb. Ev. 137. Warickshall's case, 1 Leach, 263.

(2) Foster's Discourses, 243; 4 Bl. Comm. 357. Instances have occurred, of persons confessing themselves guilty of crimes of which they were innocent; and of innocent persons acting under the imputation of crimes, in a manner affording a strong presumption of guilt. See case of Mr. Harrison, cited 1 Leach, 264, n. A case mentioned by Lord Hale, in his Pl. Cr. See also the Confessions of Witches, 2 Howell, 1049; 4 Howell, 817; 6 Howell, 647. The Suffolk Witches tried by Lord Hale, 8 Howell, 1017.

(3) See Foster's Disc. 243, where it is observed, that words in criminal cases are often misreported through ignorance, inattention, or malice, and extremely liable to misconstruction, and that the evidence cannot be disproved by negative evidence, in the same manner as facts. Speech of Mr. Adam, in Crossfield's trial for High Treason, 26 Howell, 57, where it is observed, that the person relating the confession is generally relieved from the apprehension of punishment; and that what people have said, upon a subject shocking or otherwise exciting, is usually repeated with exaggeration. And see by Alderson, B., in Rex *v.* Simons, 6 C. & P. 540, where a prisoner's conversation with his wife was repeated differently by the witnesses.

prisoners are often excluded from being given in evidence, in cases where they would be unobjectionable as the admissions of a party to a civil suit.

Confesssions made in examinations.

Confessions of prisoners are often made in the course of their examination before magistrates. These examinations are taken in the course of a judicial proceeding, and according to prescribed forms; consequently the evidence of confessions contained in them is obviously free from many of the objections incident to various other species of hearsay evidence.

As the principles applicable to confessions in general apply to such as are contained in examinations before magistrates, it has not been thought expedient to treat of examinations apart from the general subject. A more particular account of such examinations, and the mode of proving them, will be found in the second part of the Work, which however is unavoidably anticipated in some measure in the present section. Various points also, as to the verbal proof of confessions made in the presence of magistrates, will be considered in the chapter on Secondary Evidence.

Whole confession to be produced.

As we have had occasion to observe in treating of admissions, it is necessary that the whole of what a prisoner has said, on the occasion of making a confession, should be related entire. This rule did not prevail in early times, when it was usual, in state trials, to select arbitrarily from a prisoner's examination any part that might be prejudicial to him, though the whole examination, if taken together, might have had a different effect. (1) We have seen that the rule laid down in the *Queen's* case, (2) respecting admissions and confessions, requires not

(1) See, amongst many other instances, the declaration of Garnet, in his handwriting, read upon his trial for the Gunpowder Plot. In the original confession, in the State Paper Office, there are letters in Sir E. Coke's handwriting, pointing out to the officer of the court what he was to read, and which produce quite a different effect from that of the whole declaration taken together. Jardine's Criminal Trials, vol. ii, p. 357.

(2) 2 Br. & B. 298. The ground assigned by Lord Tenterden, that it would not be just to take part of a conversation as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue, seems open to exception. *Vide supra, On Admissions.*

only that those parts of a conversation should be received which explain or qualify the language of a confession, but such also as are not connected with the confession, provided they relate to the subject-matter of the charge. And though it may, in strictness, be doubted, whether there is sufficient reason for admitting those parts of a prisoner's statement, which relate to circumstances or facts in his favour, except reference to their use for explaining or qualifying his confession, yet in practice such parts are commonly received, together with the other parts, for the consideration of the jury.

Effect of parts favourable to prisoner.

With respect to the effect of what the prisoner may have said favourable to himself in making a confession, the same rule prevails as in the case of admissions; the jury may believe one part of the prisoner's statement, and disbelieve another. Thus, where a prisoner was indicted for stealing a piece of cloth, and it was proved that he had sold it very soon after it was lost, at a place distant from the residence of the prosecutor, and the prisoner's examination was given in evidence, in which he stated that the cloth was honestly bought and paid for, Mr. Justice Parke observed, "that in consequence of the prosecutor using what the prisoner had said as part of his evidence, it became evidence for the prisoner as well as against him, but still it was like all evidence given in any case, and it was for the jury to say, wheher they believed it." (1)

It has been supposed, where a prosecutor uses a prisoner's statement, that he gives to the parts favourable to the prisoner more weight than would properly belong to a party's assertion of his own innocence, and that the facts, contained in such favourable part of the prisoner's statement, are to be considered as established until disproved. (2) It may be doubted, how-

(1) Rex *v.* Higgins, 3 C. & P. 604. The prisoner was found guilty. The statement might have been adduced by the prosecutor for the purpose of identifying the prisoner, as the person selling the cloth; see Rex *v.* Steptoe, 4 C. & P. 397. The point may not unfrequently arise, where a prisoner admits killing a man, but at the same time, states facts, which, if true, would reduce the crime to manslaughter; and, in such a case, different questions will arise, according as there is, or is not other evidence produced. See Rex *v.* Clewes, 4 C. & P. 226.

(2) In Jones's case, 2 C. & P. 629.

ever, whether these opinions are well founded, when it is considered that the original object of introducing the whole of a prisoner's statement is merely to guard against any misapprehension of the prisoner's meaning, as to the terms which he has used in his confession of guilt. It is clearly competent for the prosecutor to contradict the parts of a prisoner's statement which are favourable to him. (1)

Inference from demeanor of prisoner.

A confession may, in some cases, be collected or inferred from the conduct and demeanor of a prisoner, on hearing a statement affecting himself. (2) As such statements frequently contain much hearsay and other objectionable evidence, and as the demeanor of a person upon hearing a criminal charge against himself is liable to great misconstruction, evidence of this description ought to be regarded with much caution. It has been decided, that the deposition of a witness, or the examination of another prisoner, taken in a criminal case before a magistrate, is not admissible in evidence merely because the party affected by it was present, or might have had an opportunity of cross-examining or of commenting on the evidence. The party is prevented from interposing at his will and pleasure, and, therefore, the same inference ought not to be drawn from his silence or his demeanor, as is frequently done in the case of conversations. (3)

Effect of confession.

A prisoner's confession is sufficient ground to warrant a conviction, although there is no other proof of his having committed

It is said, that if there is not evidence in the case, independently of the prisoner's statement, which is incompatible with the parts of it favourable to the prisoner, these must be taken to be true. See *ib.* a case before Garrow, B. A similar opinion appears to have been expressed by Littledale, J., in Rex *v.* Clewes, 4 C. & P. 226.

(1) By Bosanquet J., Jones's case, 2 C. & P. 629.

(2) Such evidence is admissible, though the statement be made in the presence of the prisoner by his wife, and whether he answers or not. Rex *v.* Bartleet, 7 C. & P. 832. Rex *v.* Smithies, 5 C. & P. 332.

(3) Appleby's case, 3 St. 33. Melen *v.* Andrews, M. & M. 336. Turner's case, 1 Mo. Cr. C. 347. The case of Rex *v.* Edmunds, 6 C. & P. 164, seems of doubtful authority. There, Tindal, Ch. J., received a statement upon oath, made on the occasion of a summary conviction in the presence of a prisoner.

the offence with which he is charged. And it appears, from several cases, that his confession may, in some instances, even supply the absence of all proof as to the fact of the commission of the offence charged. (1) But a confession is obviously not conclusive evidence against a prisoner, and when it involves matter of law as well as of fact, is to be received with more than usual caution. (2)

Confession, voluntary.

It has been considered necessary in all cases, previous to receiving a confession in evidence, to inquire whether it has been voluntary. The usual questions are, whether the prisoner has been told, that it would be better for him to confess, or worse for him if he did not confess, or whether any language to that effect has been used. "The object of the rule relating to the exclusion of confessions is, to exclude all confessions which may have been procured from the prisoner, by leading him to suppose that it will be better for him to admit himself to be guilty of an offence, which he really never committed." (3)

The cases probably are rare, in which such unfounded self-accusations occur, or at least where a jury would be misled by them; and certainly the rule occasions, in a multitude of instances, the escape of the guilty. There is a general feeling, not unfounded, that the rule has been extended much too far, and been applied in some cases where there could be no reasonable ground for supposing that the inducement offered to the prisoner was sufficient to overcome the

(1) In Rex *v.* Eldridge, R. & R. Cr. Ca. 440, the court thought there was sufficient evidence to confirm the confession. In Rex *v.* Falkner, R. & R. Cr. Ca. 481, the only other evidence was, that the prisoner had sent a message to the party alleged to have been robbed, and who did not appear, to prevent his appearance. In Rex *v.* White, R. & R. Cr. Ca. 508, (and Rex *v.* Tippet, *ibid.* 509,) no person could swear that the property had been actually stolen, though there was strong confirmatory evidence that the theft was probable: the report states that most of the judges were of opinion, that without the confirmatory evidence the jury might have convicted on the prisoner's confession. In Wheeling's case, Leach, 311, n. a., it is stated to have been determined by Lord Kenyon, that a prisoner might be convicted on his own confession, though totally uncorroborated by any other evidence.

(2) *Vide supra,* Admissions of matters of law. See Philps' case, 1 Mo. Cr. C. 271, where a prisoner's statement, as to the ownership of a vessel, was negatived by the Ship-registry Act.

(3) By Littledale, J., in R. *v.* Court, 7 C. & P. 487.

strong and universal motive of self-preservation. The doctrine has also been attended with much inconvenience, in consequence of the nice distinctions, and numerous and sometimes contradictory decisions, to which it has given rise. (1)

Proper course for magistrates on taking a prisoner's statement.

The proper course of proceeding for a magistrate, when a prisoner is brought before him, and is willing to make a statement, has been stated by Lord Denman, in the following terms: "A prisoner is not to be entrapped into making any statement; but when a prisoner is willing to make a statement, it is the duty of magistrates to receive it; but magistrates, before they do so, ought entirely to get rid of any impression that may have been on the prisoner's mind, that the statement may be used for his own benefit; and the prisoner ought also to be told, that what he thinks fit to say will be taken down, and may be used against him on his trial." (2)

Statement by prisoner under charge, examined on oath.

The examination of a prisoner before a magistrate, put into writing, and taken upon oath, is not admissible against him on his trial: (3) and a prisoner's examination on oath, taken before a coroner on an inquest upon the body of the deceased, while the prisoner was in custody, has been held to be inadmissible against him on his trial for murder. (4) This rule applies to the case where the prisoner was before the magistrate under the criminal charge on which he is afterwards tried: his examination in such a case, taken on oath, is not to be received against him in support of the charge, on which he was so examined. As an *examination* it is irregular; the modern statute, which regulates the proceedings of magis-

(1) See Rex *v.* Row, R. & R. Cr. Ca. 153; Rex *v.* Thompson, Leach, 292; Rex *v.* Cass, Leach, 293, n. See also on this subject Bentham's Rationale of Judicial Evidence, Jurist, No. 7, vol. xl. Ed. Rev. p. 166, 169.

(2) R. *v.* Arnold, 8 C. & P. 621.

(3) R. *v.* Smith and Hornage, 1 Stark. C. 242. R. *v.* Rivers, 7 C. & P. 177. R. *v.* Lewis, 6 C. & P. 162. R. *v.* Pikesley, 9 C. & P. 125.

(4) R. *v.* Owen, 9 C. & P. 239, by Gurney, B., A. D. 1840. R. *v.* Whealey, (decided by Alderson, B.), 8 C. & P. 250. This last case was cited as an authority in point, in R. *v.* Owen. The prisoner Owen had been tried at the preceding assizes for a rape on the woman, who was afterwards murdered; and on that trial the same examination was offered in evidence, and received by Williams, J.; the point was reserved; the prisoners were acquitted. See 9 C. & P. 83. As to examinations of prisoners before magistrates, see vol. 2.

trates on criminal charges brought before them, (1) makes a distinction between the examination of a prisoner, and the informations of those who make the charge,—the informations (but not the examination of the prisoner) being especially required to be *on oath.* Since the statement upon oath cannot be received as a judicial proceeding, or formal examination—is it admissible as a *confession?* There are objections to it also in that form; the oath imposed on the prisoner, especially while in custody, is likely to operate as a constraint, or as a kind of compulsion; the statement, therefore, cannot be considered as completely free and voluntary.—It has been held, that a statement, in the heading of the examination, that the prisoner was sworn, is conclusive, and that proof of his not having been sworn is inadmissible. (2) But there seems to be no good reason for this decision.

Statement by prisoner, under suspicion, examined on oath.

In the case of *Rex* v. *Lewis,* (3) it appeared that the prisoner, among other persons, was summoned before a committing magistrate upon an investigation in a matter of felony, but no person was specifically charged with the offence; the prisoner was sworn and made a statement; the other persons also were examined, and made depositions; at the conclusion of the examination, the prisoner was committed for trial, on the depositions of the others. This statement was held to be not receivable against the prisoner. When she was summoned to appear, suspicion attached to her; and the case bears a strong resemblance to that of an individual examined on oath under a charge. The judge said, he did not think the examination perfectly voluntary.

In *Rex* v. *Davis,* (4) one of several persons, when before the committing magistrate, was examined on oath as a witness against

(1) 7 G. 4, c. 64, s. 2. The old statutes which formerly regulated their proceedings, were to the same effect; 1 & 2 P. & M. c. 13; 2 & 3 P. & M. c. 10.

(2) So held by the late Mr. Justice Park, in the case of R. *v.* Rivers, 7 C. & P. 177. See on this case, vol. 2, p. 80.

(3) Rex *v.* Lewis, 6 C. & P. 162, by Gurney, B. In R. *v.* Walker, an affidavit, by a prisoner, made in a suit in Doctors' Commons, was read against him; cited by Gurney, B., 6 C. & P. 162.

(4) R. *v.* Davis, 6 C. & P. 177, by Gurney, B.

the others upon a charge of felony, and, after examination, was charged as a prisoner, and committed for trial; the judge held, that what he said as a witness before the magistrate could not be used against him upon the criminal charge. It does not appear from the report, that this individual was taken as a prisoner before the magistrate; but there were circumstances sufficient to raise a suspicion of guilt, and sufficient also to show that the statement was not perfectly voluntary.

Statement by prisoner, not under charge or suspicion, on oath, as witness against another.

The principle of these decisions does not apply to a statement made by the prisoner, in an examination upon oath before a magistrate, when he was not in custody, but examined against another person on a distinct charge,—provided, of course, there has been no inducement given to confess, and no promise of favour or of a reward for information; a statement so made by one in his capacity of witness, who was perfectly free to refuse answering any questions that had a tendency to expose him to a criminal charge, seems to be clearly admissible. Thus, in the case of *Rex* v. *Haworth*, (1) where a prisoner had been examined upon oath respecting a distinct charge against another person, Parke, B., received the evidence of the examination as a confession. And it may be laid down generally, that a statement upon oath by a person not being a prisoner, and when no suspicion attached to him,—the statement not being compulsory, nor made in consequence of any promise of favour,—is admissible in evidence against him on a criminal charge. (2)

General rule.

Deposition taken on oath by mistake—but afterwards destroyed.

Where a prisoner before the committing magistrate was sworn by mistake, (being supposed to be a witness,) but his deposition was afterwards destroyed, and he was cautioned, a subsequent statement which he made was held receivable. (3)

(1) Haworth's case, Greenw. Col. 138, n. 4 Car. & P., S. C. The examination of the prisoner, used against him, was on a charge distinct from that on which he was sworn and examined by the magistrate. The statement in the report is as follows: "It appeared, that before the prisoner was charged with, or suspected of having committed, any offence, a person had been examined on a charge of forgery, and that the prisoner was then called as a witness against him, and sworn to a deposition; after which, the prisoner himself was charged with a different forgery."

(2) Rex v. Tubby, 5 C. & P. 530, referred to in Rex v. Lewis, 6 C. & P. 162. See also Rex v. Wheater, 2 Mo. Cr. C. 42; 8 C. & P. 45; S. C., where the statement was made on an examination before commissioners of bankrupt.

(3) Rex v. Webb, 4 C. & P. 564.

A confession drawn from the prisoner by a clergyman, or other person, by means of spiritual exhortation, is not on that account inadmissible. (1)

Spiritual inducements.

It seems that exhortations, simply to speak the truth, will not invalidate a confession, but that in such cases a slight inducement superadded will exclude it. (2)

Exhortation to speak the truth.

A confession by a prisoner to a constable in whose custody he is, the prisoner being drunk at the time, is not on that account inadmissible. Such evidence was received in the case of *Rex* v. *Spilsbury*. (3) As to the weight or effect of such evidence, that is a matter upon which the judge will observe.

Confession by prisoner drunk.

A promise by a constable to a prisoner, that if he would confess, he should see his wife, has been held not to render inadmissible a confession made in consequence of such promise, no hope of favour being held out as to the charge upon which the prisoner was in custody. (4)

Favour not connected with the charge.

The circumstance that some deception has been practised, in order to obtain a prisoner's confession, will not render it inadmissible in evidence: as where a person promised a prisoner, that what he had to say should go no further; (5) and took an oath to that effect. (6) Where a prisoner asked the turnkey, if he would put a letter in the post, and upon his promising that he would do so, gave him the letter; it was detained by the turnkey, and given in evidence as a confes-

Deception used in obtaining a confession.

(1) Gilham's case, 1 Mo. Cr. C. 186. Wild's case, 1 Mo. Cr. C. 455. See Rates's case, Chetw. Burn, tit. Confession. 2 Russ. 648.

(2) Rex v. Court, 7 C. & P. 486, where the magistrate said, "Be sure to tell the truth," the statement was admitted. Rex v. Shepherd, 7 C. & P. 579, where the constable said, "you had better not add a lie to the crime of theft," the statement was rejected.

(3) Rex v. Spilsbury, 7 C. & P. 187. The facts of the case, as reported, do not warrant the marginal note, which is as follows: "*Semble*, if a constable give him (the prisoner) liquor to make him drunk, in the hope of his saying something, that will not render the statement inadmissible, but it will be matter of observation for the judge in his summing up.—It is not to be inferred from the case, that a confession—so immorally, not to say criminally, extorted—would be received.

(4) Rex v. Thomas, 6 C. & P. 553. In Rex v. Green, 6 C. & P. 656, the prisoner's statement was received, after his saying, that "if his handcuffs were taken off, he would tell."

(5) Rex v. Thomas, 7 C. & P. 345.

(6) Rex v. Shaw, 6 C. & P. 373.

sion. (1) In another case, artifice was used to induce a prisoner to suppose that some of his accomplices were in custody, under which mistaken supposition he made a confession, and it was admitted in evidence. (2) In another, where a constable, in order to extract a confession, assumed the prisoner's guilt, asking her how she came to poison her uncle, a confession made in answer was admitted. (3) In these cases, there was no reason to suppose, (which is the main point to be considered,) that the inducement held out was calculated to produce an untrue confession, or lead the prisoner to suppose that it would be better for him to admit himself guilty of an offence which he had not committed.

Confession obtained by questions.

A confession, obtained without threat or promise, has been received, notwithstanding it was elicited by questions put by a police officer. (4) In like manner, the examination of a prisoner before a magistrate, consisting of answers to questions put by the magistrate, is receivable. (5)

Confession during illegal custody.

It was ruled in one case, by Holroyd, J., that the fact of the person being in unlawful custody, when he made the confession, would render it unavailing. (6) This seems question-

(1) Donington's case, 2 C. & P. 418.

(2) Burley's case, East, 7, 1818.

(3) By Littledale, J., Warwick Ass.

(4) Rex *v.* Thornton, 1 Mo. Cr. Ca. 27. The prisoner was a boy, fourteen years old, and the confession was made after he had been without food for nearly a whole day. The constable repeatedly told him that there was no doubt of his being guilty, and repeatedly asked him who was concerned with him. Rex *v.* Shaw, 6 C. & P. 373, where questions had been put by a fellow prisoner.

(5) Rex *v.* Ellis, R. & M. 432. See Rex *v.* Wilson, Holt, 597, *contra*, which, together with a case decided by Holroyd, J., were referred to. Rex *v.* Bartlett, 7 C. & P. 832.

(6) Ackroyd & Warburton's case, Lewin, Cr. C. 49. See Thornton's case, Lewin, Cr. C. 49. 1 Mo. Cr. Ca. 27, where the legality of the detention was considered doubtful, by Bayley, J.—Inducements have been held to be sufficient to exclude confessions, in the following cases: Rex *v.* Jones, R. & R. Cr. Ca. 152. Rex *v.* Parratt, 5 C. & P. 570. Rex *v.* Thompson, Leach, 292. Rex *v.* Partridge, 7 C. & P. 551. Rex *v.* Thomas, 6 C. & P. 353. Rex *v.* Walkley, 6 C. & P. 175. Rex *v.* Mills, 6 C. & P. 146. Hall's case, Leach, 559, n. Thompson's case, Leach, 292. Sexton's case, Chetw. Burn. R. *v.* Partridge, 7 C. & P. 551. R. *v.* Sheppard, 7 C. & P. 579. R. *v.* Drew, 8 C. & P. 140. R. *v.* Taylor, 8 C. & P. 733. R. *v.* Hearn, 1 Car. & Mar. 109.

In the following cases, the inducements were held not to be sufficient to exclude: Wright's case, Lewin, Cr. C. 48. Long's case, 6 C. & P. 179. R. *v.* Court, 7 C. & P. 483. R. *v.* Thomas, 7 C. & P. 345.

able. If the prisoner were to believe the apprehension unlawful, that would make him careful not to disclose anything against himself: if he should suppose it lawful, that also would make him careful not to make his situation worse, nor in any respect to prejudice himself.

Caution by magistrate.

It is not necessary, in order to render the examination of a prisoner admissible in evidence against him, that he should be cautioned by the magistrate, that he must not expect any favour from making a confession,—or that if any one has told him it will be better for him to confess, or worse for him if he does not confess, he must pay no attention to it,—and that any thing said by him against himself will be used against him at his trial. (1) The magistrate is not bound to give such cautions, and it would certainly be improper in him to dissuade a prisoner from making a voluntary confession. (2)

Inducement by persons in authority.

A promise of benefit or favour, or threat or intimation of disfavour, held out by a prosecutor, or by the prosecutor's wife or attorney, or by a constable, or some person assisting him in the apprehension or custody, or by a magistrate acting in the business, or other magistrate, or by a person having authority in the matter, will be sufficient to exclude a confession made in consequence of such inducement, either of hope or fear. The cases cited in the present section establish this principle.

Inducement by persons without authority.

But a confession made in consequence of an inducement held out by a person who has no authority, is not liable to the suspicion or presumption of being untrue. It is not likely that an inducement, held out by a person having no authority, would have the effect of prevailing on a prisoner to make an untrue confession to him; on the contrary, he would, probably, be particularly cautious as to what he stated to such person to his own disadvantage. It has been decided, therefore, that a confession made to a person who made an inducement, but who had no authority whatever in the matter, is not to be excluded on

(1) Rex *v.* Magill, Macn. 38, that the evidence is receivable, though no caution has been given.

(2) See Rex *v.* Green, 5 C. & P. 312.

account of such inducement. In *Rex* v. *Row*, (1) where some of the prisoner's neighbours, who had nothing to do with his apprehension, prosecution, or examination, had admonished the prisoner to tell the truth and consider his family, it was held, that a confession was receivable, on the ground that the advice to confess was not given or sanctioned by any person who had any concern in the business. This case was followed by other decisions to the like effect. (2) Some doubt was expressed upon this subject in the case of *Rex* v. *Spencer*; (3) a statement was there offered in evidence, which a prisoner had made to a person, who, without any authority of any kind, told him, it would be better for him to confess; Parke, B. said, he would receive the evidence if pressed, but that there was a difference of opinion among the judges, whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable.—This doubt seems now to be removed. For, in the later case of *R.* v. *Taylor*, (4) where the inducement was the same, and from a person who had no authority, the same objection was taken; two cases were cited as in point, and the case of *R.* v. *Spencer* was referred to as shewing the existing doubt among the judges; but Patteson, J., said, "It is the opinion of the judges, that a confession is receivable, unless there has been some inducement held out by some person in authority." It seems settled, therefore, for the present, that a confession is not to be excluded on account of it's having been made under an inducement held out by some person who had no authority of any kind in the matter.—The evidence offered

(1) R. & R. Cr. Ca. 153. This is a strong case; because the advice to confess was given to the prisoner while he was in the custody of a constable, and the constable made no observation upon it, nor did the prisoner answer at the time, but confessed to the constable about an hour afterwards. But see Rex *v.* Pountney, and Rex *v.* Taylor, p. 409.

(2) Rex *v.* Gibbons, 1 C. & P. 97; the confession was some time after the inducement. Rex *v.* Hardwick, cited, *ib.* 98, n. (Nott. L. Ass. 1811, MS.), where the inducement was held out by the constable's wife, some days before the commitment. Rex *v.* Tyler, 1 C. & P. 129. In Rex *v.* Richards, 5 C. & P. 318, the inducement was at an end, when the prisoner was delivered to the constable. A woman placed with a prisoner, by a constable, to prevent her escaping, is a person in authority for this purpose; Rex *v.* Enoch, 5 C. & P. 539.

(3) 7 C. & P. 776. See also Simpson's case, 1 Mo. Cr. C. 412. Rex *v.* Dunn, 4 C. & P. 543. Rex *v.* Kingston, 4 C. & P. 387. Rex *v.* Slaughter, 4 C. & P. 544, n.

(4) 8 C. & P. 733.

in *R.* v. *Taylor* was rejected for another reason, quite distinct, which will be next mentioned.

Where inducement is with apparent sanction of one in authority.

Where a person having authority is present at the time when an inducement is held out by a third person without any authority, and there is ground for supposing that he appeared to the prisoner to sanction, though tacitly, the inducement made in his presence, it seems that a confession under such circumstances ought not to be received. In the recent case of *Rex* v. *Pountney*, (1) a prisoner, being in the custody of a constable upon a charge of felony, was taken by the constable to an inn, where the innkeeper, in the hearing of the constable, held out an inducement to confess, whereupon the prisoner confessed in the constable's hearing; Mr. Baron Alderson, though he received the evidence, said, he entertained a strong opinion against it's admissibility, and that, if it had been necessary, he would have reserved the point for the opinion of the judges. In the still later case of *R.* v. *Taylor*, above mentioned, the prisoner, who was servant to the prosecutor, made his confession (while in custody) in the presence of the prosecutor's wife, who was present when the inducement was made, and expressed no dissent: and Patteson, J., said, the mistress of the prisoner who was present at the time of the inducement, must be understood, as she expressed no dissent, to have sanctioned the inducement; and the inducement must be taken, as if held out by the wife who was a person in authority over the prisoner. For this reason, only, the evidence was rejected.

Suspicion of inducement given, to be removed.

For the purpose of introducing a confession in evidence, it is unnecessary, in general, to do more than negative any promise or inducement held out by the person to whom the confession was made. (2) However, if there be any probable ground to suspect collusion in obtaining the confession, such a suspicion ought, in the first instance, to be removed. Where a constable, who had a prisoner in custody, left the room in which the prisoner was detained, and, upon another constable entering the room, the prisoner at once made a statement without any caution being given him, it was held necessary for the

(1) 7 C. & P. 303.

(2) Rex v. Clewes, 4 C. & P. 233.

prosecutor to call the first constable, for the purpose of disproving any collusion. (1)

Inducement by one in authority—*subsequent* statement by prisoner.

Where an inducement has been held out to the prisoner by a prosecutor, or by a person in authority, it seems, in general, that a confession made at a subsequent time to such persons, would not be receivable; (2) that is, unless it is clear that by full explanation and caution they afterwards put an end to all inducement, and left the prisoner to speak or not, freely and without bias, as if no inducement had ever been made.

Caution after inducement.

Although an inducement has been held out by a prosecutor, constable, or other person, yet if the magistrate, before whom he is afterwards taken, forewarns him that what he says against himself will be given in evidence against him, a confession, made to the magistrate after such caution, will be receivable. (3) In a case, tried before Mr. Justice Bayley, (4) where it appeared that the prisoner, on being taken into custody, had been told by a person who came to assist the constable, that it would be better for him to confess; but on his being examined before the committing magistrate on the following day, he was frequently cautioned by the magistrate to say nothing against himself; a confession under these circumstances before the magistrate was held to be clearly admissible.

In another case, it appeared that a constable told the prisoner, he might do himself some good by confessing; the prisoner afterwards asked the magistrate, if it would be any benefit to him to confess; on which the magistrate said, he could not say it would, and the prisoner then declined confessing; but afterwards, in his way to prison, he made a confession to another constable, and he confessed again in prison to another magistrate; the judges were unanimous in holding, that the confessions were admissible in evidence, on the ground that the

(1) Rex *v.* Swatkins, 4 C. & P. 550. It was afterwards shewn that the prisoner was not under any charge at the time, but that the first constable was detaining him as an unwilling witness; and the evidence was received.

(2) See Rex *v.* Nute, Chetw. Burn. Confession, 2 Russ. 648. Rex *v.* Sexton, *ib.* 2 East's P. C. 658. White's case, M. T. 1800.

(3) Rex *v.* Howes, 6 C. & P. 404.

(4) Rex *v.* Lingate, Derby Lent Ass. 1815.

magistrate's answer was sufficient to efface any expectation which the constable might have raised. (1)

It is not a valid objection to a confession before a magistrate, that the prosecutor, who was present, first suggested to the prisoner that he had better speak out, if it appear that the magistrate, or his clerk, immediately checked the prosecutor, desiring the prisoner not to regard him, but say what was proper. (2)

It has been held, that a caution by a magistrate was sufficient to render a confession receivable in evidence, notwithstanding there may have been some inducement before held out, to which the magistrate did not advert, and of which he may have been ignorant. (3)

If a person of superior authority, as a magistrate, holds out an inducement to confess, a confession afterwards to a person of an inferior authority, as a turnkey, seems not to be admissible. Such a confession has been held not to be receivable, where the inferior officer did not caution the prisoner. (4)

Property found in consequence of a confession.

Though a confession may have been obtained by means of undue inducements, yet if, in consequence of the information obtained from the prisoner, property stolen is discovered, it is competent to give in evidence the fact that the property has been discovered conformably with the prisoner's information. The statement, as to his knowledge of the place where the property is to be found, being confirmed by the fact of the finding, is thus proved to be true, and not to have been fabricated in consequence of any inducement. It is competent therefore to inquire, whether the prisoner stated that the property would be found by searching a particular place, and to prove that it was found

(1) Rex *v.* Rosier, Easter Term, 1821, MS. Rex *v.* Clewes, 4 C. & P. 225, where the inducement was given by a magistrate and clergyman; a caution was given by a coroner; and there was a letter from the Secretary of State refusing a promise of pardon on condition of giving evidence.

(2) Edwards's case, East. Term, 1802.

(3) Rex *v.* Howes, 6 C. & P. 404. The magistrate knew of the former confession, and did not tell the prisoner that it would have no effect, but cautioned him generally. In Sexton's case, Chetw. Burn. tit. Confessions, the confession was obtained by giving gin; the officer, to whom it was made, read it over before the magistrate, who cautioned the prisoner; and the prisoner said it was the truth, and signed the paper. See the preceding cases of Rex *v.* Lingate, and Rex *v.* Rosier.

(4) Rex *v.* Cooper, 5 C. & P, 535.

there. (1) Upon this, the jury would have to consider, whether the prisoner, who knew of the concealment of the property, had not himself concealed it, or was privy to the concealment.

In the case of *R.* v. *Gould*, (2) on a trial for burglary, the statement of the prisoner that he had himself disposed of property which had been in the house, and concealed it in a place named by him, was held to be admissible in evidence, although other parts of his statement (being considered questionable), were not brought forward. The whole of what he said respecting the concealment of the property was admitted. But the judge in such a case would direct the jury—and so, it is understood, did direct in that case—that his statement must not be taken as proof that *he concealed*, but merely as evidence that he knew of, or was privy to the concealment—from which, together with the rest of the evidence, they would consider whether it was probable that he concealed it himself.

Discovery of property, and contemporaneous expressions.

Where inducements have been held out, which would render a confession inadmissible, and the prisoner, under such inducements, has delivered property to the prosecutor, there may be a question, how far proof may be given of what the prisoner has said on the delivery, in answer to questions put to him, or to a demand made. Words used by him, confessing guilt, are not admissible as proof of his guilt: but proof of what he said, on delivering the property, would be admissible for the purpose of shewing that he delivered it as the stolen property. In *Rex* v. *Griffin*, (3) a prisoner was charged with stealing a guinea and two promissory notes: after inducements to confess, it was held that the prosecutor might prove, not only that the prisoner brought him a guinea and a note, but that he also gave them up, as the guinea and one of the notes that had been stolen from him. In *Rex* v. *Jones*, (4) when the prosecutor asked the prisoner for the money which the prisoner had taken out of his pack, and at the same time held out inducements to

(1) On this subject, see Warwickshall's case, Leach, 263. Butcher's case, *ib.* 265, n. Lockart's case, Leach, 386. Mosey's case, Leach, 265, n. Rex *v.* Harvey, 2 East's P. C. 658. Rex *v.* Grant, and Rex *v.* Hodge, 2 East's P. C. 658. It seems formerly to have been thought, that no part of the confession could be given in evidence, but only the actual discovery of the property.

(2) 9 C. & P. 364.

(3) R. & R. Cr. Ca. 151.

(4) R. & R. Cr. Ca. 152.

confess, whereupon the prisoner produced a sum of money, stating, that it was all he had left of it, it was held that this evidence ought not to have been received. The distinction between these cases is, that, in the former, the admission went only to this point,—that the property had been stolen; but in the latter there was an implied admission by the prisoner, that the property had been stolen *by himself.*

Discoveries after a confession implicating others with the prisoner.

If a prisoner's statement (obtained by threat or promise) of his having concealed property, is not admissible against him as proof of the fact that *he concealed* the property,—though the property was found so concealed; still less would it be admissible against other persons to implicate them in the guilt of the transaction. Thus, in *R.* v. *Jenkins,* (1) where a prisoner was induced by a promise from a prosecutor to confess his guilt, and after that confession he carried the officer to a particular house, as the house where he had disposed of the property, and pointed out the person to whom he had delivered it; the person denied knowing any thing about it, and the property was never found; it was held, that the evidence of what passed between the prisoner and the officer ought not have been received:—that is, it was not receivable as evidence against the third person. If the property had been found there, the prisoner's statement that he delivered it to a third person would not have been evidence against that person; but his statement would be evidence against himself, not that he concealed the property there, but that he had knowledge of the concealment,—for this would be established by the fact of the discovery.

Confessions not evidence against others.

With respect to the prisoner's liability to be affected by the confessions of others, a marked distinction exists between the branch of law now under consideration, and that which has been considered in treating of admissions. Where two persons were indicted together, one for stealing and another for receiving, in which the principal pleaded guilty, and the receiver pleaded not guilty, Baron Wood refused to allow the plea of guilty to establish the fact of the stealing by the principal as against the receiver. (2) And in a recent case, the confession

(1) Rex v. Jenkins. R. & R. Cr. Ca. 492.

(2) Cited in Turner's case, 1 Mo. Cr. Ca. 348.

of the principal felon before a magistrate was held to be inadmissible against the receiver. (1)

Confession by prisoner, naming others.

It appears to be settled by late authorities, that where a confession by a prisoner (whether oral or in writing) implicates other prisoners by name, the confession must be proved according to the manner in which it was made, and the names of the others must be repeated. The whole must be given in evidence, unmutilated and entire. On such occasions, the judge will not fail to caution the jury, that the confession ought not to affect any one but the person who made it. (2)

Statement on a former hearing, not taken down in writing.

A voluntary statement made by a prisoner, and taken down in writing on a hearing before a magistrate, when witnesses were examined, is admissible in evidence against him, although there has been a second hearing, at which the depositions were for the first time written out formally, and the prisoner's statement was not returned by the magistrate with the depositions, but, on the contrary, a memorandum was made by him that the prisoner declined to say any thing. Whether the officer was right or wrong in not returning the statement, or in not furnishing a copy of it to the prisoner, it was held to be clearly admissible, whatever might be it's effect with the jury. (3)

Statements of co-conspirators.

Upon trials for treasonable and other conspiracies, questions have arisen respecting the admissibility of statements made by co-conspirators. These have been adverted to in treating of the distinction between original and hearsay evidence. Such statements are receivable, when they accompany, or when they are in the nature of acts for which all parties concerned in the conspiracy are responsible; but they are not receivable, when they are in the nature of narratives, descriptions, or confessions. (4)

(1) Turner's case, 1 Mo. Cr. Ca. 348. The principal was alive, but the decision does not appear to have been founded on this circumstance. The point had not been previously settled. Black's case, 4 C. & P. 377.

(2) Hearne's case, 4 C. & P. 215. Clewes' case, *id.* 225. Fletcher's case, Lewin, Cr. Ca. 107. Hall's case, Lewin, Cr. Ca. 110. Foster's case, *ib.* Rex *v.* Walkley, 6 C. & P. 175.

(3) R. *v.* Wilkinson, 8 C. & P. 663, by Littledale, J., and Parke, B.

(4) Hardy's trial, 24 Howell, 452, 475, where Thelwall's letter was considered to be a narrative merely.

In former times, it was usual to admit the confessions of prisoners, even of such as had afterwards been executed, as evidence against others, and this at a period when torture was not unfrequently applied in order to obtain confessions; as, for example, upon the trials of Sir N. Throgmorton, the Earl of Essex, and Sir W. Raleigh, and upon the trials for the Gunpowder Plot. (1) One of the earliest reported instances of the change of practice occurs in the resolution of the judges in *Tong's* case. (2)

Confession in case of treason.

The statute of the 7 W. 3, c. 3, s. 2, enacts, "that no person shall be indicted, tried, or attainted, for high treason or misprision of high treason, but upon the oaths and testimony of two witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason, unless the party indicted and arraigned shall willingly, without violence, in open court confess the same." Mr. Justice Foster seems to have been of opinion, (3) that the legislature intended by this section to require two witnesses to the overt act in all cases, except where the prisoner confessed the treason upon his arraignment in open court, and that to warrant a conviction there must be proof of the overt acts upon oath, not merely proof of the confession of the overt acts. "But," he adds, (4) "perhaps it may not now be too late to controvert the authority of the opinion in 1716, in *Francia's* case, warranted as it hath been by later precedents." (5) The rule is now clearly settled. All the judges, on a conference preparatory to the trial of *Francia*, (6) held, that a confession of the overt acts, if proved by two witnesses, is proper evidence to be left to a jury. The same construction of the statute was adopted in *Greg's* case, (7) by six judges against two; in *Berwick's* case, (8) by Lord

(1) See also Abingdon's case, 2 Howell, 16. Sir M. Foster's Discourses, 234, where the practice is justly stigmatized. With regard to torture, see notes on Fortescue, *de laudibus legum Angliæ;* Jardine on the use of torture in England. Prisoners were told, that the trial *per gents de leur condition*, meant confessions of accomplices. In Sir W. Raleigh's case, Sir E. Coke says, that the *law presumes*, a man will not accuse himself for the purpose of accusing another.

(2) Kel. 18, res. 5, tem. Car. 2. 6 Howell, 227. Hevey's case, Leach, 235.

(3) See Fost. Disc. 232, 240, 243. Willis's case, *ib.* 242. S. C. 8 St. Tr. 254, 255, fol. ed. S. C. 15 Howell's St. Tr. 622. Smith's case, Fost. 240. 243.

(4) Fost. Disc. 243.

(5) See Fost. Disc. 11 n.

(6) Francia's case. 1716. Mr. J. Burnett's MS. 1 East's P. C. 133. Kelynge, 18.

(7) Greg's case, 1 East's P. C. 134.

(8) Fost. Disc.

Chief Justice Willes and Sir Thomas Abney against the opinion of Mr. Justice Foster; and by the judges in the commission, on the trial of the rebels in 1746. (1)

If the overt act of high treason, alleged in the indictment, is the assassination of the king, or any direct attempt against his life or his person, it is plain from the provision of the statute 39 & 40 Geo. 3, c. 93, (which enacts, that in such cases the prisoner shall be tried according to the same order of trial and upon the like evidence, as if he stood charged with murder,) that a confession, proved by a single witness, will be sufficient to convict the prisoner. And the overt acts themselves may be proved by a single witness. In these cases, the rule of the common law is restored.

39 & 40 G. 3, c. 93.

In all cases of high treason, when the prisoner's confession is offered in evidence as confirmatory of the testimony of the witnesses, it is clearly admissible, though proved by a single witness. (2) And with regard to all facts merely collateral, which do not conduce to the proof of the overt acts, it may be laid down as a general rule, that whatever was evidence of them at common law, is still good evidence under the statute of William. (3) A confession, therefore, of such collateral facts is still admissible in evidence, though proved by a single witness.

Proof of collateral facts.

From the above-cited cases, it appears now to be an established rule, that a full and voluntary confession by the prisoner, of the overt acts charged against him, if proved by two witnesses, is of itself sufficient evidence to warrant a conviction. And, although Mr. Justice Foster suggests, (4) that "the rule, for admitting a confession against the prisoner, ought not to extend further than to a confession made during the solemnity of an examination before a magistrate, or before some person having authority to take it, when the party may be presumed to be properly upon his guard and apprised of it's danger," no distinction of this kind is to be found in the

Principle of the rule.

(1) Fost. Disc. 11 n. (†) 1 East's P. C. 134.

(2) Willis's case, 2 St. Tr. 254, fol. ed. S. C. 15 Howell's St. Tr. 622. And see Crossfield's case, 26 Howell's St. Tr. 56, 57.

(3) Fost. Disc. 242.

(4) Fost. Disc. 243. 4 Black. Com. 356.

authorities before mentioned. On the contrary, in *Francia's* case the judges resolved, that the confession would be evidence, whether made before a magistrate, or in the course of conversation. (1) And there appears to be no solid ground for such a distinction; as confessions are admissible in trials for high treason, precisely on the same principle which made them evidence at common law.

The observations of Mr. Justice Foster, on the subject of confessions in cases of high treason, relate to the effect of this sort of evidence, rather than to it's admissibility. "Hasty confessions," he says, (2) made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured; words are often mis-reported whether through ignorance, inattention, or malice—it mattereth not to the defendant—he is equally affected in either case: they are extremely liable to misconstruction: and withal this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be and often is confronted."

CHAPTER VIII.

OF THE EXCLUSION OF SECONDARY EVIDENCE, AND OF THE RULE WHICH REQUIRES THE BEST EVIDENCE TO BE GIVEN.

THE law excludes such evidence of facts as from the nature of the thing supposes still better evidence behind in the party's possession or power. The rule has been sometimes expressed in these terms—that the *best* evidence must always be given. (3) Other writers have stated the rule to be—that the law requires the highest proof of which the nature of the thing is capable. (4) The precise import of the rule cannot be clearly comprehended without reference to it's application in various instances.

(1) See Burnett, J., MSS. cited, 1 East's P. C. 113. Kelynge, 19. Howell, 108.
(2) Fost. Disc. 243; and see 26
(3) B. N. P. 293.
(4) Bacon, Ab. Ev. 662.

Principle of the rule.

The principle of the rule under consideration is founded on the presumption, that there is something in the better evidence which is withheld, which would make against the party resorting to inferior evidence. Although, in some instances, this presumption may not be very strong, yet the general effect of the rule is to prevent fraud, and to induce parties to bring before a jury the kind of evidence which is least calculated to perplex or mislead them. (1)

Rule explained.

The present rule is satisfied by the production of the best *attainable* evidence. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence of a nature merely substitutionary shall be received, when the primary evidence is producible. By substitutionary evidence is meant such evidence as implies the existence of primary or more original information.

Examples.

If a party offer a copy of a deed or will, where he ought to produce the original, this raises a presumption that there is something in the original deed or will which would make against the party; and therefore the copy, in such a case, is not evidence.

Copy of written instrument.

But if he prove the original deed or will to be in the hands of the adverse party, who refuses to produce it after receiving a regular notice for that purpose—or if he prove that the original has been lost or destroyed without his default,—no such presumption can reasonably be made, and a copy will be admitted, because such a copy is the best evidence that can be adduced. (2)

All possible proof not requisite.

Where there is no substitution of evidence, but only a selection of weaker for stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed: the rule of law does not require the strongest possible assurance of a fact. If a deed, for example, is attested by several subscribing witnesses, the execution may be proved by one of them: or, if none of those witnesses can be produced, proof of

Proof of execution of deed by one of several witnesses.

(1) See Gilb. Ev. 13. B. N. P. 223. See what is said by Lord Tenterden, in M. & M. 258, as to the imperfection of parol testimony concerning written instruments.

(2) Gilb. Ev. 13. Bull. N. P. 293. Garnons *v.* Swift, 1 Taunt. 507. Henry *v.* Leigh, 3 Camp. 499.

the signature of one witness will be sufficient; for the proof is, as far as it goes, complete, and not inferior in it's kind to any that can be produced: nor can it be inferred merely from the absence of further proof of the same kind, that such additional proof would be inconsistent with that already produced. So, to prove the plaintiff's demand satisfied, the defendant may give evidence of an admission by the plaintiff to that effect, though it should appear that the plaintiff also signed a receipt, and it may be said the receipt would be more satisfactory proof. (1) And, where an agent for the plaintiff made a verbal agreement with the defendant, and afterwards put it down in writing, (which was not signed by the parties,) as a memorandum to assist his recollection, such writing is not the best evidence, nor indeed any evidence of the agreement, though it may be used by the agent for the purpose of refreshing his memory.

Admission of payment.

Written memorandum.

Upon the same principle, for proving the execution of a will, attested by three subscribing witnesses, it will be sufficient to prove it by one of them. (2) And for the purpose of proving handwriting, it is not necessary to call the supposed writer himself. (3) So, where a notice had been given to produce a letter, written by a plaintiff to a defendant, it was held that it's contents might be proved by any person acquainted with them although it was in the plaintiff's power to produce the clerk who wrote the letter. (4)

Further illustration of the rule.

In prosecutions, where it is necessary to prove, that the act, with which the prisoner is charged, was done without the consent or against the will of some other person, (as, upon indictments for unlawfully killing deer, or taking fish,) it is not,

Proof of negative, when not necessary.

(1) Jacob *v.* Lindsay, 1 East, 460. Smith *v.* Young, 1 Campb. 439.

(2) B. N. P. 264. Even the examination of a deceased subscribing witness may supersede the necessity of calling a survivor. Wright *v.* Tatham, 1 A. & E. 3.

(3) On a bank prosecution, it was not thought necessary to *disprove* the cashier's handwriting, by calling the cashier. Hughes's case, 2 East's P. C. 1002. M. Guire's case, *ib.*, case of bank prosecutions, R. & R. 378. In an early case it was thought necessary to disprove handwriting, by calling the party whose receipt had been altered. Smith's case, 2 East's P. C. 1000.

(4) Liebman *v.* Pooley, 1 Stark. C. 167. On an indictment for perjury, it is not necessary to call the clerk who wrote the jurat. Rex *v.* Benson, 2 Camp. 508. See 2 Burr. 1189.

in general, indispensably necessary to call that person as a witness on the part of the prosecution, in order to prove the negative, namely, that he did not give his consent. (1)

Williams v. *E. I. Co.*

Some misapprehension as to the nature and extent of the rule has been occasioned by the case of *Williams* v. *The East India Company*, (2) where the question was, whether the defendants had put on board the plaintiff's ship some articles of a combustible and dangerous kind, without giving due notice of their nature to the master of the ship, or to any other person employed in its navigation. It appeared in evidence at the trial, that the goods were delivered by the officer of the defendants, with a written order to the plaintiff to receive them, in which order nothing was said as to their nature; that they were received by the chief mate of the plaintiff's ship, who had since died; and that no other person was present at the time of the delivery. It was further proved by the captain of the ship and the second mate, that no communication had been made to either of them, nor, as far as they knew, to any other person on board. Upon this evidence, the plaintiff, who had to prove the negative, was nonsuited, on the ground that he had not given the best evidence of the want of notice, which it was in his power to produce, by calling the company's officer, who delivered the articles on board. And the nonsuit was afterwards affirmed by the Court of King's Bench. "The best evidence," said Lord Ellenborough, in delivering the opinion of the court, "should have been given, of which the nature of the case was capable. The best evidence was to have been had, by calling, in the first instance, upon the persons immediately and officially employed in the delivering and in the receiving of the goods on board, who appear in this case to have been the first mate on the one side, and the military conductor, the defendant's officer, on the other: and though one of these persons, the mate was dead, that did not warrant the plaintiff in resorting to an inferior and secondary species of testimony, (namely the presumption and inference arising from a non-communication to the other persons on board,) as long

Best proof of negative.

(1) Allen's case, 1 Mo. Cr. Ca 154. Hary's case, 2 C. & P. 458. At one time it appears to have been thought necessary to call the owner as a witness. Rogers's case, 2 Camp. 654.

(2) 3 East, 193, 201.

as the military conductor, the other living witness, immediately and primarily concerned in the transaction of shipping the goods on board, could be resorted to; and no impossibility of resorting to this evidence, the proper and primary evidence on the subject, is suggested to exist in this case." It is to be observed, that the evidence in this case which was received, was not secondary in its nature, inasmuch as it would have been admissible, notwithstanding what was said to have been the primary evidence had been produced; and it is difficult to consider upon what principle it could have been substituted for such primary evidence, in case of its failure in consequence of the death of witnesses. The case, therefore, appears to be one in which there was a failure of the proper measure of proof, and not a substitution of secondary for primary evidence. (1)

The rule relates to the *quality* of evidence, not *quantity*.

That the rule in question relates only to the quality, and not to the quantity or strength of the evidence, is further illustrated by the cases, in which it has been held, that the entries or hearsay statements of deceased persons are receivable in evidence notwithstanding the same facts might be proved by living witnesses. Though all information must be traced to its source, if possible, yet if there are several distinct sources of information as to the same fact, it is not, in general, necessary to shew that they have all been exhausted, before secondary evidence can be resorted to. Thus an entry made by a deceased collector is proof of the fact of the money having been paid, without calling the persons who paid it to him. (2)

Parol evidence of writing, when not admissible.

One of the most ordinary occasions, to which the present rule is applicable, relates to the substitution of oral for written evidence. The qualifications, under which oral evidence may sometimes be received, notwithstanding the existence of written evidence, will be more particularly considered in the second

(1) On the subject of what is the proper measure of proof in cases similar to that in the text, see Coster *v.* Reed, 6 B. & C. 21. The strength of proof required will depend materially on the facility afforded to the opposite party for explanation or contradiction. By Lord Tenterden, in Rex *v.* Burdett, 4 B. & A. 162.

(2) Middleton *v.* Melton, 10 B. & C. 328. By Park, J., *ib.* referring to Barry *v.* Bebbington. The rule as to the proof of instruments by subscribing witnesses, some of whom are dead, is otherwise, in consequence of the intervention of another principle. See Wright *v.* Tatham, 1 A. & E. 3.

part of this work; in the present place, it is only material to inquire, in what cases it is not allowable to substitute entirely the one for the other.

Where the writing is the subject of dispute.

First, then, oral evidence cannot be substituted for any instrument in writing, (which is not merely the memorandum of some other fact,) the existence of which instrument is disputed, and its production material to the issue between parties, or to the credit of the witnesses. One advantage, derived from the application of this rule is, that the court acquires a knowledge of the whole contents of the instrument, which may have an effect very different from a statement of a part. "I have always," says Lord Tenterden, "acted most strictly on the rule, that what is in writing shall only be proved by the writing itself; my experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments; they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule."(1)

Rule as to cross-examining the contents of letters.

It was decided in the Queen's case, (2) that it is not allowable, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness, whether he wrote a letter to any person with such contents, or to the like effect; because the counsel might thus put the court in possession of a part only of the contents of a written paper. And even if the witness acknowledges the letter to be in his handwriting, he cannot be questioned as to its contents, but the whole letter must be read in evidence. So,

Proof of allotments by minutes of commissioners.

where the inquiry was as to the existence of allotments made by inclosure commissioners in another mode than in the execution of their award, it was considered that, if such allotments were made, they must be in writing, and therefore the minutes of the commissioners were the primary evidence of them, and no other evidence of such allotments could be given, until a search had been made after the minutes. (3)

(1) Vincent *v.* Cole, M. & M. 258.

(2) 2 Br. & B. 286. Crowley *v.* Page, 7 C. & P. 790.

(3) Bendyshe *v.* Pearse, 1 Br. & B. 464.

Rule as to substituting *oral* evidence.

Oral evidence cannot be substituted for any written conveyance or contract. (1) The written instrument in such cases may in some measure be regarded as the ultimate fact to be proved, especially where the question relates to the proof of deeds and negociable securities; and the principal object of committing contracts of every kind to writing is for preserving a memorial of them, more lasting and more authentic than oral testimony. Accordingly, a plaintiff is not permitted to recover in an action for use and occupation, or in ejectment, where there is a written contract of tenancy, without producing it. (2) If it comes out upon cross-examination of the plaintiff's witnesses, that there is a written agreement, he must produce it; but if he makes out a *primâ facie* case, without shewing that there was any written contract, the other party, if he relies on that written contract, will have to produce it; (3) otherwise the plaintiff might, on a mere assertion of the defendant, be non-suited for the non-production of a written instrument, which, if it had been produced, might turn out not to apply to the contract in question.

Where there is a lease, &c.

Where fact of tenancy to be proved.

Where the single fact of the occupation of land is in issue, such fact may be proved by payment of rent, declarations of the tenant, or other parol evidence sufficient to establish it, notwithstanding it appears that the holding is under an agreement in writing; (4) but where the question is not merely as to the occupation of land, but as to the person under whom it is held, if there be a written agreement shewing that fact, it must be produced. (5)

(1) B. N. P. 246.

(2) Brewer *v.* Palmer, 3 Esp. 213. Fenn d. Thomas *v.* Griffith, 6 Bing. 533. Rex *v.* Inhabitants of Castle Morton, 3 B. & A. 588, where the contract was lost, but was not stamped. Rex *v.* Inhabitants of Rawden, 8 B. & C. 708. Dover *v.* Mestaer, 5 Esp. 92. It is not sufficient to nonsuit the plaintiff by the evidence of his witness, that there is an agreement, in writing, *relative* to the land. Doe d. Wood *v.* Morris, 12 East, 237. Shearwood *v.* Pearson, 12 East, 239. By Park, J., 5 Bing. 150.

(3) Rex *v.* Padstow, 4 B. & Ad. 210. Fenn d. Thomas *v.* Griffith, 6 Bing. 533. Fielder *v.* Ray, 6 Bing. 332, where plaintiff proved a contract by parol, and it was held that he could not be nonsuited by the defendant producing an unstamped written agreement. By Littledale, J., Reed *v.* Deene, 7 B. & C. 266. Stephens *v.* Pinney, 8 Taunt. 327, where the defendant had neglected to give the plaintiff notice to produce. By Bayley, J., Rex *v.* Rawden, 8 B. & C. 708.

(4) Rex *v.* Holy Trinity, Hull, 7 B. & C. 611. Strother *v.* Barr, 5 Bing. 136, commented on in Doe *v.* Harvey, 8 Bing. 241.

(5) Doe *v.* Harvey, 8 Bing. 241. In Strother *v.* Barr, 5 Bing. 136,

Same rule as to other contracts.

The same doctrine applies to every species of written contracts, as well as to contracts between landlord and tenant. (1) In an action for work and labour, when it is shewn that the work was commenced under a written agreement, the agreement ought to be produced, and the plaintiff cannot recover without it for extra work; for the written contract might be of importance even with respect to the extra work, as furnishing some evidence between the parties as to the rate at which the work should be paid for. On the question whether a judge, in such a case, may examine an unstamped agreement, in order to see whether it referred to items claimed independently of it, Lord Tenterden has observed, such a practice would be attended with much inconvenience. (2)

Reference to unstamped document.

Collateral writing need not be produced.

Where a written communication or agreement between parties is collateral to the question in issue, it need not be produced; as where the writing is a mere proposal, which has not been acted upon; (3) or where, during an employment under a written contract, a separate order is given by parol; (4) or where the action is not in the form of assumpsit upon the agreement, but in tort for the conversion of it. (5)

Rule as to substituting *written* evidence.

The instances which occur on the subject of this rule, most commonly relate to the reception of oral testimony; but the prin-

the Court of Common Pleas were divided upon the question, whether, in an action for injury to the reversion, it is competent to prove the occupier's holding by parol, when he holds under a written agreement. See Cotterill *v.* Hotby, 4 B. & C. 465.

(1) Policies of insurance, Rex *v.* Gilson, R. & R. 138. Rex *v.* Dovan, 1 Esp. 127.

(2) Vincent *v.* Cole, M. & M. 258. Rex *v.* Pendleton, 15 East, 449.

(3) Doe d. Bingham *v.* Cartwright, 3 B. & A. 326. Dalisen *v.* Stark, 4 Esp. 163. Stevens *v.* Pinney, 8 Taunt. 328. Hawkins *v.* Warr, 3 B. & C. 698. Wilson *v.* Bowie, 1 C. & P. 8. Ramsbottom *v.* Tunbridge, 2 M. & S. 434, signed paper delivered by auctioneer. Edgar *v.* Blake, 1 Stark. C. 464, a prospectus. Ingram *v.* Lea, 2 Camp. 521, order for goods.

(4) Reed *v.* Battie, M. & M. 413.

(5) See Bucher *v.* Jarret, 3 B. & P. 143. Jolly *v.* Taylor, 1 Camp. 143. Davis *v.* Reynolds, 1 Stark. C. 115. How *v.* Hall, 14 East, 274. Doe d. Wood *v.* Morris, 12 East, 237. Shearwood *v.* Pearson, *ib.* By Park, J., 5 Bing. 150. Dover *v.* Mastaer, 5 Esp. 92. So where the foundation of the action is a written security, but the immediate demand is for monies received. Bayne *v.* Stone, 4 Esp. 13. See Ingram *v.* Lea, 2 Camp. 521. In trover for a written document, the plaintiff may prove the description of the document by secondary evidence, though the defendant offers to produce it. Whitehead *v.* Scott, 1 M. & Ro. 2.

ciple of the rule applies equally to the substitution of secondary written testimony. Thus, on the trial of a person charged with having wilfully, with intent to injure an insurance company, set fire to a house, which he had insured at the company's office, it was held not allowable to prove the insurance by the books of the company, without previous regular notice to the prisoner to produce the policy. (1)

So, if it should be material for a plaintiff, in reply to the case of the defendant, to prove the contents of a registered deed, which is in the defendant's possession, the memorial of the deed would not be admissible for that purpose, unless there had been previously a notice given to the defendant to produce the original; (2) and numerous other examples occur to the like effect. The rule has reference to the substitution of evidence, whether it be of the same or of inferior degree.

Matter of record.

Where the law requires an entry to be made in a Court of Justice, of particular transactions, the official entry excludes all independent evidence of the transaction. Thus, parol evidence was held not admissible to prove the taking of oaths required by the Toleration Act, as the fact would be recorded in the court where the oaths were taken. (3) In like manner, parol evidence is not admissible of the day on which a cause came on to be tried, as it is capable of proof by matter of record. (4) Upon a question whether the Abbey de Sentibus was an inferior abbey or not, Dugdale's *Monasticon* was refused, because the original record was to be found in the Augmentation Office. (5)

Discharge of insolvent.

The discharge of a defendant, by a Court of Quarter Sessions, under an Insolvent Debtors' Act, cannot be proved by parol

(1) Rex *v.* Doran, 1 Esp. 127. Rex *v.* Gilson, R. & R. 138.

(2) Molton q. t. *v.* Harris, 2 Esp. 548, and see Underhill *v.* Witts, 3 Esp. 56.

(3) Rex *v.* Hube, Peake, 132.

(4) Thomas *v.* Ansley, 6 Esp. 80. Rex *v.* Page, *ib.* 83; and see Phillips's case, R. & R. 369.

(5) Salk. 281.

evidence, nor by proof of an acknowledgment of the discharge by the plaintiff himself; for the discharge may have been irregular and void, or may have been mistaken by the plaintiff; a judicial act of this kind should be proved by calling the clerk of the peace, and giving in evidence the judgment or adjudication of the court for the debtor's discharge. (1)

Examinations of prisoners.

The rule under consideration may be further illustrated by cases relating to examinations of prisoners under charges of felony or misdemeanor, in which cases the magistrate is expressly enjoined to take the examination in writing. Parol evidence cannot be received of a prisoner's confession before the committing magistrate, unless it be first proved that the confession was not taken in writing; as it must be presumed until the contrary is shewn, that it was so taken, in conformity with the statute 7 Geo. 4. c. 64. But if it were clearly shewn that the prisoner's statement was not taken in writing, parol proof of what he said will be admissible. (2) If the written examination of a prisoner is given in evidence against him, it will not be competent to the prosecutor, it is conceived, to give evidence of other statements made by him during his examination, and relating to the same matter on which he was examined, but which statement has been omitted by the committing magistrate. (3)

A written examination of a prisoner is not admissible, if taken on oath; (4) nor can secondary evidence be admitted; the objection in each case, is, that as the prisoner was subjected to an oath, the statement may be presumed not to have been voluntary. A written examination will not exclude

(1) Scott *v.* Clare, 3 Camp. 236.

(2) Decided by all the judges except one, in R. *v.* Hall, cited in R. *v.* Lambe, Leach, Cr. C. 635. R. *v.* Jacobs, Leach, 349, and other cases there cited, and see Hawk. C. 46, s. 43. Such evidence was received also in Huet's case, 2 Leach, 956; and it has been the practice ever since to receive it.

(3) See on this subject, "*Examinations before magistrates,*" in vol. 2.

(4) See *Confessions, supra* p. 426. In R. *v.* Rivers, 7 C. & P. 177, the prisoner's examination purported to have been taken on oath; and the magistrate's signa-

proof of a former confession, made previously or subsequently to the prosecutor or any other person. (1)

Rule in case of informal examination.

Where the confession of a prisoner before a magistrate has been taken down in writing, but the written examination is informal,—in not being signed, or from being signed before the evidence was concluded, or from some other informality, so that it cannot be received,—there is no longer any ground for excluding parol evidence: for the parol evidence is in such cases adduced, not in substitution of the official document, but according to its effect at common law; the prisoner's statement may, therefore, be proved by a witness who heard it made. (2) And the informal examination may, like any other contemporaneous document not of an official character, be used, if necessary, to refresh his memory in giving the evidence. (3) This subject will be more particularly considered in the second part of the Work, which treats of examinations.

Proof of marriage.

Although a parish register is required by law to be made of

ture was held to be conclusive of the oath having been taken; as to this case see vol. 2, on the subject of *Examinations*.—In Rex *v.* Walter, 7 C. & P. 267, the magistrate returned that the prisoner said, "I decline to say any thing;" after which the judge refused to receive evidence of a confession made before the magistrate. But this decision seems questionable. See vol. 2, on *Examinations*.

(1) Rex *v.* M'Carthy, Macn. 45. See vol. 2, *Examinations*.

(2) See vol. 2, on *Examinations*.—Cases of examinations not signed, Rex *v.* Telicote, 2 Stark. 483. Foster's case, Lewin, 46. Hirst's case, *ib.* Rex *v.* Pressly, 6 C. & P. 183.—Not signed, but acknowledged to be true, Lambe's case, 2 Leach, 625.—Not read over, and signed with a mark,—or not signed, and not proved to have been read over by the magistrate, or by his clerk; Rex *v.* Chappel, M. & Ro. 395. Rex *v.* Richards, and Rex *v.* Hope, *ib.* 396, n., 7 C. & P. 136. Rex *v.* Taylor, *ib.* 138, n. Rex *v.* Foster, 7 C. & P. 148. Rex *v.* Reading, 7 C. & P. 649. 2 Hale, ch. 38, ch. 7, p. 52.—Informal heading, Rex *v.* Bently, 6 C. & P. 148. Rex *v.* Tarrant, 6 C. & P. 182.

(3) Layer's case, 16 Howell, 214. Rex *v.* Tarrant, 6 C. & P. 182. Rex *v.* Pressly, 6 C. & P. 183. Hirst's case, Lewin, 46. Jones's case, Carr. 13. Dewherst's case, Lewin, 47. Rex *v.* Bell, 5 C. & P. 163, where Rex *v.* Fagg, 4 C. & P. 566, was overruled. A case before Lord Lyndhurst, cited 5 C. & P. 164, n. Rex *v.* Reason and Tranter, 1 Str. 499. Rex *v.* Watkins, 4 C. & P. 550, n. Rex *v.* Reed, 1 M. & M. 403. See Rex *v.* Lewis, 6 C. & P. 163. A confession written by a constable, and signed with the prisoner's mark, allowed to be read by the officer of the court; 4 C. & P. 548, In Lambe's case, 2 Leach, 625, the examination, which had been read over to the prisoner, and acknowledged by him to be true, but not signed by him, seems to have been received in evidence not as an official document, but as a paper expressly *admitted* by him. See vol. 2, on *Examinations*.

all marriages, the fact of a marriage may be proved by the testimony of the persons who were present at it, or by general reputation. (1)

Rule as to admission of hearsay.

The substitution of the hearsay of a person in the place of his testimony, falls obviously within the principle of the rule under consideration. It has been before mentioned, that where hearsay evidence is admissible, it will be necessary, in compliance with the rule which excludes secondary evidence, to shew that the person, whose hearsay is offered, is deceased. So depositions are not receivable, whilst the parties who made them are alive, or capable of being produced as witnesses.

Secondary written evidence for refreshing memory.

The rule applies not only to the evidence produced in a cause, but also to such writings as a witness may use to refresh his memory: and, therefore, where a contemporaneous entry has been made, it seems that a copy of the entry, made at a subsequent period, is not admissible for the purpose of refreshing a witness's memory. (2)

Rule as to duplicate originals.

It is an established rule, that where there are duplicate originals, all the originals must be accounted for, before secondary evidence can be given of any one of them. (3)

Writings not excluding oral evidence.

Where a writing is not the fact itself to be proved, and not made an appropriate instrument of evidence by private compact, nor required by law, there is no reason why it should exclude oral or other evidence. It often happens that an oral communication is accompanied by one in writing to the same effect, yet the oral communication may be received, provided it

(1) Evans *v.* Morgan, 2 Cr. & J. 453. B. N. P. 247. Allison's case, R. & R. 109. Birt *v.* Barlow, Doug. 172. St. Devereux, *v.* Much Dew Church, 1 Bl. 367. Read *v.* Passer, Peake, 305.—Nor is the evidence of the attesting witness required to prove the handwriting of the parties in the register, Doug. 174.—An entry of a marriage in a day-book is not admissible in evidence, if the entry has been afterwards made in the register. May *v.* May, Str. 1073, and see Doe d. Warren *v.* Bray, 8 B. & C. 813.

(2) By Patteson, J., in Burton *v.* Plummer, 2 A. & E. 344. Jones *v.* Stroud, 2 C. & P. 196. Doe *v.* Perkins, 3 T. R. 749.

(3) By Parke, B., in Alivon *v.* Furnival, 1 Cr., M. & R. 292.

be adduced, not to prove the contents of the writing and in substitution of it, but as independent evidence. Thus, the payment of money may be proved by oral evidence, though a receipt be taken. (1) Where there is both a verbal and written notice to deliver up property, it is not necessary that the written notice should be produced. (2)

Where a written statement cannot be received on the ground of it's being in the nature of hearsay evidence, or for want of a stamp, there is still less reason for prohibiting the substance of it from being proved by independent testimony. Thus it has been shewn, an informal examination taken before a magistrate will not exclude oral evidence of what a prisoner has stated. For although the witness is allowed to refresh his memory by reading the examination, he is supposed, in notion of law at least, to speak from his memory independently of the written paper. Where a witness read over to the defendant an account in writing, which was signed by the defendant, but which could not be used in evidence for want of a receipt stamp, the witness was allowed to refresh his memory by the inspection of the account, and to prove that he called over the items to the defendant, and that the defendant admitted them to be correct. (3) In the same manner, what a party says admitting a debt is evidence, notwithstanding the promise to pay is reduced into writing. (4)

Proof of resolutions at a meeting.

In the prosecution of *Hunt* for a conspiracy, (5) the court of King's Bench determined, that a paper, which had been delivered by the defendant to a person present at a meeting, as

(1) Rambert *v.* Cohen, 4 Esp. 213.

(2) Smith *v.* Young, 1 Camp. 439. It has been held, that a witness, on cross-examination, may admit not having mentioned a fact in an examination before commissioners of bankrupt, but that he might ask for the written examination if he chose. Ridley *v.* Gyde, 1 M. & Ro. 197. As to dying declarations taken down in writing, R. *v.* Gray, 7 C. & P. 231.

(3) Jacob *v.* Lendsay, 1 East, 461; and see Dalison *v.* Stark, 4 Esp. 163. In Maugham *v.* Hubbard, 8 B. & C. 14, a witness called to prove the payment of money, was allowed to refresh his memory by an unstamped receipt signed by himself.

(4) Singleton *v.* Barrett, 2 C. & J. 369.

(5) Rex *v.* Hunt, 3 Barn. & Ald. 568, 572. See also Watson's case, 32 Howell's St. Tr. 68, 83, 256, 257.

a copy of certain resolutions about to be proposed and read, and which was proved to correspond with the resolutions afterwards proposed, was properly received at the trial as evidence of those resolutions; without proof of any previous notice to the defendant to produce the paper from which the resolutions were supposed to be read. This paper was considered, as against the party himself to whom it applied, to be fully as good evidence as any that could be produced. In the same case, (1) the Court of King's Bench held, that inscriptions on flags and banners, which had been exhibited to public view, might be proved by eye witnesses, speaking to what they had seen on the occasion; and though it appeared that the flags had been seized and taken away by police officers, (so that they might have been produced,) the evidence was not considered on this account to be less competent; such inscriptions are, as the Lord Chief Justice observed, the public expressions of the sentiments of those who bear them, and have rather the character of speeches than of writings. It may be observed, that the oral testimony was in this case adduced for the express purpose of representing accurately the contents of the writing, and therefore might seem to fall directly within the principle which excludes secondary evidence.

Proof of inscriptions on flags, &c.

Resolutions *read*, proved by parol.

Whether resolutions, which have been proposed at public meetings, may be primarily proved by the parol evidence of witnesses, when the person proposing the resolutions appeared to read them from a written paper, was a point much discussed in the prosecution of Dr. Sheridan and Kirwan, in Ireland, (2) who were tried for an offence against the Irish Convention Act. The indictment began with averring that divers persons had assembled together, and intending to procure the appointment of a committee of persons, (of a particular description, and for a specific object,) entered into certain resolutions respecting such committee, the purport and effect of which resolutions were set out at length; the indictment then proceeded

(1) Rex *v.* Hunt, 3 Barn. & Ald. 574.

(2) 1811. 31 Howell's St. Tr. 672, and see Rex *v.* Moors, 6 East, 420, n. In the case of printed documents, all the impressions are originals, and are evidence against a person who adopts the printing by taking away copies, Watson's case, 2 Stark. Ca. 130.

to charge Dr. Sheridan with certain acts done by him for the purpose of assisting in forming such committee, and for carrying into effect the resolutions before-mentioned. To prove the first averment, the counsel for the prosecution called a witness, who stated, that at a general meeting (at which it was admitted the defendants were not present,) the secretary of the meeting proposed a resolution, and read it from a paper. The proposition was seconded; the secretary then handed the paper to the chairman, and the chairman read it. The witness was then asked, "What was the resolution?" This question was objected to, on the ground, that the absence of the writing itself should be accounted for, before any parol evidence of its contents could be received. After a very full argument, a majority of the court were of opinion, that this was not a case to which the distinction between primary and secondary evidence was strictly applicable. That the proposed evidence was intended to shew, not what the paper contained, but what one person proposed and what the meeting adopted; in short, to prove the transactions and the general conduct of the assembly; and that such evidence could not be rejected, because some person present took notes of what passed. The form in which the argument was presented by the Solicitor General, was more striking:—"A number of persons," he said, "assemble and confer together—they agree to a certain resolution. If it be necessary to prove such a transaction in a criminal trial, would the prosecutor be bound to produce the resolution in writing? Would the prosecutor be bound by the manner in which it was taken down by one of the confederates? If the paper, supposed to contain the resolution, were produced, would that preclude the prosecutor from giving evidence of other matters which took place? Or suppose, further, that the matter were reduced to writing in such a way as to avoid a criminal imputation, although every sentence of the debate or conversation were criminal, would the prosecutor be bound by the former, and precluded from giving evidence of the latter?"

Cases may here be mentioned, which appear at first sight to be exceptions to the general rule now under consideration.

But in none of these cases, it may be observed, could there be any ground for presuming, that the party offering the proof withheld some better evidence, which, if produced, would make against him. The reason, therefore, upon which the rule is founded, does not apply to such cases.

Proof of records.

Public books.

1. Where it is necessary to prove the contents of any record, or of proceedings of a Court of Justice, or of entries in Court Rolls, or in public books or registers, it is sufficient to produce an examined copy. (1) This is on a principle of general convenience, and because it is apparent, that if the contents were misrepresented, there would be obvious means of exposing the fraud or error. (2)

Proof of appointment to office.

2. It is not, in general, necessary to prove the written appointments of public officers; for this would be attended with general inconvenience, and a strong presumption arises from the exercise of a public office, that the appointment to it is valid. (3) The cases upon this subject sometimes appear to be governed by the doctrine of admissions, but it will be seen, by the examples, that the exception is of a more extensive nature. In

Acting as justice, &c.

the case of all peace-officers, justices of the peace, constables, &c. it is sufficient to prove, that they acted in these characters,

Revenue officer.

without producing their appointments. (4) And in the case of officers of any branch of the revenue, where the question is whether they are such, proof of being reputed to be so, or of

(1) *Vide infra*, part 2. This doctrine would seem not to apply to the case of every official memorandum, and perhaps not to every species of public record; but it appears to embrace the proceedings of all courts, whether superior or inferior, and whether of record or not. It will be seen that the like documents may sometimes be proved by office copy, or copy by authorized officer.

(2) *Vide*, part 2, proof of judicial and other public documents.

(3) The rule has been held, in equity, not to apply to a tithe-collector, as acting under a private authority. Short *v.* Lee, 2 Jac. & W. 468. Nor to assignees of a bankrupt, Pasmore *v.* Bromsfield, 1 Stark. Ca. 296. As to the agency of a person signing notes for the bank, Rex *v.* Bigg, 3 P. Wms. 427. In Rex *v.* Jones, 2 Camp. 131, a letter purporting to come from the Lords of the Treasury was read, the only evidence of their acting being the letter in question.

(4) By Buller, J., in Berryman *v.* Wise, 4 T. R. 366. By the opinion of all the judges in the case of the Gordons, tried for murder in 1789, Leach's Cr. C. 585. Rex *v.* Shelley, 381, n.

having exercised the office, is good evidence of the fact, on any indictment, information, action, or prosecution. (1) On an indictment for perjury, committed by the defendant before a surrogate in an Ecclesiastical Court, proof that the person, who administered the oath, acted as surrogate, has been held to be sufficient *primâ facie* evidence of his appointment and authority. (2) On a like indictment, an affidavit, purporting to be sworn before a public commissioner, was held admissible, without proof of the commission, on the ground that a commissioner for taking affidavits was a person acting as a public officer. (3) And proof of a person's acting as under-sheriff is sufficient proof of his authority to do any act necessary in the course of the office; as, for instance, to make an assignment of a lease, under an execution, in the name of the sheriff. (4) The like proof was held sufficient on the part of a plaintiff of his being vestry-clerk; and the rule was said to extend to all public officers. (5)

Surrogate.

Under-sheriff.

Vestry-clerk.

3. Inquiry has been allowed in some cases, as to a general mode of dealing, or as to the general result of an examination of accounts, and other such matters, where the evidence is the result of voluminous facts, or of the inspection of many books or papers, the examination of which could not conveniently take place in court. Thus a witness may be asked as to a practice of accepting bills drawn in a particular manner, without producing the bills. (6) In this case Lord Ellenborough observed, that parol evidence might be received of one unvaried mode of dealing between parties by means of bills of exchange; but that if the mode of dealing varied, the bills must be produced. So a witness may give evidence of a general

Inquiry as to general mode of dealing, &c.

(1) St. 26 Geo. III. c. 77, s. 13, st. 26 Geo. III. c. 82, s. 6; and see st. 11 Geo. I. c. 30, s. 32.

(2) Rex *v.* Verelst, 3 Camp. 432. Rex *v.* Creswell, Lond. Sitt. after Mich. 1816, S. P.

(3) Rex *v.* Howard, 1 M. & Ro. 187.

(4) Doe dem. James *v.* Brawn, 5 Barn. & Ald. 243.

(5) M'Gahey *v.* Alston, 2 M. & Wel. 211. The same has been held by Lord Tenterden, as to a clerk of trustees under a turnpike act. The rule would seem to prevail even in actions for libel. By Parke, B. *ib.* 209. By Tindal, Ch. J., in Cannel *v.* Curtis, 2 Bing. N. C. 234. For the cases, where the acting in a particular capacity is proof against a party by way of admission, *vide supra*.

(6) Spencer *v.* Billing, 3 Camp. 310.

balance of accounts. (1) A witness may be interrogated as to his examination of old records, and may state that they correspond in substance with a particular record which has been read, without going through the whole in detail, subject however to a full cross-examination. (2) Where the question is as to the solvency of a party at a particular time, a witness may speak to the general result of his inquiries, as derived by the accounts rendered by a bankrupt of his affairs. (3)

Rule, on the *voire dire.*

It has been already noticed, that the rule is not in general enforced upon examinations on the *voire dire*, owing to the peculiar circumstances under which those examinations take place; but that it prevails where an inquiry is made for the purpose of disqualifying a witness on the ground of infamy in consequence of a previous conviction, which is capable of being proved by

As to notices.

matter of record. Notices of the dishonour of bills, notices to quit, and attorney's bills of charge delivered under the statute, may be proved by secondary evidence, without giving a notice to produce or shewing the loss of the original evidence. (4)

Where original evidence not attainable.

Where the production of evidence indicates the existence of other evidence of a more original character, still if it can be shewn that the better evidence is not attainable, the principle of

Where documents lost, &c.

the rule will not apply. (5) With respect to the proof of documents, it is, in general, permitted to give secondary evidence of them, where they are destroyed or lost, or where they are

(1) Roberts *v.* Doxen, Peake, 83. In Furness *v.* Cope, 5 Bing. 114, a bankrupt's ledger was received, to prove that a person had no funds in the bank, without calling the clerks who made the entries.

(2) Rowe *v.* Brenton, 3 M. & R. 212.

(3) Assignees of Meyer *v.* Sefton, 2 Stark. C. 274. It was observed by Holroyd, J., that the like evidence had been received by Lord Kenyon, as from the nature of the case, such an inquiry could not be made in court.

(4) Notice of dishonour, Kine *v.* Beaumont, 3 Br. & B. 288. Attorney's bill, Colling *v.* Treweek, 6 B. & C. 395. It is not necessary that such notices should be proved by duplicate originals, or contemporary copies, *ib.* Ackland *v.* Pearce, 2 Camp. 601. If a notice to quit be attested, the attesting witness must be called, Doe *v.* Durnford, 2 M. & S. 62. Such notices are usually proved by duplicate originals, or, at least, by examined copies.

(5) Inscriptions on walls and fixed tables do not admit of being proved, otherwise than by secondary evidence, Doe d. Coyle *v.* Cole, 6 C. & P. 360. Rex *v.* Fursey, 6 C. & P. 81.

in the possession of an adversary who refuses to produce them, or are not available, in consequence of some reason of public policy, or of consideration for the interests of witnesses. This subject involves several subordinate questions of great practical importance, as, for example, the necessary search after documents, and the due notice to produce them; which will be more particularly considered in treating of written evidence.

With respect to the cases where the more original evidence is to be supplied by the testimony of an individual, questions frequently occur in regard to the absence of attesting witnesses, or of persons who have made depositions. Where there is not sufficient proof that the parties are dead, some difficulty often arises as to whether any, and what, causes of absence shall be sufficient to allow of the admission of secondary evidence. The search after absent witnesses is another point of considerable practical importance. These matters will be more particularly considered in treating of written evidence, in which part of the work it will also be more convenient to examine the cases where the proof of documents by attesting witnesses may be dispensed with, from various other causes, besides that of not being able to procure their attendance. It may be proper, however, to observe in this place, that where it is proposed to discredit a witness,—in which case it is proper to give him an opportunity of explaining his own acts and declarations previously to the proving of them by other witnesses, (such inquiry not being irrelevant to the issue,)—it will be necessary to examine the witness as to these matters in the first instance, notwithstanding his answers would tend to criminate himself. (1)

Where original evidence is not available, many questions have arisen as to what shall be deemed sufficient secondary evidence. These questions usually occur in the proof of documents, and will, therefore, be more conveniently treated of in the second part of the work. (2)

(1) The Queen's case, 2 Br. & B. 313. See Edmunstone *v.* Webb, 3 Esp. 244. *Vide infra, Examination of Witnesses.*

(2) To the same part of the work belong the questions, whether particular documents are the best, or secondary, evidence. A counterpart is original evidence, Burleigh *v.* Stibbs, 4 T. R. 465. Roe *v.* Davis,

CHAPTER IX.

OF PRESUMPTIVE EVIDENCE, AND OF PRESUMPTIONS.

IN the preceding chapters we have considered the various general rules which have been adopted in our courts of law, relative to the exclusion of evidence. In the present chapter it is proposed to treat of the nature or quality of evidence; more especially with regard to *presumptive* or *circumstantial* proof, as contradistinguished from *direct* proof. Where the facts proved are not the precise facts in issue, and the jury is to come to a conclusion upon the facts in issue by an act of reasoning from those other proved facts, the evidence in such cases is said to be presumptive.

A presumption of fact is, properly, an inference of that fact from other facts that are known; it is an act of reasoning. In drawing an inference from facts proved, regard must always be had to the facility that appears to be afforded for explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable conclusion against him in the absence of explanation or contradiction; but when such sufficient proof has been given, and the nature of the case is such as to admit of explanation or contradiction, human reason cannot do otherwise than adopt the conclusion to which the proof tends, if no explanation or contradiction is offered. (1)

A presumption, then, is a probable inference, which our common sense draws from circumstances usually occurring in

7 East, 363. Paul *v.* Meek, 2 Y. & J. 115.—As to copies by a machine, Nodin *v.* Murray, 3 Camp. 228. Rex *v.* Watson, 2 Stark. C. 129, n. De Beringer's case, *ib.* Holland *v.* Reeves, 7 C. & P. 36. As to post-marks and marks of double postage, Rex *v.* Plumer, R. & R. 264.—As to duplicate originals, see by Bayley, J., in Colling *v.* Treweek, 6 B. & C. 398.

(1) By Lord Tenterden, R. *v.* Burdett, 4 B. & A. 162.

such cases. The slightest presumption is of the nature of probability; and there are almost infinite shades from the lightest probability to the highest moral certainty. If the circumstantial evidence be such as to afford a fair and reasonable presumption of the fact to be tried, it is to be received and left to the consideration of the jury, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved, and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue. (1)

Presumptive evidence must obviously be as admissible in criminal prosecutions as in civil cases; for whether the proceeding be of a civil or criminal nature, the modes of reasoning, and of drawing conclusions from facts, must necessarily be the same. When direct evidence of facts cannot be supplied, as must continually happen in some of the worst species of crimes, reasonable minds will necessarily form their judgment on circumstances, and act on the probabilities of the case. "As mathematical or absolute certainty" (to use the words of Lord Mansfield in the Douglas cause,) (2) is seldom to be attained in human affairs, reason and public utility require, that judges and all mankind, in forming their opinion of the truth of facts, should be regulated by the superior number of the number of probabilities on the one side or the other, whether the amount of these probabilities be expressed in words and arguments, or by figures and numbers." The principal difference to be remarked between civil and criminal cases, with reference to the modes of proof by direct or circumstantial evidence, is, that in the former, where civil rights are ascertained, a less degree of probability may be safely adopted as a ground of judgment, than in the latter case which affects life and liberty. In criminal prosecutions, it has been observed, the circumstantial evidence should be such, as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of evidence. (3) Doubtless the

(1) 2 H. Black. 297.

(2) Cited in Andrew Stuart's 3rd Letter to Lord Mansfield.

(3) Burnet's Tr. on the Criminal Law of Scotland, p. 523. See also the masterly summing up of the Lord Chief Justice in the Court of K. B. in Ireland, on the trial of Graham, Forbes, and others, for a conspiracy. Printed report, p. 350.

circumstances ought to be of such a nature as not to be reasonably accounted for on the supposition of the prisoner's innocence, but perfectly reconcilable with the supposition of the prisoner's guilt.

In some instances, undoubtedly, circumstantial evidence has been found, to produce a much stronger assurance of the prisoner's guilt, than could have been produced by the most direct and positive testimony. As a general principle, however, it is certainly true, that positive evidence of a fact from credible eye-witnesses is the most satisfactory that can be produced, and the universal feeling of mankind leans to this species of evidence in preference to that which is merely circumstantial. Chief Baron Gilbert, therefore, considers it a higher species of proof. He says, "when the fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances which necessarily or usually attend such facts, and which are called presumptions and not proofs, for they stand instead of the proofs of the fact till the contrary be proved."

There are presumptions of law as well as presumptions of fact. Some presumptions of law are considered so strong and conclusive, as not to admit of contrary proof: but there are fewer instances of this strictness in the present day than formerly. That innocence is to be presumed, till the contrary is proved, may be called a presumption of law, founded on the universal principles of justice. That a child born during marriage shall be presumed to be legitimate, is another presumption of the same description. That grants and deeds are to be presumed in support of long undisturbed possession, is also a presumption in law, founded on principles of public policy and convenience.

The presumptions of ordinary occurrence, made by courts and juries, will be considered in the first section of the present chapter: in the second section, something will be said on the relevancy of this kind of evidence, with reference to the points in issue to which it ought to be directed.

Section I.

Of Presumptions made by Courts and Juries.

Presumptions of law.

The chief part of the reported cases concerning presumptive evidence relates to presumptions of law. These are of two descriptions: First, where the presumption is so conclusive in its nature (as a rule of law) as to be capable of being withdrawn altogether from the consideration of a jury, and which, if successive juries were to disregard it, would be enforced by granting as many new trials, the presumption being as obligatory upon juries as upon the court. Secondly, where the presumption is not so conclusive in its nature, yet having received judicial sanction, ought to be adopted by a jury, and which, if not adopted, might be a ground for a new trial.

Presumptions as to facts.

Lord Stowell observes, that when a criminal fact is ascertained, presumptive proof may be taken to shew who did it, in order to fix the criminal, there being an actual *corpus delicti*; but that to take presumptions, in order to swell an equivocal and ambiguous fact into a criminal fact, is an entire misapplication of the doctrine of presumptions. (1) However, on proper occasions, the same learned judge was accustomed to resort to presumptive evidence for the purpose of testing the truth of positive testimony, especially that presumption which arises from the conduct of the parties at the time of a transaction,—the *evidentia rei*, as he used to call it,—which will generally be found to lead to a conclusion incompatible with direct testimony, where such testimony is invented or exaggerated. (2)

(1) Evans *v.* Evans, 1 Hagg. Con. Rep. 105. And see the observations of Lord Tenterden, in Rex *v.* Burdett, 4 B. & A. 161, as to the proof of the *corpus delicti*.

(2) Evans *v.* Evans, 1 Hagg. Con. Rep. 105, 112. See Lord Stowell's observations on the circumstantial evidence leading to the presumption of the fact of adultery, which, he observes, is rarely proved by direct testimony, Loveden *v.* Love-

Where it appears that on one side there has been forgery or fraud in some material parts of the evidence, and they are discovered to be the contrivance of a party to the proceeding, it affords a presumption against the whole of the evidence on that side of the question, and has the affect of gaining a more ready admission to the evidence of the other party. (1)

Effect of *presumptive* compared with *direct* evidence.

With respect to the comparative weight due to direct and presumptive evidence, it has been said that proof by circumstances is in many cases of greater force and more to be depended on than direct proof: inasmuch as witnesses speaking directly to a fact may be mistaken themselves, or may intend to deceive others, whereas circumstances and presumptions, naturally and necessarily arising out of a given fact, cannot lie. (2) It may be remarked also, that circumstantial evidence is generally composed of a more extensive and comprehensive assemblage of facts under the cognizance of a jury, and requires, therefore, a greater number of witnesses than where the evidence is direct, whereby it is more capable of being disproved if untrue. (3)

On the other hand, it may be observed, circumstantial evidence ought to be acted on with great caution, especially where an anxiety is naturally felt for the detection of great crimes: this anxiety often leads witnesses to mistake or exaggerate facts, and juries to draw rash inferences. Not unfrequently a presumption is formed from circumstances which would not have been noticed as a ground of crimination, but for the accusation itself;—such, are the conduct, demeanor, and expressions of a suspected person, when scrutinized by those who suspect

den, Hagg. Con. Rep. vol. ii. page 2. Cadogan *v.* Cadogan, 2 Hagg. 4, n. Chambers *v.* Chambers, 1 Hagg. 444. Williams *v.* Williams, *ib.* 294. Elwes *v.* Elwes, *ib.* 277. Hammerton *v.* Hammerton, 2 Hagg. 2 Ser. 14.

(1) See Mr. A. Stuart's Letters to Lord Mansfield, upon the Douglas case.

(2) Charge of Mountenoy, B., in the great cause of Annesley *v.* Lord Anglesea, and the opinion quoted by him, *ib.* 9 St. Tr. 426, 17 Howell, 1430. It was said, the presumptions in that case, arising from kidnapping, and the prosecution for murder, were stronger than the evidence of a thousand witnesses.

(3) See the observations of Mr. Bentham, on the probative force of circumstantial evidence, Rationale of Judicial Evidence, vol. iii. p. 251.

him. (1) And circumstantial evidence, which comes through the medium of witnesses, no less than direct evidence, may be discoloured, exaggerated, or perverted.

Kinds of presumption.

The first species of presumption may be again divided into two kinds, first, when the presumption admits of no proof to the contrary, and secondly, where it only affords a *primâ facie* inference, which is conclusive only in the absence of proof to the contrary.

In the history of the law, several presumptions which were at one time deemed conclusive by the courts, have, by the opinions of later judges, acting upon more enlarged principles, become conclusive only in the absence of proof to the contrary, or have been treated as wholly within the discretion of juries. In modern times, many presumptions have been established, which convenience or general experience have dictated, and which are binding upon juries, until they are rebutted. Several presumptions of this nature have been created by the courts; others have been made by act of parliament, and this principally in cases of revenue and penal statutes. (2)

With respect to those presumptions of law, which are not considered imperative upon juries, the occasions, upon which judges have afforded their sanction and authority to them, have been various. In some cases, it has been said, a jury ought to have drawn a particular inference which they have not drawn, and a new trial has consequently been granted. In others, the court has observed, that a jury or inferior

(1) Of the suspicious conduct sometimes exhibited by innocent persons under accusation of crimes, a remarkable instance is mentioned by Lord Hale in his Pleas of the Crown. On the dangers of circumstantial proof, see Defence of Donellan, published by his solicitors, A.D. 1781. On the general subject of *Presumptive Evidence*, see 7 Howell's St. Tr. 1529, n. 14 vol. 1229, 1230, 1246; 17 vol. 1341, 1430; 33 vol. 606. Burnet's Criminal Law of Scotland; Harris's Criminal Law of Scotland; Paley's Moral Philosophy; Evans's Appendix to Pothier, 339; Bentham's Rationale of Judicial Evidence, vol. v., which contains many valuable suggestions on this subject.

(2) A remarkable example of a statutory presumption, was that which was founded on a concealment of birth, by the repealed statute of 21 Jac. 1, c. 27. See Ashford *v.* Thornton, 1 B. & A. 405, where the nature of those presumptions is considered, which were deemed sufficient to support a counter plea to the wager of battle.

court have not improperly acted upon a particular presumption, and that therefore the decision ought not to be interfered with. It has not unfrequently happened, that the same presumption has been spoken of by some judges, as a rule of law; whilst by others it has been treated merely as fit to be recommended to a jury, or as one which a jury might properly make. Though the presumptions under consideration are strictly within the province of a jury, the language of courts expressed in regard to particular presumptions may, in general, be expected to have considerable influence in the determination of future cases, whether by a court or a jury, in which the like presumption may arise.

The presumption of prescriptive rights or of obligations from modern user, is seldom warranted in point of fact, or really entertained by juries. It seems, however, improper for a judge to leave the presumption to a jury, in cases where modern user is uncontradicted, as one which it is *competent* for them to make; the jury should rather be instructed, that they *ought* to make the presumption. (1)

In a recent case, respecting the sea-worthiness of a ship, the Court of Common Pleas were equally divided upon the question, whether a second new trial should be granted on the ground that the jury had found their verdict in direct opposition to the presumption of unsea-worthiness arising from the ship having become distressed recently after sailing, without any adequate cause; a presumption which had been sanctioned by great legal authorities, and been even called a rule of law. (2)

It seems to be a presumption not admitting of proof to the

(1) See by Parke, B., and Alderson, B., in Jenkins *v.* Harvey, 1 Cr., M. & R. 894. The usage had existed for more than seventy years. It was asked by the court, if juries were at liberty to make the presumption, or not, at their discretion, what would become of moduses? In Rex *v.* Joliffe, 2 B. & C. 54, Lord Tenterden, Ch. J., speaks of modern user as affording cogent evidence of prescription; and, he observes, that it is fit to *recommend* a jury to make the presumption. In that case the usage had existed only for twenty years.

(2) Foster *v.* Steele, C. B. Trin. T. A. D. 1837. Douglas *v.* Scougal, 4 Dow. 269. Parker *v.* Potts, 3 Dow. 23. Watson *v.* Clark, 1 Dow. 32.

contrary, that a person under the age of fourteen is unable to commit the crime of rape; (1) and also, that an infant under the age of seven cannot be guilty of felony: (2) and it is a *primâ facie* presumption of law, that a person under the age of fourteen is not guilty of a felonious intention, until evidence is produced to shew that he is *doli capax*; for then, it is said, *malitia supplet ætatem.* (3)

Presumptions with respect to age.

If a child be born after the marriage of the mother, and during the husband's life, it is presumed to be legitimate. It was formerly an established doctrine of the courts, that this presumption in favour of legitimacy could not be rebutted, unless the husband was incapable of procreation, as from impotency or old age, or was absent beyond the four seas during the whole period of the wife's pregnancy. (4) This doctrine was not, however, conformable to the more ancient legal authorities. (5) In later times it came to be established, that the presumption, in favour of the legitimacy of the child of a married woman, might be rebutted, if it were shewn that the husband had not opportunity for sexual intercourse within such a period of time before the birth of the child, as would admit of his having been the father; and, in the present day, even where a husband and wife have had opportunities for sexual intercourse, at a time when the husband might have become the father of the child, a court or jury are at liberty to infer, from the circumstances of the case, that no sexual intercourse took place. (6) But where a jury believe that sexual intercourse took place between husband and wife, at a time when it might have led to the conception of the child whose legitimacy is disputed, it would seem that they ought not to find the child a bastard. (7) Children,

Presumptions as to legitimacy.

(1) 1 Hale's P. C. 630. Rex *v.* Groombridge, 7 C. & P. 582, where it was held that the presumption was not affected by the statue 9 Geo. 4, c. 31. Rex *v.* Eldershaw, 3 C. & P. 396, unless as a principal in the second degree.

(2) 1 Hale, P. C. ch. 3; 1 Russell on Crimes, ch. 1.

(3) Rex *v.* Owen, 4 C. & P. 236.

(4) Co. Litt. 244, a. Rex *v.* Alberton, 1 Lord Ray. 395. Regina *v.* Murray, 1 Salk. 121.

(5) See the ancient authorities collected in Le Merchants' Preface to the Gardiner's Peerage case.

(6) Pendrell *v.* Pendrell, 2 Str. 925. Rex *v.* Reading, Rep. temp. Hard. 82. Rex *v.* Luffe, 8 East, 193. Banbury & Gardiner Peerage cases, Le Merchant's Ed. Cope *v.* Cope, 1 M. & Ro. 275. Morris *v.* Davies, 3 C. & P. 215. Rex *v.* Luffe, 8 East, 206. Goodright *v.* Saul, 4 T. R. 356.

(7) Cope *v.* Cope, 1 M. & Ro.

born during a divorce *a mensâ et thoro*, are presumed to be illegitimate. (1)

Presumptions as to marriage.

The fact of marriage is generally considered as sufficiently proved by presumptive evidence of cohabitation, or even by general reputation, (2) but in actions for adultery and on indictments for bigamy an actual marriage must be proved. (3) Even where a marriage between parties is proved to have been illegal, it may be competent for a jury to presume, from the circumstances of the case, where the parties have cohabited as man and wife, that a subsequent valid marriage has taken place. (4)

Presumptions as to intention.

There is a general presumption in criminal matters, that a person intends whatever is the natural and probable consequence of his own actions. Where a prosecutor, on an indictment for forging a receipt with intent to defraud him, swore that he believed the prisoner had no such intent, the judge directed the jury, that the defrauding, being the necessary effect and consequence of the forgery, was sufficient evidence of the intent of the prisoner to warrant them in convicting. (5)

Presumption of malice, from injury done.

It seems to be clearly a presumption of law, which ought not

275, where it is said by Alderson, B., that where a jury believes that a husband and wife have actually had sexual intercourse within the requisite limits of time, the law will not allow a balance of the evidence as to who is most likely to have been the father. See Head *v.* Head, 1 Sim. & Stu. 152. 1 Turn. 139. It has been said, that if a man marries a woman visibly pregnant, it is a conclusive inference of law, that the child is legitimate. As to the existence of any presumption respecting the length of the period of gestation, see the evidence in the Gardiner Peerage case. Hargr. Co. Litt. 123, b. n. 1 & 2. Alsop *v.* Bowtrell, Cro. Jac. 541. As to the presumption, when a widow marries again, and has a child within nine months, Harg. Co. Litt. 8 a. n. 7.

(1) Parish of St. George *v.* St. Margaret, 1 Salk. 123.

(2) Doe *v.* Fleming, 4 Bing. 266. Reed *v.* Prosser, Peake, 233.

(3) Morris *v.* Miller, 4 Burr. 2057. Birt *v.* Barlow, 1 Doug. 170. It was said by Lord Mansfield, that the action might be turned to bad purposes, if persons could give the name of a wife to women to whom they were not married. 1 Russell on Crimes, 206, 207. Rex *v.* Allison, R. & R. 109.

(4) Wilkinson *v.* Payne, 4 T. R. 468.

(5) The judges held the conviction to be right, Shepherd's case, R. & R. 169. See Phelps's case, 1 Mo. Cr. Ca. 263; Maragora's case, R. & R. 291; Farrington's case, R. & R. 207, where intention to injure the owner of a mill set on fire

to be left to the discretion of the jury, that where an act is done injurious to an individual, malice is *primâ facie* to be presumed in the person doing that act. Thus a new trial has been granted, because a judge left it to the jury to say, whether a defendant intended to injure the plaintiff by the publication of a libel, the court determining that the law would presume the intention. (1) Sir M. Foster observes, that, in every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity or infirmity are to be satisfactorily established by the prisoner, unless they arise out of the evidence produced against him; for the law presumes the fact to be founded in malice, unless the contrary appears. (2)

Presumption of innocence.

A presumption exists against criminality and the commission of fraud. (3) Thus, where a plaintiff complained that a defendant had put on board of a vessel combustibles which occasioned the loss of the vessel, the court held it to be incumbent on the plaintiff to prove the negative, that no proper notice had been given, and they confirmed a nonsuit upon this ground. (4)

The force of this presumption has been considered, in a late case, not so great as to preclude the jury, or the

was presumed. Dixon's case, 3 M. & S. 15.

(1) Haire *v.* Wilson, 9 B. & C. 643. The distinction between malice in fact and in law, is explained by Bayley, J., in Bromage *v.* Prosser, 4 B. & C. 253. In actions for malicious prosecution, malice may be presumed from want of probable cause, Burley *v.* Bethune, 5 Taunt. 583. See Turner *v.* Turner, Gow, 20. Brooks *v.* Warwick, 2 Stark. C. 389. Cozer *v.* Pilling, 4 B. & C. 26. But the want of probable cause is only presumptive evidence of malice, and ought not to be left to the jury as conclusive, Mitchell *v.* Jenkins, 5 B. & Ad. 588.—On the inference of malice in criminal cases, Foster's Disc. 256, 257, 3 M. & S. 15. R. & R. 169, 207, 191.

(2) Sir M. Foster's Discourses, 256, 257. 1 Hale's P. C. 455. 1 East's P. C. 340, 3 M. & S. 15. R. & R. Cr. Ca. 169, 207, 291.

(3) 10 Coke, 56, the case of the Chancellor *v.* the University of Oxford.

(4) Williams *v.* E. I. Co. 3 East, 192. For other examples, see Rex *v.* Hawkins, 10 East, 211. Powell *v.* Milbank, 3 Wils. 355; 2 Bl. 851. Monke *v.* Butler, 1 Roll. R. 83. Clayton's R. fol. 48, Dr. Hasker's case, Comb. 202. Rex *v.* Coombs, Comb. 57. B. N. P. 298. Rex *v.* Rogers, 2 Camp. 654. Bennet *v.* Clough, 1 B. & A. 461. Sissons *v.* Dixon, 5 B. & C. 758. Rodwell *v.* Redge, 1 C. & P. 220. 3 Ch. Ca. 114; Cro. Car. 550; Latch. 68; and see the cases, where a person acting in a public capacity is presumed to have been duly appointed.

Court from presuming the continuance of human life, although such presumption necessarily led to a conclusion that a party had been guilty of bigamy. (1) But on the other hand, the presumption, that a party has not been guilty of bigamy, may, it has been held, warrant a jury or Court of Quarter Sessions in concluding that a person was dead, who had been proved to have been alive within seven years. (2)

It appears from the case of *Williams* v. *East India Company*, that the presumption under consideration may have the effect of shifting the *onus probandi* from the person who has to prove the affirmative to him who relies on the negative; (3) but it is conceived that it will not have this effect, where the affirmative lies peculiarly within the knowledge of the party supposed to be criminal. Thus, in an action for practising as an apothecary without having obtained a certificate, the proof of the certificate lies on the defendant. (4) The like rule obtains in convictions against persons for trading as hawkers, or selling without license. (5)

Publication of libels.

But where a libel is sold at a bookseller's shop by his servant, it is, at least, presumptive evidence of a publication by the master; though, in general, an authority to commit a breach of the law is not to be presumed. This is stated to be upon a ground of policy, lest irresponsible persons should be put forward, and the person who really produces the publication, and without whom it could not be published, should escape. (6)

(1) Rex *v.* Harbonne, 2 A. & E. 545.

(2) Rex *v.* Twyning, 2 B. & A. 388. The general observations of the court as to the force of the presumption of innocence in this case, are impugned by the observations of the court, in Rex *v.* Harbonne, 2 A. & E. 545.

(3) 3 East, 192, and see B. N. P. 298. Monke *v.* Butler, 1 Roll. Rep. 83, cited by Lord Ellenborough, 3 East, 199. Powell *v.* Milbank, 2 Bl. Rep. 851. Rex *v.* Coombs, Comb. 57. Gilb. Ev. 132.

(4) Apothecaries' Co. *v.* Bentley, R. & M. 159. See 4 B. & A. 140; 9 Price, 257; 5 M. & S. 211; 1 B. & C. 150; 3 B. & C. 242; 2 East's P. C. 782; Dickson *v.* Evans, 6 T. R. 57.

(5) Rex *v.* Hanson; Paley on Convictions, by Dowling, 45; and the cases of qualifications under the repealed Game Laws, 1 T. R. 144; 1 East, 650; 2 Russ. on Crimes, 692. Rex *v.* Turner, 5 M. & S. 206. Rex *v.* Smith, 3 Burr. 1475. 1 B. & P. 468; 2 B. & P. 307.

(6) Gutch's case, M. & M. 433.

Presumption of theft from possession.

On an indictment for larceny, proof that part of the stolen goods have been found upon the person of the prisoner, or in his house or possession, is presumptive evidence against him of his having stolen them, so as to call upon him for his defence; and may be sufficient to warrant a conviction, if no facts appear in evidence to repel that presumption. The goods are sometimes found in the prisoner's house before his apprehension, frequently found afterwards; and there can be no objection to proof of their being found at one time or the other. This kind of evidence is frequently strengthened materially by other circumstances,—as by proof that about the time of the offence the prisoner was near the spot from which the goods were taken, —or that he gave some false account respecting the goods on being charged with the crime,—or endeavoured to conceal them, or, perhaps, tried to prevent an inspection,—or by some other proof of suspicious circumstances in his behaviour. On the other hand, the inference, arising from the mere fact of possession, will be much weakened, if any considerable time has elapsed between the loss of the property and the finding of it again, or if the property was from it's nature likely to pass in the interval through many hands; especially, where the prisoner betrayed no appearance of guilt at the time of his apprehension. (1)

Presumption *contra spoliatorem.*

Where a person is proved to have suppressed any species of evidence, or to have defaced or destroyed any written instrument, a presumption will arise that, if the truth had appeared,

Almon's case, 5 Burr. 2698. Walter's case, 3 Esp. 21. Cuthel's case, Holt on Libel, 287; 2 Starkie on Slander, 33; Dodd's case, 2 Sess. Ca. 33; 1 Russ. on Crimes, 236. See Harding *v.* Greening, 8 Taunt. 42. Several authorities appear to decide, that the master is responsible for the publication by his shopman, in the ordinary course of his business, notwithstanding he is able to negative all knowledge of the particular libel, by shewing that he has been kept away from the premises for a long time by illness.

(1) See the observations on this presumption, 2 East's P. C. 656, 665; 2 Hale's P. C. 289. As to the interval elapsing between the loss and discovery of the property, see *Anon.* 2 C. & P. 459. Roscoe on Cr. Evidence, 17. It may be observed, that this presumption is frequently as strong in favour of receiving stolen property, as of stealing it. As to the possession of stolen property being evidence of another felony, *e. g. Arson*, Rickman's case, 2 East's P. C. 1035. That it is not necessary that the stolen property should be discovered before the prisoner's apprehension, see by Lord Ellenborough and Lord Tenterden, in Watson's case, 2 Stark. C. 139.

it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance. In *Harwood* v. *Goodright*, (1) a testator made a will, and devised premises to A.; afterwards he made another will, which was lost, and which the jury stated in a special verdict to be different from the former will, but they did not find in what particular the difference consisted: the court decided, that the devisee under the first will was entitled to the estate; but Lord Mansfield said, that if the devisee under the first will had destroyed the second, it would have been a good ground for a jury to find a revocation.

Presumption from fabrication of evidence.

The fabrication of evidence is calculated to raise a presumption against the party who has recourse to such a practice, not less than when evidence has been suppressed or withheld. Legal experience, however, has shewn that false evidence has sometimes been resorted to, for proving facts which are true. (2) In the *Douglas Peerage case*, the successful party had to contend with a presumption against him arising from the fabrication of several letters. (3)

It has been considered, that upon a charge of robbery it is not necessary that actual fear should be strictly proved, because, as it is said, the law, *in odium spoliatoris*, will presume fear, where there appears to have been a just ground for it. Accordingly an indictment for robbery has been sustained, where the party robbed sought out the robber, and submitted to be robbed by him, purposely with the view of bringing him to justice. (4)

(1) Cowp. 86. For other examples of this presumption, see the case of Annesley *v.* Anglesea, 17 Howell, 1430, where the presumption arose from the plaintiff being kidnapped and sold for a slave. Sir S. Romilly's speech on Lord Melville's trial, where most of the cases are collected. Cowper *v.* Cowper, 2 P. Wms. 720, 748, 752. 8 Ves. 363. Gartside *v.* Ratcliffe, 1 Ch. Ca. 292. Delany *v.* Tenison, 3 Br. P. C. 659. Dalston *v.* Coulsworth, 1 P. Wms. 731. *Anon.* 1 Lord Raym. 731. Barker *v.* Ray, 2 Russ. 73. Evans's Pothier, vol. 2, p. 336. Crisp *v.* Anderson, 1 Stark. C. 35. Clunnes *v.* Pezzy, 1 Camp. 8 n. Braithwaite *v.* Coleman, 1 Harr. 22; Burr. 2484. As to the inferences to be drawn from withholding books, after notice to produce, Cooper *v.* Gibbons, 3 Camp. 363. Lawson *v.* Sherwood, 1 Stark. C. 314.

(2) See a remarkable instance, 4 Institute, 232.

(3) See Appendix to Evans's Pothier, respecting the four letters of Lamarre, the surgeon, fabricated by Sir J. Stewart.

(4) Fost. 128, 2 East's P. C. c. 16, s. 128. 1 Russ. on Crimes, 72.

In general, there is a presumption in favour of the continuance of what is once proved to have existed. (1) In questions concerning the duration of human life, there is a presumption which has been much sanctioned and acted upon (if it be not obligatory upon juries), that where a person has been absent abroad for seven years, he is to be presumed to be dead. This period has been adopted as the ground of such presumption, from analogy to the statute 1 Jac. 1, c. 11, relating to bigamy, and to the statute 19 Car. 2, c. 6, relating to the continuance of lives on which leases are held. (2) But the fact of absence for seven years raises no inference as to the exact time of the death, or that the death took place at the end of seven years. (3)

Death presumed, where.

By the civil law and in foreign codes several rules are laid down for the direction of courts, in ascertaining the fact of survivorship, where several persons have perished by the same calamity. No very definite rule has been adopted in this country upon the subject; but there appears to have been a leaning

Presumption of survivorship.

(1) Wilson *v.* Hodges, 2 East, 312. Throgmorton *v.* Walton, 2 Roll. R. 461. Atty. Gen. *v.* Parnther, 3 Br. Ch. Ca. 25. *Ex parte,* Holyland, 11 Ves. 10. White *v.* Wilson, 13 Ves. 88. Swinb. 72, 78. Hargr. Co. Litt. n. 185. White *v.* Driver, 1 Phillim. 100. Groom *v.* Thomas, 2 Hagg. 2 Ser. 434. Rex *v.* Budd, 5 Esp. 230.

(2) In Doe d. George *v.* Jesson, 6East, 85, the presuption is spoken of as a rule of law. Doe d. Lloyd *v.* Deakin, 4 B. & A. 433. Rowe *v.* Hasland, 1W. Bl. 405, at the period of which decision the presumption does not appear to have been so definite as to time. Hopewell *v.* De Penna, 2 Camp. 113, where, in a plea of coverture, the defendant was held to be bound to prove her husband alive within seven years. In Rex *v.* Harbonne, 2 A. & E. 544. Lord Denman, Ch. J., said, that there was no rigid rule of presumption upon such questions of fact, without reference to accompanying circumstances, as, for instance, the age or health of the party. Death, without issue, may be presumed, where marriage and issue are two affirmative facts to be proved. Doe d. Oldham *v.* Wolley, 8 B. & C. 22. See Doe *v.* Griffin, 15 East, 293. Rowe *v.* Hasland, 1 W. Bl. 404. The presumption of death, from absence of seven years, was formed previous to the statute of bigamy, in Thorne *v.* Rolffe, Dyer, 185. Bendl. 86.

(3) Doe d. Knight *v.* Nepean, 2 A. & E. 95, where the lessor of the plaintiff sought to place the period of death at the end of seven years, in order to avoid an adverse possession. Watson *v.* King, 1 Stark. C. 121, where it was held, that the time of death of a person, sailing on board a missing ship, was to be judged of according to the special circumstances. Norris *v.* Norris, Rep. tem. Finch, 419. Dixon *v.* Dixon, 3 Br. Ch. Ca. 510; and Mr. Belts' notes.

to consider the person, possessed of the property in dispute, to have survived; and some regard appears to have been paid to the probability of the survival of the stronger party. (1)

Presumption of loss of ship.

With respect to the presumption of the loss of missing ships, a practice is said to prevail among underwriters, that a ship shall be deemed lost, if not heard of for six months after her departure for any part of Europe, or in twelve months after departure for any greater distance. (2)

Presumption as to appointment being regular.

It has been seen, that it is a rule that all public officers, who are proved to have acted as such, are presumed to have been duly appointed to the office, until the contrary is shewn, and that the force of this presumption is so strong as to supersede the rule which excludes secondary evidence. (3)

Presumption *omnia rite acta.*

Where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution; it has been said on such occasions, "*Omnia præsumuntur rite acta.*" Thus, in order to support a parish certificate, a custom was presumed, contrary to the common law, of the parish having only one churchwarden, and it was also presumed that a party to the instrument had died within a very short period,—on the ground that the certificate had been sanctioned by justices. (4)

(1) Taylor *v.* Duplock, 2 Phillimore, 263. Colven *v.* H. M. Procurator Gen. 2 Ser. Hagg. vol. 1, p. 92. Rex *v.* Dr. Hay, 1 W. Bl. 640. Case of General Stanwix, Fearne's posthumous works. In the goods of Selwyn, 3 Hagg. Ecc. R. 748. Mason *v.* Mason, 1 Mer. 308, n. Broughton *v.* Randall, Cro. Eliz. 503. Wright *v.* Netherwood, 2 Salk. 593, n., question of revocation of a will, a father, wife, and child dying by shipwreck. The French Code, Liv. 3, tit. 1, ch. 1.

(2) Park on Ins. 106, 107, 2 Str. 1199. Patterson *v.* Black, Park on Ins. 433. Newly *v.* Reed, Park, 63. Green *v.* Brown, 2 Str. 1199. Cohen *v.* Hinkley, 2 Camp. 51. Kostu *v.* Innes, R. & M. 333. Twemlow *v.* Oswin, 2 Camp. 85. Houstman *v.* Thornton, Holt, 242. Kostu *v.* Reed, 6 B. & C. 19. Watson *v.* King, 1 Stark. C. 121.

(3) *Vide supra, Secondary Evidence.* M'Gahey *v.* Alston, 2 M. & Wel. 211.

(4) Rex *v.* Catesby, 2 B. & C. 820; and see Rex *v.* Morris, 4 T. R. 550. Rex *v.* Hinckley, 12 East, 361. Rex *v.* Bestland, 1 Wils. 128. Rex *v.* Long Buckby, 7 East, 45, where an indenture executed thirty years before, was presumed to be stamped against strong negative evidence.

This presumption has been extended to the acts of private individuals, especially when they are of a formal character, as writings under seal. Thus, in *Doe* d. *Griffin* v. *Mason*, (1) in an action in which the plaintiff's title was founded on the assignment of a term to secure an annuity, it was objected that there was no proof of the annuity being enrolled; but Lord Ellenborough held, that proof of the want of enrolment should come from the other side, and that he would presume the security to be valid, till the contrary was shewn. Where there was proof that a party had signed a deed which purported to have been sealed and delivered, it was held, that the judge at *Nisi Prius* had not done wrong in leaving it to the jury to infer that the deed had been sealed and delivered. (2)

With regard to judicial proceedings in inferior courts and before magistrates, the maxim "*Omnia præsumuntur rite esse acta*," does not apply so as to give jurisdiction; (3) therefore, where an examination of a soldier, taken before two magistrates, was tendered to prove his settlement, but it did not appear by the examination itself, or by other proof, that the soldier, at the time he was examined, was quartered in the place where the

(1) 3 Camp. 7.

(2) Talbot *v.* Hodson, 7 Taunt. 251. The illustrations of this presumption are very numerous. For example, M'Queen *v.* Farquhar, 11 Ves. 467.—Necessary priority of conveyances of the same date, Barker *v.* Keate, 1 Freem. 251; 1 Burr. 106; 2 Co. 75, a.—Sheets of a Will present in a room, Bond *v.* Seawell, 3 Burr. 1773; 1 Bl. 407.—Subscription in testator's presence, Hands *v.* James, Com. 531. Brice *v.* Smith, Willes, 1. Croft *v.* Pawlet, 2 Str. 1109, Cro. Eliz. 401. Bac. Ab. Ev. 2 Saund. 42.—Ancient certificates, Rex *v.* Upton Gray, 10 B. & C. 807. Rest *v.* Hobson, 1 Sim. & Stu. 543.—Interlineations before sealing, Trowell *v.* Castle, 1 Keb. 22. Hargr. Co. Litt. 225, b. n. 1. Glanville *v.* Paine, Barn. 19. Fitzgerald *v.* Fauconberg, Fitzg. 204.—Consecration of chapel, 2 Hagg. 2 Ser. 50.—Confirmation of conveyance of glebe, Cro. Jac. 456.—Sanction of right of presentation to a chapel of ease, 2 Eden, 360; Ambl. 528, 4 B. & C. 455.—Confirmation of modus, 2 P. Wms. 573.—Composition real, 2 Anstr. 372. Consent to inclosure, 1 Vern. 32; 5 Vin. Ab. 8, pl. 32. Performance of condition, Grimes *v.* Smith, 12 Cc. 4. Re-publication of will, 8 Ves. 129. Induction, Chapman *v.* Beard, 3 Anstr. 342. Enrolment of charitable use, 3 B. & A. 152. Surrender of copyhold, 1 J. & W. 620. 10 East, 409. Copyhold admittance, Blunt *v.* Clarke, 2 Sid. 61. Froswell *v.* Welsh, Roll. Ab. 505; 3 Bulstr. 214, 217, 239; Godb. 269; Cro. Jac. 403. Watkins on Copyholds, 269, n. 7 East, 21; Dyer, 292, a. Cookes *v.* Hellier, 1 Ves. 234.

(3) By Holroyd, J., 7 B. & C. 790. Rex *v.* Helling, 1 Str. 7, overruling Regina *v.* Gouche, 2 Salk. 441. Rex *v.* Hulcot, 6 T. R. 583.

justices had jurisdiction, it was held that such an examination was not receivable in evidence. (1)

Presumption from course of public office.

Presumptions are frequently made from the regular course of a public office. Thus, where it was proved that the custom-house would not permit an entry to be made, unless there had been an indorsement made upon a licence, it was held, after proof that the licence had been lost, that the indorsement might be presumed from the entry. (2) If a letter is sent by the post, there is a *primâ facie* presumption, from the usual course of a department of the public service, that it reached its destination, till the contrary is proved. (3) And presumptions are frequently drawn from the usual course of private offices, that letters have been sent by the post, or notices delivered, where the persons are dead, who alone could give direct evidence of the fact. (4)

Private office.

Presumption from possession.

Several presumptions are made with reference to persons in possession of property. A person in possession of land, is *primâ facie* presumed to be seised in fee. (5) This presumption, however, may be rebutted by a stronger presumption arising from circumstances,—as, from subsequent possession; it is not conclusive evidence of a seisin which can only be divested by deeds. (6) The possession of personal property affords a

(1) Rex *v.* All Saints, Southampton, 7 B. & C. 789.

(2) Butler *v.* Alnutt, 1 Stark. C. 222.

(3) By Parke, B., in Warren *v.* Warren, 1 Cr., M. & R. 252. Proof of notice of dishonour, by putting letter into the post, R. & M. 149; 2 Campb. 633; 9 East, 347. Post marks are evidence that the letters were in the office at the times which the dates specify, R. & R. 264; 3 Stark. C. 64; 2 Camp. 23; 1 M. & M. 276. *Vide infra*, part 2.

(4) Doe d. Pattershall *v.* Turford, 3 B. & Ad. 895, service of a notice to quit. The deceased person had made a memorandum of the service, which was admissible, according to a recognised exception to the rule which excludes hearsay evidence. As to the effect of the course of business in proving that letters have been sent by the post, where the clerks of an office are dead, Pritt *v.* Fairclough, 3 Camp. 305. Hagedorn *v.* Reid, 3 Camp. 377. Toosey *v.* Williams, M. & M. 129. As to the effect of the like course of business, where the clerks are living, Hetherington *v.* Kemp, 4 Camp. 193. Hawkes *v.* Salter, 4 Bing. 715.

(5) *Vide* the cases, *supra*, of declarations against interest by persons in possession of property, which depend on this presumption.

(6) Jayne *v.* Price, 5 Taunt. 326, as to presumptive right to minerals. Rowe *v.* Grenfel, R. & M. 396; Rowe *v.* Brenton, 8 B. & C. 737, of quit-rent. Doe *v.* Johnson, Gow,

primâ facie presumption of ownership. Thus, although a documentary title is essential to the ownership of ships, it is sufficient, in an action upon a policy, for the plaintiff to rest upon the mere fact of possession, unless further proof be rendered necessary by the contrary evidence being adduced. (1)

Presumption as to boundaries.

There are certain *primâ facie* presumptions in respect of the ownership of property, which seem not to have the force of rules of law, though a jury are to draw the conclusion which is derived from them. Thus, the ownership of a road, *ad medium filum viæ*, presumptively belongs to the owner of the adjacent land; (2) and there is the like presumption in respect of the property in rivers. (3) It is a presumption, that strips of waste land, which adjoin a road, belong to the owner of the adjoining inclosed land, whether he be a freeholder or copyholder, and not to the Lord of the Manor, unless the strips communicate with open commons, or larger portions of land. (4) In speaking of the latter presumption, Mr. Justice Bayley says, it is very desirable, that there should be one certain and definite rule applicable to all cases of this description; (5) and Mr. Justice Holroyd remarks, that it was of considerable importance, that the *primâ facie* presumption should be constant and uniform. (6)

173, of property in mines. B. N. P. 33. As to rebutting the presumption arising from possession, by shewing that an ancestor has not conveyed by true recovery, Doe *v.* Pike, 3 B. & Ad. 738.

(1) Robertson *v.* French, 4 East, 130. See also Trotter *v.* Harris, 2 Y. & J. 285, possession of the franchise of a ferry. Doe *v.* Dyeball, M. & M. 346. Doe *v.* Clarke, 7 Bing. 346, possession of title in ejectment against a wrong doer. See also on presumptions from possession, Sutton *v.* Buck, 2 Taunt. 302. Thomas *v.* Foyle, 5 Esp. 88. Catteris *v.* Cowper, 4 Taunt. 547. Graham *v.* Peat, 1 East, 244. Sheriff *v.* Cadell, 2 Esp. 617. Webb *v.* Fox, 7 T. R. 397. 1 B. & P. 44; 1 Stark. C. 374, 454; 3 Esp. 140, 278; Peake, 148.

(2) Berry & Goodman's case, 2 Leon. 148. By Gibbs, Ch. J., in Grose *v.* West, 7 Taunt. 40. See Headlam *v.* Hedley, Holt, N. P. 463.

(3) Hale de Jure Maris, part 1, ch. 1, Callis on Sewers.

(4) Doe d. Pring *v.* Pearsay, 7 B. & C. 304. Steel *v.* Prickett, 2 St. C. 463. Grose *v.* West, 7 Taunt. 40. Cook *v.* Green, 11 Pr. 736. The presumption has a reasonable foundation, since, if the road was out of repair, travellers might go upon the adjacent land, which would be a reason for the owner not inclosing up to the margin of the road. It appears not to exist where the road is defined for the first time under an inclosure act, Rex *v.* Hatfield, 4 A. & E. 165.

(5) In Doe *v.* Pearsey, 7 B. & C. 304.

(6) *Ibid.* Presumptive owner-

Presumption as to incorporeal rights.

2 & 3 Wm. 4 c. 71.

By the prescription act, 2 & 3 Wm. 4, c. 71, various presumptions, which juries had been ordinarily recommended, if not directed, to make from modern user, as to the existence of immemorial rights, or of modern rights founded on supposed non-existing grants, have been converted into positive rules of law. Previous to this act, a technical effect was given to the evidence of enjoyment of certain incorporeal rights for the period of twenty years, which, though, in theory, only presumptive evidence, was in practice and effect a bar.(1)

Presumption of public way.

With respect to the presumed creation of rights of way, it is to be observed, that notwithstanding the statute, the dedication of public ways is still a matter to be presumed by juries; and in making a presumption in such cases, numerous circumstances require to be taken into consideration, the effect of which has, in different instances, been more or less clearly defined by legal authorities. (2)

With respect to the presumption of incorporeal rights from user not included within the statute, many presumptions may continue to be formed by juries, and will, it is conceived,

ship of walls, Duke of Newcastle *v.* Clark, 8 Taunt. 613. Wiltshire *v.* Sidford, cited 8 B. & C. 259. Matts *v.* Hawkins, 5 Taunt. 20. Callis on Sewers, p. 74. Presumptive ownership of trees, Masters *v.* Pollie, 2 Roll. R. 141. Holder *v.* Coates, 1 M. & M. 112. Waterman *v.* Soper, 1 Lord Raym. 737. 2 Roll. R. 265; B. N. P. 85, of materials of public bridge. Hamson *v.* Parker, 6 East, 154, presumptive ownership of soil in separate fishery.—Lloft, 364. Vowles *v.* Miller, 3 Taunt. 138. Guy *v.* West, 2 Selw. N. P. 1218. See also the following examples: Bailiffs of Godmanchester *v.* Phillips, 4 A. & E. 556.

(1) By Parke, B., in Bright *v.* Walker, 1 Cr., M. & R. 212. The statute does not prevent a jury from presuming a grant from possession with other circumstances, if they believe one to have been actually made; but it precludes the presumption from possession alone for a less period of enjoyment than that prescribed. *Ibid.*

(2) The limit of time is not clearly defined, and the question is generally affected by other stronger circumstances, than mere lapse of time. See Rex *v.* Lloyd, 1 Camp. 262. Trustees of British Musem *v.* Furnis, 5 C. & P. 460. Trustees of Rugby Charity *v.* Merryweather, 11 East, 376, n. 2 M. & S. 262; 4 Camp. 189.—As to the effect of a bar, Roberts *v.* Karr, 2 Camp. 262, n. Lethbridge *v.* Winter, 1 Camp. 263, n. 11 East, 376, n.—As to limited dedications, Marq. of Stafford *v.* Coyney, 7 B. & C. 257. Woodyer *v.* Haddon, 5 Taunt. 125.—As to the persons, whether tenants or trustees competent to dedicate, Rex *v.* Leake, 5 B. & Ad. 469. Wood *v.* Veal, 5 B. & Ad. 454. Rex *v.* Barr, 4 Camp. 16. Harper *v.* Charlesworth, 4 B. & C. 574. 2 B. & C. 686; 11 East, 372; 4 B. & A. 579.

be recommended to them in deference to legal authority, and in consonance with the justice of a case, though contrary to their opinion of the real facts; as, when faculties are presumed for regulating the right to pews or vaults. (1) The like may be said of copyhold customs, (2) and the liability to repair fences. (3) Various other instances might be added, resting as well upon modern as immemorial title.

Faculties presumed.

It has been said, that an act of Parliament may be presumed. (4) Thus, where a road obstructing a navigable channel had existed for so long a time, that the state of the channel could not be proved, it was considered that an act of Parliament, or a writ of *ad quod damnum*, might be presumed, which had extinguished the public right in the channel. (5)

Act of parliament presumed.

Writ of *ad quod damnum*.

Grants from the Crown may be presumed: but where such a presumption has been made, it has been under particular circumstances, and, after a much longer period of time than has been deemed sufficient for raising the presumption of a grant from private individuals. (6)

Grants from the crown presumed.

Conveyances between private individuals are often recommended to juries, in more or less forcible terms, as presumable

Private conveyances presumed.

(1) Rogers *v.* Brooks, cited 1 T. R. 431, n. Pettman *v.* Bridger, 1 Phillim. 323. Fuller *v.* Lane, 2 Adams, 425. Walter *v.* Gunner, 1 Hagg. 314. Com. Dig. Esglise. Byerley *v.* Windus, 5 B. & C. 1. Mainwaring *v.* Giles, 5 B. & A. 360. Stock *v.* Booth, 1 T. R. 430. Griffith *v.* Matthews, 5 T. R. 296.

(2) A single entry upon the rolls may afford evidence from which a copyhold custom may be presumed, Doe d. Mason *v.* Mason, 3 Wils. 63.

(3) 6 B. & C. 337. Cheetham *v.* Hampson, 4 T. R. 318; 2 Wms. Saund. 285, n. 4; 290, n. 7. Booth *v.* Wilson, 1 B. & A. 59. Churchhill *v.* Evans, 1 T. R. 529. Vin. Ab. tit. Fences. Com. Dig., action on the case for negligence.

(4) By Lord Mansfield, in Eldridge *v.* Knott, Cowp. 215, citing Lord Coke.

(5) Rex *v.* Montagu, 4 B. & C. 599. See Cowper, 215; 1 Eden, 296; 6 Ves. 215; 2 Ves. Jun. 583; 1 Jac. & W. 63; Lopez *v.* Andrews, Hayes' Conv. 11 n. That a private act of parliament may be presumed, Skinner, 78; 12 Ves. 265. That the relinquishment of public rights is not to be presumed in the same manner as that of private rights, Vooght *v.* Winch, 2 B. & A. 662. 4 Burr. 2613; 7 East, 199.

(6) Roe *v.* Ireland, 11 East, 161, enfranchisement of a copyhold by the crown, presumed after an enjoyment of more than a hundred years. Rex *v.* Brown, cited by Lord Mansfield, Cowp. 110; 1 J. & W. 159. Mayor of Kingston *v.* Horner, Cowp. 102. Lord Mansfield, in Eldridge *v.* Knott, Cowp. 115.

in favour of a party who has proved a right to the beneficial ownership of property, and whose possession has been consistent with the existence of such a conveyance as is to be presumed, especially if the possession cannot be accounted for, and would have been unlawful, except on the supposition of a conveyance; such presumptions are made to prevent justice being defeated by a mere formal objection to the party's title in a Court of Law. (1) But where the original possession of property may be accounted for, and is consistent with the fact of there having been no conveyance, it seems proper to direct a jury to presume a conveyance or not, according to their actual belief on the subject. (2)

Conveyance from trustee presumed.

With regard to the presumptions of a conveyance from a trustee to a *cestui que trust*, and of the surrender of outstanding terms, which are often necessary in order to constitute a legal title in an action of ejectment, considerable differences of opinion have been expressed. As these questions are somewhat removed from ordinary comprehension, it may be expected, that, although they must be submitted to a jury, yet that, in point of fact, they will ordinarily be decided upon principles of law by the Judge. A surrender of an outstanding term will, in general, be presumed, where the trustees ought to convey to the beneficial owner, (3) or where a term is satisfied, and is set up by a mortgagor against a mortgagee. (4) But such a presumption will not be made, where it would have been a breach of trust in the trustees to have surrendered the term; (5) or, in general, where the surrender would have been against the interests of the owner of the inheritance, especially if the term has been recognised as subsisting at a late period. (6) The mere fact of a term having been satisfied does

(1) By Tindal, Ch. J., in Doe *v.* Cooke, 6 Bing. 180. See Matthews on Presumptions, ch. iv.

(2) Doe d. Fenwick *v.* Reed, 5 B. & A. 233. It was said that the presumption of grants and conveyances had gone to too great a length. See Levett *v.* Wilson, 3 Bing. 115.

(3) By Lord Kenyon, Doe *v.* Staple, 2 T. R. 696. Doe *v.* Sybourn, 7 T. R. 2.

(4) *Ibid.*

(5) Keene *v.* Dearden, 8 East, 867.

(6) Doe *v.* Scott, 11 East, 478. See Doe *v.* Wright, 2 B. & A. 720.

not afford sufficient ground, upon which a jury can presume it surrendered. (1)

It has been considered, that when acts are done or omitted by the owner of the inheritance and persons dealing with him as to the land, which ought not reasonably to have been done or omitted if the term existed in the hands of a trustee, a surrender may be presumed. (2)

Surrender of term presumed.

The principal difference of opinion has existed in respect of the presumption of the surrender of terms, from the circumstance of their not being noticed in recent marriage contracts or other conveyances. It should seem that the courts of law had in some instances proceeded on an erroneous opinion as to the practice of noticing outstanding terms upon such occasions. But the Courts of Equity having expressed great dissatisfaction at the decisions of the Courts of Law as to this matter, the Courts of Law appear to have been desirous, in later cases, to assimilate their decisions to those of the Equity Courts. According to one of the most recent decisions upon the subject in the Court of King's Bench, Lord Tenterden observed, that the authorities which had been discussed had been much questioned; and, in answer to an inquiry made by him, whether a term, like that under consideration, had been usually noticed in a marriage settlement, having received an answer in the negative, he observed, "if that be so, there is no ground for presuming that this term, which was assigned to attend the inheritance, was ever surrendered."(3)

Where the ground for the presumption of a conveyance be-

(1) Evans *v.* Bicknel, 6 Ves. 184, Sugd. V. & P. 424; 7th ed.

(2) By Lord Tenterden, 2 B. & A. 792. See further on this controverted subject, Doe *v.* Hilder, 2 B. & A. 782. Bartlet *v.* Downes, 3 B. & C. 616. Doe *v.* Plowman, 2 B. & Ad. 573. Townsend *v.* Champernown, 1 Y. & J. 538. Doe d. Hammond *v.* Cooke, 6 Bing. 124. Day *v.* Williams, 2 Cr. & J. 460. Doe *v.* Putland, Sugd. V. & P. 8th ed. 440. Marq. Townsend *v.* Bp of Norwich, *ib.* 443. Cholmondeley *v.* Clinton, *ib.* 444. Aspinal *v.* Kempson, *ib.* 446. Sugden's V. & P. 8th ed. 440 to 446. Matthews on Presumptions, 226 to 259.

(3) The subject is fully discussed, by Sir E. Sugden, in the last edition of his book on Vendors and Purchasers (9th ed. A. D. 1837). He concludes, that the profession are justified by the authorities in considering the law to stand as it did, before the decision in Doe *v.* Hilder.

tween private individuals is simply that of length of possession, it should seem that the courts have imposed a restriction upon the discretion of juries. It has been held, that possession of land for any period less than twenty years by a feoffee is not sufficient to found a presumption, that livery of seisin has accompanied the feoffment. (1)

Licences presumed.

Licences may be presumed after a shorter space of time than is ordinarily required for the presumption of actual conveyances. Thus where an inclosure had been made from a waste twelve or fourteen years, and had been seen by the steward of the lord from time to time, without objection being made, it was left to the jury to say, whether the inclosure was made by the lord's licence. (2)

Bye-law presumed.

Although there do not remain any traces of a bye-law in the corporation books, and although there cannot be any proof given of the loss of it, yet, upon evidence of constant usage, a jury may be directed to presume its existence. Sixty years' usage has been considered evidence of a bye-law. (3)

Presumptions by the law of treason.

It has sometimes been laid down, that a conspiracy to levy war against the King, when proved, amounts, in presumption of law, to a compassing of the King's death; but, on the other hand, there are still higher and better authorities, both ancient and modern, for considering, that a jury are not bound to make such a presumption, unless they are satisfied, that the conspi-

(1) Doe d. Wilkins *v.* Marquis Cleveland, 9 B. & C. 871. As to the presumption of livery of seisin, Isack *v.* Clarke, Roll. Rep 132, pl. 9. Biden *v.* Loveday, Vern. 196. Rees *v.* Lloyd, Wightw. 123. The period of twenty years has been adopted by the courts, in various instances, for the purpose of raising presumptions, in analogy, probably, to the statute of James; but, in regard to the proof of written instruments, by their production from the proper custody, without further proof of execution, the period of thirty years has been adopted, 11 East, 504; 4 B. & A. 376; 5 T. R. 359; 2 M. & S. 337; 2 B. & C. 814.

(2) Doe *v.* Wilson, 11 East, 56. Goodtitle *v.* Baldwin, 11 East, 488. Ditcham *v.* Bond, 3 Camp. 525.

(3) See Rex *v.* Head, 4 Burr. 2518. Rex *v.* Bird, 13 East, 368. By Lord Mansfield, in Perkin *v.* Warden of the Co. of Cutlers, 21 MSS. Serg. Hill, p. 65; 2 Ves. 330; B. N. P. 211; 4 Co. 78; Cowp. 110.

racy was of such a nature as in its consequences to occasion probable danger to the King's life. (1)

Payment presumed.

Presumptions of the payment of money have been sanctioned in various cases. Where it has been usual between parties to make payments that frequently become due, without taking written vouchers, and a long time has elapsed without any complaint being made of non-payment, the fact of payment may very properly be presumed. (2) If a landlord gives a receipt for the rent last due, it is to be presumed that all former rent due from the tenant has been paid. (3) Where a bill of exchange, negociated after acceptance, is produced from the hands of the acceptor subsequently to its becoming due, the presumption is that the acceptor has paid it. (4)

Reputed ownership.

Where a person has been the absolute owner of property, and he continues in possession of it till the time of his bankruptcy, he will be *primâ facie* presumed to have had the re-

(1) See the authorities collected in Phillipps's observations on Lord Russell's case, in his abridgment of the State Trials; and Luders's tracts on Treasons. The charge of Chief Justice Eyre, in Hardy's case; his summing up in Horne Tooke's case; the summing up of Lord Ellenborough, in Watson's case, are in favour of treating the presumption of one of pure law.

(2) See Lucas *v.* Novosilieski, 1 Esp. 296. Sellen *v.* Norman, 4 C. & P. 86. Evans *v.* Birch, 3 Camp. 10. Topham *v.* Braddick, 1 Taunt. 572.

(3) Gilb. Ev. 157.

(4) Gibbon *v.* Featherstonehaugh, 1 Stark. C. 225. Pfiel *v.* Vanbatenberg, 2 Camp. 439. See Bembridge *v.* Osborn, 1 Stark. C. 374.—As to the presumption of payment arising from the production of a cheque, see Boswell *v.* Smith, 6 C. & P. 60. Pearce *v.* Davis, 1 M. & Ro. 365. Egg *v.* Barnet, 3 Esp. 196. Gow, 16; 4 Taunt. 293. Lloyd *v.* Sandilands, Gow, 16.—That the payment of money does not, in general, raise the presumption of a loan, Welsh *v.* Seabone, 1 Stark. C. 474; Carey *v.* Gerrish, 4 Esp. 9; Holden *v.* Hartsink, 4 Esp. 46.—As to a presumption of gift to a relative, Hick *v.* Keats, 4 B. & C. 71. See further on the presumption of payment, Cooper *v.* Turner, 2 Stark. C. 207. 4 Taunt. 293.—On the presumption of the satisfaction of judgments, warrants to confess judgment, decrees, statutes, recognizances, annuities, portions, legacies, liens for purchase money, quit rents, Matthews on Presumptions, ch. 19 & 20. Willaume *v.* Gorges, 1 Camp. 217. Hulke *v.* Pickering, 2 B. & C. 555. Cowp. 214.—On the subject of the payment of bonds, see the statute 3 & 4 W. 4, c. 42. Before the statute, payment might have been presumed within twenty years, if circumstances concurred to fortify the presumption arising from lapse of time, as a settlement of accounts. Colsel *v.* Budd, 1 Camp. 27. Oswald *v.* Leigh, 1 T. R. 270.—The production by the assured of a policy, with an adjustment, and the name of the defendant struck off, does not prove payment, Adams *v.* Sanders, M. & M. 373.

puted ownership of it, unless he has made the change of property notorious; but if he has never been the absolute owner, it will be necessary to establish the fact of a reputed ownership by other means than proof of possession. (1)

It would be impossible to enumerate within convenient limits, the various presumptions which have received judicial sanction. The greater part of the rules of evidence is founded upon presumptions; and the subject of the present chapter receives illustration from nearly every other chapter of the present Work.

Section II.

Of the Relevancy of Presumptive Proofs; and of the Rule which confines Evidence to the Points in Issue.

With respect to presumptions which are too remote to admit of any reasonable direction to a jury in regard to the issue which they have to try, a very nice exercise of discretion often devolves upon the judge. It is his duty to confine the evidence to the points in issue, that the attention of juries may not be distracted, nor the public time needlessly consumed; but in deciding that the evidence of any particular circumstance is not receivable upon this ground, he must impliedly determine, that no presumption to be drawn from that circumstance ought properly to have an effect upon the minds of the jury. (2)

Proof of other contracts, &c. when admissible.

It is considered, in general, that no reasonable presumption can be formed as to the making or executing of a contract by

(1) Lingard *v.* Messiter, 1 B. & C. 312. Storer *v.* Hunter, 3 B. & C. 374.

(2) In some instances, judges have drawn the line as to the length of time after a robbery, which may render the possession of stolen goods relevant, *Anon.* 2 C. & P. 459. In Mann *v.* Lang, 3 A. & E. 705, all the judges appear to have thought the probate admissible evidence, though several of them appear to have thought the presumption arising from it of the weakest description.

a party with one person, in consequence of the mode in which he has made or executed similar contracts with other persons. Where the question between a landlord and his tenant is, whether the rent was payable quarterly or half-yearly, it has been held irrelevant, to consider what agreements subsisted between the landlord and other tenants, or at what time their rents would become due. (1) So, where the question was as to the quality of beer to be furnished by the plaintiff to the defendant, it was held, that evidence could not be admitted of the quality of beer supplied by the plaintiff to other persons. (2)

On the other hand, it may frequently be very proper, and in some cases absolutely necessary, to look beyond the transaction, which is the immediate subject of inquiry, into previous transactions, for the purpose of making a just inference as to the knowledge of the parties, their motives, or intentions. (3) The case of *Hunter* v. *Gibson and Johnson*, (4) affords an instance of this kind. That was an action by an indorsee against the defendants, as acceptors of an instrument purporting to be a bill of exchange; a question arose on the third count, which stated the bill to be payable to bearer, under the following circumstances: It appeared in evidence, that the name of the person mentioned as payee was merely fictitious, but this fact was not known to the plaintiff; and for the purpose of shewing, that the defendants at the time of their acceptance knew the name in the bill to be fictitious, or that the defendants had given authority to the drawer to draw the bill in question payable to a fictitious person, the plaintiff proposed to prove, that the defendants had given a general authority to the drawer to draw bills of exchange upon them, to be made payable to fictitious persons, and evidence to this effect was produced; the counsel for the defendants objected to this evidence, on

Proof of other transactions, to shew *knowledge*.

(1) Carter *v.* Pryke, Peake, 94. For other examples, Spenceley *v.* De Willot, 7 East, 108. The point frequently arises at the Quarter Sessions, where it is attempted to prove the terms on which a master hired a particular servant, by the manner in which he hired other servants.

(2) Holcombe *v.* Hewson, 2 Campb. 391. See Balutti *v.* Serani, Peake, 142. Viney *v.* Barrs, 1 Esp. 293, forgery of another acceptance.

(3) See *infra*, as to the *proof of knowledge* in issuing counterfeit money.

(4) 2 H. Bl. 187, 288, 290, 295.

the ground that it had no relation to the particular bill in question, and that the facts of any particular transaction could not legally be inferred from circumstances which applied wholly to other transactions. Lord Kenyon, who tried the cause, admitted the evidence; upon which the counsel for the defendants tendered a bill of exceptions. The Court of King's Bench gave judgment for the defendant in error. A writ of error was then brought in the House of Lords; and the question on the admissibility of the evidence was referred to the judges. On this question there was a division among the judges; but the majority of them being of opinion that the evidence ought to have been received and left to the jury, the judgment below was affirmed.

Proof of customs in other manors, &c.

With respect to the relevancy of a presumption, that a customary right exists in one place, from the fact of its being proved to exist in another, it is to be observed, that when 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 in general, admissible evidence. (1) In the *Duke of Somerset's* case, Lord Chief Justice Raymond said, he had always looked upon it as a settled principle in the law, that the customs of one manor could not be given in evidence to explain the custom of another manor; "for if this kind of evidence were to be allowed, the consequence seems to be, that it would let in the custom of one manor into another, and in time bring the customs of all manors to be the same." And in addition to this argument of inconvenience, the objection taking to the evidence in that case, namely, that it was inapplicable to the point in dispute, appears to be very strong; customs being different in different manors, and in their nature distinct. Unless, therefore, some connection or relation is proved to have existed between them, as by shewing, that they were all formerly holden under the same lord, or that the one manor was anciently parcel of the other manor, (2) such evidence is not admissible.

(1) Duke of Somerset *v.* France, 1 Str. 661. Ruding *v.* Newell, 2 Str. 957. Furneaux *v.* Hutchings, Cowp. 807. By Buller, J., in Noble *v.* Kennoway, 2 Doug. 512, S. P.; by Wood, B., in Doe d. Foster *v.* Sisson, 12 East, 63, S. P. Erskine *v.* Ruffie, 3 Gwill. 965.

(2) Moulin *v.* Dalison, Cro. Car. 484.

Rule on question of *tenure*;

But several cases appear to have determined this point, that, where all the manors within a certain district are held by the same peculiar tenure, and a question arises in any one of them upon an incident to the tenure, evidence may be given of the usage which prevails in any of the other manors within the district. The first reported case of this kind is *Champian* v. *Atkinson*, (1) where the question was, whether a general fine was due to an infant admitting lord during his minority, and the defendants were allowed to give in evidence, upon the trial of this issue, that other adjoining manors had the same custom, not to pay to the lord before he attained his full age; similar evidence was there said to have been received, on a question of copyhold tenure, between certain manors in Middlesex.

On the authority principally of this case of *Champian* v. *Atkinson*, the *Duke of Somerset's* case was decided. (2) On a trial at bar in that case, where the issue was, whether a general fine was due from the tenants of certain manors in Cumberland to the Duke as next admitting lord, the court after much argument received evidence, that the same fines had been paid in similar cases to the lords of other manors. Lord Chief Justice Raymond and Reynolds, J., laid down the general rule as above stated, and were strongly against admitting the evidence; but afterwards agreed to receive it, on the authority of the precedent in Keble, and of cases said to have been so ruled on the northern circuit. Fortescue, J., the only judge then present, thought the evidence admissible, and made a distinction between the *custom* and the *tenure* of a manor, and as the question, there to be tried, merely concerned the tenure of the plaintiff's manors, he was of opinion that it would be proper to inquire, what were the qualities that attended other estates holden by the same tenure.

In the case of *Furneaux* v. *Hutchins* on a question relative

(1) 3 Keb. 90, on trial at bar.

(2) Duke of Somerset *v.* France, 1 Str. 658. See also Lowther *v.* Raw and others, Fortesc. 44, 55, S. P., on appeal to the House of Lords from the judgment of Lord Talbot, Ch.; Dean and Chapter of Ely *v.* Warren, 2 Atk. 189, S. P. See also Cowp. 807, 808; 5 T. R. 31; and Rex *v.* Ellis, 1 Maule & Selw. 662. Lord Barclay's case, Hale *de jure maris*, 35.

Rule on question as to custom of the country.

to the custom of tithing, (1) Lord Mansfield, after laying down the general rule, that "proof of the custom in one parish is not evidence to affect another parish," adds this qualification, "unless the custom is laid as a general custom of the country." Thus, where half of a river belongs, by the constant custom of the country, to the lords of the manors on each side of the water, proof of the custom in one manor is evidence of the same customary right in another. (2) It is evidence of a custom pervading one common district of manors.

Where in each of several sub-manors, part of the same district and belonging to the same lord, there appeared to be a certain peculiar class of tenants answering the same description, and to whom their tenements were granted by similar words, it was held, that evidence of the rights, which had been enjoyed by the tenants of one manor was admissible to shew, what rights the tenants were entitled to in another. (3)

Proof of acts of ownership in other lands.

In like manner acts of ownership in one place may sometimes afford a legitimate presumption of the right of ownership in another. In an action of trespass, the plaintiff claimed the whole bed of a river flowing between his land and the land of the defendant, the defendant contending that each was entitled *ad medium filum aquæ*: it was held, that it was allowable for the plaintiff to give in evidence acts of ownership exercised by him upon the bed and banks of the river on the defendant's side lower down the stream, and where it flowed between the plaintiff's land and a farm adjoining the defendant's land, and also to prove repairs done by the plaintiff to a fence which divided that farm from the river, and which was in continuation of a fence dividing the defendant's land from the river. (4) It was

(1) 1 Cowp. 808.

(2) 1 Maule & Selw. 662.

(3) Rowe *v.* Brenton, 8 B. & C. 758. The matter in dispute was neither a question of tenure nor of custom, as to which some nice distinctions are taken by Fortescue, J., in Duke of Somerset *v.* France. That proof of the manner in which a particular trade is carried on at one place, is evidence as to the course of that particular trade in another place. Noble *v.* Kennaway, 2 Doug. 510.

(4) Jones *v.* Williams, 2 M. & Wel. 331, where the nature of this kind of evidence is explained by Parke, B. See Evans *v.* Butt, K. B. Hil. T. 1837.

said by the Court, that the acts of ownership in question might reasonably lead to the inference, that the entire edge and bed of the river, and consequently the part in dispute, belonged to the plaintiff. In the previous case of *Doe* d. *Barrett* v. *Kemp*, (1) it had been decided in the Exchequer Chamber, upon a question whether a piece of waste land between a highway and inclosures belonged to the plaintiff (the owner of the adjoining inclosure), or to the lord of the manor, that the lord might give evidence of grants by him of waste land terminating in a common, between the road and the inclosures of other persons at a distance from the spot claimed by the plaintiff; but that such evidence must be confined to the waste adjoining the road which passed by the spot so claimed.

The case of *Sir T. Stanley* v. *White*, (2) may here be mentioned as a leading authority upon this subject. It was an action of trespass for cutting down the plaintiff's trees; the defendant pleaded his soil and freehold in the close upon which the trees were growing. The plaintiff replied, that the trees were his trees and freehold. It appeared on the trial, that the trees in question grew in a woody belt of considerable extent, entire and undivided, which encircled the plaintiff's manor, and lay contiguous to a number of closes belonging to several owners, one of which closes was that of the defendant. Evidence was admitted of several acts of ownership, in different parts of the belt, by those under whom the plaintiff claimed, which had been acquiesced in by the owners of the adjoining land. And the Court of King's Bench afterwards, on a motion for a new trial, adjudged the evidence to have

(1) 2 Bing. N. C. 103. 7 Bing. 332, a *venire de novo* was granted, because the court considered that they could not assume that all the pieces of waste, with respect to which evidence was received, lay on the sides of a road or roads terminating in a large common. They were however, of opinion that evidence was admissible of grants of parcels of one and the same waste, lying on both sides of the road, although the continuity of the waste was interrupted for a short distance by the intervention of houses. The same principle is recognised in Tyrwhitt *v.* Wynne, 2 B. & A. 554, where leases were rejected on account of no previous proof being given that the *locus in quo* was part of a larger district to which these leases applied. And see Brisco *v.* Lomax, 8 Ad. & Ell. 211.

(2) 14 East, 332. See also Bryan *v.* Winwood, 1 Taunt. 208. Hollis *v.* Goldfinch, 1 B. & C. 218, 219.

been properly admitted, as evidence of the general right through the whole extent of such entire undivided inclosure, which might be presumed to have belonged formerly to one owner. This appears to be the true principle, on which the proposed evidence in that case was admissible. For, generally speaking, acts of ownership, submitted to by the holder of one portion of land, cannot be proof that the person exercising them has any right to the adjoining land. (1)

Inquiry in cross-examination.

Though it is a general rule, that a custom of tithing, &c. in one parish will not be evidence of a custom in another, yet such an inquiry may sometimes be very proper in cross-examination. Thus, in an action by a rector for tithes, where the point in issue is, whether there exists a modus of a certain sum of money for a particular farm in a township within the parish, the defendant will not, in general, be allowed to inquire, whether other farms in the same township are not subject to the same payment. But where a modus is alleged on one side, it may be relevant on the other side to make an inquiry of this nature, for the purpose of shewing that such payments cannot be a modus, consistently with the evidence which has been previously adduced. This was adjudged to be admissible in the case of *Blundell* v. *Howard*. (2) The question there was not put by the defendant with a view of supporting the modus set up by him, but was put by the plaintiff, in order to shew that this and similar payments by the occupiers of different tenements were merely portions of a sum in gross paid throughout the township by way of composition, and could not be a modus, since the ecclesiastical surveys, which had been produced on the part of the rector, were entirely silent as to any modus co-extensive with the township.

Evidence of character.

The character of the parties to a civil suit affords, in general, such a weak and vague inference as to the truth of points in issue between them, that it is not usual to admit

(1) See 1 Barn. & Cress. 218, 222.

(2) 1 Maule & Selw. 292. See Rex *v.* Stallard, 7 C. & P. 263, where an inquiry as to what other persons had said of the prosecutor became relevant on account of an inquiry respecting the prisoner's expressions concerning him.

evidence of this description. Thus, in an action of ejectment by an heir at law, to set aside a will for fraud and imposition committed by the defendant, witnesses cannot be examined to the defendant's good character. (1) So, on the trial of an information against the defendant for keeping false weights where it was proposed to call witnesses on behalf of his character, Eyre, C. B., ruled that such evidence was not admissible in a civil suit. (2) "The offence imputed is not," he said, "in the shape of a crime. To admit such evidence would be contrary to the true line of distinction, which is this, that in a direct prosecution for a crime, evidence of character is admissible; but when the prosecution is not directly for the crime, but for the penalty, it is not. If evidence to character were admissible in such a case as this, it would be necessary to try character in every charge of fraud upon the Excise and Custom-house laws."

Where character is in issue in *civil suits.*

Where, in a civil suit, character is a matter in issue, there the evidence of it ceases to be of a circumstantial nature, and there can be no objection to receiving it. Various questions, however, have arisen in civil suits as to the point, whether the character of the parties, or of a third person was directly in issue or not.

In action for adultery.

In actions for adultery or seduction, the wife's or daughter's general conduct, if not their general character in regard to chastity, is directly in issue; and accordingly, it seems that general evidence of bad character is admissible in such actions; (3) whereas in actions for defamation, it appears, according to the later authorities, that general evidence of the plaintiff's good or bad character is irrelevant. (4) In actions for adultery or seduction, general evidence of the good character of the

For defamation.

For seduction.

(1) Goodright d. Farr *v.* Hicks, B. N. P. 296. B. N. P. 293.

(2) Attorney Gen. *v.* Bowman, 2 B. & P. 532.

(3) Dodd *v.* Norris, 3 Campb. 519. Gardiner *v.* Tadis, 1 Selw. N. P. 25. Roberts *v.* Malsten, B. N. P. 296. Elsam *v.* Faucett, 2 Esp. 562. As to the husband's bad character, Bromley *v.* Wallace, 4 Esp. 237. The authorities rather imply, than directly shew, that general hearsay evidence of bad character, as distinguished from positive evidence of general conduct, is receivable, either where the general issue is pleaded, or where there are pleas of justification.

(4) Cornwall *v.* Richardson, R. & M. 305. Stuart *v.* Lovell, 2 Stark. C. 93. Jones *v.* Stevens, 11 Price, 235. 2 Stark. C. 93; 2 Campb. 251. Waithman *v.* Weaver, D. & R., N. P. C. 10.

wife or daughter is admissible, where the defendant has endeavoured to impeach it by general evidence upon cross-examination, or by calling witnesses; (1) but it may be doubted, whether the plaintiff in reply can give general good character in evidence, where the defendant's evidence has not been general, but has related to particular instances, especially where the imputations are made in the course of the daughter's cross-examination, who has therefore an opportunity of explaining them away upon re-examination. (2) It seems that, according to the later authorities, evidence of the plaintiff's bad character is not admissible in an action for a malicious prosecution. (3)

For malicious prosecution.

Evidence as to character of *prosecutor*, when admitted.

In criminal matters, evidence of character frequently affords a material presumption in regard to the perpetration of offences. Thus, where the charge is that of rape, or of an assault with an attempt to commit a rape, the general bad character of the prosecutrix may, under the circumstances of particular cases, afford a just inference as to the probability of her having consented to the commission of the act for which the prisoner is indicted. Accordingly, upon the trial of indictments for such offences, evidence is admissible, on the part of the prisoner, that the woman bore a notoriously bad character for want of chastity and common decency. (4) It appears also, that, at least, upon trials for rape, evidence is admissible, that the woman had been before criminally connected with the prisoner. But it seems that evidence of particular facts cannot, in general, be received to impeach the chastity of the woman: as, that, previously to the commission of the offence,

(1) Bamfield *v.* Massey, 1 Camp. 460. Dodd *v.* Norris, 3 Camp. 519.

(2) Bamfield *v.* Massey, 1 Camp. 460. Dodd *v.* Norris, 3 Camp. 519. Bate *v.* Hill, 1 C. & P. 100. See King *v.* Francis, 3 Esp. 116. It may be observed, that it is often impossible to give a satisfactory answer to a charge unexpectedly made, except by general evidence. See Rex *v.* Clarke, 2 Stark. C. 242, where general evidence of character was received after the prosecutrix's character had been impeached upon her cross-examination.

(3) The evidence was admitted by Lord Kenyon, in Rodguer *v.* Tadmire, 2 Esp. 721; rejected by Wood, B., in Newsam *v.* Carr, 2 Stark. C. 70.

(4) In Rex *v.* Clarke, 2 Stark. C. 244. This is stated by Holroyd, J., to be the law as well upon indictments for an assault with intent to commit a rape, as for the capital charge; and it is not necessary that the woman should have been previously interrogated on the subject. *Ibid.*

she had a criminal connection with other persons. (1) It has been held, that the woman in a prosecution for rape is not bound to answer questions tending to criminate and disgrace herself; as, whether she had not before connection with other persons, or with a particular person. (2)

Evidence as to character of *prisoner.*

In trials for felony and high treason, and in trials also for misdemeanors, (where the direct object of the prosecution is to punish the offence,) the prisoner is always permitted to call witnesses to his general character; and in every case of doubt, proof of good character will be entitled to great weight. The inquiry as to the prisoner's general character ought manifestly to bear some analogy and reference to the nature of the charge against him. On a charge of stealing, it would be irrelevant and absurd to inquire into the prisoner's loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. Such evidence relates to principles or moral conduct, which, however they might operate on other occasions, would not be likely to operate on that which alone is the subject of inquiry; it would not afford the least presumption, that the prisoner might not have been tempted to commit the crime for which he is tried, and is therefore totally inapplicable to the point in question. The inquiry must also be as to the *general* character: for it is general character alone, which can afford any test of general conduct, or raise a presumption that the

Upon what points.

General character.

(1) By Holroyd, J., in Rex *v.* Clarke 2 Stark. C. 244. Mr. Justice Holroyd also ruled, that the woman's answers as to particular facts would be conclusive; but it is to be observed, that this is treating the question as merely discrediting the witness, and not as relevant to the issue. *Vide infra*, vol. 2, *Examination of Witnesses.* The same judge also admitted evidence of the woman's conduct and situation since the commission of specific felonies admitted by her in cross-examination. Rex *v.* Hodgson, R. & R. 211, on the alleged ground that the prosecutrix could not be prepared to answer evidence of particular facts. Perhaps it may be considered that the question of the woman's chastity is not directly in issue upon such charges, as it is in actions for *crim. con.* and seduction. The determination of this question may, however, afford a material inference as to the truth of the charge; and the alleged objection to the evidence is in some degree obviated by the power, as in actions of seduction, of producing general evidence of good character in reply.

(2) Rex *v.* Hodgson, R. & R. 211. It may be observed, that the questions do not merely tend to discredit the witness, but are also relevant to the issue. *Vide* vol. 2, *Examination of Witnesses.*

person, who had maintained a fair reputation down to a certain period, would not then begin to act a dishonest unworthy part. Proof of particular transactions, in which the defendant may have been concerned, is not admissible, as evidence of his general good character.

Evidence of general character.

What, then, is evidence of general character? The best medium of proof is, by showing how the person stands in general estimation; proof that he is reputed to be honest, is evidence of his character for honesty, and the species of evidence most properly resorted to in such inquiries. It frequently occurs, indeed, that witnesses, after speaking to the general opinion of the prisoner's character, state their personal experience and opinion of his honesty; but when this statement is admitted, it is rather from favour to the prisoner, than strictly as evidence of general character. (1) In cases where the intention forms a principal ingredient in the offence, a wider scope is allowed. On a charge of murder, for instance, expressions of good will and acts of kindness on the part of the prisoner towards the deceased, are always considered important evidence, as shewing what was his general disposition towards the deceased, from which the jury may be led to conclude, that his intention could not have been what the charge imputes.

Particular acts.

It is not the practice to cross-examine witnesses to character, (2) or to make the calling of them a ground for addressing the jury on the part of the prosecution; though the practice in these respects is not imperative, and, in particular instances, it may be deviated from with propriety. (3) It is expressly provided by the statute 6 & 7 Wm. 4, c. 111, that if upon the trial of any person for felony, such person shall give evidence of good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of a conviction of such person for a previous felony, and the jury shall inquire concerning such pre-

6 & 7 Wm. 4, c. 14.

(1) See 31 Howell, 190, 310.

(2) Rex v. Hodgkiss, 7 C. & P. 298, unless the prosecutor has some distinct charge to which to cross-examine the witness.

(3) 7 C. & P. 676. Rex v. Stannard, 7 C. & P. 673. That a right of reply is given as to the whole case, Rex v. Whiting, 7 C. & P. 771.

vious conviction, at the same time that they inquire concerning the subsequent felony.

In prosecutions evidence to be confined to the charge.

In criminal cases, it is peculiarly the duty of courts of justice to prevent evidence being given which would support a charge against the prisoner, of which he is not previously apprised, under the pretext of it's affording some presumption as to the offence which is the subject of the indictment. In treason, therefore, no evidence is to be admitted of any overt act that is not expressly laid in the indictment. This was the rule at common law: and it is again prescribed and enforced by the statute of Wm. 3, which contains an express provision to that effect, (1) in consequence of some encroachments that had been made in several state prosecutions. (2) The meaning of the rule is, not that the whole detail of facts should be set forth, but that no overt-act, amounting to a distinct independent charge, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment; but still, if it conduce to the proof of any of the overt-acts which are laid, it may be admitted as evidence of such overt acts. (3) With this view, the declarations of the prisoner, and seditious language used by him, are clearly admissible in evidence, as explaining his conduct, and shewing the nature and object of the conspiracy. (4) And acts of treason, tending to prove the overt acts charged, though committed in a foreign country, may be given in evidence. (5)

Examples.

In treason.

In burglary.

On the trial of an indictment for burglary and larceny, (6) it appeared upon the evidence, that the prisoners might have entered the house before it was dark, and that they had not taken any part of the goods at the time when they were discovered in

(1) 7 W. 3, c. 3, s. 8.

(2) Foster, Cr. L. 245, 246.

(3) *Id.* 9, 246. Vaughan's case, 5 St. Tr. 2 fol. ed. S. C. 13 Howell's St. Tr. 453. Deacon's case, 9 St. Tr. 8 fol. ed. S. C. 15 Howell's St. Tr. 747.

(4) Rex *v.* Watson, 2 Starkie, C. 134. So on an indictment for sending a threatening letter, a subsequent letter from the prisoner, explanatory of that stated on the record, is admissible. Robinson's case, 2 East's P. C. 1112.

(5) Fost. Cr. L. 10. Deacon's case, 9 St. Tr. 8, fol. ed. S. C. 15 Howell's St. Tr. 747.

(6) Rex *v.* Vandercomb and Abbott, 2 Leach, Cr. Ca. 816. For disproving a prisoner's *alibi*, proof admitted of acts done by him, though criminal; R. *v.* Briggs, 2 Mood. & R. 199.

the house, upon which the counsel for the prosecution proposed to give evidence of a larceny in the house, committed by the prisoners on a preceding day: but the court rejected the evidence, on the ground that it tended to prove a felony of a totally distinct kind, which had no reference to the subject-matter of the prosecution; the prisoners were, therefore, acquitted on this charge, but were afterwards indicted for the other offence, and convicted.

Where the felony charged is connected with several others.

But although it is usual to confine the prosecutor to one single act of felony, yet, when the character of the particular act charged against the prisoner is to be collected from other acts done by him, all of them constituting one entire transaction, or mutually explanatory of each other, it is discretionary in the judge to allow the prosecutor to go into the whole. (1) Thus, in a case of robbery, where the prisoners came with a mob to the prosecutor's house, and one of them went up to the prosecutor, and civilly advised him to give them something to get rid of them—to shew that this was not *bonâ fide* advice, but in reality a mode of robbing the prosecutor, evidence was allowed to be given of other demands of money made by the same mob at other houses, at different periods of the same day, both before and after the particular transaction, when any of the prisoners were present. (2) A case is cited by Lord Ellenborough, in *Whiley's* case, where a man committed three burglaries in one night, and stole a shirt in one place and left it at another, and they were all so connected, that the court heard the history of the three burglaries. (3)

Proof of other criminal acts to shew intention.

In offences which consist in the guilty knowledge or intention of a prisoner, it is frequently necessary to examine into collateral facts, in order to arrive at a just conclusion upon a matter, which must necessarily depend altogether on presumptive evidence. Thus, in a prosecution for uttering a bank-note,

(1) Ellis's case, 6 B. & C. 145, several purloinings from a till. Egerton's case, R. & R. 376, an infamous accusation on the following evening. Vowkes's case, R. & R. 531, two malicious shootings. Mogg's case, 4 C. & P. 364. Rex v. Moore, 2 C. & P. 235. Rex v Long, 6 C. & P. 179, firing three ricks, for which there were separate indictments.

(2) Winkworth's case, 4 C. & P. 444, upon a special commission, after communicating with Lord Tenterden.

(3) 2 Leach, 985. 1 New R. 92.

bill, or promissory note, with knowledge of it's being forged, proof that the prisoner had uttered other forged notes or bills, whether of the same kind or of a different kind, (1) or that he had other forged notes or bills in his possession, (2) is clearly admissible, as shewing that he knew the note or bill in question to be forged. And on a prosecution for uttering counterfeit money, the fact of the prisoner having other counterfeit money upon him, or of his having uttered other pieces of money of the same kind, is, according to common practice, evidence of his having known that the money, which he is charged with uttering, was counterfeit; (3) and proof of the prisoner's conduct in such other utterings, (as, for example, that he passed by different names,) is, for the same reason, clearly admissible. (4) Such evidence, far from being foreign to the point in issue, is extremely material; for the head of the offence charged upon the prisoner is, that he did the act with knowledge; and it would seldom be possible to ascertain, under what circumstances the uttering took place, (whether from ignorance, or with an intention to commit a fraud,) without inquiring into the demeanor of the prisoner in the course of other transactions. The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment; and the question then would be, whether the evidence is sufficient to warrant the inference of knowledge at one time, from such particular transactions at another time. (5) That may be thought

Uttering other notes or money.

(1) Rex *v.* Wylie, 1 New Rep. 92. Rex *v.* Ball, 1 Camp. 324. Russ. & Ry. Cr. Ca. 132, S. C. That it is not necessary that the other forged notes should be of the same description, see Kirkwood's case, Lewin's Cr. Ca. 103. By Hullock, B., in Hodgson's case, Lewin's Cr. Ca. 103. The point was doubted in Millard's case, R. & R. 245, n. jud. See Bayley on Bills, 4th ed. 450. In Rex *v.* Balls, Mo. Cr. Ca. 470, on an indictment for engraving the notes of a foreign prince, evidence of engraving the notes of *another* foreign prince was held admissible.

(2) Rex *v.* Hough, Russ. & Ry. Cr. Ca. 120. Rex *v.* Rowley, Bayley on Bills, 447. The forgery of the other notes or bills must be distinctly proved; and they ought to be produced, Rex *v.* Millard, Bayley on Bills, 449. Russ. & Ry. Cr. Ca. 245, S. C. Phillips's case, Lewin, Cr. C. 106, where the point was doubted and the evidence received; the notes had been destroyed. It would seem that presumptive evidence of forgery, as that the prisoner destroyed the note, ought to be received.

(3) 1 New Rep. 95. 1 Russ. on Crimes, 85.

(4) See Rex *v.* Millard, R. & R. 245. Bayley on Bills, 449. Tattershall's case, cited by Lord Ellenborough, 2 Leach, 984 Phillips's case, Lewin, Cr. C. 105.

(5) 1 New Rep. 94. It would

a question to be left, in most instances, at least, to the jury. But whatever weight the evidence may have, (which is quite another consideration,) it is, in general, admissible; not as evidence of another offence, but simply of another transaction, in which the prisoner was engaged, affording a reasonable presumption as to his conduct, with regard to the offence with which he is charged.

Proof of subsequent facts for the same purpose.

It may be thought that collateral evidence of facts, occurring soon after the offence with which a prisoner is charged, may sometimes afford as reasonable a presumption of guilty knowledge, as when the facts occurred at some time before the offence. Upon an indictment for uttering a bill with a forged acceptance, knowing it to be forged, it was proposed to give in evidence other forged bills, precisely similar, with the same drawers' and acceptors' names, uttered by the prisoner about a month after the uttering of the bill mentioned in the indictment. Mr. Justice Gaselee, after consulting Alexander, C. B., was disposed to allow the evidence to be received, but said that he would reserve the point for the opinion of the judges; upon which the counsel for the prosecution declined to press the evidence. (1) It is to be observed, however, in this case, that the similarity of the notes shewed, that they originated with one person; and, in a previous case of an indictment for uttering a forged bank note, where the prosecutors offered to prove the uttering of another forged note, five weeks after the uttering which was the subject of the indictment, the court, (consisting of Ellenborough, C. J., Thompson, C. B., and Lawrence, J.,) held that the evidence was not admissible, unless the latter uttering was in some way connected with the principal case, or unless it could be shewn that the notes were of the same manufacture. (2)

seem that the evidence was not the less admissible, because the other forged notes are the subject, at the time, of other indictments; though doubts have been entertained as to this point Kirkwood's case, Lewin's Cr. Ca. 103. Hodgson's case, Lewin's Cr. Ca. *Ibid.* Rex *v.* Smith, 2 C. & P. 633. Rex *v.* Long, 6 C. & P. 179.

It has been held, that evidence of what the prisoner has said at a time collateral to a former uttering, to show that what he said at the time of a former uttering was false is not receivable, Phillips's case, Lewin, Cr. C. 106.

(1) Smith's case, 4 C. & P. 411.

(2) Taverner's case, 4 C. & P. 413, n. On a charge for sending a threatening letter, or of publishing a libel, acts done by the prisoner

Proof of other criminal acts to shew intention.

Upon other proceedings, besides prosecutions for forgery, or the uttering of forged notes or counterfeit coin, it is frequently material to give evidence of other acts, not in issue, in order to raise a presumption as to the intent of the prisoner, in committing the act for which he is indicted. Thus, upon an indictment for maliciously shooting, evidence was allowed to be given, that the prisoner, about a quarter of an hour before the shooting with which he was charged, intentionally shot at the prosecutor, (1) the whole being one continued transaction in the prosecution of the malicious intent of the prisoner. So, on a charge for sending a threatening letter, other letters written by the prisoner, both before and after that for which he is indicted, may be read in evidence, for the purpose of explanation. (2) And, in like manner, in actions for libel or slander, it has been held that other libels or words may be given in evidence, occurring both before and after the subject of the action, in order to shew the *animus* of the defendant. (3)

Malicious shooting.

Threatening letter.

Libel.

In prosecution for receiving, &c.

Upon an indictment for receiving stolen goods, which had been all stolen at the same time, but received at different times, the prosecutor was put to his election of some particular act of receiving; but it was held, that evidence might have been given of the prisoner having in his possession, and of having pledged and disposed of, other articles of the stolen property, in order to shew his guilty knowledge, as all the property had been stolen from the same persons, and had been brought to the prisoner by the prisoner indicted with him for the theft. (4)

subsequently to the offence charged, are admissible to shew the *animus*. *Vide infra.* In like manner, subsequent felonies have been given in evidence to explain a preceding one, Egerton's case and Winkworth's case, *supra.*

(1) Vowkes's case, R. & R. 531.

(2) Robinson's case, 2 East's P. C. 1110; 2 Leach, 749.

(3) Charlton *v.* Barrett, Peake, 22. Rex *v.* Pearce, Peake, 75, 124, 166. Rastell *v.* Macquesta, 1 Camp. 49, n. Stuart *v.* Lovel, 2 Stark. C. 93, subsequent publications. Lord Ellenborough observed, that the law would be the same upon an indictment. Chubb *v.* Westley, 6 C. & P. 436. Plunkett *v.* Cobbett, 5 Esp. 136; 2 Camp. 73, n.; 3 C. & P. 312; 2 Camp. 72, 73, n.; 5 Esp. 136; 2 Stark. C. 457; 3 B. & C. 113; R. & M. 422. Proof of collateral matters in actions for malicious prosecution, to shew malice, Caddy *v.* Barlow, 1 Mann. & Ry. 275.

(4) Dunn's case, Mo. Cr. Ca. 150. The report contains a marginal note, that the evidence had been confined to acts previous to that on which the prosecutor had elected

Or for conspiracy to cheat.

On an indictment against several prisoners, for a conspiracy to carry on the business of *common cheats*, proof is admissible that the prisoners, at a different time, made similar representations to other tradesmen besides those named in the record, (1) cumulative instances being necessary to prove the offence. The same sort of evidence is allowed in a prosecution for barratry, and, as before mentioned, in prosecutions for the greatest of all offences, high treason. The same kind of proof is constantly admitted in trials for murder; in which former grudges and antecedent menaces are evidence of the prisoner's malice against the deceased.

Or for murder.

Rule as to conspiracy to riot.

On the trial of an indictment against several persons for a conspiracy, in unlawfully assembling for the purpose of exciting discontent and disaffection, it would be irrelevant to inquire, on behalf of the defendants, what the conduct of those employed to disperse the meeting may have been at the time of the dispersion, if no evidence has been previously offered, on the part of the prosecution as to the conduct of the meeting at that time or subsequently; for the conduct of the dispersers of the meeting can have no bearing on the intention and object of the meeting itself; in other words, it is irrelevant to the matters in issue. (2) In such a prosecution, as the material points for the consideration of the jury are, the general character and intention of the assembly, and the particular case of each defendant as connected with that general character, it would be relevant to prove, on the part of the prosecution, that bodies of men came from different parts of the country to attend the meeting, arranged and organized in the same manner, and acting in concert. It would be relevant also to shew, that early on the day of the meeting, in a spot at some distance from the place of meeting, (from which very spot a body of men came afterwards to the place of meeting,) a great number of persons, so organized, had assembled, and had there conducted themselves

to proceed. The same point has occurred in respect of utterings subsequent to that for which a prisoner is indicted. That the possession of property may afford presumptive evidence of the commission of arson, Rickman's case, 2 East's P. C. 1035.

(1) Rex *v.* Roberts, 1 Camp. 400.

(2) Rex *v.* Hunt, 3 Barn & Ald. 566, 577.

in a disloyal, riotous, or seditious manner. (1) Further, it would be relevant, on such a trial, to produce in evidence certain resolutions, which had been proposed by one of the defendants, at a large assembly in another part of the country very recently held for the same professed object and purpose as were avowed by the meeting in question, and that the defendant acted at both meetings as president or chairman; in a question of intention, as this is, it is most clearly relevant to shew against that individual, that at a similiar meeting, held for an object professedly similar, such matters had passed under his immediate auspices. (2)

Upon trials of indictments for offences involving a charge of conspiracy, much evidence is usually produced, which does not relate to the particular conduct of a prisoner. Such evidence, however, is not necessarily of a presumptive nature. Thus it is usual to give general evidence of a conspiracy, previously to shewing the connection of the prisoner with it. (3) It has been seen, in treating of hearsay evidence, that the acts and declarations of other conspirators in the absence of the prisoner are admissible against him; it has been seen also, in treating of admissions, that the prisoner may be affected by writings from other persons, which came into his custody before his apprehension. In these cases the evidence is of a direct nature, applying to the acts in furtherance of a conspiracy and not circumstantial, as proving only collateral circumstances from which these acts are to be inferred.

General disposition to commit such an offence not proveable.

It would not be allowable to shew, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that charged against him. Thus, in a prosecution for an infamous crime, an admission by the prisoner, that he had committed such an offence at another time, and with another person, and that he had a tendency to such practices, ought not to be received in evidence. (4)

(1) Rex *v.* Hunt, 3 Barn. & Ald. 573, 574.

(2) Rex *v.* Hunt, 3 Barn. & Ald. 568, 572.

(3) The Queen's case, 2 B. & B. 302, and State Trials, *passim.*

(4) Rex *v.* Cole, Mich. Term, 1810, by all the judges, MS.

Acts and declarations of prisoner when evidence for him.

As, in trials for conspiracies, whatever the prisoner may have done or said, at any meeting alleged to have been held in pursuance of the conspiracy, is admissible in evidence against him, on the part of the prosecution; so, on the other hand, any other part of his conduct at the same meetings, will be allowed to be proved on his behalf: for the intention and design of the party, at a particular time, are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single and insulated act or declaration. In the case of *Walker* and others, (1) who were tried for a conspiracy to overthrow the government, evidence having been produced, on the part of the prosecution, to shew that the conspiracy existed and was brought into over-act at meetings in the presence of Walker, the counsel for the prisoners were allowed to ask a witness, whether, at any of these times, he had ever heard Walker utter any word inconsistent with the duty of a good subject? The question was opposed, but held by Mr. Justice Heath to be admissible. The prisoner's counsel were also allowed, in the same case, to inquire into the general declarations of the prisoner at those meetings; as, whether the witness had heard him say any thing that had a tendency to disturb the peace of the kingdom; and questions to the same effect were put to many other witnesses in succession.

When they refer to transactions proved against him.

The question, in the case last cited, was expressly confined, and so required by the court to be, to the conduct of the prisoner at those particular meetings, which had been previously inquired into on the part of the prosecution. Proof of what the prisoner might have said or done at other meetings, or at other times, unconnected with the transactions proved against him, would not have been admissible evidence in his favour. In *Lord George Gordon's* case, (2) a witness was asked, by the prisoner's counsel on cross-examination, as to a statement made by the prisoner, on the night before a meeting in St. George's Fields, and with respect to which meeting much evidence had been produced. This was objected to; and the court decided, that the question was not regular. Lord Mansfield held, that as the

(1) 23 Howell, 1131, and see 31 Howell's St. Tr. 43.

(2) 21 Howell's St. Tr. 542.

counsel for the crown had given evidence of what the prisoner said at the meeting upon the 29th May, the counsel for the prisoner might shew the whole connection of what the prisoner said besides at that meeting; but that they could not go into evidence of what he said on the antecedent day. And in *Hanson's* case, (1) on a charge for promoting a riot, the counsel for the prisoner was not allowed to prove what he had said privately to a friend, previously to his going to the place of riot, respecting his motive in going thither. Many other cases might be cited to the same effect.

H. Tooke's case.

The rule, on this subject, appears to have been extended much beyond the line here laid down, on the trial of *Horne Tooke*. (2) In that case, several publications were given in evidence, on the part of the crown, containing, as was alleged, republican opinions, which had been distributed by the prisoner during the period assigned for the existence of the conspiracy; and this evidence was much relied on, as shewing that the notion of a reform, which was expected to be set up by the prisoner in his defence, was a mere pretext to cover treasonable designs: to repel this conclusion, the counsel for the prisoner offered in evidence a book, which had been written by the prisoner twelve years before, on the subject of parliamentary reform; the evidence was objected to, as having no relation with the particular transaction in question, and because the prisoner's opinions, whatever they were formerly, might have afterwards charged. But the Lord Chief Justice Eyre said, that the question was not whether this book had a reference to the conspiracy charged, but whether it had not reference to the proof given in support of the charge: and he thought it evidence to rebut the supposition, that the reform of parliament was a pretence made by the prisoner. book was accordingly received in evidence. There i authority, however, for doubting, whether such evidence would, on revision, be considered strictly admissible. (3) It seems, indeed, reasonable, if some other acts

(1) 31 Howell's St. Tr. 4281.

(2) 1 East's P. C. 61, Gurney's Report, vol. ii. 36. 25 Howell's St. Tr. 345, S. C.

(3) See the observations on this point by Lord Ellenborough, C. J., in Rex *v.* Lambert and Perry, 31 Howell's St. Tr. 355, S. C. 2

of the prisoner, besides those charged in the indictment, are proved against him for the purpose of shewing his design in the affair in question, that he should be allowed to explain those acts by proof of other *contemporaneous* particulars of his conduct, which shew that he had a different design from that imputed to him. But this limitation (namely, that such other particulars, offered in evidence by the prisoner, ought to be contemporaneous with those proved on the other side, or at least confined within the same limits to which the evidence on the part of the prosecution is subject,) appears to be just and necessary; for, otherwise, the prisoner would be at liberty to take the whole range of his life, in the course of which his character and his designs may have undergone a complete change.

Hardy's case.

In *Hardy's* case, (1) great liberty was allowed to the counsel for the prisoner, in examining into particulars of his conduct, even into his speculative opinions; and perhaps it may be questionable, whether the rule was not carried to it's utmost extent in that case. The question there put to the witness was this: whether, from his personal acquaintance with the prisoner, he had ever heard him state what was his plan of reform? The question was objected to. The overt-act charged was, that the prisoner, for the purpose of accomplishing the treason of compassing the king's death, did conspire with others to call a convention of the people, in order that the convention might depose the king; and the counsel for the prisoner submitted, that for the purpose of shewing that the convention was intended to be held, not with the design imputed by the indictment, but with an innocent design, they might go into evidence of what the prisoner had at other times declared, inasmuch as the counsel for the prosecution had gone into all that the prisoner had, at any part of his life, declared touching this fact, and had

Campb. N. P. C. 400. In that case, which was on the trial of an information for a libel in a newspaper, it was held that the defendant had a right to have read in evidence any extract from the same paper connected with the subject charged as libellous, although disjoined from it by extraneous matter, and printed in a different character.

(1) 24 Howell's State Trials, 1065—1093. See trial of O'Coigly and O'Connor, 27 Howell's State Trials, p. 31, and 31 Howell's St. Tr. 189, 310.

gone also into evidence of what other members of the corresponding societies had said. They then defended the question by an able argument, in the course of which several cases were cited from the state trials; particularly the case of Lord Russell, the one which came nearest in principle to that under discussion, where the charge against the prisoner was for compassing the king's death, and the overt act was consulting to raise rebellion and seize the king's guards; and Lord Russell, in his defence, called many witnesses to speak to his affection towards the government, and his detestation of risings against it; some of the witnesses gave evidence of his conversations and sentiments on this subject, shewing his aversion to all risings of the people: Dr. Burnett and Dr. Cox, in particular, spoke fully to this point, and without any objection either from the court or from the counsel for the prosecution. After the question in *Hardy's* case had been argued at some length, Lord Chief Justice Eyre is reported to have thus addressed himself to the prisoner's counsel, (1) "I do not know whether you can be content to acquiesce in the opinion that we are inclined to form upon the subject, in which we go a certain way with you. Nothing is so clear, as that all declarations which apply to facts, and even apply to the particular case that is charged—though the intent should make a part of that charge, are evidence against a prisoner, and are not evidence for him; because the presumption, upon which declarations are evidence, is, that no man would declare any thing against himself, unless it were true; but that every man, if he were in difficulty, or in apprehension of any difficulty, would make declarations for himself. Those declarations, if offered as evidence, would be offered, therefore, upon no ground which entitles them to credit. That is the general rule. But if the question be, what was the political speculative opinion which this man entertained touching a reform of parliament, I believe we all think that opinion may very well be learned and discovered by the conversations which he has held at any time or in any place." The question afterwards put to the witness was, whether, before the time of the conventier which

Lord Russell's case.

(1) 24 Howell's St. Tr. 1094.

was imputed to the prisoner, he had ever heard from him what his objects were, and whether he had at all mixed himself in that business; and, in answer, the witness stated what he had heard from the prisoner respecting his plan of reform. (1)

Section III.

The rule which is now the subject of discusssion, (namely, that evidence is to be confined to the points in issue,) will be further illustrated by considering the effect of judgments by default, of payment of money into court, and of particulars of demand.

What a judgment by default admits.

A judgment by default is an admission of the cause of action. Thus, in an action on a bill of exchange against the defendant as acceptor it admits that he accepted it, and that the bill is as stated in the declaration; and he cannot afterwards shew, on the execution of a writ of inquiry, that he had not accepted it; (2) nor can he object to the sufficiency of the stamp, on which the bill is drawn: the only use in producing the bill is, for the purpose of seeing whether there is any indorsement upon it, of money having been paid. (3) So, in an action for goods sold and delivered, or for money had and received, the defendant, by suffering judgment to go by default, admits that something is due; and he cannot afterwards dispute the contract of sale, or shew fraud on the part of the plaintiff in making the contract;(4)* but the plaintiff will only have to prove the amount due to him.

(1) 24 Howell's St. Tr. p. 1097. Another question, which is stated to have been put by the prisoner's counsel to one of the witnesses, and allowed to be answered, was, as to what the prisoner had declared to be the object of the corresponding societies. This question was not opposed. *Ibid.* p. 1101.

(2) Green *v.* Hearne, 3 T. R. 301. Bevis *v.* Lindsell, 2 Str. 1149.

(3) 3 T. R. 302. Billers *v.* Bowles, Barnes' Rep. 233. Ellis *v.* Wall, *ib.* 234. Bayley on Bills, 227; and Mills *v.* Lyne, 487.

(4) East Indian Company *v.* Glover, 1 Str. 612.

---

* After judgment by default against one of two defendants, the plaintiff may elect to be nonsuited on the trial of the issue joined by the other defendant. Murphy *v.* Doulan, 5 Barn. & Cress. 178.

So, on the execution of a writ of inquiry after judgment on demurrer, the defendant cannot controvert any thing but the amount of the sum in demand: as, in an action for goods sold and delivered, to which the defendant pleaded coverture, and the plaintiff replied that the defendant's husband had resided abroad, and that the defendant, during all the time, &c. had carried on trade as a *feme sole*, the court were of opinion, that, after judgment on demurrer to this replication, evidence of the wife having acted as agent to the husband ought not to have been admitted on the execution of the writ of inquiry; that the only question, to be decided by the jury, was the amount of the debt; and that the question, whether the debt had been contracted by the defendant as agent for her husband, or in her separate capacity, ought to have been considered as determined by the record. (1)

Judgment on demurrer.

Of the Effect of Payment of Money into Court.

The provision, respecting the payment of money into court, in the law-amendment-act, (2) has not made any alteration as to the effect of such payments, considered as an admission. In this view, it is the same precisely as it was before the act passed. It's effect, as an admission, must be considered with reference to the state of the pleadings, and the subject-matter of the admission. Such payments is in general an acknowledgment of the right of action to the amount of the particular sum. (3) A general plea of payment into court, in an action of covenant, is an admission of some damage on every part of the breach of covenant in the declaration. (4) And as it is an acknowledgment on record, the party cannot recover it back, although he has paid it wrongfully or by mistake. (5) It is an admission by the defendant, that the plaintiff has a legal demand to a certain extent. But it is not an acknowledgment beyond that amount, and will not preclude the defendant from taking any objection to the action with respect to any other part of the demand, to which the payment of the money does not apply,

Effect as an admission.

To what extent.

(1) De Gaillon *v.* L'Aigle, 1 Bos. & Pull. 368.

(2) 3 & 4 Wm. 4, c. 42, s. 21.

(3) 5 Burr. 2640. 1 T. R. 465. 2 East, 134. 1 Barn. & Cress. 4. 3 Barn. & Cress. 10.

(4) Wright *v.* Goddard, 8 Ad. & Ell. 144.

(5) Vaughan *v.* Barnes, 2 Bos. & Pull. 392. Malcolm *v.* Fullarton, 2 T. R. 645.

although, if no money had been brought into court, the objection might have been a bar to the whole demand. (1)

General plea of payment, its effect.

Where there is a count on a special contract together with money counts, payment of money generally upon the whole declaration is an admission of the contract on every count, to which the contract is in its nature applicable. (2) Thus in the case of *Cox* v. *Brain*, (3) where the declaration stated a specific bargain to pay a particular sum of money for certain articles, a general payment of part of the money into court, by admitting the bargain, admitted also the sum which was originally due; and the only question that could be raised after that admission, would be, whether the remainder of the money had been previously paid. If the contract had been to pay, not any particular price, but the average price at which such articles were sold, to be ascertained by a certain time, a general payment of money into court would not have admitted the amount of the breach as stated in the declaration, though it would admit a cause of action on each count, and something due on each of the breaches: the contract is admitted, but not the averment of the average price. (4)

Plea to separate counts.

The plea of payment, when pleaded to a special count, confines the inquiry to the amount of damages; when pleaded to the *indebitatus* counts, it admits that the defendant was indebted, either entirely, or upon one or more separate contracts. (5)

Effect in action on policy.

Where the defendant has paid money into court generally, upon a declaration containing a count on a policy of insurance together with money counts, he will not afterwards be permitted to shew, that the policy was originally different from that set out in the special count, but altered by the broker without his knowledge. (6)

(1) Cox *v.* Parry, 1 T. R. 464. Mellish *v.* Allnut, 2 Maule & Selw. 106. Blackburn *v.* Scholes, 2 Campb. 341. Meager *v.* Smith, 4 B. & Ad. 678. Booth *v.* Howard, 5 Dowl. 438.

(2) Bennett *v.* Francis, 2 Bos. & Pull. 550.

(3) 3 Taunt. 95. 2 Barn. & Ald. 118.

(4) Stoveld *v.* Brewin, 2 Barn. & Ald. 116. In Everth *v.* Bell, 7 Taunt. 450. Lechmere *v.* Fletcher, 1 C. & M. 623.

(5) By Parke, B., in Hingham *v.* Robins, 7 Dowl. 357, correcting what was said in Meager *v.* Smith, 4 B. & Ad. 680.

(6) Andrews *v.* Palsgrave, 9 East, 325.

In an action to recover the amount of the sale of goods, which have been sold by sample at a particular price, the defendant will not be allowed to shew, after such general payment into court, that the goods were of a quality inferior to the sample. (1)

In case of a sale by sample.

In an action of assumpsit for goods sold and delivered, and on the money counts, in which the defendant paid money into court, and pleaded the general issue, with a plea of the statute of limitations, payment into court generally does not take the case out of the statute. (2)

Pleaded, with plea of Statute of Limitations.

In an action on a bill of exchange, the defendant, by paying money into court generally, dispenses with the regular proof of the party's handwriting, (3) and cannot object to the sufficiency of the stamp on which the bill is drawn. (4) So, in an action of covenant, he admits the execution of the deed. (5) On the same principle, payment of money into court admits the plaintiff's right to sue in that court: (6) it admits also the title on which he sues, as, for instance, his being a surgeon, (7) or farmer of tithes, &c. (8)

Plea admits signature on note or bill; sufficiency of stamp; execution of deed; jurisdiction of court; title of plaintiff in suing.

In an action upon a promise to pay another person's debt, the defendant cannot insist, after paying money into court, on the count charging him with such promise, that the promise is not binding, because not written and signed, as the statute of frauds directs; for he has admitted the agreement to be binding to a certain extent, and disputes only the amount of the debt. (9)

Admits an agreement to be valid within the statute of frauds.

Payment of money into court is an admission only of a legal

Gives no effect to an *illegal* contract.

(1) Leggett *v.* Cooper, 2 Starkie, N. P. C. 103.

(2) Long *v.* Greville, 3 Barn. & Cress. 10. Reid *v.* Dickons, 5 B. & Ad. 499.

(3) Gutteridge *v.* Smith, 2 H. Bl. 374. Middleton *v.* Brewer, Peake, N. P. C. 15.

(4) Israel *v.* Benjamin, 3 Campb. 40.

(5) Randale *v.* Lynch, 2 Campb. 357. Watkins *v.* Towers, 2 T. R. 275.

(6) Miller *v.* Williams, 5 Esp. N. P. C. 19.

(7) Lipscombe *v.* Holmes, 2 Campb. 441.

(8) Broadhurst *v.* Baldwin, 4 Price, 58.

(9) Ramsbottom *v.* Brewer, Peake, N. P. C. 15.

demand. If the contract declared upon be illegal, the defendant cannot give it validity by his admission; no admission of the parties will oblige the Court to give effect to an illegal transaction. (1)

Although payment of money into court admits the contract, that is, the entire consideration for the act and the entire act which is to be done for such consideration, yet it will not be an admission of other parts of the contract, which are distinct and collateral, respecting the liquidation of damages after breach of the contract. (2) If indeed the provision is of such a nature as will discharge the defendant from all liability under the contract, unless the plaintiff has complied with the condition, (as was the case in *Clay* v. *Willan* (3), where the goods were not to be accounted for to any amount unless properly entered and paid for,) that will operate not merely in reduction of the damages, but in bar of the action: and therefore, in such a case, if the defendant pays money into court on a declaration against a carrier in a common form, he cannot afterwards give in evidence such a provision, which entirely negatives the contract as stated in the declaration.

Proof of payment.

Where a rule or judge's order is still necessary to authorize a payment of money into court, (4) the payment into court must be proved by the production of the rule or order, or by an office copy. It will not be sufficient to call the attorney, who has taken the money out of court. (5) The production of the rule by the defendant does not entitle the plaintiff to a reply. (6)

Of the Effect of a Particular of Demand.

The Courts of Common Law have a general jurisdiction, independently of any statute, to order particulars of demand, or of defence, to be given, in order to prevent the necessity of

(1) Ribbans *v.* Cricket, 1 Bos. & Pull. 264. 2 East, 134.

(2) See Clarke *v.* Gray, 6 East, 564.

(3) 1 H. Bl. 298. 6 East, 570.

(4) See the exceptions in sect. 21, st. 3 & 4 Wm. 4, c. 42, and rule of H. T. 4 Wm. 4, s. 18.

(5) Israel *v.* Benjamin, 3 Campb. 40. As to the commencement of the practice of paying money into court, see 2 H. Bl. 376. 1 Lord Raym. 254.

(6) 2 Taunt. 267.

applying to a Court of Equity, and to enable them to administer justice effectually between the parties.

It has been before mentioned, that a bill delivered by an attorney to his client for business done during a certain period, or by a tradesman for goods sold, is strong presumptive evidence against any additional item within the same period. The party is not, however, precluded from shewing, that items, included in a subsequent bill, have been omitted by mistake in the former bill, and that the business, which is the subject of the charge, has been done by him for the defendant. A bill of particulars, delivered under a judge's order, is more conclusive: its sole object is to inform the opposite party of what he ought to come prepared to try; and it will effectually preclude the party, who delivers it, from giving evidence of any other demand not there stated.

Effect of bill of particulars.

Thus, where a declaration contained a count for money had and received for the plaintiff's use, and also a demand for horses sold by the plaintiff to the defendant himself, and the bill of particulars specified the last demand alone, it was decided that the plaintiff could not give evidence of horses being sold by the defendant as the plaintiff's agent (1): for a contract for the absolute sale of horses to the defendant is essentially different from a contract to repay money received on a sale of horses by commission; and the proceeds of such a sale by the defendant could only be recovered under the count for money had and received, which the plaintiff abandoned by confining his bill of particulars to the demand stated in the other count.

Particular confined to part of demand.

In *Moss* v. *Smith* (2), an action to recover the value of property deposited with the defendant for safe custody, the declaration alleged two breaches:—1. That he had not taken proper care of the property: 2. That he had not returned part. The particulars took the same distinction, giving two sets of articles, one set as not returned, the other as damaged. In the parti-

(1) Holland *v.* Hopkins, 2 Bos. & Pull. 243. Macarthy *v.* Smith, 8 Bing. 145. Davenport *v.* Davies, 1 M. & W. 570.

(2) Moss *v.* Smith, 8 Dowl. 537, 1 Sc. N. S. 25, S. C.

culars, some *glass* was described as not *returned,* but it appeared by the evidence, that the glass so described had been broken. The Judge held, and the Court of Common Pleas agreed with him, that damages for the *broken* glass could not be recovered under that head of the particulars which related to goods not *returned.*

Where the declaration contains a count on a promissory note, together with money counts, and the particular of demand includes only the note, the plaintiff will not be allowed to prove the consideration for which the note was given, in order to recover under the money counts. (1)

So, where the declaration contained counts on three several bills of exchange, but in the particulars the plaintiff claimed in respect of the first of them only, it was held, that the plaintiff clearly could not recover on the other two,—though they were admissible in evidence on a collateral inquiry, whether two of the defendants had ceased to be partners at the time when the bill was given, in respect of which they were sought to be charged. (2) But where the declaration contained two counts, each on a bill of exchange, and the particulars stated the action to be brought to recover the amount of the bill mentioned in the first count, with interest, and that the plaintiff *would rely on the whole or any part of the declaration* for the recovery thereof, the plaintiff was allowed to recover on the second count. (3)

Enlarged by second particular.

Although the plaintiff, on perceiving the defect of his first particular of demand, which only mentions the promissory note, delivers a second bill of particulars large enough to comprehend the original debt, yet this will not avail him, unless the second particular has been delivered under a Judge's order. (4)

Particulars not abridged by demand.

On the other hand, if the plaintiff, either before or after

(1) Wade *v.* Beasley, 4 Esp. N. P. C. 7.

(2) Duncan *v.* Hill, 2 B. & B. 682. Breckon *v.* Smith, 1 Ad. & Ell. 488. See Cooper *v.* Amos, *infra*, p. 489.

(3) Hay *v.* Fisher, 2 M. & W. 722.

(4) Brown *v.* Watts, 1 Taunt. 353.

delivering a bill of particulars under a Judge's order, makes a demand of payment only for a part of the articles specified in the bill, such a demand will not have the effect of confining him in his evidence, nor supersede the bill of particulars. (1)

Interest on note recovered, though not particularized.

In an action on a note, if the plaintiff is entitled to recover the principal sum due, he may recover interest also, as arising out of the principal, and incident to it, though it has not been specifically claimed in the particular of demand. (2)

Plaintiff's particular, evidence in support of defendant's plea.

In an action of assumpsit, where the defendant pleaded in abatement, that the promises were made by himself and another person jointly, on which plea issue was joined, and on the trial it appeared from the bill of particulars, that some of the articles had been furnished to the defendant jointly with the person named in the plea, and they were not distinguished from the rest of the articles, Lord Kenyon, C. J., held that the plaintiff was bound by his bill of particulars, which supported the defendant's plea: and therefore he nonsuited the plaintiff. (3) Here the articles, stated to have been furnished on the joint credit of the defendant and another person, were items of the plaintiff's demand and were a necessary part of his bill of particulars, if he intended to recover for them.

In what case the plaintiff may recover on special count; though particulars do not allude to it.

Where the declaration, in addition to the common counts, contains special counts, of which no rule of practice, nor previously obtained judge's order, calls upon the plaintiff for particulars, and the particulars, furnished to the defendant and annexed to the record, relate to the common counts only, the plaintiff will not be precluded from giving evidence in support of the special counts. Thus, in an action on a bill of exchange, and for the price of goods sold and delivered, the plaintiff may recover on the bill, though the particulars relate to the goods only. (4)

(1) Short *v.* Edwards, 1 Esp. N. P. C. 374.

(2) Blake *v.* Lawrence, 4 Esp. N. P. C. 147.

(3) Colson *v.* Selby, 1 Esp. N. P. C. 452. A rule to set aside the nonsuit was afterwards refused by the court. Tidd. Pr. 9th ed. 600.

(4) Cooper *v.* Amos, 2 C. & P. 267. Day *v.* Davies, 5 C. & P. 340. Fisher *v.* Wainwright, 1 M. & W. 480.

Error in particular.

The use of a bill of particulars is to prevent the inconveniences which might otherwise arise from the general and undefined statements in the plaintiff's declaration, and to apprise the defendant of the particulars of the demand, which the plaintiff has against him. If it gives sufficient information to the opposite party to guard him against surprise, it answers the purpose for which it was intended, and will be sufficient, though it may be in some respects inaccurate. Thus, in an action of assumpsit for money paid to the defendant's use, where in the bill of particulars an item for money advanced was by mistake written under the name of A. B., instead of being written under that of C. D. in another part of the particular, and thus appeared to have been advanced to the former, Lord Ellenborough allowed the plaintiff to prove, that the item in question was intended, and must have been understood, to refer to the latter name, but by mere clerical error had been misplaced; and that if the defendant could shew by affidavit, that he had been misled by the plaintiff's particular, it might furnish a ground for the court afterwards to set aside that particular sum. (1) So where the work for which the action was brought was stated by the particular to have been done in a wrong month, when in fact no work had been done, the plaintiff was allowed to give evidence of his having done work for the defendant in the other month. (2)

Clerical error.

Error in date.

The particulars of the plaintiff's demand were on an account stated, with this addition, "as appears by a memorandum under the hand of the defendant of this date," and the memorandum could not be received for want of a stamp; it was held, that the account stated might be proved by other evidence than the memorandum; and that parol evidence might be given of an admission of the money being due, and of a

(1) Day *v.* Bower, 1 Campb. 69, n. Brown *v.* Hodgson, 4 Taunt. 189. See also Davies *v.* Edwards, 3 Maule & Selw. 380, an action of debt to recover rent, where the locality of the premises, not described in the pleadings, had been misdescribed in the particular; but the objection was overruled.

(2) Millwood *v.* Walter, 2 Taunt. 224. See also Harrison *v.* Wood, 1 M. & Sc. 536. 8 Bing. 371. S. C. Lambirth *v.* Roff, 1 M. & Sc. 597. Green *v.* Clark, 2 Dowl. 18. See also Lane *v.* Micklethwaite, 9 Dowl. 531.

promise to pay by instalments, though the admission and promise were made at the same time with the memorandum, and embodied in it.(1)

When defendant's evidence supplies other items for plaintiff.

In the case of *Hurst* v. *Watkis*,(2) which was an action brought by one partner against another to recover a balance due on a statement of accounts, where the bill of particulars was confined to the balance due on *separate* accounts, the plaintiff, in support of this demand, gave in evidence an account in which the defendant made himself debtor to a certain amount, and the defendant in answer to this evidence produced an account subsequently rendered by the plaintiff, according to which there appeared to be a balance due to the defendant on the *separate* accounts; but on the opposite side of the page, there was a statement also of the *partnership* accounts, on which the balance was in favour of the plaintiff, and greatly exceeded the balance on the separate account. It was objected that the plaintiff could not recover beyond his particular; Lord Ellenborough however held, that the defendant himself had given the plaintiff a better case than he was at liberty to make for himself, and that the plaintiff was entitled to a verdict for all that had been proved to be due to him. The parties afterwards came to a compromise, and agreed upon the sum to be recovered. So in *Fisher* v. *Wainwright*, (3) Mr. Baron Parke held, that although the bill of particulars confines the plaintiff's evidence to the causes of action mentioned in the particulars, yet if the defendant, in giving evidence for himself, gives evidence also for the plaintiff of some claim not included in the particulars, the plaintiff, as to that claim, is no longer confined to the particulars, but may avail himself of the defendant's evidence.

When particulars of demand have been annexed to the record, neither the order for particulars, nor the delivery of the particulars, need be proved. When they are not annexed,

(1) Singleton *v.* Barrett, 2 C. & J. 368.
(2) Hurst *v.* Watkis, 1 Campb. 68.
(3) Fisher *v.* Wainwright, 1 M. & W. 486.

the particulars are proved by the producing the judge's order, and proving the delivery of the particulars. (1) The delivery will be sufficiently proved by proving the signature of the party's attorney, or of his agent, on the particular.

If the particulars annexed vary from those delivered to the defendant, it will be prudent to be prepared with proof of the particular delivered, that he may avail himself of such proof, in case the plaintiff has not proved any cause of action included in the particulars delivered. (2) This variance would be a ground of nonsuit.

CHAPTER X.

OF THE RULE FOR DETERMINING WHETHER THE PLAINTIFF OR DEFENDANT OUGHT TO PROVE THE ISSUES ON THE RECORD.

THE competency of witnesses, and the quality of evidence, having been fully treated of, two questions remain to be considered; the one, as to the party on whom the burthen of proving an issue is cast; the other, as to the form or particularity required in the proof: in other words, which of the parties is to prove the issue, and to what extent must the issue be proved. These will be the subjects of the two last chapters.

(1) Macarthy *v.* Smith, 8 Bing. 145. 1 Dowl. 253. S. C.

(2) Morgan *v.* Harris, 1 Dowl. 570. 2 C. & J. 461. S. C.

There are several general rules, of great use for ascertaining whether the plaintiff or defendant will have to prove the issue on the record. One of the most useful of these is the rule, that the point in issue is to be proved by the party who asserts the affirmative—that is, the affirmative in substance, not in mere form. A few instances will be sufficient to illustrate this rule.

Action for loss by barratry.

In an action for a loss, occasioned by barratry in the master of a ship, where it was objected by the defendant, that the plaintiff ought to prove that the master was not also the owner or freighter, and that he did not act under the direction of the person who was, (in which case barratry could not be committed,) the court held, that if the master was owner or freighter, or acted under the direction of the owner, the burthen of proving that fact lay on the defendant. (1) "It was not incumbent on the plaintiff," said Mr. Justice Buller, "to prove that the captain was not the owner, for that would be calling on him to prove a negative; and if the captain were not the owner, it is immaterial who was; proof of that fact, which operates in discharge of the other party, lies upon him."

Charge of breach of duty.

Where one party charges another with a culpable omission or breach of duty, the general rule, above laid down, does not apply. In such a case, the person who makes the charge is bound to prove it, though it may involve a negative; for it is one of the first principles of justice, not to presume that a person has acted illegally, till the contrary is proved. Thus, in a suit for tithes in the Spiritual Court, where the defendant pleaded that the plaintiff had not read the thirty-nine articles, the court called on the defendant to prove the fact, though a negative: upon which he moved the Court of King's Bench for a prohibition; but it was refused, for the reason already stated. (2)

In not reading the thirty-nine articles;

In putting combustibles on board a vessel.

In an action by the owner of a ship against the

(1) Ross *v.* Hunter, 4 T. R. 33, 38.

(2) Monke *v.* Butler, 1 Roll. Rep. 83, cited by Lord Ellenborough, 3 East, 199. Powell *v.* Millbank, 2 Black. Rep. 851. S. P. 3 Wils. 355, S. C. See also Lord Halifax's case, Bull. N. P. (298). R. *v.* Combs, Comb. 57. Gilb. Ev. 132.

defendants, for putting on board a quantity of combustible and dangerous articles, "without giving due notice thereof," the court held, that it lay upon the plaintiff to prove this negative averment. (1) In an action, for the recovery of penalties, under the Hawkers' and Pedlars' Act, (2) against a person charged with having sold goods by auction, in a place in which he was not a householder, some proof of this negative, namely, of the defendant not being a householder in the place, would be necessary on the part of the plaintiff. And in an action of covenant against a lessee, where the breach is, in the language of the covenant, that the defendant did not leave the premises well repaired at the end of the term, the proof of the breach lies upon the plaintiff; this breach, though in terms it involves a negative, admits of as easy proof, as if it had been expressed in the affirmative.

Breach of covenant (stated negatively) to be proved.

Pros. for coursing without consent, &c.—what proof necessary of want of consent.

On the trial of an indictment on the statute 42 Geo. 3, c. 107, s. 1, which makes it felony to course deer on an inclosed ground "without the consent of the owner of the deer," it ought to appear from the evidence produced on the part of the prosecution, that the owner had not given his consent. According to the report of a late case, (3) it seems to have been thought necessary to call the owner of the deer, for the purpose of disproving his consent; and the owner not being called, the jury were directed to find a verdict of acquittal. The particular circumstances of that case are not stated in the report; and it is not easy to discover upon what principle such evidence was held to be indispensable. If the circumstances were of such a nature as to raise a reasonable presumption, that what had been done had not been done illegally (which, however, it is difficult to conceive), then, doubtless, the direct evidence of the owner would be necessary to repel that presumption, and to establish the charge against the prisoner. But, as a general proposition, it may be safely laid down, that the non-consent of the owner may be properly inferred from the conduct

(1) Williams *v.* East India Comp. 3 East, 193, 199. R. *v.* Hawkins, 10 East, 211.

(2) St. 29 G. 3, c. 26, s. 4.

(3) R. *v.* Rogers, 2 Campb. 654, by Mr. Justice Lawrence. See R. *v.* Mallinson, 2 Burr. 679. R. *v.* Corden, 4 Burr. 2279.

of the prisoner, and the circumstances under which the act was done—such as the secrecy of the proceedings, the attempt to conceal, the disguise of the prisoner, or his resistance, or any other circumstance of guilt; and the evidence of the owner, to negative the supposition of his consent, seems not more necessary in this prosecution, than on a charge of larceny, in which it is an essential ingredient, that the goods should have been taken against the owner's consent — yet the owner is never questioned as to that point, though he is generally called to prove the property.

Where the presumption of law is in favour of the defendant's plea.

Where the presumption of law is in favour of the defendant's plea, there it will be incumbent on the plaintiff to disprove the plea, though in so doing he may have to prove a negative. As in an action on a bond, if the defendant plead payment, and the bond appears to have been outstanding for twenty years, the law presumes that the principal debt has been discharged; this legal presumption of itself affords a defence in support of the plea; and to repel the presumption, it will be necessary for the plaintiff to produce evidence, from which the contrary presumption of non-payment may be inferred; such as evidence of payment of interest, or of an admission of the debt.

In case of bond twenty years old.

On question of legitimacy.

Where the question is on the legitimacy of a child, if a legal marriage is proved, the legitimacy is presumed, and the party who asserts the illegitimacy, ought to prove it: but if there has been a divorce *a mensa et thoro*, the presumption is, that a child born afterwards (that is, beyond the time of gestation), is illegitimate; (1) it will be sufficient, therefore, in such a case, to prove the divorce; and this will call upon the opposite party to establish the legitimacy by proof of access.

Where a fact is peculiarly within the knowledge of a party.

It is a general rule of evidence, that the burthen of proof lies on the person who has to support his case by proof of a fact which lies more peculiarly within his own knowledge, and of

(1) Parishes of St. George and St. Margaret, 1 Salk. 123.

which he is supposed to be cognizant. (1) In an action by the assignees of a bankrupt, where the defendant, under a notice of set-off, gave in evidence promissory notes dated before the bankruptcy, the court held that he ought also to show that the notes came to his hands before that time. (2) In an action on the Game Laws, though the plaintiff must aver, in order to bring the defendant within the act, that he was not duly qualified; yet it is not necessary to disprove his qualification, but it will be for the defendant, if he can, to prove himself qualified. (3) And it has lately been determined by the Court of King's Bench, that the same rule of evidence applies as well to proceedings on informations before magistrates, as to actions for penalties; and that a conviction which specifically negatives the several qualifications mentioned in the statute, is sufficient, without stating evidence to negative those qualifications. (4) If such negative evidence were necessary to support the information, it would scarcely be possible in any case to convict, in consequence of the great number of distinct heads of qualification, which are enumerated in the statute. On the other hand, all the qualifications specified are peculiarly within the knowledge of the qualified person. If he is entitled to any such estate as the statute requires, he may prove it by his title-deeds, or by the receipt of the rents and profits; or if he is the son and heir apparent, or servant to any lord or lady of a manor, and appointed to kill game, that will be a good defence. All these qualifications are peculiarly within the knowledge of the party himself; but the prosecutor has probably no means of proving a disqualification.

Rule as to proving or disproving qualification under the game laws.

Rule as to proof of fact alleged in defence.

Although, in general, it is necessary for a party, who brings an action, to prove all the material facts, which he alleges in support of his claim, yet where the defendant pleads a fact

(1) 4 Barn. & Ald. 140. 9 Price, 257. 5 Maule & Selw. 211. 1 Barn. & Cres. 150. 3 Barn. & Cres. 242.

(2) Dickson *v.* Evans, 6 T. R. 57. See other examples in criminal cases, in 2 East, P. C. 782.

(3) By Lord Mansfield, in Spieres *v.* Parker, 1 T. R. 144. By Buller, J., in 1 T. R. 649. By Heath, J., in Jelfs *v.* Ballard, 1 Bos. & Pull. 468. By Chambre, J., in Frontine *v.* Frost, 3 Bos. & Pull. 307. Admitted by the court, in R. *v.* Stone, 1 East, 650.

(4) R. *v.* Turner, 5 Maule & Selw. 206.

within his own knowledge in discharge of himself, and the plaintiff still insists on the defendant's liability, alleging the same fact in his replication, there the burthen of the proof lies on the defendant, not upon the plaintiff. Thus, in an action of assumpsit, where the defendant pleaded infancy, and the plaintiff replied, that "the defendant, after he had attained his full age, ratified and confirmed the promise and undertaking," the Court held, that the mere proof of a promise to pay was sufficient on the part of the plaintiff; and that it was for the defendant to prove the personal incapacity to contract, on which he grounded his defence, and which lay peculiarly within his own knowledge. (1)

Plea of infancy—replication, promise ratified after full age—proof of infancy by defendant, when necessary.

On a trial for bigamy, the register of the first marriage being produced, which stated the marriage to be by license, without stating it to be by consent of parents or guardians, the prisoner in his defence proved, that he was an infant at the time of the marriage; and it was held that this made it necessary, on the part of the prosecution, to give some evidence of the consent required by the marriage act. (2) Any subsequent countenance given by the parents or guardians, or other circumstances of a similar kind, might afford ground for presuming the necessary consent. (3)

Pros. for bigamy.

First marriage, by license—proof of consent of parents, when necessary.

(1) Borthwick *v.* Carruthers, 1 T. R. 648.

(2) Butler's case, Russ. & Ry. Cr. C. 61.

(3) *Ibid.* in note.

CHAPTER XI.

OF THE RULE THAT THE SUBSTANCE ONLY OF THE ISSUE NEEDS BE PROVED.

Another general rule is, that the substance only of the issue needs be proved. This is founded on the principles of good sense and justice. If a party prove the substance of the issue, he has proved a substantial ground of action, and is entitled to his remedy. He will not be obliged to prove immaterial averments, which might be expunged from the record without affecting his right to recover. Such averments serve only to encumber the record; and the proof of them would be as immaterial as the averments themselves.

It is a general principle of evidence, that all the material facts in the declaration, which are put in issue, must be established by legal proof. Another principle is, that the nature and extent of the proof will depend upon the manner in which the alleged facts are introduced; allegations, which are merely matters of inducement, do not require such strict proof as those which are precisely put in issue between the parties. (1) Evidence, as Lord Mansfield used frequently to observe, is always to be taken with reference to the subject-matter to which it is applied, and with reference to the person against whom it is used.

There are a great variety of examples, both in civil and criminal cases, which might be cited in illustration of the rule now under discussion. The object in the present chapter will be to make a selection of such examples as appear most generally

(1) By Chambre, J., 1 New Rep. 210.

useful: the nature of material and immaterial averments, and the doctrine of variances, will be also here considered.

1. *Examples in Civil Cases.*

In an action on a bond, if the defendant plead *solvit ad diem*, the issue will be maintained by proof of payment *before* the appointed day; and payment to a third person by the appointment of the plaintiff will be substantially payment to the plaintiff himself. Plea, *solvit ad diem.*

In an action of covenant, when the breach assigned is, "that the defendant has not used a farm in a husbandlike manner, but on the contrary has committed waste," &c., to which the defendant pleads, "that he has not committed waste," &c., but used the farm in a good and husbandlike manner, and issue is taken upon this, the plaintiff cannot give evidence of any unhusbandlike treatment of the farm, not amounting to waste; for the issue is narrowed to this point. (1) Covenant.

In an action against a sheriff, where the plaintiff declared, that he had J. S. and his wife in execution, and that the defendant suffered them to escape, and a special verdict was found, that the husband alone was taken in execution, (the execution being for a debt due from the wife before coverture,) and that he escaped, the court held, that the substance of the issue was found, and gave judgment for the plaintiff. (2) Action against sheriff.

In an action on a simple contract, whether assumpsit or debt, the plaintiff may prove and recover a less sum than he has demanded in the writ; and for this reason it has been held, that a declaration in such action is not bad for specifying a less sum, though the breach assigned is the non-payment of the whole sum demanded. (3) Assumpsit.

In actions for slander, the courts used at one time to hold, Action for slander.

(1) Harris *v.* Mantle, 2 T. R. 307.
(2) Roberts and wife *v.* Herbert, 1 Sid. 5. S. C. cited Bull. N. P. 299.
(3) M'Quillin *v.* Cox, 1 H. Bl. 249.

that the plaintiff was bound to prove the words spoken precisely as laid; but it is now settled that it will be sufficient, if the plaintiff prove some material part of the words alleged on the record. If the declaration contain several actionable words, the plaintiff will be entitled to a verdict on proving some of them. (1)

Replevin.

In an action of replevin, where the defendant avowed taking the cattle as damage-feasant, the plaintiff pleaded in bar, that one W. was seised of a house and land, &c., whereto he had common, &c., and demised the same to him to hold from a certain day next before a year; the avowant traversed the lease, *modo et forma*, upon which issue was taken; the jury found a special verdict, that W. made a lease to the plaintiff on the day stated, for a year; and the plaintiff had judgment, for although this is not the same lease as pleaded, (since this begins on the day, and the other not so soon,) yet the court said, the substance of the issue is, whether or not the plaintiff had such a lease that by force thereof he might have common at the time, and this appeared to be the case here. (2)

If the issue joined between the parties is, whether A. & B. were churchwardens, proof that one was, and not the other, would not be sufficient. (3) Where the declaration averred, that the plaintiff was constable of a particular parish, and that he was assaulted in the execution of his office as constable, and it appeared on the evidence, that he had been sworn in to serve for a whole liberty, of which the parish formed a part, this was held to be a material variance. (4)

Assault on constable.

District.

Plea of tender.

If the plaintiff reply to a plea of tender, that, before the cause of action and after the tender, he demanded the sum tendered, he will be obliged to prove, under the issue joined upon this replication, a demand of that specific sum. The

(1) Compagnon *v.* Martin, 2 Bl. Rep. 790.
(2) Pope *v.* Skinner, Hob. 72. S. C. cited Bull. N. P. 300. Forty *v.* Imber, 6 East, 434.
(3) Bull. N. P. 299.
(4) Goodes *v.* Wheatly, 1 Campb. 231.

proof of a demand of a *larger* sum would not support the issue. (1)

2. Examples in Criminal Cases.

The same general rule of evidence applies, if possible, still more strongly to the case of criminal prosecutions than to civil suits. "It is an universal principle, which runs through the whole of the criminal law, that it will be sufficient to prove so much of the indictment, as charges the defendant with a substantive crime." (2)

If the indictment charges, that the defendant did, and caused to be done, a particular act, it is enough to prove either the one or the other. If the defendant is charged with composing, printing, and publishing a libel, he may be convicted only of the printing and publishing. (3) Pros. for libel.

On an indictment for obtaining money under false pretences, it is not necessary to prove the whole of the pretences charged: proof of part of the pretences, and that the money was obtained by such part, is sufficient. (4) False pretences.

On a charge of petit treason, if the killing with malice is proved, but no circumstances of aggravation are proved to make the offence treasonable, the prisoner may be found guilty of the murder. (5) On an indictment for burglary and stealing goods, if it appear that no burglary was committed, as where the breaking and entering were not in the night—or on a charge of robbery, where the property was not taken from the person by violence, or by putting him in fear—the prisoner may be found guilty only of the simple larceny. (6) Petit treason. Burglary. Robbery.

On the trial of an indictment for murder, the jury may find the prisoner guilty of manslaughter only; for the principal Murder.

(1) Rivers *v.* Griffiths, 5 Barn. & Ald. 630. Spybey *v.* Hide, 1 Campb. 181.

(2) By Lord Ellenborough, in R. *v.* Hunt, 2 Camp. 583.

(3) R. *v.* Hunt, 3 Campb. 583. R. *v.* Williams, *ib.* 646. See also cases in 2 East, P. C. 515, 516.

(4) Hill's case, Russ. & Ry. Cr. C. 190.

(5) Case of Swan and Jefferys Fost. Cr. L. 104.

(6) 2 East, P. C. 513, 515, 516.

Manner of death.

matter is the killing, and the malice is only a circumstance in aggravation. (1) And if the manner or means of the death, proved at the trial, agree in substance with the means charged in the indictment, it will be sufficient; as, where the indictment is for killing with a dagger, and the evidence prove a killing with a staff; (2) or if the indictment be for killing with one sort of poison, and the evidence proves the killing with another; such evidence maintains the indictment, because the proof of the instrument is not absolutely necessary to the proof of the fact itself; (2) but if the charge is for poisoning, and the death is proved to have been caused by striking or starving, &c., this evidence would not support the indictment, as the species of death in the one case is totally different from that in the other. (3)

Murder.

One of several prisoners charged as principal in *first degree*, proved to be principal in *second*.

If the indictment charges that A. gave the mortal blow, and that B. and C. were present, aiding and abetting, &c., but on the evidence it appears that B. struck, and that A. and C. were present, aiding, &c., this is not a material variance, for the stroke is adjudged in law to be the stroke of every one of them, and is as strongly the act of the others, as if they all three had held the weapon, and had struck the deceased. (4) The identity of the person, supposed to have given the stroke, says Mr. Justice Foster, is but a circumstance, and in this case a very immaterial one. The stroke of one is, in consideration of law, and in sound reason too, the stroke of all. They are all principals in law, and principals in deed.

Accessory.

If two persons are indicted as principals, and one is proved to be only accessory, he must be discharged on this indictment, (5) for in consideration of law their offences are quite different. And one indicted as accessory before the fact cannot be con-

(1) Mackalley's case, 9 Rep. 67, *b*. Co. Lit. 282, *a*. Gilb. Ev. 233.

(2) 9 Rep. 67, *a*. Gilb. Ev. 231. 1 East, P. C. 341. R. *v*. Clark, 1 Brod. & Bing. 473.

(3) 9 Rep. 67, *a*. Gilb. Ev. 231. 1 East, P. C. 341. 2 Inst. 319.

(4) Mackalley's case, 9 Rep. 67, *b*. 1 Plowd. 98. Wallis's case, 1 Salk. 334. Fost. Disc. 351. Towle's case, on st. 43 G. 3, c. 58. 3 Price, 145. 2 Marsh, 466, S. C.

(5) Gilb. Ev. 232. See Fost. Cr. L. 361.

victed upon evidence proving him to have been (principal in the second degree) present, aiding and abetting, at the fact. (1)

Murder of officer in execution of his office.

In *Mackalley's* case, (2) where the prisoner was tried for the murder of a serjeant at mace in London, the indictment charged that the sheriff made a precept to the serjeant for the arrest, and it appeared upon the evidence, that there was no such precept, but that the serjeant made the arrest *ex officio* at the plaintiff's request, on the entry of the plaint according to the custom of the city; and all the judges held, that the variance between the indictment and the evidence was not material, because the warrant to arrest was only a circumstance, and the substance of the matter had been found, which was, that the prisoner killed an officer in the lawful execution of legal process. The judges were also of opinion, that the indictment might have been general, (that the prisoner feloniously and of his malice prepense killed, &c.) and that the special matter might have been given in evidence; and since the indictment in the principal case contained such an averment, they held that the charge of murder had been proved, notwithstanding that the special matter, given in evidence, might vary in substance from the special matter contained in the indictment.

Mackalley's case.

3. *Of Material and Immaterial Averments, in Civil Suits; and of the Doctrine of Variance.*

A great variety of cases occurs in the books with respect to the necessity of proving averments in pleading. Immaterial averments need not be proved. It is a general rule, that a variance between the allegation and the proof will not defeat a party, unless it be in respect of matter which, if pleaded, would be material. (3) If the variance be in respect of a matter not essential to maintain the action or the plea, it is of no importance.

Many of the variances in civil suits, of the kind mentioned in the course of this chapter, might now be corrected by an amendment under the statutes which will be presently noticed;

(1) Gordon's case, 1 East, P. C. 352.

(2) 9 Rep. 61, *b*, 67, *a*, 68, *a*.

(3) 3 Barn. & Cress. 122, by Lord Tenterden, Ch. J.

and some of them would be remedied by the general rules of the courts under those amending acts.

Action on bill of exchange.

In an action upon a bill of exchange, where the declaration stated the bill to have been accepted and indorsed *before* it became due, and the proof was, that it was indorsed *after* it became due, the court held it was no variance; because it was immaterial, whether the bill was indorsed before or after it became due; and therefore it was unnecessary to prove the indorsement precisely at the time when it was alleged. (1)

ction of tort.

The general rule in actions of tort is, that it will be sufficient if part only of the allegation stated in the declaration be proved, provided that what is proved affords a ground for maintaining the action, supposing it to have been correctly stated as proved. There is an exception, however, to this rule, when the allegation contains matter of description. There, if the proof given be different from the statement, the variance is fatal. (2)

It is quite enough in actions of tort, if the same ground of action is proved as is laid in the declaration, although not to the extent there stated. In the case of a contract or prescription, the rule is different. Unless the whole of the contract is proved, as stated in the declaration, a different contract is proved, and a different ground of action; the party therefore cannot be entitled to the judgment of the court. So in the case of a prescriptive right, when a prescription is alleged in bar, it is an entire thing, and must be proved to the extent laid. (3)

In cases of contract or prescription.

An averment, mere inducement, needs not be proved strictly.

An averment, which is merely matter of inducement to the action, need not be proved with the utmost strictness and precision. Thus where an action was brought to recover double the value of goods, which had been removed for the purpose of preventing a distress, and the declaration stated a certain sum to be in arrear for rent, it was decided that the plaintiff was

(1) Young *v.* Wright, 1 Campb. 139.

(2) 2 Barn. & Ald. 363, by Lord Tenterden. 4 Barn. & Cress. 385.

(3) 2 Barn. & Ald. 366.

entitled to recover, although the notice of distress was for a less sum. (1) Here, whether the particular sum stated in the declaration was in arrear, must be perfectly immaterial; the damages were not to be measured by the quantity of rent, but by the value of the goods which had been removed.

If an averment may be struck out without destroying the plaintiff's right of action, it will not be necessary to prove it; but it is otherwise, if the averment cannot be struck out, without getting rid of a part essential to the cause of action: for then, though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover. (2) Thus, in the case of *Bristow* v. *Wright*, (3) which was an action against the sheriff for taking the goods of a lodger without leaving a year's rent, the declaration stated some particulars of the demise relative to the time of payment of rent, which were negatived by the evidence, and the court held that the variance was fatal. There, it was necessary for the plaintiff, in order to show that he was landlord, to set forth a contract between himself and the tenant, and no part of the contract alleged could be struck out, because it was in its nature entire; though it was admitted, that the part of the contract, relating to the time of payment, need not have been averred.

An averment that cannot be struck out must be proved.

Bristow v. *Wright.*

Averment of particulars of a lease.

The case of *Williamson* v. *Allison* (4) illustrates the other part of the rule, namely, that where an averment may be struck out, it need not be proved. That was an action on the case in tort, for the breach of a warranty in selling goods unfit for sale, and the declaration averred that the defendant knew the goods to be in an unfit state, of which fact there was no evidence at the trial; but the court held, that such proof was unnecessary, for if the whole averment respecting the defendant's knowledge of the unfitness for sale were struck out, the declaration would

Averment that may be struck out needs not be proved.

Williamson v. *Allison.*

(1) Gwinnet *v.* Phillips, 3 T. R. 643. See another instance in Stoddart *v.* Palmer, 3 Barn. & Cress. 2, stated *infra*.

(2) By Lawrence, J., in Williamson *v.* Allison, 2 East, 452.

(3) 2 Doug. 664. See 5 T. R. 496. 2 East, 450, 452. 8 East, 9.

(4) 2 East, 446. See also Peppin *v.* Solomon, 5 T. R. 496. Broomfield *v.* Jones, 4 Barn. & Cress. 380.

still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved.

4. Of Material and Immaterial Averments in Indictments.

The same rule is applicable to averments in an indictment. If an averment may be entirely omitted, without affecting the charge against the prisoner, and without detriment to the indictment, it will be considered as surplusage, and may be disregarded in evidence.

Robbery. Thus where the prisoner was charged with a robbery near the highway, and the robbery was proved, but not near the highway (1)—where the robbery was averred to have been committed in the house of a certain person named, and the name of the owner was not proved (2)—and where the offence

Arson. of arson was stated in the indictment to have been committed in the night-time, and was proved not to have been in the night-time, (3)—in these cases, all the judges were of opinion, that the convictions were proper, and the prisoners were ousted of the benefit of clergy.

But where the averment in the indictment is sensible and material, it ought to be regularly proved; as, where the

Burglary. prisoner was indicted for a burglary in the house of J. D. with intent to steal the goods of J. W., and it appeared in evidence that no such person had any goods in the house, but that the name of J. W. was put by mistake for J. D., (4) the judges held, that it was material to state truly the property of the goods, and on account of this variance the prisoner was acquitted.

5. Of Variances in Actions on Contracts.

Where the action is brought upon a contract, the contract ought to be stated correctly, and proved as laid; and if any part of the contract proved vary materially from that stated in the

(1) Wardle's case, 2 East. P. C. 785. Russ. & Ry. Cr. C. 9, S. C.

(2) Pye's case, Johnstone's case, 2 East, P. C. 785. Russ. & Ry. Cr. C. 9, note S. C.

(3) Minton's case, 2 East, P. C. 1021.

(4) Jenk's case, 2 East, P.C. 514.

pleadings, the whole foundation of the action fails, since the contract is entire and indivisible. (1) If the contract, therefore, for the breach of which the action is brought, was in the *alternative* at the option of the defendant, (as to deliver *this* or *that* quantity of goods at one time, and the remainder at another), it ought to be so stated, for if the declaration states an *absolute* contract, and the proof is of a contract in the *alternative*, the plaintiff cannot recover, although the defendant may have determined his option. (2) In an action against a carrier on a general undertaking to carry safely, proof of a contract to carry safely, *fire and robbery excepted*, is a variance. (3)

Contract stated in action of tort.

This rule is not confined to actions of assumpsit. In an action of tort also, where a contract is necessary to be stated in order to maintain the ground of action as laid in the record, the contract ought to be proved as stated. Thus in an action against two defendants for deceit, charged in the declaration to have been committed by them in a joint sale of their joint property, the Court of King's Bench held, as there was no evidence against one of the defendants, that the action could not be maintained against the other. (4) The joint contract here described, said Lord Ellenborough, in delivering the judgment of the court, is the foundation of the joint warranty laid in the

(1) 1 T. R. 240; 3 T. R. 645. The following are the principal modern cases on this subject; Bristow *v.* Wright, 2 Doug. 664 (*supra*, p. 505, S. C.) Carlisle *v.* Trears, Cowp. 671. Churchill *v.* Wilkins, 1 T. R. 447. Durston *v.* Tuthan, cited 3 T. R. 67. Littler *v.* Holland, 3 T. R. 590. Hockin *v.* Cooke, 4 T. R. 314. Leery *v.* Goodson, 4 T. R. 687. White *v.* Wilson, 2 Bos. & Pull. 116. Penny *v.* Porter, 2 East, 2. Brown *v.* Sayce, 4 Taunt. 320. Pool *v.* Court, 4 Taunt. 700. Cohen *v.* Hannam, 5 Taunt. 101. Arnfield *v.* Bate, 3 Maule & Sel. 173. Squire *v.* Hunt, 3 Price, 68. Wildman *v.* Glossop, 1 Barn. & Ald. 9. Tucker *v.* Cracklin, 2 Starkie, N. P. C. 385. Parker *v.* Palmer, 4 Barn. & Ald. 387. Strong *v.* Rule, 3 Bing. 315.—The following are cases on promissory notes and bills of exchange. Whitwell *v.* Bennet, 3 Bos. & Pull. 559. Gordon *v.* Austin, 4 T. R. 611. Jones *v.* Mars, 2 Campb. 305. Roche *v.* Campbell, 3 Campb. 247. Hodge *v.* Fillis, 3 Campb. 463. Hutchinson *v.* Piper, 4 Taunt. 810. Exon *v.* Russell, 4 Maule & Selw. 505. Mountstephen *v.* Brooke, 1 Barn. & Ald. 224.

(2) Penny *v.* Porter, 2 East, 2; and see 2 East, 134; Cooke *v.* Munstone, 1 Bos. & Pull. N. R. 351.

(3) Latham *v.* Rutley, 2 Barn. & Cress. 20.

(4) Weall *v.* King, 12 East, 452. Green *v.* Greenbank, 2 Marsh. 485. Lopes *v.* De Tastet, 1 Brod. & Bing. 538.

declaration, and essential to it's legal existence and validity; and it is a rule of law, that the proof of the contract must correspond with the description of it in all material respects.

What parts of contracts need be stated.

It will not be necessary for the plaintiff to state all the several parts of a contract, which consists of distinct and collateral provisions; but it is sufficient to state so much of the contract as contains the entire consideration for the act, and the entire act to be done in virtue of such consideration, including the time, manner, and other circumstances of it's performance. (1) Thus, if there is a provision in the contract to discharge the party from all liability, in case a particular condition is not complied with, it ought to be set out and strictly proved: but it is otherwise, where the provision respects only the liquidation of damages on a breach of the contract; such a provision need not be stated in the pleadings. (1) In an action on the case upon the warranty of a horse, if the plaintiff states truly the whole of the consideration for the promise of the defendant, (which, in the case referred to, was the re-delivery of the horse to the defendant,) and then states truly the substantive parts of the warranty, of the breach of which he complains, this will be sufficient, without averring other parts of the warranty entirely collateral and irrelevant to those stated. (2) In the case of *Gladstone* v. *Neale*, (3) the contract stated was for the purchase of a certain quantity of goods, ("to wit, eight tons,") and the contract proved was for the purchase of "*about* eight tons," the exact amount not being known at the time of making the contract, but being ascertained before the action was brought; and it was determined at the trial, and afterwards by the Court of King's Bench, that the variance was not material.

Joint-contracts

In all cases of joint contracts, in writing or by parol, or *ex quasi contractu*, and in all cases of joint obligation, it seems now to be settled, that if one only be *sued*, he may plead the matter

(1) Clarke *v.* Gray, 6 East, 564, 569. Thornton *v.* Jones, 2 Marsh. Rep. 287. Parker *v.* Palmer, 4 Barn. & Ald. 387.

(2) Miles *v.* Sheward, 8 East, 7. Cotterell *v.* Cuff, 4 Taunt. 285. Squier *v.* Hunt, 3 Price, 68. Handford *v.* Palmer, 2 Brod. & Bing. 359. See Blyth *v.* Bampton, 3 Bing. 472.

(3) 13 East, 410. Crispin *v.* Williamson, 8 Taunt. 107.

in abatement, but cannot take advantage of it afterwards upon any other plea, or in arrest of judgment, or give it in evidence under the general issue. Thus, in an action against the defendant as drawer of a bill of exchange, who pleaded non assumpsit, and it appeared in evidence at the trial, that the bill was drawn by the defendant and another jointly; on a motion to set aside the verdict (which had been found for the plaintiff,) upon the ground of this supposed variance, the Court of Exchequer was clearly of opinion, that there was no variance between the bill of exchange proved, and that which was declared upon. (1) The same rule holds, when the action is brought against one of several partners; the defendant must plead in abatement, and cannot give the partnership in evidence under the general issue. (2) Formerly, a different rule was adopted, on the ground of a supposed variance. (3) But with respect to the party suing, the rule is still the same; namely, that if an action of assumpsit is brought by one only of several parties to a contract, who ought to join, the defendant may take advantage of it upon the general issue of non assumpsit. (4)

Rule as to party *sued*.

Rule as to party *suing*.

A distinction, however, has been made, in this respect, between actions of assumpsit and actions of tort; and, in the latter case, if one only of several persons, who ought to join, bring the action, the defendant cannot avail himself of the variance under the general issue, but must plead it in abatement. (5) There is a distinction also between these forms of action, with respect to the party sued. For if several persons jointly commit a tort, the plaintiff has his election to sue all or any number of the parties, a tort being in its nature the separate act of each individual; and, therefore, in actions *ex delicto* against one only, (such as trover, trespass, case for malfeasance, and the like,) for a tort

Rule as to joinder in torts.

(1) Evans *v.* Lewis, MS. case reported in Mr. Serjeant Williams's edit. of Saund. 1 V. 291, d. Germain *v.* Frederick, MS. case, *ib.* Rees *v.* Abbott, Cowp. 832. Powell *v.* Layton, 2 New Rep. 365.

(2) Rice *v.* Shute, 5 Burr. 2611. Abbott *v.* Smith, 2 Black. 947. 1 Bos. & Pul. 72.

(3) Boson *v.* Sandford, 2 Salk. 440.

(4) Leglise *v.* Champante, 2 Str. 820. Graham *v.* Robertson, 2 T. R. 282. 1 Saund. 291, *f.* in note. Teed *v.* Elworthy, 14 East, 210.

(5) Dockwray *v.* Dickinson, Skin. 640. Leglise *v.* Champante, 2 Str. 820. Addison *v.* Overend, 6 T. 766. Sedgworth *v.* Overend, 7 T. 279. Bloxham *v.* Hubbard, 5 East, 420.

committed by several, the defendant cannot plead such matter in abatement or in bar, nor give it in evidence on the general issue. (1)

5. *Of Variances in the Proof of Prescriptive Rights.*

The rule above laid down with respect to contracts applies equally to the case of a prescription: a prescriptive right is one entire thing, and, when put in issue, must be proved as stated. It ought to be proved, therefore, to the full extent, to which it is claimed. Thus, in replevin, if the defendant avow taking the cattle as damage-feasant, and the plaintiff plead in bar a right of common, and aver that the cattle were levant and couchant, on which averment issue is joined, proof only for part of the cattle will not support the averment, for the issue is upon the whole. (2) But though the party must prove a prescriptive right commensurate with the right claimed, he will not be precluded from recovering, because he proves a more ample right than what he claims. Evidence of a right of common for sheep and cows will support a plea prescribing for common only for sheep. (3)

Replevin.

Proof of more ample right.

A distinction is to be made between the case of a prescriptive right of common alleged in bar, on which issue is taken, and a possessory right of common claimed in an action of tort for disturbance of the right. In the latter case, it is sufficient to prove the same ground of action as is laid in the declaration, although not to the extent there stated. If the allegation is, that the plaintiff was entitled to the right of common in respect of a certain quantity of land, and the proof is in respect of a part only of that land, it will be sufficient (4); so, if it is claimed in respect of a messuage and a certain number of acres of land, and proved to be in respect only of land. (5) The proof, in

Action for disturbance of right.

(1) Boson *v.* Sandford, 1 Show. 29. Mitchell *v.* Tarbutt, 5 T. R. 651.

(2) Sloper *v.* Allen, 2 Roll. Ab. 706, tit. Trial, c. 41, S. C. cited Bull. N. P. 299. Gray's case, 5 Rep. 79. Down's case, 4 Rep. 29, *b.* Rogers *v.* Allen, 1 Campb. 313. See Brook *v.* Willett, 2 H. Black. 225.

(3) Bushwood *v.* Bond, Cro. El. 722. Bailiff, &c. of Tewksbury *v.* Bricknell, 1 Taunt. 142. West *v.* Andrews, 5 Barn. & Ald. 328.

(4) Eardley *v.* Turnock, Cro. Jac. 629. Palmer, 269, S. C. 2 Barn. & Ald. 366.

(5) Ricketts *v.* Salwey, 2 Barn. & Ald. 360. Manifold *v.* Pennington, 4 Barn. & Cress. 161.

these cases, is not of a different allegation, but of the same allegation in part; and that is sufficient. (1)

Of Variances in the Proof of Deeds, Records, &c. set out in Pleadings.

It would be quite unnecessary and superfluous to refer here to the numerous instances of variances, which used to be fatal, between the averment of records, deeds, or other writings in the record of the action, and the documents produced in evidence; as, in those cases, under the remedial statutes which will immediately be noticed, the variances might now be corrected and cured by an amendment of the record. It will be sufficient, with a view to shew the inconveniences and failure of justice in former times, and the improvements in the administration of justice in the present day, to observe generally that, according to the settled practice, till within a few years, where a deed was declared upon, and it appeared, on comparing and reading the record with the instrument produced, that some of the words, stated in the pleadings as descriptive of the deed, (and which could not be rejected as surplusage,) varied from the deed, the variance was fatal (2); and though it was not necessary to

(1) 2 Barn. & Ald. 366.

(2) The following may be cited as the principal cases relating to such variances:—Sands *v.* Ledger, 2 Lord Raym. 792. Pitt *v.* Green, 9 East, 188. Bowditch *v.* Mawley, 1 Campb. 195. Howell *v.* Richards, 11 East, 633. Waugh *v.* Bussell, 5 Taunt. 707. Tempany *v.* Bernard, 4 Campb. 20. Morgan *v.* Edwards, 2 Marshall, 96. Hoar *v.* Mill, 4 Maule & Selw. 470. Weeks *v.* Maillardet, 14 East, 568. Gordon *v.* Gordon, 1 Starkie, N.P.C. 294. Horsefall *v.* Testar, 7 Taunt. 385. Cartridge *v.* Griffiths, 1 Barn. & Ald. 57. Swallow *v.* Beaumont, 2 Barn. & Ald. 765. Brown *v.* Knill, 2 Brod. & Bing. 395. Arnold *v.* Revoult, 1 Brod. & Bing. 443.—Cases of variances between a record averred in the pleadings and the record in the action, where formerly the variance was fatal: Green *v.* Rennett, 1 T R. 656. 9 East, 161, 163. Brown *v.* Jacobs, 2 Esp. N. P. C. 726. R. *v.* Taylor, 1 Campb. 404. See also Com. Dig. tit. Record, (C), (D). R. *v.* Leefe, 2 Campb. 141. Woodford *v.* Ashley, 2 Campb. 193. R. *v.* Bellamy, 1 Ry. & Mo. 171. Sheldon *v.* Whitaker, 1 Ry. & Mo. 266. Bevan *v.* Jones, 4 Barn. & Cress. 403. Edwards *v.* Lucas, 5 Barn. & Cress. 339.

---

* Many variances between the prescriptive right claimed and the right proved, have been remedied by the following rule. Reg. Gen. H. T. 1834:

"When, in an action of trespass *quare clausum fregit*, the defendant pleads a right of way with carriages, and cattle, and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle or on foot only shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for

state some parts of the deed which the declaration purported to set out at length, or only necessary to state those shortly according to their legal effect and operation (1), yet, if they were set out at length and were descriptive of the deed, they were required to be proved as laid, and in case of a variance the plaintiff failed. If a covenant was set out in the declaration as a general covenant, and on reading the deed in evidence it appeared to be subject to an exception or limitation, the variance was fatal. (2)

Deed set out *in substance* on the record.

If the declaration does not profess to describe a deed or to set it out according to its tenor, but states it correctly in substance and in its legal effect, a variance will be immaterial. In an action against a tenant for breach of covenant, proof of a lease from the plaintiff and his wife to the defendant will support an averment of a lease from the plaintiff alone, at least, where the wife had only a chattel interest in the lands before marriage, or they are the property of the husband; for the covenants made to husband and wife may, in legal effect, be deemed covenants made to the husband alone. (3) So, bonds and promissory notes, given to the wife, may be declared upon, as having been given to the husband, in a suit by him. (4) In such cases, where the variance is immaterial, an amendment of the record would be unnecessary.

(1) Dundas *v.* Lord Weymouth, Cowp. 665. Price *v.* Fletcher, Cowp. 727. Roulston *v.* Clarke, 2 H. Bl. 563.

(2) Howell *v.* Richards, 11 East, 633. Tempany *v.* Bernard, 4 Campb. 20.

(3) Arnold *v.* Revoult, 1 Brod. & Bing. 442. Beaver *v.* Lane, 2 Mod. 217. S. P.

(4) 1 B. & B. 443. Ankerstein *v.* Clarke, 4 T. R. 616. In this case the bond was given to the husband and wife as administratrix.

---

the plaintiff in respect of such of the trespasses as shall not be so justified. (See Higham *v.* Rabett, 5 Bing. N. C. 622.)

"And where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of common of pasture for divers kind of cattle, (ex. gr., horses, sheep, oxen, and cows,) and issue is taken thereon; if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found; and for the plaintiff, in respect of the trespasses which shall not be so justified.

"And in all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded, that the allegations as to the extent of the right are capable of being taken distributively, they shall be construed distributively." See Knight *v.* Woore, 3 Bing. N. C. 3. Phythian *v.* White, 1 Mee & Welb. 216.

Record set out in the pleadings *in substance.*

The same rule extends to averments of records in pleadings. Where the pleadings do not undertake to set out the tenor of the record, and the substance only of the record is stated, there a variance between the allegation and the record will not be material, provided the allegation is substantially proved. Thus in the case of the *King* v. *Lookup*, on a prosecution for perjury, where the objection was, that the indictment stated a bill in Chancery to be directed to Robert Lord Henley, &c., and it appeared in evidence to have been directed to Sir Robert Henley, Knight, &c., the court overruled the objection, and held it to be sufficient, that the complainant had preferred a bill before the person who held the great seal, by whichever title he was styled. (1)

R. v. *Lookup.*

Averment as to day of acquittal.

Purcell v. *Macnamara.*

So in the late case of *Purcell* v. *Macnamara* (2), in an action for a malicious prosecution, where the allegation was that the defendant prosecuted an indictment against the plaintiff, until afterwards, to wit, on a certain day named, the plaintiff was in due manner acquitted, &c.; and, to prove this allegation, the record of acquittal was produced, which showed that the acquittal was on another day, the court held that the variance was not material, and that the averment had been substantially proved. Here the day was not alleged as part of the description of the record; but the substance of the allegation was, that the plaintiff had been acquitted on the prosecution.

Averment as to date of judgment.

So in an action against a sheriff for a false return, the declaration stated that the plaintiff in a certain term, (naming the term and the year) by judgment recovered, "as appears by the record," and the proof was that he recovered by a judgment of another term and a different year: the court held that this was not a material variance; that the averment, "as appears by the record," was mere surplusage, and might be rejected, inasmuch as the judgment was not the foundation of the action, but only inducement to it. (3)

(1) R. *v.* Lookup, cit. 1 T. R. 240. 9 East, 163. R. *v.* Pippett, 1 T. R. 235. R. *v.* Payne, cit. 9 East, 158. R. *v.* Leefe, 2 Campb. 139. Byne *v.* Moore, 5 Taunt. 187. Cousins *v.* Brown, 1 Ry. & Mo. 291.

(2) 9 East, 157. Philips *v.* Bacon, 9 East, 298. Philips *v.* Shaw, 4 Barn. & Ald. 435.

(3) Stoddart *v.* Palmer, 3 Barn. &

7. *Of the Rule as to Proof of Time, Place, Name, &c., stated in the Pleadings.*

Proof of time.

It will not be necessary to prove the time precisely as laid, unless that particular time is material. This is the constant course of proceeding in criminal prosecutions from the highest offence to the lowest. In high treason, evidence may be given

In prosecutions.

of an overt act either before or after the day specified in the indictment; the particular day is not material in point of proof, and is merely matter of form. Objections of this kind, on behalf of the prisoner, have been repeatedly overruled. (1)

The same general rule applies, with as much reason, to civil suits. Thus in an action on a promissory note, where the declaration states that the defendant on such a day made, &c., proof that he made his promissory note on a different day would be sufficient. So in an action for assault, battery, taking of goods, &c., where the defendant pleads the general issue, the plaintiff will not be confined to the day stated in the declaration, but may prove the assault, &c., on any other day before the commencement of the action. (2) If the defendant justifies by *son assault* on the same day, and the plaintiff traverses the cause of justification, and at the trial the defendant proves the trespass on the same day, there the plaintiff cannot give evidence of an assault on another day. (3) And though the defendant should prove the assault of the plaintiff on another day, yet the plaintiff, after having made such a traverse, cannot prove another assault on a different day. (4)

In civil suits.

Proof of place.

The same certainty of description, as to the place or parish, is not so necessary in transitory as in local actions. In an action for non-residence, where the parish was described as *St. Ethelburg*, and proved to be *St. Ethelburga*, it was held,

Cress. 2. In this case, an opinion of Lord Ellenborough in Purcell *v.* Macnamara was overruled.

(1) Lord Balmarino's case; Lord Kilmarnock's case; Townley's case; State Trials. Fost. 8.

(2) Co. Lit. 282, a. b. 2 Roll. Ab. 687, 689. tit. Verdict, (N). Com. Dig. tit. Pleader, (S. 12.)

(3) Downes *v.* Skrymsher, Brownl. 233. 2 Roll. Ab. 687. l. 30. S. C.

(4) 2 Roll. Ab. 680, tit. Evidence, (C), Art. 3. Thornton *v.* Lyster, Cro. Car. 514, contra, (Jones, J. doubting,) Roll. Ab. Ib. See 2 Saund. 5, note 3.

that the variance was material. (1) So, in an action of ejectment, where the premises were described as situate in the *united parishes of A. and B.*, but were proved to be in *the parish of A.*, and the two parishes were united only for the single purpose of maintaining the poor, (2) the variance was thought to be material. So also in a case where the premises were described as being in the parish of *St. George the Martyr, Bloomsbury*, and were proved to be in the parish of *St. George, Bloomsbury*, the variance was held to be fatal. (3) In all these cases, the variance might now be corrected under the recent statute, by amending the record.

Rule as to indictments.

On the trial of an indictment, it will be sufficient to show, that the offence was committed in some place within the county or other division. Mr. Serjt. Hawkins says, (4) it seems to be agreed, that the mistake of the place, in which an offence is laid, will not be material upon the evidence, on the plea of not guilty, if the fact be proved at some other place in the same county. Even if there should appear to be no such parish, as that laid, in the county, it has been doubted whether the indictment would be bad. (5)

8. *Of the recent Statutory Provisions for remedying and correcting the failure of Justice, in certain cases, from defective Pleading, and from Variances.*

St. 7, G. 4, c. 64, s. 20.

Judgments on indictments not be stayed in certain cases.

The stat. 7 Geo. 4, c. 64, s. 20, relates to some technical defects and immaterial averments in indictments and informations either in cases of felony or misdemeanor. It enacts, that no judgment upon any indictment or information shall be stayed or reversed for want of the averment of any matter

(1) Wilson, q. t. v. Gilbert, 2 Bos. & Pul. 281.

(2) Goodtitle dem. Pinsent *v.* Lammiman, 2 Campb. 274.

(3) Harris *v.* Cooke, 8 Taunt. 539. And see Guest *v.* Caumont, 3 Campb. 235. 6 East, 352. The following are instances, in which variances in the description of parishes, &c. were held to be immaterial. Goodtitle dem. Bremridge *v.* Walter, 4 Taunt. 671. Doe dem. Tollet *v.* Salter, 13 East, 9. R. *v.* Glossop, 4 Barn. & Ald. 616. Taylor *v.* Hooman, 1 Moore, C. P. 161. Kirtland *v.* Pounsett, 1 Taunt. 570.

(4) B. 2, ch. 25, s. 84. R. *v.* Dowling, 1 Ry. & Mo. 433.

(5) R. *v.* Dowling, 1 Ry. & Mo. 433. And see 3 Campb. 73. But see also 9 H. 5, st. 1, c. 1; and Burn's Just. 24th ed. p. 56, MS. case.

unnecessary to be proved, or because any person is therein designated by a name of office or other descriptive appellation instead of his proper name,—nor for the omission of the words "as appears by the record," or of the words "with force and arms," or of the words "against the peace,"—nor for the insertion of the words "against the form of the *statute*" instead of the words "against the form of the *statutes*," or *vice versâ*,—or on account of the omitting to state the time of the commission of the offence where time is not of the essence of the offence, or for stating the time imperfectly,—or for stating the offence to have been committed on a day subsequent to the finding of the indictment or the exhibiting of the information, or on an impossible day, or a day that never happened; nor shall it be stayed or reversed for want of a proper or perfect venue, where the Court shall appear to have had jurisdiction over the offence.

St. 9 G. 4, c. 15.

Lord Tenterden's act (9 Geo. 4, c. 15) provided a further remedy, but very limited. That act was passed for preventing a failure of justice, which is often occasioned by variances between records and writings produced in evidence in support of the records. It recites "that great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances, between writings produced in evidence and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case, and that such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time: the statute then enacts, that it shall 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, &c., 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

Recital.

Enactment.

Variances in civil actions and misdemeanors, between the written matter averred and the writing proved, may be amended.

such costs (if any) to the other party, as such judge or court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at *nisi prius*, the order for the amendment shall be indorsed on the postea, and returned together with the record; and thereupon the papers, rolls, and other records of the Court from which such record issued, shall be amended accordingly.

This enactment, it will be observed, does not extend, like the provision in the 7th of Geo. 4, before-mentioned, to indictments for *felony*, but for misdemeanor only; and yet, the greater the crime is, the greater will be the public concern, that justice should be defeated by such technical objections, wholly irrelevant to the issue of guilty or not guilty, and that the criminal should thus escape. For preventing a failure of justice from technical defects, in criminal cases as well as in civil, and in all criminal cases whether of felony or misdemeanor, the amplest power of amending the record should be allowed,—provided only the requisite amendment cannot in any respect prejudice the party accused in making his defence. The remedy provided by this act in civil actions, was also very limited: as it relates to variances in the proof of written or printed documents, and is confined to these.

Cases on this statute.

Under this statute, it has been held that, in setting out a record of a judgment, a mis-statement as to the court, in which it was obtained, may be amended;(1) and that a mistake in the date of a bill of exchange,(2) or the misdescription of a promissory note as a bill of exchange, may be rectified.(3)

Masterman v. *Judson*.

In *Masterman* v. *Judson*,(4) an action for not obeying a subpœna, the Court of Common Pleas held, that a declaration ought to be amended, by inserting, instead of "a copy of a writ of subpœna," "a copy of so much of the writ of subpœna as related to the defendant."

(1) Briant *v.* Eicke, M. & M. 359.
(2) Bentzing *v.* Scott, 4 C. & P. 24. Parks *v.* Edge, 1 C. & M. 429.
(3) Moilliet *v.* Powell, 6 C. & P. 233.
(4) 8 Bing. 480.

Lamey v. *Bishop.*

Contract.

Smith v. *Brandram.*

Contract.

On the authority of this case, the Court of King's Bench decided, in *Lamey* v. *Bishop*, (1) that a statement of a contract might be made conformable to the written contract produced at the trial, as to the time for the performance of it, though it did not appear in the declaration whether the contract was written or oral. And in *Smith* v. *Brandram*, (2) a material variance, in point of legal effect, between a contract of guarantee, produced in evidence, and the contract set out in the declaration, was held to be amendable within this act. The case of *Lamey* v. *Bishop* appears to overrule an earlier decision of Mr. Justice Park at *nisi prius*, who held that a variance between the statement in an avowry of the terms of a tenancy, and the proof produced in support of it, was not within the statute. (3)

The Court of Exchequer has held, that this statute does not apply to a variance between the statement of a writing in the pleadings, and the secondary evidence of the writing. (4) In one case, Lord Tenterden is said to have refused to amend the declaration, on the ground that the mistake arose from want of common care in drawing it: (5) but in many instances, it has been the want of common care that caused the mistake; and to prevent the failure of justice through such carelessness or ignorance, was one of the objects of the legislature in passing the act.

St. 3 & 4 Wm. 4, c. 42. Sect. 23. Recital.

A much fuller remedy and more complete power of making amendments was given to judges and courts of record, in civil actions, by the stat. 3 & 4 Wm. 4, c. 42. The 23rd section of that act recites, that great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances, as to some particular or particulars between the proof and the record, or the setting forth on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances, not material to the merits of the case, and by the mis-statement of which the opposite cannot have

(1) 4 B. & Ad. 479.
(2) 9 Dowl. 430.
(3) Ryder v. Malbon, 3 C. & P. 594.
(4) Brooks v. Blanshard, 1 C. & M. 779.
(5) Jelf v. Oriel, 4 C. & P. 22.

been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record, and that it is expedient to allow amendments to be made on the trial of the cause: the statute then enacts, that it shall be lawful for any Court of Record, holding plea in civil actions, and any judge sitting at *nisi prius*, if such court or judge shall see fit so to do, to cause the record, writ, or document, on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedings on a *mandamus*,—when any variance shall appear between the proof and the recital or setting forth, on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, *in any particular or particulars* in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence,—to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings, which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars, in the judgement of such court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial aforesaid, as such court or judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared; and in case such trial shall be had at *nisi prius*, or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the postea or the writ, as the case may be, and returned

Enactment.

Variances—

in what particular—

not material to the merits, &c.

Amendment.

Postponement of trial.

Variances, where a party may have been prejudiced, &c.

Withdrawing the record, or postponing, &c.

Trial to proceed after amendment.

Indorsement of order for amendment on the *postea*.

together with the record or writ, and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had; pro-

Application for a new trial.

vided that it shall be lawful for any party who is dissatisfied with the decision of such judge at *nisi prius*, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court, from which such record or writ issued, for a new trial upon that ground; and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet."

Sect. 24.

Power of the court or judge to direct the jury to find facts specially.

The 24th section enacts, "That the said court or judge shall and may, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said court or the court, from which the record has issued, shall, if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case."

In what proceedings.

The power of amendment given by this act extends only to civil actions, or informations in the nature of a *quo warranto*, or proceedings on a *mandamus*.

What variances.

The variances which are amendable are those which appear between the proof—and the recital or setting forth on the record, writ, or document, on which the trial is proceeding—of any contract, custom, prescription, name, or other matter.

Amendment how made.

The power of making amendments, is to be exercised, by causing the record, writ or document on which the trial is

pending, to be amended by some officer of the court, or otherwise, in the part of the pleadings where the variance occurs, and in every other part of the proceedings which it may become necessary to amend.

Power, where the variance not prejudicial, &c.

The judge is authorised to order such variances to be amended, *in any particular which in his judgment is not material to the merits of the case, and by which the opposite party cannot have been prejudiced* in the conduct of his action, prosecution or defence; the terms on which the amendment is to be made, are payment of costs, or postponing the trial, or both payment and postponement, as the judge may think reasonable; the amendment to be forthwith made, and, after amendment, the trial to proceed (if it proceed) in the same manner in all respects as if no such variance had appeared.

Where variance may be prejudicial.

Withdrawing the record, &c.

Power is also given to the judge to direct amendments to be made, even in cases where the variance is in some particular *by which the opposite party may have been prejudiced in the conduct* of his defence, &c. In these cases, the amendment may be made on payment of reasonable costs to the other party, *and withdrawing the record*, or postponing the trial. The power of amending in these latter cases, where the opposite party *may have been prejudiced* by the variance, is the same as that in the cases before mentioned, when the opposite *cannot have been prejudiced;* but the terms on which the amendment is to be made vary in some small degree—the power of ordering the record to be withdrawn being given in the latter case, but not in the former.

Restriction on amendments.

The words of the act, relating to the particular in which the amendment may be made, namely, where the variance appears "*in any particular or particulars, in the judgment of the court or judge not material to the merits of the case,*" are very general and undefined. The words immediately following, which are specific, and which point to circumstances clearly connected with the merits of the case, "*and by which the opposite party cannot have been prejudiced in the conduct of,*" &c., &c., seem intended as an explanation or qualification of the more general

expressions in the preceding clause. Those general expressions may at least be taken to relate to the substantive-matter which the parties come to try, without reference to the precise terms of the defence. (1)

Power exercised liberally.

The very large powers granted by this act for amending the record, have enabled the Courts to reduce the expenses of prolixity in pleading; with this view, they have made rules prohibiting a multiplicity of counts and pleas. To prevent these restrictive rules from operating to the prejudice of parties, it is necessary that the power of making amendments, and correcting variances, should be exercised liberally; at the same time, exercised cautiously, so as not to prejudice either party on the real and substantial merits of the case. (2)

In proportion to the strictness of the courts, on the one hand, in reducing the number of counts on declarations, must be, on the other hand, the liberality of exercising the power of amendment. The accuracy of a contract may be ambiguous, and it must be set out according to its legal effect: if a mistake is made, and the legal effect is misstated, great injury would be done by the rule which confines the plaintiff to one count, unless the judge at trial should allow the error to be set right by amendment. And in case he entertains a doubt, the best course will be to allow, rather than disallow the amendment, for if he allows at the trial an amendment which ought not to be permitted, the statute provides a remedy; but there is no remedy when the judge does not allow the amendment. (3)

Amendment when to be made.

An amendment of the record, at *nisi prius*, must be made (at least where the record is not *withdrawn*) (4) during the trial, and before the verdict, except when both parties consent to an amendment afterwards. This construction of the statute

(1) See Tindal, C. J. in Smith *v.* Knowelden, 9 Dowl. 406, stated *infra*.

(2) By Parke, B., in Sainsbury *v.* Matthews, 4 M. & W. 347. See Doe d. Marriott *v.* Edwards, 1 M. & Rob. 321; and Tindal, C. J., in Smith *v.* Knowelden, 9 Dowl. 405.

(3) See Coleridge, J., in Jenkins *v.* Phillips, 9 C. & P. 769.

(4) See *supra*, p. 521.

may be inferred from those parts which speak of amendments to be made *on the trial*, and to be made *forthwith*,—and of the document amended, as that *on which the trial is proceeding*,—and still more strongly from the recital, that it is expedient to allow the amendments to be made on the *trial of the cause*. Besides, the 23rd section of the act contains no provision respecting amendments to be made after the conclusion of the trial, and after the verdict.

1. *Cases in which amendments have been allowed.*

Hemming v. *Parry*.

Amendment as to warranty.

In the case of *Hemming* v. *Parry*, (1) the declaration in an action for a breach of warranty of a horse stated a *general* warranty: the defendant pleaded non assumpsit. Upon the proofs it appeared, that the warranty was *sound except in one foot*. The breach of warranty complained of, consisted in an unsoundness of the wind. Alderson, B., amended the declaration, observing, that if the defence had depended in any way upon the qualification of the warranty, he would not have allowed it, as that would have gone to the merits. So also in the case of *Mash* v. *Denham*, (2) which was an action on the case for a false representation of the soundness of a horse, and the plea was not guilty, Alderson, B., amended the declaration, by substituting, for an allegation that the defendant represented the horse to be *sound and a good worker*, an allegation that the defendant represented the horse to be *sound in the wind*.

Mash v. *Denham*.

Hanbury v. *Ella*.

Contract.

In *Hanbury* v. *Ella*, (3) the Court of King's Bench recognized the propriety of an amendment made at *nisi prius*, by which a statement in the declaration, of a contract *to pay* for certain goods to be delivered, was altered to a statement of a contract *to guarantee* payment for them.

Parry v. *Fairhurst*.

Action against carriers.

In the case of *Parry* v. *Fairhurst and others*, (4) an action on the case was brought against the defendants as carriers for *negligence in conveying* the plaintiff's goods; the defendants pleaded not guilty. Upon the evidence, it appeared that the defendants, if liable at all, were liable only as *wharfingers*. No

(1) 6 C. & P. 580.
(2) 1 M. & R. 443.
(3) 1 Ad. & El. 61.
(4) 2 Cr., M. & R. 190.

application was made for an amendment until after the defendant's case was closed, and the plaintiff's counsel was about to reply. The judge refused to amend, but left to the jury the question of the liability of the defendants as wharfingers. The jury finding this question in favour of the plaintiff, the judge directed the verdict on the unamended issue to be entered for the defendant, and the special finding of the jury to be indorsed on the record, in order that, if the Court should be of opinion that the amendment ought to have been allowed, the declaration might be altered and set right. There were special circumstances in the case, shewing that the defendant might have been prejudiced in the conduct of his defence. The Court made the rule absolute for a new trial on payment of costs, Parke, B., observing, that under the circumstances, he should have exercised the power of amendment given by the statute, postponing the trial to another day to enable the defendants to shew the fact (notice of limited liability), which might have exonerated them altogether.

Howell v. *Thomas.* A close misnamed.

In *Howell* v. *Thomas*, (1) an action of trespass, in which issue was joined on the plaintiff's property in a close specifically named in the declaration, but not correctly named, Coleridge, J., allowed the name to be set right.

Boys v. *Ancell.* Agreement.

Where an agreement was stated in the pleadings to have been made between the plaintiff and the defendant, and the agreement produced was between the plaintiff on the one part, and the defendant and two others on the other part, but was signed only by the plaintiff and the defendant, an amendment was allowed. (2)

Doe v. *Leach.*

In the case of *Doe* d. *Edwards* v. *Leach*, (3) where it appeared, on the trial of an ejectment, that the day on which the

(1) 1 M. & R. 342.

(2) Boys *v.* Ancell, 5 Bing. N. C. 390. Dew *v.* Katz, 8 C. & P. 315; amendment as to *time of delivery* of goods contracted for. Doe d. Marriott *v.* Edwards, 6 C. & P. 208; amendment as to the name of the parish in which the premises were situated.

(3) 9 Dowl. 877. It was an ejectment for a forfeiture. Doe *v.* Heather, 8 Mees. 158; the omission of the year in the demise was held not to be amendable within the act.

right of entry accrued was subsequent to the day of the demise in the declaration, (being Monday immediately after), Mr. Baron Parke allowed the declaration to be amended, and the date of the demise to be altered to the day preceding; and the court of Common Pleas afterwards were of opinion that the judge had power to make this amendment. The Lord Chief Justice said, "there was a variance between the allegation in the record and the proof, and this was amendable under the act. The moment the amendment is made, the declaration is to be considered to have been always in its amended form, and the consent rule adapts itself to its terms." Day of demise.

In *Ivey* v. *Young*, (1) the variance was between a contract for certain poles to be paid for on delivery, and a contract to pay cash on delivery, with five per cent. discount. It further appeared that part had been delivered. An application to amend was opposed on the ground, that if the contract had been stated properly, the defendant might have been prepared to show, that he rescinded the contract on the plaintiff's refusal to pay on the first delivery. Alderson, B., allowed the cause to proceed, and nothing appearing to show that the defendant rescinded the contract on that ground, the learned judge directed the amendment, and the plaintiff had a verdict. *Ivey* v. *Young*. Contract.

Where a proposed amendment would introduce in effect a new contract and a new breach, it is not within the statute. (2) But when an averment in the declaration may be properly considered as a statement of the *legal effect* of a contract, and not as a substantive part of the contract, it may be amended, and the statement as to the legal effect may be made conformable with that which is proved. Thus, where the declaration on a charter-party, after setting out that part of the contract relating to the voyage, alleged a promise to have an agent at a place named, to give orders, &c.; but this allegation was not (as was intended) a correct statement of the legal effect of the *Whitwill* v. *Scheer*. Contract.

(1) 1 M. & R. 546.

(2) Brashier *v.* Jackson, 6 Mees. & W. 549. Ward *v.* Pearson, 5 Mees. & W. 16. S. C. 7 Dowl. 382, is another example of an amendment in the statement of a contract.

charter-party; it was, therefore, struck out, and another more correct statement was inserted. (1)

Smith v. *Knowelden.* Action for slander.

In the case of *Smith* v. *Knowelden*, (2) where in an action of slander, in which defendant pleaded not guilty, and the variance was (according to the evidence produced at the trial) that the defendant said, *he had heard* that the plaintiff was to be tried, &c., &c., instead of saying (as represented in the declaration) positively, and as from his own knowledge, that *the plaintiff was to be tried;* the Lord Chief Justice and the Court of Common Pleas, were of opinion, that an amendment had been properly made at the trial. "It may be difficult," said the Chief Justice, "to give any very exact meaning to the words of the act, '*merits of the case*,' in an action of this sort; but it may be taken to mean the substantive matter which the parties came to try, without reference to the precise terms of the defence; and therefore, the act will clearly apply to this amendment, so as to supply the place of those various allegations which formerly would have been introduced into the declaration, in order to meet every contingency which might arise." With regard to the other words of the same act, "*by which the opposite party cannot have been prejudiced*," the Chief Justice said, "there could not be any prejudice in this case by amending the declaration; because the witnesses who would be called, either to prove or disprove the fact of the words being spoken, would be just the same, whether one set of words was used, or the other.

Jenkins v. *Phillips.* Action for slander.

In another action for slander, (3) the slanderous words were set out in *English*, but the words proved to have been spoken were *Welsh*, of the same meaning; an amendment was allowed to be made, by inserting in the declaration Welsh words, which were the exact Welsh translation of the English words, set out in the declaration.

(1) Whitwill *v.* Scheer, 8 Ad. & Ell. 301. Evans *v.* Fryer, 2 Perr. & D. 541; action on a wager, that a work would be completed on a certain day; the proof was of a wager that the work would be completed, but no day was mentioned; the averment as to the day was struck out.

(2) 9 Dowl. 402, 406.

(3) Jenkins *v.* Phillips, 9 Carr. & P. 766.

2. Cases in which Amendments have been refused.

In the case of *Doe* d. *Poole* v. *Errington*, (1) the demise was joint by two lessors of the plaintiff; it appeared that they claimed as tenants in common: an application was made to amend, by striking out the name of one of the lessors of the plaintiff, or adding proper words applicable to the title as it appeared. Taunton, J., refused the application, being of opinion that the amendment was prayed for in a particular way very material to the merits of the case. *Doe* v. *Errington.*

This statute, it seems, gives no power to supply a material omission in a plea. In *John* v. *Currie*, (2) in an action of trespass for taking two different articles of property, Parke, B., refused to amend a plea, which justified the taking of the one article, by extending the justification to the other also. *John* v. *Currie.*

The statute gives no authority to amend the award of *venire* on the nisi prius record: (3) nor to strike out the name of a co-defendant who was not fixed by the evidence; (4) nor to increase the amount of damages laid in the declaration. (5)

In the case of *Frankum* v. *The Earl of Falmouth*, (6) the plaintiff complained of an injury sustained by the diversion of a watercourse, the right to which he claimed in respect of a mill: the defendant traversed the right to the watercourse. At the trial before Alderson, B., it appeared that the mill was of modern erection, and that therefore the plaintiff's claim to the water was not in respect of the mill, but *ex jure naturæ*, in right of the stream running to his land, and of an antecedent appropriation of the water by the plaintiff by the erection of the mill. An application to amend the declaration was refused, but the learned judge directed a special finding under the 24th section, that the defendant had diverted the water from it's *Frankum* v. *Earl of Falmouth.*

(1) 1 Ad. & E. 750.
(2) 6 C. & P. 618.
(3) Adams *v.* Power, 7 C. & P. 76.
(4) Cooper *v.* Whitehouse, 6 C. & P. 545.
(5) Watkins *v.* Morgan, *ib.* 661. Hill *v.* Street, 2 C. & M. 420.
(6) 6 C. & P. 529. 2 Ad. & E. 451.

accustomed and proper course to the plaintiff's premises, as they existed before the mill was erected. The verdict was entered for the defendant on the issue. On a motion for entering judgment for the plaintiff "according to the right and justice of the case," the Court refused the rule as prayed for, saying, that the variance was material, and that the defendant might have prepared his defence to meet the claim made in respect of the mill, and not of the land. (1)

Guest v. Elwes.

In *Guest* v. *Elwes*, (2) an action was brought against the sheriff for an escape. At the trial, the proof, upon an issue joined on a plea of not guilty, was that the defendant negligently omitted to arrest. Alderson, B., directed the facts to be found specially, and the Court of King's Bench, in delivering the judgment of the Court for the plaintiff, said, "After conference with the learned judge, and indeed upon the argument at the bar, we are fully convinced, that in this case the defendant experienced no disadvantage whatever from the course adopted, and that, on the other hand, the plaintiff who had suffered from some breach of duty on the part of the sheriff, and who most probably was without the means of discovering precisely what it was, might have been really injured by too strict an adherence to the issue actually joined." Lord Denman further said, the Court had no power, whatever the judge at *nisi prius* might have, to impose terms "on the successful party whose mistake has been corrected, and whose right, if claimed, as it has been proved, might possibly never have been disputed by the defendant."

Brashier v. *Jackson.*

In the case of *Brashier* v. *Jackson*, (3) an action brought by the plaintiff, as tenant under the defendant, for breach of an agreement for quiet possession, &c., the defendant pleaded non assumpsit, and that the plaintiff did not become tenant *modo et formâ:* at the trial, the agreement produced in evidence agreed with the statement in the declaration: on an objection taken by the defendant's counsel, the judge was of

(1) 2 Ad. & El. 455.
(2) 5 Ad. & El. 118.
(3) 6 Dowl. 549.

opinion, that the instrument did not amount to a present demise, but only to an agreement for a future lease; that the second plea was therefore proved, and defendant entitled to a verdict on that issue. The plaintiff's counsel then applied that an amendment might be made, by omitting the words which expressed actual tenancy, and inserting other words applicable to an agreement for a lease. After argument, the judge granted the application, permitting the amendment to be made (if the plaintiff should elect to make it) within four days before the ensuing term; after which the trial proceeded. All this matter being brought before the Court, and fully argued on all the points, the Court was clearly of opinion that the judge had no power, without the consent of both parties, to give to the plaintiff liberty of making the amendment after the trial,—if the amendment could properly be made,—but that he should have postponed the trial for that purpose according to the provisions in the 23rd section of the act. (1) The court was further of opinion, that the second plea was substantially proved, the articles of agreement produced amounting only to a contract for a future tenancy, not to an actual demise as alleged in the declaration; and that the amendment ought not to have been allowed at the trial, inasmuch as it introduced a new contract, and would require a remodelling of all the pleas on the record.

Power of amendment wanted in criminal cases.

It appears from the foregoing pages that, in civil suits, where private interests are concerned, much has been done for preventing failures of justice, by correcting variances; but where public interests are chiefly concerned—in criminal prosecutions,—scarcely anything. The statute of 9 Geo. 4, allows of amendments only in a few limited cases—where mistakes have been committed in setting out, on the record, written or printed documents; and these it allows only in trials for misde-

(1) The words of the act are to the effect, that the amendment is to be made in a matter, which, in the opinion of the judge, is not material to the merits of the case. This implies that he is to exercise his judgment on it at the time; the amendment must be made at the trial; the trial must proceed; and the jury are to give their verdict on the amended record. See the remarks of Alderson, B., 6 Dowl. p. 554, 5.

meanors. Even in cases of misdemeanors, that statute does not extend to the kind of variancy most likely to occur; nor does it extend to any case of *felony*,—so that variances in prosecutions for the worst offences are beyond the reach of amendment. For instance, no amendment can be made, if, in an indictment for stealing, a mistake is made in describing the property; or if, in an indictment for burglary, the dwelling-house is described as situated in a wrong parish; or if, in an indictment for murder, the murdered man is described by a wrong name. In this last instance, however clearly the guilt may have been proved, however atrocious may be the crime,—though the true name of the murdered man was made known to the prisoner, when first charged,—though he may have had a copy of the depositions setting forth the true name,—though he has confessed the murder, and in his confession stated the true name,—though his defence has been conducted throughout, with the full knowledge of the true name,—though the wrong name was inserted in the indictment through mere clerical error—notwithstanding all this, the variance cannot be set right, and the consequence must be an acquittal. Thus the guilty party escapes; public justice is defeated; and the general impression among all who hear or read the trial, is a strong feeling of dissatisfaction and surprise. For preventing failures of justice, it is as necessary in criminal prosecutions, as it is in civil suits, that power should be given to amend the record according to the proof given,—care being always taken that the prisoner is not prejudiced in his defence.

END OF VOL. I.

LONDON.

PRINTED BY RAYNER AND HODGES,

109, Fetter Lane, Fleet Street.