A

TREATISE

ON THE

LAW OF EVIDENCE.

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ON THE

LAW OF EVIDENCE.

Ninth Edition.

WITH CONSIDERABLE ALTERATIONS AND ADDITIONS.

BY S. MARCH PHILLIPPS, ESQ.

IN TWO VOLUMES.

VOL. II.

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ERRATA IN VOL. II.

Page
15, par. 1, line 9, for "tort," read "soil."
16, n. (2), for "Kitchin," read "Hitchin."
17, line 10, from bottom, for "is," read "was."
— n. (2), for "M. & Ro.," read "Moo. & Rob.," and the same at p. 25, n. (2); p. 26, n. (3); p. 85, n. (4); p. 155, note, col. 1, line 2; p. 337, n. (6); p. 345, n. (4); p. 398, n. (2); p. 405, n. (1).
19, line 4, from bottom, for "writ," read "suit."
21, line 14, for "Kirwan," read "Trevivan."
— n. (2), line 5, for "Eastmore *v.* Lewes," read "Eastmure *v.* Laws."
22, n. (3), for "Mo." read "Moo.," and the same p. 26, n. (3).
27, n. (1), line 4, after "vol. 1," insert "p. 252."
30, par. 3, line 4, from bottom, for "suit," read "cause."
35, par. 3, line 3, from bottom, for "the means," read "in respect of the means."
44, par. 1, line 7, for "(2)," read "(1)," and par. 2, line 7, for "(1)," read "(2)."
50, end of par. 3, read "the doctrine, there laid down, as to questions of property in action of trover, has been considered as applying," &c.
60, par. 2, line 8, for "It," read "he."
68, par. 2, line 4, after "and," insert "the."
77, par. 3, line 5, for "his prisoner," read "the prisoner."
80, n. (4), for "Hinxman," read "Hickman."
85, n. line 1, after "had," insert "not."
89, end of n. (2), insert name of case, "Bricknell *v.* Nulse."
112, n. (1), line 3, for "Whettuck," read "Whittuck."
123, line 8, for "the same book was," read "Speed's Chronicles were."
134, n. (2), line 2, for "Tay," read "Jay."
135, marg. note at bottom, for "c. 3," read "c. 111."
146, line 6, dele "and received," at the end of the line.
149, n. (1), line 15, for "Buller *v.* Michell, 4 Dow.," read "Bullen *v.* Michel, 4 Dow."
166, n. (5), line 1, for "Best," read "Birt."
167, par. 1, line 2, from bottom, for "person," read "parson."
197, par. 2, line 3, and marg. note, for "c. 27," read "c. 37."
200, marg. note to par. 2, and n. (4), for "Gregory," read Godfrey."
209, n. (1), line 1, for "Doe," read "Roe."
210, marg. note to par. 3, and n. (10), for "Crank," read "Crouk."
211, n. (5), for "Howell," read "Hovill."
222, n. (1), before "363," insert "3 Camp."
226, end of par. 2, refer to n. (3).
249, n. (1) and (2), for "Eagleton *v.* Coventry," read "Eagleton *v.* Kingston."
—— n. (1), line 13, for "reversing," read "overruling."
252, line 7, for "although," read "where."
272, transpose line 25, between line 20 and line 21.
289, n. (3), for "2 Nev." read "2 Vern. Rep."
309, par. 2, line 5, from bottom, for "ought," read "out."
—— n. (1), line 1, after "Dow," insert a comma, instead of a full stop, and dele "P. C."
314, n. (1), line 6, for "ground," read "instrument."
337, par. 3, in marg. for "Charty," read "Charter."
357, note, transpose the latter part to the end of n. (3), p. 358.
358, n. (1), for "5 B. & A.," read "5 B. & Ad."
394, par. 3, line 3, from bottom, for "he," read "and."
———— line 2, from bottom, dele "and."
411, n. (2), dele "*vide infra*, p. 411."
412, n. (1), line 1, for "Tr. R.," read "T. R."
417, n. (1), line 4, from bottom, for "16 C. 2, s. 1," read "16 C. 2, St. 1."
———— col. 2, line 4, from bottom, for "1, 2 Geo. 4," read "1 & 2 Geo. 4."
418, n. (1), for "1 Carr. C.," read "1 C. & P."
444, n. (1), after "3 Nev. & P.," insert "139."
483, col. 2, line 1, for "will. All," read "will, all"

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27, n. (4), at beginning, refer to "Vol. 1, p. 219."

41, n. (3), add "Doe *v.* Webber, 1 Ad. & Ell. 733; 3 Nev. & M. 746."

43, n. (4), add "Webster *v.* Mason, 8 Dowl. P. C. 705; a case of irregularity of proceeding in an inferior court. See also Bruce *v.* Waitt, 1 Man. & Gr. 1, and 1 Sc. N. S. 81."

44, end of n. (1), add "Ferguson *v.* Mahon, 11 A. & E. 179."

65, end of n. (5), add "Tufton *v.* Whitmore, 12 A. & E. 370."

70, end of n. (1), add "R. *v.* Greenacre, 8 C. & P. 32."

71, end of n. (2), add "R. *v.* Marshall, 1 C. & Marsh. 147."

——— n. (7), add "As to receiving depositions, taken before a coroner, where a witness is beyond sea, see Sills *v.* Brown, 9 C. & P., 601, 603."

77, n. (1), add *Vide infra*, p. 179.

——— end of par. 1, refer to R. *v.* Edwards, and Woodcock, 8 C. & P. 26, 31, where Littledale, J., and Coleridge, J., decided that the prisoner's counsel may put into the hands of a witness for the prosecution his own deposition, and may ask him, after he has read it, whether he adhered to the statement made by him in court. See R. *v.* Beardmore, 8 C. & P. 260.

80, end of n. (3), add "R. *v.* Bentley, 6 C. & P. 148. R. *v.* Wheeley, 8 C. & P. 250."

88, n. (5), col. 2, line 6, after "B. N. P. 242," refer to Earl of Roscommon's claim, 6 Cl. & Fin. 103.

89, par. 2, note, The new Act of Bankruptcy (5 & 6 Vict. c. 122, s. 25) enacts, that the deposition of a witness as to the petitioning creditor's debt, trading, or act of bankruptcy, under a fiat already issued or to be issued, and purporting to be sealed with the seal of the Court of Bankruptcy, or a copy thereof purporting to be so sealed, shall, in the event of the deponent's death, be in all cases receivable in evidence of the matters therein contained.—By sect. 42, a bankrupt's certificate, and the confirmation thereof, are made sufficient evidence of the trading, bankruptcy, fiat, and other proceedings precedent to the obtaining of the certificate.

93, end of n. (2), add "Tufton *v.* Whitmore, 12 A. & E. 370."

107, n. (2), add "Entry reciting limitations in a patent of peerage admitted by Committee of Privileges; in Lord Dufferin's case, 4 Cl. & F. 568."

108, par. 4, See the new Bankruptcy Act (5 & 6 Vict. c. 122, s. 24), which specifies in what cases the Gazette is made conclusive evidence of the bankruptcy of a person, and of the time of the suing forth of the fiat.

109, n. (3), add "case of Huntley Peerage, 4 Cl. & Fin. 349."

115, n. (2), add "Mortimer *v.* M'Callan, 6 M. & W. 58."

117, n. (3), add "R. *v.* Pembridge (Inhabitants), 1 Car. & M. 157."

121, n. (1), add "Jewison *v.* Dyson, 2 M. & R. 377."

—— end of n. (3), refer to "Stockin *v.* Collin, 7 M. & W. 515; and as to foreign post-marks, see Reed *v.* Norman, 8 C. & P. 65."

122, n. (2), add "See Doe *d.* Garrod *v.* Olley, 12 Ad. & Ell. 486."

123, n. (7), add "See Vaux Peerage case, as to inadmissibility of statements in cotemporary histories."

129, end of n. (1), add "See Forman *v.* Dawes, 1 Car. & Marsh. 127."

—— end of par. 3, add "See London and Birmingham Railway Comp. 5 Bing. N. C. 27, reported in 1 Arn. Rep. C. P. 363, 368, n. (p.)"

131, end of n. (3), add "As to cross-examining from office copy of an affidavit, see Davies *v.* Davies, 9 C. & P. 252."

133, end of n. (5), add "But a different rule prevails in the Committee of Privileges of the House of Lords, according to which, to make a copy of a record admissible, there must be a change of hands, or the witness must himself read the copy with the original, Slane Peer. case, 5 Cl. & Fin. 23, 24, 42."

137, n. (3), add "Holt *v.* Miers, 9 C. & P. 191."

141, n. (3), add "See Leake *v.* Marquis of Westmeath, 2 Mo. & R. 394."

166, n. (5), add "R. *v.* Pembridge (Inhabitants), 1 Car. & Marsh. 157."

179, n. (2), add "See also R. *v.* Edwards and Woodcock, 8 C. & P. 26, 30."

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186, n. (1), add "R. *v.* Mayor of Beverley, 8 Dowl. P. C. 140. Mayor of Arundel *v.* Holmes, 8 Dowl. P. C. 118. Pontet *v.* Basingstoke Can. Co., 2 Bing. N. C. 370, and 2 Sc. 543."
193, n. (1), add "Wood *v.* Morewood, 2 Sc. N. S. 204; inspection not granted, to support a motion for a new trial."
200, end of n. (1), add "Wood *v.* Morewood, 9 Dowl. P. C. 44."
203, n. (6), add "See Bringloe *v.* Goodson, 5 Bing. N. C. 738; S. C. 8 Sc. 71."
204, end of n. (2), add "S. C. 2 A. & E. 431. As to custody of an old will, see Doe *d.* Bowdler *v.* Owen, 8 C. & P. 751."
—— n. (6), add "Doe *v.* Boynon, 4 P. & D. 193."
207, n. (3), "See Collins *v.* Bayntun, 1 Ad. & Ell. N. S. 118."
210, n. (7), add Doe *d.* Counsell *v.* Caperton, 9 C. & P. 112. Glubb *v.* Edwards, 2 Mo. & R. 300."
—— n. (10), after "197," add "S. C. 2 Moo. & Rob. 262."
211, end of n. (1), add "Wilman *v.* Worrall, 8 C. & P. 380."
219, n. (1), add "See Hughes *v.* Budd, 8 Dowl. P. C. 315."
—— n. (4), add "Firkin *v.* Edwards, 9 C. & P. 478. Gibbons *v.* Powell, Id. 635. Byrne *v.* Harvey, 2 Moo. & Rob. 89."
—— n. (5), add "Gibbons *v.* Powell, 9 C. & P. 634."
221, n. (1), add "Poole *v.* Warren, 3 Nev. & P. 693."
228, n. (1), add "Knight *v.* Marquis of Waterford, 4 Younge & C. 284."
229, n. (1), add "Doe *v.* Ross, 7 M. & W. 102."
237, n. (2), add "Hall *v.* Ball, 3 Scott. 577."
241, n. (3), add "Trewhitt *v.* Lambert, 10 Ad. & Ell. 470. S. C. 3 P. & D. 676."
258, end of par. 1, add "As to inspection of ancient documents by skilful witnesses, for ascertaining whether they belong to a particular period; see Davies *v.* Lowndes, 1 Bing. N. C. 597, 609; 5 Bing. N. C. 161, 168; and see 1 Arn. Rep. C. P. 450, 456, n."
294, n. (3), add "Boys *v.* Williams, 2 Russ. & M. 689."
295, n. (1), line 4, from bottom, add "See Doe *d.* Haden *v.* Burton, 9 C. & P. 254."
337, n. (4), add "Spier *v.* Cooper, 1 G. & D, 52. Bourne *v.* Gatliff, 3 Sc. 1, 40."
—— n. (6), add "Bottomley *v.* Forbes, 5 Bing. N. C., 121; S. C. 8 Sc. 866. Ellis *v.* Thomson, 3 M. & W. 445."
340, n. (2), add "Spicer *v.* Cooper, 1 Ad. & Ell. N. S. 424."
347, n. (2), add "Dunbar Corporation *v.* Duchess of Roxburghe, 3 Cl. & Fin. 335."
348, n. (1), add "As to letters written without prejudice, see Healey *v.* Thatcher, 8 C. & P. 388."
351, n. (3), add "Doe *d.* Bainbridge *v.* Statham, 7 D. & Ry. 141."
356, n. (3), line 6, from bottom, after "facts," refer to "Healey *v.* Thatcher, 8 C. & P. 388."
358, n. (3), add "See R. *v.* Barratt, 9 C. & P. 387, as to papers being in a prisoner's possession."
363, n. (1), add "See also Higgins *v.* Senior, 8 Mee. & W. 844."
367, n. (2), add "Wright *v.* Crookes, 1 Sc. N. S. 685."
371, n. (2), add "Doe *d.* Rowcliffe *v.* Earl of Egremont, 2 Mo. & R. 386."
372, n. (1), refer to "Bastard *v.* Smith, 2 P. & D. 453."
373, n. (8), add "R. *v.* Wigley, 7 C. & P. 4."
374, n. (3), add "See Spencer *v.* Newton, 6 Ad. & Ell. 623, where the privilege was disallowed."
377, n. (3), add "Newton *v.* Harland, 9 Dowl. P. C. 16. R. *v.* Lord John Russell, 7 Dowl. P. C. 693."
378, n. (1), add "See Evans *v.* Rees, 12 Ad. & Ell. 55."
384, n. (1), add "Evans *v.* Rees, 12 Ad, & Ell. 55."
395, end of n. (1), add "As to the time of taking this objection, see R. *v.* Frost, 9 C. & P. 129, 139, 162."
416, n. (1), see note *supra*, on n. (1), p. 77.
434, n. (1), at the end add, "S. C. stated, p. 435."
—— n. (3), add to the cases cited, "Long *v.* Hitchcock, 9 C. & P. 619."
462, n. (2), add "Winter *v.* Butt, Sp. Ass. 1841, cor. Erskine, J., 2 Moo. & R. 357."

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VOLUME SECOND.

PART THE SECOND.

ON WRITTEN EVIDENCE.

WRITINGS are either public or private. Some public writings are of record; others, not of record. Again, public writings may be distinguished into such as are of a judicial character, and such as are not judicial.

It is proposed to treat, in the first chapter, of the admissibility and effect of judicial writings, as evidence; and, in the second, of the admissibility and effect of such public writings as are not judicial. The proof of writings, both public and private, will be considered in subsequent chapters.

CHAPTER I.

OF THE ADMISSIBILITY AND EFFECT, IN EVIDENCE, OF JUDICIAL WRITINGS.

IN the present chapter, the effect and admissibility of judicial writings will be treated of in the following order:—1. Of verdicts and judgments of superior courts; 2. Of proceedings

in Chancery; 3. Of sentences in the ecclesiastical courts; 4. Of judgments of courts of admiralty; judgments *in rem* in the Exchequer; judgments by commissioners, visitors, courts martial, &c.; 5. Of judgments of inferior courts; 6. Of sentences of foreign courts; 7. Of depositions and examinations; 8. Lastly, of inquisitions.

It may be observed, that these several parts of the subject will serve to illustrate each other, and that the general principles, applicable to each, may be most clearly comprehended by reference to all.

Section I.

Of the Admissibility and Effect, in Evidence, of Judgments and Verdicts in the Superior Courts.

Records.

Records are the memorials of the proceedings of the Legislature, and of the King's courts of justice, preserved in rolls of parchment; and they are considered of such authority, that no evidence is allowed to contradict them. A record imports such absolute verity, that no person, against whom it is admissible, shall be allowed to aver against it. (1) "The authorities," said Lord Tenterden, delivering the judgment of the court in the case of the *King* against *Carlile*, (2) "are clear, that a party cannot be received to aver as error in fact, a matter contrary to the record."

Judgment conclusive of fact recorded.

Judgments and verdicts in the superior courts are always of record. They have, therefore, the character which belongs to all records, that they are not to be contradicted by evidence.

If a verdict finding several issues were to be produced in evidence, the opposite party would not be allowed to shew,

(1) Co. Litt. Inst. 260, a.; 12 Rep. 24, 25; Dodderidge's English Lawyer, p. 200; Lamb. Inst. B. 1, c. 13, p. 71; Gilb. Ev. 5; B. N. P. 221. Glynn *v.* Thorpe, 1 B. & A. 156. Rex *v.* Hopper, 3 Price, 495.

(2) 2 B. & Ad. 362.

that no evidence was offered on one of the issues, and was indorsed on the *postea* by mistake. (1) On an indictment for assisting the escape of a convict out of prison, if the record of the conviction is produced by the proper officer, evidence is not admissible to dispute the statement in the record, or to shew that it never was filed among the other records of the county; even though the indictment refer to it with a *prout patet*, as remaining among those records. (2) An officer who has the care and custody of records may be examined as to their condition, but cannot be examined as to their matter or contents. (3)

Not conclusive on immaterial averments.

A record will not be conclusive as to the truth of allegations, which were not material nor traversable. (4) Thus, for example, a party will not be estopped from averring, in an action of debt on a bond, that the bond was made at A., though, in a former action on the same bond, he averred it to have been made at B. (5) So, in the case of a conviction for a felony, where the jury has given a general verdict, the record will not be conclusive that the offence was committed on the day mentioned in the indictment, for the time is not of the substance of the charge; and therefore a party interested to dispute a forfeiture (which in the case of real property relates to the time of the offence), may shew that the offence was committed on a different day from that alleged in the record. (6)

Judgment how used.

The record of a judgment or verdict not being liable to contradiction as to the truth of its contents, the question as to its admissibility or effect in evidence must depend on the inferences attempted to be drawn from it. These inferences are sometimes necessary and conclusive, and sometimes optional with juries.

To prove fact of judgment.

Where a judgment is produced merely for the purpose of shewing that such a proceeding actually took place (as, with a view to disqualify a witness, by shewing that judgment was actually

(1) Reed *v.* Jackson, 1 East, 355.
(2) Rex *v.* Shaw and others, 1 R. & R. Cr. Ca. 526.
(3) Leighton *v.* Leighton, 1 Str. 210.
(4) Co. Litt. 352 b.
(5) Com. Dig. Estoppel, E. 6.
(6) Ives's case, 3 Inst. 230; Gilb. Ev. 230. See Co. Litt. 352 b.; and Attorney-General *v.* King, 5 Price, 195.

passed upon him), the record is conclusive of the fact of conviction,—the fact of conviction being by the law made the criterion of incompetency.

The legal consequences arising from the simple fact of a judgment having been pronounced by a court of competent jurisdiction are very numerous. In some cases, a judgment constitutes part of a title; in others, it is used merely to shew a suit determined,—or to let in evidence of what was sworn upon a trial,—or to justify proceedings in execution of the judgment,—or to entitle a partner to contribution,—or for some other purpose to which it is properly applicable as a judgment. In *Green* v. *New River Company*, (1) the judgment was used to prove the fact that a party had by process of law been compelled to pay damages to a certain amount.

Judgment in *Duchess of Kingston's* case.

The celebrated judgment of Lord Chief Justice De Grey, expressing the unanimous opinion of all the judges, in the *Duchess of Kingston's* case, (2) gives such a clear and comprehensive view of the general principles applicable to the subjects treated of in this chapter, it will be desirable to introduce the whole of it, distributing its several parts under the several heads to which they relate.

The judgment begins as follows:—"What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particu-

(1) 4 T. R. 590.

(2) 20 Howell's St. Tr. 538.
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lar reasons, but not being applicable to the present subject it is unnecessary to state them."

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true. First, that a judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar,—or, as evidence, conclusive,--between the same parties, upon the same matter directly in question in another court. Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction,—nor of any matter incidentally cognizable,—nor of any matter to be inferred by argument from the judgment."

A much more conclusive effect is here attributed to the judgments of courts of *exclusive* jurisdiction than to the judgments of courts which have only *concurrent* jurisdiction. With regard to *the parties* between whom they are to be used, and *the matter* to which they relate, these two classes of judgments are put upon the same footing, and subject to the same limitation and restriction; the *matter* must be the same, the *parties* also the same. But in one important particular they differ, that is, with reference to the *occasion* and the *manner* in which it is proposed to use them. It is only upon a matter *directly in question* that the judgment of a court of *concurrent* jurisdiction is conclusive,—while the judgment of a court of *exclusive* jurisdiction is conclusive, not only when the matter comes in question directly, but also when it comes *incidentally* in question. This difference in the effect of the judgments arises from the difference in the constitution of the courts which pronounce them. When a matter, over which some other court is allowed to have exclusive jurisdiction, comes in question—whether directly or incidentally—and the judgment of such a court is offered in evidence as proof of the matter, it must

necessarily be *conclusive*; implicit credit must be given to a court so constituted, while its judgment is unreversed and in full force; for the court in which the particular matter is to be proved, has no authority to examine into the merits of the judgment, and must take the matter as judicially and conclusively decided.

1. *Of the Admissibility and Effect of Verdicts and Judgments with reference to the Parties.*

What parties bound by a judgment.

Lord Chief Justice De Grey distinctly states the rule of law as to the effect of a judgment, where the parties in the first suit are the same as in the second; the judgment is said to be *conclusive* between the same parties. It is evident, from taking both passages together, he meant to be understood as laying down, that the judgment would be conclusive also between all *claiming under the parties*;—and it is only just that if the parties to a suit are to be bound by a judgment, all claiming under them ought likewise to be bound.

It was resolved by Chief Justice Holt, and the other Judges of the Court, upon a trial at bar, that no record of a conviction or verdict can be given in evidence, but such whereof the benefit may be mutual; that is, such as might have been given in evidence, either for the plaintiff or the defendant. (1) Chief Baron Gilbert lays it down, "that no body can take benefit by a verdict who had not been prejudiced by it, had it gone contrary." (2)

Principle of this rule.

It seems obviously unjust, that proceedings should be evidence *against* a stranger, inasmuch as he had no opportunity of calling witnesses, or of cross-examining those on the other side, or of appealing against the judgment. And it may

(1) Rex *v.* Warden of the Fleet, Rep. temp. Holt, 134. B. N. P. 233, S. P. It is a rule of estoppels, that they must be reciprocal, Co. Litt. 352; Com. Dig. Estoppel. Gaunt *v.* Wainman, 3 Bing. N. C. 69. Doe d. Marchant *v.* Errington, 6 Bing. N. C. 79.

(2) Gilb. Ev. 28; B. N. P. 232; Ward *v.* Wilkinson, 4 B. & A. 412. The case of Whateley *v.* Menheim and another, 2 Esp. 608,—where a verdict, on an issue directed by the Court of Exchequer to try a question of partnership, was used by a stranger,—does not appear consistent with principle.

perhaps be thought a sufficient reason for not allowing verdicts and judgments as evidence *for* a stranger, even against a party who was engaged in the former suit, that if the stranger had been party to that suit, instead of the person who succeeded in it, the result might have been different; for as the parties would in that case have been constituted differently, the evidence might have varied; part of the evidence might then have appeared inadmissible, or of a doubtful character, or perhaps other evidence might have been produced by the party who lost the verdict. Under such circumstances, to admit a verdict or judgment, as evidence, would be giving a party indirectly the benefit of testimony, which he might be precluded from using directly in his own suit.

Rule with reference to *real* and *nominal* parties.

But in the same manner as admissions may be used against the real parties to a suit, though they are not the nominal parties to the record, it has been held that verdicts and judgments are receivable in evidence against the parties, on whose account the suits, in which the judgments were obtained, were instituted or defended. Thus, in the case of *Kinnersley* v. *Orpe*, (1) which was an action for a penalty incurred by destroying fish in the plaintiff's fishery, a verdict for a plaintiff in a former action, for a trespass committed in the same fishery against one who justified as servant, was allowed to be evidence against the defendant: for the defendant in the second suit acted by the command of the same person under whom the defendant in the first action had justified, who was considered to be the true party in both causes. In *Strutt* v. *Bovingdon*, (2) in an action on the case, for the diversion of a water-

Kinnersley v. *Orpe*. For injury to a fishery.

Strutt v. *Bovingdon.*

(1) 2 Doug. 517. At the trial, the verdict was admitted as conclusive evidence; but the Court of King's Bench considered the evidence not to be conclusive. This case appears to be doubted by Lord Ellenborough, in Outram *v.* Morewood; but to be sanctioned by the judges, in Simpson *v.* Pickering, 1 Cr., M. & R. 529.

(2) 5 Esp. 56. The case appears to have been decided on the ground that the defence in the second action was substantially the defence of Bovingdon alone; and not on the ground that whatever is evidence in the nature of an admission against one defendant is evidence against other defendants. It is said in B. N. P. 40, that a verdict on an issue out of Chancery, to which only one of the defendants was a party, may be read against all the defendants, to prove the time of an act of bankruptcy.

For injury to a watercourse.

course, against the defendant Bovingdon, and two other defendants who justified under him, a former verdict in a similar action against Bovingdon alone was held to be admissible as evidence of the plaintiff's right. In *Hancock* v. *Welsh*, (1) it was held, that a record in replevin, between a tenant and the bailiff of his landlord making cognizance under him, was admissible evidence in a subsequent action between the tenant and the landlord himself.

Hancock v. *Welsh.*

Replevin.

Tenancy.

Rule as to judgment in ejectment.

Upon the ground that the lessor of the plaintiff and the tenant are substantially the real parties to an ejectment, a judgment in ejectment is admissible evidence in an action *for mesne profits*,—and this, whether the action be brought by the nominal plaintiff, or by the lessor of the plaintiff, and whether the judgment be upon verdict or by default; but the judgment is not conclusive, unless pleaded by way of estoppel. (2)

Doe v. *Huddart.*

Doe v. *Seaton.*

It seems to be settled also, that a judgment recovered by the defendant against the same lessor of the plaintiff in a former ejectment, is admissible in evidence on the trial of a second ejectment by the same lessor of the plaintiff. (3) "A judgment," said Mr. Baron Parke, "is in no case conclusive, unless pleaded by way of estoppel. It could not be pleaded in ejectment, because the defendant is bound by the terms of the consent rule to plead not guilty; but if the parties are the same, it is evidence to go to the jury. In this case, the former judgment shews that the lessor of the plaintiff had no title to demise the premises in question on the particular day of the demise."

When the parties are the

Though the individual be the same in the two suits, yet if he

(1) 1 Stark. Ca. 347.

(2) Doe *v.* Huddart, 2 Cr., M. & R. 322, judgment admissible, but not *conclusive*, unless pleaded; *vide infra*, p. 20. Doe d. Lewes *v.* Preece, 1 Tyrw. 410. B. N. P. 87, 232.

(3) Doe d. Strode *v.* Seaton, 2 Cr., M. & R. 731. The particulars of the premises demised in the former ejectment were given in evidence with the judgment. The judgment was admissible, not *conclusive*. See B. N. P. 232; 4 Bac. Ab. Ev. (F). See also Wright *v.* Doe d. Tatham, 1 A. & E. 19.

stood in a different relation or character on the two occasions, he will not be affected by a verdict or judgment in the first suit. This doctrine has been established in regard to estoppels. A woman is not estopped, after coverture, by an admission on record by her husband and herself during coverture; and an heir, claiming as heir of his father, is not estopped by an estoppel upon him as heir to his mother. (1) A party suing as executor in an action of debt upon a bond will not be estopped by having been barred in an action upon the same bond, when he sued as administrator; but he may shew, that the letters of administration have been since repealed. (2)

same, but not suing in the *same right.*

The general rule under consideration manifestly does not apply to a case where the plaintiff uses a record in a former suit against the defendant, whom he is suing for negligence as his servant or agent, not to prove the fact of the injury or negligence, but merely to prove the amount of damages which he has been compelled by law to pay to another person (the plaintiff in the former recorded suit) in consequence of that negligence of which he now complains. (3)

2. *Of the Admissibility and Effect of Verdicts and Judgments with reference to Parties claiming in Privity.*

It is another rule derived from the doctrine of estoppels, that verdicts and judgments are admissible between persons who are in privity with the parties to the former proceedings. Such privity is of three kinds,—by blood,—in law,—and by estate.

Verdicts and judgments considered with respect to *privies* to a party.

A privy in blood—as, for instance, an heir—may give in evidence a verdict for his ancestor, and is bound by a verdict against the ancestor. (4)

Privy in blood.

The examples given of privies in law by Lord Coke, are "lords by escheat, tenant by the curtesy, tenant in dower, the

Privy in law.

(1) Com. Dig. Estoppel, C.
(2) Robinson's case, 5 Rep. 32, b.
(3) Green *v.* New River Company, 4 T. R. 590.
(4) Locke *v.* Norborne, 3 Mod. 141.

incumbent of a benefice, and others that come in by act of law, or in the *post.*" (1) A party suing as executor or administrator will be bound by a verdict against his testator or intestate, to whom he is privy *in law.* (2) A verdict against an unmarried woman is admissible against herself and a husband, to whom she is afterwards married. (3) A judgment against a schoolmaster of an hospital, concerning the rights of his office, is evidence against his successor. (4)

Vicar or rector.

A verdict on a question of tithes, between a vicar and an occupier of land in the parish, is evidence between him and another occupier, the vicar in both suits claiming the same general right to tithes. (5) Upon this principle, a decree, in the Court of Exchequer, in a cause between the vicar on one side, and the impropriator on the other, (establishing the vicar's title to small tithes under an ancient endowment against the defendant, who insisted that he was only entitled to an annual payment in lieu of tithes,) was held to be evidence in suits between succeeding vicars and patrons; but not conclusive evidence, as it might have been, if the ordinary had been a party to the first suit. (6)

Judgment of ouster.

The principle, of judgments being admissible against privies in law, affords a ground for the well-known rule, that a judgment of ouster is evidence, in a *quo warranto*, against a person claiming to have been admitted to a corporate office by the party against whom the judgment was obtained. (7)

(1) Co. Litt. 352, b. Outram *v.* Morewood, 3 East, 353.

(2) Rex *v.* Hebden, Andr. 389.

(3) Outram *v.* Morewood, 3 East, 345. See this case stated *infra*, p. 17.

(4) Lord Brounker *v.* Sir R. Atkins, Skinn. 15. As to judgments against former churchwardens, see Berry *v.* Banner, Peake, 156.

(5) Travis *v.* Chaloner, 3 Gwill. 1237. And see Ashby *v.* Power, 2 Gwill. 1239. Benson *v.* Olive, 2 Gwill. 701.

(6) Carr *v.* Heaton, 3 Gwill. 1261.

(7) B. N. P. 231; 2 Barnard. 370. Rex *v.* Lisle, Andr. 163. Rex *v.* Hebden, 2 Str. 1109. 5 T. R. 72; 11 St. Tr. 216. Rex *v.* Grimes, 5 Burr. 2598. Selw. N. P. 1047.—Judgment of ouster has been also considered in the nature of a judgment *in rem*: Rex *v.* Mayor of York, 5 T. R. 72, where Rex *v.* Hebden, and Rex *v.* Grimes, were cited to shew that the judgment was not *conclusive* against third persons; and Lord Kenyon is reported to have said, "If you

Privy in estate.

With regard to privies in estate, it does not appear to be clearly settled, how far the admissions of persons having title to parts of the inheritance of the same estate, may be received against parties having title to other parts, and how far verdicts and judgments obtained for or against such persons may be received in evidence between these parties. It has been held, that where several remainders are limited by the same deed, a verdict for one in remainder may be given in evidence for one next in remainder; (1) and that a verdict and judgment for or against a lessee is evidence for or against the reversioner. (2) But on the other hand, it has been held that a verdict against a tenant for life will not bind a reversioner, unless where the reversioner, in certain ancient forms of suit, had been made a party to the proceeding, upon *aid-prayer*. (3)

Verdicts and judgments when evidence for or against.

Doe v. *Webber.*

In an action of ejectment on the several demises of a mortgagor and mortgagee, evidence was offered on the part of the defendant, that, some years before, he brought an ejectment on his own demise against the mortgagor for the premises now in question, who had been allowed to remain in possession; that the cause was referred, and the award was in favour of the defendant, who obtained possession; this evidence was rejected as inadmissible against the mortgagee, with respect to whom the award was *res inter alios acta*; and the rejection was approved by the court above. (4)

Blakemore v. *Glam. C. C.*

In the case of *Blakemore and Booker* v. *Glamorgan Canal*

derive title to a corporate office through A., and the prosecutor shew a judgment of ouster against A., it is conclusive against you, unless you can impeach the judgment as obtained by fraud."

(1) Pyke *v.* Crouch, 1 Lord Raym. 730. B. N. P. 232. Rushworth *v.* Countess of Pembroke, Hardr. 472. Com. Dig. Ev. (A. 5.) Bishop of Lincoln *v.* Ellis, Bunb. 110. 1 E. & Y. 777, where a decree against the lessee of an impropriator was produced against a subsequent impropriator. And see Warden of St. Paul's *v.* Morris, 9 Ves. 155. Kingworth *v.* Leigh, Gwill. 1615. 3 E. & Y. 1385. Carr *v.* Heaton, Gwill. 1258. 3 E. & Y. 1320. Doe *v.* Tyler, 6 Bing. 390.

(2) Com. Dig. Ev. (A. 5) Gilb. Ev. 35, 36. Per Curiam, in Rushworth *v.* Countess of Pembroke, Hardr. 472. The answer of an impropriator is evidence against his lessee, De Whelpdale *v.* Melburn, 5 Pr. 485.

(3) B. N. P. 232; Hardr. 436; Bac. Ab. Ev. 617. See 12 Vin. Ab. 132.

(4) Doe d. Smith and Payne *v.* Webber; 1 A. & E. 119.

Company, (1) an action brought for diverting water from their works, it appeared that one of the plaintiffs, whilst in the sole possession of the same works, had brought a former action for a similar injury against the same defendants, in which he had recovered a verdict and judgment against them; the other person, now co-plaintiff, was examined on the trial of the former action as a witness against the defendants; this verdict and judgment was admitted as evidence for the plaintiffs on the trial of the second suit, and, as the Court of Exchequer decided, properly admitted. "There is no doubt," said Mr. Baron Parke, "that a verdict for an owner of an estate, upon a question relating to the rights and easements belonging to that estate, is evidence for another claiming under him. In this case, there was proof that Blakemore was in possession of the works when the former cause of action accrued, and that he and Booker were so at the time of the present cause of action: this is, without doubt, abundant *primâ facie* evidence, that the present plaintiffs were privy in estate to the former plaintiff." Upon the second point, whether the record was inadmissible, because one of the present plaintiffs was himself a witness in the former suit, Mr. Baron Parke said, "The case being brought within the general rule, that a verdict on the matter in issue is evidence for and against parties and privies, no exception can be allowed in the particular action, on the ground that a circumstance occurs in it, which forms one of the reasons why verdicts between different parties are held to be inadmissible, any more than the absence of all such circumstances in a particular case would be allowed to form an exception to the general rule, that verdicts between other parties cannot be received. It is much wiser and more convenient for the administration of justice, to abide as much as possible by general rules."

Verdict used by one who was witness in former suit.

It has been laid down, that "a verdict is evidence for one under whom any of the present parties claim." (2) But this must be understood to mean a claim acquired through such

(1) Blakemore and Booker *v.* Glamorganshire Canal Company, 2 Cr., M. & R. 133.

(2) Com. Dig. Ev. (A. 5).

party subsequently to the verdict; for if the rule could be extended to parties claiming other lands under the same title previously to the verdict, the effect of such verdict might be carried back for an indefinite period. (1)

Verdicts, evidence of reputation.

Verdicts are frequently admitted in evidence on the footing of hearsay statements, upon matters in which hearsay evidence is receivable; in such cases, the reason of the rule, that a verdict is only admissible between parties or privies, is not applicable; nor can verdicts, when used for this purpose, be pleaded by way of estoppel. The use of verdicts for the purpose of hearsay evidence has been considered in the former Volume.

3. *Of the Admissibility and Effect of Verdicts and Judgments, with reference to the Matters in Controversy.*

Judgment on the *same* matter in question.

It is a settled principle, as appears from the judgment of Lord Chief Justice De Grey, that the judgments of courts of concurrent jurisdiction are not admissible in a subsequent suit, unless they are upon the same matter coming in question, and directly upon the point; but when the same matter is directly in question in another suit, and the judgment in the former suit is directly upon the point, the rule laid down by Lord Chief Justice De Grey is, that it will be, as a plea, a bar,—or, as evidence, conclusive. (2)

Seddon v. *Tutop.*

Action for several distinct causes—no proof offered as to

Where the plaintiff in a former action declared on a promissory note and for goods sold, but upon executing a writ of inquiry after judgment by default, gave no evidence on the count for goods sold, the judgment was not a bar to his recovering for the goods in another action. (3) Here there were

(1) By Littledale, J., in Doe d. Foster *v.* Earl of Derby, 1 A. & E. 787.

(2) *Supra*, p. 4.

(3) Seddon *v.* Tutop, 6 T. R. 607. This was an action for goods sold; the defendant pleaded a former recovery for damages sustained by reason of his not performing the identical promises, &c.; the plaintiff replied that the promises in this action were not the same identical promises for which he had recovered by the former judgment; so that the issue was, in substance, whether the damages demanded in this action had been already satisfied by the recovery in the former.

some—a second action for these was not barred.

distinct demands, and separate counts applicable to each. If the plaintiff had given any evidence at all on the count for goods sold, and the judgment had included this with the rest of the plaintiff's demand, the judgment might then have been pleaded as a judgment recovered upon the same identical causes of action. For if a plaintiff, having several causes of action against a defendant, on the trial offers evidence of these several causes, and fails for want of sufficient evidence to establish some of them, he cannot bring another suit for those causes of action in which he has failed. (1)

Hadley v. Green.

A plaintiff, having a claim against the defendant for rent, and also for stone taken from a quarry, declared in debt for use and occupation of a farm, with the money counts; by the particulars it appeared, that the plaintiff sought to recover a stated sum for the value of certain quantities of stone. Before the trial, the plaintiff commenced a second action on the case against the defendant, for quarrying, taking, and carrying away stone, with counts for mismanagement of the farm, and in trover; and delivered particulars claiming the same sum as before, for similar quantities of stone. At the first trial, the plaintiff confined his evidence to the count for use and occupation, and recovered a general verdict. At the second trial, the plaintiff's counsel abandoned the counts for injuries done to the farm, and confined the evidence to the counts respecting the stone; the jury gave a general verdict for the plaintiff, subject to the opinion of the court above. The question was argued, whether the plaintiff could recover in the second action, or whether the tort was waived by the statement in the particulars in the first action, that the plaintiff sought to recover the value of stone taken away, under the common counts. The court held, that the plaintiff having distinct demands

It was clear, on the facts above stated, that they had not been satisfied, and that this demand had not been inquired into in the former action: and the form of the issue was such, said Lord Kenyon, the court could decide according to the justice and truth of the case. The case of Seddon *v.* Tutop, was recognized by the court in Hadley *v.* Green, 2 Tyrw. 395.

(1) By Best, Ch. J., in Stafford *v.* Clark, 2 Bing. 382.

against the defendant, claimed on distinct counts, one of which demands, namely, that for the tort, was not enforced by him at the trial of the first action, the tort was not thereby waived, and consequently, that the second action was maintainable notwithstanding the former recovery.(1) "The plaintiff here," said Mr. Baron Bayley, "had originally a right to sue in trespass or case, and was not bound in the first instance to have declared in debt or assumpsit. A jury might give more in the action for subverting the tort, than in that for the value of the stone. Then, when would the time for the plaintiff's election of his remedy be complete? I am of opinion, that it was not complete till the time of the first trial."

Eastmure v. Lawes.

In the case of *Eastmure* v. *Lawes*,(2) the Court of Common Pleas decided, that a party is estopped by a verdict in a former action, which found against a demand in a matter for which he afterwards sues. It was an action of debt with the common counts, where the defendant pleaded that he formerly sued the plaintiff, who pleaded the present demand as a set-off, and that a verdict was found against the set-off; and that the present action is brought to recover the identical claim specified in the set-off: to this plea there was a replication, that no evidence was offered in that action in support of the set-off. On a demurrer to the replication, the Court of Common Pleas held, that the verdict was an estoppel, and conclusive between the parties. "The question is," said Lord Chief Justice Tindal, "whether, after a precise issue on the same point has been found against the plaintiff, he may bring an action, and agitate the whole matter over again. There can be no doubt that, if the plaintiff had sued the defendant for this sum in a former action, and after plea a verdict had been found against him, he could never have brought the matter again in question on the ground that he was not then prepared with evidence. Consistently with the decision of *Outram* v. *Morewood*,(3) I can-

(1) Hadley *v.* Green, 2 Tyrw. 390.

(2) 5 Bing. N. C. 450. See Smith's Selection of leading cases, vol. 2, 442, and reference there to Tuck *v.* Tuck, 5 M. & W. 109, and to Kilner *v.* Bailey, *ib.* 382.

(3) See this case stated, *infra*, p. 17.

not see how an estoppel can be set aside on the ground set up by this replication."

Test of *cause* of action being *the same*.

One criterion for trying whether the matter or cause of action be the same as in a former suit, is, that the same evidence would sustain both actions. Thus, a judgment for a defendant in trespass, when the right of property is determined, is a bar in trover for the same taking. (1) So a verdict for the defendant in trover is a bar in an action of money had and received for the money arising from the sale of the same goods: and this, although the former action was brought against the creditor and the sheriff, and the latter against the creditor alone. (2)

Former recovery in a different form of action, when a bar to second action.

Verdict for defendant, when not a bar to a second action.

If the plaintiff failed in his first suit on account of some defect in pleading, or from having mistaken the form of action, the judgment will not be conclusive, and he may bring another action to try the same right. (3)

Proof of the *subject matter* being the *same*, necessary.

When a verdict is offered as proof of a right to tithes, the right not being of a general nature, it will be necessary to shew that the former proceedings related to the same lands as those concerning which the right to tithe is in dispute. Thus, in *Benson* v. *Olive*, (4) where a bill by an impropriator was filed, demanding tithes, a decree obtained by a former impropriator, and a verdict obtained by himself, were rejected, on the ground that it was not proved that they related to the same lands, which were in the occupation of the defendant to the suit.

Benson v. *Olive*.

The same matter determined, in a different form of action.

Although the form of action be changed, yet, if the same matter be determined, the former verdict and judgment will be admissible in evidence upon a second trial. Thus, a verdict in

(1) Putt *v.* Rawsterne, 2 Mod. 319; 3 Mod. 1; Sir T. Raym. 472; S. C. 2 Bl. 831. See Slade's case, 4 Rep. 94; Com. Dig. tit. Action, K. 3.

(2) Kitchin *v.* Campbell, 2 Bl. Rep. 827.

(3) Robinson's case, 5 Rep. 33; 6 Rep. 8 a.; Com. Dig. tit. Action. Ferrars *v.* Arden, Cro. Eliz. 668. Godson *v.* Smith, 2 B. Moore, 157.

(4) Bunb. 284; Gwill. 701; 2 E. & Y. 24; and see Scott *v.* Allgood, Gwill. 1372. In Benson *v.* Olive, the defendant insisted upon an exemption for his lands, as being parcel of one of the greater abbies. If the defence had been a *modus*, the decree and verdict might have been admissible. Travis *v.* Chaloner, 3 Gwill. 1237. Ashby *v.* Power, Gwill. 1239.

replevin, upon an issue on the plea of *non tenuit* pleaded to an avowry for rent, has been held admissible in a subsequent action of assumpsit, to recover the rent which was accruing at the time of the distress. (1) On a plea of usury to an action on a bond, a verdict of acquittal in an action for penalties for usury on the same bond, between the same parties, is admissible for the plaintiff. (2)

Some cases may now be mentioned, to shew that a verdict and judgment in a former suit, between the same parties, and upon the same matters,—though pleadable in bar, and conclusive if pleaded,—will not be conclusive, if not pleaded and only offered as evidence in the cause. In the case of *Outram* v. *Morewood and his Wife*, (3) an action of trespass for breaking and entering a coal mine, described in the declaration, the defendants justified, setting out their title to the mine in question; the plaintiff replied, in effect, that he had before sued the person, now wife of the defendant, and that she had then pleaded the same title as that set out by herself and her husband in this action, and that the issue then joined was the same as now, which issue was then found for the plaintiff, &c.; and the question was, whether the husband and wife were estopped by this verdict and judgment from averring, contrary to the title, upon which an issue was taken and found for the plaintiff, that the coal mine now in question is parcel of the coal mine to which they made title. The Court of King's Bench were of opinion, that the authorities cited, as well as the reason and convenience of the thing, and the analogy to the rules of law in other cases, were decisive—that the defendants in this case were estopped by the former verdict and judgment *on the same point* in the former action, from averring contrary to the title then found for the plaintiff. "A recovery," said Lord Ellenborough, delivering the judgment of the court, "in any suit, upon issue joined on matter of title, is conclusive upon the subject-matter of such title. A finding

Outram v. *Morewood.*

Verdict and judgment pleaded in bar, an estoppel

(1) Hancock *v.* Welsh, 1 Stark. Ca. 347.
(2) Cleve *v.* Powell, 1 M. & Ro 228.
(3) 3 East, 345.

upon title in trespass, not only operates as a bar to the future recovery of damages founded *on the former injury*, but also operates by way of estoppel to any action for *an injury to the same supposed right of possession.*

"It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself, in an action of trespass, is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties from contending to the contrary of that point or matter of fact which having been once distinctly put in issue by them, has been, on such issue joined, solemnly found against them." (1)

Lord Ellenborough, in the course of his judgment, adverting to a case cited for the defendants, said, "A plea of *liberum tenementum* found for the defendant would be conclusive, that at the time of pleading the plea, the soil and freehold were in him, and if properly pleaded by way of estoppel, it would estop the plaintiff against whom it was found, from again alleging the contrary: but if not brought forward by plea, but only offered in evidence, it would be material evidence indeed, that the right of freehold was at the time as found, but not conclusive between the parties, as an estoppel would be."

If not pleaded, evidence, but not conclusive.

Vooght v. *Winch.*

In the case of *Vooght* v. *Winch*, (2) the plaintiff brought an action on the case against the defendant, for widening a water-channel to the damage of his mill: this was the second action for the same cause; the first action was tried a year before this, when the verdict was for the defendant; the cause of action, namely, the widening of the water-channel, (which was the same cause of action in both cases) took place nearly three years before the first trial. The defendant pleaded the general issue, and gave in evidence the verdict in the first action as conclusive. It was admitted, but not as conclusive, and the trial proceeded. On a motion afterwards for entering a non-suit for this ruling, the Court of King's Bench held, that the

Judgment pleadable in bar, and not so pleaded, not conclusive against the defendant as evidence.

(1) See the same judgment, *ib.* p. 354.

(2) 2 B. & A. 662.

verdict and judgment in the first action were not conclusive, but only evidence for the consideration of the jury. Mr. Justice Holroyd stated very clearly the principle applicable to this case: "There were two modes," he said, "by either of which the defendant might defend himself. There having been a former action, in which he had succeeded, he might have alleged that he was not to be called upon again to defend himself for the same cause. If he chooses to adopt that mode of defence he must plead it in bar, and say that the other party is not at liberty to call upon him to answer again that which he had before called upon him to do when a verdict was given in his favour. If, however, he declines that mode of defence, and submits to answer for the cause of action alleged, and defends himself by saying, that the plaintiff has no cause of action, he then leaves the question to the jury, and they are to try, not whether there was a former action for the same cause, but whether the plaintiff has such a ground of action as he alleges in his present declaration. A party may have matter which he may either give in evidence, or which, if pleaded, would be an estoppel; but when he puts it to the jury to find what the fact was, it is inconsistent with the issue which he has joined, for him to say that the jury are estopped from going into the inquiry. He may, however, use the former verdict as evidence, to guide the jury, who are to try the second cause, to a conclusion in his favour; but if, notwithstanding the prior verdict and judgment, the jury think the case is with the plaintiff, they are not estopped from finding the verdict accordingly." (1) And Mr. Justice Bayley, after observing—that the question raised upon the issue, of guilty or not guilty, in an action on the case, was whether the plaintiff had or had not any cause of action at the time of the commencement of the writ, and that the judgment for the defendant in a former action for the same cause, did not necessarily prove that the plaintiff had no cause of action, and that it decided nothing unless by way of estoppel,—added, that in *Outram* v. *More-*

(1) *Ibid.* p. 670. The learned judge referred to Treviban *v.* Lawrence (Salk. 276, 2 Lord Raym. 1051, S. C.), where it was held that if a party will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for they are to find the truth of the fact.

wood, where this subject was fully considered, Lord Ellenborough took this distinction, and stated expressly, that a former judgment, if properly pleaded by way of estoppel, would be conclusive, but if, only offered in evidence, it would not be so. (1)

Doe v. *Huddart.*

In *Doe* v. *Huddart*, (2) the Court of Exchequer decided, that a judgment in an action of ejectment is not conclusive evidence of title in an action of trespass for mesne profits, unless pleaded by way of estoppel; and such a judgment having been received as conclusive, the Court of Exchequer granted a new trial. The case was decided on the general principle, that if the form of the pleadings be such that the case goes to the jury, they are not estopped to find the truth; (3) and the court relied on the authority of *Vooght* v. *Winch*, as clearly establishing the rule, that a judgment between the same parties is not *conclusive*, unless pleaded as an estoppel.

Doe v. *Wright.*

In the recent case of *Doe* v. *Wright*, (4) an action of trespass for mesne profits, the defendant pleaded, 1, that the plaintiff was not possessed *modo et formâ*; 2, *liberum tenementum*; the plaintiff replied, by way of estoppel, to each plea, a recovery in ejectment for the same premises, on a demise which would cover the possession averred in the declaration in this action; the defendant rejoined, no writ of execution issued, and writ of error still pending, &c., to which there was a general demurrer: the Court of King's Bench decided that the replications were good by way of estoppel, and that the rejoinders, alleging the pendency of a writ of error in the House of Lords, would not destroy their effect.

Magrath v. *Hardy.*

In the case of *Magrath* v. *Hardy*, (5) an action for money had and received to the plaintiff's use, the defendant pleaded a recovery by foreign attachment at the suit of one of the plain-

(1) *Ibid.* p. 670, referring probably to a part of Lord Ellenborough's judgment before stated.

(2) Doe *v.* Huddart, 2 C., M. & R. 316, overruling Aslin *v.* Parkin, 2 Burr. 665, upon the point that the judgment, not pleaded, was *conclusive* as evidence.

(3) By Alderson, B., S. C. p. 320.

(4) 10 A. & E. 763.

(5) 4 Bing. N. C. 782. There were other points in this case, besides that here stated.

tiff's creditors, and that the creditor had execution of the sum recovered according to the custom of London; the plaintiff replied that no execution was executed, on which the defendant joined issue. The defendant at the trial called no witnesses, but gave in evidence an examined copy of the judgment in the suit by the creditor; and it was argued by his counsel, that the record, before mentioned, was conclusive to shew that the creditor, who sued, had been satisfied, and that the defendant in this case was discharged. But the Court of Common Pleas decided, that as the defendant had joined issue on the fact of the execution, the jury were not estopped, by a record of satisfaction in the foreign attachment, from finding according to the fact. The court mainly relied upon the principle laid down in *Goddard's* case,(1) and *Kirwan* v. *Lawrence*, and decided the case before them, on the ground that the defendant had by his own act expressly, and in terms, waived the benefit of the estoppel, and referred the truth of the fact to the consideration of the jury.

It appears from the cases above cited,(2) that one part of Lord Chief Justice De Grey's judgment, which states that a judgment of a court of concurrent jurisdiction directly upon the point, between the same parties, upon the same matter directly in question in another court, *is, as a plea, a bar—or, as evidence, conclusive*, has been qualified and restricted by later decisions. The rule now settled is, that a judgment in such cases, though admissible in evidence, is not *conclusive;* and that it will not be conclusive, unless pleaded by way of estoppel. (3)

(1) 2 Rep. 4.

(2) See judgment of Lord Ellenborough in Outram *v.* Morewood, *supra*, p. 17; Vooght *v.* Winch, *supra*, p. 18; Magrath *v.* Hardy, *supra*, p. 20; Eastmore *v.* Lewes, *supra*, p. 15; Doe *v.* Huddart, *supra*, p. 20; Doe *v.* Seaton, *supra*, p. 8.

(3) It has been suggested in argument, in the case of Doe *v.* Wright, 10 A. & E. 777,—and the suggestion has been adopted by Mr. Smith, in his remarks on the Duchess of Kingston's case in his Selection of leading cases, vol. 2, p. 445,—that the decisions in Vooght *v.* Winch, Magrath *v.* Hardy, and Doe *v.* Huddart, are reconcileable with the part of Lord Chief Justice De Grey's judgment above referred to, by holding a judgment to be conclusive as *evidence*, when the party, who relies on it, has *no opportunity of pleading it*,—and not to be conclusive, where the party elects to refer the fact to the jury, when he might have pleaded the estoppel; in other words, by substituting for the words in the text above written *in italic*, the following, "*is, when*

4. *Of the Rule as to Verdicts or Judgments in Prosecutions, considered with reference to the Parties.*

Conviction of principal, whether evidence against accessory.

A record of conviction of a principal in felony has been admitted in some cases, not of modern date, as evidence against the accessory. (1) This has been supported on the ground of convenience, because the witnesses against the principal might be dead or not to be found, and on the presumption that the proceedings must be taken to be regular, and the guilt of the convicted party to be established. (2) But this is not strictly in accordance with the principle respecting the admissibility of verdicts as evidence against third persons. From the report of the recent case of *Rex* v. *Turner*, (3) it seems that a record of conviction of a *principal* in the crime of stealing, who pleads *guilty*, would not now be received as evidence of the guilt of the principal against the *receivers* of the stolen property, or the accessory after the fact; and it is said to be doubtful, whether a record of the conviction of the principal on his plea of *not guilty*, would be admissible against the accessory. As proof of the *fact of conviction*, the record would be admissible and conclusive, but it seems not to be admissible evidence of the *guilt* of the convict, as against another person charged with being connected with him in crime, the record being in this respect *res inter alios acta*. It is evidence that a certain person, named in the record, was convicted by the jury, but not evidence as against a third person, supposed to have been engaged with him in a particular transaction, as to the *ground* on which the

pleaded, a bar,—and when it cannot be pleaded, conclusive as evidence. But this would be to impute to Lord Chief Justice De Grey great want of precision, in a judgment remarkable for precision and accuracy of definition. The construction which has always been put upon the words of the Lord Chief Justice must surely be the true meaning—namely, that the judgment is, when pleaded, a bar, and, when not pleaded, conclusive as evidence. And this statement may be explained by the fact, that at the time when the opinion was pronounced, there were recognized decisions, and reported *dicta* of judges, which held that such judgments would be conclusive as evidence, though not pleaded. It is certain that the proposed construction cannot now be adopted, after the decision in the case of Doe *v.* Seaton, above stated.

(1) R. *v.* Smith, Leach. Cr. C. 288. R. Baldwin, 3 Camp. 265.

(2) Fost. Disc. iii, c. 2, s. 2, p. 364.

(3) Trial at York Ass. 1832. Mo. Cr. C. 348.

conviction proceeded, namely, that the convict committed the criminal act described in the record.

Conviction for non-repair of a road.

A record of conviction upon an indictment against a parish for non-repair of a road, has been held to be evidence of the non-liability of another parish on the trial of an indictment for not repairing the same road. (1) If it can be shewn that fraud has been practised in obtaining the former verdict, this would vitiate the judgment.

If a parish consists of several districts, which have immemorially repaired the respective highways within them, and if the districts, in which the road indicted is not situate, can shew that they had no notice of the former indictment, the defence having been made and conducted entirely by the district within which the road lies,—the court will consider the indictment as being substantially against that district, and give the other districts leave to plead the prescription to a subsequent indictment for not repairing the highways in the parish. (2)

Verdicts in criminal cases, how far evidence in civil suits.

From the rule that verdicts and judgments are only evidence between the same parties, it follows, as a consequence, that a conviction in a *criminal* proceeding cannot be admissible in a *civil* action. Where the conviction has actually proceeded on the evidence of the party seeking to make use of it, the receiving of the conviction would be allowing a party to the suit to give evidence for himself. (3) According to some authorities, the evidence of convictions is rejected in civil suits, on the ground of the *possibility* that the conviction might have proceeded partly on the evidence of the party seeking to use it. But it seems now settled, that the evidence is inadmissible upon the more general ground of want of mutuality in the parties. (4)

1) Rex *v.* St. Prancras, Peake, 286. Though this decision is not strictly in accordance with principle, yet it is to be considered that the dispute would, in reality, most probably be between the two parishes.

(2) R. *v.* Townsend, 1 Doug. 421. R. *v.* Eardisland, 2 Camp. 494. R. *v.* Justices of Lancashire, 12 East, 368. See 2 Saund. 159.

(3) Smith *v.* Rummens, 1 Camp. 9. Hathaway *v.* Barrow, 1 Camp. 151.

(4) See judgment of Parke, B., in Blakemore *v.* Glamorganshire Canal Co. 2 Cr., M. & R. 139; *vide supra*, p. 11.

Hillyard v. *Grantham.*

In the case of *Hillyard* v. *Grantham,* (1) which was an issue directed by the Court of Chancery upon a question of legitimacy, a sentence against the supposed father and mother, upon a proceeding against them in the Consistory Court of Lincoln for living together in fornication, was offered in evidence to prove that they were not married; but the whole Court of King's Bench were of opinion, on a trial at bar, that the sentence could not be given in evidence; "because, first, it was a criminal matter, and could not be given in evidence in a civil cause; next, because it was *res inter alios acta,* and could not affect the issue." The court also held, that if it had been a sentence on the point of marriage, in a question on the lawfulness of the marriage, it might have been given in evidence, being the sentence of a court having peculiar jurisdiction.

Sentence for fornication.

Gibson v. *Maccarty.*

In the case of *Gibson* v. *Maccarty,* (2) on an issue to try the genuineness of some promissory notes, depositions of a deceased witness having been read on the part of the plaintiff, (in which depositions the witness swore, that the defendant had acknowledged the notes in question and also another note,) it was proposed, on the part of the defendant, to shew by a record of conviction, that the plaintiff had since been convicted of forging this other note, mentioned by the deponent; for such evidence, it was said, would go to the credit of the deponent's evidence, as to the acknowledgment of the notes in question; and, secondly, because there is at all times a liberty given to examine into the plaintiff's character. But this evidence was opposed on the part of the plaintiff, on the ground, that no record of a criminal action can be given in evidence in a civil suit. Lord Hardwicke is reported to have said, "that the general rule was as had been stated by the plaintiff's counsel; (3) and that it had been so strictly kept, that, in the case of *Hillyard* v. *Grantham,* on a question of legitimacy, the court refused to admit a sentence of excommunication in the Spiritual Court for fornication between the father and mother of the party whose legitimacy was impeached."

Record of conviction for forgery.

(1) Cited by Lord Hardwicke, in Brownsord *v.* Edwards, 2 Ves. 246, and in Rep. temp. Hard. 311.

(2) Rep. temp. Hard. 311.

(3) Acc. by Sir J. Mansfield, Ch. J., in Hathaway *v.* Barrow and others, 1 Camp. 151. See also 12 Mod. 337.

Coroner's inquest offered as evidence of lunacy.

Upon an issue to try the question of devise or no devise, (1) a coroner's inquest, finding the deceased a lunatic, was offered in evidence against the plaintiff, who claimed as executrix, for the purpose of shewing that the deceased was incompetent to make a will; this evidence was objected to on the part of the plaintiff, and the court were equally divided in opinion. Lord Chief Justice Parker was of opinion, that the inquest ought to be admitted, "because it was for the plaintiff's advantage, as the personal estate would be saved by the finding of lunacy;" and he added, that in *Lord Derby's* case an inquest *post mortem* was allowed to be given in evidence. Mr. Justice Powys agreed with the Chief Justice. Mr. Justice Eyre said, "This is a criminal matter, and ought not to be given in evidence in a civil proceeding. A verdict on an indictment for battery cannot be read in an action for the same battery. An inquest *post mortem* is in the nature of a civil proceeding; but this is criminal, for it might induce a forfeiture of the goods, if he had been found *felo de se*." Mr. Justice Pratt said, "If a verdict be given in evidence, it must be between the same parties, and, therefore, an indictment at the suit of the king cannot be read in an action at the suit of the party."

Verdict in action for *penalties*.

In an action upon a bond, to which there was a plea of usury, a verdict of acquittal in an action for the usury penalties on the same bond, between the same parties was held to be admissible for the plaintiff. (2)

Verdict on plea of guilty.

Where a person indicted for an assault pleads guilty to the charge, it may be thought that the evidence, being in the nature of an admission by the party himself against whom it is used, stands upon a different ground from a conviction upon the evidence of others. According to some old authorities, the record, in such a case, has been considered conclusive in an action for damages for the same assault; (3) it seems, at least, to be admissible. (4)

(1) Jones *v.* White, Str. 68.

(2) Cleve *v.* Powel, 1 M. & Ro. 228.

(3) Lamb. Inst. B. 2, c. 9, p. 427, cited 9 H. 6, 60, and 11 H. 4, 65.

(4) This point was so ruled by Wood, B., in an action for assault and battery, tried at Leicester Lent Ass. 1808. It was an undefended

Verdict of acquittal.

An acquittal upon an indictment has been considered not to be receivable in evidence upon a subsequent indictment, where the same right or liability is in question. Thus it has been said, that a verdict of not guilty, on an indictment against a parish for not repairing a road, would not be evidence for the parish on a second indictment. (1)

Autre fois acquits.

The rule established in regard to the plea of *autre fois acquits* is, that an acquittal on a former indictment is not a bar to a second indictment, if the first was such that the prisoner could not have been legally convicted upon it, on proof of the charge laid in the second indictment. Thus, an acquittal upon an indictment for a burglary in breaking and entering a house and *stealing* goods, is not a bar to an indictment for a burglary (though in the same dwelling-house and on the same night), with *intent* to steal; (2) for proof of the bare *intent to steal* would not have been sufficient to establish the charge of an *actual stealing*,—he has not been acquitted, therefore, of the intent to steal, though he has been acquitted of the stealing,—in other words, he has not been acquitted of the charge laid in the second indictment.

Rex v. *Vandercomb.*

An acquittal on an indictment for having been present, aiding and abetting in a felony, is no bar to an indictment charging the party as accessory before the fact; (3) because the offences described in the two indictments are distinct in their nature.

cause; but Mr. Baron Wood suggested the objection, and, after consideration, admitted the record in evidence.

(1) See Rex *v.* St. Pancras, Peake, 220. The acquittal might have proceeded on some other ground than the non-liability to repair, as, for example, on the ground that the road was not out of repair. It is said by Mr. Justice Buller, B. N. P. 245, and in Gilb. Ev. 32, that though a *conviction* in a court of criminal jurisdiction, is conclusive evidence of the fact, if it come collaterally in controversy in a court of civil jurisdiction; yet an *acquittal* does not prove the reverse, *because it does not ascertain facts.*

(2) Vandercombe's case, 2 Leach, 716; 2 East's P. C. 519, overruling Turner's case, Kel. 30; and the case of Jones and Beaver, Kel. 52. And see 2 Russell on Crimes, 39, n.

(3) Rex *v.* Burchenough, 1 Mo. Cr. Ca. 477. An anomaly in the law was supposed to have existed upon this subject; see 1 Hale's P. C. 626; 2 Hale, 224; Hawkins, b. 2, c. 35, s. 11; Foster's Cr. Ca. 361.

Section II.

Of the Admissibility and Effect of Proceedings in Chancery.

Decree.

A decree in the Court of Chancery may be given in evidence on the same footing, and under the same limitations, as the verdict or judgment of a Court of Common Law. (1) It should seem that the decree of a Court of Equity, fixing the balance of a partnership account, would be enforced in a Court of Law; but an action at common law is not generally maintainable upon a decree of a Court of Equity for a specific performance, the decree in equity merely ascertaining that a party is under equitable obligation to pay money. (2)

Evidence between other parties, when.

On a trial touching the right to lands, decrees in Chancery between other parties, concerning the same lands, were held admissible in evidence, to shew the character in which the possessor enjoyed the lands: and with respect to the objection that they were *res inter alios gestæ*, it was observed, that this reason was not conclusive against their admissibility; for, in actions against the sheriff for an escape, it is usual to give in evidence judgments against third persons, in order to shew the character in which the plaintiff claims, and the amount of damage which he has sustained. (3)

Bill.

The subject of the admissibility of bills in Chancery, for the purpose of proving matters of pedigree by the allegations contained in them, has been considered in a former part of this work. (4)

A question has been made, whether a bill in Chancery may

(1) *Vide supra*, p. 4. B. N. P. 243. Case of Manchester Mills, 1 Doug. 222, n. 13; *vide supra*. S. C. vol. 1. Trotter *v.* Blake, 2 Mod. 231. Layburn *v.* Crisp, 8 C. & P. 404.

(2) Henley *v.* Soper, 6 B. & C. 20. Carpenter *v.* Thornton, 3 B. & A. 52.

(3) By Tindal, Ch. J., in Davies *v.* Lowndes, 1 Bing. N. C. 607.

(4) See B. N. P. 235. Snow *v.* Phillips, 1 Sid. 221. Gilb. Ev. 42. Woollett *v.* Roberts, 1 Ch. Ca. 64. Banbury Peerage case, from MSS. in 2 Selw. N. P. 685.

be received against the complainant, on the principle of it's being an admission made by him. The authorities are contradictory upon this subject, but it seems to be the more prevalent opinion, that a bill in Chancery cannot be used for this purpose, —on the ground that the facts stated in a bill are frequently the mere suggestions of counsel, made for the purpose of obtaining an answer upon oath by the defendant. (1)

A bill in Chancery is proper evidence to shew the existence of a judicial proceeding, and that certain facts were in issue between the parties, in order to introduce the answer, depositions, or decree.

Demurrer. A demurrer in Chancery does not admit the facts charged in the bill; for if the demurrer be overruled, the defendant

Plea. may still go on, and answer. So if the defendant pleads; for the plea only amounts to a statement, that, supposing the facts charged to be true, the defendant is not bound to answer. Demurrers, therefore, and pleas in Chancery are not evidence against the party demurring, or pleading the facts charged in the bill, in a future action between the parties to the Chancery suit. (2)

Answers. The authorities respecting the admissibility and effect, in evidence, of answers in Chancery, have been noticed in treating

Depositions. of the subject of admissions. (3). The subject of depositions in Chancery will be considered in connection with other species of depositions in a following section.

(1) Lord Ferrers *v.* Shirley, Fitz. 9, 196. B. N. P. 235. Doe d. Bowerman *v.* Sybourn, 7 T. R. 3. 1 Wightw. 325.

(2) Tomkins *v.* Ashby, Mo. & M. 32.

(3) *Vide supra*, vol. 1, 341, as to the rule that the whole answer is to be taken together; and as to the effect of an answer in Chancery against parties and privies, *vide supra*, vol. 1, 366, 392. The case of Pennell *v.* Meyer, 2 M. & R. 99. may be added as an authority, to shew that when an answer is given in evidence against the party, the interrogatory part of the bill must be read, if he require it, and any other part to which the answer refers.

Section III.

Of the admissibility and Effect of Sentences of Ecclesiastical Courts.

The sentences of Ecclesiastical Courts, though they are not Courts of Record, have generally, at least where they are in the nature of proceedings *in rem*, a conclusive effect,—even with respect to persons who are not parties to the proceedings. But where they are not of this nature, they are conclusive only as between parties to the suit. They are not admissible to prove matters which are not expressly adjudicated, but which are only inferred from the decision. (1)

In various instances it is part of the law, which binds the temporal Courts, that the state or legal character, conferred on a person by the Ecclesiastical Courts, shall give him certain rights, and subject him to certain liabilities. To divest or exempt him from these, recourse must be had to an original suit in the Ecclesiastical Court.

Probate. Thus a probate is the only legitimate evidence of personal property being vested in an executor, or of the appointment of an executor; on these points, it is conclusive against all persons: (2) the original will is not admissible for that purpose. (3) So letters of administration are conclusive that the person therein appointed administrator is such. (4)

Letters of administration.

Probate. Though a person has not been party to a suit respecting the granting of a probate, he is not admitted to prove that another person was appointed executor, or that the testator was insane, or that the will was forged. (5)

(1) *Vide supra*, p. 5.

(2) Noel *v.* Wells, 1 Lev. 235. See Cox *v.* Allingham, and Doe *v.* Gunning, *infra*, on *Proof of Public Writings*.

(3) Coe *v.* Westernam, 2 Sel. N. P. 730. Pinney *v.* Pinney, 8 B. & C. 235.

(4) 1 Lev. 235.

(5) 1 Lev. 236.

Probate.

Payment of money to an executor, who has obtained probate of a forged will, is a discharge to the debtor of the deceased, who has made the payment, though the probate be afterwards declared null and void. (1) "The probate," said Mr. Justice Buller, is a judicial act; for the Ecclesiastical Court may hear and examine witnesses on the different sides, whether a will be or be not properly made. That is the only court which can pronounce whether the will is good, and the courts of Common Law have no jurisdiction over the subject. The probate is conclusive, till it is repealed; and no Court of Common Law can admit evidence to impeach it."

Proof of probate forged.

A party may shew that a probate is forged, because such evidence supposes that the Spiritual Court has given no judgment: (2) and he may shew, that the particular Spiritual Court granting probate had no jurisdiction under the circumstances; as, that the supposed testator was still alive, or that he left *bona notabilia*.

Sentences as to marriage.

It was said by Lord Chief Justice De Grey, in delivering the opinion of the judges in the *Duchess of Kingston's* case, that although a sentence of nullity of marriage, or in affirmance of marriage, or in suits upon a promise of marriage, (3) or for jactitation of marriage, had been received in

Between what parties, evidence.

civil causes, yet that the parties to the suit, or at least the parties against whom the evidence was received, were parties to the sentence and had acquiesced under it, or claimed under those who were parties or had acquiesced. (4) But these

(1) Allen *v.* Dundas, 3 T. R. 125.

(2) T. Raym. 404; 1 Sid. 359; B. N. P. 247; 5 Rep. 30; 1 Lev. 236. Allen *v.* Dundas, 3. T. R. 125. It may be shewn that letters of administration are revoked, B. N. P. 247. As to proof of want of jurisdiction, see Betsworth *v.* Betsworth, Style, 10. 12 Vin. Ab. 128.

(3) See Da Costa *v.* Villa Real, Str. 961, where a sentence in a suit, upon a contract of marriage, was held conclusive in an action for damages.

(4) 11 St. Tr. 261; 20 Howell, 538. In Robins *v.* Crutchley, 2 Wils. 124, in a writ of dower, where the question was, whether the plaintiff had been married to an ancestor of the defendant, it was considered, that the plaintiff could not conclude the defendant by a sentence affirming the plaintiff's marriage, in a suit to which the plaintiff's alleged husband was no party: but it was said, that the sentence was evidence. It is to be observed, however, that the suit was one for divorce, and that the marriage was determined upon plea. The sentence was not a pro-

observations seem to have reference to cases where the proceeding in the Ecclesiastical Court was not a proceeding *in rem*, and where the question of marriage was only incidentally determined; but where the object of the suit has been directly to deprive a person of the legal character of husband or wife, by virtue of the exclusive jurisdiction of the Ecclesiastical Court, the sentences of nullity of marriage or of divorce, in like manner as probates and letters of administration, appear to have the effect of establishing conclusively the state and legal character of parties for and against all persons. (1)

The fact of the legality of a marriage, arising incidentally in a civil suit, may be determined, in modern proceedings at least, without referring the question to the spiritual Judge; though upon issue joined in dower upon the fact of legality of marriage, the bishop's certificate is the appropriate evidence, and is conclusive. (2)

Sentence conclusive of what.

The questions of difficulty which have arisen respecting the effect of sentences in the Ecclesiastical Courts, relate to the point whether, in fact, an Ecclesiastical Court has already determined a matter, which can only in such Court be the subject of a direct suit or proceeding *in rem*, but which has incidentally become the subject of controversy in a civil suit. One of the principal rules, applicable to cases where a sentence of a Spiritual Court is adduced in proof of a fact in issue

ceeding *in rem*; it did not originally confer any legal character. It is difficult to conceive, upon what principle it could even be admitted in evidence against a stranger. The same remarks apply to the mode, in which the sentence as to the marriage was obtained in the jactitation suit in the Duchess of Kingston's case.

(1) See Bunting's case, 4 Co. 29, where the husband of the first marriage was bound by a sentence of divorce, though no party to the suit. Kean's case, 7 Co. 41. Hatfield *v.* Hatfield, Str. 961 Jones *v.* Bow, Carth. 225. Harvey's case, 11 St. Tr. 235. In the case of Hillyard *v.* Grantham, cited by Lord Hardwicke, 2 Ves. 246. Rep. temp. Hard. 311, *sup.* p. 24, the court held that a sentence of excommunication for incontinency was inadmissible, on an issue to try a question of legitimacy, upon the ground, that it was *res inter alios acta*: but they held, that if it had been a sentence on the point of marriage, in a question on the lawfulness of the marriage, it might have been given in evidence. As to the effect of sentences of deprivation, see Phillips *v.* Crawley, Freem. 84, pl. 103; 12 Vin. Ab. 128.

(2) By Lord Loughbourgh, Ilderton *v.* Ilderton, 2 H. Bl. 156.

in a Temporal Court, is that the sentences of Courts of Justice are not evidence of any collateral matter which may possibly be collected or inferred from them by argument. (1)

Sentence of jactitation of marriage, its effect.

Thus a sentence of jactitation of marriage only imports, that it did not appear that the parties were married at a particular time and place, and not that there was no marriage at any time or place. The cause is ranked as a cause of defamation, unless when the defendant pleads a marriage. The sentence has a negative and qualified effect, namely, that the party has failed in his proof, and that the libellant is free from all matrimonial contract as far "as yet appears," leaving it open to new proofs of the same marriage in the same cause, or to any other proofs of that or any other marriage in another cause. It is no plea to a new suit in the Ecclesiastical Court.

Its effect, on charge of bigamy.

Accordingly, in the *Duchess of Kingston's* case, (2) on a charge of bigamy, where a sentence in a Spiritual Court, in a cause of jactitation of marriage, was offered as conclusive evidence to disprove the second marriage, the Judges held, that this sentence (even admitting it to be evidence on a criminal prosecution) could not be conclusive, but that the sentence and judgment of the Lords might well stand together, and both propositions be true. The sentence would only prove, that it did not then appear that the parties were married; but, because the Court had not then sufficient proof of the marriage specified, it could not be inferred that there was no marriage between them at any other time or place. (3).

(1) By Lord Holt, in Blackham's case, 1 Salk. 290. By Chief Justice Eyre, in the Duchess of Kingston's case, 11 St. Tr. 261. 20 Howell, 538 *Vide supra*, p. 5. In several of the decisions on this subject, the point determined was, that the sentence was not *conclusive* as to matters of inference; but it would seem to be the proper conclusion from the authorities, that the sentence is not *admissible* evidence as to such matters.

(2) 11 St. T. 261. 20 Howell, 539. The sentence in the jactitation suit not being a proceeding *in rem*, but arising only upon plea, would seem not to have been admissible evidence, except between the parties to the suit, even if it had been an adjudication of the precise point in issue. A sentence in a proceeding for incontinency has been rejected as evidence against a child of the marriage claiming by descent, Hilliard *v.* Phaley, 8 Mod. 180; but upon a more questionable ground, *viz.* that such proceedings could not affect the title to lands.

(3) In Jones *v.* Bow, Carthew, 225, a sentence of nullity in a cause

The principles applicable to this subject are explained by Chief Justice Holt in *Blackham's* case. That was an action of trover, and the plaintiff proved that certain goods had been in his possession, which had been taken away by the defendant. The defendant shewed, that these were the goods of a deceased woman, and that he had taken out administration; upon which the plaintiff proved, that the deceased some days before her death was married to him. The defendant contended, that the Spiritual Court, in granting the letters of administration to him, must have assumed that there was no such marriage. Lord Holt, C. J., ruled, that the sentence of the Ecclesiastical Court was conclusive only, where a matter had been directly determined by the sentence; but that was to be intended only in the point directly tried. It was otherwise if a collateral matter be collected or inferred from the sentence,—as, in that case, because administration was granted to the defendant, it was inferred, that the plaintiff was not the intestate's husband, as he could not have been taken to be, if the point then tried had been *married* or *not married*, and their sentence had been *not married*. (1)

Letters of administration, not evidence of collateral matters, or by way of inference.

Where indeed the sentence of the Spiritual Court, determining the state and legal character of a person, is not a sentence arising out of an adverse suit between parties, there can be no reasonable ground for allowing it any further effect than that of establishing the rights and liabilities incident to such state and legal character. Thus, letters of administration which have been granted to a person as administrator to A. B. deceased, are not legitimate proof of A. B.'s death. (2) It appears to be

Not evidence of intestate's death.

of jactitation was not only admitted, but deemed conclusive, and, as it would seem, in favour of a stranger to the suit in the Ecclesiastical Court. And the Chief Justice of the Common Pleas, in delivering the opinion of the judges in the Duchess of Kingston's case, observes, that a sentence in a jactitation suit had been admitted in evidence upon the trial of an ejectment. The sentence was, however, used against a party to the suit in the Spiritual Court.

(1) Blackham's case, 1 Salk. 290. It did not appear that there had been any suit in the Ecclesiastical Court, concerning the right to letters of administration, in which suit the plaintiff and defendant were parties, and in which the question of the marriage had been determined, Hargr. Law Tracts, p. 451.

(2) Thompson *v.* Donaldson, 3 Esp. 63. The probate of a Will devising real property is not evidence of the contents of such will, see B. N. P. 245. Doe d. Ash *v.*

settled, notwithstanding a prior decision to the contrary, that the probate of a will is not, at least, conclusive evidence of it's validity, on an indictment for the forgery of the same will. (1)

Evidence between what parties.

It would seem, however, that between the parties to an Ecclesiastical suit, any point expressly determined would be admissible evidence in a civil suit, notwithstanding the sentence did not confer or take away any legal character, and notwithstanding it was not a sentence upon the main object of the suit, but upon some subordinate matter raised in the pleadings. Cases of this nature have not been much considered in the civil courts.

When evidence in criminal suits.

It has been stated, that the sentence of an Ecclesiastical Court, directly upon a point within it's peculiar jurisdiction, is not, as in civil cases, conclusive on the same matter coming incidentally into question in a criminal suit. Thus, the Chief Justice of the Common Pleas, in delivering the opinion of the Judges in the *Duchess of Kingston's* case, observes, "Proceedings in matters of crime, and especially of felony, fall under a different consideration from civil suits; first, because the parties are not the same—for the king, in whom the trust of prosecuting public offences is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is no party to such proceedings in the Ecclesiastical Court, and cannot be admitted to defend, examine witnesses, or in any manner intervene, or appeal; secondly, such doctrines would tend to give the Spiritual Courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the decision from the course of the common law, to which it solely and peculiarly belongs. The ground of the judicial powers, given to Ecclesiastical Courts, is merely of a spiritual consideration, *pro cor-*

Calvert, 2 Camp. 389. Hoe *v.* Nathorp, 1 Lord Raym. 154. St. Leger *v.* Adams, *ib.* 731. Dike *v.* Polhill, *ib.* 744. Rex *v.* Netherseal, 4 T. R. 258. Hume *v.* Rundall, 6 Madd. 331. The probate is not evidence as to copyholds, Jervoise *v.* Duke of Northumberland, 1 J. & W. 570.

(1) Rex *v.* Gibson; Rex *v.* Buttery; S. P. R. & R. Cr. Ca. 342, 343, n., overruling Rex *v.* Vincent, 1 Str, 481; other grounds are assigned for the judgment. It seems not to be *primâ facie* evidence.

rectione morum et pro salute animæ. They are, therefore addressed to the conscience of the party. But one great object of temporal jurisdiction is the public peace; and crimes against the public peace are wholly, and in all their parts, of temporal cognizance alone. A felony by common law was always so. A felony by statute becomes so at the moment of it's institution. The Temporal Courts alone can expound the law, and judge of the crime and it's proofs; in doing so they must see with their own eyes, and try by their own rules, that is, by the common law: it is the trust and sworn duty of their office."

It may be observed, the particular Ecclesiastical proceeding, to which the observations of the Chief Justice in the *Duchess of Kingston's* case are applied, was not a proceeding *in rem*, and had not for it's direct object the investing or divesting a person of any partiular state and legal character, but the question of marriage was only decided upon a plea to a suit for defamation. The point is of less importance with regard to sentences in direct matrimonial suits, as it is expressly provided by the statute 9 Geo. 4, c. 31, s. 22, that the penalties of bigamy shall not extend to any person who, at the time of his second marriage, shall have been divorced from the bond of his first marriage, or to any person whose former marriage shall have been declared void by any court of competent jurisdiction.

With regard to the cases of *Rex* v. *Gibson*, and *Rex* v. *Buttery and M'Namara*, (1)—which decide that the probate of a will is not, at least, conclusive evidence that the will has not been forged, upon an indictment for forgery,—it is not necessary to rely, in their support, upon the principles stated by the Chief Justice in the *Duchess of Kingston's* case. In any criminal proceedings for stealing property, a probate, it is conceived, would be conclusive as to the right of an executor; but the fact of obtaining probate seems irrelevant to a charge for the means used to obtain it,—except by inference, which, it has been seen, is not a legitimate use to be made of judicial sentences.

Probate conclusive of title of executor in criminal cases.

(1) R. & R. C. Ca. 342, 343, n.

Sentence may be impeached for fraud.

Judgments of the Ecclesiastical Courts, like other judicial acts, may be impeached by evidence of fraud or collusion, and such evidence was adjudged to be admissible on the part of the prosecution in the case of the *Duchess of Kingston*, who was tried for bigamy.(1) It was observed in that case, that fraud was an extrinsic collateral act, which vitiated the most solemn proceedings, and that Lord Coke had said that it avoided all judicial acts, ecclesiastical and temporal; and that although it was not permitted to shew that the Ecclesiastical Court was mistaken, it might be shewn that it was misled.

A distinction, in this respect, has been made between the case of a stranger, (who cannot come in and reverse the judgment, and therefore of necessity he must be permitted to aver that it was fraudulent) and the case of a party to the proceedings; the party himself cannot give evidence of fraud, but must apply to the court, which pronounced the judgment to vacate it. Thus, in the case of *Prudham* v. *Phillips*, (2) where the defendant proved her marriage with one M., in answer to which a sentence of an Ecclesiastical Court was produced, to which sentence she was a party, shewing that she was at the time married to another person, Chief Justice Willes, after much debate, refused to allow the defendant to prove that the sentence had been obtained by fraud.

Section IV.

Of Judgments of Courts of Admiralty; Judgments in rem in the Exchequer; Judgments by Commissioners, Visitors, Trustees, Courts Martial, Aribitrators, Justices, &c.

It has been seen, that the sentences of Spiritual Courts are not, in general, examinable, when they determine, by their ex-

(1) 11 St. Tr. p. 262. By Lord Hardwicke, 2 Ves. 246.

(2) Ambler, 763, cited by the Lord Chancellor from a MSS. note of Serjt. Parker.

clusive authority, the state and legal character of individuals. In like manner, the judgments about to be noticed of other courts of exclusive jurisdiction, are, in general, conclusive in the superior courts of common law. It seems to be a part of the general law of the land, that the determination of such courts, in the absence of fraud and collusion, are constituted as the sole criterion of those rights which are subjected to their jurisdiction.

Judgment of courts of Admiralty.

With respect to Courts of Admiralty, it was observed by Lord Mansfield, that the nature of the question of *prize* excludes the jurisdiction of the common law courts; that the views of a prize court could not be answered in any court in Westminster Hall; and, therefore, that the Courts of Westminster Hall never attempted to take cognizance of the question, *prize* or *no prize*,—not from the locality of the thing being done at sea, but from their incompetency to embrace the whole of the subject. (1) The subject has been considered in this country principally with reference to the decisions of foreign Courts of Admiralty.

Judgment of condemnation in the Exchequer.

A judgment of condemnation in the Court of Exchequer, where proceedings *in rem* have been instituted, is conclusive evidence in any other court, as to all the world, that the goods were liable to be seized; "because the property of the goods being changed, and irrevocably vested in the crown by the judgment of condemnation, it follows as a necessary consequence that neither trespass nor trover can be maintained for taking them in an orderly manner." (2) The jurisdiction of the Court of Exchequer, in this case, is not only competent, but sole and exclusive; and though no formal or express notice is given to the owner of the goods in person, yet he has sufficient notice to try the point of forfeiture, by the seizure of the property, by the proclamations according to the course of the court, and by the writ of appraisement.

(1) In Le Caux *v.* Eden, 2 Doug. 614, n.

(2) Scott *v.* Shearman, 2 Black. Rep. 979. By Lord Kenyon, Ch. J., in Geyer *v.* Aguilar, 7 T. R. 696. Bull. N. P. 244. See also the cases cited in 5 Price, 202.

The Court of Exchequer decided, in the case of *The Attorney General* v. *King*, (1) that a record of condemnation of goods, proceeding upon one act of Parliament, is not evidence with respect to the commission of an offence charged under another act. And Mr. Baron Wood held, in the same case, that the record, if admissible at all, could not be admitted as proof of any *immaterial* allegation which might be contained in it. The condemnation was upon a different matter, and for a different cause; and was not admissible for a collateral purpose, according to the rule in Lord Chief Justice Eyre's judgment. (2)

Though the condemnation of the *goods*, being a proceeding *in rem*, is conclusive between other parties, a conviction for *penalties*, which is a proceeding against the *person* not *in rem*, is of a different nature, and subject to the same rules as other judicial proceedings. In an action, therefore, for the price of spirits, where the defence was that the spirits had been adulterated, such record of conviction has been held not to be admissible as proof of the adulteration. (3)

Acquittal in the Exchequer.

An acquittal in the Exchequer was considered by Lord Kenyon, in the case of *Cooke* v. *Sholl*, (4) to be conclusive evidence of the illegality of the seizure. That was an action of trover for several pipes of wine seized by the defendant for want of a permit. At the trial of the cause, the plaintiff gave in evidence a record of acquittal in the Court of Exchequer. The defendant then insisted, that, under the circumstances of this case, the permit had expired before the seizure was made; and Mr. Justice Heath, who tried the cause, was of that opinion, but on it's being suggested, that there had been a different determination in the Court of Exchequer, he reserved the point for the opinion of the Court of King's Bench, with liberty to enter a verdict for the defendant, if it should be adjudged for him. When the case came before the court,

(1) 5 Price, 195.
(2) *Vide supra*, p. 5.
(3) Hart *v.* M'Namara, 4 Price, 154, in note, by Gibbs, Ch. J.
(4) 5 T. R. 255, and see a case in 12 Vin. Ab. (A. b. 22), pl. 1, before Price, B., *acc.*

Lord Kenyon thought the record of acquittal precluded all reasoning on the construction of the permit; but as the question respecting the judgment of acquittal was not upon the record, and the only question was on the construction of the permit, a verdict was entered for the defendant. This case, therefore, has not determined, that an acquittal in the Exchequer would be conclusive evidence of the illegality of a seizure, although certainly that appears to have been the opinion of Lord Kenyon. It may be observed, that an acquittal does not, like a conviction, ascertain any precise fact. The sentence might have proceeded on the ground, that sufficient evidence was not produced, on the part of the crown, to warrant the seizure; and though the sentence may be conclusive as against the crown, it seems reasonable, that it should not have such a conclusive operation in an action for seizing the property against a third person, who was not a party with the crown in the original proceedings, and had no notice or opportunity for supporting the condemnation.

Judgment of Commissioners of Excise.

It has been decided in several cases, that a judgment of condemnation by commissioners of excise, in a matter exclusively within their jurisdiction, is conclusive, on the right of seizure coming into question in any other court. (1)

Commissioners appointed by Act of Parliament.

Where a statute provides that the judgment of commissioners, appointed by the act, shall be final, their decision is conclusive, and cannot be questioned in any collateral proceeding. It has therefore been held, that a certificate from commissioners for settling the debts of the army, stating that so much was due from the defendant, (an army agent) to the plaintiff (an officer,) was conclusive in an action brought to recover the money; and that no evidence could be received, to shew that the commissioners had formed a wrong judgment. (2)

(1) Terry *v.* Huntington, Hardr. 480. Fuller *v.* Fotch, Carth. 346. Roberts *v.* Fortune, before Lee, Ch. J., 1742. 1 Harg. Law Tracts, 468, n. 1 Ridg. Ir. T. R. 1. 2 Evans' Pothier, 307. The doctrine in Henshaw *v.* Pleasance, 2 Bl. Rep. 1174, that the judgment of the Court of Excise could not have that effect, because it was not a Court of Record, is at variance with general principles, and the current of authority as to this particular court.

(2) Moody *v.* Thurston, 1 Str. 481, ruled by Pratt, Ch. J.; and a new trial afterwards refused by the whole court. See also Lane *v.*

Sentence of visitors.

The same principle is applicable to tribunals of a private nature, as where founders of colleges, or persons creating any trust, confer on certain individuals, whether visitors or trustees, the exclusive power of determining the rights of persons seeking a benefit under the donation or trust. The courts of common law receive the determinations of the visitors or trustees as the criterion of the rights of the parties. A mandamus to restore the fellow of a college has been frequently refused. (1) In the case of *Phillips* v. *Bury*, it was decided, on an appeal to the House of Lords, that a sentence of deprivation, by the visitor of a college, acting within the limits of his visitatorial jurisdiction, was conclusive evidence in an action of ejectment for one of the college estates; and the judgment of the Court of King's Bench, which had been given on the opinions of three Judges, against the opinion of Lord Holt, was reversed. (2) In another case on this subject, which was a prosecution for an assault, in turning out of a college one who had been expelled, the Court of King's Bench determined, that evidence, impeaching the sentence of expulsion, had been properly rejected at the trial. (3) But the sentences of visitors may be impeached for excess of jurisdiction. (4)

Sentence of trustees.

In an action of ejectment against a schoolmaster, removed by sentence of the trustees of the school (such power being vested in them,) for misbehaviour, it was held that it was not necessary for the lessors of the plaintiff to prove the grounds of the sentence, and that it was not competent for the defendant to disprove them. (5)

Sentence of courts martial.

The Mutiny Acts have created certain courts, and invested them with authority to try those who are a part of the army or navy—the object of the trial being limited to breaches of military

Hegberg, Bull. N. P. 19. Earl of Radnor *v.* Reeve, 2 Bos. & Pull. 391. Brown *v.* Bullen, 1 Doug. 407.

(1) Dr. Wedrington's case, 1 Lev. 23; Dr. Patrick's case, 1 Lev. 65; case of New College, 2 Lev. 14.

(2) Philips *v.* Bury, Skin. 447. 1 Lord Raym. 5, S. C. 2 T. R. 346, S. C.

(3) Rex *v.* Grundon, Cowp. 315.

(4) See Rex *v.* Bishop of Chester, 1 W. Bl. 22. That the sentence will not be impeached for informality or irregularity. See Bishop of Ely *v.* Bentley, 1 W. Bl. 85.

(5) Doe *v.* Haddon, 3 Doug. 310.

or naval duty. It seems that the sentences of these courts are conclusive in any action brought in the courts of common law. But the courts of common law will examine whether courts martial have exceeded the jurisdiction given them; (1) not, however, after the sentence has been ratified, and carried into execution. (2)

Decision of arbitrators.

It is probably on the ground that the jurisdiction of arbitrators is an exclusive jurisdiction created by the parties, that it has not been contended, as in the case of judgments of inferior courts, that their awards are open generally to review, or that it was necessary, before the new rules, to plead them by way of estoppel. (3) It is, however, competent to shew that an arbitrator has proceeded without jurisdiction. (4)

Action against judge.

It may be proper, in this place, briefly to advert to the doctrine, that a person acting as Judge (that is, where he has over the subject-matter and over the person a general jurisdiction which he has not exceeded,) will not be liable to have his judgment examined in an action brought against himself. (5) It will not, however, be necessary to examine the law upon this subject, because the sentence of the Judge, when used on such occasions, considered with reference to the law of evidence, is only produced for the purpose of shewing

(1) See Grant *v.* Gould, 2 H. Bl. 69. Ship Bounty, 1 East, 313; Stratford's case, 1 East, 313. Mann *v.* Owen, 9 B. & C. 595.

(2) In the matter of Poe, 5 B. & A. 681, on a motion for a prohibition.

(3) Doe d. Morris *v.* Rosser, 3 East, 15. Dunn *v.* Murray, 9 B. & C. 780. Whitehead *v.* Tattersall, 1 Ad. & E. 491. Barret *v.* Wilson, 1 Cr., M. & R. 586. It cannot be shewn that the arbitrator has proceeded on a mistake, see Johnson *v.* Durant, 2 B. & Ad. 931. Ashton *v.* Poynter, 1 Cr., M. & R. 738. Nor can the award be impeached at *nisi prius* for coruption, Wells *v.* Maccarmick, 2 Wils. 148. Braddick *v.* Thompson, 8 East, 344. Brazier *v.* Bryant, 3 Bing. 167.

(4) Rex *v.* Washbrook, 4 B. & C. 732.

(5) As to Judges of Record, see Hammond *v.* Howell, 1 Mod. 184. Mostyn *v.* Fabrigas, Cowp. 172. Dr. Bonham's case, 8 Co. 114. Groenvelt *v.* Burwell, 1 Ld. Raym. 454. By Holt, Ch. J., 1 Ld. Raym. 470. Basten *v.* Carew, 3 B. & C. 649. Lumley *v.* Quaree, 2 Ld. Raym. 767.—As to judges not of Record; Ecclesiastical Judge, Ackerley *v.* Parkinson, 3 M. & S. 411. Commissioners of Court of Requests, Aldridge *v.* Haines, 2 B. & Ad. 395. Returning Officer at Election, Ashby *v.* White, 2 Ld. Raym. 941. Cullen *v.* Morris, 2 Stark. 577. Harman *v.* Tappenden, 1 East, 555. Ministerial Officers, Marshalsea case, 10 Co. 76. Moravia *v.* Sloper, Willes, 30. Parton *v.* Williams, 3 B. & A. 330. Justices of the Peace, by Lord Tenterden, in Basten *v.* Carew, 3 B. & C. 653. Mills *v.* Collett, 6 Bing. 85.

that what was done was a judicial act. The questions which ordinarily arise upon the production of the sentence are, whether the subject of the sentence was within the jurisdiction of the Judge, and whether the sentence was pronounced in a regular manner. When these preliminaries are ascertained, the effect of the sentence depends on principles which do not belong to the law of evidence. (1)

Section V.

Of the Admissibility and Effect, in Evidence, of Judgments of Inferior Courts.

Judgment whether conclusive.

The general principle, as to the conclusive effect of what has been regularly decided by a competent tribunal, with regard to the same subject matter or cause of dispute, and between the same parties, or those succeeding to their rights and standing in the same relation and character, seems to apply to all the constituted tribunals of the kingdom, whether superior or inferior, whether of record or not of record. But it appears to be questionable, whether a judgment of an inferior court would be conclusive and not examinable, if an action were brought upon it in a superior court for the recovery of a debt.

(1) Cases of apparent want of jurisdiction:—Conviction for more than one penalty on the same day, Crepps *v.* Durden, Cowp. 640. Time of commitment unreasonable, Davis *v.* Capper, 10 B. & C. 28; Hill *v.* Bateman, 1 Str. 710.—Committal without complaint, Morgan *v.* Hughes, 2 T. R. 225.—Excess of imprisonment, Groome *v.* Forrester, 5 M. & S. 314.—Cases where the excess of jurisdiction was only made apparent by extrinsic evidence, Terry *v.* Huntington, Hardr. 480. Hill *v.* Bateman, 2 Str. 710. Welsh *v.* Nash, 8 East, 402; 1 Br. & B. 409; 12 East, 67, 82. By Le Blanc, J., Fuller *v.* Cotch, Carth. 346. Lowther *v.* Lord Radnor, 8 East, 113. Strickland *v.* Ward, 7 T. R. 634, n. Gray *v.* Cookson, 16 East, 23.—Cases as to the statement of facts, giving jurisdiction, being conclusive, Brittain *v.* Kinnaird, 1 B. & B. 432, 442. Basten *v.* Carew, 3 B. & C. 649. Fawcett *v.* Fowlis, 7 B. & C. 394.—Informal convictions, Rogers *v.* Jones, 3 B. & C. 409. Daniell *v.* Phillips, 1 Cr., M. & R. 662. Wickes *v.* Clutterbuck, 2 Bing. 483. Massey *v.* Johnson, 12 East, 67. Bridget *v.* Coyney, 1 M. & R. 211. Gimbert *v.* Coyney, M'Cl. & Y. 469.

In the case of *Moses* v. *Macfarlane*, (1) it was decided, that a sum of money, paid under the direct authority of an inferior court, might be reclaimed as unduly paid. This decision has given great dissatisfaction. (2) It proceeded on the ground, not that the judgment was wrong, but that, (for a reason which the defendant in the court below could not avail himself of against that judgment,) the defendant in the court above ought not in justice to keep the money. Lord Mansfield expressly said, that the merits of a question, determined in the court below, never could be examined over again in any shape whatever.

In the Irish case of *Gahan* v. *Mainjay*, (3) the Lord Chancellor observed, that the Ecclesiastical and Admiralty Courts are not courts of record, and that sitting in a court of law he was not at liberty to enter into the examination of the justice or injustice of any judgment of a court of competent jurisdiction, unless it came before him by a writ of error. It has however, been frequently stated, that inferior courts, not of record, have not the privilege of not having their judgments controverted. (4)

When examinable.

The following are instances in which the judgments of inferior courts were held to be examinable :—

When due notice not given.

Where it appears that a judgment has been pronounced in an inferior court, and due notice of the proceedings has not been given to the party, the judgment will not be enforced, the matter not having been duly submitted to the jurisdiction of the inferior court. (5)

(1) 2 Burr. 1005.

(2) See opinion of Chief Justice Eyre, in Philips *v.* Hunter, 2 H. Bl. 402, where it was held, that if a creditor in England, after a trader has become a bankrupt, attaches his property in a foreign country, he is liable for the amount to the assignees. And see Poth. by Evans, 350.

(3) Cited 2 Evans' Pothier, 353.

(4) By Lord Mansfield, in Walker *v.* Witter, Doug. 3. By Buller, J., in Galbraith *v.* Neville, Doug. 6, n. And see Barnes *v.* Wenkler, 2 C. & P. 345. Thompson *v.* Blackhurst, 1 Nev. & M. 266.

(5) See *infra*, various examples to the same effect in regard to foreign judgments.

Where a judgment by foreign attachment was relied on by way of defence in an action, it was held of no avail, on account of want of notice to the defendant in the court below. It was said by the Chief Justice, that a practice to proceed in the absence of the defendant, without summoning him or giving him notice, was contrary to the first principles of justice, and could not be supported. (2)

When process not duly served.

Where a summons and attachment, returnable at the same time, were issued at the same time, and neither of them was served personally, and the plaintiff declared and had judgment, the defendant not appearing,—though this was certified to be the practice of the court, the proceedings were vacated upon a writ of error; (1) and it is conceived, that they would have been equally unavailing in an action.

Where a judgment and process of execution in a county court were pleaded in bar to an action of trespass, and it appeared that the process of the court had not been served, nor an appearance duly entered, the court held, that a jury were at liberty to consider the whole proceedings fraudulent and collusive; and this, notwithstanding that a motion to set aside the proceedings in the court below had been made without effect. (3) The record of an inferior court is not conclusive, but only *primâ facie* evidence, that the debt arose within the jurisdiction of the court. (4)

To what extent examinable.

It does not appear to be clearly settled, to what extent, beyond the grounds of objection already noticed, the judgments of inferior courts are examinable. Assuming that they are examinable for all purposes, when an action is expressly brought upon them, it does not follow that they should be subject to the like examination, where they have been

(1) Williams *v.* Lord Bagot, 3 B. & C. 772; see Pratt *v.* Dixon, Cro. Jac. 108. Ward *v.* Ellayn, Cro. Jac. 261.

(2) Fisher *v.* Lane, 3 Willes, 303.

(3) Thompson *v.* Blackhurst, 1 Nev. & M. 273.

(4) Huxham *v.* Smith, 2 Camp. 21. See Briscoe *v.* Stevens, 2 Bing. 215, where the plaintiff in the inferior court had failed. Herbert *v.* Cook, 3 Doug. 101.

acted upon, or where a complaint in the court below has been dismissed upon the merits.

In a *nisi prius* case, indeed, (1) it has been held, where a plaintiff had sued for a debt in a county court, and his complaint was dismissed on the merits, that he might, nevertheless, afterwards sue in the superior courts for the same demand, and that the former proceedings would not be conclusive against him; but that the matter was proper for the consideration of the jury, as something might have occurred in the county court, which was not brought before the jury in the second action. But in the case of *Huxham* v. *Smith*, (2) where the defendant had, under process of foreign attachment in the Mayor's court, paid a sum of money to a creditor of the plaintiff, it was held, that although the record was only *primâ facie* evidence of the jurisdiction of the court, yet that if there were no excess of jurisdiction, it would be conclusive as to the obligation to pay the money. Lord Ellenborough observed, that if the money was paid pursuant to the judgment of a court of competent jurisdiction, he must presume *omnia rite acta*; and that he could not unravel the proceedings and grant a new trial.

When conclusive.

When a cause is removed by *habeas corpus* from an inferior court, after judgment by default, that judgment is not evidence against the defendant in the superior court: for the judgment may have been suffered by default, with the express view of removing the cause into the superior court; and the effect of holding the judgment by default in the inferior court to be an admission of a cause of action, would be to turn the trial in the inferior court into an execution of a writ of inquiry. (3)

Judgment by default in inferior courts.

The decisions relative to the effect of judgments of Courts of Quarter Sessions illustrate the doctrine laid down in the *Duchess of Kingston's* case, that a judgment is conclusive evidence between the same parties, upon a matter directly in

Judgments of courts of quarter sessions.

(1) Barnes v. Wenkler, 2 C. & P. 345.
(2) 2 Camp. 19.
(3) Bottings v. Firby, 9 B. & C. 762.

issue, but is not evidence of any matter which came collaterally in question, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. (1)

Conclusive between what parishes, and of what, in questions of settlement.

A judgment of a Court of Quarter Sessions, discharging an order of removal, (not for defect of form but upon the merits,) is conclusive as between the contending parishes, (but not as to a third parish,) to establish this, that the settlement of the pauper was not in the appellant parish at the time of the removal. (2) And if a woman were to be removed from the one parish to the other, as the pauper's wife, the former judgment would be conclusive, on an appeal against her removal between the same parishes, that the husband was not settled there at the time of the prior order. So, if the respondents should prove a derivative settlement for the pauper from his *father*, it would be competent to the appellants to show, that the father was removed from the respondent parish to their parish, as his place of settlement, and that the order for his removal was reversed; such evidence would be admissible, because the precise point, which is a necessary part of the proof in the second appeal, has been determined on the first appeal. (3) But it has been held, that it would not be competent to show that the pauper's *brother* was removed, and the order of removal reversed, though the settlement proved for the pauper should be one derived from the common father; because the father's settlement must have come into question on the former appeal (if it came into question at all), only collaterally and incidentally. (4)

(1) Duchess of Kingston's case, 20 Howell's St. Tr. 613. *Vide supra*, p. 5.

(2) Rex *v.* Sarratt, Burr. S. C. 73. Harrow *v.* Ryslip, Salk. 524.

(3) Rex *v.* Catterall, 6 M. & S. 83.

(4) Rex *v.* Knaptoft, 2 Barn. & Cres. 883. The respondents here proved a *primâ facie* case of settlement, by proof of relief to the pauper. The case was determined on the authority of the observations of Chief Justice De Grey, in the Duchess of Kingston's case. Although the father's settlement was not the direct point in issue upon the former appeal, yet parol evidence was tendered, to shew that it was, in fact, the point decided. But Mr. Justice Bayley said, that assuming the parol evidence to be admissible, still the judgment could not be received on the authority of the *dictum* of Chief Justice De Grey. If the parol evidence was admissible, that *dictum* seems not to apply.

Effect of judgment of reversal,

It appears to be clear, from considering the language and nature of an order of removal, and the nature of judgments in appeals against such orders, that a judgment, reversing an order of removal from A. to B., ascertains nothing but this negative proposition, namely, that at a certain time the pauper was not settled in B. the appellant parish, and upon this point it is conclusive in any future appeal between the same parishes. But with regard to the removing parish, this judgment determines nothing affirmatively. If, therefore, afterwards, B. should remove the same pauper to A., and A. should appeal, that judgment could not be used by B. as evidence of the pauper's settlement in A.; the judgment itself professes nothing upon that point, and affords not the least reason for supposing, that a settlement in A. was ever any part of the subject of inquiry. It finds the *negative*, that there was no settlement in B.: but as to the *affirmative* proposition, of a settlement ever having been in A., such a judgment is a mere blank, and supplies no kind of information.

as to appellant parish,

as to removing parish.

Quashing of order generally,

An order of sessions, quashing an order of removal generally, is conclusive evidence between the parties to the appeal, that when the order of removal was made, the appellant parish was not bound to receive the pauper; but it is only *primâ facie* evidence that the pauper was not settled in that parish. It is competent to the removing parish to shew, by parol evidence, that the former order was quashed on the ground that the pauper was not removable, as residing on a settlement of his own, or that he was not chargeable. (1)

effect of as to appellant parish.

It is a peculiarity in the effect of a judgment of a Court of Quarter Sessions, not in conformity with the principles which prevail in other cases of judgments, that an order for the removal of a pauper, confirmed on appeal, is not only admissible, but conclusive of the pauper's settlement at the time of the order, between the appellant parish, and any third parish, on any subsequent appeal. (2) It may be observed of this exception, that the parish, against whom the judgment was

(1) Rex *v.* Wick St. Lawrence, 5 B. & Ad. 526. Rex *v.* Wheelock, 5 B. & C. 511. Osgathorp *v.* Diseworth, 2 Str. 1256.

(2) Admitted, Rex *v.* Rislip, 2 Bott, 700. 2 Salk. 524. Rex *v.*

pronounced, had an opportunity of discharging themselves by proving the liability on a third parish. And although cases may occasionally occur, in which a parish might have means of proving the liability on a third parish, which they are precluded from using in a proceeding between themselves and the removing parish, yet this does not commonly happen, and perhaps the prevention of a great deal of parochial litigation may have been deemed a sufficient ground for departing from the ordinary rule.

Effect as between several townships of a parish.

R. v. *Oldbury.*

A pauper was removed by order of justices to a parish, which consisted of several townships maintaining their own poor jointly, which order was acquiesced in, and afterwards one of the townships separated itself from the parish, and thenceforth maintained it's own poor separately; the same pauper was afterwards removed to the township so separating itself: on an appeal against the order, it was held, that the former order was not conclusive on the township. The case was apparently decided on the ground, that the parties were not the same; it was spoken of by the court as one of considerable difficulty. (1)

R. v. *Wye.*

In *R.* v. *Wye,* (2) two persons were removed as man and wife; the order was appealed against; pending the appeal, the parish officers of the appellant parish instituted a suit in the spiritual court to dissolve the marriage as incestuous; the order was confirmed; afterwards the marriage was decreed to be incestuous, and void *ab initio;* the pauper was born of this marriage before the order, but not named in it, and he was unemancipated, and had gained no settlement when the order was made. The court of Queen's Bench held, that the confirmation of the order was not conclusive proof of a derivative settlement of the pauper in the appellant parish, on an appeal against an order by which the pauper was removed

Bentley, 2 Bott, 704. Rex *v.* Sarratt, 2 Bott, 702. An order executed and unappealed against, has the same effect. Rex *v.* Kenilworth, 2 T. R. 598. Rex *v.* Corsham, 11 East, 388. The order is conclusive, not only of the settlement of persons named in the order, but also as to children not included by name, Rex *v.* St. Mary, Lambeth, 6 T. R. 615. Rex *v.* Catterall, 6 M. & S. 83.

(1) Rex *v.* Oldbury, 4 Ad. & E. 167.

(2) 7 A. & E. 761.

to that parish after the decree of the spiritual court; but that the appellant parish might prove the incestuous marriage and the pauper's illegitimacy.

Section VI.

Of the Admissibility and Effect of the Proceedings of Foreign Courts.

Foreign judgments *in rem*.

If a sentence or judgment of a court in a foreign country is a proceeding *in rem*, it appears, by the general consent of nations, that where the matter in controversy is land or other immoveable property, the judgment pronounced in the *forum rei sitæ* is of universal obligation; and it would be conclusive here, to the same extent in which it is conclusive in the foreign country.(1)

The same principle has generally been applied as to moveable property within the jurisdiction of the court which pronounced the judgment. Thus, a foreign judgment against a garnishee, upon proceedings by way of foreign attachment, is not examinable in the English courts. (2)

A sentence of a foreign court of competent jurisdiction, on a question of intestacy as to personal property, in the case of a person domiciled in the foreign country, is conclusive. "The rule of law," said the Vice Chancellor, in the case of *Price* v. *Dewhurst*, (3) "is now clearly established by a great variety of cases, that where a person dies intestate, his personal estate is to be administered according to the law of the country in which

(1) Upon the subject of this section, see Story on the Conflict of Laws, ch. xv., where it is treated of with great ability. See also Kent's Commentaries, Lecture xxvii.

(2) Phillips *v.* Hunter, 2 H. Bl. 410. The process of attachment will, however, be void, if obtained in the absence of the party affected, Cavan *v.* Stewart, 1 Stark. Ca. 525, *infra*, p. 539.

(3) 8 Sim. 299; where may cases are cited.

he was domiciled at the time of his death, whether he was a British subject or not; and the question whether he died intestate or not, must be determined by the law of the same country."

Judgments *in rem*, in foreign Admiralty Courts.

Another example of the application of this principle in the case of judgments *in rem*, concerning moveable property, is afforded by the proceedings of foreign Courts of Admiralty. "It has been clearly settled," said the Master of the Rolls, in the case of *Kindersley* v. *Chase*, (1) "from the time of Lord Hale down to the present period, that a sentence of condemnation in a Court of Admiralty, when it proceeds on the ground of enemy's property, is conclusive that the property belongs to enemies, and not only for the immediate purpose of such sentence, but is binding on all courts and against all persons. The sentence of a Court of Admiralty, proceeding *in rem*, must bind all parties, must bind all the world."

Hughes v. *Cornelius.*

In the case of *Hughes* v. *Cornelius*, the leading case on this subject, the question upon the foreign sentence arose in an action of trover, and not in an action on a policy of assurance, where the non-compliance with a warranty of neutrality is in dispute. But from that period down to the present, the doctrine, there laid down, has been considered as applicable to questions of warranty in actions on policies, as to questions of property in actions of trover. (2)

It may now be assumed as the settled doctrine of English

(1) Cockpit, July, 1801. Park, Ins. 8th Ed. 743. Hughes *v.* Cornelius, 2 Show. 232. Sir T. Raym. 473. Graham *v.* Maxwell, 2 Dow. 314. Hamilton *v.* Dutch E. I. Co. 8 Br. P. C. 264. Bernardi *v.* Motteux, 2 Doug. 575. As to the effect of an admiralty sentence of acquittal, Le Caux *v.* Eden, Doug. 605, commented on in Obichini *v.* Bligh, 8 Bing. 347. When an Admiralty Court has jurisdiction of the original matter, it has jurisdiction of every thing necessarily incidental, as the amount of damage, or the like, *ib.* Faith *v.* Pearson, 2 Marsh. 133. Smart & Wolff, 3 T. R. 323.

(2) By Chambre, J., Lothian *v.* Henderson, 3 Bos. & Pull. 513. "The doctrine in favour of the conclusiveness of sentences of foreign Admiralty Courts rests upon the authority in Shower (Hughes *v.* Cornelius, 2 Show. 232), which does not fully support it; and the practice of receiving them often leads to the greatest injustice;" by Lord Ellenborough, in Donaldson *v.* Thompson, 1 Camp. 429, 432. See also to the same effect, in Fisher *v.* Ogle, 1 Camp. 418; and Geyer *v.* Aguilar, 7 T. R. 691, 692.

courts of law, that all sentences of foreign courts of competent jurisdiction to decide questions of prize, are to be received here as conclusive evidence in actions upon policies of insurance, on every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they have professed to decide judicially. (1) "It is now too late," said Mr. Justice Lawrence, (2) "to examine the practice of admitting these sentences to the extent to which they have been received, supposing that practice might at first have appeared doubtful. On the authority of those decisions men have acted for a long series of years, and entered into contracts of assurance in this country, with a knowledge of such decisions, and in expectation that the questions, arising out of such contracts, to which the decisions are applicable, will be ruled by them."

Conclusive, to what extent.

Such a sentence of condemnation will be binding on the rights of third persons, as well as on the parties to the original suit; it is conclusive between the assured and the underwriter, with respect to every fact which it professes to decide. Thus, when it proceeds on the ground of enemy's property, it is conclusive that the property belongs to enemies, not only for the immediate purpose of such a sentence, but it is binding on all courts and against all persons. (3) And the sentence is binding, whether it proceed to condemn the ship expressly as being enemy's property, or whether such a ground of decision can only be collected from other parts of the proceedings; and this, although it appear on the face of the sentence, that the prize-court arrived at the conclusion through the medium of rules of evidence and rules of presumption, established only by the particular ordinances of their own country, and not admissible on general principles. (4)

(1) Bolton *v.* Gladstone, 5 East, 160. Christie *v.* Secretan, 8 T. R. 196. Kindersley *v.* Chase, Park, Ins., 8th Ed. 743.

(2) Lothian *v.* Henderson, 3 Bos. & Pull. 524. Baring *v.* Clagett, 3 Bos. & Pull. 214. See 1 Camp. 432.

(3) Kindersley *v.* Chase, Park, Ins., 8th Ed. 743. All the cases on this subject are collected in ch. xviii of that work.

(4) Bolton *v.* Gladstone, 5 East, 155. 2 Taunt. 85. Baring *v.* Roy, Ex. Ass. Comp. 5 East, 99.

The sentence is conclusive evidence of the points upon which it professes to decide. (1) Thus, for example, if it proceeded upon the ground of the property not being neutral, it is conclusive against the insured, that he has not complied with his warranty. (2) If no special ground is stated, and the ship is condemned generally as lawful prize, it is to be presumed from the condemnation, as no other cause appears, that the sentence proceeded on the ground of the property belonging to an enemy; and the sentence, in such a case, has been held to be conclusive evidence, that the property was not neutral. (3)

Not conclusive, when.

Where the sentence professes to be made on particular grounds, which are set forth in the sentence, but which appear not to warrant the condemnation, the sentence will not be conclusive as to such facts. (4) Or if the sentence has not decided the question of property, nor declared whether it be neutral, but condemned the property as prize, solely on the ground, that the ship had violated an *ex parte* ordinance, to which the neutral country had not assented, or on the ground of a foreign ordinance against the law of nations, such a sentence, though conclusive of the question of prize or no prize, would not be conclusive of the fact, whether or not the ship were neutral. (5)

Not conclusive, when the grounds alleged are ambiguous.

The ground alleged in the sentence is presumed to be that on which the confiscation proceeded; (6) but the sentence of a foreign Court of Admiralty, is not conclusive as to the ground of condemnation, if there be any ambiguity as to what the

(1) Christie *v.* Secretan, 8 T. R. 196. Fisher *v.* Ogle, 1 Camp. 418. Everth *v.* Hannam, 2 Marshall, 72. Marshall *v.* Parker, 2 Camp. 70.

(2) Barzillay *v.* Lewis, Park, Ins. 8th Ed. 725. Baring *v.* Clagett, 3 Bos. & Pull. 201.

(3) Saloucci *v* Woodmas, Park, Ins., 8th Ed. 727. See 8 T. R. 444; and Baring *v.* Clagett, 3 B. & P. 215. See also the judgment of Tindal, C. J., in Dalgleish *v.* Hodgson, 7 Bing. 504.

(4) Calvert *v.* Bovil, 7 T. R. 523. 8 T. R. 444.

(5) Pollard *v.* Bell, 8 T. R. 444. Bird *v.* Appleton, 8 T. R. 562. Baring *v.* Clagett, 3 Bos. & Pull. 215. Bolton *v.* Gladstone, 2 Taunt. 85, 95. Dalgleish *v.* Hodgson, 7 Bing. 504.

(6) Horneyer *v.* Lushington, 3 Camp. 89. Bernardi *v.* Motteux, Doug. 581.

ground is. It must not be collected by inference only, or left in uncertainty, whether the ship was condemned on one ground which would be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country. (1)

Nor where the court not duly constituted.

Sentences of condemnation in foreign courts of prize are admissible only where such courts are constituted according to the law of nations, and exercise their functions either in the belligerent country, or in the country of a co-belligerent or ally in the war. (2) It has, therefore, been determined, that a sentence, pronounced by the authority of the capturing power within the dominions of a neutral country, to which the prize may have been taken, is illegal, (3) and consequently, would not be admissible evidence to falsify the warrant of the neutrality.

Foreign sentences concerning marriage, &c.

Much controversy has existed among writers on general law, as to the point whether foreign sentences affecting the general capacity of persons, or sentences concerning marriage or divorce, ought to be conclusive. The sentence of a foreign court of competent jurisdiction, directly establishing a marriage in that country, would be conclusive in any of our courts on the validity of the marriage. (4) And it seems that a sentence of nullity of marriage, pronounced in the country where the marriage was solemnized, would, at least, carry with it great authority in this country. (5) But a judgment of a

(1) By Tindal, Ch. J., in Dalgleish *v.* Hodgson, 7 Bing. 504. Bernardi *v.* Motteux, Doug. 581. Calvert *v.* Bovill, 7 T. R. 523. The sentence is not evidence of what may be gathered by inference, Fisher *v.* Ogle, 1 Camp. 418.

(2) Oddy *v.* Bovil, 2 East, 473.

(3) Havelock *v.* Rockwood, 8 T. R. 268. Case of Flad Oyen, 8 T. R. 270, n. 1 Rob. Adm. Rep. 135. Donaldson *v.* Thompson, 1 Camp. 429. The practice of different states varies on the question, whether sentences *in rem* are conclusive upon all the points which are incidentally disposed of by the sentence, and of the facts and allegations on which they profess to be founded. Story on the Conflict of Laws, p. 496.

(4) By Lord Hardwicke, in Roach *v.* Garvan, 1 Ves. 159. Also a case, temp. Car. 2, cited by Lord Hardwicke, in Boucher *v.* Lawson, Ca. temp. Hard. 89. 2 Swanst. 349.

(5) Sinclair *v.* Sinclair, 1 Hagg. Con. 297. It seems that it would be conclusive, from Cottington's case, 2 Swanst. 326, n.

third country, upon the validity of a marriage not within it's territory, nor between the subjects of that country, though admissible, would not have the like authority. (1)

Sentence of divorce.

The weight of authority in our courts is against the doctrine which gives validity to a foreign sentence of divorce, in the case of an English marriage between English subjects. (2) A foreign sentence of divorce, in such cases, is not allowed by our courts to be valid, on the ground that it is not just that one party should be able to dissolve a contract by means of a law different from that under which it was formed, and by which the other party understood it to be governed.

Sentences in criminal cases.

On a criminal charge, (as, for a murder committed in a foreign country, but indictable here,) an acquittal in that country may be pleaded here in bar to an indictment for the same offence. (3) But if the foreign court had no jurisdiction in the case, or if the proceedings were instituted for the purpose of defeating justice, and in fraud of the rightful sovereignty, this matter might be pleaded in reply, and, if proved, would make the acquittal inoperative and void.

Effect of foreign judgments, when sued upon.

Some difference of opinion appears to have prevailed in the English courts, respecting the effect of a foreign judgment in an action brought directly upon it. It is clearly established, that in such cases a foreign judgment is *primâ facie* evidence

(1) Sinclair *v.* Sinclair, 1 Hagg. Con. 297. Scrimpshire *v.* Scrimpshire, 2 Hagg. Con. 397.

(2) By the twelve judges in Lolly's case, R. & R. 237. Tovey *v.* Lindsay, 1 Dow. 124, in which the opinions of Lord Eldon and Lord Redesdale appear to have coincided with that of the judges. M'Carthy *v.* De Caix, cited 3 Hagg. Ecc. 642, n. In the case of Conway *v.* Beazley, 3 Hagg. Ecc. 639, the opinion of the Ecclesiastical Court was intimated, that an English marriage might be avoided by a Scotch divorce, if the parties were *bonâ fide* domiciled in Scotland. The Scottish divorce in that case was avoided, on the express ground that there was no *bonâ fide* change of domicile. In Warrender *v.* Warrender, 9 Bligh. 89, it was decided that, by the law of Scotland, parties married in England but domiciled in Scotland may be divorced by the court of that country.—The reader will find this subject very fully discussed by foreign jurists. Kent, 2 Comm. 92. Story on the Conflict of Laws, 499.

(3) Hutchinson's case, cited 1 Show. 6: also in 2 Str. 733. Roche's case, 1 Leach, 160. B. N. P. 245. The reason assigned, by Buller, J., appears to be too general, as it would apply equally to civil judgments also.

to sustain the action.(1) It is settled also, that the sentence or judgment of a court in a foreign country, will be assumed to be in accordance with the law of that country, at least, until the contrary is distinctly proved;(2) but the question has been, whether it is to be deemed conclusive, or, if not conclusive, to what extent and in what manner can the original merits be properly inquired into. "Great doubts have formerly existed," said Lord Chief Justice Tindal, in *Smith* v. *Nicolls*, (3) "and some degree of doubt still exists, whether a judgment so recovered is conclusive between the parties, or whether the matter may be opened and agitated in this country."

It seems to have been the opinion of Lord Nottingham, (4) Lord Hardwicke, (5) Lord Kenyon, (6) and Lord Ellenborough, (7) that foreign judgments are conclusive in evidence. But Lord Mansfield, (8) Chief Baron Eyre, (9) and Mr. Justice Buller, (10) appear to have expressed a contrary opinion. In the cases in which their opinions were delivered, it does not appear to have been necessary to decide the express point under consideration.

(1) See Phillips *v.* Hunter, 2 H. Bl. 410. Sinclair *v.* Fraser, Doug. 5, n. Hall *v.* Odber, 11 East, 124.

(2) Becquet *v.* Macarthy, 2 B. & Ad. 957. Alivon *v.* Furnival, 1 Cr., M. & R. 293.

(3) 5 Bing. N. C. 221.

(4) Kennedy *v.* Earl of Cassilis. See 2 Swanst. 326, n.

(5) Boucher *v.* Lawson, Cas. temp. Hard. 89. See also Roach *v.* Garvan, 1 Ves. 157.

(6) Galbraith *v.* Neville, Doug. 5, n., expressing doubts concerning the doctrine laid down in Walker *v.* Whitter, *post.* The court refused a new trial, on the ground that the judgment was, at all events, *primâ facie* evidence. See also Guinness *v.* Carroll, 1 B. & Ad. 459.

(7) Tarleton *v.* Tarleton, 4 M. & S. 21.

(8) In Walker *v.* Witter, Doug. 1; Herbert *v.* Cook, Willes, 36, n., the observations were merely incidental. S. P. Hall *v.* Odber, 11 East, 118; and see Bayley *v.* Edwards, 3 Swanst. 703, 711.

(9) In Phillips *v.* Hunter, 2 H. Bl. 410. The opinion of the Lord Chief Baron is very full upon this point, and on such a question is of great weight.

(10) In Galbraith *v.* Neville, Doug. 5, n., relying upon the decision of the House of Lords, in Sinclair *v.* Fraser, Doug. 5. n. 20 Howell's St. Tr. 468. In that case it was declared by the House of Lords, "That the judgment of the Supreme Court of Jamaica ought to be received as evidence *primâ facie* of the debt, and that it lies upon the defendant to impeach the justice thereof, or to shew the same to have been irregularly or unduly obtained." Perhaps in Arnott *v.* Redfern, 3 Bing. 353, and Guinness *v.* Carroll, 1 B. & Ad. 463, the court may be thought to have considered foreign judgments not conclusive.

Martin v. Nicolls.

In a recent case in equity, *Martin* v. *Nicolls*,(1) the Vice Chancellor, after an examination of the authorities, held that a bill for a discovery and a commission to examine witnesses in Antigua, in aid of the plaintiff's defence to an action brought on a foreign judgment in this country, was demurrable; on the ground, that a foreign judgment is not examinable by the Courts of Westminster Hall.

Houlditch v. M. of Donegal.

In the case of *Houlditch* v. *Marquis of Donegal*, (2) before the House of Lords, Lord Chancellor Brougham referring to the case *Martin* v. *Nicolls*, expressed a different opinion from the Vice Chancellor, and said, he thought that case ill decided; and that, if it came before him, he could not affirm that judgment on the ground on which it now stands. "One question," said the Lord Chancellor, "which arises in this case, (*Houlditch* v. *Marquis of Donegal*) and which has been made a point of on both sides, is one which has been raised in some of our courts, in which there have been *dicta*, with some authority of judicial decision, but conflicting *dicta* upon this point, namely, whether a judgment of a foreign court is only *primâ facie* evidence or ground of an action, or whether it is conclusive, not to be traversed or rebutted, and not to be averred against. It is the general sense of lawyers in Westminster Hall, that the judgment of a foreign court is in courts of this country only *primâ facie* evidence, liable to be averred against, and not conclusive. One argument is clear—that the law in the course of its procedure abroad sometimes differs so mainly from ours in the principles upon which it is bottomed, that it would seem a strong thing to hold, that our courts are bound conclusively to give execution to the sentences of foreign courts, when possibly there may not be any one of those things which are reckoned the elements or the corner stones of the due administration of justice, present to the procedure of those foreign courts." The Lord Chancellor then pointed out instances, in which foreign sentences might be contrary to the first principles of natural justice, with a view to shew the danger and injustice which

(1) Martin *v.* Nicolls, 3 Sim. 458. See Houlditch *v.* M. of Donegal, 8 Bligh. 301, 337; and Price *v.* Dewhurst, 8 Sim. 302; and Ferguson *v.* Mahon, 11 A. & E. 179.

(2) 8 Bligh. 301; A.D. 1834.

would follow, if they were to be held conclusive in our courts. And no doubt for this reason, to guard against the possibility of injustice, the rule of law, as settled generally in foreign states, is, that foreign sentences are examinable, and not conclusive. (1) In the American states, a foreign judgment, when used as the foundation of an action, is never more than mere *primâ facie* evidence, and the defendant may impeach it by shewing that it was irregularly obtained, or indeed, upon almost any ground which would have constituted a defence to the original suit. But in American courts, if a foreign judgment come *incidentally* in question, it is conclusive.

Foreign judgment impeachable, when.

For error on its face.

Where a foreign judgment proceeds upon an error in law apparent on the face of it, it may be impeached; and this, even where it is set up in answer to an action, and the action is not brought upon it. Thus in the case of *Novelli* v. *Rossi*, (2) where it appeared that the French court had mistaken the law of England as to the effect of the cancellation of a bill of exchange, and that it's decree had been founded upon such mistake, the defendant was not allowed to set up the decree, in answer to the plaintiff's claim. But on the ground, that the foreign courts are much more competent to decide questions arising upon the law of the foreign country, the English courts will not set aside the judgments of foreign courts for a mistake of law, unless they see very plainly that such a mistake has been committed. (3)

Novelli v. *Rossi.*

For palpable mistake in law.

(1) See Story on the Conflict of Laws, c. xv.

(2) 2 B. & Ad. 757. The defendant contended, that he had indorsed two bills to the plaintiff in discharge of the debt which was the subject of the plaintiff's claim. The bills were cancelled by mistake, and the defendant procured a decree discharging himself from liability on account of the cancellation, and that the bills should remain to the plaintiff's debit. And see Arnott *v.* Redfern, 2 Car. & P. 88. In Buchanan *v.* Rucker, 1 Camp. 67, Lord Ellenborough says, that there might be such glaring injustice on the face of a foreign judgment, or it might have a vice rendering it so ludicrous, that it could not raise an assumpsit, and if submitted to the jurisdiction of the courts of this country could not be enforced.

(3) Becquet *v.* Maccarthy, 2 B. & Ad. 957; the action was brought upon the foreign judgment. Alivon *v.* Furnival, 1 Cr., M. & R. 293; the action was brought upon an award made by order of the foreign court. And see Arnott *v.* Redfern, 3 Bing. 353. 2 Carr. & P. 88, S. C.

Impeachable for fraud.

The judgments of foreign courts may of course be avoided, as those of our own courts, if founded on fraud, or pronounced by a court which had not competent jurisdiction over the subject matter of the cause. In all such cases, the foreign sentence is considered to be a nullity. In the late case of

Price v. *Dewhurst.*

Price v. *Dewhurst*, (1) on a question as to the validity of a sentence of a court in a foreign country, giving effect to a bequest of personal property by a British subject domiciled there, the sentence was considered null and void, the persons interested under the will, and claiming the property bequeathed, having taken part in the proceedings of the foreign court, and in fact having constituted the court which pronounced the sentence. "Wherever it is manifest," said the Vice Chancellor, "that justice has been disregarded, and that the parties are merely making use of the legal proceedings as a matter of form, for the purpose of doing that which is contrary to all notions of justice, namely, of deciding for themselves and in their own favour, the court is bound to treat their decision as a matter of no value or substance." The foreign sentence, therefore, in that case was declared to be fraudulent and void.

Impeachable, when on it's face unjust.

A foreign judgment is not available in the courts of this country, either for the plaintiff or defendant, if anything appears in the record of the proceedings, on which the judgment is founded, contrary to reason and justice. If the judgment, for example, should have passed against a defendant, who does not appear to have been served with process, or to have had any opportunity of defending the action, such a judgment would not be enforced by courts of justice in this country.

Buchanan v. *Rucker.*

This point occurred in the case of *Buchanan* v. *Rucker*, (2) where it appeared from the proceedings, that the summons had been served by nailing up a copy of the declaration on the door of the court-house; and it was adjudged, that although such might be the practice abroad, it was a practice inconsistent with all principles of justice, and that the judgment therefore could not be made the ground of an action of assumpsit. It will be necessary therefore to prove, that the party was duly

(1) 8 Sim. 279.
(2) 1 Camp. 63; 9 East, 192, S. C.

summoned; or, if he is described in these proceedings as an absentee, that he had absented himself from the country. (1) With respect to the proof of his absence, that fact might perhaps be inferred from a return of *non est inventus* to the process issued against him, if it be proved that he had been in the country. (2)

Absence of the party from the country, when sued.

But it has been held to be no objection to a colonial judgment, that the party, against whom it was obtained, was absent from the colony, where by the law of the colony, in the case of a person formerly resident in it absenting himself, and not leaving any attorney, the procurator fiscal was bound to take care of the interests of such absent party. (3) An action lies on a Scotch judgment of horning, notwithstanding it is obtained in the absence of the party affected by it, the party having property within Scotland, and public proclamation having been given according to the Scotch law. (4) An action may be maintained on a foreign judgment obtained by default, which states that the defendant appeared by attorney, without proving that the attorney mentioned had authority to appear; for the judgment must have credit for the facts which it specifically alleges. (5)

Judgment by default.

How far may a defendant, sued on a judgment, enter into the original merits.

It may reasonably be doubted, whether the courts would feel justified in allowing greater latitude in the examination of foreign judgments, upon which actions are brought, than in the instances before mentioned. It would apparently be attended with inconvenience, (in all cases at least in which it is competent to a party to appeal to the Queen in Council,) if the defendant

(1) Buchanan *v.* Rucker, 9 East, 192. Cavan *v.* Stewart, 1 Stark. N. P. C. 525, and see Frankland *v.* M'Gusty, 1 Knapp. Pr. C. 274. Obichini *v.* Bligh, 8 Bing. 351.

(2) By Lord Ellenborough, Cavan *v.* Stewart, 1 Stark. N. P. C. 525.

(3) Becquet *v.* M'Carthy, 2 B. & Ad. 958.

(4) Douglas *v.* Forrest, 4 Bing. 693. It was noticed that Lord Ellenborough, in Buchanan *v.* Rucker, appeared to have considered that a person having property in the island, was virtually present, and that in Cavan *v.* Stewart, Lord Ellenborough said, "You must prove him summoned, or, at least, that he was once in the island of Jamaica when the attachment issued."

(5) Molony *v.* Gibbons, 2 Camp. 503. It is presumed, that the judgment would only furnish *primâ facie* evidence of the fact of appearance by attorney. Lord Ellenborough said, in this case, that he would look to foreign judgments with great jealousy.

not appealing, and resisting an action on the judgment, were to be at liberty to exercise all the privileges of a new trial, and to do this under a different law and different rules of evidence. Besides it may frequently, perhaps generally, be difficult to bring forward a second time the merits as formerly laid before the foreign court, in consequence of the distance of places and the loss of witnesses and vouchers. And though a jury, under proper direction, might possibly make all due allowances on account of these circumstances, it would be a great hardship to the people of our colonies to be subjected to such a risk, and to the expense necessarily occasioned by such an investigation.

Although it should be held, that a foreign judgment, sued upon here, is open to review in the same manner as if a new trial were granted, it would not follow that, in all cases, the judgment should be open to examination on other grounds than that of palpable errors in the face of it, want of jurisdiction, or fraud. It may be said, that no sovereign is, by the law of nations, bound to execute within his dominions a sentence pronounced out of it: It may, therefore, impose terms upon the execution of the sentence, and reserve a right to examine into it's merits. But if a foreign judgment has been pronounced by a court of competent jurisdiction, and the losing party institutes a new suit upon the same matter, it seems contrary to the principles of general jurisprudence, that the merits should be subjected to a second inquiry.

The inconvenience of the doctrine, that a defendant should be at liberty to go at large into the original merits, and to shew, if he can, that the judgment ought to have been different, although obtained *bonâ fide*, and not erroneous or bad on its face, is forcibly pointed out by the commentator on the *Conflict of Laws*.(1) "It is very difficult," he says, "to perceive what could be done, if such a doctrine was maintainable to the full extent of opening all the evidence and the merits of the cause anew, on a suit upon the foreign judgment.

(1) Story, p. 864, 2nd ed.

Some of the witnesses may be since dead: some of the vouchers may be lost or destroyed. The merits of the case, as formerly before the court upon the whole evidence, may have been decidedly in favour of the judgment: upon a partial possession of the original evidence, they may now appear otherwise. Suppose a case purely sounding in damages,—such as an action for an assault, for slander, for conversion of property, for malicious prosecution, or for a criminal conversation,—is the defendant to be at liberty to re-try the whole merits, and to make out, if he can, a new case upon new evidence? or is the court to rescind the former decision, like a court of appeal, upon the old evidence? In a case of covenant, or of debt, or of a breach of contract, are all the circumstances to be re-examined anew? The rule that the judgment is to be *primâ facie* evidence for the plaintiff would be a mere delusion, if the defendant might still question it, by opening all or any of the original merits on his side: for, under such circumstances, it would be equivalent to granting a new trial. It is easy to understand, that the defendant may be at liberty to impeach the original justice of the judgment, by shewing that the court had no jurisdiction; or that the party never had any notice of the suit; or that the judgment was procured by fraud; or that on it's face it is founded in mistake; or that it is irregular and bad by the local law *fori rei judicatæ*. To such an extent the doctrine is intelligible and practicable. Beyond this the right to impugn the judgment is, in legal effect, the right to re-try the merits of the original cause at large, and to put the other party upon proving those merits."

Acceptor of bill, discharged by foreign sentence, sued on the same bill here.

Burrows v. *Jemino*.

In the case of *Burrows* v. *Jemino*, (1) the acceptor of a bill residing at Leghorn, having been discharged of his acceptance, according to the laws established there, by the failure of the drawer, instituted a suit there, and had his acceptance vacated by a decree of the court: being afterwards sued in England upon the same bill, he applied to the Court of Chancery for an injunction, which was granted on the broad ground, that the sentence of a court of competent jurisdiction is conclusive.

(1) Str. 733.

Tarleton v. *Tarleton.*

In the case of *Tarleton* v. *Tarleton,* (1) where a covenant had been made by the defendant to indemnify the plaintiff from all debts due from a late partnership subsisting between the plaintiff, the defendant, and a third person, and from all suits on account of non-payment, proof was given on the part of the plaintiff, that proceedings had been instituted in a foreign court against the late partners for the recovery of a partnership debt, and that a decree passed against them for want of an answer, (in consequence of which a sequestration issued against the estate of the plaintiff, and he was obliged to pay the debt); the decree was held to be conclusive, in an action on the covenant against the defendant, who was a party to the foreign suit, and who, having notice, ought to have appeared and made his defence; and the defendant was not allowed to shew that the proceedings were erroneous. (2)

In covenant, on indemnity against partnership debts, decree for recovery of a debt is conclusive against the defendant, a party to the foreign suit.

Substance of the judgment to be considered.

In considering the proceedings of a colonial court, the courts of this country look at their substance and not at their form; it has been said that few foreign judgments could be sustained, if the same accuracy in them were required, as in our own. (2) A foreign judgment will not be an estoppel in this country, if it do not appear to be final and conclusive as an estoppel in the country where it was pronounced. (3)

An action will not lie upon a decree of a foreign Court of Equity, where the sum due on the decree is left indefinite. (4) But if the decree be perfected, as by stating a balance due upon partnership accounts, an action may be maintained on the decree. (5)

(1) Tarleton *v.* Tarleton, 4 M. & S. 21. See the case of Novelli *v.* Rossi, 2 B. & Ad. 757, *supra*, p. 57; and Buchanan *v.* Rucker, 9 East, 191, *supra*, p. 58.

(2) By Lord Tenterden, in Henley *v.* Soper, 8 B. & C. 20, where his Lordship states, that this is according to the rule of the Privy Council.

(3) Plummer *v.* Woodburne, 4 B. & C. 636. The foreign judgment was pleaded in bar, and the plea adjudged to be bad, because its conclusiveness was not alleged on the record. See also Smith *v.* Nicolls, 5 Bing. N. C. 222. And see Obichini *v.* Bligh, 8 Bing. 351, where the foreign judgment was not acted upon, because the proceedings were imperfect.

(4) Sadler *v.* Robins, 1 Camp. 253.

(5) Henley *v.* Soper, 8 B. & C. 19.

Irish judgment —whether the grounds of it are examinable here.

In the case of *Guinness* v. *Carrol*, (1) the Court of King's Bench expressed doubts as to the point, whether the grounds of an Irish judgment were examinable. Lord Tenterden said, "Assuming that this court, as has been contended, can inquire into the consideration of a judgment like that declared on, and that, on principles of general justice, we ought not to give it effect if it has been unduly obtained, still I am of opinion that this has not been made apparent." The argument in the case turned on the point, whether a judgment in Ireland has the same effect as a judgment of a Court of Record in England.

Guinness v. *Carrol.*

Practice of nations, as to the effect of foreign judgments.

The general doctrine, maintained in the American courts, is, that foreign judgments are *primâ facie* evidence, but that they are impeachable. But to what extent this doctrine is to be carried does not seem to be definitively settled. It has been declared, that the jurisdiction of the court may be inquired into, as also it's power over parties and things, and that the judgment may be impeached for fraud.

According to the law of France, it is said by the commentator on the *Conflict of Laws*, (2) the merits of the judgment are examinable; and no distinction seems to be made whether the judgment, is in a suit between foreigners, or between Frenchmen, or between a foreigner and a Frenchman; or whether it is in favour of one party or of the other; or whether it is rendered upon default, or upon confession, or upon a full trial and contestation of the merits. And foreign judgments are said to be re-examinable upon the merits in the courts of France, whether they are the ground of the plaintiff's suit, or whether set up by the defendant by way of bar to a new action; and that in either case, all the original grounds of the action may be debated and considered anew.

(1) 1 B. & Ad. 463. The certificate of a vice-consul is not evidence of the facts stated in it, Waldron *v.* Coombe, 3 Taunt. 162. With respect to discharges by foreign bankruptcy, see Potter *v.* Brown, 5 East, 125. Smith *v.* Buchanan, 1 East, 6. Edwards *v.* Ronald, 1 Knapp. Pr. C. 259. Odwin *v.* Forbes, Buck, 57. Philpots *v.* Read, 1 B. & B. 294. Orr *v.* Brown, 5 C. & P. 414. Sidaway *v.* Hay, 3 B. & C. 14. Phillips *v.* Allan, 8 B. & C. 477.

(2) Story on the Conflict of Laws, p. 872, 2nd ed.

The same writer states, that Holland seems at all times, upon the general principles of reciprocity, to have given great weight to foreign judgments; and in many cases, if not in all cases, to have given to them a weight equal to that given to domestic judgments, wherever the like rule of reciprocity with regard to Dutch judgments has been adopted by the foreign country whose judgment is brought under review.

Section VII.

Of the Admissibility of Depositions and Examinations.

Principle of admission.

Depositions, as generally used, are a species of evidence of a secondary character, where the *vivâ voce* examination of the deponent is not attainable. They differ from ordinary hearsay evidence in these particulars,—that they are taken upon oath, and that the deponent has been subjected to the cross-examination of the person against whom they are used, or of some person standing in relation of privity with him; there is a strong presumption also, from the course of official duty, that depositions are faithfully recorded. But depositions are subject to great defects. For the demeanour of the deponent, which is a principal criterion of the truth of his statement, is not subjected to the observation of the jury; the powers of cross-examination are often restricted; and where the inquiry has been private, as is generally the case, the best safeguard against falsehood and equivocation is thus entirely lost.

Cross-interrogatories.

Bill and answer.

That the proper effect of depositions may be understood, the party reading them must read the answers to the cross-interrogatories as part of his case. (1) Depositions in Chancery are not in general received without proof of the bill and

(1) Timperley *v.* Scott, 5 C. & P. 341.

answer, (1) except where they are read under an order of the Court of Chancery, (2) or for the purpose merely of contradicting a witness. (3) A party cannot abandon part of a series of interrogatories; he must abandon the whole, if any, (4) even though the answers refer to or state the contents of writings not in themselves evidence. (5)

Effect in evidence.

The effect of giving a deposition in evidence is a complete substitution for the evidence of the witness, whose deposition is used. Therefore the deposition of an attesting witness to a will who is deceased, dispenses with the necessity of calling a surviving witness to prove the executon of the will. (6)

It is proposed to consider, in this section, the judicial character of various kinds of depositions,—their character as affecting particular individuals,—and their admissibility as primary or secondary evidence. The written examinations also of prisoners before magistrates will be here considered.

Judicial proceeding.

In order that depositions may be admitted in evidence, it is necessary that they should appear to have been obtained in the course of a judicial proceeding. (7) A voluntary affidavit, though made before an officer of the superior Courts, is not receivable in evidence. (8)

(1) B. N. P. 240; Gilb. Ev. 62, unless where they are ancient, Gilb. Ev. 64. Byam *v.* Booth, 2 Price, 234. Rowe *v.* Brenton, 8 B. & C. 765; answers to lost interrogatories read as admissions.

(2) Palmer *v.* Lord Aylesbury, 15 Ves. 176.

(3) See Highfield *v.* Peake, 1 M. & M. 110.

(4) Wheeler *v.* Atkins, 5 Esp. 246.

(5) M'Intyre *v.* Layard, R. & M. 203. Falconer *v.* Hanson, 1 Camp. 171. It is too late to take an objection to a deposition on the ground of the interest of a witness, after cross-examination, Ogle *v* Paleski, Holt's N. P. C. 485; or to leading questions, after publication, Williams *v.* Williams, 4 M. & S. 497. Where depositions have been taken to perpetuate testimony, and the witness becomes a party to the suit, his deposition cannot be read; Tilley's case, Lord Raym. 1009.

(6) Wright *v.* Doe d. Tatham, 1 Ad. & E. 3. It was held, in the same case, that the circumstance of the bill having been dismissed could not affect the admissibility of the evidence.

(7) B. N. P. 241. Stork *v.* Denew, 12 Vin. Ab. Ev. A. b. 31, pl. 16.

(8) Bac. Ab. Ev. 628; Styl. 446; B. N. P. 242, unless by way of admission. As to *ex parte* examinations of paupers before the late Poor Law Act, see Rex *v.* Nuneham Courtenay, 1 East, 373. Rex *v.* Ferry Frystone, 2 East, 54. Rex *v.* Abergwilly, *ib.* 63. Rex *v.* Eriswell, 3 T. R. 725.

Depositions in equity.

Depositions in Courts of Equity are written examinations of witnesses, taken by the officers of the respective Courts of Equity, or by commissioners appointed for the purpose. In order that the depositions may be considered as regularly taken under the authority of a Court of Equity, it must appear that they were obtained in a suit, which was regularly before the Court, and within it's jurisdiction. But if a bill in Equity be dismissed, merely because the Court considered the matter unfit for Equity to decree, the depositions may still be given in evidence. Thus, where a bill of revivor is brought, in a case where a bill of revivor does not lie, there cannot regularly be any depositions. (1) But where, upon a bill to perpetuate testimony, the cause is set down for hearing, and the bill is dismissed, because it ought not to have been so set down, the plaintiff will, at law, have the benefit of the depositions which have been obtained. (2)

Depositions in ecclesiastical courts.

Depositions in the Ecclesiastical Courts, when taken in a cause over which those courts have jurisdiction, appear to be admissible, on the same principle as other depositions taken in the course of a judicial proceeding. Chief Baron Gilbert says, "depositions in the Spiritual Courts may be read, when taken in a cause in which those courts have authority, as far as relates to that cause, inasmuch as they are lawful oaths, and a man may be indicted for the violation of them, though they be not oaths in a Court of Record." (3) There are some old authorities against the admissibility of depositions taken in the Ecclesiastical Courts, as evidence in trials before Courts of Common Law; (4) but they appear, for the most part, to be

(1) Backhouse *v.* Middleton, Ch. Ca. 175. Gilb. 56.

(2) Hall *v.* Hoddesden, 2 P. Wms. 162. Vaughan *v.* Fitzgerald, 1 Sch. & Lef. 316, where a bill is dismissed for want of equity. Moyser *v.* Peacock, 12 Vin. Ab. Ev. 31, pl. 15. Smith *v.* Veale, 12 Vin. Ab. Ev. A. b. 31, pl. 41; Lord Raym. 735: and see further, as to the admissibility of depositions, Copeland *v.* Stanton, 1 P. Wms. 414. Jones *v.* Dunthorpe, 1 Dick. 50. Mulvany *v.* Dillon, 1 Ball. & Be. 411. Lord Cholmondeley *v.* Clinton, 2 Mer. 81; Ch. Ca. 175; 3 Ch. Rep 72.

(3) Ev. p. 60. He further observes, "Depositions taken in the Spiritual Courts, in a cause relating to lands, cannot be read, because they are no oaths at all;"—that must be, because in such a cause the Spiritual Courts would not have jurisdiction.

(4) Earl of Sarum *v.* Sir B. Spencer, 2 Roll. Abr. 679, pl. 5. Litt. Rep. 167; March. Rep. 120, even

founded on the doctrine, that depositions are only admissible in evidence, when taken in Courts of Record; a doctrine, which does not seem to be supported by satisfactory reasons, and does not by any means universally hold. (1)

Informations and examinations, on criminal charges.

Informations of witnesses and examinations of prisoners, on the bailment or commitment of prisoners charged with felony, used formerly to be taken under the statutes 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10, they are now taken under the statute 7 Geo. 4, c. 64.

7 G. 4, c. 64, s. 1.

In cases of felony.

Power of commitment.

The first section of the 7 Geo. 4, enacts, that where any person shall be taken on a charge of felony, or suspicion of felony, before one or more justices of the peace, and the charge shall be supported by positive and credible evidence of the fact, or by such evidence as, if not explained or contradicted, shall in the opinion of the justice or justices, raise a strong presumption of the guilt of the person charged, such person shall be committed to prison by such justice or justices in the manner therein after mentioned; but if there shall be only one justice present, and the whole evidence given before him shall be such as neither to raise a strong presumption of guilt nor to warrant a dismissal of the charge, that justice shall order the person charged to be detained in custody, until he or she shall be taken before two justices at the least; and where any person so taken, or any person in the first instance taken before two justices of the peace, shall be charged with felony or on suspicion of felony, and the evidence given in support of the charge shall, in their opinion, not be such as to raise a strong presumption of the guilt of the person charged, and to require his or her committal, or such evidence shall be adduced on behalf of the person charged as shall, in their opinion, weaken the presump-

by consent; B. N. P. 242; Bac. Ab. Ev. 628; Gilb. Ev. 60; Vin. Ab. Ev. A. b. 31; 1 Hawk. c. 42; Vin. Ab. Ev. A. b. 31. See 2 Hale, 285, Welsh's case, where the objection appears to have been against proceedings by the civil law, and also that the deponent was interested.

(1) Depositions in Chancery are not of record. In Breedon *v.* Gill, 1 Ld. Raym. 219, 222; Salk. 555, Lord Holt expressed an opinion, that depositions before Commissioners of Excise might be read before the Commissioners of Appeals.

tion of his or her guilt, but there shall notwithstanding appear to them, in either of such cases, to be sufficient ground for sufficient inquiry into his or her guilt, the person charged shall be admitted to bail by such two justices; provided always, that nothing contained in the act shall be construed to require any such justice or justices to hear evidence on behalf of any person so charged as aforesaid, unless it shall appear to him or them to be meet and conducive to the ends of justice to hear the same.

Power of bailing.

Section 2

Examinations and informations to be taken.

The second section, after reciting that it is expedient to amend and extend the statutes of Philip and Mary, enacts, that "the two justices of the peace, before they shall commit to bail, and justice or justices, before the committing to prison, shall take the examination of the person arrested for felony, or on suspicion of felony, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing; and such justice and justices respectively shall subscribe all such examinations, informations, bailments, and recognizances, and deliver, or cause the same to be delivered, to the proper officer of the court in which the trial is to be, before or at the opening of the court."(1)

In case of misdemeanor. 7 G. 4, c. 64, s. 3.

The third section of the same statute gives a power of taking informations in cases of misdemeanor, which had not before been given. It enacts, that, "every justice of the peace, before whom any person shall be taken on a charge of misdemeanor or suspicion thereof, shall take the examination of the person charged, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing, before he

(1) The statute of Philip and Mary did not require the magistrate to *subscribe* the examination and informations; nor did it require him to reduce them into writing *before the commitment*. The magistrate was allowed two days *after the examination* for taking them in writing. One other difference may be remarked; by the old statute the magistrate was required to take down in writing as much as was material *to prove the felony*;—he might have admitted only such part of the statement as bore against the prisoner, omitting all that was in his favour.

shall commit to prison, or require bail from the person so charged;—and shall subscribe all examinations and informations, and deliver or cause the same to be delivered to the proper officer of the court in which the trial is to be, before or at the opening of the court, in like manner as in cases of felony." (1)

Depositions before coroners. 7 G. 4, c. 64, s. 4.

The fourth section of the 7 Geo. 4, c. 64, respecting depositions taken before a coroner, enacts, that "every coroner, upon any inquisition before him taken, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material; and shall certify and subscribe the same evidence, and also the inquisition before him taken, and deliver the same to the proper officer of the court, in which the trial is to be, before or at the opening of the court."

Principle, on which depositions are evidence.

This statute has given jurisdiction to magistrates in the cases specified, and directed them how to proceed. The informations, or, as they are more usually called, the depositions of witnesses, taken before them under the statute, thus acquire the stamp of a judicial proceeding. The statute contains no provision respecting their admissibility as evidence; they are admissible, therefore, on the general principles of the common law. One of the principal objects of the Legislature in passing the statute appears to have been, to enable the judges to see whether a prisoner had been properly admitted to bail, or was entitled to be bailed; and whether the witnesses are consistent in their several accounts of the transaction. (2)

Depositions before coroners also are admissible upon the

(1) By a recent act (st. 6 & 7 Wm. 4, c. 114, which will be afterwards noticed), prisoners are allowed to have copies of the examinations of the witnesses on whose depositions they have been bailed or committed, and to inspect all depositions on their trial. Upon this subject, see *infra, Inspection of Public Writings.*

(2) See the judgment in Lambe's case, 2 Leach, Cr. C. 633; which was decided with reference to the statute of Philip and Mary; but the same remark applies to the statute of G. 4. See also Grady's case, 7 C. & P. 650; Coveney's case, 7 C. & P. 668.

same principle, as depositions before magistrates; (1) and they derive some additional sanction from the circumstance, that they are taken in a court to which the public have access. (2)

The statute relates to informations against persons arrested for felony or on suspicion of felony, or charged with a misdemeanor, or on suspicion of misdemeanor. Depositions taken on a charge of high treason are not within the statute. (3)

1. *Of the Informations or Depositions of Witnesses.*

Requisites of information.

The statute expressly commands the magistrate to take the information, upon oath, of the persons who know the facts and circumstances of the case, and to put the same, or as much thereof as shall be material, into writing. It is his duty, therefore, to take in writing at least *all that is material* in the information of the witness, relative to the facts and circumstances of the case, and to the charge brought against the prisoner. If there have been several examinations of the same witness before the magistrate, on separate occasions, relative to the offence which is the subject of trial, every one of them ought to be transmitted to the officer of the court, that it may be seen at the trial whether the witness has varied in his statements, and, if he has varied, to what extent; (4) and all that is material in such examinations ought to be taken down in writing. Unless this is done, the whole truth may not be known; the judge is kept in the dark; the prisoner may be materially prejudiced in his defence; and the object of the Legislature in allowing the prisoner to inspect the deposition, that he may know what he has to answer, is defeated. (5) And further, nothing should be returned as a deposition against a prisoner, unless he has had an opportunity of knowing what was said, and an opportunity of cross-examining the person making the deposition. (6)

(1) Depositions before the coroner held to be admissible by all the judges, in Lord Morley's case, Kel. 55; 6 Howell's St. Tr. 770, 776; Harrison's case, 12 Howell's St. Tr. 851; 2 Hale, 284; Gilb. Ev. 120; Thatcher's case, Sir T. Jones, 50; Broomwich's case, 1 Lev. 180.

(2) By Lord Kenyon, Ch. J., in Rex *v.* Eriswell, 3 T. R. 707. 4 Bl. Comm. 274; 1 Hale, 60; Rex *v.* Scorey, Leach, 50.

(3) Foster Cr. L. 337; 1 Hale, 306.

(4) R. *v.* Simons, by Alderson, B., 6 C. & P. 540.

(5) See R. *v.* Simons, (4). R. *v.* Grady and Curley, 7 C. & P. 650. R. *v.* Coveney, 7 C. & P. 668.

(6) R. *v.* Arnold, 8 C. & P. 621.

Information when admitted in evidence.

In case of the death of a witness before the trial, (1) or in case of his being insane, without hope of recovery, which for this purpose is the same as if he were dead, (2) or of his being permanently disabled from attending at the trial, (3) his deposition will be admissible as evidence, if regularly taken, and regular in point of form. There is still stronger reason for admitting a deposition, if the witness has been kept away, and prevented from attending by the practices of the prisoner; (4) for this is a fraud practised by him for defeating justice, and raises suspicion that he believed the *vivâ voce* evidence of the witness would be more unfavourable than the *written* statement.

There are old authorities, which lay down generally, that if the witness is unable to attend on account of sickness or other cause, (5) or cannot be found after diligent inquiry, (6) his deposition may be received: but it seems questionable, whether on a criminal prosecution any cause of absence less than permanent disability would be sufficient to warrant the reception of a deposition against the prisoner. (7) If there is any reasonable probability of the witness being capable of attending on a future occasion, the proper course will be to apply to the court for a postponement of the trial, before the jury is charged. (8) In the case of *R.* v. *Hagan*, (9) the counsel for the prisoner applied to the judge to permit the reading of a deposition, which had been made before the committing magis-

(1) 1 Hale, P. C. 305. B. N. P. 242. R. *v.* Westbeer, 1 Leach, 12; the deceased was an accomplice. And see R. *v.* Edmonds, 6 C. & P. 164, by Tindal, C. J.

(2) See in R. *v.* Eriswell, 3 T. R. 711, by Lord Kenyon.

(3) R. *v.* Hogg, 6 C. & P. 176; and R. *v.* Wilshaw, 1 Car. & Marsh. 145; where the witness was old and bed-ridden; and see by Tindal, C. J. in R. *v.* Edmonds, above cited.

(4) Harrison's case, 4 St. Tr. 492. Lord Morley's case, Kel. 55; 6 Howell, St. Tr. 776. R. *v.* Gutteridge, 9 C. & P. 471.

(5) See in R. *v.* Eriswell, 3 T. R. 721. Hale, P. C. 305.

(6) Bull. N. P. 239. Hawk. P. C. b. 2, c. 46, s. 18. Gilb. Ev. 138.

(7) See authorities cited in n. (3). and see Lord Morley's case, Kel. 55, where it was adjudged not to be sufficient to shew that endeavours had been used to find the witness, but that he could not be found.

(8) R. *v.* Savage, 5 C. & P. 143. The deponent was unable to attend, in consequence of being near her confinement. Some of the old authorities were cited for the reception of the deposition; but Patteson, J., said, that the point had been doubted, and rejected the evidence; here there was only a temporary cause of absence.

(9) 8 C. & P. 169.

trate by a witness who, as the counsel for the prosecution admitted, afterwards went to sea, and could not be produced; the judge was of opinion, that it could not be received. With the consent, however, of the counsel for the prosecution, it was received and read.

Information irregularly taken.

If the magistrate has not taken in writing the information of a witness, it is clear, that no proof can be admitted, after his death, of what he said before the magistrate. Or if the magistrate took the information in writing, but irregularly, as for instance, if the witness was not sworn, or the magistrate did not subscribe, it is equally clear that, after the witness's death, parol evidence of his information will not be admissible; for such evidence would not have been admissible except by virtue of the statute, nor is it admissible since the passing of the statute, the statutory regulations not having been complied with: the written information is the primary and best proof of the information, and the irregularity of that primary evidence is not a sufficient ground for receiving evidence of a secondary and inferior kind. Or if the magistrate took the information regularly upon oath, in the presence of the prisoner, and subscribed it, but instead of taking all that was material as he ought to have done in pursuance of the statute, omitted some material parts of the witness's statement, parol evidence of the parts omitted cannot be received; for the statement which has been omitted, though upon oath, and open to cross-examination, cannot be received as part of a judicial proceeding, the magistrate not having proceeded in conformity with the statute; nor can such supplementary evidence be received upon general principles. In the case of *R.* v. *Thornton*, (1) Mr. Justice Holroyd ruled, that parol evidence could not be admitted either to add to, or vary the deposition.

Parol evidence of information, not admissible.

Evidence on the part of the crown not admissible to add to or vary a deposition.

Signature of witness not necessary.

It is not essential to the validity of a deposition, that it should have been signed by the witness; but it is always proper to require his signature, for authenticating the document.

Fleming's case.

In *R.* v. *Fleming*, (2) on an indictment for a rape, all the

(1) Warw. Sum. Ass. 1817, on trial for murder.

(2) 2 Leach, 854.

judges concurred in opinion, that the depositions of a girl deceased, on whose person the crime had been committed, taken on oath by the committing magistrate, had been properly admitted in evidence at the trial, though the depositions were not signed by the deceased.

Subscribing by justice.

The signature of the justice is expressly required by the statute, which directs him to *subscribe* all such examinations, informations, &c.; and a similar direction is given to the coroner.

Osborne's case.

In the case of *R.* v. *Osborne*, (1) where the deposition of the prosecutor, since deceased, was offered in evidence, it appeared that this and two other depositions were taken down in writing consecutively on one piece of paper, the prosecutor's being the first in order; the only subscription by the magistrate was at the end of the last deposition, where his signature was written, with the words "sworn before me;" this was held to be sufficient, and the prosecutor's deposition was received,—after the usual proof of it's having been regularly taken and read over in the presence of the prisoner, and that he had an opportunity of cross-examining the prosecutor.

Information before magistrate to be in prisoner's presence.

The information of the witnesses must be taken in the presence of the prisoner. There are authorities, before the stat. 7 Geo. 4, which establish this principle; and the language of the statute in the two first sections, which regulate the proceedings before the justices, clearly shews the intention of the Legislature, that the prisoner should be present when the witnesses give their evidence.

Woodcock's case.

In *R.* v. *Woodcock*, (2) when a magistrate, at the request of overseers visited a person who had received a mortal wound, and took her examination upon oath in writing, but in the absence of the prisoner: it was held by Eyre, C. B., that this examination was not admissible as a deposition, inasmuch as the prisoner had no opportunity of contradicting the facts which it contained.

(1) 8 C. & P. 113, by Coleridge, J., Lord Abinger being of the same opinion.

(2) 1 Leach, 500. R. *v.* Douglas, 2 Leach, 561. The rule does not apply to *dying declarations*. Callaghan's case, *supra*.

Forbes's case. In the case of *R.* v. *Forbes*, (1) a constable, who produced a deposition, stated that the prisoner was not present during the time that a part of the deposition, (standing before that part of the deposition distinguished by a cross), was taken down; but that he was afterwards introduced, and was present during the time when the remaining part of the deposition was taken down, and that the whole was then read over to him; Chambre, J., refused to receive that part of the deposition which stood before the mark.

Smith's case. In *R.* v. *Smith*, (2) the greater part of a deposition was reduced into writing during the prisoner's absence, but it appeared that the witness was afterwards re-sworn in the prisoner's presence, and the deposition was then read over to the witness who declared it to be correct, and the prisoner was then asked if he had any questions to put; this deposition was held to be admissible. There is some little difference between this case and the former, but whether sufficient to warrant a different decision, seems questionable. The proceeding before the magistrate was not regular in this last case,—if it is a settled principle that the prisoner is to be present while the whole of the informations of witnesses are taken, on a charge against him. The prisoner is under some disadvantage in not being allowed to hear and see the witness during the whole time of his giving evidence; the re-swearing of the witness to the truth of his statement, and the power afterwards given to the prisoner to put questions, cannot compensate for the disadvantage which he may have suffered; and, unless the prisoner is present during the whole time, he has not the means of knowing that the whole of the evidence was taken down truly.

Same rule as to information before coroner. There are authorities which hold that depositions taken on an inquest before a coroner, in the absence of the prisoner, may be admitted, (3) on the ground that the coroner is a public

(1) Holt's C. 598.

(2) R. & R. Cr. C. 339. 2 Stark. Ca. 208. See R. *v.* Crowther, 1 T. R. 125.

(3) Bull. N. P. 242. R. *v.* Purefoy, before Hotham, B., Peake Ev. 68, n. Harrison's case, 12 St. Tr. 853. See also the remarks of Lord Kenyon and Buller, J., in R. *v.* Eriswell, 3 T. R. 713.

officer, appointed to make inquisitions in matters relating to public interests. It is unquestionably regular for the coroner to take depositions in the *absence* of the party who may be afterwards charged with murder on the inquest,—as regular, as it is for a justice to take depositions in the *presence* of a prisoner. But although an inquiry by the coroner in the absence of the person afterwards charged with murder, is a regular judicial proceeding, and required by the duty of his office, there appears to be no satisfactory reason, why such a deposition should at the trial be received in evidence, under circumstances which would render every other kind of judicial depositions inadmissible. And it seems an unreasonable and anomalous proposition to hold that, on a trial for murder upon the coroner's inquest, a deposition, taken before him in the absence of the prisoner, is receivable in evidence; but that, if the trial take place on a bill of indictment, a deposition, so taken before a magistrate, is not receivable. The same principle which excludes in the one case, ought, if it is just and sound, to exclude also in the other.

Depositions taken on *another charge*, but relating to the same transaction.

The deposition of a person since deceased has been held admissible upon a charge of murder, although it was taken upon the occasion of the prisoner being charged before the magistrate with an assault on the deceased, and with a robbery; the two charges relating to the same transaction.(1) This case was decided principally on the authority of *R.* v. *Radburne*, (2) where the deposition of a deceased person was read in evidence on a trial for murder. Indeed, if it were necessary that the charge should be identical, it would exclude the depositions of the deceased in all cases of homicide. In such cases, it may be reasonably inferred, that the witnesses deposition would not have been varied by the cross-examination of the prisoner, if he had been charged before the magistrate with the precise offence for which he is afterwards tried.

As the deposition of a witness, when judicially and regularly

(1) R. *v.* Smith, R. & R. C. C. 340; 2 Stark. Ca. 208. And see R. *v.* Edmunds, 6 C. & P. 164.
(2) 1 Leach, 457.

Deposition used for contradicting.

taken, is admissible in evidence against a prisoner, after the death of the witness; so, on the other hand, when a witness appears and gives evidence, his deposition may be used for the purpose of contradicting his testimony. One of the objects of the Legislature in requiring the committing magistrate to take informations in writing, was to enable the judge before whom the prisoner is tried, to see whether the account given by the witnesses at the trial is consistent with that first given by them; and the object of the Legislature in allowing prisoners to have copies of depositions, was to enable the prisoner also to see whether their several accounts are consistent. (1) It was admitted, in Lord *Stafford's* case, (2) that the deposition of a witness, taken before a justice of the peace, might be read at the desire of the prisoner, in order to take off the credit of the witness, by showing a variance between the deposition and the evidence given in court *vivâ voce*.

Before the late act which allowed prisoners to make defence by counsel, a prisoner had no means of confronting the evidence of a witness at the trial with that given by him before the magistrate, or of exposing the inconsistencies of his two statements: he had no right either to a copy or to an inspection of the depositions. Sometimes a judge, struck with the contradictions of a witness, would question him as to his former statement, or hand down his deposition to counsel — if the prisoner had counsel — as materials for cross-examination. But no power was given for enforcing the production of depositions, and laying their contents before the jury. Now, under the new law and the new practice, if there should be any contradiction or variance between the testimony given in court by a witness, on whose information before a magistrate the prisoner was committed, and his former deposition, the deposition itself may be read for the purpose of showing the variance; the deposition is to be read as part of the evidence of the cross-examining counsel; when it is read, but not

(1) See Grady's case, 7 C. & P. 650; Coveney's case, 7 C. & P. 668.

(2) 3 St. Tr. p. 131. Hawk. P. C. b. 2, c. 46, s. 22. See 31 Howell's St. Tr., Dr. Sheridan's case.

before, the counsel may cross-examine the witness as to the variance or contradiction between his statements; and the witness cannot be compelled to answer, in cross-examination, whether he did or did not make such a statement before the magistrate, till it appears, from the reading of his deposition, that it contains no mention of such statement. (1) After the deposition has been read, the prisoner's counsel may cross-examine the witness as to any statement made by him to the magistrate in giving his information, but which statement has been omitted in the deposition; the statement omitted may be inconsistent with his evidence in court, or may have been favourable to the prisoner; and, in either way, it may be the subject-matter of cross-examination.

Informations to be taken down fully.

In the case of *Rex* v. *Thomas*, (2) in which several of the witnesses were cross-examined as to contrary statements before the magistrate, the judge, in summing up the case, said,— "Magistrates are required by law to put down the evidence of witnesses, or so much thereof as shall be material. They have hitherto in many cases confined themselves to what they deemed material; but, in future, it will be desirable that they should be extremely careful in preparing depositions, and should make a full statement of all the witnesses say upon the matter in question,—as the experience we have already had of the operation of the prisoners' counsel act, has shown us how much time is occupied in endeavouring to establish contradictions, between the testimony of the witnesses and their depositions, in the omission of minute circumstances in their statements made before the magistrates, as well as in other particulars."

Thomas's case.

It appears to be quite as just and reasonable, that the prosecuting counsel should be allowed to use a deposition for showing a variance or discrepancy between the statement in court and the statement before the magistrate, when a witness for the crown varies his testimony from favour to his prisoner, as that the counsel for the defence should have that power,

(1) See the rules of practice settled by the judges, to be observed on trials for felony, where the prisoner has counsel; 7 C. & P. 676.

(2) 7 C. & P. 818, by Parke, B.

when the witness has varied his evidence to the prejudice of the prisoner.

Oldroyd's case.

In the case of *Rex* v. *Oldroyd*, (1) which occurred long before the act above referred to, one of the witnesses, whose name was on the back of the indictment, not having been called on the part of the prosecution on account of a strong suspicion of his being an accomplice with the prisoner,—the judge directed, that this witness should be examined; and as his evidence materially differed from a deposition taken before the coroner, the judge ordered that his deposition should be read in evidence, for the purpose of impeaching the credit of the witness at the trial. And all the judges, on considering the case, were of opinion, that it was competent for the judge, under the circumstances, to order the deposition to be read for that purpose. Lord *Ellenborough*, and Lord Chief Justice *Mansfield* thought, that the prosecutor had the same right to call for a deposition, in order to impeach the credit of a witness, who on the trial contradicted what he had before deposed.

2. *Of the Examinations of Prisoners.*

The examination of the prisoner, as well as the informations of the witnesses, is required by the statute to be taken by the magistrate in writing, and to be subscribed by him: the magistrate is to take the examination, *or so much thereof as is material*, in writing.

Questioning of prisoner.

The words in the act, respecting the taking of *the examination*, imply an authority given to examine the prisoner, and, therefore, to put questions—for without questions no examination can be carried on—as to the facts proved against him.*

(1) Russ. & Ry. Cr. C. 89.

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* The language used in the stat. of Geo. 4, is taken from the old statute of Philip and Mary. Lambard, a writer in the reign of Elizabeth, in noticing the statute of Philip and Mary writes thus: "There also you may see, if I am not deceived, the time when the examination of the felon himself was first warranted by our law. *For at the common law, his fault was not to be wrung out of himself*, but rather to be proved by others." Eirenarcha, cap. 21, p. 208. See also Dalton Just. chap. 164, p. 544, and Cromp. 193. The passage, above cited from Lambard, shows how the law was then understood, though it also proves that the power, given by the statute, was exercised with great harshness.

The prisoner is not to be cross-examined, as a witness against himself: but questions, for explanation, may be properly put. An examination, therefore, is not to be rejected on the ground that the prisoner had been questioned by the justice in the course of his statement. (1)

Signature of prisoner not required by the act.

The examination of the prisoner, when reduced into writing, ought to be read over to the prisoner, and tendered to him for his signature. The prisoner's signature is not required by the statute; but it is always desirable and proper, if it can be obtained, as authenticating the statement, and for the facility of future proof.

Lambe's case.

In *Lambe's* case, (2) the question for the opinion of the judges was, whether the written examination, taken by the committing magistrate, which was not signed by the magistrate, nor by the prisoner, but which the prisoner, on it's being read over to him, admitted to be true, ought to have been received in evidence; and a majority of the judges held, that such a statement, containing a confession, would have been evidence at common law, and that it was not rendered inadmissible by the provisions of the statute. In this case the examination was rendered admissible by the prisoner's acknowledging the truth of its contents, and the correctness of the manner in which it was taken: if he had not made such an admission, and had refused to sign it, even after it had been read over, it could not have been received in evidence.

Examination not to be on oath.

The prisoner's examination is not to be taken on oath, while the examination of *witnesses* cannot be regularly taken without oath. The statute points out clearly the distinction, by enacting, that the justice shall take the examination of the person arrested for felony, and *the information upon oath* of those who shall know the facts and circumstances, &c.,—thus

(1) Ellis's case, before Littledale, J. 1 Ry. & Mo. 432; and a case there cited, before Holroyd, J. Acc. R. *v.* Bartlet, 7 C. & P. 832 (R. *v.* Wilson, before Richards, C. B. Holt, 597, *contrà*, overruled). See also Thornton's case, 1 M. C. C. 27, and Rees's case, 7 C. & P. 569.

(2) 2 Leach, 625. See also Thomas's case, 2 Leach, 637.

specifically confining the administering of the oath to the *witnesses*. If, therefore, the prisoner's examination has been taken on oath, it cannot be received; (1) a statement made by him under an oath so imposed, is supposed not to be completely free and voluntary. And as the examination itself cannot in such case be received, so neither can any other evidence be admitted of his statement during such sworn examination; (2) for the same objection still applies, namely, the supposed constraint of the oath. If the examination purport on its face to have been taken on the oath of the prisoner, it has been held, (3) that proof is not admissible to show that in point of fact the prisoner was not sworn. This is a strong decision; for if there was no oath imposed, and if the prisoner had his choice to speak, or not, as he might think right, his statement was voluntary; and why should the mistake and carelessness of the magistrate or his clerk, in making a mis-statement as to the fact of swearing, be an estoppel to the reception of evidence, which in all other respects is unobjectionable.

Parol evidence of prisoner's statement.

If at the close of the informations of the witnesses, a statement has been made by the prisoner relative to the charge brought against him, it was the duty of the justice to take it in writing; parol evidence, therefore, of his statement, cannot be admitted against him, until it is clearly proved, that it was not reduced into writing by the magistrate. (4) But if it clearly appears that the prisoner's statement before the magistrate was not taken by him in writing, proof of what the prisoner said will be admissible. (5)

There is a difference between a prisoner's examination and

(1) See vol. 1, p. 402 and 426.

(2) See vol. 1, p. 426.

(3) R. *v.* Rivers, 7 C. & P. 177, by the late Mr. Justice Park; and he said, he remembered a case in which the same point had been ruled. Smith's case, 1 Stark. Ca. 242.

(4) Jacob's case, 1 Leach, 310. Henxman's case, *ib.* n.; and Fisher's case, 311, n.

(5) Decided by all the judges, except one, in Hall's case, cited in Lambe's case, 2 Leach, 635. Such evidence was received, a few years afterwards, in Huet's case, 2 Leach, 956; and though another point was reserved for the judges, there appears to have been no doubt upon this. See also 16 Howell's St. Tr. 35.

the information of witnesses, with respect to their admissibility, and with respect also to the consequences of inadmissibility. If an information has been taken not in pursuance of the statute, — as, for instance, if it was not subscribed by the magistrate, — it cannot be received as evidence, nor can any other proof be allowed of what the witness said. But if a prisoner's examination has not been subscribed by the magistrate,—though his signature is required by the statute in this case, no less than in the other,—the examination will not be inadmissible on that account: if it was signed by the prisoner, it is admissible; or if he refused to sign it, but admitted it to be true, it will be received. (1)

Examination not signed by the magistrate, but signed by the prisoner, or admitted to be true.

This difference between examinations and informations is to be explained by the principle on which they are respectively admitted as evidence. The information must be received under the statute, or not at all; without some statutory enactment, it would not be receivable as evidence against a prisoner on a criminal charge; and it cannot be received under the statute, unless the requisitions of the statute have been duly observed. But by the common law, and upon the principles of common sense, the voluntary statement of a person might always be brought forward against him in proof,—with greater or less effect *secundum subjectam materiem:* it is evidence against him, from its nature, without reference to any statute; it became evidential as soon as it was made by him, and before it was reduced into writing; it owes nothing of its admissibility to the provisions of the Legislature, and if the magistrate has not subscribed the examination, it does not on that account lose its nature or quality as evidence. A voluntary examination, therefore, signed by the prisoner, though not signed by the magistrate, is good evidence against him: or if the prisoner refused to sign it, but, after hearing it read over, admitted it to be true, it is in that case also good evidence against him, as appears from *Lambe's* case above cited. But if he refused to sign it, and Examination

(1) Lambe's case, 2 Leach, 625. Grose, J., delivered the opinion of the judges in this case, explaining the principle on which the examinations of prisoners are receivable. The decision was with reference to the statute of Philip and Mary; but it is quite as applicable and useful now, under the statute of Geo. 4, as it was under the old statute.

not signed, nor admitted.

Parol proof.

did not admit its truth or correctness, then, it is manifest, the written paper cannot be received; (1) still, however, the statement made by him may be proved by a witness who heard it; for this proof is independent of the written paper, and it is not proposed as *secondary* evidence, but as competent *primary* proof,—which would have been admissible if there had been no written examination, and is not the less admissible because the examination has not been signed either by the magistrate or by himself. (2) This last instance, in which the prisoner is supposed neither to have signed, nor to admit the correctness of the written examination, differs from the former case, where there was such an admission, merely with respect to the mode of proving what the prisoner stated; but not at all with respect to the principle on which his statement is receivable.

Irregular examination, used as a *memorandum*.

The prisoner's examination, when taken so informally as not to be admissible in evidence, may yet be used as a *memorandum* by the magistrate's clerk, or by other witnesses who were present during the examination, to assist them, when necessary, in proving the prisoner's statement,—in all cases in which the examination itself, if regularly taken, would have been admissible. (3)

Material parts of examination, omitted by the magistrate, cannot be supplied by parol evidence.

It has been before shewn, that parol evidence is not admissible, on the part of the prosecution, to add to or vary the informations of witnesses; and the same rule, it is conceived, applies equally to the examination of a prisoner,—though the reason of the rule is not exactly the same in both cases. If a prisoner's statement, taken down in writing, is given in evidence against him, as containing an admission of some fact, or a confession of guilt, and the magistrate has omitted to insert some other material part of his statement, the

(1) Bennet's case, 2 Leach, 553, n. Tellicote's case, 2 Stark. Ca. 483.

(2) See Dewhurst's case, 1 Lewin, Cr. C. 47; and Pressly's case, 6 C. & P. 183; and Reed's case, 1 M. & M. 103.

(3) See Layer's case, 16 Howell's St. Tr. 214. R. *v.* Tarrant, and other cases referred to in vol. 1, p. 427, n. (3). The following are instances of informal examinations: Layer's case, 16 Howell's St. Tr. 215; Jones's case, 2 Russ. 658, n.; Thomas's case, 2 Leach, 637; Bennet's case, 2 Leach, 553; Tarrant's case, 6 C. & P. 182.

counsel for the crown will not be allowed to supply the omission by the evidence of witnesses. When the examination has been reduced into writing, and read over to the prisoner, it must be taken to be complete, and to contain all that was material; the prisoner might conclude, and not unreasonably, that the examination, in the state in which it was drawn up when read over to him at the conclusion of the business, contained the whole of what was to be used against him; and to admit proof of other additional statements, which might and ought to have been inserted, but which are omitted, may in some cases materially prejudice him in his defence. There seems to be no other principle than this, upon which such proof can be rejected; but the principle appears reasonable and just.—There is one other argument against the reception of such evidence, but which relates rather to convenience of practice than to the principle of the rule. If the counsel for the crown is allowed to *add to* the written examination by such evidence, will he also be allowed to *vary* it? May he shew, that some statements made by the prisoner were stronger, some larger, some more unqualified than those contained in the examination? To admit such proof would be most inconvenient; yet this must be the consequence,—since the only reason to be given for allowing counsel to *add to* the examination, is that everything material, which the prisoner stated to the magistrate in his examination, ought to be admitted in proof, for the ends of truth and justice; and the same reason would apply with equal force, if it were proposed to *vary* the examination. The inconvenience of such a practice might be extremely great,—not so much from the embarrassment that would be occasioned by the trial of collateral issues, as from the difficulty of ascertaining the truth amidst contradictory statements.

The only decision upon the point that can be found, after a careful search among the recent cases, is in a note of the case of *Rex* v. *Mulvey*, (1) in which, it is said, Mr. Justice Little- *Mulvey's* case.

(1) Lanc. Sp. Ass. 1831, Matthew's Cr. L. 157; S. C. cited under the name of Maloney's case, in Roscoe's Dig. Cr. C. by Grainger, p. 56. In R. *v.* Morse and others, 8 C. & P. 605, each of the prisoners made a statement in which he mentioned the names of the other prisoners, but the magistrate's clerk, in taking down the examinations, *Morse's* case.

dale ruled that proof of such additional statements ought not to be received, and rejected the evidence.

There appears to be no reported decision, on the other side, in which such evidence has been received. There is, indeed, a reported *dictum* in favour of it's reception, by Lord Chief Justice Best, (1) not however in a criminal prosecution, but incidentally on the trial of an action in answer to a remark of counsel,—so that, with reference to the point in question, that opinion must be taken to be extra-judicial. The case of *Rex* v. *Harris and two Others*, (2) has also been sometimes cited as an express authority for the reception of such evidence; but it will be found, on attentive perusal, not to bear upon the point in question, nor even to afford an argument against the proposition above maintained. *

omitted the names; the counsel for the crown proposed to inquire of the clerk what were the names mentioned; the judge, Patteson, J., held that this parol evidence could not be received; the statement, he said, professed to be a complete account of what took place, and supplementary evidence ought not to be admitted.

(1) Rowland *v.* Ashby and another, 1 R. & M. 231, the defendant's counsel, for the purpose of proving a partnership between the plaintiff and another, proposed to give in evidence an admission by the plaintiff in his examination before a commissioner of bankrupt,—the official examination, which was produced, not containing such an admission,—this was objected to by the plaintiff's counsel, who stated, by way of argument, that on a trial for felony nothing could be added by parol to the written examination of a prisoner. Best, C. J. received the evidence, observing, he thought "it would be admissible to prove something said by a prisoner, beyond what was taken down by the committing magistrate."

(2) Mo. Cr. C. 338. The marginal abstract of the case in the report is, "parol evidence may be given to add to the written examination of a prisoner taken before a magistrate."

Harris's case.

* The case of R. *v.* Harris and others, was as follows:—The three prisoners were brought before the magistrate, charged with being jointly concerned in three different offences of sheep stealing. The committing magistrate was called as a witness, and explained the manner of his taking the written examinations of two of the prisoners. It appeared that although he supposed he had taken in writing all that was said to him, he did not take down their statement as to the offence for which they were now tried; the examinations which he took, and which were produced at the trial, related to another offence of sheep stealing committed by these prisoners against *another person* (not the prosecutor) who was named in the examinations. It was proposed to prove by two witnesses, who were present during the whole time, that the two prisoners admitted, while under examination, that they were concerned in stealing also the *prosecutor's* sheep; this confession, as before mentioned, was altogether omitted in the written examination taken by the magistrate. The evidence of the two witnesses tendered was received at the trial by Mr Justice Littledale, subject to the opinion of the judges; and the question reserved for the

But though the counsel for the crown ought not to be allowed to give evidence of other statements of the prisoner omitted in the written examination, the prisoner himself is not to be precluded from shewing, if he can, that omissions have been made to his prejudice: for the examination has been used against him as an *admission*, and admissions must be taken as they were made, the whole together, not in pieces, nor with partial omissions. Even the prisoner's signature ought not to estop him from proving, if he can, such omissions; if the truth is, that omissions were made to his prejudice, the fact should be proved, and

Rule on this subject with respect to the *prisoner*.

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judges is stated in the report to have been, "whether, as the magistrate had taken down in writing all that was said to him, and he believed he did [take down all], parol evidence could be given of anything else that was addressed to the magistrate." The judges afterwards decided, (eleven in number, and all who were present), that "the evidence, being precise and distinct, was properly received, and that the conviction was right." It is not to be inferred from this decision, that parol evidence can be given of anything else that was addressed to the magistrate. The proposed evidence was receivable, being *distinct* (that is, *distinct from the examination produced*, and *distinct from the offence therein mentioned*); this is quite different from its being an *addition* to the examination. The examination produced related to *another offence*, and was not admissible as evidence in this prosecution; the only reason of it's being produced, doubtless was, to shew that the confession, which it was proposed to prove by the evidence of the two witnesses, was not *included* in the examination, but altogether *omitted;* for that purpose, and that only, it was proper and indispensable to produce the written examination. The point decided then was nothing more than this, that parol evidence might be given of a confession made by a prisoner before the committing magistrate who took a written examination relating to *other distinct* charges, but which did not in any respect relate to the offence for which he was afterwards tried.

Venafra v. *Johnson*, 1 M. & R. 316, has also been cited, but incorrectly, as an authority to shew that an examination before a magistrate may be added to by parol evidence. It was an action for maliciously charging the plaintiff before a magistrate, &c., and the information of the defendant, which had been taken in writing by the magistrate's clerk, having been given in evidence on the part of the plaintiff, the *defendant's* counsel proposed to ask the clerk in his *cross-examination*, whether the defendant had not, in addition to what appeared in the information, stated that the plaintiff, on the occasion deposed to, used a threat: this was objected to, on the ground that they would be adding to the information. The judge (Gaselee, J.,) consulted on this point the judges who were then sitting in the Court of Common Pleas; and they were of opinion, that the evidence was admissible.—The information was used against the defendant to show *malus animus;* it is clear, that he must be allowed to prove the whole of what he said before the magistrate, that the whole of the *animus* might be known. This case, therefore, does not apply. Would the *plaintiff*, who gave the information in evidence, have been allowed to prove *in addition* some further statement by the defendant? If that question had arisen, and been decided in the affirmative, the case would have been an authority in point.

Venafra v. *Johnson*.

the prejudice no longer suffered to exist. The same principle, as before shewn, is adopted with respect to depositions. (1)

It can scarcely be necessary to remark, that an examination taken in writing before a magistrate, whether taken formally or informally, cannot have the effect of excluding material and voluntary statements made by the prisoner at any other time, either before the commencement or after the close of the examination. The general rule respecting this species of evidence is, that a free and voluntary confession made by a person accused of an offence, at any time,—while those who have him in custody are conducting him to the magistrates, or after he has entered the house of the magistrate for the purpose of undergoing his examination, or after he quits it,—is receivable in evidence against him. (2) Remarks or statements by the prisoner, made by him even after the inquiry by the magistrate has begun, and while the witnesses are giving their informations, have been received in evidence, although afterwards his examination was taken in writing. If, for instance, the prisoner should make a remark upon a witness's statement while he is giving his information, or answer some question addressed to the witness by the magistrate, proof of such an incidental remark in the course of the hearing, which was not at all connected with the prisoner's defence, has been held to be admissible. (3)

Statements by prisoner while not under examination.

Spilsbury's case.

If the prisoner, when under examination before the magistrate, should make a statement amounting to a confession of guilt, but at the end of the examination should state, notwithstanding what he has already said, that he declines saying anything, and the magistrate should afterwards return on the depositions that the prisoner stated that he declined saying anything,—there seems to be nothing in this return of the magistrate which ought to exclude proof of the confession: for the return of the magistrate is a blank; it contains no statement

Magistrate's return, that the prisoner *declined saying anything*, when in fact he had said something material.

Walter's case.

(1) *Vide supra*, p. 72, 76.

(2) By Grose, J., in delivering his judgment, in Lambe's case, 2 Leach, pp. 628, 635.

(3) R. *v.* Spilsbury, 7 C. & P. 188. Moore's case, in Matthew's Dig. C. L. 157.

whatever by the prisoner respecting the circumstances of the case, or his own conduct; the proposed evidence, therefore, would not be an *addition* to his statement, but would supply the whole statement made by him. (1)—Or if there have been two inquiries before the magistrate, at the first of which a statement was made by the prisoner, and taken down in writing, but it was not read over to him, nor was he asked to sign it: on the second inquiry, the depositions of the witnesses, who had been before examined, were taken formally; and these depositions were returned by the magistrate, but he did not return with them the statement made by the prisoner on the first occasion; on the contrary, he made a return that the prisoner, advised by his attorney, declined to say anything: (2) it was proposed by the counsel for the crown, to give evidence of the prisoner's statement; this was objected to, and *Rex* v. *Walter* was cited in support of the objection; but it was held by the two Judges who presided, that the proposed evidence was clearly admissible.

Several written examinations—but not returned.

Wilkinson's case.

The examination of a prisoner containing a confession, is evidence only against the person confessing, and if a prisoner, in his examination before the magistrate, implicate another who is present, and who, being charged with the same offence, does not deny it, yet this is not to be used against him as an admission. (3)

Prisoner's examination not evidence against another.

Of Depositions, in general, with reference to the Party by, or against, whom they may be used, and the Subject-matter to which they may be applied.

Lord Holt, in *Breedon* v. *Gill*, (4) was of opinion that depositions before commissioners of excise, (who, by statute 12 Car. 2, c. 24, have power to administer oaths on inquiry into forfeiture,) taken in the presence of the other party, and signed

Depositions before commissioners of excise.

(1) If R. v. Walter, 7 C. & P. 267, is fully reported, it is an authority *contrà*. But the case of R. v. Harris. stated *supra*, p. 84, in note, might be used in support of the proposition in the text; and see the next case, R. v. Wilkinson.

(2) R. v. Wilkinson, 8 C. & P. 663. Cent. Cr. Ct. before Littledale, J., and Park, B.

(3) R. v. Appleby, 3 Stark. Ca. 33. by Holroyd, J., who said that several judges had so decided the point.

(4) 1 Lord Raym. 219.

by the witness, would be admissible on an appeal from the sentence of the commissioners, in case the witness should be dead at the time of hearing the appeal.

Depositions on commissions.

Depositions may be taken under the authority of several acts of Parliament, enacted principally with a view of providing against the deficiences of evidence in civil suits, where the witnesses are abroad, or about to leave the kingdom, or are infirm and unable to attend at a trial. (1) Depositions are also frequently taken by consent in civil suits, and occasionally upon prosecutions for misdemeanors. (2)

Admissible between same parties, on same matter in issue.

It is a general rule, that evidence which a witness has given on a trial between parties is admissible upon the same subject-matter between the same parties on a subsequent trial, if the witness has died in the interim; (3) or if he has gone abroad and is not returned. (4)

Power of cross-examining.

It is in general, essential that the party to be affected by the evidence of depositions, or some person in privity with him, should have had an opportunity of cross-examining the witnesses, with reference to the same subject-matter. The rule of the common law is, that no evidence shall be admitted, but what is, or might be, under the examination of both parties. (5)

(1) See stat. 1 Wm. 4, c. 22. Duckett *v.* Williams, 1 Cr. & J. 510. Pond *v.* Dimes, 3 M. & Scott, 161. Abraham *v.* Newton, 8 Bing. 274. The statute does not apply to indictments, Rex *v.* Briscoe, 1 Dow. P. C. 520. See also statutes 13 Geo. 3, c. 63; 42 Geo. 3, c. 85.

(2) Rex *v.* Morphew, 2 M. & S. 602, information for a misdemeanor, for illegally transacting the sale of military commissions.

(3) Rex *v.* Jolliffe. 4 T. R. 290. Strutt *v.* Bovingdon, 5 Esp. 56. Mayor of Doncaster *v.* Day, 3 Taunt. 262. Pyke *v.* Crouch, 1 Lord Raym. 730 (5th resolution).

(4) Cole *v.* Hadley, 11 Ad. & El. 807.

(5) By Lord Ellenborough, in Cazenove *v.* Vaughan, 1 M. & S. 6. See also De Grey, Ch. J., in Duchess of Kingston's case, 20 Howell, 538. By Hullock, B., Attorney-General *v.* Davison, M'Cl. & Y. 169. See Hardr. 215, 472; 2 Jones, 164; Wils. 214, 215; Hob. 155; 2 Roll. Ab. 679; 1 Vern. 413; B. N. P. 242.—Depositions taken before Commissioners of Bankrupts, being *ex parte*, were not evidence before the statutes, 5 G. 2, c. 30, s. 41; 49 G. 3, c. 121, s. 10; 6 G. 4, c. 16; B. N. P. 242; 1 Lev. 180; Lord Raym. 220; 2 Jones, 53; Janson *v.* Wilson, Doug. 244; Bowles *v.* Langworthy, 1 T. R. 366; 2 Roll. Ab. 679; B. N. P. 242.—*Ex parte* depositions taken before Barrack Commissioners, under 47 G. 3, c. 1, held inadmissible, in Attorney General *v.* Davison, 1 M. & Y. 160.—*Ex parte* depositions before Commissioners of Inquiry not allowed as evidence to expunge a creditor's

A. being seised of two closes, which he claimed as heir at law, conveyed one to B., and both A. and B. were afterwards ousted by C.; they afterwards brought actions of ejectment against him for the premises respectively, which they recovered. B. was again dispossessed by C., and again brought ejectment against him, claiming the same premises as in the former action, and by the same title. On the trial B. offered to prove the deposition made by a witness since deceased, upon the trial of the former ejectment between A. and C.; it was held, that the evidence was inadmissible. (1) And it appears to have been held, on an issue from Chancery between A. and B., that depositions produced by B. in Chancery, in a suit of C. against B., were inadmissible. (2)

Not evidence against strangers.

Doe v. *Earl of Derby.*

Depositions of deceased witnesses, taken before commissioners of bankrupt on the opening of a commission, and enrolled by the assignees afterwards appointed, have been held not to be admissible evidence in an action brought by the bankrupt against the assignees acting under the commission. (3) It was observed, that the assignees had no opportunity to cross-examine the witnesses at the meeting which was strictly private, and that the witnesses are supposed to be produced by the petitioning creditor, who has often an interest adverse to that of the assignees.

Depositions before commissioners of bankrupt.

Although it has been seen that verdicts are not admissible as evidence of a *res judicata*, unless there be a complete mutuality of parties,—for the reason, principally, that other evidence might have been admissible, if the parties had been in any way changed, —this reason does not apply to the deposition of a witness

Evidence in former trial admissible against a party who might have cross-examined.

proof; *ex parte* Coles, Buck. 242; Cooke's B. L. 552, 8th ed.; *ex parte* Campbell, 2 Rose, 51.

(1) Doe d. Foster *v.* Earl of Derby, 1 Ad. & E. 790. It was there said, that the Earl of Bath *v.* Bathersea, 5 Mod. 9, was not reported clearly enough to be acted on. It was also observed, that although it had been laid down, that a verdict is evidence where it was for one under whom any of the present parties claim, that must mean a claim acquired through such party subsequently to the verdict.

(2) Atkins *v.* Humphreys, 1 M. & Ro. 523; Chief Justice Tindal said, "he was inclined to think that he could not receive the evidence, on the ground of want of reciprocity, and rejected it." See Rushworth *v.* Countess of Pembroke and Currier, Hardr. 472. See also 7 Ad. & Ell. 456, 458.

(3) Chambers *v.* Bernasconi, 1 Cr., M. & R. 352.

against a person who had full power of cross-examination. In the case of *Wright* v. *Doe* d. *Tatham*, (1) where, in a suit in Chancery, an issue of *devisavit vel non* was ordered, (in which the defendants in Chancery were plaintiffs, and the plaintiff in Chancery was defendant,) respecting the execution of a will, the issue was found in the affirmative: at the trial of the issue one of the three attesting witnesses to the will swore to its execution: the plaintiff in Chancery afterwards brought an action of ejectment on his own demise, as heir at law of the testator, against one of the defendants as devisee under the will; it was held, that the evidence of the witness given on the former occasion was, after his death, admissible at the second trial. It was noticed by the Court, that the defendant at the second trial was on the first occasion joined with other plaintiffs, and that the defendant on the first occasion was, on the second, only lessor of the plaintiff. But it was said, that the lessor of the plaintiff was the real party in an action of ejectment, and that in the former action the present lessor of the plaintiff had precisely the same power of objecting to the competency of the witness, and the same right of cross-examination, or of calling witnesses to discredit or contradict his testimony on both occasions.

Wright v. *Tatham.*

Upon same matter in issue.

Although the parties are the same, yet if the same matters were not in issue in the former cause, the depositions are not evidence; the general rule being, as laid down by Lord Chief Justice De Gray in the judgment often referred to, and in other authorities, that depositions, to be admissible, must have been made between the same parties, and upon the same matter in issue. In one case, and one case only, it is an *objection* to their admissibility, that they relate to the *same matter*; that case is, where depositions are offered as evidence of *reputation*,—in which case, the very circumstance, that the *same matter* was litigated, is (as before shewn) an objection to such evidence, and renders them inadmissible, as being *post litem motam*.

Opportunity for cross-examination.

The rule of the common law is, (as before observed) that no evidence shall be admitted, but what is, or might be, under the

(1) 1 Ad. & E. 3.

examination of both parties. Upon the ground of the absence of all opportunity of cross-examination, it has been held, with respect to Chancery Depositions, that if a witness, after being examined *de bene esse*, should die before the defendant puts in his answer, the deposition cannot be read; for the opposite party would not, in that case, have an opportunity of cross-examination. (1) And although an answer be put in, yet if the witness, examined *de bene esse*, die before he can be examined again, having been sick from the time of putting in his answer until his death, which prevented his going to be examined, the witness's deposition will not be admissible. (2) But where, upon a bill to perpetuate testimony, the defendant stood in contempt, and would not answer, and thereupon the plaintiff had a commission and examined witnesses *de bene esse*, and the defendant joined in the commission, and cross-examined some of the witnesses produced for the plaintiff, and before the answer came in, the witnesses died, their depositions were held receivable upon the trial of an ejectment. (3)

Opportunity neglected.

Where a party has had an opportunity of cross-examining a witness, and has neglected to do so, the case is the same in effect as if he had cross-examined: for, otherwise, as observed by Lord Ellenborough, the admissibility of the evidence would be made to depend upon his pleasure, whether he will cross-examine or not,—which would be a most uncertain and unjust rule. (4) Upon this principle, where a person

(1) Dutton *v.* Colt. Sir T. Raym. 335, n. Ford *v.* Guy, cited in Howard *v.* Tremaine, 1 Show. 363. Piercy *v.* ——, 2 Jones, 165. B. N. P. 343. Vin: Ab. A. b. 31, pl. 12, 22. "The rule is, that depositions are not allowed to be read before answer put in, or before the party is in contempt, unless he has had an opportunity for cross-examining:" By Le Blanc, J., in Cazenove *v.* Vaughan, 1 M. & S. 8. With respect to the practice of Courts of Equity, in allowing such depositions to be read in certain cases, see Gilb. Ev. 57, 58. 2 Jones, 164. It is said that an order in Chancery, requiring such evidence to be admitted, does not bind the common law courts. 2 Jones, 164. B. N. P. 240. Gilb. Ev. 57.

(2) Brown's case, Hardr. 315; the case of Arundel *v.* Arundel, Ch. R. 90.

(3) Howard *v.* Tremaine, 1 Show. 364. Carth. 265. 1 Salk. 278.

(4) In Cazenove *v.* Vaughan, 1 M. & S. 6. The abstaining from cross-examining affords also a presumption of acquiescence in the statement of the witness. Bills to perpetuate testimony would be altogether frustrated, if the adverse party refused to answer till all the witnesses were dead; see Howard *v.* Tremaine, Carth. 265.

Cazenove v. Vaughan.

filed a bill in Chancery for the examination of a witness *de bene esse*, to which the defendant did not put in an answer, and an order of the Court of Chancery was afterwards obtained for the examination of the witness, and notice of the order, and of the interrogatories which it was intended to put, was given to the defendant; but no cross interrogatories were filed, and an order for the publication of the deposition was afterwards obtained; the Court of King's Bench decided that the deposition of the witness, who was proved to be abroad, had been properly admitted at the trial. (1) "The rule is," said Mr Justice Le Blanc, "that depositions are not allowed to be read before answer put in, or before the party is in contempt, unless he has had an opportunity of cross-examining; for if he has, and has omitted to avail himself of it, then it is his fault, and he cannot make that a ground for objection to the depositions. In this case there was no evidence given at the trial to show, that the defendant had not liberty granted to him to cross-examine, or that he might not have exercised it; on the contrary, it appears that when the order for examination was made, there was no objection interposed, nor further time prayed for. It must be presumed, therefore, that he had an opportunity to cross-examine, and chose to forego it."

Where party in contempt.

It is laid down by Chief Baron Gilbert, that if the adverse party is in contempt, the depositions of the witnesses shall be admitted, for then it is the fault of the objector that he did not cross-examine the witnesses, since he would not join in the examination. (2)

Alleged irregularity in

In the case of *Steinkeller* v. *Newton*, (3) depositions which

(1) Cazenove *v.* Vaughan, 1 M. & S. 6. Depositions of witnesses examined, without service of the order for liberty to do so, cannot be read; Mulvany *v.* Dillon, 1 Ball. Be. 413..

(2) Gilb. Ev. 56, 62, 64. 4 Mod. 146. Com. Dig. Ev. C. 4. And see by Le Blanc, J., 1 M. & S. 8, *supra*, (1). And see *dictum* in Brown's case, Hardr. 315. 12 Vin. Abr. 109, pl. 23. B. N. P. 240. See also Howard *v.* Tremaine, Show. 363, 364. Carth. 265. 4 Mod. 147. Salk. 278.—In Hamond *v.* ——, 1 Dick. 50, the deposition of a witness examined after publication was received under the circumstances, one of which was that he had been cross-examined.

(3) 9 C. & P. 315. The plaintiff knew that there had been an order

had been taken under a commission to examine witnesses abroad, were tendered in evidence, on the part of the defendant; the plaintiff's counsel objected to them on the ground, that there had been no notice to the plaintiff of the issuing of the commission, or of the interrogatories proposed to be put, nor any request of cross interrogatories; and he proposed to prove this, in support of his objection: But Lord Chief Justice Tindal refused to inquire at *nisi prius* into the alleged irregularity in the issuing of the commission, (which he considered more fit for the cognizance of the court on affidavit,) and received the depositions.

issuing the commission.

Though a deposition may be admissible as secondary evidence, in case of the death of the deponent or for other sufficient cause, it will not follow that all statements contained in the deposition can, therefore, be received as evidence. If a deposition contain mere hearsay of a fact, upon which hearsay is not evidence, it cannot be received as proof of that fact. (1) Or if a deposition sets out the contents of a letter, which letter is not produced, this part of the deposition, if objected to, is not to be received,—although the deponent may be abroad, and so out of the reach of process for compelling him to produce the original letter. (2) "We have no power," said Lord Chief Justice Tindal, "to compel the witness to give any evidence at all: but if he does give an answer, that answer must be taken in relation to the rules of our law on the subject of evidence."

Deposition containing hearsay,

or setting out the contents of a letter.

In some particular cases a peculiar effect is given to depositions by statute. Thus, under the Statute of Bankruptcy, 6 Geo. 4, c. 16, s. 90 and 92, depositions in bankruptcy are made conclusive in certain cases; and by the statute 2 & 3 Wm. 4, c. 114, s. 7, depositions in bankruptcy are made evidence in certain cases, where the witnesses are dead.—By the mutiny act, the *ex parte* examination of a soldier as to his parochial settlement

Effect of depositions under statutes.

for a commission; but the plaintiff's attorney, after an interval of some time, wrote to the defendant's attorney, that he should consider the commission as abandoned. The plaintiff had a verdict.

(1) An instance of this kind is noticed in vol. 1, p. 345.

(2) A second point in Steinkeller *v.* Newton, above cited, p. 92. (3).

is made evidence in case of his death or absence from the kingdom.—By the statute 59 Geo. 3, c. 12, a similar provision is made in regard to the examinations of prisoners as to their settlements.—The decisions with regard to these statutes are not here minutely adverted to, as they were not grounded on the general rules of evidence, but related to the construction of clauses in acts of Parliament, limited in their application to particular subjects.

Depositions as secondary evidence.

Several questions have arisen as to depositions being primary or secondary evidence, and as to the circumstances under which, upon the principles relating to secondary evidence, depositions are allowed to be produced. It has been held that a deposition taken in Chancery cannot, without a special order, be read, on the ground that the deponent is unable to attend by reason of sickness. (1)

Deposition in Chancery—deponent sick

Depositions on going abroad.

Depositions, which have been taken under a commission on the ground of a witness being about to go abroad, cannot be read, if the witness be in this country at the time of the trial; and some evidence of the witness having actually gone abroad should be given. (2) Where a witness had actually sailed from this country, but the vessel was in port, having been driven back by contrary winds, it was held that his deposition might be received. (3)

(1) Doe *v.* Evans, 3 C. & P. 221. As to reading Chancery depositions, where the witness is kept away by contrivance, B. N. P. 243; where he cannot be found, Benson *v.* Olive, 2 Str. 920; where he is not amenable to process, 1 Atk. 445.

(2) Ward *v.* Wells, 1 Taunt. 461. Fonsick *v.* Agar, 6 Esp. 92. Falconer *v.* Hanson, 1 Campb. 171. Proctor *v.* Lainson, 7 C. & P. 629.

(3) Highfield *v.* Peake, M. & M. 110.

Section VIII.

Of the Admissibility and Effect of Inquisitions.

Nature of inquisitions.

The last species of judicial writings, upon the admissibility and effect of which it is necessary to advert with any particularity, are inquisitions. These contain the result of inquiries made under competent public authority, concerning matters in which the public are concerned. In some cases, indeed, such inquisitions relate to private affairs, as, for example, the particulars of the estate of a deceased individual, or of his pedigree; still, if the inquiry has been made with a view to ascertain the rights of the crown in regard to such private matters, the inquisition is to be considered as of a public nature, for the purposes of evidence.

The inquisitions here treated of are, in general, clearly of a judicial character, and are in many instances the conclusions of juries upon their oaths, or the conclusions drawn by commissioners from evidence taken upon oath. For convenience, other public inquisitions also, not so clearly of a judicial character, are treated of in the present section. The principle of their admissibility appears to be the same.

Domesday-book.

The most ancient inquisition among the records of the country, is that of Domesday-book. It contains a general survey of all the counties in England, excepting the four northern, and was compiled soon after the Conquest, for the purpose of ascertaining the ancient demesne lands, which were the *socage tenures*, first in the hands of Edward the Confessor, and afterwards of William the Conqueror; it has been said to have been made with a view to the establishment of tenures. The inquiry was made upon oath before the King's Justices appointed to conduct it. (1)

(1) First Report of the House of Commons on Public Records, App. Sir H. Ellis's preface to Domesday-book furnishes a most interesting

Uses of.

Domesday-book is the ultimate criterion for determining what lands are ancient demesne of the crown; a question of practical importance in the present day, especially in regard to the validity of fines which have been levied of those lands. (1) Owing to the changes of names since the time when Domesday-book was compiled, such an inquiry is often attended with much difficulty. (2) This inquisition is also occasionally of importance in determining the parcels of manors; (3) the pedigrees of families; (4) the sites of ancient mills; (5) the abbey lands belonging to religious houses, and a variety of other circumstances incident to the proof of immemorial rights and obligations. (6)

Inquisitions *post mortem*, nature of.

Inquisitions *post mortem* form an extensive and valuable source of evidence respecting the early pedigree of the most ancient families in the kingdom. They also furnish a variety of particulars, frequently material in the proof of immemorial rights and of titles to estates. These inquisitions appear to

guide to its contents and their legal use. See also Spelman's Gloss. *voce* Domeday; Reeve's History of English Law, vol. 1, p. 219; Kelham's Domesday; Grimaldi's Origines Genealogicæ. Connected with Domesday-book, are four records called the Exon Domesday, the Inquisitio Eliensis, the Winton Domesday, and the Bolden-book. See Cooper on the Public Records, Ch. 7.

(1) Hob. 188. Gilb. Ev. 69, 76. The trial is said to be by the inspection of Domesday. But it is usual to produce an examined copy from Domesday in evidence, except in proceedings before the House of Lords, where originals are required, if they are in England.

(2) In a trial before Holroyd, J., upon the point, whether the Manor of Great Bowden, in Leicestershire, was ancient demesne, it was successfully identified, by means of old deeds, with a manor called in Domesday Bugedine, and which was in a different hundred. See Sir H. Ellis's preface, as to changes in the counties and in the hundreds of Domesday.

(3) In Alcock *v.* Cook, tried before Tindal, C. J., in London, the question depended on the point, whether Sutton, in Lincolnshire, was part of the manor of Greetham. Domesday-book was produced, and the effect of the evidence turned on what, according to the correct mode of reading Domesday, was parcel of the manor of Greetham, and whether the effect of a red line, made through the word Hythe Wapentake, denoted an error, or was for the purpose of drawing attention.

(4) See Grimaldi on the Genealogical Uses of Domesday, Origines, p. 6.

(5) See Sir H. Ellis's preface as to the Mills of Domesday. As to the Churches of Domesday, see Selden on Tithes, ch. 6, p. 72. See also Second report on Public Records, App. sec. 7, p. 456.

(6) Extracts were read from Domesday in Rowe *v.* Brenton, 8 B. & C. 738, and on various other recent occasions.

have been first taken by the Justices in Eyre, but the duty of taking them was afterwards transferred to the escheators. By the statute 1 Hen. 8, c. 8, it is enacted, that they are to be taken on the oaths of twelve men, and in open places. They afterwards fell within the jurisdiction of the Court of Wards and Liveries, which was erected in the 32nd and 33rd years of Henry 8. This court was abolished, together with the military tenures to which it owed it's origin, soon after the Restoration.; at which time the practice of taking inquisitions *post mortem* ceased. It seems that they were taken only upon the deaths of tenants *in capite*. (1)

In treating of the exception to hearsay evidence, which has been established in matters of pedigree, particular mention has not been made of inquisitions *post mortem*, because their admissibility and effect does not depend on their relation to questions of pedigree. But such is the use of them in proving ancient pedigrees, it has been observed, that it is easier to establish a pedigree for five hundred years before the time of Charles II., than for one hundred years since his reign. (2)

Irregular inquisitions.

Where there appears to have been any irregularity in the proceedings, the evidence of inquisitions *post mortem* will be rejected. Thus, in the case of the *Barony of Powis*, A.D. 1731, three inquisitions *post mortem* were produced, but as the finding of the jury in two of them had exceeded the authority conferred by the writ, and a *supersedeas* had issued and vacated a

(1) 2 Bl. Com. 68, St. 29 Ed. 1, de escheatoribus.—The statutes 14 Edw. 3, st. 1, c. 13, and 18 Hen. 6, ch. 7, relate to Escheators:—Stat. 32 Hen. 8, c. 46, and 33 Hen. 8, c. 22, to wards and liveries:—Stat. 12 Car. 2, c. 24, to the abolition of feudal tenures. —The inquisitions between the reign of Henry 3, and that of Car. 1, are preserved in the Tower and the Rolls' Chapel; those in the chapel begin with the 1st of Hen. 8, and are continued down to the 20th Car. 1.—There is a series of transcripts kept in the King's Remembrancer's Office, from Edw. 1, to Car. 1; and another series in the Chapter House at Westminster, from the erection of the Court of Wards, 32 Hen. 8, to the abolition of that Court at the Restoration.

(2) By Lord Mansfield, in Birt *v.* Barlow, Doug. 171; and see by Lord Erskine, 13 Ves. 143.

third, and it appeared that the Court of Wards had declared them insufficient, they were rejected. (1)

Several inquisitions.

There are several instances of a number of inquisitions having been taken at intervals after the death of the same tenant, in consequence of the issuing of writs *de melius inquirendo*, so that sometimes, especially in cases of disputed legitimacy, they are found alternately establishing or controverting the same fact. In the case of the *Banbury Peerage*, an inquisition had been taken after the death of the Earl of Banbury, A.D. 1632, and it was thereby found, that he died without heirs male of his body; but by another inquisition taken seven years afterwards, it was found that Edward, then Earl of Banbury, was his son and next heir, and that he left another son named Nicholas. The House of Lords admitted both these inquisitions in evidence, but do not appear to have attached much weight to either of them. (2)

Effect of.

Inquisitions *post mortem* are not conclusive of the facts which they state. Thus, in the case of the *Earl of Thanet* v. *Forster*, (3) an inquisition, or, as it was there called, an office, taken after the death of George Earl of Cumberland, in the time of King James I., which recited a grant of lands from King Henry 6 to the ancestor of the plaintiff, and the subsequent seisin of his descendant, was held not to be conclusive of such seisin, but was considered to be repelled by the operation of an act of resumption of the 33 Hen. 2, vesting the reversion in the crown. Lord Hardwicke notices that such inquisitions are not conclusive evidence. (4) And in *Bree* v. *Beck*, (5) Bayley, B., speaking with reference to the inquisitions *post mortem* which were produced in evidence in that case, observes, that they put the value of the property so low,

(1) Cruise on Dignities, ch. 6, s. 60.

(2) See App. to Le Merchants' Report of the Claim to the Gardiner Peerage, and note to the Report, p. 409, where cases of conflicting inquisitions are collected. In the Lisle Peerage case, two inquisitions expressly contradicted each other; Report, p. 123.

(3) Jones, T. 224.

(4) Sergeson *v.* Sealey, 2 Atk. 412.

(5) 1 Cr. & J. 257.

he was not surprised that a jury should consider them as not furnishing safe and solid grounds on which they could act.

Herald's visitation.

The visitation books in the Herald's Office contain likewise the result of inquries upon public matters under public authority. They contain the pedigrees and arms of the nobility and gentry of the kingdom, from the 21 Hen. 8, to the 2 James 1. The inquiries were made by the heralds, by virtue of a commission under the great seal. (1) Entries of the visitations were made in books kept at the Herald's College, which have frequently been received in evidence. (2)

Inquisition of lunacy.

An inquisition of lunacy is evidence on the trial of an indictment, to shew that the prisoner was insane, when he committed the offence. (3) Such inquisitions are evidence even against third persons who were strangers to the proceeding. Thus, in a case, where an inquisition of lunancy was offered as evidence to affect the rights of third persons, and objected to as *res inter alios acta*, Lord Hardwicke overruled the objection, and said, that inquisitions of lunacy, and likewise other inquisitions, as *post mortem*, &c., are always admitted to be

(1) See an account of these books in the App. to the First Report of the Commissioners of Public Records, ch. 8, p. 82.

(2) See Matthews *v.* Port, Comb. 63. Pitton *v.* Walter, 1 Str. 162. Vin. Ab. Ev. A. b. 39.—In the Huntingdon peerage case, two visitation books were given in evidence; Bell's Huntingdon peerage, p. 350.—Chief Justice Pratt admitted the minute book of a visitation, signed by the heads of several families, in Pitton *v.* Walter, 1 Str. 162.—At the Herald's College are to be found books of entries of pedigrees, concerning the admissibility of which some doubt exists. In an action of ejectment before Fortescue Aland, J., cited 12 Vin. Ab. 119, they were rejected; but they have been admitted in some older cases. Earl of Thanet *v.* Foster, Jones, 224. 2 Plowd. 425.—Pedigrees of persons claiming dignities, made out by the heralds, have been admitted, on their authority, by the House of Lords; as in the claim to the barony of Clifford, A.D. 1691, Journ. vol. xiv., p. 613; vol. xv., p. 203. And see a standing order of the House of Lords upon the subject, Journ. vol. xxxi., p. 583. —The books of entries of funeral certificates are described in App. to First Report of Record Commission, ch. 8, p. 82. This species of evidence was tendered in the Banbury Peerage case, see Le Merchant's report of that case; p. 415, and in the Huntingdon Peerage case, in order to prove who was the chief mourner at a particular funeral. In the same case, evidence was given of a funeral achievement.—See Minutes of the De Lisle case, p. 12, as to the Earl Marshal's book.

(3) Rex *v.* Bowler, O. B. June, 1812, before Le Blanc, J., and Lord Chief Justice Gibbs.

read, but are not conclusive. (1) And in an action upon a bond against the executors of the obligor, an inquisition of lunacy has been admitted, under the plea of *non est factum*, for the purpose of shewing, that the obligor had been a lunatic from a certain time, as found by the inquisition. (2)

Inquisition by warrant of Court of Exchequer.

An inquisition taken by virtue of a commission which issued in the reign of Queen Elizabeth, under the seal of the Court of Exchequer, to commissioners to inquire, whether a prior was seised of certain lands as parcel of a manor, or whether the crown was seised of them after the dissolution of the priory, was adjudged to be good evidence of those facts. (3)

By order of House of Commons.

And an inquisition, taken under an order of the House of Commons, is evidence respecting the fees of certain offices. (4)

Inquisition by sheriff, as to property.

Inquisitions, which are extrajudicial, are not admissible in evidence. Thus, an inquisition made by a sheriff's jury, for the purpose of ascertaining who was entitled to the property of goods taken under an execution, seems not to be admissible evidence against the sheriff, in an action of trover brought by the party, in whose favour the inquisition was found. (5) This evidence was received at the trial of a cause by Mr. Justice Buller, who admitted it, but held it not to be conclusive; and a verdict having been found for the defendants, a motion was afterwards made for a new trial, on the ground that the inquisition was conclusive evidence in favour of the plaintiff, as against the person who contested the property with the plaintiff, and who was present at the time of taking the inquisition. But the court refused the application. Chief Justice Eyre said, he doubted whether a sheriff can, strictly speaking, hold any inquisition as to property, except under a writ *de proprietate probandâ* in replevin. And Mr. Justice Buller said, he

Not evidence.

thought he ought not to have admitted the evidence at the trial, as the inquisition was not under the king's writ, but

(1) Sergeson *v.* Sealey, 2 Atk. 412.

(2) Faulder *v.* Silk and another, executors of Jervoise, 3 Campb. 126, before Lord Ellenborough.

(3) Tooker *v.* Duke of Beaufort, 1 Burr. 146. Sayer, 297, S. C.

(4) Green *v.* Hewett, Peake, N. P. C. 184.

(5) Latkow *v.* Eamer and Barnett, Sheriff of Middlesex, 2 H. Black. 437. Glossop *v.* Poole, 3 Maule & Selw. 175.

merely a proceeding by the sheriff on his own authority. Such an inquisition is not evidence for the sheriff, unless, perhaps, if the question were, whether the sheriff has acted maliciously. (1)

Inquisition by coroner.

An inquisition of *felo de se*, taken before the coroner *super visum corporis*, is considered by Lord Coke to be conclusive evidence of the fact against the executors or administrators of the deceased. (2) But Lord Hale, in his Pleas of the Crown, (3) is of a different opinion, justly conceiving it unreasonable that they should be concluded, and lose the goods of the deceased without an answer, by an inquisition which may be taken by the coroner behind their backs. And it is now settled that such an inquisition may be removed into the King's Bench, and traversed by the executors and administrators of the deceased. (4)

A variety of other inquisitions, some upon oath and others not on oath, might be added to those already enumerated. In order to exhaust the subject, it would be necessary to pursue inquiries concerning the records of the country, which would extend to a most inconvenient length. (5) It appears sufficient to refer, in conclusion, to the different ecclesiastical inquisitions or surveys.

Surveys of ecclesiastical benefices.

The *Valor Beneficiorum*, or Pope Nicholas's Taxation, is another document of a public nature. In the year 1288, Pope Nicholas the Fourth, to whose predecessors in the see of

(1) Glossop *v.* Poole, 3 M. & S. 175. By Lord Ellenborough, *ib.* 177.

(2) 3 Inst. 55.

(3) 1 Pl. Cr. 416. 1 East's P. C. 389.

(4) See 1 Saund. 362, note 1, by the Editor, who has there collected the cases on this subject. As to the duty of the coroner in taking an inquest, see stat. 1 H. 8, c. 8.

(5) An account of inquisitions *post mortem* may be seen in the report of the proceedings of Commissioners of Public Records, Append. (F. 1.) p. 63. An account also of Inquisitions *ad quod damnum* may be seen in the same report, App. (F. 2.)—An extent taken pursuant to a stat. of 4 Edw. 1, admitted in Rowe *v.* Brenton, 8 B. & C. 747, though the commission could not be found.—Survey of a Nunnery, from the First-Fruits Office, in Kellington *v.* Trin. Col. 1 Wils. 170. Underhill *v.* Durham, 2 Gwill. 542.—Survey of the Honor of Bolingbroke taken temp. Jac. 1, and the map annexed thereto, admitted by Tindal, Ch. J. in Alcock *v.* Cook, tried in London.

Rome the first-fruits and tenths of all ecclesiastical benefices had for a long time been paid, granted the tenths to king Edward the First for six years, towards defraying the expense of an expedition to the Holy Land; and, that they might be collected to their full value, a taxation, by the king's precept, was begun in that year, and finished for the province of Canterbury in the year 1291, or the 20th year of the reign of Edward the First; and for that of York in the following year; the whole being under the direction of the Bishops of Winton and Lincoln. (1) This taxation of Pope Nicholas is an important document, because all the taxes, as well those paid to our kings as those to the Pope, were regulated by it, till the survey made in the twenty-sixth year of Henry the Eighth; and because the statutes of colleges, which were founded before the Reformation, are also interpreted by this criterion, according to which their benefices under a certain value are exempted from the restriction in the statute of the twenty-first of Henry the Eighth concerning pluralities. (2) The taxation is evidence of the rate and value, at which the persons, employed in that taxation, though fit at that time to estimate the living. (3) The original is kept in the office of the king's remembrancer in the Exchequer.

26 H. 8. *Valor beneficiorum.* A. D. 1515.

A new *Valor Beneficiorum* was instituted in the twenty-sixth year of Henry the Eighth, when the first-fruits and tenths of every ecclesiastical promotion were annexed to the revenue of the crown. (4) To ascertain their value, ecclesiastical surveys were taken, by virtue of commissions in the king's name issuing under the great seal. (5) It is to be observed, that the *Valor Beneficiorum* of the reign of Henry the Eighth in no instance mentions the existence of a modus. The commissioners appear not to have taken notice of any existing modus, or immemorial agreement between the parson and the occupiers; but to have calculated the value of the first-fruits and

(1) See first Report of House of Commons on Public Records, p. 15.

(2) Humphrey *v.* Knight, Cro. Car. 455. 2 Lutw. 1305. Stump *v.* Ayliffe, 2 Gwill. 536.

(3) By Lord Redesdale, Bullen *v.* Michel, 2 Price, 477.

(4) St. 26 H. 8, c. 3.

(5) Ib. Sect. 3 & 10.

tenths, without considering the question of modus, or any other legal exemption.

Surveys of the church and crown lands were taken by commissioners in the time of the Commonwealth, under the authority of acts or ordinances of the Parliament; and copies of these surveys were deposited in many of the cathedrals. The originals would have been good evidence of the particulars of the surveyed estates, upon the same principle as the other public surveys which have been before mentioned; but as they were destroyed at the time of the great fire in London, the copies have been admitted as evidence, in the place of the original surveys, provided they have been kept in unsuspected repositories. (1) Parliamentary surveys.

The history of the *Inquisitiones Nonarum* is thus given in the Report of the Commissioners of Public Records, before referred to. (2) A grant having been made by Parliament to Edward the Third, in the fourteenth year of his reign, of the ninth lamb, ninth fleece, and ninth sheaf, assessors and venditors were thereupon appointed, and directed, by three commissions under the great seal, for every county in England, to assess and sell these ninths. The *Inquisitiones Nonarum* were taken under the third commission, whereby the commissioners were directed to levy the ninth of corn, wool, and lambs, in every parish, according to the value upon which churches were taxed, (this refers to Pope Nicholas's taxation,) if the value of the ninth amounted to as much as the tax; but should the value of the ninth be less than the tax, they were directed to lay only the true value of the ninth, and to disregard the tax; and in order to gain correct information of these facts, they were directed to take inquisitions, upon the oath of the parishioners, in every parish. These inquisitions form the records called the *Inquisitiones Nonarum*. *Inquisitiones Nonarum.* A. D. 1341.

(1) Underhill *v.* Durham, 2 Gwill. 542. Green *v.* Proude, 1 Mod. 117. Bullen *v.* Michel, 4 Dow. 325. 2 Price, 399, S. C.

(2) Appendix (L. 2), p. 146. The Commissioners do not appear to have been required to examine into the value of the glebe.

Effect of ecclesiastical inquisitions.

The Ecclesiastical inquisitions are used, generally, as affording an inference, and not for the simple purpose of proving a fact; as, for example, whether, consistently with the value of a benefice, as stated in such surveys, it is probable that a modus of a particular amount should have existed in the parish from time immemorial. Consequently it can rarely happen, that these surveys are conclusive for the purpose for which they are produced. (1) Great difference of opinion as to their effect for such purposes, and as to their actual and comparative credit, has been expressed by Judges on various occasions. (2)

(1) See Bree *v.* Beck, 1 Cr. & J. 265. Jee *v.* Hockley, 4 Pr. 87. Robinson *v.* Williamson, 9 Pr. 136. Armstrong *v.* Hewitt, 4 Pr. 221. O'Connor *v.* Cook, 6 Ves. 665. 8 Ves. 535. Fermer *v.* Loraine, cited 1 Cr. & J. 268, and the cases collected in Short *v.* Lee, 2 Jac. & W. 464. Ashby *v.* Power, 3 E. & Y. tithe cases, 1311.—In Drake *v.* Smyth, 5 Price, 377, Chief Baron Richards says, that he had sufficient experience in these subjects to say, that these documents could not be implicitly relied on.—In Jee *v.* Hockley, 4 Price, 88, where there was merely evidence of the payment of the modus on the one side, and the amount of the modus was inconsistent with all the ancient documents, the Chief Baron said, that these documents were never conclusive, and did not make the case so clear as to prevent him from directing an issue —In Armstrong *v.* Hewitt, 4 Price, 221, it was said by the court, that the ecclesiastical survey, or any other ancient document, was not equivalent, in point of evidence, to usage. To the same effect, see Tamberlain *v.* Humphreys, Gwill. 1345.

(2) See Bree *v.* Beck, 1 Cr. & J. 267. In a case of Weston *v.* Vaughton, tried at Warwick, Lord Tenterden said, that it had been generally supposed, that Pope Nicholas's valuation was too low, but as the value of the living for the purpose of the inquiry was to be taken 100 years previous to the survey, it might be adopted as a safe guide. In Chapman *v.* Smith, 2 Ves. sen. 506, the Chancellor treated the survey of Henry 8, as too low. See also 6 Price, 483; 2 E. & Y. tithe cases, 141; 3 E. & Y. 951.—See further, as to the ecclesiastical survey, and its effect in proving endowments and parcels of an abbey, and the circumstance of a religious house being a greater or smaller monastery, 2 Price, 329; 4 Pr. 216; 3 E. & Y. 743, 837, 1022, 1367; 2 Jac. & W. 464; 9 Pr. 136.—Lord Ellenborough, in Roe *v.* Ireland, 11 East, 283, speaks of the extreme accuracy of the parliamentary survey; and in Blundell *v.* Howard, 1 M. & S. 294, Lord Ellenborough said, that this document being silent as to a modus, affords strong evidence against its existence. But in Driffield *v.* Orrel, 6 Price, 324, the Chief Baron observed, "as to the fact of the parliamentary survey not referring to the moduses, there is nothing in that, when opposed to the proof of actual payment." He continued, "Had that document even stated that there was no modus, though it is entitled to great respect on some questions, yet, as being, on that subject, *res inter alios acta*, it would not be strong enough to overpower the positive evidence of actual payment." See further as to this survey, Doe *v.* Harcourt, Peake's Ev. App. 28; 1 E. & Y. 581; Atkins *v.* Drake, 1 M'Cl. & Y. 221, 223, 231. Travis *v.* Oxter, 3 E. & Y. 1252.

CHAPTER II.

OF THE ADMISSIBILITY AND EFFECT OF PUBLIC WRITINGS NOT JUDICIAL.

Principle of admission.

THE ordinary purpose for which public writings, not judicial, are produced in evidence, is to prove facts by means of an official statement. The cases upon the subject constitute important exceptions to the rule discussed in the first part of this Work, which excludes hearsay and secondary evidence. Writings of the nature in question will be found defective, in regard to those securities which are required for the admission of evidence in ordinary cases. But they are recommended by other securities which are not found in ordinary cases, arising from the public station of the authors of such writings, and from the course of public duty under which they have been collected or issued.

Statements in records.

In some instances, this kind of evidence is supposed to derive superior weight from the circumstance of it's being a record. The evidence, however, is not on that account incontrovertible. A record is conclusive as to all matters passing under the inspection of the proper officers, whose duty it is to draw up the record, but it is not conclusive, except upon the principle of *re judicata*, as to other matters recited or alleged in the record to be true.

Act of Parliament.

The most authoritative species of evidence of the nature under consideration, is that of Acts of Parliament; though it may be doubted, whether the facts recited in them are always in-

quired into with the same care that has been used in several other species of public investigations. It has been held, that the preamble of an Act of Parliament, reciting that certain outrages had been committed in parts of the kingdom, was admissible evidence for the purpose of proving an introductory averment in an information for a libel, that outrages of that description had existed. (1) Public Acts of Parliament, it was said, are binding upon every subject, the Judges are bound to take judicial notice of their contents; every subject is, in judgment of law, privy to the making of them, and supposed to know them; the passing of an Act of Parliament is a public proceeding in all it's stages, and when the act is passed, it is, in the contemplation of law, the act of the whole body of the kingdom. The Court of King's Bench, for these reasons, were of opinion, that the preamble in question had been properly admitted in evidence.

Recital.

A private Act of Parliament, and private in it's nature, is not admissible in evidence as against strangers, though it contain a clause declaring that it shall be deemed and taken to be a public act, and judicially taken notice of without being specially pleaded. Such a clause relates to the forms of pleading and does not vary the nature and operation of the act. (2) A preamble therefore in a private act, reciting certain facts, is not proof of those facts as against a stranger or third party.

Private act.

A resolution of either House of Parliament has been considered not to be evidence of the truth of the facts there affirmed. In the case of Titus Oates, who was charged with having committed perjury on the trial of persons suspected of the Popish Plot, a resolution in the journals of the House of Commons, asserting the existence of the plot, was not allowed to be evidence of that fact. (3) But an address of the Lords to the king, and the king's answer, have been admitted as evidence of an

Parliamentary resolution.

(1) Rex *v.* Sutton, 4 M. & S. 532. See Rex *v.* De Berenger, 3 M. & S. 67, recital of the existence of a war.

(2) Brett *v.* Beales, 1 Mood. & Malk. 421, 5.

(3) 4 St. Tr. 39; 10 Howell, 1165, 1167.

averment in an information, that certain differences had existed between the king of England and the king of Spain. (1)

Journals of Parliament.

The proceedings of the Lords and Commons, which are not Acts of Parliament, are properly evidenced by their Journals. These are the documents peculiarly appropriated to the purpose of preserving the memory of such proceedings, which do not appear capable of other authentic or satisfactory proof. The journals of the House of Lords, indeed, are sometimes in the nature of a record of judicial proceedings. Thus, an entry in the journals of the House of Lords, stating that a judgment below had been reversed, is the proper record of the fact of reversal. (2) But the journals of the House of Lords, without reference to their judicial character, as well as those of the House of Commons, are evidence of public transactions which have taken place in either house, and of which it is the duty of the officers of the house to preserve a faithful memorial. Thus, the journals have been admitted to prove an address from the House of Lords to the king, and the answer of the king. (3)

Proclamation.

Statements of facts in acts of state, emanating from the crown, have credit attached to them in Courts of Justice. Thus, in the case of the *King* v. *Sutton*, (4) before cited, the Court of King's Bench determined, that the king's proclamation (which recited that it had been represented, that certain outrages had been committed in different parts of certain counties, and offered a reward for the discovery and apprehension of offenders) was admissible in evidence, as proof of an introductory averment in an information for a libel, that acts of outrages of that particular description had been committed in those parts of the country.

Gazettes.

The public acts of government, and acts by the king in his political capacity, are commonly announced in the Gazette

(1) See Franklin's case, 17 Howell, 637; 9 St. Tr. 259, cited by Buller, J., in Rex *v.* Holt, 5 T. R. 415.

(2) Jones *v.* Randall, Cowp. 17.

(3) Rex *v.* Franklin, 17 Howell, 637.

(4) 4 M. & S. 532.

Evidence of acts of the government.

published by the authority of the crown. Of such acts announced to the public in the Gazette, the Gazette is admitted, in courts of justice, to be good evidence. It has been held, that proclamations for reprisals, for a public peace, or for the performance of quarantine, may be proved by the Gazette.(1) A Gazette in which it was stated, that certain addresses had been presented to the king, has been judged to be proper evidence to prove an averment of that fact in an information for a libel; (2) "for they are addresses," said Lord Kenyon, "of different bodies of the king's subjects, received by the king in his public capacity, and they thus become acts of state."

In some instances in which Gazettes are evidence of public transactions, it may be thought that the announcement in the Gazette was the fact itself to be proved; and generally the proof, by primary evidence, of the facts announced in the Gazette would be attended with much inconvenience, whilst the danger arising from accidental errors in the Gazette is not very considerable, and it is to be remembered, that intentionally to publish, especially in the royal Gazette, anything as emanating from royal authority, with knowledge that it did not so emanate, would be a misdemeanor.

Not evidence of matters of private interest.

But Gazettes are not evidence of private titles or private interests, which have no reference to the affairs of government, —as a presentation, or a grant by the king to an individual; (3) nor is a Gazette evidence to prove an appointment to a commission in the army. (4)

Notices relating to bankruptcies are frequently inserted in

(1) Rex *v.* Holt, 5 T. R. 443. Atty. Gen. *v.* Theakstone, 8 Price, 89. Quelch's case, 8 St. Tr. 212. Dupays *v.* Shepherd, Rep. temp. Holt, 296. Gen. Picton's case, 30 Howell, 493, in which case the articles of capitulation for the surrender of an island were proved by the Gazette.—To ascertain the date of a declaration of war, the declaration from the ambassador of the court abroad transmitted by him to the Secretary of State's office, is evidence; and public notoriety has been held sufficient evidence of a war; Foster's Disc. ch. 2, sect. 12. 11 Ves. 292. Thellusson *v.* Cosling, 4 Esp. 266. Case of Eliza Ann, 1 Dods. Ad. Rep. 244.

(2) Rex *v.* Holt, 5 T. R. 443.

(3) See Rex *v.* Holt, 5 T. R. 443.

(4) Kirwan *v.* Cockburn, 5 Esp. 233. Rex *v.* Gardner, 2 Camp. 513.

the Gazette, but it seems that, unless the party who is to be affected by the notice, be proved to be in the habit of reading the Gazette, such evidence will be of little avail, though it is admissible. (1)

Upon the same principles on which Gazettes are receivable in evidence, copies of written acts of state, purporting to be printed by the king's printer, are evidence of those acts. Thus, articles of war, purporting to be printed by the king's printer, are allowed to be evidence of such articles. (2)

Articles of war.

All public acts done by the crown, affecting the revenues and possessions of the crown, are considered as public evidence. The same rule applies to the acts of the king when there is no Duke of Cornwall, or of the Duke of Cornwall when there is one, affecting the revenues or possessions of the duchy; as, for example, an ancient caption or seisin to the use of the Duke of Cornwall, or the enrolment of the counterpart of a lease granted by the Duke. (3) In like manner, an enrolment of a lease of lands belonging to the crown, in right of the Duchy of Lancaster, is admissible, on account of the interest of the crown in the duchy. (4)

Crown conveyances.

The king's sign manual, authorizing the release of a prisoner, is evidence to prove the legality of his being at large. (5) A license from the Pope, granted in the reign of Edward 2, has been adjudged to be evidence of an impropriation, the Pope being formerly the supreme head of the church, and having the

King's sign manual.

Pope's license.

(1) See Graham *v.* Hope, Peake, 154. Godfrey *v.* Macauley, *ib.* 155, 1 Esp. 371, S. C. Newsome *v.* Coles, 2 Camp. 617. Gorham *v.* Thompson, Peake, 42. Leeson *v.* Holt, 1 Stark. Ca. 186. Munn *v.* Baker, 2 Stark. Ca. 255.—Knowledge of the blockade of a port is not to be necessarily presumed from the notification of such blockade in the Gazette, but is a question of fact for the jury, Harratt *v.* Wise, 9 B. & C. 712. See *ib.* various points as to notice of blockade.

(2) Rex *v.* Withers, cited 5 T. R. 446. As to the court taking judicial notice of articles of war, see Bradley *v.* Arthur, 4 B. & C. 304. As to the certificate of the Secretary at War, see Lloyd *v.* Wooddall, 1 W. Bl. 29.

(3) Rowe *v.* Brenton, 8 B. & C. 765.

(4) Kinnersly *v.* Orpe, Doug. 56.

(5) Miller's case, Leach, 69.

disposition of all spiritual benefices. (1) For the same reason,

Bull. a Pope's Bull was formerly admitted in evidence, to shew that monastery lands had a special exemption from the payment of tithes. (2)

Official registers. The next species of public writings, to be considered, are those in which official persons are required to make a memorandum of particular transactions occurring in their presence. The obligation to make such a memorandum is sometimes imposed by statute, and sometimes is incident to the course of public business.

Parish registers. Parish Registers began to be kept in the thirtieth year of Henry 8. The practice is said to have been adopted at the instigation of Lord Cromwell, who was at that time Vicar General, and in whose court all wills of property, exceeding the amount of 200*l*., were required to be proved. It served his purpose, therefore, to set on foot a registry. The keeping of parish registers was enforced by injunctions of Edward 6, and Queen Elizabeth, and also by one of the ecclesiastical canons, A.D., 1603. The practice first received the sanction of an act of Parliament, by the statute 6 & 7 Wm. 3, c. 6. Particular provisions were afterwards made respecting parish registers, by the Marriage Act, and other statutes. (3)

Parochial registers are considered evidence, that the transactions, required to be recorded in them, occurred on the days specified in the register. Thus, a register has been received as evidence between strangers, of the time of marriage. (4)

(1) Cope *v.* Bedford, Palm. 427.

(2) Lord Clanrickard's case, Palm. 37. See Brett *v.* Ward, Winch. 70, as to copy of a Bull.

(3) See the Attorney General's Report, Bell's Huntingdon Peerage, 332, Burn's Ecc. Law, 390. See the Marriage Act, 26 Geo. 2, c. 33; stat. 52 Geo. 3, c. 146; and the recent statute, 6 & 7 Wm. 4, c. 86, some of the provisions of which are stated *infra*. By this act the st. 52 Geo. 3, c. 146, is repealed.

(4) Doe d. Wollaston *v.* Barnes, 1 Mo. & R. 386. A minister's entry of a baptism, which took place before he became minister, and of which he received information from the parish clerk, is not admissible; nor is the private memorandum made by the clerk who was present at the baptism, Doe *v.* Bray, 8 B. & C. 813.

Such registers are not, in general, evidence of any fact not required to be recorded in them, and which did not occur in the presence of the registering officer. Thus, an entry in a register of christenings, stating the year of the birth, is not evidence in support of a plea of infancy. (1)

The register, used for it's proper purpose, may constitute part of a chain of evidence, to prove another fact, as birth within a particular parish,—where, for example, it is shewn by evidence *dehors*, that the child was extremely young when baptised; but the register, of itself does not prove the fact of birth in the parish. (2) It is obvious that evidence *dehors* the register must in every case be necessary, in order to identify the parties. (3)

Legal registers.

Various questions have arisen as to what can be properly read as a register, so as to afford evidence of the truth of facts therein stated. It is settled, that the books of Fleet marriages cannot be read as registers, because they were not compiled under public authority. (4) A copy of a register of baptism, kept in the Island of Guernsey, is not admissible in our courts of law; (5) nor is the copy of a register of a foreign chapel admitted here as a proof a marriage abroad. (6) The copy of a register of a Dissenting chapel has been adjudged

(1) Wihen *v.* Law, 3 Stark. Ca. 63. Burghart *v.* Angerstein, 6 C. & P. 690. Rex *v.* Clapham, 4 C. & P. 29. Rex *v.* North Petherton, 5 B. & C. 508. Burghart *v.* Angerstein, 6 C. & P. 690. Duins *v.* Donovan, 3 Hagg. Ecc. 301.

(2) Rex *v.* North Petherton, 5 B. & C. 508.

(3) Birt *v.* Barlow, Doug. 170, as to the various ways in which the identity or the parties to the register may be proved. Draycott *v.* Draycott, 12 Vin. Ab. 89, pl. 11. Coventry's Conv. Ev. p. 278; Martin's Introduction to Conveyancing, p. 192. Bain *v.* Mason, 1 C. & P. 202.

(4) Read *v.* Passer, 1 Esp. 213. Lloyd *v.* Passingham, 16 Ves. 59. Peake, 233; 1 Esp. 136, 197. Doe *v.* Catacre, 6 C. & P. 578. Most of the Fleet books were purchased by Government in 1821, and deposited in the Consistory Court of London; they contain original entries of marriages in the Fleet prison from 1686 to 1754. See particulars respecting Fleet marriages and Guernsey marriages, in Burn's Fleet Reg. The books have in one or two cases been received in evidence, Lawrence *v.* Dixon, Peake, 136; and see Read *v.* Passer, 1 Esp. 215; Peake, 231.

(5) Huet *v.* Le Mesurier, 1 Cox. Ca. 275.

(6) Leader *v.* Barry, 1 Esp. 353.

not to be admissible as evidence of a marriage;(1) and the original register itself would not have been admissible.

Informal registers.

With respect to imperfect or informal registers,—where it appeared that the practice was to make entries in the general parish register once in three months, out of a day-book, in which the entries were made immediately after the christening, or on the same morning; and in the day-book, after a particular entry, the letters B. B. (signifying base-born) were inserted, which were omitted in the register; it was held, that evidence of the day-book could not be received, as there could not regularly be two parish registers. (2)

Effect of register.

It may be observed, that the entry in the register is not essential to the validity of a marriage, so that if it has not been expressed in the regular form, the only consequence will be, that it cannot be admitted as evidence of the marriage, which must, therefore, be established by some other medium of proof. Even upon an indictment for bigamy, where it is necessary to give evidence of an actual marriage, it is sufficient to prove the fact by a person present at the time, without giving any evidence of the registration. (3) In order to prove that the parties described in the register are the same parties whose marriage is in question, it is unnecessary to call either of the subscribing witnesses to the register. (4)

St. 6 & 7 Wm. 4, c. 86.

The acknowledged insufficiency of parochial registers for the purpose of proving pedigrees and other national objects of importance, combined with the fact that they had been often

(1) Newham *v.* Raithby, 1 Phillimore, 315. *Ex parte* Taylor, 1 J. & W. 483. Whittuck *v.* Waters, 4 C. & P. 375. But now see the recent act, 3 & 4 Vict. c. 92, *infra*.—An arrangement was made by Lord Stowell and the Bishop of London, that persons residing abroad might transmit to this country certificates of baptisms, marriages, and burials, for the purpose of being deposited in the registry of the diocese of London, see Paroch. Reg. Rep. p. 46, Mr. Shephard's Evidence.—On the registers of Dissenters, see Paroch. Reg. Rep. p. 79, 112.—As to Quakers' registers, and their birth notes and burial notes, see Paroch. Reg. Rep. p. 72.—As to Jewish registers, see *ib.* p. 23, 24.

(2) May *v.* May, 2 Str. 1073, and see Lee *v.* Meecock, 5 Esp. 177. Walker *v.* Wingfield, 18 Ves. 443.

(3) Rex *v.* Allison, R. & R., Cr. Ca. 109.

(4) B. N. P. 27. Birt *v.* Barlow, Doug. 172.

falsified, stolen, burnt, inaccurately transcribed, or carelessly preserved, rendered it highly expedient that a national registration of births, marriages, and deaths, should be established; and accordingly, the statute of 6th & 7th Wm. 4, c. 86, (1) was passed for this purpose, entitled "An Act for Registering Births, Deaths, and Marriages in England." 6 & 7 Wm. 4, c. 86.

The 35th section of this act directs the registrars, registering officers, and secretary, who have the keeping of any register-book of births, deaths, or marriages, to allow searches to be made in the registers, and to give a copy certified under his hand of any entries. The 37th section directs the Registrar General to cause indexes of all certified copies of the registers to be kept in the General Register Office, and to give a certified copy of any entries in such certified copies of the registers. The 38th section directs the Registrar General to have an office seal made, and to cause all certified copies of entries given in the office, to be sealed with it; and then it enacts, that "all certified copies of entries, purporting to be sealed or stamped with the seal of the said register office, shall be received as evidence of the birth, death, or marriage, to which the same relates, without any further or other proof of such entry; and no certified copy, purporting to be given in the said office shall be of any force or effect which is not sealed or stamped as aforesaid. There is a provision in the act, (section 49,) that nothing therein contained shall affect the registration of baptisms or burials as now by law established. Sect. 35. Sect. 37. Sect. 38. Sect. 49.

Non-parochial registers.

An act has lately been passed, (3 & 4 Vict. c. 92), for enabling courts of justice to admit non-parochial registers as evidence of births or baptisms, marriages, and deaths or burials. After referring to a report of commissioners, who had been appointed to make inquiry respecting non-parochial registers, the act provides that certain registers deposited in the office of the Registrar General,—or extracts of entries in these registers, duly certified and described by the Registrar General, shall be receivable in evidence on the trial of any cause, reasonable

(1) This act repeals 2 Geo. 3, c. 146; and 4 Geo. 4, c. 76.

notice having been previously given to the opposite party of the intention to use such evidence. In all criminal cases, the original registers are required to be produced, and extracts of entries are not receivable. The act also authorizes the Judges of the Courts of Common Law and of Equity, to make rules for regulating the mode of reception of the registers in evidence, and as to some other particulars; which regulations are to be laid before Parliament, and to take effect at an appointed time afterwards: but the making of such regulations is not a condition precedent to the reception of the registers as evidence, as the clauses relative to their reception would come into force immediately on the passing of the act.

Ship registers.

The effect of the registers of ships is of a different nature from that of parish registers. To give them the effect of proving the facts stated in them, would enable parties to make evidence for themselves; the entry not being of any transaction, of which the public officer, who makes the entry, is conusant. The entry, therefore, or the absence of it, is a fact to be proved, and does not furnish evidence of any other fact. Thus, the register or certificate is not *primâ facie* evidence of title in favour of the owner; nor against him, unless proved to have been made with his consent, or to have been recognised by him. But the register and certificate of register, are conclusive evidence of want of title against those who are not named in the register. (1)

Public books.

Another species of public documentary evidence consists of books, kept under the authority of particular statutes, or in public offices, in the course of official duty. It has been held, that the register of the Navy Office, with proof of the usage to

(1) Pirie *v.* Anderson, 4 Taunt. 652; and see Tinkler *v.* Walpole, 14 East, 226. Flower *v.* Young, 3 Camp. 240. Teed *v.* Martin, 4 Camp. 90. Robertson *v.* French, 4 East, 136. Hubbard *v.* Johnstone, 3 Taunt. 177. Thomas *v.* Foyle, 5 Esp. 88. Camden *v.* Anderson, 5 T. R. 709. Marsh *v.* Robinson, 4 Esp. 98.—Upon the same principle, an entry in books kept in the office for licensing stage-coaches, is not proof that persons named in a license are owners of a coach, Strother *v.* Willan, 4 Camp. 24. See also Ellis *v.* Watson, 2 Stark. Ca. 453, 478.—A British register, describing a vessel to be British built, is not evidence of that fact. Reusse *v.* Myers, 3 Camp. 475.

return all deaths happening at sea, is evidence of the death of a sailor. (1) The Bank books are admissible, to prove the transfer of stock. (2) The copy of an official paper, containing the number of passengers on board a vessel, made by the captain in pursuance of an act of Parliament, and deposited at the India House, has been admitted to prove the number and description of persons as stated. (3) The book at Lloyds' is evidence of the capture of a ship. (4) The book from the Master's Office, with the production of the roll of attornies, is evidence to prove a person an attorney of the court. (5) The books of the King's Bench and Fleet prisons are admissible to prove the dates of the commitment and discharge of prisoners; but they are not admissible to prove the cause of commitment. (6) Entries, in the books of a clerk of the peace, of deputations, many years since granted to gamekeepers by the lord of a manor, are evidence, without the production of the deputations themselves, to shew that the party mentioned exercised the right of appointing gamekeepers, by applying to the clerk of the peace to get certificates. (7) A copy from the Custom House of the searchers' report of a cargo kept there is evidence. (8) The poll-books at an election for members of Parliament, are evidence in a penal action for bribery. (9)

(1) Wallace *v.* Cook, 5 Esp. 117. Rex *v.* Fitzgerald, 1 Leach, 20. 2 East, P. C. 953. Rex *v.* Rhodes, 1 Leach, 24.

(2) Breton *v.* Cope, Peake, 30.

(3) Richardson *v.* Mellish, 2 Bing. 229; and see Lacon *v.* Hooper, 1 Esp. 246.

(4) Abel *v.* Potts, 3 Esp. 242. It is not notice of a loss to any person in particular, but coupled with other evidence, may go to the jury. Lloyd's Register is not admissible to prove a ship copper-fastened; Freeman *v.* Baker, 5 C. & P. 475. Further, as to this book, see Ker *v.* Shedden, 4 C. & P. 531, n. a.; Bain *v.* Case, 3 C. & P. 496.

(5) See Jones *v.* Stevens, 11 Price, 235. Rex *v.* Crossley, 2 Esp. 526.

(6) Salte *v.* Thomas, 3 B. & P. 188. Rex *v.* Aickles, 1 Leach, 391.

(7) Hunt *v.* Andrews, 3 B. & A. 341. Rushworth *v.* Craven, M'Cl. & Y. 417, as to the effect of deputations.

(8) Johnson *v.* Ward, 6 Esp. 48. See as to Custom-house books, Tomkins *v.* Atty. Gen. 1 Dow. 404. The Custom-house and Excise books are frequently used as affording *primâ facie* evidence against parties by way of admission, Ellis *v.* Watson, 2 Stark. Ca. 453. Rex *v.* Grimwood, 1 Price, 369.

(9) Mead *v.* Robinson, Willes, 422. Rex *v.* Hughes, cited *ib.* Rex *v.* Davis, 2 Str. 1048. For other books, see Henry *v.* Leigh, 3 Camp. 499. Bankruptcy books, D'Israeli *v.* Jowet, 1 Esp. 427. Log-book of man-of-war and official letter, to prove the parting of

Parish books.

Parish books are directed to be duly kept by the statute 17 Geo. 2, c. 38, s. 14, which enacts that true copies of all rates and assessments, made for the relief of the poor, shall be entered in a book, and attested by the churchwardens and overseers, and carefully preserved.

2 Geo. 3, c. 22.

The two statutes of 2 Geo. 3, c. 22, and 42 Geo. 3, c. 46, provide for the keeping of certain books by the parish officers.

Register of pauper children.

By the 2 Geo. 3, c. 22, a register is required to be kept in every parish within the bills of mortality, in which are to be registered all infants under the age of four years, which are in the workhouse, hospital, or other place provided for the maintenance of the poor, or under the care of the churchwardens or overseers of the poor, with the times when they were received, their names, age, and other description relating to them as far as can be traced. In case any infant is received into the workhouse before it is baptised, or known to be baptised, due care is to be taken to baptise the same within fourteen days after its reception, so that the Christian and the true surname, if known,—and if not known, a surname to be given by the churchwardens and overseers of the poor, or any one of them,—may be regularly entered in the said book; and the name and surname of such infant are also to be registered in the parish register of the parish. Copies of the registers are to be laid monthly before the vestry, and at the end of every year, a copy is to be deposited in the vestry room, the originals remaining with the parish books, in the custody of the parish officers. And lastly, copies signed by five of the vestry, churchwardens, overseers, vestry clerk, and masters of the workhouse, are to be delivered yearly to the clerk of the company of parish clerks, who is to cause them to be bound up in alphabetical order, and make an annual abstract thereof; and the register and abstract are to remain in the custody of the masters, wardens, and court of assistants of the company of parish clerks.

a vessel from convoy, Watson *v.* King, 4 Camp. 272; and see Rundle *v.* Beaumont, 4 Bing. 537. Entries by Commissioners of Paving in book directed to be kept by act of parliament; Trustees of British Museum *v.* Furnis, 5 C. & P. 460.

By the 42 Geo. 3, c. 46, overseers of the poor in every parish, are required to keep a book containing the name, sex, and age of every parish apprentice; the names and residence of their parents, and other particulars. The registers so kept are to be open to public inspection, and are declared to be sufficient evidence of the existence of such indentures, and of the several particulars respecting them specified in the registers, in case it shall be satisfactorily proved that the indentures are lost or destroyed.

42 Geo. 3, c. 46.

Register of parish apprentices.

An entry in a vestry book, stating that a certain individual was duly elected treasurer of a parish, at a vestry duly held in pursuance of notice, is evidence of such election. (1) In an action for disturbing the plaintiff in the enjoyment of a pew claimed in right of his messuage, an old entry in a vestry-book signed by the churchwardens, stating repairs of the pew by a former owner of the messuage under whom the plaintiff claimed, is evidence to prove the plaintiff's title, as being made by the churchwardens within the scope of their official authority. (2)

Vestry book.

In a late case, old entries in the vestry books of a parish were held not to be evidence for the purpose of shewing the right of election to a parish office to be in the parishioners concurrently with the rector, and not in the rector alone, on the ground, that it did not appear that the incumbent was present at the meeting they related to. But extracts from the register of the bishop of the diocese were received in evidence to prove similar appointments, as were also several entries of vestry meetings at which the rector was present. (3)

Books of parish rates have occasionally been used in evi-

Rate books.

(1) Rex *v.* Martin, 2 Camp. 100.

(2) Price *v.* Littlewood, 3 Camp. 288. Entries made by a churchwarden in a book in which he did not charge himself, apparently not made in the discharge of his official duty, were rejected; Cooke *v.* Banks, 2 C. & P. 478. An entry in a book kept in a parish chest is not evidence, for the parish, of a certificate; Rex *v.* Debenham, 2 B. & A. 185. As to parish books, see further Goss *v.* Watlington, 3 B. & B. 132.

(3) Hartley *v.* Cook, 5 C. & P. 441. Papers handed over to the present incumbent by the representatives of the deceased incumbent were received as parish papers, in Earl *v.* Lewis, 4 Esp. 1.

dence for the purpose of proving the existence and residence of parishioners at particular periods. Thus, in the case of the *Zouch Peerage*, the book of rates and loans of the parish of Hanbury was produced, in order to prove the existence of a person, a widow, and her residence there in the year 1649, which was done by the entry of the payment of her subscription to a parish loan in that year. (1)

Land tax assessments.

It seems that land-tax assessments are evidence to prove seisin, on the ground that it is the duty of a public officer to ascertain the occupier, and to charge him. Connected with other evidence, (as receipts in a steward's book,) such assessments have been considered to be entitled to weight. (2) But they were held to be no evidence of seisin, in a case where the name of a former occupier had been incorrectly inserted, and no alteration had been made subsequently, and where it was the custom to continue the name of an ancestor on the assessment books, so long as the property continued in the same family. (3)

Bishop's books.

A bishop's register is evidence of business transacted at a visitation; and where the visitation was in the year 1606, and the entry related to the admission of a curate of a particular church in the year 1591, according to a particular cus-

(1) Printed Evidence, 162. Such books are more clearly admissible where they contain an entry in which a person charges himself with the receipt of a rate or other money; as in the Chandos Peerage case, p. 97, where the churchwardens' account books contained an entry of money received at a burial by the parish clerk, to be accounted for to the church-wardens.

(2) Doe d. Strode *v.* Seaton, 2 Ad. & E. 182. Where the receiver charges himself with the receipt, the land-tax assessment is evidence, upon a principle before considered, in treating of hearsay evidence. Doe d. Smith *v.* Cartwright, R. & M. 62. See Rex *v.* Commissioners of Land Tax, 2 T. R. 234.

(3) Doe d. Stansbury *v.* Arkwright, 2 Ad. & E. 182. n. See this case explained by Patteson, J., in Doe d. Strode *v.* Seaton, 2 Ad. & E. 178. The two first entries were in the name of T. S., who was dead at the time of their dates, subsequently they were in the name of Mr. S. The seisin of S. S. devisee of T. S. was in question. The assessments were received but were thought to be no evidence of the title. The Chief Justice observed, that it would be indifferent to the collectors from whom they got the amount of the tax, so that it was raised.

tom, the register was held to be evidence of such custom. (1) On a question, whether a particular district was part of a parish, it was held, that a book produced from the chapter-house of the Dean and Chapter of Sarum, purporting to contain copies of leases granted by the dean and chapter, and which book was open to the tenants of manors within which the lands were situate, was evidence as a public book, on a question of reputation, without any proof that possession accompanied the particular leases. (2)

Ministers' accounts.

Ministers' accounts of monasteries frequently furnish important evidence in suits for tithes, and upon questions concerning endowments, as exhibiting a detailed description, made out from year to year, of the parcels and value of property which had belonged to the monasteries, and had become vested in the crown. These accounts have been relied on, even in preference to the Ecclesiastical Surveys. The ministers derived their authority under the statute 27 Hen. 8, c. 27, for the creation of the Court of Augmentations. A commission and instructions were prepared in obedience to this statute; but no official report of the commissioners appears to be extant. The accounts for different years are frequently mere transcripts of each other, and occasionally they will be found to make returns of property belonging to the monasteries, long after it has been parted with by the crown.

Terrier.

Another species of public documentary evidence is that of terriers. By the ecclesiastical canons, an inquiry is directed to be made from time to time of the temporal rights of the clergyman in every parish, and to be returned into the registry of the bishop. This return is denominated a terrier.

(1) Arnold *v.* Bishop of Bath and Wells, 5 Bing. 316, and see Bullen *v.* Michel, 2 Price, 399; Bishop of Meath *v.* Belfied, 1 Wils. 215.

(2) Coombs *v.* Coether, &c., M. & M. 398. The same kind of evidence was received from the office of the Bishop of Durham, in Humble *v.* Hunt, Holt's N. P. C. 601. A bishop's endowment under his seal is evidence, Potts *v.* Durant, 4 Gwill. 1453. As to Bp. Wells's book, see Tucker *v.* Wilkins, 4 Sim. 262. Further, as to Bishop's books, Leonard *v.* Franklin, 4 Pr. 264. Halse *v.* Eyston, 4 Pr. 417. Hebden *v.* Freeman, 4 Pr. 420.

The principle, on which terriers appear to be receivable in evidence, has been considered not so much with reference to the official character of the statements which they contain, as to the fact that they are admissions by persons who stood in a degree of privity with the parties, between whom they are sought to be used. Accordingly, a terrier is never admitted for a parson, unless it be signed by a churchwarden, or, if the churchwardens are nominated by him, by some substantial inhabitants of the parish. (1) This is not altogether on the ground of the terrier being imperfect; for it is not necessary, in order to make a terrier admissible in evidence for the parson, that it should have been made a perfectly formal instrument by the authentication of his predecessor's signature; indeed it has been said, that the absence of such signature makes the terrier stronger evidence in favour of a successor. (2) It seems that a modus cannot be established by evidence of terriers alone, without some evidence of payments; unless, perhaps, when the terriers have been made in the time of the existing parson. (3) Terriers have not always been confined, as to their effect, to controversies affecting the landowners on the one side and the parson on the other. They are admissible in suits between a vicar and impropriator. (4)

Ancient survey. On a question as to the boundary of a manor, an ancient document produced from the office of the Duchy of Lancaster, bearing date at a time when the manor belonged to the Duchy, and purporting to be a survey of the manor, as taken by a

(1) B. N. P. 248. Earl *v.* Lewis, 4 Esp. 3. A terrier not signed by the owner of a particular farm is evidence against a succeeding owner on the subject of a modus claimed for the farm; Mytton *v.* Harris, 3 Price, 19.

(2) Illingworth *v.* Leigh, 4 Gwill. 1615; Potts *v.* Durant, 3 Anstr. 796. An imperfect terrier may sometimes be used by way of admission; Maddison *v.* Nuttal, 6 Bing. 226. As to imperfect and irregular terriers, see Atkins *v.* Drake, M'Clel. & Y. 214; Bertie *v.* Beaumont, 2 Price, 310.

(3) Lake *v.* Skinner, 1 J. & W. 9; see further on the effect of terriers, Atkins *v.* Drake, M'Clel. & Y. 214; Stuart *v.* Greenhall, 9 Price, 113, where the two earliest terriers negatived a modus, which the subsequent terriers confirmed. Great weight was given to the evidence of terriers in Drake *v.* Smyth, 5 Price, 369.

(4) Illingworth *v.* Leigh, 4 Gwill. 1615; Potts *v.* Durant, 3 Anst. 796, the terrier was imperfect, not being signed by the vicar. seems to have been treated as evidence of reputation.

person therein named, under authority of letters of deputation to him as deputy of the Surveyor General of the Duchy, is not admissible in evidence, as an ancient document of a public office with which the manor was formerly connected, nor is it admissible as furnishing evidence of reputation: the document not being proved, nor appearing on it's face, to have been made by any competent authority for ascertaining the boundaries of the manor. (1) In support of the admissibility of this document, the case of *Rowe* v. *Brenton*, (2) was much pressed, in which an ancient document purporting to be an extent of a manor by the steward of the King's land, had been held to be admissible, on a question as to the right of *minerals* claimed by certain tenants of manorial lands of the duchy. But the court determined that this survey of *boundaries* was not within the scope and authority of the statute, *extenta manerii*, (4 Edw. 1, stat. 1), under which statute the extent, produced in the case of *Rowe* v. *Brenton*, might properly and regularly have been made, and as such was admissible.

Post-office marks. Post-office marks, in town or country, proved to be such, are evidence that the letters, on which they are impressed, were in the office, to which those marks apply, at the dates which the marks specify. (3) An almanac has been admitted good evidence, to prove that a particular day was Sunday. (4) Almanac.

Manor books. The rolls of manor-courts may be considered as the title deeds of copyhold property, and, for the purpose of proving title to copyhold estates, are receivable against all persons upon the same principle as actual conveyances. The rolls sometimes also afford evidence of copyhold customs, either by way of general statement of a custom, or as containing entries of acts done in the copyhold court, from which the existence

(1) Evans *v.* Taylor, 7 Ad. & Ell. 617. The persons who signed were described as "jurors at the Court of Survey," and it was stated, that they were examined and did present, &c. The boundaries of the manor were set out in the survey, together with other particulars, as tenants, rents, &c.

(2) 8 B. & C. 747.

(3) Plumer's case, R. & R. Cr. Ca. 264. See Fletcher *v.* Braddyll, 3 Stark. Ca. 64. Arcangelo *v.* Thompson, 2 Camph. 623. Cotton *v.* James, M. & M. 276.

(4) Page *v.* Faucet, Cro. Eliz. 227.

of the custom may be inferred; they also sometimes afford evidence of the boundaries of the manor, and of the boundaries of particular estates situate within it. To prove facts of this description, the manor rolls are evidence between the lord and his copyholders, or between different copyholders. As regards strangers to the manor, it seems that entries in the rolls can only be received on the footing of admissions, or as hearsay evidence upon matters of general right. (1)

To prove a surrender of a copyhold to the use of a will, the steward of a manor produced a book of the records of the manor, in which was a record of an admittance, reciting a surrender of the copyhold: he stated that he had not been able to find the surrender itself, except as there recited, that the old surrenders were kept in an irregular manner, and that the originals were very often not to be found; but that he had not been able to discover any other instance in which there was not either the original surrender, or a record of the surrender in the court rolls. This entry in the manor books was adjudged to be good evidence of a surrender. (2)

Corporation books.

Corporation books are evidence, by way of admissions, between members of the corporation. They are receivable also to prove entries of a public nature. (3) They sometimes contain the only memorial of acts of the corporation,—in which case the entry is the thing itself to be proved. They occasionally contain hearsay evidence relative to matters concerning which evidence of reputation is admissible. They cannot, in general, be adduced by a corporation, in support of it's own rights or privileges, against strangers. (4)

(1) B. N. P. 247. Denn *v.* Spray, 1 T. R. 466. Roe *v.* Parker, 5 T. R. 26. Doe *v.* Askew, 10 East, 520. Chapman *v.* Cowlan, 13 East, 10. Doe *v.* Askew, 10 East, 520. Roe *v.* Jeffery, 2 M. & S. 92. Richards *v.* Basset, 10 B. & C. 657.

(2) R. *v.* Thrucross, 1 A. & E. 126.

(3) By Lord Tenterden, Ch. J., in Marriage *v.* Lawrence, 3 B. & A. 144. Case of Gibbon upon a *quo warranto*, 17 Howell, 810, 854.

(4) Mayor of London *v.* Mayor of Lynn, 1 H. Bl. 214, n. Rex *v.* Mothersell, 1 Str. 92. Marriage *v.* Lawrence, 3 B. & A. 142. Brett *v.* Beales, M. & M. 429. The books of a corporation aggregate are admissible on a question of tithes in the same manner as those of a corporation sole; Short *v.* Lee, 2 J. & W. 470.

"A general history may be admitted," says Mr. Justice Buller, "to prove a matter relating to the kingdom at large."(1) Thus, in the case of *St. Katharine's Hospital*, Lord Hale allowed Speed's Chronicles to be evidence of the death of Isabel, Queen Dowager of Edward the Second.(2) So, chronicles have been admitted to prove that, at a certain period, King Philip had not assumed the style given him in a particular deed.(3) And the same book was admitted as evidence of the death of Edward the Second's queen, in the case of *Lord Brounker* v. *Sir R. Atkyns*, (4) where Chief Justice Pemberton said, he knew not what better proof they could have. Histories, however, it is admitted, cannot be received as proof of a private right or particular custom.(5) Camden's Britannia was therefore rejected on an issue, whether, by the custom of Droitwich, salt-pits could be sunk in any part of the town, or only in a certain place. And in another case, where the question was, whether a particular abbey was of the inferior order, Dugdale's Monasticon was refused, because the original records might be had in the augmentation office.(6) So, it has been determined, that Dugdale's Baronage is not evidence to prove a descent.(7) Histories.

A question arose on the impeachment of Warren Hastings, as to the competency of proving a national custom by a general history. The managers for the commons wished to prove the customs in Hindostan, respecting the treatment of women of rank; and, for this purpose, proposed to read extracts from the History of the Growth and Decay of the Ottoman Empire, by Prince Demetrius Cantemir:(8) the counsel for the de-

(1) Bull. N. P. 248.

(2) 1 Vent. 151. Stainer *v.* Burgesses of Droitwich, 1 Salk. 282. Skin. 623, S. C.

(3) Neale *v.* Fry, cited 1 Salk. 282. B. N. P. 249.

(4) Skin. 14.

(5) Bull. N. P. 248. Cockman *v.* Mather, 1 Barnardist. 14.

(6) 1 Salk. 282. Skin. 623.

(7) Piercey's case, 2 Jon. 164. A year-book is evidence to prove the course of the court, 1 Salk. 281. Bishop Wells' Liber de Ordinationibus Vicariorum has been received to prove an endowment; Tucker *v.* Wilkins, 4 Simons, 262.

(8) Extract from a report of the proceedings on the impeachment, in the possession of T. Jones Howell, Esq. The question occurred on the 22d of April, 1788. The point was referred to, by Lord Ellenborough, on the trial of Ge-

fendant objected, that it would be first necessary to lay some ground for the production of this evidence; at least, it should be shewn, that the laws and customs of Constantinople were the same as those of Hindostan; and even then, they said, it might admit of considerable doubt, whether such a history could be admitted in evidence. After argument on the part of the managers of the Commons, the House of Lords informed them, that if the passage, which it was proposed to produce from Cantemir's History, went to prove an universal custom of the Mahomedan religion, the managers might read it. Two extracts from the book were accordingly read.

Upon a question as to the boundaries of two parishes, where it was admitted, on both sides, that the boundaries of the parishes, and of the counties of Brecon and Glamorgan were conterminous, Nicholls's History of Breconshire was rejected. It was said, that the writer of that history probably had the same interest in enlarging the boundaries of the county as any other inhabitant of it, and that it was not like a general history of Wales. (1)

Notarial protest.

A notarial protest under seal is not evidence that a foreign bill of exchange has been presented for payment in England. (2) A protest, as to the presentment and non-acceptance in a foreign country, of a foreign bill of exchange, attested by a notary-public, is evidence of those facts, in an action upon the bill: this is a relaxation of the strict rule, from a principle of general convenience. (3)

Ship-protest.

A ship-protest is of itself only evidence to contradict the captain's testimony, and not to shew a variance between it and

neral Picton, See 30 Howell's State Trials, p. 492.

(1) Evans *v.* Getting, 6 C. & P. 586. See further, on the subject of histories as evidence, Lord Ellenborough's observations in Governor Picton's case, 30 Howell, 492. Chief Justice Jefferies, in Lady Ivy's case, refused to admit a printed history to show the date of the resignation of the Emperor Charles V., 10 Howell, 625.

(2) Chesmer *v.* Noyes, 4 Camp. 129.

(3) Willes, 550. Anon. 12 Mod. 345. As to foreign notarial copies, see Brown *v.* Thornton, 1 Nev. & P. 339.

the condemnation. (1) The mere production of a diploma of a doctor of physic, under seal of one of the universities, is not sufficient evidence to shew that the party named in the diploma is entitled to that degree. (2) The sound-list, containing the account of the arrival of ships, is not evidence of that fact. (3)

Diploma.

Sound list.

Certificates are made evidence by statute in several cases; as, for example, to prove a previous conviction for felony, or for uttering counterfeit money. (4) Certificates, upon matters of law mixed with fact, have sometimes been made the appropriate medium of proof, and conclusive evidence upon certain questions. (5) But, in general, a certificate of a mere matter of fact, not coupled with any matter of law, is not receivable in evidence. (6)

Certificates.

A certificate of the king, under his sign manual, has been admitted, in an old case, as evidence of a fact, in a suit on a promise of marriage; (7) the report states, that the certificate was allowed for proof, *without exception*. But it is laid down in Rolle's Abridgment, (8) "that the king, as it seems, cannot

By the crown.

(1) Christian *v.* Coombe, 2 Esp. 490. See 2 Evans's Pothier, 288.

(2) Moises *v.* Thornton, 8 T. R. 307.

(3) Roberts *v.* Eddington, 4 Esp. 88. — Documents transmitted by British Consuls, stating the arrival of vessels at particular ports, are not evidence, Roberts *v.* Eddington, 4 Esp. 88, and see Waldron *v.* Coombe, 3 Taunt. 162.— Entry of contracts for coals, under 47 Geo. 3, c. 68, not evidence against buyer, Brown *v.* Capel, M. & M. 374.—As to the effect of a shipping entry at the Custom-house, see Hughes *v.* Wilson, 1 Stark. Ca. 179.—Books of receiver of duties on coals, Weaver *v.* Prentice, 1 Esp. 369.—Entry in office for licensing stage-coaches, Strother *v.* Willan, 4 Camp. 24.—Returns of sales of corn, under 1 & 2 Geo. 4, c. 87, not conclusive. Woodley *v.* Brown, 2 Bing. 527.

(4) See 1 Russ. on Crimes, b. 2, ch. 36. Rex *v.* Watson, R. & R. 468.

(5) As to the certificates of bishops, see Omichund *v.* Barker, Willes, 549. By Lord Chief Justice De Grey, in Duchess of Kingston's case, 20 Howell, 339.

(6) Certificate of British Consul, *ex parte* Church, 1 D. & R. 324;— of Vice Consul, Waldron *v.* Coombe, 3 Taunt. 162; Roberts *v.* Eddington, 4 Esp. 88;—of British merchants, Rex *v.* Vyse, and Rex *v.* Spearpoint, Forrest, 35;—certificates in coal trade, Aldred *v.* Hallwell, 1 Stark. Ca. 117;—of Veterinary College, Sewell *v.* Corp, 1 C. & P. 392;—of agent at Lloyd's, Drake *v.* Marryat, 1 B. & C. 473.

(7) Abignye *v.* Clifton, Hob. Rep. 213. See 3 Woodeson, Lect. 275.

(8) 2 Roll. Ab. 686 (H). Art. 1, citing the case of Abignye *v.* Clifton, *contra.*

be witness in a cause, by letters under his sign manual." And Lord Chief Justice Willes, in his judgment in the case of *Omichund* v. *Barker*, (1) says, referring to this case in Hobart, "Even the certificate of the king, under his sign manual, of a matter of fact, has been always refused, except in one old case in Chancery."

Of minister abroad.

A certificate under the seal of a minister abroad, as to the fact of a marriage having been solemnized before him, was admitted in an old case; (2) but the admissibility of such evidence has been questioned; (3) and it cannot be doubted, but that the evidence would now be rejected.

Of secretary at war.

A certificate from the secretary at war, as to the nature of the station of a sergeant in the army, is said to have been admitted, though opposed, in the case of *Loyd* v. *Woodall*, (4) but for what reason it was admitted, or upon what principle, is not stated. The general rule is, that our law never allows a certificate of a mere matter of fact, not coupled with matter of law, to be admitted as evidence. (5)

Of justices.

A certificate of justices, certifying that a highway, which is the subject of an indictment, is in a state of repair, is admitted, in common practice, as an adjudication of the state of repair, after a plea of guilty pleaded by the parish. (6)

CHAPTER III.

OF THE PROOF OF WRITTEN EVIDENCE.

IT is proposed, in the first section of the present chapter, to treat of the proof of records and judicial proceedings; and, in the second, of the proof of other public writings.

(1) Willes, Rep. 550.
(2) Alsop v. Bowtrell, Cro. Jac. 541.
(3) Willes, Rep. 549.
(4) 1 Black. Rep. 29.
(5) By Willes, Ch. J., Willes's Rep. 550.
(6) 6 T. R. 630, 635.

Section I.

Of the Proof of Records and Judicial Proceedings.

The admissibility and effect of records and judicial proceedings having been treated of in a former chapter, it remains to consider how they are to be proved, so as to render their contents receivable in evidence.

The peculiarity of the principle which governs the proof of the documents in question, is, that it is a deviation from the general rule, which requires the production of the best evidence. And the ground of this deviation is, that documents of great importance should not be subject to the loss that might be incurred if they were removable; and that the public should not be deprived of the use of their contents when wanted in several places at the same time. (1) Besides which, the danger of fabricating evidence in reference to such documents is inconsiderable, in consequence of the ready access to the original instruments.

Acts public, private.

Of some records the courts will take judicial notice. A distinction upon this subject exists with respect to the proof of public and private acts of Parliament. Laws which concern the king, the public, all spiritual persons, all officers in general, all traders, are public acts. But such as relate to particular classes only, as the temporal lords, or spiritual lords, or to particular places, or particular trades, are private acts. (2) This distinction between public and private acts is not applied, in collections of the English statutes at large, to any statutes before those of Richard the Third.

(1) 1 B. & A. 185; Gilb. Ev. 8; Bac. Ab. Ev. 7.

(2) Gilb. Ev. 39, 40; Runnington's Hale, H. of C. L. 15 and 16, n. See Bac. Ab. Stat. F., with respect to decisions whether particular acts were public or private. If a private statute be afterwards recognised in a public act, it will be judicially noticed, Samuel *v.* Evans, 2 T. R. 575; Burr. 224.

Public. After the public acts of the session have received the royal assent, a transcript of the whole is engrossed on parchment, and certified by the clerk of the Parliament, and deposited in the Rolls Chapel. The original act is kept in the Parliament Office. Enrolments of public acts, certified and delivered into Chancery, are preserved in an uninterrupted series in the Rolls Chapel, from the beginning of the reign of Richard the First to the present time, except during the time of the Commonwealth. Such of the rolls of Parliament as are not in the Rolls Chapel are in the Tower of London, except a few of an early date which are in the Chapter House.

Private. Private acts are filed and labelled, and remain with the clerk of the Parliament, and are not enrolled or deposited in the Rolls Chapel,—though some of the earlier private acts are to be found there, and for a considerable time it was the practice to enrol in Chancery the titles to private acts. (1)

A private act may contain clauses of a public nature, and then the act, as far as those clauses are concerned, is to be regarded as a public act. Thus, in the case of *Rex* v. *Utterby*, a clause relating to a public highway, occurring in a private inclosure act, was held by Mr. Justice Holroyd to be proveable in the same way as a public act. (2)

Proof of act. Public acts of Parliament are judicially noticed; and the printed statute is, in theory, used only for the purpose of refreshing the memory of the courts. The regular proof of a private act of Parliament is by an examined copy compared with the Parliament roll.

Clause making an act public. In some acts of Parliament, not relating to the kingdom at large, a special clause is often inserted, declaring them to be public acts, and that they shall be taken notice of as such, without being specially pleaded; in which case, they are to be proved in the same manner as public acts; it is not necessary to prove them by an examined copy, or to shew that the printed

(1) Preface to the Statutes, by the Commissioners of the Public Records.

(2) Rex *v.* Utterby, Lincoln, before Holroyd, J. See also Hob. 227.

copy was printed by the king's printer. (1) The clause referred to, is intended for the facility of proof; it will not give the act the effect of a public act for other purposes,—as, with regard to the recital of facts contained in it. (2)

A clause was often formerly inserted in private acts, providing that they shall be printed by the king's printer, and that a copy so printed shall be admitted as evidence of the act. In such cases, a copy, purporting to be printed by the king's printer, will be admissible in evidence; it is not necessary to prove that the act was purchased of the king's printer. (3)

Incorrect printing of act.

The printed copy of an act is sometimes incorrect, in which case the court will be governed by the Parliament roll, as in *Rex* v. *Jeffries*, (4) where Keeble's and Rastel's edition of the statutes were at variance; and in the case of *Spring* v. *Eve*, (5) where Keble's and Poulton's editions of a statute were found incorrect.

Judicial record.

Next, with respect to the proof of records in courts of justice; these may, for the reasons before stated, be proved by copies. Where, indeed, the existence of the record is the very point in issue, as upon an issue joined on the plea of *nul tiel record*, and the record belongs to the same court wherein issue is joined, the record itself must be actually produced. But, even upon issue joined on such a plea, when the record is in another superior court, the inconvenience of removing the originals is in some measure avoided by obtaining the tenor of

Record in issue.

(1) Beaumont *v.* Mountain, 10 Bing. 404. 4 M. & Sc. 177. Woodward *v.* Cotton, 1 Cr., M. & R. 44. See by Lord Lyndhurst, 1 Cr., M. & R. 47. The present form of enactment was adopted, in order to make the proof, of the act being printed by the king's printer, unnecessary, *ibid.*

(2) Brett *v.* Beales, Moo. & M. 421.

(3) Lincoln Summ. Ass. 1832, by Park, J.

(4) 1 Str. 446.

(5) 2 Mod. 240; see also Price *v.* Hollis, 1 M. & S. 105.—See 3 B. & C. 71, as to punctuation in acts.—1 Show. 210, as to the title of the act being a part of it. 1 W. Bl. 95; 1 Lord Raym. 77; Ambl. 20; 8 T. R. 165; 2 B. & C. 37; 3 B. & C. 18, 183; 8 B. & B. 466. The translation of the statutes now commonly in use bears the date 1618.

the record, through the means of a *certiorari* and *mittimus* out of Chancery. (1)

Record of inferior court.

If the record of an inferior is required in a suit before a higher tribunal, a *certiorari* may be issued out of the superior court as well as from the Court of Chancery. (2) And in pursuance of this suit, where the superior court sends for the record of an inferior court, not for the purpose of seeing whether their proceedings are within the limits of their jurisdiction, but merely to know whether there be in fact such a record, it will be sufficient to certify the tenor, that is, a literal transcript of the record; but where the record itself is the subject of the proceedings in the superior court, the original ought to be returned. (3)

Certiorari.

Copy of record.

Where a record is to be used in evidence, not upon an issue of *nul tiel record*, but merely in support of some allegation, and as such to be submitted to a jury, it may in all cases be proved by a copy.

Copy under seal.

Copies of records are of two kinds, under seal and not under seal: those under seal are either by exemplifications, or by inspeximus. Copies of records and judicial proceedings under seal, are considered as of higher credit than any sworn copy; for it is said, "Courts of justice that put their seal to the copy, are more capable than a common person to examine, and more exact and critical in their examination." These copies under seal, principally occur in the proof of letters patent, probates, letters of administration, and foreign judgments; in the latter instance, they are, as will be shewn, the peculiarly proper evidence of acts of foreign courts. (4)

(1) Luttrell *v.* Lea, Cro. Car. 297; Pitt *v.* Knight, 1 Saund. 98; Hewson *v.* Brown, 2 Burr. 1034.

(2) Butcher and Aldworth's case, Cro. Eliz. 821; Guilliam *v.* Hardy, 1 Lord Raym. 216.

(3) Woodcraft *v.* Kinaston, 2 Atk. 317.

(4) See B. N. P. 227; 3 Inst. 173; 10 Co. 93, a.; Sid. 145; Plowd. Com. 411; Hardr. 118. On the proof by *constat* or *inspeximus*, see further, Vin. Ab. Ev. A. b. 44, p. 121; A. b. 25, p. 97. On the proof by *exemplifications*, *ib.* A. b. 33, p. 114.

Seal of court.

In proving a record or judicial proceeding by a copy under seal, it is to be observed, that the seals of the king, and of the superior courts of justice, and of all courts established by act of Parliament, are admitted without extrinsic proof of their genuineness. Judicial notice is also taken of the seal of the county palatine of Chester, and of the seal of the Ecclesiastical Court on the exemplification of a will. (1)

Office copy.

An office copy of a record is a copy authenticated by a person trusted for that purpose; and it is admitted in proof upon the credit of the officer, without evidence of it's having been actually examined. The rule respecting the admission of office copies in evidence is, that an office copy, in the same court, and in the same cause, is equivalent to a record; but in another court, or another cause in the same court, the copy must be proved to be examined. (2) It seems, that in the case of an issue out of Chancery, office copies of depositions in the same cause in the Court of Chancery are not receivable. (3)

Copies by authorized officer.

Besides office copies of the judicial proceedings of courts, which, according to the rule of Lord Mansfield, are only admissible between the same parties in the same court, office copies are admitted, in all courts, of certain records of which

(1) Tooker *v.* Duke of Beaufort, Sayer, 297; County Palatine Seal, Hardr. 120; Seal of Archbishop, Hardr. 118.—Exemplification of fine or recovery in Wales or counties palatine, Olive *v.* Guin, 2 Sid. 145; see 10 Co. 93, a.; Sid. 146. —The distinction is not very precisely drawn between those seals which are admitted without proof of genuineness, and those which require such proof: *vide infra,* Seals of Private Courts and Corporations. —On proof by the seals of Courts, see further, Vin. Ab. Evidence; A. b. 69, p. 132.—As to the effect of a seal being broken off or nearly so, in the instance of administrations, recoveries, certificates, and other instruments, and the effect of public documents being torn, see Vin. Ab. Evidence, A. b. 74, p. 136.

(2) Denn *v.* Fulford, 2 Burr. 1179; Black *v.* Lord Braybroke, 2 Stark. Ca. 13; by Littledale, J., in Highfield *v.* Peake, M. & M. 111. It seems that the rule has not been strictly acted upon in regard to affidavits before the same court, but not in the same cause; see Wightwick *v.* Banks, Forrest, 153; Casburn *v.* Reid, 2 B. Moore, 60; Croke *v.* Dowling, B. N. P. 14; 3 Doug. 75; and see Salter *v.* Turner, 2 Camp. 87, as to office copy of answer.—As to certified copies under the Insolvent Act, 7 Geo. 4, c. 57, see Northam *v.* Latouche, 4 C. & P. 143. The printed rules of the Insolvent Court are evidence; Dance *v.* Robson, M. & M. 294.

(3) The point was decided in the *nisi prius* case of Burnard *v.* Nerot, 1 C. & P. 580. In Highfield *v.* Peake, M. & M. 111, Littledale, J., expressed a different opinion. See B. N. P. 229.

it is the duty of particular officers, appointed by the law, to furnish copies. These are copies which it is the duty of the officer to make, and which he is not merely authorized by a particular court to make for the convenience of suitors in that court. It has been said upon the subject of such copies, that, where the law appoints any person for a particular purpose, the law must trust him, as far as he acts under it's authority. (1)

Chirograph. The chirograph of a fine, for example, is evidence of the fine, the chirographer being appointed to give out copies of the agreements between the parties, which are entered of record. (2)

Enrolment. An indorsement by the proper officer on a deed of bargain and sale, enrolled according to the form of the statute 27 H. 8, c. 16, is evidence of the enrolment: (3) and an indorsement of the date of enrolment, by the clerk of the enrolments, is part of the record, and conclusive as to the date. (4) So, where it became necessary for the plaintiff to shew, in proof of his title, that a certain lease had been enrolled with the auditor of the Duchy of Lancaster, the Court of King's Bench held, that a memorandum of enrolment, on the margin of the lease, signed "A. B., auditor," was sufficient proof of the enrolment. (5)

Copy by officer unauthorized. Where the officer of the court is only entrusted with the custody of records, and is not authorized to make out a copy, he has no more authority for that purpose than a common person; and the copy must be regularly proved in a strict and

(1) B. N. P. 229.

(2) Gilb. Ev. 21; 2 Stark. Ca. 13. *Vide infra*, p. 133.

(3) By Buller, J., in Kinnersley *v.* Orpe, 1 Doug. 56. It would seem that the signature of the certifying officer should be proved, unless where it is otherwise provided by statute, (as it is by the Bankrupt Act, 2 & 3 Wm. 4, c. 114, s. 3.) *Vide infra, Secondary Evidence of Private Writings.*

(4) The King in aid of Reed *v.* Hopper, 3 Price, 495. The same rule, with respect to the date of the enrolment of a memorial of annuity deeds; Garrick *v.* Williams, 3 Taunt. 540.

(5) Kinnersley *v.* Orpe, 1 Doug. 56. An examined copy of the memorial of an assignment of a judgment (the memorial being required by act of parliament) is evidence of *the fact of assignment*. And an examined copy of the memorial of the registry of a deed, is evidence of the fact *of the registry*; Hobhouse *v.* Hamilton, 1 Scho. & Lef. 207.

regular mode. A copy of a judgment, though purporting to be examined by a clerk of the Treasury, is not admissible, without proof of it's having been examined; because it is no part of the necessary office of the clerk to deliver a copy, he is only entrusted to keep the records for the benefit of public perusal, and not to make out copies of them. (1) If a deed enrolled be lost, a copy of the enrolment, made out by the clerk of the peace, but not proved to be examined, is not admissible. (2)

Of judgment.

Of enrolment.

Where a fine with proclamations was to be proved, the established rule used to be that the proclamations ought to be examined with the roll. (3) By the 5th & 6th of Wm. 4, c. 82, the offices of chirographer, &c., are abolished; but the copies made by the officer of the Court of Common Pleas are made (by section 4,) as available in evidence, as they would have been, if made by the former officers. And now, an examined copy of a record of a fine levied with proclamations is as good evidence of the fine as the chirograph itself signed by the officer. (4)

Proclamations of fine.

Chirograph.

The more usual way of proving the records of the superior and inferior courts of this country, is by means of examined copies and office copies. The proof by an examined copy is by producing a witness who has compared the copy, line for line, with the original, or who has examined the copy while another person read the original: the latter mode of examination will suffice, without proof that the witness examined the original both ways, and without calling both persons engaged in the examination; for it will not be presumed, that a person wilfully misread the record. (5) And it appears not to be necessary, that the person reading the record aloud should be the officer of the court. (6) But it ought to be shewn, that the original

Examined copy.

(1) Bull. N. P. 229.
(2) *Ibid.*
(3) Gilb. Ev. 21; Allen's case, B. N. P. 229; 3 Taunt. 166; Doe *v.* Bluck, 6 Taunt. 486. S. P.
(4) Doe *v.* Ross, 7 M. & W. 102.
(5) Reid *v.* Margison, 1 Camp. 469; Rolf *v.* Dart, 2 T. R. 52; Fyson *v.* Kemp, 6 C. & P. 72; Gyles *v.* Hill, 1 Camp. 469; McNiel *v.* London (Sheriffs), 1 Esp. 263.
(6) By Lawrence, J., in Eccles *v.* Hill, 1 Camp. 471, n.

came from the proper place of deposit, or out of the hands of the officer, in whose custody the records are kept. (1)

Minutes of record.

The minutes from which a record is afterwards made up, or the copies of such minutes, are not equivalent to an examined or office copy of the record, nor are they proper evidence of the record. Thus, it has been held, that a judgment in paper, signed by the Master, is not evidence, though upon such judgment execution may be taken out; for it is not yet become permanent, or part of the permanent rolls of the court, but is removable from place to place. And a judgment will not be regularly proved by the judgment-book of the court, though the record of the judgment roll has not been made up, and though the party interested in the proof of the judgment were not a party to the suit in which the judgment was obtained. Records are not complete until they are delivered into court in parchment, and there fixed as the rolls of the court. (2) In a case, where there had been an interlocutory judgment, an inquisition, final judgment and execution, it was held that both judgments must be proved by an examined copy of the roll, which must be carried in; and that it was not enough to produce entries in the prothonotary's book, and the inquisition with the prothonotary's *allocatur*. (3) The day-book, kept at the judgment office, is not evidence to prove the time of signing the judgment. (4)

Judgment on paper.

Judgment-book.

Prothonotary's book.

Day-book.

Minutes at Quarter Sessions.

A minute-book in which entries of proceedings at a Court of Quarter Sessions are made, and from which book the roll containing the record of such proceedings is subsequently made up, is not itself a record, so as to be admissible in evidence; (5)

(1) Adamthwaite *v.* Synge, 1 Stark. Ca. 183, 4 Camp. 372. It was there held, that in order to prove an examined copy of an Irish judgment, it was not enough for the witness to say, that he examined the copy with a record produced to him in a room over the Four Courts at Dublin, where the records of the superior Irish courts are kept, without seeing whence the record was taken, or knowing the person who produced it to be officer of the court.

(2) B. N. P. 2[illegible] efroy *v.* Tay, 3 C. & P. 19[illegible]ey *v.* Davenport, 2 N. R. 47[illegible].

(3) Godefroy *v.* Jay, 3 C. & P. 192.

(4) Lee *v.* Meecock, 5 Esp. 177.

(5) Rex *v.* Bellamy, R. & M. 171. Rex *v.* Ward, 6 C. & P. 366, as to proof of an allegation, that an appeal came on to be heard.

nor is such a minute-book evidence of the finding of a bill of indictment, though no record in fact be drawn up. (1) But where the book containing the proceedings at Sessions was proved to be the original sessions-book, regularly made up by the clerk of the peace, headed with an entry as to the style and date of the sessions, in the form of a caption, (though made up from minutes of the clerk taken in court, on paper, not parchment,) and kept as the only record of the court, the Court of Queen's Bench decided, that it had been properly admitted in evidence as the record of the Court of Quarter Sessions, to prove an order of the sessions on an appeal against an order of removal. (2)

Minutes of court sitting.

The minutes of a court of oyer and terminer may be received, where the matter to be proved by the minutes has occurred before the same court sitting under the same commission; as upon the trial of Horne Tooke, where the minutes of the court were received as proof of the acquittal of Hardy. (3)

Certificate proof of conviction.

7 & 8 Geo. 4, c. 18.

The stat. 7 & 8 Geo. 4, c. 18, s. 11, enacts, that on the trial of a prisoner for felony, when the indictment states a former conviction for felony, (averring generally that he was at a certain time and place convicted of felony, without otherwise describing the former felony,) a certificate containing the substance and effect only of the former indictment and conviction, purporting to be signed by the clerk of the court, or other officer having the records of the court where the prisoner was before convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same. (4)

(1) Rex *v.* Smith, 8 B. & C. 341. Porter *v.* Cooper, 6 C. & P. 354; as to the proof of an indictment found by a grand jury, at Quarter Sessions, to be a true bill.

(2) The Queen *v.* Yeoveley, 8 Ad. & Ell. 806.

(3) 25 St. Tr. 446. And see 8 B. & C. 343, by Lord Tenterden. When an ancient record has been lost, an old copy has been allowed to be given in evidence, without proof of its being a true copy. *Anon.* 1. Ventr. 257; B. N. P. 228.

(4) With reference to the statute 7 & 8 Geo. 4, above cited, a subse- 6 & 7 Wm. 4, c. 3.

Loss of record when presumed.

The existence of an ancient record may sometimes be established by presumptive evidence. The presumption that a record has existed and is lost, must depend upon the facts proved, both with respect to it's actual existence, and also with respect to it's custody, which may admit of a greater or less probability of a loss. It does not appear, that the existence and loss of records of the Superior Courts have been presumed; but it appears, from the instances cited in a former chapter, that even acts of Parliament may be presumed. An

Recovery of land in ancient demesne.

unexamined copy of a recovery of lands in a court of ancient demesne has been received, where the recovery, if it existed, must have been ancient, and where the possession was proved

License to appropriate.

to have gone a long time according to the recovery. (1) So a license to appropriate has been presumed. (2) And where it appeared that the records of the city of Bristol had been burnt,

Exemplification.

an exemplification of a recovery of houses in Bristol, under the town seal, has been allowed in evidence. (3)

Proof of old records lost or destroyed.

Upon ejectment for the recovery of a rectory, to which a recusant had presented, it was held, that the record of conviction

Conviction.

which was proved to have been burnt, might be proved by estreats in the Exchequer, and an inquisition of the recusant's lands returned there. (4) So, in an action of trover, secondary

Fi. fa.

evidence has been admitted of a *fieri facias*, and a *venditioni exponas* proved to have been lost. (5) And similar proof has been allowed of the decree in the time of Henry the Eighth

Decree.

for tithe in London, that decree having been lost. (6) "In

quent act has passed, 6 & 7 Wm. 4, c. 111, by which it is provided that the jury shall not be charged to inquire concerning such former conviction, until after they have inquired and found the prisoner guilty of the subsequent felony, and that the reading to the jury of the statement of the former conviction shall be deferred until after the finding of the verdict; provided, that if the prisoner on his trial shall give evidence of his good character, the prosecutor may, in answer thereto, give evidence of the indictment and conviction for the former felony, before the verdict of the jury is returned, and the jury shall inquire concerning the former conviction at the same time that they inquire concerning the subsequent felony.

(1) *Anon.* Ventr. 257; B. N. P. 228; Greene *v.* Proude, 1 Mod. 117.

(2) So stated by Hale, C. J., 1 Mod. 117; Hardr. 323.

(3) 1 Mod. 117.

(4) Knight *v.* Dauler, Hardr. 323; Salk. 285.

(5) Hardr. 323.

(6) See Macdougal *v.* Young, Ry. & M. 393; B. N. P. 228.

such cases," says Chief Baron Gilbert, "the instrument m us be, according to the rule of the civil law, *vetustate temporis aut judiciaria cognitione roboratum.*" (1) This subject has been more fully considered in treating of presumptive evidence.

Judgment of lords.

Judgments in the House of Lords may be proved by examined copies of the minutes of the judgment entered in the journals. The minutes of a judgment are the judgment itself, which it is not the practice to draw up in form. (2)

Judgment. Verdict.

A verdict is frequently given in evidence for the purpose of shewing the opinion of a jury on certain points in issue; as, for example, where a jury, upon some former trial, have found matter of reputation, or have decided a particular right. In such cases, though it is the verdict and not the judgment which is relevant to the inquiry, still it seems to be necessary to produce a copy of the judgment founded upon the verdict. It has been considered that the production of the *postea* alone is not sufficient; for the judgment may have been arrested, or a new trial may have been granted. (3)

Postea.

Postea. Minute of Verdict.

It has been held, that a *nisi prius* record, with the *postea*, or with a minute of the verdict indorsed by the officer of the court on the jury panel, is good evidence that the cause came on for trial, though no regular *postea* be indorsed. In London and Westminster it is not the practice for the officer at the trial to endorse the *postea*, as it is in the country. (4) The *nisi prius* record and *postea* have been held sufficient to support a plea of set-off on an action for contribution. (5) The *postea*

(1) Gilb. Ev. 19.

(2) Jones *v.* Randall, Cowp. 17, action on a wager, whether a decree in Chancery would be reversed. An unstamped copy of the minutes of reversal is evidence, without more of the proceedings.

(3) Pitton *v.* Walter, 1 Str. 162. B. N. P. 234; unless in the case of an issue out of Chancery, when no judgment is entered, B. N. P. 234.

(4) Rex *v.* Browne, 1 M. & M. 315. In this case there was a general verdict entered, in the minute, against all the defendants.

(5) Garland *v.* Scoones, 2 Esp. 648. In Foster *v.* Compton, 2 Stark. Ca. 365. Abbot, C. J., admitted the *postea* as evidence of the amount recovered by the verdict, without proof of the judgment: at the same time exrpessing a doubt. That the day of trial, and the fact that the cause was carried down to trial, must be proved by the record,

is sufficient evidence to introduce the testimony of a witness who is dead, (1) or that of a person indicted for perjury. (2)

Decree in Chancery.

A decree in the Court of Chancery may be proved by an exemplification under the seal of the court, or by an examined copy, or by a decretal order in paper, with proof of the bill and answer. (3)

Proof of proceedings, when necessary.

It is said in a book of authority, (4) that if a party wants to avail himself of the decree only, and not of the answer, the decree, under the seal of the court and enrolled, may be given in evidence without producing the bill and answer, and the opposite party will be at liberty to show, that the point in issue was not the same as the present issue. However, the rule, generally laid down, seems to be, that, where a party

Bill and answer.

intends to avail himself of the contents of a decree, and not merely to prove an extrinsic collateral fact, (as, that a decree was made by the court,) he ought regularly to give in evidence the bill and answer upon which the decree is founded. "The whole record," says Chief Baron Comyns, "which concerns the matter in question, ought to be produced." (5) The proof

Depositions.

of the *depositions* is certainly not necessary for letting in the decree, although the decree may state that depositions have been taken; and the rule is the same, whether it is a decree on an issue, or on a reference to a master as to facts. (6) In

see Thomas *v.* London (Sheriffs), 6 Esp. 80; Parry *v.* Collis, Peake, Add. A. 47.

(1) B. N. P. 243; 1 Str. 162. 2 Russ. on Crimes, 549. See also Barnard. 243; Hardr. 118; 2 Hawk. c. 46, s. 56.

(2) Iles's case, ca. tem. Hardr. 1818; Browne's case, M. & M. 315. See Coppard's case, M. & M. 118, where the *postea* stated the trial to have been before the Chief Justice, it having been, in fact, before a judge sitting for the Chief Justice; the objection was overruled. See Alford's case, 1 Leach, 150; Lincoln's case, R. & R. 421, *ib.*

(3) Trowell *v.* Castle, 1 Keb. 21. Com. Dig. Ev. (C. 1.) mentioned by Bayley, B., in Blower *v.* Hollis, 1 Cr. & M. 396. It has been held that the bill and answer need not be proved, if they are recited in the decretal order; by Trevor, C. J., in Wheeler *v.* Lowth, cited Com. Dig. *ib.*, but 1 Kel. 21, *contra.*

(4) Buil. N. P. 235, citing Lord Thanet *v.* Paterson, K. B. East; 12 G. 2.

(5) Com. Dig. tit. Ev. (A. 4), p. 85. It seems not quite certain that a decree, reciting the bill and answer, cannot be given in evidence without proof of the bill and answer, where it is offered as evidence of an immemorial right. See Layburn *v.* Crisp, 8 C. & P. 405.

(6) Layburn *v.* Crisp, 8 C. & P. 404, 405.

cases at law, when the pleadings are in a general form, evidence may be given to explain them; but in equity-proceedings the questions in dispute are to be ascertained from the bill and answer. (1)

Admiralty sentence. Judgment of inferior court.

A sentence in the Admiralty Court may be evidence, upon the libel and answer produced: and a judgment in a Court-baron or other inferior court, with proof of the proceedings on which the judgment was given." (2)

Proof of previous proceedings, when not necessary.

If the fact to be shown were merely, that a decree has been made in the Court of Chancery, or that a decree made there has been reversed on appeal, proof of the previous proceedings will not be necessary. (3) And in the case of an ancient decree, if the bill and answer cannot be found after proper search, the decree alone may be admitted.

Answer in Chancery.

An answer in Chancery may be proved by an examined copy. (4) It cannot regularly be given in evidence without proof of the bill; for the bill may materially tend to explain the answer. But if there be proof, by the proper officer, that the bill has been searched for in the office, and cannot be found, the answer has been allowed to be read without sight of the bill. (5) When an answer is offered in evidence as an admission of the party on oath, or when it is used for the purpose of contradicting a witness, or upon an indictment for perjury in the answer, it will not be necessary to shew that there has been any decree in the suit. (6) If an answer is given in evidence on one side, the counsel on the other side is at liberty to insist on the bill being read as well as the answer. (7)

(1) Layburn *v.* Crisp, 8 C. & P. 408, by Parke, B.

(2) Com. Dig. tit. Ev. (C. 1), p. 94.

(3) See Jones *v.* Randall, Cowp. 17. See by Bayley. B., in Blower *v.* Hollis, 1 Cr. & M. 396. Lord Thanet *v.* Patterson, B. N. P. 235.

(4) Hennel *v.* Lyon, 1 B. & A. 182. Ewer *v.* Ambrose, 4 B. & C. 25. See Rees *v.* Bowen, 1 M'Cl. & Y. 383. Highfield *v.* Peake, M. & M. 110. See Salter *v.* Turner, 2 Camp. 87. Burnard *v.* Nerot, 1 C. & P. 578, as to office copies of answers.

(5) Gilb. Ev. 55.

(6) Lady Dartmouth *v.* Roberts, 16 East, 334. Ewer *v.* Ambrose, 4 B. & C. 25.

(7) Pennell *v.* Meyer, 8 Carr. & P. 470.

In civil suits, an answer in Chancery may be proved by an examined copy; (1) but it is said, that, upon an indictment for perjury, the original must be produced, and such is the practice, though there does not appear to be any sufficient reason for the distinction. (2)

Proof of oath on answer.

In civil suits it will be presumed that an answer was made upon oath; (3) but, in criminal prosecutions, some evidence of the administration of an oath is required;—as, that an individual was sworn, who is identified with the defendant. The fact of swearing may also be proved by evidence of the Master's handwriting to the jurat, and it will not be necessary to call the Master. (4) The jurat is also evidence of the place at which the oath was taken. (5) This strictnesss of proof is required not only in criminal proceedings, (as on a trial for perjury,) but also in actions which are in the nature of a criminal proceeding, as in an action for a malicious prosecution. (6)

Identity of party.

When an original answer or an examined copy is given in evidence, some proof of the identity of the party will be requisite. (7) It was to facilitate the proof of identity upon trials for perjury, that an order was made in Chancery, requiring answers to be signed. (8) When the original answer is produced, the proof of the handwriting will be a proper and easy method of identifying the party. (9) If an examined copy is given in evidence, the identity must be established by extrinsic evidence: it may be proved by

(1) B. N. P. 238, 239. Hennel *v.* Lyon, 1 B. & A. 182. Ewer *v.* Ambrose, 4 B. & C. 25. Lady Dartmouth *v.* Roberts, 16 East, 234.

(2) B. N. P. 238, 239.

(3) B. N. P. 238, 239. See James's case, 1 Show. 327. Crook *v.* Dowling, 3 Doug. 77.

(4) Rex *v.* Morris, 2 Burr. 1189. Str. 1043. Rex *v.* Benson, 2 Camp. 508.

(5) Rex *v.* Spencer, R. & M. 97.

(6) Spencer's case, R. & M. 98; 16 East, 340. On the evidence in indictments for perjury, committed in the course of judicial proceedings, see Roscoe's Criminal Evidence. 2 Russ. on Crimes. Hailey's case, 1 C. & P. 258, case of perjury in affidavit, signed by mark; Laycock's case, 4 C. & P. 326, case of perjury in answer to a bill afterwards amended. The jurat is not conclusive evidence as to the place; Embden's case, 9 East, 437.

(7) B. N. P. 238, 239.

(8) Rex *v.* Morris, 2 Burr. 1189.

(9) Rex *v.* Benson, 2 Camp. 509. Rex *v.* Morris, 2 Burr. 1189.

a person who can speak to the signature to the original answer, although the original is not produced at the trial. (1)

Records of criminal courts.

Where a prisoner pleads *autrefois acquits* to an indictment, he may remove the record by *certiorari* into Chancery, and have it exemplified; but it seems to be the usual practice for the clerk of assize or clerk of the peace to make up the record, and to attend with it without writ. (2)

Ecclesiastical sentences.

Practice of court.

For the proof of proceedings in Ecclesiastical Courts, it has been held that the minute-book of the Ecclesiastical Court is sufficient evidence of a decree for alimony pronounced in that court, without the production of a decree drawn up in form; it appearing that, in practice, nothing more is done with the minutes, unless where alimony is not paid. (3) The practice of the Ecclesiastical Court is a matter to be proved by evidence, and to be left to a jury. (4)

Proceedings in inferior courts.

Where the judgment of an inferior court is offered in evidence, it is usual to produce the book containing the proceedings from the proper custody. (5) But as the proceedings are not usually made up in form, the minutes will be admitted, if they are perfect, and omit nothing material; (6) so it seems,

(1) Dartnall *v.* Howard, R. & M. 169. See Scott *v.* Lewis, 7 C. & P. 349, where a *cognovit* was proved by the like evidence. Hennel *v.* Lyon, 1 B. & A. 182, proof from coincidence of name and character. Hodgkinson *v.* Willis, 3 Camp. 401, proof of person against whom a bill was filed.—The leaning of the courts is in favour of relieving parties from the onus of the proof of identity, at least in civil cases, as it is a fact, which, in general, is more easy to be disproved than established; By Lord Tenterden, Hennel *v.* Lyon, 1 B. & A. 182.—See Burnand *v.* Nerot, 1 C. & P. 578, where the copy of an answer was adduced to contradict a witness, and was rejected on the ground of the identity not being proved.—On the proof of identity, upon the plea of *autrefois acquits*, see 2 Russ. on Crimes, 721; and on the proof of identity on indictments for perjury, see Brady's case, 1 Leach, 330; Price's case, 6 East, 323.

(2) See 2 Russ. on Crimes, 720, n.—As to what are the requisites for making a criminal record complete, see Bellamy's case, R. & M. 172. Smith's case, 8 B. & C. 341. Cooke *v.* Maxwell, 2 Stark. Ca. 183. Porter *v.* Cooper, 6 C. & P. 354. Ward's case, 6 C. & P. 366; Bowman's case, 6 C. & P. 101.

(3) Howleston *v.* Smyth, 2 C. & P. 25.

(4) Beaurain *v.* Scott, 3 Cam. 388.

(5) It seems that evidence should be given of the proceedings previous to the judgment, Com. Dig. tit. Evidence, c. 3. Fisher *v.* Lane, 2 Bl. 836. Arundel *v.* White, 14 East, 216. *Vide supra*, p. 134, *Minutes at Quarter Sessions*.

(6) Fisher *v.* Lane, 2 Bl. 834. Holt, Ch. J., in Rex *v.* Hains,

examined copies of the minutes would be evidence. (1) If the proceedings of the inferior court are not entered in the books, they may be proved by the officer of the court, or by some other person conversant with the fact. (2) As the court of Quarter Sessions is a court of oyer and terminer, the minute-book kept by the clerk of the peace is not evidence of a conviction or acquittal. The caption is a necessary part of the record, and the record itself, or an examined copy, is the only legitimate evidence to prove it. (3)

Insolvent court.

By a provision in the Insolvent Act, 7 Geo. 4, c. 57, certified copies of the proceedings of the Insolvent Act are made admissible in all courts. (4) But this provision does not take away the right of producing in evidence the original proceedings. (5)

Proof of its practice.

On a trial for perjury, assigned upon an affidavit sworn by an insolvent, in the Insolvent Debtors' Court, (6) a clerk of the court was called to prove that by the practice of the court the affidavit was necessary: he produced a printed paper purporting to be rules of the court, stating that he had got it from the clerk of the rules; that he was in the habit of delivering out copies of this paper as the rules, and that a copy was hung up in an office adjoining; but he had not compared the rules pro-

Comb. 337; 12 Vin. Ab. A. b. 26. By Lord Tenterden, in Rex *v.* Smith, 8 B. & C. 342. Arundel *v.* White, 14 East, 216, where the entry was "withdrawn by plaintiff's order," made opposite the plaint. Macnally's case, 9 Co. 69, where there was a brief note of the plaint. See Pitcher *v.* Rinter, 12 Vin. Ab. A. b. 48.

(1) By Holt, Ch. J., in Rex *v.* Hains, Comb. 337.

(2) See Dyson *v.* Wood, 3 B. & C. 451, 453.

(3) Rex *v.* Smith, 8 B. & C. 343, and see Rex *v.* Bellamy, R. & M. 171, cited *supra*, p. 134. Rex *v.* Thring, 5 C. & P. 507. Porter *v.* Cooper, 6 C. & P. 354; where the original indictment, with the words "true bill" indorsed, was held not to be evidence of a finding by the grand jury. Rex *v.* Ward, 6 C. & P. 367; that the minute-book is not evidence to prove that an appeal came on to be tried. Bowman's case, 6 C. & P. 101: that the indictment with the finding of the jury (*guilty*) endorsed upon it by the proper officer is not sufficient proof, on plea of *autrefois convict*. And see Rex *v.* Yeoveley, *supra*, p. 135.

(4) See sections 19 and 76. Andrew *v.* Pledger, 1 M. & M. 508. Delafield *v.* Freeman, 6 Bing. 294.

(5) Northam *v.* Latouche, 4 C. & P. 140. As to the proof of proceedings, on commission of bankrupt, see 1 & 2 Wm. 4, c. 56, and 2 & 3 Wm. 4, c. 114.

(6) The King *v.* Koops, 6 Ad. & Ell. 198. *Vide supra*, p. 131, n. (2), *ad fin.*

duced with that copy, nor did he know of any authentic original of the rules, or anything of the practice of the court, except from the printed paper. The court determined that this evidence was not sufficient: there was clearly no proof either of a written or an unwritten practice.

It's seal.

A seal purporting to be the seal of the Insolvent Debtors' Court, affixed to a document brought from the court, (as, a schedule by an insolvent debtor) will be admitted without proof of it's genuineness. (1)

Foreign judgment.

In an action upon judgment of a court of a foreign country, if the judgment is subscribed by the judge of the court, and has a seal affixed, it must be proved by proving the handwriting of the judge, and the authenticity of the seal. (2)

Seal of Colonial Court.

If a colonial court possess a seal, it ought to be used for the purpose of authenticating it's judgments, although it may be so much worn as no longer to make any impression. (3) If it is clearly proved, that the court has not any seal, so that the document cannot be clothed with the form of a legal exemplification, it must be shewn to possess some other requisite to entitle it to credit; (4) as, by proving the signature of the judge upon the judgment. (5)

Exemplification.

An exemplification of a foreign judgment, that is, a copy authenticated under the seal of the court, is evidence of the judgment in the courts of this country. (6) But a document, purporting to be a copy of a judgment, and to be made by the officer of the court, is not admissible. (7)

(1) Doe d. Duncan *v.* Edwards, 9 Ad. & Ell. 554.

(2) Henry *v.* Adey, 3 East, 221. Buchanan *v.* Rucker, 1 Camp. 63, where the witness swore to the handwriting of the Chief Justice, and said that he would have acted upon the seal. Flindt *v.* Atkins, 3 Camp. 215.

(3) Cavan *v.* Stewart, 1 Stark. Ca. 525.

(4) 2 Stark. Ca. 11.

(5) Alves *v.* Bunbury, 4 Camp. 28. It seems that an examined copy would suffice; by Lord Ellenborough, 6 M. & S. 36. An examined copy of an Irish judgment is sufficient; see Adamthwaite *v.* Synge, 4 Camp. 372; 1 Stark. Ca. 183.

(6) 2 Stark. Ca. 11, 12; by Lord Ellenborough and Bayley, J.

(7) Appleton *v.* Lord Braybrooke, 6 Maule & Selw. 34. 2 Stark. Ca. 6, 7, S. C.

Charter-party abroad.

In *Brown* v. *Thornton*, (1) a charter-party had been entered into between the parties, and written in the book of a notary (a public officer), and there signed by the parties: a copy made out by the notary, signed and sealed by him, signed also by the officer of the government, was delivered to each party by the notary. Such copies are not receivable in this country, either as originals, or as secondary evidence of the charter-party.

Instrument abroad, not removable.

In *Alivon* v. *Furnival*, (2) it was held, that an agreement of reference made in France, was sufficiently proved by an examined copy, together with the evidence of the attesting witness, it appearing that the original was deposited with a notary in Paris for safe custody, and that it was the established usage in France not to allow the removal of a document so deposited.

Official copy abroad.

It seems that although a person is authorized by the law of a foreign country to give official copies of private documents, the courts of this country will not recognise such copies as evidence. (3)

Proof of foreign laws.

The existence of a foreign law is a fact to be proved, like any other fact, by appropriate evidence. Without such proof, our courts cannot take notice of foreign laws. (4) The written law of a foreign state is to be proved by a copy of the law, properly authenticated. (5) The unwritten law of a foreign

(1) 6 A. & E. 185. 1 Nev. & P. 343, S. C. It did not appear when the notary gave out copies, nor whether it was done in the presence of the parties.

(2) 1 Cr., M. & R. 277. The usage was not a provision of the written law; but it was considered that secondary evidence was, in general, admissible, where it was out of the power of the party to produce the original. There was much discussion as to whether there was a duplicate original; this, however, was not satisfactorily proved. *Vide infra, Secondary Evidence of Writings.*

(3) See Brown v. Thornton, 1 Nev. & P. 343. It was said, in the case here referred to, to have been established by the cases of Appleton v. Lord Braybrooke, and Black v. Lord Braybrook, that the courts of this country will not adopt the rules of evidence of foreign courts.

(4) 1 P. Wms. 431; 3 Ves. & Beam. 29. Ganer v. Lady Lanesborough, Peake, N. P. C. 17.

(5) Gen. Picton's case, 30 Howell's St. Tr. 491. Boehtlinck v. Schneider, 3 Esp. N. P. C. 58. In Clegg v. Levy, 3 Camp. 166, the evidence of a merchant of Surinam was rejected, as to the necessity of a foreign stamp, it appearing that there was a written law; for the law, on inspection, might contain exceptions. Miller v. Heinrick, 4 Camp. 155. In the case of Bohtlingk v. Inglis, 3 East, 381, the

state, (having first been ascertained to be part of the unwritten law, by witnesses professionally conversant with the laws of the state,) may be proved by the parol evidence of witnesses possessing competent professional skill. (1) In the judgment, delivered in the Consistory Court of London, in the case of *Dalrymple* v. *Dalrymple*, (2) Sir W. Scott, after observing, with reference to the law of marriage in Scotland, that the determination of the question must be taken from the authorities of that country, proceeds thus:—"The authorities to which I shall have occasion to refer, are of three classes; first, the opinions of the learned professors, given in the present or similar cases; secondly, the opinions of eminent writers, as delivered in books of great legal credit and weight; and thirdly, the certified adjudication of the tribunals of Scotland upon these subjects. I need not say, that the last class stands highest in point of authority; where private opinions, whether in books or writing, incline on one side, and public decisions on the other, it will be the undoubted duty of the court, which has to weigh them, *stare decisis*."

Law of colony.

If a question should arise with respect to a colony, whether the law of the mother-country is the law of the colony, the statement of text-writers may be admitted. In General Picton's case, (3) where such a question was suggested as likely to oc-

counsel for the plaintiff, after proving one of the mercantile navigation laws of Russia, offered in evidence a certificate (signed by the presiding judge of the Custom-house Court in Russia, and bearing the seal of the court), which purported to have been delivered by the judges to the plaintiff, with reference to the suit then commenced in this country; the certificate set out the navigation law, and contained the opinion of the judges of the Custom-house Court on its construction; the plaintiff's counsel insisted, that the certificate was admissible in evidence, not simply as a report of the opinion of the court, but as an adjudication of the law certified under the seal of the court, and entitled to the same credit as the exemplification of a foreign judgment. On the other side, it was argued, that the certificate was merely a parol exposition of a written law, and entirely extra-judicial; and therefore not admissible. The Court of King's Bench decided the case upon other points, and did not express any opinion upon the question, as to the admissibility of the proposed evidence. —The case of Middleton *v.* Janverin, Haggard's Con. Rep. vol. ii. p. 442, may be referred to upon this subject.

(1) Millar *v.* Heinrick, 4 Camp. 155. See 3 Esp. N. P. C. 58.

(2) Haggard's Con. Rep. vol. ii. p. 81.

(3) 30 Howell's St. Tr. 492.

cur, Lord Ellenborough said, "The text writers furnish us with their statement of the law; and that would certainly be good evidence, upon the same principle as that which renders histories admissible. There is a case," continued Lord Ellenborough, "in which the history of the Turkish empire by Cantemir, was received by the House of Lords, and received after some discussion; I shall, therefore, receive any book that purports to be a history of the common law of Spain."

Foreign commercial regulations.

The practice of a court of justice in a foreign country may be proved by witnesses professionally acquainted with that practice. (1) The commercial regulations of a foreign country ought to be proved by well authenticated copies of such regulations. (2) The acts of state also of a foreign government can only be proved by copies of such acts properly authenticated. Thus, in the case of *Richardson* v. *Anderson*, (3) the counsel on the part of the defendant proposed to give in evidence a book purporting to be a collection of treaties concluded by America, and to be published by the authority of the American government; it was proposed further to prove, by the American minister resident at this court, that the book produced was the rule of his conduct; this evidence was offered, as equivalent to a regular copy of the archives in Washington: but Lord Ellenborough rejected the evidence, and held that it was necessary to have a copy examined with the archives.

Acts of state.

Treaties.

Foreign civil code.

In the case of *Lacon* v. *Higgins*, (4) Lord Tenterden admitted a copy of the civil code of France, produced by the French Vice Consul, who stated that it was an authentic copy of the law of France, upon which he acted at his office, and that it was printed at the office for printing the laws of France, and would be acted upon in any of the French courts.

(1) Buchanan *v.* Rucker, 1 Camp. 66.

(2) By Lord Ellenborough, in Gen. Picton's case, 30 Howell's St. Tr. 491.

(3) 1 Camp. 65 (a).

(4) 3 Stark. Ca. 178. Lord Tenterden at first inclined in favor of the objection, but afterwards overruled it on the authority of Picton's case. The book in Picton's case seems to have been cited for a point of unwritten law; and see Clegg *v.* Levy, 3 Camp. 166.

In *Ganer* v. *Lady Lanesborough*, (1) Lord Kenyon permitted a party divorced to give parol evidence of her divorce, according to the ceremony and custom of the Jews at Leghorn.

Rule abroad, as to proof of foreign seals.

The reader may not be indisposed to see on what footing the law upon this subject stands in foreign countries. The able commentator, before referred to, lays down the law in the courts of America on this subject, in the following terms:—

"It seems that the public seal of a foreign sovereign, affixed to a writing purporting to be a written edict, or law, or judgment, is, of itself, the highest evidence of its authority: and the courts of other countries will judicially take notice of such public seal, which is therefore considered as proving itself. But the seal of a foreign court does not prove itself, and therefore, it must be established as such by competent testimony. There is an exception to this rule in favour of Courts of Admiralty, which being courts of the law of nations, the courts of other countries will judicially take notice of their seal without positive proof of it's authenticity. (2)

Rule abroad, as to proof of foreign laws.

On the subject of proof of foreign laws in the American courts, the same writer states, (3) that authenticated copies of written laws, or of other public instruments of a foreign government, are generally expected to be produced: "For it is not to be presumed," he says, "that any civilized nation will refuse to give such copies duly authenticated, which are usual and necessary for the purposes of administering justice in other countries. It cannot be presumed that an application to a foreign govern-

(1) Peake, C., 17. It was also held, that an instrument purporting to be a divorce under the seal of the Synagogue, was not admissible, without previous proof of the law of the country. See further, on the proof of foreign laws, Male *v.* Roberts, 3 Esp. 163. Brown *v.* Gracey, 1 D. & R. 41. (n). Mostyn *v.* Fabrigas, Cowp. 174. Mace *v.* Kay, 4 Taunt. 43. Burrows *v.* Jemino, 2 Str. 733. Fremoult *v.* Dedire, 1 P. Wms. 429. Feaubert *v.* Turst, 1 Brown, P. C. 38. Lindo *v.* Belisario, 1 Hagg. Con. 216. Middleton *v.* Janvers, 2 Hagg. Con. 441. Harford *v.* Morris, 2 Hagg. Con. 431. On the trial of the Wakefields', for abduction, a gentleman of the Scotch bar was examined as to the point, whether the marriage, as proved by the witnesses, would be a valid marriage according to the law of Scotland, Murray's ed. p. 238. In Alivon *v.* Furnival, 1 Cr., M. & R. 282, a French advocate and a French notary were examined, as to the usage in France, on various points of evidence.

(2) Story on the Conflict of Laws, 2nd edition, p. 897.

(3) P. 896.

ment to authenticate it's own edict or law will be refused; but fact of such refusal must, if relied on, be proved. If such refusal is proved, then inferior proofs must be admissible. In general, foreign laws are required to be verified by the sanction of an oath, unless they can be verified by some other high authority, such as the law respects no less than it respects the oath of an individual. The usual mode of authenticating foreign laws, (as it is of authenticating foreign judgments,) is by an exemplification of a copy under the great seal of a state; or by a copy, proved to be a true copy by a witness who has examined and compared it with the original; or by the certificate of an officer properly authorized by law to give the copy, which certificate must itself also be duly authenticated. But foreign unwritten laws, customs, and usages, may be proved, and indeed must ordinarily be proved by parol evidence. The usual course is to make such proof by the testimony of competent witnesses, instructed in the laws, customs, and usages, under oath. Sometimes, however, certificates of persons in high authority have been allowed as evidence without other proof."

Award. In an action upon an award, it is necessary to prove both the submission and the execution of the award. And, in general, whether the validity of the award comes in question directly or only incidentally, the submission of all the parties should be regularly proved. (1) If the submission was to two arbitrators, named in the reference, and to a third person to be appointed by them, the appointment of such person to be umpire must be duly proved. A recital of such appointment in the award, signed by the three, will not be sufficient; nor will it be enough to shew that the third person acted with the other arbitrators, and signed the award. (2)

Inquisition. When an inquisition is offered in evidence, the commission under which it was taken ought regularly to be proved, or

(1) Antram *v.* Chace, 15 East, 209. Ferrer *v.* Oven, 7 B. & C. 427. Brazier *v.* Jones, 8 B. & C. 124.—As to proof of submission by rule of court, Still *v.* Halford, 4 Camp. 17; and proof of enlargement, *re* Hick, 8 Taunt. 694. Halden *v.* Glasscock, 8 D. & R. 151. Lawrence *v.* Hodgson, 1 Y. & J. 16. As to proof of an award, under an Inclosure Act, see Rex *v.* Haslingfield, 2 M. & S. 558.

(2) Still *v.* Halford, 4 Camp. 19.

shewn to be lost. But in cases of more general concern, such as the ecclesiastical surveys, the commissions are of such public notoriety as not to require proof. (1)

Depositions in Chancery.

With regard to the proof of depositions in Chancery, the general rule is, that they are not to be admitted in evidence without proof of the bill and answer: (2) for, if there do not appear to be a cause depending, the depositions are considered to be merely voluntary affidavits; and the bill and answer ought to be produced, in order to shew who were the parties to the suit, and what the points in issue, as depositions in general are evidence only upon the same points, and between the same parties, or those who claim under the parties. But depositions may be read without such antecedent proof, if they are so ancient that no bill or answer can be forthcoming; formerly, it was not the practice to enrol bills and answers. (3) And if the defendant is in contempt, or has had an opportunity of cross-examining, which he chose to forego, the depositions may then be read, after proving the bill, although no answer has been put in. (4) Depositions are evidence, as an admission against

Lost bill and answer.

Defendant in contempt.

(1) Vin. Ab. Ev. A. b. 42. B. N. P. 228. Hardcastle *v.* Sclater, 2 Gwill. 787. Vicar of Kellington *v.* Trinity College, 1 Wils. 170.—In Rowe *v.* Brenton, 8 B. & C. 747, an inquisition taken under the statute 4 Edw. 1, was received, though the commission could not be found.—The originals of some of the Parliamentary Surveys having been destroyed in the fire of London, copies from unsuspected repositories have been admitted, Underhill *v.* Durham, 2 Gwill. 542. Buller *v.* Michell, 4 Dow. 325. Greene *v.* Proude, 1 Mod. 117.—In Anderton *v.* Magawley, 3 Bro. P. C. 588, an old inquisition, *post mortem*, was read without production of the commission; but it was held to be necessary to prove that such a commission did actually issue.—In Alcock *v.* Cook, tried before Tindal, Ch. J., in London, a survey from the office of the Duchy of Lancaster was admitted, though the commission was not extant. It purported to be signed by the commissioners, and came from the proper custody, and was proved to be of the handwriting of the age.

(2) Gilb. Ev. 56. Bull. N. P. 240. Nightingal *v.* Devisme, 5 Burr. 2594, *ad fin.* Baker *v.* Sweet, Bunb. 91. Raym. 335. Vin. Ab. Ev. A. b. 31. Illingworth *v.* Leigh, 3 Gwill. 1619. At the trial of the last-cited case, Mr. Justice Heath refused to admit depositions in evidence, because the bill and answer had not been duly proved, nor inquired after. But it is said by the reporter, that the rejection of this evidence was one of the grounds upon which a new trial was afterwards granted. And see Byam *v.* Booth, 2 Price, 234, n. In a cause respecting the Retford Charity Lands tried at Nottingham, Chief Justice Tindal and Littledale, J., rejected depositions, because the decree was not produced.

(3) Byam *v.* Booth, 2 Price, 234, n. Gilb. Ev. 58.

(4) Cazenove and Another *v.* Vaughan, 1 Maule & Selw. 4. B. N. P. 240.

a party to the suit, or for the purpose of contradicting a witness, without proof of the bill and answer.

On interrogatories.

Depositions taken on interrogatories, under a commission from the Court of Chancery, of modern date, are not admissible without the production of the commission under the authority of which the depositions were taken: if the depositions are of a long standing, so that the commission may be presumed to have been lost, they are evidence by themselves: in either case, whether the depositions are of a recent or ancient date, there is no occasion to produce the bill and answer. (1)

Order to read.

Where the Court of Chancery, on directing a trial at law, makes an order, that the depositions of a witness shall be read, the proof of the bill and answer will be dispensed with. This order is not made for the purpose of making that admissible in evidence, which is not strictly admissible in courts of common law; (2) and the depositions cannot be admitted, even under the order, unless it be satisfactorily proved, at the time of the trial, that the witnesses are unable to attend in person. If depositions were offered in evidence without such an order, the whole record, bill, answer, &c., must be regularly proved; but when there is an order for reading depositions, the court of law will read them, without going through the regular and strict course which is generally necessary for the purpose of making them evidence. (3)

Depositions at chambers.

A copy of depositions, sworn at a judge's chambers, and delivered out by his clerk, and attested by his signature, is admissible evidence, without proof of it's having been examined with the original. (4)

Writs.

When a writ is only an inducement to the action, the fact of taking out the writ may be proved by producing it, because, before the writ is returned, it is not a record. But where the writ has been returned, and is itself the gist of the action, there

(1) Baylie *v.* Wylie, 6 Esp. 85. See Rowe *v.* Brenton, 8 B. & C. 765.
(2) 15 Ves. 176.
(3) Palmer *v.* Lord Aylesbury, 15 Ves. 166. Corbett *v.* Corbett, 1 Ves. & Beam. 340.
(4) Duncan *v.* Scott, 1 Camp. 100.

ought to be a copy from the record, as the best proof of which the nature of the case is capable. (1)

If it be necessary to prove, that a writ issued in a particular cause, it will not be sufficient to prove the *præcipe* by the filazer's book, and after proof of notice to produce the original, to give in evidence a copy of the writ; but a proper search must be proved to have been made at the Treasury for the original writ, before secondary evidence can be given. (2) An examined copy of the judgment-roll, containing the award of an *elegit* and return of the inquisition, is evidence, in an action for use and occupation, of the title of the plaintiff, who claims under the *elegit*, without proving a copy of the *elegit* and of the inquisition; (3) the judgment-roll is absolute proof of all the proceedings which it sets forth. *Elegit.*

A rule of court may be proved by an office copy, made out by the clerk of the rules, or by his deputy. (4) Where a court prints and circulates copies of it's rules for the guidance of it's officers, one of such copies is evidence of the rules on which the officers are to act, without proof that it had been examined with the original. (5) Rule of court.

It seems that an examined copy of a deposition in Chancery Affidavit.

(1) B. N. P. 234. As to producing the original writ, in order to prove allowance of a writ of error, see Cleghorn *v.* Desanges, 3 B. Moore, 83: Gow. 66. As to the *effect* of writs, indorsements thereon, and returns, see Brown *v.* Dean, 2 Nev. & M. 317.

(2) Edmonstone *v.* Plaisted, 4 Esp. N. P. C. 160. The sheriff's book is not the proper evidence of the contents of a writ, nor will the court take judicial notice of that book, Russell *v.* Dickson, 6 Bing. 442.

(3) Ramsbottom *v.* Buckhurst, 2 Maule & Selw. 565.

(4) Duncan *v.* Scott, 1 Camp. 100. The rule, under the hand of the proper officer, is said to be itself an original, see Selby *v.* Harris, Lord Raym. 745; B. N. P. 229. Rules are said not to be records, Rex *v.* Bingham, 3 Y. & I. 101. They are commonly produced in the same cause and in the same court; as, where the office copy of a rule to pay money into court is produced, Israel *v.* Benjamin, 3 Camp. 41. A rule making a judge's order, under which an award had been made a rule of court, has been held sufficient evidence of the order. Still *v.* Halford, 4 Camp. 19.

(5) Dance *v.* Robson, M. & M. 294. As to proof by a judge's notes, see Van Nyvel *v.* Hunter, 3 Ad. & E. 244. Smith *v.* Smith, 3 Dowl. P. C. 733. *Ex parte* Learmouth, 6 Madd. 113. Doncaster, Mayor of, *v.* Day, 3 Taunt. 262.

is admissible in evidence, at least in civil cases; (1) and that the same rule would hold in regard to an examined copy of an affidavit taken in Chancery. (2) A witness may be cross-examined from an office copy of an affidavit, the affidavit having been made by him on an application for a new trial. (3)

Of the Proof of Depositions and Examinations taken before Magistrates.

Deposition before a magistrate.

The deposition of a witness, taken before a magistrate, is of the nature of secondary evidence; and the evidence of the witness *vivâ voce*, if producible, must be produced. It will be necessary, therefore, to shew the circumstances under which the deposition can be admitted,—as, by proof of the witness's death, or permanent disability, or other sufficient cause. (4)

Who may prove it.

It used formerly to be held, on the authority of Lord Hale, (5) that it would be necessary, for proving depositions, to call as witness either the committing magistrate or coroner who took them, or the clerk who reduced them into writing; and the reason given for the rule was, that it might be known whether the true substance of what had been stated was taken

(1) Highfield *v.* Peake, M. & M. 110: the trial was upon an issue out of Chancery, and the deposition was used to contradict a witness.

(2) As to the proof of affidavits in Chancery, by examined or office copies, *vide supra, office copies.* Some doubt appears to exist as to the point, whether the original affidavits should be produced; and, on the other hand, whether office copies, though not in the same cause, might be received, Rees *v.* Bowen, M'Cl. & Y. 383. Rex *v.* James, 1 Show. 397. Casburn *v.* Reid, 2 B. Moore, 60. Crook *v.* Dowling, 3 Doug. 75; B. N. P. 14; where a distinction is taken between proving an affidavit made by a party and by a stranger. An affidavit, purporting to be sworn before a public commissioner acting as such, is evidence without proof of the commission, Rex *v.* Howard, Mo. & R. 187. An affidavit, filed in court on a motion, may be read in evidence at the sittings, without proof of it's being sworn, Cameron *v.* Lightfoot, 2 W. Bl. 1190. It seems to have been thought, that, upon indictments for perjury, the original affidavit should be produced; by Lord Mansfield, Ch. J., in Crook *v.* Dowling, 3 Doug. 77. *Vide supra, Proof of Answers in Chancery.* That user of an affidavit by the party is sufficient proof of it's being sworn in civil, and, perhaps, in criminal cases, see B. N. P. 238. A cognovit may be proved by an examined copy, Scott *v.* Lewis. 7 C. & P. 349. As to recognizances becoming records, see 4 B. & C. 409.

(3) Davies *v.* Davies, 9 Carr. & P. 252.

(4) *Vide supra*, p. 71; and as to the requisites of depositions, under the statute 7 Geo. 4, c. 64, *vide supra*, p. 70—75.

(5) 2 H. P. C. 51, 284. *Vide infra*, p. 154, (1).

down correctly. But there is no principle, or rule of evidence, which makes it indispensable to resort to the evidence of either of those persons as a higher medium of proof: their evidence may, perhaps, be in general more satisfactory to the court and the jury, than proof by a third person who was present at the proceeding; but it may in many cases be less satisfactory: it is not, therefore, in it's nature the best evidence, and the principle, which excludes secondary evidence, clearly does not apply. The rule, which now seems to be settled, is, that the deposition may be proved either by the committing magistrate, or by the magistrate's clerk, or by some other person who was present when the information of the witness was taken, and who can prove the magistrate's signature, and the regularity of the proceeding. (1)

Information on oath.

If the deposition should omit to state that the witness was sworn, or that it was taken in the presence of the prisoner, the omission, though it would not vitiate the deposition, must be supplied, and proof of the fact must be produced; for the swearing of the witness, and the delivery of his evidence in the prisoner's presence, are indispensably necessary. (2) Such proof may be supplied by any person who was present when the deposition was taken. (3)

Justice's signature, how proved.

If the magistrate's signature is attested by a person as witness, it will not be necessary to call that person for proving the signature. The magistrate may prove his own signature; or the clerk, or some other person who was present at the time, may prove it. If the evidence of the attesting witness were indispensably necessary, proof of his signature would be sufficient in case of his death; but such proof would be of much less value than the evidence of the magistrate, or of some person who could prove all the particulars of the proceeding. The magistrate, in adding the name of the attesting witness to be

(1) The last case reported on this point is Rex *v.* Wilshaw, 1 Car. & Marsh. 146, where the deposition was proved by a constable. *Vide infra*, p. 154, (1), as to *Proof of Examinations*. The same rule applies equally both to depositions and examinations.

(2) *Vide supra*, p. 70, 73.

(3) *Vide supra*, (1), and *infra*, p. 156.

inserted, probably thought he would be the most convenient witness at the trial; but this cannot make him a better witness, nor can it make his evidence indispensable.

Examination of a prisoner before a magistrate.

The statement of the prisoner, or, as it is called, his examination, when taken in writing before a magistrate in pursuance of the statute, and subscribed by him, may properly be called a judicial proceeding; but with respect to the principle on which it is receivable as evidence, it stands upon a different footing from a deposition. A deposition derives all its effect, and it's admissibility as evidence, entirely from the statute: but the prisoner's examination is receivable on a different ground, and only as an admission; before the passing of the statute, as well as since, it has always been received as evidence against him solely on the footing of an *admission*. It is not made evidence by the statute; and was evidence before the statute passed. The written examination of the prisoner, therefore, is to be considered as a *medium of proof* by which his admission may be made known to the jury. The facts to be ascertained, are, whether the statement, whatever it may be, was voluntary,—and what was the statement which the prisoner made.

Examination signed or acknowledged—how proved.

If the examination has been signed by the prisoner, his signature authenticates and verifies it as his statement; or if he refused to sign, but acknowledged it to be true after hearing it read over, that acknowledgment would be a sufficient verification, and equivalent to a signature; and after proof of the signature or it's equivalent, the only other evidence wanted to make the examination admissible, would be some proof that the statement was voluntary. These several facts, of the prisoner's signature or acknowledgment, and his making the statement voluntarily, may be proved by the subscribing magistrate, or by the clerk who took the statement down in writing, or by some person who was present at the time.(1) There is no reason for calling one of these persons as witness, in preference

(1) The practice formerly was to require proof, of *examinations* as well as of *depositions*, by the magistrate or his clerk, according to the rule laid down by Lord Hale, (2 H. P. C. 51, 284,) *vide supra*, p. 152. But the practice is now altered, and the rule different. See Hope's

to either of the others: no necessity, at least, in point of legal priority or precedence. If a third person who was present during the whole time, can prove that he heard the magistrate inform the prisoner that he was at liberty to speak or not, as he chose, and that he heard the examination read over to him, and saw him then sign it, or heard him acknowledge it to be true, nothing more is wanting. This is the only evidence that the magistrate himself, or his clerk, could give, if they were called.

When no one who was present, can be called.

It may happen, that neither the magistrate, nor any other person who was present at the examination, can be called as witness at the trial; in such a case, what proof is sufficient for ascertaining the facts above mentioned, and, to render the examination admissible? If the examination purports to have been read over to the prisoner, and to be his voluntary statement, (which is the usual form in these examinations), proof of the prisoner's signature, together with proof of the magistrate's signature, would be sufficient, (1) for it would then appear, that the prisoner had recognised and adopted the written paper

case, before Vaughan, B., and Pateson, J., M. & R. 396, n., 7 C. & P. 136, S. C. A constable, who had been present during the examination, was there called to prove the examination: he said, he heard the examination read over to the prisoner by the magistrate's clerk, and saw the magistrate sign it, and the prisoner put her mark to it, and that he (the witness) then subscribed it as attesting witness; he did not, however, see the contents of the paper which the clerk read over. This witness's evidence was held, (after an argument in which the rule laid down in H. P. C. was insisted on), to be sufficient to make the examination admissible. Any other person present, besides the constable, would have been as *competent* a witness, if he could have given the same evidence; the constable was not a *better* witness (in the technical sense of the word) from being named as having attested the prisoner's mark. Chappel's case, 1 M. & R. 395, was one in which the prisoner set his mark, and Lord Denman held that the magistrate or the clerk must be called; but the case of Rex *v.* Hope, before mentioned, (which was tried at the Central Criminal Court, a year and a-half after Chappel's case at the Ex. Ass.) may be taken as settling the rule for the present. See also Smith's case, 2 Lewin. Cr. C. 139, stated in Roscoe's Cr. L. D. by Granger, p. 61, and Rex *v.* Wilshaw, 1 Car. & Marsh. 146. Foster's case, before Bosanquet, J., and Alderson, B., 7 C. & P. 149. Where *interlineations* appear in the examination, the evidence of the clerk—or of the magistrate, if he is able to give the requisite explanation—will be necessary. See Brogan's case, before Lord Lyndhurst, in 1834; MS. case in Roscoe's Cr. L. D. by Granger, 60.

(1) Priestley's case, before Parke, J., seems to be an authority upon this point; 1 Lew. Cr. C. 74; and in Roscoe, C. L. D. by Granger, 60.

as his voluntary statement, and that the magistrate had sanctioned the proceeding as regular.

Examination *marked*—how proved.

If the prisoner has not signed, but has set his *mark* to the examination, some person who was present when the examination was taken, must be called as witness to prove that the statement of the prisoner was made voluntarily, and that it was afterwards read over to him, and then marked by him. This may be proved either by the magistrate, by the magistrate's clerk, or some other person present at the time, who may be able to speak to the facts. It is possible that the evidence of the magistrate or of the clerk may generally be more satisfactory than that of a third person, but it is not the *best* evidence (in the technical sense of the word); the evidence of a third person who was present during the whole of the proceeding, is certainly *competent*, and may be satisfactory to the jury. (1) Even if the *mark* of the prisoner is attested by a person whose name is written opposite, there appears to be no good reason for holding that this person must be called, or that his evidence is indispensable; his name was inserted, no doubt, for convenience and for the facility of proof; but the insertion of his name ought not to be allowed to limit or restrict the *medium* of proof.

Examination, neither signed, nor marked, nor acknowledged—how proved.

When the examination has been neither signed by the prisoner, nor marked by him, nor acknowledged by him to be true, it is not admissible as evidence *per se*, as a written document, although it has been regularly subscribed by the magistrate, and although his signature may have been proved in the ordinary way, by some person acquainted with his handwriting: some evidence is manifestly necessary to verify the examination as the prisoner's statement; there is nothing in the mere proof of the magistrate's signature, from which it can be reasonably inferred, that the writing was read over to the prisoner, or (what is still more material in such a case), that the statement which it contains was voluntary and truly taken down.

(1) Rex *v.* Hearn, 1 Car. & Marsh. 109. The prisoner set her mark to the examination. A third person who was present proved that it was regularly taken, read over, &c.

A witness, therefore, must be called in such a case, who was present during the examination, and who can supply information on those particulars; and that witness may be either the subscribing magistrate, or the magistrate's clerk, or some other person who was present, who may be able to prove the requisite facts. But even after all this proof, the examination cannot be read to the jury as *written* evidence, because there is no proof that the prisoner has adopted the statement as his own, or recognised it as true; and it is only upon the principle of it's being an *admission*, that it can be received in any case; the only use, therefore, to be made of the examination in this case, is for the purpose of assisting the witness in giving his evidence as to the statement made by the prisoner in his hearing, that is, as a *memorandum*, according to the ordinary course. (1)

Section II.

Of the Proof of Public Writings not being Records or Judicial Proceedings; and of the Custody of Old Writings.

Writings not judicial.

With respect to the proof of public writings not of a judicial character, it is essential that they should be produced from their proper place of custody. This rule is equally applicable to judicial writings and to all public documents, especially such as are ancient. The questions upon this subject have usually occurred in cases where the documents were not of a judicial character,—the proper place of custody being in such cases more liable to be disputed. It will be convenient to consider, in this place, the general subject relative to the custody of documents.

Custody of old documents.

Old grants to abbeys have been rejected as evidence of private right, because the possession of them did not appear to be

(1) Rex *v.* Hallett, 9 C. & P. 748. *Vide supra*, p. 82; and vol. i. p. 427.

connected with any persons who had an interest in the estate. (1)

Possession of document not connected with possession of the estate.

A grant to an abbey, contained in a manuscript, entitled *Secretum Abbatis*, in the Bodleian library at Oxford, was rejected, as not coming from the proper custody; (2) and on the authority of this case, Mr. Justice Lawrence held, that an old grant to a priory, brought from the Cottonian Manuscripts in the British Museum, could not be received, as it was not shewn, that the possession of the grant was connected with any person who had an interest in the estate. (3)

Michell v. *Rabbets.*

Connection sufficient.

In the case of *Bullen* v. *Michel*, (4) one of the questions, on the admissibility of a chartulary, related to the custody from which that old document was produced. It appeared that the chartulary was brought from the muniment room of the Marquis of Bath, who, although not the owner of the particular farm, nor of any property in the parish of S., was the owner of other estates formerly belonging to the abbey, and concerning which estate, entries were to be found in the same document; and the character of the handwriting in the chartulary was proved to be of the reigns of the three first Edwards. "The question is," said the Lord Chief Baron Gibbs, in delivering the judgment of the court, "whether this book appeared, from the facts attending it, to have belonged to the abbey of Glastonbury. We should recollect, that such a book, as this purports to be, usually contains a description of all the estates of the abbey, and all the transactions relating to them. When the abbey was dissolved, those estates went to the crown, and the crown afterwards granted them to different persons; the book, when the abbey was dissolved, would go to the officers of the crown, and when the crown portioned out and made over the possessions of the abbey to other persons, the book could go only to one of those grantees; and the only possible way of connecting it with the abbey is, by shewing a connection between the possessor and the crown, and by raising a probability that the crown may have handed over the book to the present possessor." Now, such a connection was shewn in the present case;

Bullen v. *Michel.*

(1) Lygon *v.* Strutt, 2 Anstr. 601.
(2) Michell *v.* Rabbets, 3 Taunt. 91.
(3) Swinnerton *v.* Marq. of Stafford, 3 Taunt. 91.
(4) 2 Price, 413.

for it appeared that the present owner of the book is also the owner of certain lands which formerly belonged to the abbey, and which, on the dissolution of the abbey, passed to the crown, and from the crown to the present possessor; and the probability is, that the book attended the lands in their passage from the crown. On this ground, therefore, the court were of opinion, that the custody was so accounted for as to render the book admissible in evidence.

Connection not sufficient.

Potts v. *Durant.*

In the case of *Potts* v. *Durant*, (1) the Court of Exchequer determined, that some ancient writings, which had been offered in evidence, were inadmissible, because they had not been brought from the proper depository. One was a writing, purporting to be an endowment of a vicarge; another was an ancient writing, purporting to be an *inspeximus* of the former under the seal of the Bishop of Norwich, and containing a copy of the former, which is stated to have been at that time in the registry of the diocese. These writings were produced at the trial, by a person who had purchased them at a sale, as part of a private collection of manuscripts. Here the instruments came out of the custody of a private person, perfectly unconnected with the matters contained in them; and for this reason, were adjudged to be inadmissible. In the case of *Lygon* v. *Strutt*, (2) also, the Court of Exchequer held, that an ancient writing, purporting to enumerate the possessions of a monastery, which had been brought from the herald's office, was inadmissible.

Connection not sufficient.

Earl v. *Lewis.*

The case of *Earl* v. *Lewis*, (3) is another instance on this subject. There it was proved, on the trial of an issue respecting the boundaries of two adjoining parishes, that the old papers offered in evidence on the part of the plaintiff (the rector of one of the parishes), had come into the possession of the son of the former rector, upon his father's death, and that the son delivered them over, as papers belonging to the parish, into the hands of the witness, who produced them in court in the

(1) 3 Anstr. 789.
(2) 2 Anstr. 601.
(3) 4 Esp. N. P. C. 1, before Heath, J.

same state in which he had received them; and this was held to be sufficient evidence of the authenticity of the papers. So, in the case of *Jones* v. *Waller*, (1) on a bill for tithes, a book purporting to be the book of a collector of tithes, something more than seventy years old, being in the hands of the successor of that collector, was for that reason considered authentic.

Connection not sufficient.

Manby v. *Curtis.*

In the case of *Manby* v. *Curtis*, (2) a paper, purporting to be a receipt fifty years old, was produced as matter of evidence, to shew that a man of the name of Curtis had, fifty years before, paid to a man of the name of Smith a certain sum in lieu of tithes, and, in support of the authenticity of this paper, it was proved to have been delivered to the witness by the defendant; but it did not appear where the defendant got the paper, nor did it appear whether Smith was dead, or even who he was; the Court of Exchequer, therefore, rejected the evidence, on the ground that the paper had not been authenticated. And in the case of *Randolph* v. *Gordon*, (3) where a book, purporting to be the book of a former rector, was produced by the defendant's attorney, who received it from the defendant, and the defendant was the grandson of the former rector; but it did not appear whether he had found the book among his grandfather's papers, or how it came into his possession; the Lord Chief Baron held, that the book was not admissible,

Bertie v. *Beaumont.*

In the case of *Bertie* v. *Beaumont*, (4) the question was, whether a paper, which on the face of it contained evidence of money-payments in lieu of tithes enumerated in it, was admissible to shew that Dr. Eyre, who was clearly at the time rector, and had been so for many years preceding, and had received customary payments (there being also negative evidence that no payment of tithes in kind had been ever made), had given such receipt, and thereby acknowledged such payments. This

(1) 3 Gwill. 847. The evidence is said to have been received without proof of the collector's handwriting, see 2 Jac. & Walk. 468.

(2) 1 Price, 225; Mr. Baron Wood dissenting. 2 Jac. & Walk. 480.

(3) 5 Price, 312.

(4) 2 Price, 307.

paper was produced by the defendant's solicitor, who stated, that he received it from the defendant for the purpose of preparing his defence. It was not given to the defendant, but to another person of the same name, and who of course occupied lands in the parish, for none but an occupier could have acquired such a receipt. The Lord Chief Baron Thompson said, "That person being of the same name with the present defendant, there is a reasonable inference, that they were so connected as to make this the proper custody; and reasonable evidence of proper custody is all that can be required, and is sufficient." It was objected, also, that the handwriting of the paper had not been proved; "but," said the Chief Baron, "I do not think that any such proof was necessary to establish a document of this sort, at such a distance of time, any more than it would have been necessary to prove a deed of the same date."

Document connected with the person producing it.

The rule, respecting the proof of the custody in which documents have been kept, applies more particularly to ancient documents, whose authenticity depends in a great degree upon their custody, and which must be shewn to be connected with the party who produces them. In common cases, where the written instrument itself purports to belong to the party who produces it in evidence, no proof can be requisite as to the place in which it has been kept. On a question of settlement, where the respondents produced a certificate more than thirty years old, purporting to be granted to their parish by the appellant parish, the mere production of it was held to be sufficient, and the respondents were not obliged to show that the certificate had been kept in the parish chest; (1) and it would be sufficient, if the certificate were to be produced by a rated inhabitant of the parish. (2) So in an action for a false return to a mandamus, a corporator may produce the muniments of the corporation. (3)

Documents belonging to the party producing.

Parish papers.

(1) Rex *v.* Ryton, 5 T. R. 259.

(2) Rex *v.* Netherthong, 2 Maule & Selw. 337. This was before the late act of parliament, which made rated inhabitants competent witnesses on the trial of an appeal.

(3) 2 Maule & Selw. 338. The subject of the custody of documents will be further adverted to in treating of particular species of public writings, as terriers, registers and the like. *Vide infra*, p. 165.

Bp. of Meath v. M. of Winchester.

In the case of the *Bishop of Meath* v. *The Marquis of Winchester*, (1) it was considered, that a particular document relating to the private interests of a bishop, though in some degree relating to the see, might more reasonably be expected to be preserved with his private papers and family documents, than in the public registry of the diocese; but that, under the circumstances of the case, considering the document as belonging to the see, it was not unreasonable that it should be found in the bishop's mansion house; for, upon the evidence, there was only one single ecclesiastical record preserved in the registry of the diocese of so early a date, whilst, on the other hand, the document was found in the same parcel with several papers relating to the see, and in the same room were several visitation books of the diocese and other papers relating to the see. In delivering judgment in this case, Lord Chief Justice Tindal observes, with reference to the proper custody of documents, "It is not necessary that documents should be found in the best and most proper place of deposit. If documents continued in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than the most proper place of deposit, that the investigation commences whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they were actually found. For it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various others, and many that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction, that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases. On the one hand, old grants to abbeys have been rejected as evidence of private rights, where the possession

Ecclesiastical papers, kept among the bishop's papers.

Place of deposit proper, if reasonable under the circumstances.

(1) 3 Bing. N. C. 203. Doe d. Neale *v.* Samples, 8 Ad. & Ell. 154.

of them has appeared altogether unconnected with the persons who had any interest in the estate. Thus, in the case of *Lygon* v. *Strutt*, a manuscript found in the Herald's Office, enumerating the possessions of the dissolved monastery of Tutbury,—in *Mitchell* v. *Rabbits*, a manuscript found in the Bodleian Library, Oxford,—in *Swinnerton* v. *Marquis of Stafford*, an old grant to a priory brought from the Cottonian MSS. in the British Museum,—were held to be inadmissible, the possession of the documents being unconnected with the interests in the property. On the other hand, in the case of *Bullen* v. *Mitchell*, an old chartulary of the dissolved abbey lands of Glastonbury was held to be admissible, because found in the possession of the owner of part of the abbey lands, *though not of the principal proprietor*. This was not the proper custody, which, as Lord Redesdale observed, would have been the augmentation office, and, as between the different proprietors of the abbey lands, it might have been more reasonably expected to have been deposited with the largest proprietor; but it was, as the court argued, a place of custody, where it might be reasonably expected to be found. So also, in the case of *Jones* v. *Waller*, the collector's book would have been as well authenticated, if produced from the custody of the executor of the incumbent or his successor, as from the hands of the successor of the collector. And the case of *Bertie* v. *Beaumont*, is to the same effect."

Examined copy.

Public books.

The same rule which has been adopted in the case of judicial documents, appears to be generally applicable to public writings not judicial, namely, that wherever an original is admitted in evidence upon the footing of a public document, an examined copy will equally be admitted. (1) Thus, examined copies of the journals of the House of Lords or Commons, (2) or of the entries in the council book in the Secretary of State's Office, (3) or of

(1) Holt, Ch. J., in Lynch *v.* Clerke, 3 Salk. 153. Rex *v.* Haines, Comb. 337.

(2) Lord Melville's case, 24 How. 683. Rex *v.* Lord G. Gordon, 2 Doug. 593. *Vide supra*, proof of reversal of a judgment in the House of Lords. See Vin. Ab. Evidence, p. 122.

(3) Eyre *v.* Palgrave, 2 Camp. 606, proof of a license.

entries in the Bank books,(1) or in the books of the East India Company, (2) or in the books of assessments made by the commissioners of land-tax, (3) or in the books of commissioners of excise, (4) or in the poll books of an election of a mayor or member of parliament, (5) and in other cases of the same kind, have been admitted in evidence without accounting for the non-production of the original books. (6)

Gazette. In proving any matter by the Gazette, it is not necessary to show that it was bought at the office of the printer of the Gazette, or to prove by other evidence whence it came. (7) A Proclamation. court will not take judicial notice of the king's proclamations. (8)

Court rolls. Copies of court rolls properly stamped and signed by the steward of the manor, are evidence of the contents of the rolls, to prove admissions and surrenders,—as are also the original rolls. (9) Where a surrender of copyhold lands is made out of court by a deed of surrender, although the act of 48 Geo. 3, c. 149, requires that, in such a case, the deed of surrender or memorandum thereof shall be stamped, and not the copy, as in other cases, the copy will, notwithstanding, be evidence of the surrender. (10) The steward's copy is received in evidence upon the same principle as the chirograph of a fine, or the enrolment of a deed. (11) Some

(1) Marsh *v.* Collnet, 2 Esp. 665. The testimony of the broker is insufficient to prove a transfer, Breton *v.* Cope, Peake, 30. Doug. 572, n., 593, n. Transfer books of the East India Company, Doug. 572.

(2) Doug. 503, n.

(3) Rex *v.* King, 2 T. R. 234.

(4) Fuller *v.* Fotch, Carth. 346.

(5) Mead *v.* Robinson, Willes, 424.

(6) See Coombs *v.* Coether, M. & M. 398, book kept in Chapter-house. It seems that the books of the King's Bench and Fleet prisons are not provable by copies; see Salte *v.* Thomas, 3 B. & P. 190. As to the proof of Herald's books, see Vin. Ab. Ev. A. b. 39, p. 118. B. N. P. 248. Str. 162. In one case a copy of an agreement contained in one of the books of the Bodleian Library was received, Downes *v.* Moreman, 2 Gwill. 659.

(7) Rex *v.* Forsyth, R. & R. 274.

(8) Van Omeron *v.* Dowick, 2 Camp. 44.

(9) Doe *v.* Hall, 16 East, 208, which shews that the original entry is evidence, notwithstanding the statute.

(10) Doe d. Cawthorn *v.* Mee, 4 B. & Ad. 617.

(11) By Holroyd, J., in Appleton *v.* Braybook, 6 M. & S. 38. It

evidence of the identity of the party admitted is requisite. (1) Where evidence from the manor rolls is adduced, not to prove a conveyance, but for other purposes, as to establish a custom, an examined copy appears to be the proper evidence.

Where a surrender of a copyhold was duly made and presented by the homage, but no entry of such presentment and surrender was made on the rolls, it was held, that the surrender and presentment might be proved by a draft of an entry produced from the rolls of the manor, with the parol testimony of the foreman of the homage jury who made the presentment. (2) Where a surrender was made in the year 1774, and there was no record of it on the rolls, the books of the manor containing a record of the admission, which noted the surrender, were received as evidence of it. (3)

Corporation books.

The books of a corporation cannot be admitted in any case, unless shewn to have been regularly kept by the proper officer of the corporation. On an information in the nature of a *quo warranto*, the prosecutor produced in evidence a book written by the prosecutor's clerk, not an officer of the corporation, which appeared to be only minutes of corporate acts done some years before, and was not kept as a public book of the corporation; this evidence was rejected at the trial, and, on a motion afterwards for a new trial, the court held that it had been properly rejected. "Corporation books," the court said, "are generally allowed to be given in evidence, when they have been publicly kept as such, and when the entries have been made by the proper officer; not but that entries made by other persons may be good, if it is shown that the town-clerk was sick or refused to attend." (4)

would seem that the steward's signature should be proved.

(1) Doe d. Hanson *v.* Smith, 1 Camp. 196.

(2) Doe d. Priestley *v.* Callaway, 6 B. & C. 484. Lord Holt ruled, that the rough draft of a steward was good evidence of an admittance, Lord Raym. 735.

(3) Rex *v.* Thruscross, 1 Ad. & E. 126. Various authorites shew that the rolls of a manor are not conclusive as records, but that the parties may prove a mistake in them. See the cases referred to by Lord Tenterden in Doe *v.* Callaway, 6 B. & C. 494.

(4) Rex *v.* Mothersell, 1 Str. 93. Vin. Ab. Ev. A. b. 15, pl. 16. 17 Howell, 854.

Depository of.

Corporation-books must come from the proper custody. In the case of ancient books, questions upon this point have occasionally arisen. Thus, it has been held, that books, purporting to be corporation-books, produced from a chest found in the house of a former town-clerk, after his death, and not from the corporation chest, could not be received. (1)

With regard to the question, what is properly a corporation-book, it appears that a loose paper duly stamped upon a file, containing an entry of a freeman's admission, has been, in one case, considered the proper and original act of the corporation, in preference to an unstamped entry of the admission more at large in a book of acts of the corporation. (2)

Examined copies of corporation-books are evidence to prove corporate acts; but this rule does not extend to papers belonging to a corporation and kept in their chests, the entries in which are not of a public nature. (3)

Parish registers.

Parish registers may be proved by examined copies, which need not be stamped. (4) If the register is produced for the purpose of identifying the parties to a marriage, their handwriting need not be proved by an attesting witness to the register. (5) It seems that the returns made annually of the transcripts of parish registers, under the 70th canon, to the registry of the diocese, are not receivable in evidence instead of the original register or an examined copy of it, except as secondary evidence, in which case, examined copies of the returns would be receivable; but that, if the returns be made under the statute 52 Geo. 3, c. 146, examined copies of them would be evidence, without proof of the loss of the original register. (6)

(1) Mercers of Shrewsbury *v.* Hart, 1 C. & P. 114.

(2) Rex *v.* Head, Peake Ev. 92, (*n*).

(3) Rex *v.* Gwyn, 1 Str. 401. Brocas *v.* Mayor of London, 1 Str. 307.

(4) B. N. P. 247; see 52 Geo. 3, c. 146, s. 17.

(5) Best *v.* Barlow, Doug. 172, where Lord Mansfield says, that "parish registers are in the nature of records, and need not be produced, or proved by subscribing witnesses." An examined copy of the register of a marriage in the Swedish Ambassador's chapel, at Paris, is not evidence, Leader *v.* Barry, 1 Esp. 353; and *vide supra, Legal Registers.*

(6) Walker *v.* Beauchamp (Countess), 6 C. & P. 552.

If the parson of a parish be applied to for an extract of a parish register of a particular date, and he produces to the applicant a book as the original register, it will be presumed to be so, until the contrary is shown. But his statement that there is no register of the particular year, is not sufficient proof of the loss of the register, so as to let in secondary evidence; the person himself, or some other person, should be called to prove the loss. (1)

In questions of peerage, the original register, or, if that cannot be produced, the transcript deposited with the bishop, is generally required. (2) In the *Gardiner* Peerage case, however, where, to prove the marriage of Lord Gardiner at Madras, a book brought from the secretary's office in the East India House, and containing a list of marriages and burials at Madras, purporting to be authenticated by the signature of the officiating clergyman, was produced; it appeared that this book consisted of several sheets, copied from the original register in India, and transmitted from time to time to the East India House: upon its being shown, that the list containing the entry of Lord Gardiner's marriage, was in fact transmitted from India, (which was principally proved by the accompanying dispatch from the secretary of government,) and that the clergyman, whose name was affixed thereto, did, at the time when the alleged marriage was solemnized, officiate at Madras, the marriage was considered as proved. (3)

Madras register.

By stat. 6 Geo. 4, c. 110, s. 43, it is enacted, "That the collector and comptroller of his Majesty's customs at any port or place, and the person or persons acting for them respectively, shall, upon every reasonable request by any person or persons whomsoever, produce and exhibit, for his, her, or their inspection and examination, any oath or affidavit taken

Ship's register.

(1) Walker *v.* Beauchamp, 6 C. & P. 552.

(2) Minutes of Evidence, Marchmont's case, p. 5; Kilmorey's case, p. 10.

(3) Minutes of Evidence in the Gardiner case, p. 15. On the proof of marriages in a British colony, see Lautour *v.* Teesdale, 8 Taunt. 833. Rex *v.* Brampton, 10 East, 282. Ruding *v.* Smith, 2 Hagg. Con. 371. Rex *v.* Reebly, 3 Chet. Burn. 726. Smith *v.* Maxwell, R. & M. 80. Jacob's case, 1 Mo. Cr. Ca. 140.

or sworn by any owner or owners, proprietor or proprietors, (of the vessels mentioned in the act) and also any register or entry in any book or books of registry required by that act to be made or kept, relative to any ship or vessel; and shall, upon every reasonable request by any person or persons whomsoever, permit him, her, or them to take a copy or copies, or an extract or extracts thereof respectively: and that the copy or copies of any such oath or affidavit, registry or entry, shall, upon being proved to be a true copy or copies thereof respectively, be allowed and received as evidence upon every trial at law, without the production of the original or originals, and without the testimony or attendance of any collector or comptroller, or other person or persons acting for them respectively, in all cases as fully, and to all intents and purposes, as such original or originals, if produced by any collector or collectors, comptroller or comptrollers or other person or persons acting for them, could or might legally be admitted or received in evidence."

Terriers.

Terriers are, by the Ecclesiastical Canons, required to be returned into the registry of the bishop. This return, which is generally signed by the minister, is denominated a terrier,

Custody of.

and derives its authority from being found either in the bishop's register office, (1) or the registry of the archdeacon of the diocese, (2) or the parish chest. (3) Unless it comes from one of these depositories, it cannot, in general, be admitted in evidence. A paper, therefore, purporting to be a terrier, found in the charter chest of a college which had property in the parish, was thought to be inadmissible to disprove a modus. (4) However, under particular circumstances, this rule respecting the custody of the terriers has been relaxed, and a terrier has been admitted, though not brought from one of the regular depositories, when the custody in another place has been satisfactorily explained. One that was found in the registry of the

(1) Atkins *v.* Hatton, 3 Gwill. 1406; 2 Anstr. 386, S. C.; 3 Gwill. 1593. The bishop's registry is the proper place of custody for the accounts and other papers of sequestrators, Pulley *v.* Hilton, 12 Pr. 625.

(2) Potts *v.* Durant, 3 Gwill. 1450, 1454; 3 Anstr. 789, S. C. See Drake *v.* Smyth, 5 Pr. 369, cited *supra*.

(3) Armstrong *v.* Hewit, 4 Price, 218.

(4) 3 Gwill. 1406.

Dean and Chapter of Litchfield has been admitted in evidence against a prebendary.(1) This evidence was rejected at the trial; but a new trial was afterwards granted by the Court of King's Bench, on the ground, that the evidence ought to have been received, as there appeared to be a proper connection between the terriers and the place where it was found; and a strong corroborating circumstance was, that the terrier was found annexed to an old lease of the prebend, of nearly the same date.(2) But when the custody is merely private and unconnected with the subject-matter, the courts have never gone the length of admitting such papers in evidence.(3)

Private custody.

In *Hall* v. *Farmer*, (4) a suit in the Court of Exchequer for an account of tithes, an ancient document was offered in evidence on the part of the plaintiff, the vicar, which was produced by a clerk of the bishop's registry from the depository of the records of the Bishop's Court, and was described as a terrier, but it had no date, and whether any of the persons who signed it were churchwarden, vicar, lord of the manor, or residents in the parish, did not appear. It was stated by the counsel objecting to the reception of this document, that in an action of ejectment by the vicar for some glebe land, this evidence had been offered on the part of the defendant, and rejected at the trial. Mr. Baron Alderson was of opinion, that it might be received in the Court of Exchequer, at the same time saying, he had no doubt that it was properly rejected at Nisi Prius, as it would not bind the parson if not signed by himself or his predecessors. The judge expressed some doubt upon the admissibility of the document in the case before him, but received it on the ground of it's being an ancient document,

(1) Miller *v.* Foster, 3 Gwili. 1406, n., and see Bullen *v.* Michel, stated *supra*, p. 158.

(2) 3 Gwill. 1453, and see Tucker *v.* Wilkins, 4 Simons, 241, where a terrier from the custody of an individual, who claimed tithes of a district in the parish, was admitted; and also a copy of an endowment, under peculiar circumstances. A terrier may sometimes operate by way of admission, though not found in the usual repositories, Maddison *v.* Nuttall, 6 Bing. 226.

(3) Potts *v.* Durant, 3 Gwill. 1450, *supra*. See also Atkins *v.* Drake, M'Cl. & Y. 213.

(4) 2 Younge & C. 145. There were *two* documents; the objection was taken upon the *first*, and the statement above applies more particularly to that.

produced from the proper quarter, and taken under proper authority. "A terrier," he observed, "is only one species of that form of document. The question is, whether this comes under circumstances sufficiently authenticating it as a genuine document. It is not necessary to produce the inquisition in these cases, if, when that is not done, it appears satisfactorily to be an answer to a commission issuing under proper authority."

Testaments.

Testaments are proved in the Ecclesiastical Court, either in common form, or in form of law. The first mode of proof is, where the executor presents the will, without citing the parties

Proof of will.

interested, and deposes that it is the true and last will of the testator, upon which deposition the judge allows the will. The proof in form of law is, when the will is exhibited before the judge in the presence of the parties interested, and, after a full examination, finally allowed. (1) If the will be proved in common form, it may be disputed at any time within thirty years; but if it be proved in the more formal mode, and there be no proceedings within the time limited for appeals, the will cannot afterwards be disputed. (1) After proof of the will, the original is deposited in the registry of the ordinary or metropolitan, and a copy in parchment is made out under his seal, and delivered to

Probate.

the executor, together with a certificate of it's having been proved before him, which copy and certificate are the probate.

A Court of Common Law will not take notice of a will as a title to personal property, till it is proved in the Ecclesiastical Court; (2) and though the original will, together with the probate, is produced by the officer of the Ecclesiastical Court, the will cannot be read in evidence, unless it bears the seal of the Court, or some other mark of authentication. (3)

Exemplification.

It is not the practice in the Ecclesiastical Courts to grant a second probate, if the first should be lost, but only to grant

(1) 3 Bac. Ab. 40, tit. Executor.

(2) Stone *v.* Forsyth, 2 Doug. 707. The title of several executors may be proved by probate granted to one, Walters *v.* Pfiel, M. & M. 362.

(3) Rex *v.* Barnes, 1 Stark. Ca. 243. Pinney *v.* Pinney, 8 B. & C. 335. The act of the court may be endorsed on the will, Denn *v.* Barnard, Cowp. 595.

an exemplification from the record of the court, and this exemplification will be evidence of the proof of the will. (1) And an examined copy of a lost probate is evidence of the person there named being executor, as the probate is an original, taken by authority, and of a public nature; (2) but a copy of the will would not be evidence of that fact. (3) The seal of the Ecclesiastical Court, on the probate, needs not be proved. (4)

Copy of probate.

In the case of *Cox* v. *Allingham*, (5) for the purpose of proving certain persons to be executors of a will, the probate act-book was produced from Doctors' Commons, containing an entry that the will was proved by those persons as executors, and probate granted to them; the probate was not produced, nor any evidence offered to account for its non-production: the court determined, after argument, that the evidence was admissible,—and chiefly on the authority of *Garrett* v. *Lister*, (6) in which case the book of the Ecclesiastical Court, containing an entry of an act or order of the court for a grant of letters of administration to a person named, was received as evidence of his being administrator.

Probate act-book.

To prove the plaintiff's title as executor, the will was produced from the Registrar's Office, bearing a memorandum (signed by the surrogate) that the executor had signed the will, and that the probate had been sealed; it was further proved, that such memorandum was never made till probate had been granted by the court, and that, by the practice of the particular court, there was no other record or entry of the granting of the probate than the minute subscribed by the surrogate; this evidence was held to be sufficient proof of his title as executor. (7)

Surrogate's minute on will.

In *Doe* v. *Gunning*, (8) a document was produced from the Ecclesiastical Court, purporting to be the original will, with

Minute by deputy-registrar on will.

(1) Shepherd *v.* Shorthouse, 1 Str. 412. Bull. N. P. 246.

(2) Hoe *v.* Nelthrope, 3 Salk. 154; 1 Lord Raym. 154, S. C. Holt, Ch. J., in Rex *v.* Haines, Skin. 584.

(3) Bull. N. P. 246.

(4) Kempton *v.* Cross, Rep. temp. Hard. 108.

(5) Jac. Rep. 514.

(6) Lev. 25, and see the next page.

(7) Doe d. Bassett *v.* Mew, 7 Ad. Ell. 240.

(8) 2 Nev. & P. 260; and see Gorton *v.* Dyson, 1 B. & B. 219.

an endorsement upon it, in the handwriting of the deputy-registrar, stating, in effect, that the will had been proved by the executor therein named; and the Court of Queen's Bench, on the authority of *Cox v. Allingham*, determined that this was good evidence of the person being executor.

Probate, not evidence of devise of realty.

The probate of a will devising real property is not evidence of the contents of the will in an action of ejectment, even to prove a relationship; for where the original is in being, the copy is not admissible; and, besides, the seal of the court does not prove it a true copy, unless the suit relate only to personal property. (1)

Ledger-book.

But the ledger-book, says Mr. Justice Buller, is evidence in such a case, because this is not considered merely as a copy, but is a roll of the court; and though the law does not allow these rolls to prove a devise of lands, yet when the will is only to prove *relationship*, the rolls of the Spiritual Court, which has authority to enrol wills, are sufficient proof of such testament. (2) It has been, on some occasions held, that a copy of the ledger-book is not evidence; yet, since the original would be read as a roll of the court without further attestation, it seems fit, says Mr. Justice Buller, that the copy should also be read. The contrary practice, he adds, has been founded upon the mistaken supposition that the ledger-book is read as a copy, when in fact it is read as a roll of the court. (2)

Revocation of probate.

To prove that the probate of a will has been revoked, an entry of the revocation in a book of the Prerogative Court, in which all causes were entered by the registrar, and which was

(1) Bull. N. P. 246. It is not evidence that copyholds pass by the will, Jervoise *v.* D. of Northumberland, 1 J. & W. 570; and see Hume *v.* Rundell, 6 Madd. 331, as to proof of the testamentary character of an instrument. That the probate is not admissible as secondary evidence of a will of lands, Doe *v.* Calvert, 2 Camp. 389. Probate not proof of pedigree, Doe *v.* Ormerod, 1 M. & Ro. 466.

(2) Bull. N. P. 246. The ledger-book may be secondary evidence to prove a rent-charge, *ib.* The distinction between the effect of the ledger-book and a probate, as to proving pedigree, seems to partake of subtlety. As to the copy of a will remaining in Chancery, by order of the court, see Keb. 40, 117; Gilb. Ev. 276.

kept as the only record of such proceedings and of the decree of the court, has been admitted to be good evidence. (1)

Letters of administration.

Administration is generally granted by writing under seal. It may also be granted by entry in the registry without letters under seal. (2) The Ecclesiastical Court never grants an exemplification of letters of administration, but only a certificate that administration was granted; therefore, when a lessee pleads an assignment of a term from an administrator, such certificate is good evidence. (3) And the original book of acts, directing letters of administration to be granted, with the surrogate's fiat for the same, is evidence of the title of the party to whom administration of the intestate's effects is granted, without producing the letters of administration themselves (notwithstanding subsequent letters of administration granted to another), if the first are not recalled: for the original book was the authority for the proper officer to make out letters of administration, and the letters of administration were only the copy of the original minutes of the court, drawn up in a more formal manner. (4) An examined copy of the act-book, stating that administration was granted to the defendant at such a time, is proof of his being administrator in an action against him, without giving him notice to produce the letters of administration. (5)

Certificate.

Book of acts.

Examined copy of.

Seals.

The seal of the Corporation of London has been held to prove itself; (6) but the seal of any other corporation must be proved to be genuine by a person acquainted with the seal. (7)

In *Rex* v. *Bathwick*, (8) it was intimated by Lord Tenter-

(1) Ramsbottom's case, 1 Leach, Cr. C. 25, n. (*b*).

(2) Vin. Ab. Executor, D. p. 70.

(3) Kempton, dem. Boyfield *v.* Cross, Rep. temp. Hard. 108. Bull. N. P. 246.

(4) Elden *v.* Keddell, 8 East, 187. Garrett *v.* Lister, 1 Lev. 25; Bull. N. P. 246; 2 Maule & Selw. 567.

(5) Davis *v.* Williams, 13 East, 232. Ray *v.* Clerk, *ib.* 238, n. a.

(6) Doe *v.* Mason, 1 Esp. 53. Olive *v.* Guin, 2 Sid. 145.

(7) Moises *v.* Thornton, 8 T. R. 307. The genuineness of the seal of the Apothecaries' Company must be proved. Chadwick *v.* Bunning, R. & M. 306. As to the invalidity of the instrument, where the seal is affixed by a stranger, *Anon.* 12 Mod. 423. See Rex *v.* Haughley, 4 B. & Ad. 653.

(8) 2 B. & Ad. 648. It was there

den, that the seals of courts and corporations, being of a permanent nature, and therefore capable of being proved at any distance of time from the date of the instrument to which they are affixed, were not within the principle of the rule which dispenses with the proof of private seals affixed to instruments thirty years old.

If a court is appointed by act of Parliament, and a seal is given to it by the act, proof of the seal will not be necessary.(1)

Post-marks.

The genuineness of the Post-office mark may be proved by any post-master, or, as it seems, by any one who is in the habit of receiving letters by the post. (2)

CHAPTER IV.

OF THE INSPECTION OF PUBLIC WRITINGS.

Records.

THE judicial records of the king's courts are safely kept for the public convenience, that any subject may have access to them for his necessary use and benefit;—which was the ancient law of England, and is so declared by an act of Parliament in the forty-sixth year of Edward III. (3)

1. *Of the Right of a Party to have a Copy of Proceedings against him.*

Copy of indictments.

Some restriction of the general right of inspecting records

determined that the seal of a Bishop to a certificate of ordination, was not to be considered his corporate seal.

(1) Doe *v.* Edwards, 9 Ad. & El. 554; 1 Perr. & Dav. 408.

(2) Abbey *v.* Lill, 5 Bing. 299: the latter point was not decided. In Rex *v.* Watson, 1 Camp. 215, Lord Ellenborough refused to allow a Middlesex post-mark, unauthenticated, to be a proof of publication of a libel in Middlesex.

(3) 3 Inst. 71. Pref. to 3d Rep. p. 3, 4. See Sir R. Grahame's Trial, 12 Howell's St. Tr. 659.

has been thought necessary in the case of an acquittal on a prosecution for felony; in which case, if the trial is at the Old Bailey, a copy of the indictment cannot regularly be obtained without an order from the court; and it is a common practice, on the circuits, to apply to the court for a copy at the time of the trial. This practice appears to have been first adopted at the Old Bailey, in pursuance of an order made by some of the judges, for the regulation of those sessions, in the twenty-sixth year of Charles II. (2) It was then ordered, "that no copies of any indictment for felony be given without special order, upon motion made in open court, at the general gaol delivery: for the late frequency of actions against prosecutors which cannot be without copies of the indictment, deterreth people from prosecuting for the king upon just occasions." And Lord Holt has laid it down as a general rule of law, that if a person be indicted for felony and acquitted, and means to bring an action (without sufficient cause), the judge will not permit him to have a copy of the record, and he cannot have a copy without leave. (2) In the case of *Vandercomb* and *Abbott*, (3) the prisoners after their acquittal applied for copies of the several indictments, for the purpose of assisting them in their plea of *autrefois acquits*; the court, however, refused to grant them copies, but ordered the officer to read over the indictments slowly and distinctly, which was accordingly done.

In case of felony.

The rule of the judges states, that an action against a prosecutor cannot be maintained without a copy of the indictment, and that a copy is not to be given without an order from the court; but it is not to be inferred from this, that an order is essentially necessary for the introduction of a copy in evidence, or, if a copy were offered to be produced without an order, that

(1) Directions for justices at the Old Bayley, prefixed to Kelyng's Rep. p. 3, order 7. See Brangan's case, 1 Leach, Cr. C. 27. In this case, Willes, C. J., is reported to have said, that, by the laws of the realm, every prisoner upon his acquittal has an undoubted right and title to a copy of the record, for any use which he may think fit to make of it; and that, after a demand, the proper officer might be punished for refusing to make out a copy.

(2) In the case of Dr. Groenvelt *v.* Dr. Burrell and others, 1 Lord Raym. 253. But see Browne *v.* Cumming, 10 B. & C. 70, in which this seems to have been considered a doubtful point.

(3) 2 Leach, Cr. C. 721.

it could on that account be properly rejected. The admissibility of such evidence has been determined in the case of *Legatt* v. *Tollervey.* (1)

In case of misdemeanor.

The rule, which has been before mentioned, is confined to cases of felony. In prosecutions for misdemeanors, the defendant is entitled to a copy of the record, as a matter of right, without a previous application to the court. (2) So, in the case of a conviction by a magistrate, the defendant is entitled to a copy of the conviction, in order to defend himself against an action for the same offence; and if it should be refused, and the defendant in consequence sue out a writ of *certiorari*, merely for the purpose of procuring a copy and making his defence, the magistrate will be compelled to pay his own costs of returning the conviction. (3) The conviction may be drawn up at any time, before the return to the *certiorari* or to the sessions, though after a commitment, (4) or after the levying of the penalty. (5) And the conviction returned to the sessions, or to the Court of King's Bench, is the only one of which those courts take judicial notice. (6)

Depositions under excise laws.

When informations are filed by the Attorney-General, on depositions taken under the excise laws, the defendant is not allowed to inspect those depositions. And in a case where an information was filed against an officer of the East India Company, on charges of delinquency founded upon the report of a board of inquiry in India, the Court of King's Bench were of opinion, that the defendant had no right to have an inspection of that report, and that the court had no discretionary power to grant it. (7) "The practice on indictments at common law, and on informations upon particular statutes," said Mr. Justice Buller on that occasion, "shews it to be clear, that the defendant is not entitled to inspect the evidence, on which the prosecution is founded, till the hour of trial."

(1) 14 East, 302.
(2) Morrison *v.* Kelly, 1 Black. Rep. 385. Evans *v.* Philips, reported from MS. in Selw. Ni. Pri. 1065.
(3) Rex *v.* Midlam, 3 Burr. 1721.
(4) Massey *v.* Johnson, 12 East, 67, 82. 16 East, 20.
(5) Rex *v.* Barker, 1 East, 186.
(6) *Ibid.* 188.
(7) Rex *v.* Holland, 4 T. R. 691.

Proceedings in courts.

It was decided in the case of *Fox* v. *Jones*, (1) that where writs and other proceedings in a cause are officially in the custody of an officer of the Supreme Courts, he may be compelled by a rule of court to allow an inspection of them, though it be for the purpose of affording evidence in an action against that officer for negligence. In that case, an action was brought against the Marshal of the King's Bench Prison for the escape of a prisoner in his custody on mesne process, and the Court of King's Bench made a rule absolute, calling upon the defendant to allow the plaintiff's attorney to inspect, and take a copy of the writ of *habeas corpus*, and of the return annexed. (2)

Proceedings of inferior jurisdictions.

The right of inspecting the proceedings of inferior jurisdictions is more limited. It cannot be necessary for the interests of the public that they should be open for inspection to all persons without distinction; but, on the other hand, it seems reasonable, that, in any suit, where the regularity of those proceedings may come into question, a party should have the power of taking a copy of such as have been instituted against himself. In an action of trespass and false imprisonment, brought by the plaintiff, who had been sued in the Court of Conscience in London, the Court of King's Bench allowed the plaintiff to inspect the proceedings, so far as they related to the suit against himself, on the ground that every one has a right to look into the proceedings to which he is a party. (3) In another case, where the plaintiff, having been fined for neglect of duty, as an under officer to the commissioners of lieutenancy for the city of London, brought an action of trespass against the defendant for distraining upon him, the court granted the plaintiff a rule for inspecting and taking copies of

(1) 7 B. & C. 732.

(2) *Semble contra*, Rex *v.* Sheriff of Chester, 1 Ch. 476, and Davies *v.* Brown, 9 Moore, 778. But in the former case, the application to compel inspection seems to have been made to the wrong court; and in the latter,—where the Court of Common Pleas, in a case similar to Fox *v.* Jones, refused to compel the Warden of the Fleet to allow the plaintiff, in an action against him for an escape, to inspect the writ of *habeas corpus* and *committitur*—the decision seems to have been founded on the ground, that the documents required were not properly in the custody of the warden. Davies *v.* Brown was decided before Fox *v.* Jones; but a case, not reported, of Wigley *v.* Jones, was cited in argument, as a decison of the King's Bench, that the plaintiff was not entitled to an inspection.

(3) Wilson *v.* Rogers, 2 Str. 1242.

the rates and assessments made by the commissioners.(1) On the same principle, in an action for a malicious prosecution and false imprisonment, the plaintiff may obtain a rule for a copy of the information upon which he was committed; and as the original itself ought to be produced at the time of the trial, the court will also grant a rule, calling upon the committing magistrate to cause it to be produced. (2)

2. *Of the right of Persons under a Criminal Charge to have Copies and Inspection of Depositions.*

Inspection of depositions.

Formerly, a defendant on a criminal charge was not entitled to an inspection of the grounds upon which the prosecution had been instituted. In some species of treason, indeed, the prisoner was entitled to a copy of the indictment, a privilege not allowed by the common law, but conferred by act of Parliament; but neither in cases of treason nor of felony had he any right to a copy of the depositions of witnesses who were to appear against him.

Prisoner's counsel act. 6 & 7 Wm. 4, c. 114, s. 3.

Right to have copies.

But by a recent statute, (3) for enabling prisoners to make a full defence by counsel or attorney, it is enacted, that all persons held to bail, or committed to prison, for any offence against the law, shall be entitled to copies of the examinations of the witnesses respectively upon whose depositions they have been so held to bail or committed to prison, on payment of a reasonable sum for the same, not exceeding three half-pence for each folio of ninety words: provided always, that if such demand shall not be made before the day appointed for the commencement of the assize or sessions, at which the trial of the person, on whose behalf such demand shall be made, is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person presiding at such trial shall be of opinion, that such copy

Application for copies, when to be made.

(1) Edwards *v.* Vesey, Rep. temp. Hard. 128.

(2) Rex *v.* Smith, 1 Stra. 126. Welsh *v.* Richards, Barnes, 468. S. P. Herbert *v.* Ashburner, 1 Wils. 297. Moody *v.* Thurston, 1 Stra. 304, and Rex *v.* Commissioners of Land-tax, 2 T. R. 254. See Groenvelt *v.* Burrell, 1 Lord Raym. 253, 454; Carth. 421, 491. S. C. Avery *v.* Dickenson, Say. 250.

(3) 6 & 7 W. 4, c. 114, s. 3.

may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge, or other person presiding at such trial, if he should think fit to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged. And by another section (1) of the same act it is enacted, that all persons under trial are entitled at the time of their trial to inspect without fee or reward all depositions, (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had.

Section 4.

Right to inspect.

Since the passing of this act (6 & 7 Wm. 4, c. 114), the judges have laid down the following rules of practice:—(2)

Rules as to use of depositions.

1. Where a witness for the crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked, whether he did or did not in his deposition make such a statement, until the deposition has been read, in order to manifest whether such statement is or is not contained therein, and that such deposition must be read as part of the evidence of the cross-examining counsel.

2. After such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition; after which the counsel for the prosecution may examine the witness, and, after the prisoner's counsel has addressed the jury, will be entitled to the reply; and in case the counsel for the prisoner comments upon any supposed variance or contradiction without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

3. The witness cannot in his cross-examination be compelled to answer whether he did, or did not, make such a statement before the magistrate, until after his deposition has been read,

(1) Sec. 4.

(2) See 7 C. & P. *ad fin.* The same rules are to be found also in Roscoe's Cr. L. D. by Granger, p. 67.

and it appears that it contains no mention of such statement; in that event, the counsel for the prisoner may proceed with his cross-examination, and if the witness admits such a statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

It has been laid down as a rule, that, since the passing of the Prisoners' Counsel Act, a magistrate ought to return all that was said with respect to the charge; as the object of the Legislature was to enable prisoners to know what they had to answer on their trial.(1) This rule is to be taken with the qualification—that the whole of the statement, to be returned, is *material* to the charge. (2) The object of the Legislature seems to have been more to guard against *contradicting* than *adding* to the evidence taken before a magistrate; but it is desirable that a full statement should be made of what the witnesses said, as much time is often occupied in endeavouring to establish contradictions between the testimony of witnesses and their depositions, as to the omission of minute circumstances. (3)

In a case where one person is committed for *receiving* stolen property, and another committed as the *thief*,—if the latter is admitted as a witness for the crown against the former, the prisoner's counsel may inspect the deposition returned against the witness, as well as that returned against the prisoner. (4)

A prisoner is not entitled, under the act, to a copy of his own examination taken before a magistrate, which has been returned to the officer of the court, but only to a copy of the depositions

(1) In R. *v.* Grady and another, 7 C. & P. 650.
(2) R. *v.* Covenay, 7 Carr. & P. 667.
(3) R. *v.* Thomas, 7 Carr. & P. 817.
(4) R. *v.* Walford, 8 Carr. & P. 767.

of witnesses against him. (1) This decision is founded on the express language of the act, which speaks only of depositions of witnesses, and says nothing of the examinations of prisoners. Yet it may in some cases be as necessary for the full defence of the prisoner, that he should be furnished with a copy of his own statement taken in writing before the magistrate, as it is to have a copy of the depositions; especially when a part of the case for the prosecution consists of evidence intended to disprove or contradict the prisoner's statement. In such a case, if it were necessary for the ends of justice, the judge, by virtue of his judicial authority, might allow the prisoner to inspect his written examination.

If the prisoner, charged with murder on a bill of indictment, has been committed not on a coroner's warrant, he will not be entitled, under the act, to copies of depositions taken before the coroner; as the clause of the act limits the allowance of copies to "the examinations of the witnesses *upon whose depositions the person has been committed*;" but when the depositions, taken before the coroner, have been returned by him, and are in the possession of the court, the judge has authority, *ex officio*, to order a copy to be given to the prisoner, if he thinks it essential to the ends of justice. (2)

3. *Of Books of a public Nature, which are not open to general inspection.*

Parish registers and other public books.

Parish registers, books of the India Company relating to the transfer of stock, books of the Bank, &c., are for some purposes considered as public books; and persons interested in them have a right to inspect and take copies of such parts as relate to their interest. (3) So the books of the commissioners of the lottery, and their numerical lists, are of a public nature:

(1) R. *v.* Aylett, 8 Carr. & P. 669.

(2) R. *v.* Greenacre, 8 Carr. & P. 32.

(3) Geery *v.* Hopkins, 2 Lord Raym. 851. Warriner *v.* Giles, 2 Stra. 954. Mayor of London *v.* Swinland, 1 Barnardist. 454. In an action against the Churchwardens contesting the validity of a rate, the plaintiff, a rate-payer, was allowed to inspect the parish books. Newell *v.* Simpkin, 6 Bing. 565. Golding *v.* Fenn, cited by Patteson, J., in Rex *v.* Staffordshire, 1 N. & P. 264.

and kept by the commissioners in trust for the ticket-holders, who are entitled to an inspection, by rule of court.(1)

Book of public offices.

Access will not be granted to the books of public offices, in collateral actions brought by persons who have no interest in the books; therefore, in a *qui tam* action for penalties against a clerk in the post-office, for interfering in the election of a member of parliament, the prosecutor was not allowed to have a rule for inspecting the books of the post-office, as the cause did not relate to any transaction in the post-office, for which transactions alone those books are kept. (2) Nor will the court grant a rule for inspecting the custom-house books, for the purpose of furnishing evidence in an action between two persons who have no interest in the subject-matter, concerning the amount of a particular branch of the public revenue. (3)

Rolls of manor courts.

The court-rolls of a manor are kept in the custody of the lord or his steward, not for the use of the lord alone, but as the common evidence of the manorial rights, to which evidence all the tenants of the manor, whether copyhold or freehold, have an undoubted right of access, as well in actions between the tenants and the lord, as between the tenants themselves; (4) and it is now a matter of course to grant a rule for the inspection of the court-rolls and ancient writings of a manor, on the application of a tenant, who has been refused by the lord. And by the rule, H. T., 2 Wm. 4, s. 102, "An order upon the lord of a manor, to allow the usual limited inspection of the court-rolls, upon the application of a copyhold tenant, may be absolute in the first instance upon an affidavit that the copyhold tenant has applied for, and been refused inspection."

Statute directing inspection.

There are many cases in which provision is made in particular

(1) Schinotti *v.* Bumstead and others, cited from a MS. case, in 1 Tidd's Prac. 594.

(2) Crew q. t. *v.* Blackburn, cited 1 Wils. 240. 2 Stra. 1005, S. P.

(3) Atherfold *v.* Beard, 2 T. R. 614, 616. The *dictum* in this case proceeded on the ground, that it would be contrary to the public interest to compel the disclosure of such official matters.

(4) Roe *v.* Aylmer, Barnes, 236. Hobson *v.* Parker, *ib.* 237. Addington *v.* Clode, 2 Black. Rep. 1030. Folkard *v.* Hemet, *ib.* 1061. Rex *v.* Shelley, 3 T. R. 141. Rex *v.* Lucas, 10 East, 235. Bateman *v.* Phillips, 4 Taunt. 162.

statutes, for the keeping of documents, and for the allowance of an inspection of them; such provisions are contained in the Municipal Corporation Act; (1) in the General Registry Act (2) of Births, Marriages, and Deaths; and in the statutes passed in the recent sess. 7 Wm. 4, and 1 Vict. c. 83. By the latter act clerks of the peace are required to take custody of documents which the houses of Parliament require to be deposited with them, and they are directed by the same statute to allow all persons interested, to inspect and take copies of them, on payment of certain regulated fees. There are similar provisions contained in many local acts. (3)

4. *Of the persons who have a right to inspect public Books.*

Distinction between documents—as relating to the public in general, or only to a particular part of the public.

Documents may be of a general public nature, or of a local or limited public nature, and the right of inspection is correlative. This distinction is illustrated by the case of the *King* v. *The Bishop of Ely*, (4) in which, at the instance of a person who was an adverse claimant to the Bishop of Ely of the patronage of a benefice in the diocese, a mandamus was issued to the bishop, commanding him to allow the other party to inspect his registry of presentations and institutions to the living in question. Lord Tenterden said, "the books of a corporation are kept for the use of the body at large, or that of the individual members, and not for the use of strangers; so also are parish books; but a bishop's register of institutions is kept for the use of all persons claiming title to livings in his diocese. It therefore differs from the others, and is of a public nature." In an early case (5) the court said, that the practice of compelling an inspection of court-rolls was the origin of all similar cases, and that the right to inspection was confined to persons interested; "the rolls being the common evidence which must necessarily be kept in some one hand." An inspection was for that reason refused in an action of ejectment by an impropriator against the churchwardens of a parish, where a rule was applied for on the part of the plaintiff, sug-

Corporation books.

Parish-books.

(1) 5 & 6 W. 4, c. 76.
(2) 6 & 7 W. 4, c. 86, s. 36.
(3) See Rex v. St. Marylebone, 5 Ad. & El. 268.
(4) 8 B. & C. 112. See the same rule laid down by Bayley, J., in Rex v. Buckingham, *ib.* 379.
(5) Crew q. t. v. Saunders, 2 Str. 1005.

gesting that the parish books would make the title appear, and that they were the common books belonging to the parish at large; but the court were of opinion, "that the impropriator has a distinct interest from the parishioners, for it was not a parochial right, but a title which came in question."(1) For the same reason, a public company will not be compelled to produce any books relating to their private transactions. (2)

Book of company.

Parish books.

In a case (3) where an indictment had been preferred by the inhabitants of a parish against the county for the non-repair of a bridge in the parish, and the question was, whether the parish or the county were liable to the expense of repairing the bridge, a rule for allowing to the parties indicted an inspection of the accounts of the parish, relating to the previous repairs of the bridge, was refused. Bayley, J., in giving judgment, laid down the rule in strict accordance with the above doctrine. "In order," said the learned judge, "to entitle a party to inspect books, they must either be public books, or the party who applies for such inspection must have an interest in them. In the case of corporation books, no person wholly unconnected with the corporation has a right to inspect them. This is a public prosecution, and the application is made on behalf of the defendants. If all the subjects of the realm have an interest in the books and documents, inspection ought to be granted. But these books are kept not for the benefit of all the subjects of the realm, or even of the inhabitants of the county, but for the benefit and on the behalf of the inhabitants of the parish." (4)

It seems that a person cannot be considered to have a sufficient interest to entitle him to inspect the documents of a public body, if by law he is excluded from all control over the matters to which they relate; for example, a rate-payer in a county has

(1) Cox *v.* Copping, 5 Mod. 396. 1 Lord Raym. 337. Lewis *v.* Baker, 1 Barnard. 100. Turner *v.* Gethin, Vin. Abr. Evidence, (F. b.) pl. 11. Stevens *v.* Berwick-on-Tweed, 4 Dod. 277.

(2) Shelling *v.* Farmer, 1 Str. 646. Murray *v.* Thornhill, 2 Str. 717.

(3) Rex *v.* Buckingham, 8 B. & C. 375.

(4) And see Rex *v.* Antrobus, 2 Ad. & E. 788; and Rex *v.* Great Westowe, 1 Nev. & Per. 226.

not a right to inspect and take a copy of the charges of county officers, whose bills have been allowed by the justices at Quarter Sessions, in whom alone is vested the jurisdiction of allowing or disallowing them. (1)

Court-rolls.

The privilege of inspection of court-rolls is confined to the tenants of the manor, and does not extend to third persons, who have no concern or connection with the manor-court or the court-rolls. Thus, in an action of trespass, where the question was, whether the place, in which the trespass was alleged to have been committed, was within the manor of the plaintiff, or part of a manor claimed by the defendant, the court held, that the defendant, who, as it appeared from his affidavit, was not a tenant of the plaintiff's manor, nor claimed any interest under him, could not be entitled to an inspection. (2) And it may be laid down as a general rule, that where the question is on the custom of a manor between the lord and a stranger, the lord will not be obliged to let him have an inspection of the rolls, because, in a dispute with a stranger, they may be considered as his private evidence; but if the dispute is between tenants of the manor, or between the lord and a tenant, the lord shall produce the roll, and permit copies to be taken.

General rule.

Corporation books.

Corporation-books are open to the members of the corporation, as court-rolls are to the tenants of a manor.* Thus, where a mandamus had been granted, to admit a person into a corporation, and by the returns it appeared to be a question, whether the master, under whom he had served, had been ad-

(1) Rex *v.* Nottingham, 3 Ad. & E. 500. Rex *v.* Marylebone, 5 Ad. & E. 268. Rex *v.* Staffordshire, 1 Nev. & Per. 260, overruling Rex *v.* Leicester, 4 B. & C. 891. See also Rex *v.* Great Farringdon, 9 B. & C., as to inspection of accounts kept by guardians of the poor of parish expenditure.

(2) Talbot *v.* Villeboys, cited from MS. by Buller, J., 3 T. R. 142. Smith *v.* Davies, 1 Wils. 104. Bishop of Hereford *v.* Duke of Bridgewater, Bunb. 269. Attorney General *v.* City of Coventry, Bunb. 290.

* See the provisions of the Municipal Corporation Act, 5 & 6 W. 4, c. 76, as to the documents of which the officers of the corporation are obliged to allow inspection to the members. And see Davis *v.* Humphreys, 3 M. & S. 223, as to what documents are comprehended in a similar provision of the earlier act, 32 G. 3, c. 58, s. 4.

mitted to his freedom in the corporation, a rule was moved for, on the part of the person claiming admission, to inspect the books of the corporation; and the court held, that every member has a right to inspect and take copies of corporation-books for any matter that concerns himself, even in a dispute with strangers; but, as the return had pointed out the necessity of inspecting them for a particular purpose, the rule should be confined to such books as contained the admissions of freemen. (1)

Where an information in the nature of a *quo warranto* had been obtained, at the relation of corporators, against a person charged with unlawfully holding a corporation-office, the court held, that these relators were entitled to inspect the books, and that the rule should be limited to the inspection of such papers, as related to the subject-matter in discussion. (2) And in an action for the breach of a bye-law, restraining all but freemen from exercising trades within a corporate city, the court compelled the corporation to allow the defendant to inspect the bye-law in their books, (3) on the ground, that though he was not a member of the corporation, yet being one of a class of persons affected by the bye-law, he was not to be regarded as a stranger, and was entitled to demand inspection.

This right of inspecting the muniments of a corporation is confined to the members of the corporate body. A stranger has no better right to inspect corporation books, than to inspect the books of any private person. On a prosecution against a person for practising physic, (not being a member of the college of physicians, nor having a license, nor being a graduate of either university,) the defendant moved for leave to inspect the book of the college of physicians; but the court refused to grant the rule, as the defendant, who was not a member, had no right to see the books. (4) And in an action of trespass,

(1) Rex *v.* Fraternity of Hostmen, in Newcastle, 2 Stra. 1222.

(2) Rex *v.* Babb, 3 T. R. 579. Crew q. t. *v.* Saunders, 2 Str. 1005. Corporation of Banstaple *v.* Lathey, 3 T. R. 303. Young *v.* Lynch, 1 Black. Rep. 27.

(3) Harrison *v.* Williams, 3 Barn. & Cress. 162.

(4) Dr. West's case, cited 1 Wils. 240. Allan *v.* Tapp, 2 Black. Rep. 850.

where the defendant justified under a corporation for distraining for a toll, the court refused a similar rule to the plaintiff, who was a stranger to the corporation. (1)

A different practice was at one time introduced in courts of law, (2) upon the ground, that, on filing a bill for disclosure in a court of equity, an inspection would be granted as a matter of course, and that it would only cause unnecessary expense to send the parties into that court. But this practice, which was not warranted by earlier authorities, (3) nor conformable to the practice of courts of equity, (4) has been long discontinued; and the rule of law, now established, is, that in disputes between several members of a corporation an inspection of the corporation-books will be granted, because each has a right to see them; but an inspection will not be granted in the case of a corporation, when a similar inspection would be refused, if the suit were between private persons. No distinction is to be made, in this respect, between a corporation aggregate and a corporation sole, nor between a corporation sole and a private person suing in his individual capacity. (5)

5. *Of certain cases in which a Court will not compel Inspection.*

Inspection when not compelled.

The rule for inspecting court-rolls, corporation books, and other public writings, will not be allowed, where the party, who has them in his custody, would, by producing them for inspection, disclose any evidence of a criminal nature, or expose himself to a prosecution. On an information, therefore, against several persons, for executing an office of trust without taking the oaths, the court refused a motion for leave to inspect some books kept by the defendants, in which they had entered their elections, receipts, and disbursements, as it would have compelled them to give evidence against themselves in a criminal

(1) Cited by De Grey, C. J., in Hodges *v.* Atkis, 3 Wils. 398, and by Lawrence, J., in 8 T. R. 594. Mayor of Southampton *v.* Graves, 8 T. R. 590.

(2) Mayor of Lynn *v.* Denton, 1 T. R. 689. Corporation of Barnstaple *v.* Lathey, 3 T. R. 303.

(3) Dr. West's case, cited 1 Wils. 240. Rex *v.* Dr. Bridgeman, 2 Str. 1203. Mayor of Exeter *v.* Coleman, Barnes, 238. Hodges *v.* Atkis, 3 Wils. 398.

(4) See as to the practice in Equity, Kynaston *v.* The East India Company, 3 Swanst. 248.

(5) 8 T. R. 593.

prosecution; (1) and a similar motion was refused, on an information against two overseers for making a rate without the concurrence of the churchwardens. (2) Another case to the same effect is the case of the *King* v. *Dr. Purnel*, (3) where, on an information against the defendant for a misdemeanor in his office of vice-chancellor of the university of Oxford, a rule for taking a copy of the University-statutes, in the care of the keeper of the archives, was refused by the Court of King's Bench after great consideration; and the principle, that no man shall be bound to criminate himself, was fully recognized.

In the recent case of the *King* v. *Antrobus*, (4) in which an information was filed against the sheriff of the county of Chester for not executing a criminal, and the question was, whether it was the duty of the sheriff of the county, or of the officers of the corporation of the city of Chester to execute the criminal, the court refused to issue a mandamus to the corporation, to allow an inspection of their muniments on the defendant's behalf. The grounds of the decision do not appear in the report, but it seems to be a sufficient reason for the refusal, that the sheriff was not a member of the corporation, and, though the person, who made the application to inspect in his behalf, was a freeman, yet, as he did not make it in his own right, that circumstance would not make any difference.

Quo warranto. This principle will not apply to the case of informations in the nature of a *quo warranto*, for usurping a franchise, or intruding into a corporation-office; for such informations, although originally and strictly criminal methods of prosecution, are applied to the purpose of trying civil rights, and are considered at present as merely civil proceedings. On an information, therefore, exhibited at the relation of a member of a corporation, against a person for unlawfully executing an office, the relator, who as member has a right and interest in the books of the corporation, may obtain an inspection and copy of

(1) Reg. *v.* Mead, 2 Lord Raym. 927. Rex *v.* Worsenham, 1 Lord Raym. 705. Rex *v.* Cornelius, 2 Str. 1210.

(2) Rex *v.* Lee, cited 1 Wils. 240.

(3) 1 Wils. 239. 1 Black. Rep. 37. Rex *v.* Heydon, 1 Black. Rep. 351. See also Rex *v.* Earl of Cadogan, 5 Barn. & Ald. 902.

(4) 2 Ad. & El. 788.

such, (and of such only,) as relate to the subject-matter in discussion. (1)

Entry in parish book, but not of a public matter.

In a case before the Court of King's Bench, (2) an action having been brought for a libel contained in a written statement, which the defendant had drawn up respecting the plaintiff's conduct, the defendant applied for a rule to inspect certain documents belonging to the parish, then in the plaintiff's possession, from which documents he had drawn up his statement by the authority of the vestry. The inspection was required, with the view of enabling the defendant to justify in the action. But the court refused to order the plaintiff to furnish evidence against himself; if the papers, the court added, had been wanted for the purpose of advancing any parochial right, the case would have been different.

6. *Of the mode of obtaining Inspection.*

How to obtain inspection of documents.

The motion for a rule to inspect and take a copy, where an action is depending, is founded on an affidavit stating the circumstances under which the inspection is claimed, and stating further, that an application has been made in the proper quarter, for permission to make the required inspection, which has been refused. (3) When a motion for a mandamus, or for an information in the nature of a *quo warranto* in a corporation, is depending, the court will grant a rule absolute in the first instance. (4) But when the motion is for a writ of mandamus to inspect, grounded upon affidavits, the rule, to be granted, is only to show cause.

In what stage of the proceedings.

With regard to the proper stage of the proceedings for making the application, it may be observed, that the court has refused the motion in an action against a corporation upon a demand. It seems the necessity for having an inspection must be shewn to the court; Gas Company *v.* Clarke, 7 Bing. 95. Rex *v.* Clear, 4 B. & C. 899. Rex *v.* Merchant Tailors' Company, 2 B. & Adol. 115.

(1) Rex *v.* Babb, 3 T. R. 579.

(2) May *v.* Gwynne, 4 Barn. & Ald. 301.

(3) Roe *v.* Aylmar, Barnes, 236. And see Rex *v.* Wilts and Berks Canal Company, 3 Ad. & El. 477, as to what is a sufficient refusal, and the consequences of neglecting to make a sufficient previous

(4) Rex *v.* Shelley, 3 T. R. 141.

right of toll, *because issue was not joined*, so that it could not appear, whether an inspection would be necessary. (1) And in the case of *Dr. Groenvelt* v. *Dr. Burnell*, where the plaintiff applied for a copy of the proceedings, instituted against him by the college of physicians, the court admitted the rule for inspecting the proceedings to be usual, for the sake of evidence, *after issue joined*, but not by way of assisting the party to plead. (2) If a rule has been granted to show cause, why a mandamus should not be awarded, the court will not make a rule for inspecting and taking copies, until the first rule is made absolute, and a return is made to the mandamus; (3) and it has been thought the most convenient practice, where a rule *nisi* for a *quo warranto* information has been obtained, not to grant an inspection, until the information is granted. (4)

Where no action depending.

If no action is depending, the proper motion is for a rule to show cause, why a writ of mandamus should not issue, commanding the officer, who has the custody of the books, to permit the party to inspect and take a copy. The affidavit, upon which this motion is founded, ought to state clearly the right, under which the inspection is claimed, and that the inspection has been refused, and the reason for requiring the inspection. (5) In a case of this kind, where an inspection of the court-rolls of a manor was applied for, the party stated in his affidavit a *primâ facie* title to a copyhold of the manor; and the Court of King's Bench held that, as he was clearly entitled to the copyhold, unless it had been conveyed away by those under whom he claimed, he had a right to see, whether any such conveyance appeared on the rolls: the court, therefore, made the rule absolute, so far as related to the copyhold lands, the subject of the party's claim. (6)

(1) Hodges *v.* Atkis, 3 Wils. 398. 2 Black. Rep. 877, S. C.

(2) Carthew. 421. This distinction has not been supported by modern cases. In Fox *v.* Jones, *supra*, 177, the court compelled the marshal of the King's Bench prison to allow an inspection of a writ for the express purpose of enabling the plaintiff to declare; and that is the constant practice with respect to private documents.

(3) *Per Cur.* in Rex *v.* Justices of Surrey, Say. 144.

(4) By Ashurst, J., in Rex *v.* Babb, 3 T. R. 581. Rex *v.* Hollister, Rep. temp. Hard. 232.

(5) *Supra*, p. 189, note (3).

(6) Rex *v.* Lucas, 10 East, 235; and see 3 T. R. 142. Rex *v.* Tower, 4 M. & S. 162.

CHAPTER V.

OF THE INSPECTION OF PRIVATE WRITINGS.

A VERY useful jurisdiction is exercised by the superior courts of law in assisting the parties to a suit, by compelling the production of writings which relate to the matter in dispute. In the earlier reported cases, the principles which regulate this jurisdiction are not very clearly defined. Lord Mansfield was disposed to compel the production of all papers which a party could get at by a bill in equity for a discovery. (1) But courts of law have not exercised their authority to such an extent.

Power of compelling production.

The practice of compelling a party to produce an instrument, by which he seeks to charge the other, has probably grown up from analogy to the practice which required a profert to be made of all instruments under seal, stated in the pleadings; one of the reasons for which was, that it might appear whether the effect of the deed was truly given, or whether the deed was upon "condition, limitation, or power of revocation, &c. to the intent that if there be a condition, limitation, or power of revocation in the deed,—if the deed be poll, or if there wants a counterpart of the indenture,—the other party may take advantage of the condition, limitation, or power of revocation." (2)

General rule as to inspection.

The benefit derived from a *profert* is obtained in other cases by the exercise of the equitable jurisdiction of the court in compelling a party to produce documents, upon which a declaration or other pleading appears to be founded. A distinction was formerly taken between an express statement of a writing

(1) Barry *v.* Alexander, 1 Tidd. Pr. 9th edit., 592. 4 Dougl. 15.

(2) Leyfield's case, 10 Coke, 92 *b.*

in the pleadings, and a statement of a contract of which the writing is merely evidence; it being held, that in the former case only, "the court, on affidavit of the defendant that he had no part, would let him have a copy."(1) But this distinction has not been observed in modern practice, and the general rule is that the court will compel a party to allow an inspection of written documents, on which either an action or a defence is founded, if the party applying for inspection have the requisite interest in them. (2) It is, however, discretionary with the court to make such an order, and a proper ground must be shown for requiring it.

To whom inspection may be given.

It seems that the person in whose favour an order for inspection of documents is made, must be a party to the suit; but it is not necessary that he should be one of the parties executing the instrument; it is sufficient, if he be identified in interest with a party executing,—as, for example, if he take an estate by way of remainder. (3) But unless he is either a party to the deed, or a party in interest, he cannot compel the other party to produce an instrument in his possession. (4) In one case it was held, in an action against a sworn broker of the city of London for negligence in making a purchase for the plaintiff, that the plaintiff was entitled to an inspection of the entry, in the defendant's books, of the contract made on his behalf, on the ground that the defendant was the agent of the parties in making the contract and the entries: (5) it was urged in argument in support of the rule, that it was the duty of the broker to make in his books entries of all contracts, and allow the parties to inspect them, and that he gave a bond to do so on his appointment.

Inspection, for helping to a

The court will not compel a plaintiff who brings an action

(1) Suster *v.* Cowell, 2 Keb, 430. Hill *v.* Aland, 1 Salk. 215.

(2) Barry *v.* Alexander, 4 Dougl. 15, and see judgment of Dallas, C. J., in Threlfall *v.* Webster, 1 Bing. 161.

(3) By Heath, J., Bateman *v.* Phillips, 4 Taunt. 161. In Brown *v.* Rose, 6 Taunt. 283, the decision of the court was not on this point, but founded on their discretionary power to grant or refuse an application of this nature.

(4) Lawrence *v.* Hooker, 5 Bing. 6. See Brown *v.* Rose, 6 Taunt. 283.

(5) Browning *v.* Aylwin, 7 B. & C. 204.

upon an agreement to deliver a copy of the agreement to the defendant, to enable him to plead in abatement, that it was signed by others as well as himself. (1) Great injustice might be done if this were allowed. It would enable the defendant to interpose vexatious delay, and perhaps might defeat the plaintiff's claim.

plea, in abatement, refused.

In *Jessel* v. *Millinghen*, (2) an action upon an agreement, the defendant's attorney having stated that he had a document in his possession, signed by the plaintiff, which was a complete answer to the action, the plaintiff made an affidavit, that if such a document existed, it must be a forgery, and applied for an inspection and a copy of the document; the court refused the application. To grant an inspection in such a case would be to compel the defendant to disclose the nature of his defence to the action. "If the fact is as the plaintiff swears," said the Lord Chief Justice, "then there is no document in existence bearing his signature; and if such document does exist, he ought to be aware of it."

Inspection which would lay open the defence, refused.

Jessel v. *Millinghen.*

Applications for inspection have in several cases been made, on a suggestion that the instrument is a forgery. In the case of *Chetwind* v. *Marnell* (3) where an action was brought on a bond of the defendant's testator, the defendant, after obtaining oyer, pleaded *non est factum*, and then moved for a rule calling on the plaintiff to allow an inspection of the bond by an officer of the stamp duties, suggesting that it was a forgery; but the court refused it, on the ground that it would be much too strong a measure to order the plaintiff to produce an instrument, which might be the means of convicting him of a capital felony. The court further said, that as the defendant had pleaded *non est factum*, the plaintiff would be obliged to produce the bond, if he meant to proceed in his action; but as he might think better of it, the court would not put his life in danger, by the exercise of it's authority.

Inspection sought on suggestion of forgery.

Chetwind v. *Marnell.*

In the case of *Hildyard* v. *Smith*, (4) in an action on a bill

Hildyard v. *Smith.*

(1) Beale *v.* Bird, 2 D. & R. 419.
(2) 1 M. & Sc. 605. And see Smith *v.* Winter, 3 M. & W. 309; S. C. 6 Dowl. P. C. 386.
(3) 1 B. & P. 271.
(4) 1 Bing. 451, S. C. 8 B.

of exchange, the court refused to compel the plaintiff to deposit the bill in the hands of the prothonotary for inspection by the defendant, that he might see whether it was a forgery; the ground on which the application was refused, seems to have been, that the reason alleged for the necessity of inspection would be matter of defence at the trial. But in the recent case of *Woolmer and Another* v. *Devereaux*, (1)—where a Judge at Chambers had made an order on the plaintiffs to permit the defendant to inspect and take a copy of a promissory note, on which the action was brought, and the Court of Common Pleas refused to set it aside, (on the ground that it was a matter entirely in the discretion of the judge,) although the order was not made on an affidavit stating any special ground for such inspection,—Lord Chief Justice Tindal said, "There is no doubt that a judge has authority to make such an order, if circumstances call for it; as, where there is a suggestion that the instrument is a forgery, or that it was altered since it was signed, or the party swears that he has no recollection of ever having executed such a document."

Woolmer v. *Devereaux.*

Inspection, when the instrument (sued upon) is the property of both parties.

The general rule has been laid down in the following terms: "Inspection of documents in the custody of an adverse party is only permitted when they are to some extent the property of both parties, as in the case of an agreement, of which there is but one copy; then the party who holds it holds it as trustee for the other." (2) In the case of *Blakey* v. *Porter*, (3) an action was brought upon a covenant in an indenture of assignment, which was in the hands of the defendant, and of which there was no counterpart, and the Court of Common Pleas made a rule absolute, to compel the defendant to allow the plaintiff to read it, and take a copy at his own expense. Sir James Mansfield said, the necessary consequence of the parties being content to execute one part only of an indenture, was

Blakey v. *Porter.*

Moore, 586. A rule to shew cause had been obtained, which was afterwards discharged.

(1) 2 Man. & Gr. 758. See also Richey *v.* Ellis, Alc. & Nap. 111, Irish Rep.

(2) See Jessel *v.* Millingen, 1 M. & Scott, 606, by Tindal, C. J. See also Pickering *v.* Noyes, 1 B. & C. 262. Ratcliffe *v.* Bleasby, 3 Bing. 150. Lord Portmore *v.* Goring, 4 Bing. 152. Rowe *v.* Howden, *id.* 539. Rundle *v.* Beaumont, *id.* 537. Cocks *v.* Nash, 9 Bing. 723.

(3) 1 Taunt. 386.

"that the party who has the custody undertakes to produce the deed, when wanted for the use of both;" and Heath, J., assimilated the case to that of inspection of court-rolls by a copyholder. It was held that it made no difference in the application of this rule, that the object of the party applying for inspection was to discover some defect in the deed. (1)

Blogg v. *Kent.*

In the case of *Blogg* v. *Kent*, (2) in an action on an agreement, the defendant pleaded, that there was no agreement in writing as required by the Statute of Frauds; the plaintiff replied, that there was such a writing; it was held, that the defendant was entitled to an inspection. Tindal, C. J., said, "the replication virtually inserts in the declaration an averment of an agreement in writing. It appears that one party only has a copy; and it comes round to the ordinary case, that where there is only one copy of the contract in dispute between the parties, the party who holds it is a trustee for the production of it to the other party."

Or where such an instrument is wanted as evidence.

In cases where the instrument is not the direct foundation of the action or defence, but is merely matter of evidence to be used at the trial, the rule compelling inspection seems to be the same. Where there is but one instrument between the parties, the court will compel the party, in whose possession it is, to produce it for the inspection of the other. (3)

It has been above stated, as the foundation of the right to inspect an instrument, that the party, in whose custody it is, must be trustee, so far as the production of the instrument is concerned, for the other party. It seems that he must have received the custody under that implied trust *ab initio*,—as, where it appears, that only one instrument was executed. There is no case in which a rule has been made to compel a party,

(1) King *v.* King, 4 Taunt. 666.
(2) 6 Bing. 614.
(3) Goater *v.* Nunnely, 2 Str. 1130. Gracewood *v.* ——, Barnes, 439. Bateman *v.* Phillips, 4 Taunt. 157. Morrow *v.* Saunders, 1 B. & B. 318. Gigner *v.* Bayly, 5 Moore, 71. Ratcliffe *v.* Bleasby, 3 Bing. 148. Devenoge *v.* Bouverie, 8 Bing. 1. Reid *v.* Coleman, 2 Cr. & M. 456. Rex *v.* Winkles, M'Clel. & Y. 33. Whitbourne *v.* Pettifer, 4 M. & Sc. 182. Jones *v.* Palmer, 4 Dowl. P. C. 447. Doe d. Morris *v.* Roe, 1 M. & W. 207.

holding the counterpart of an instrument, to allow an inspection, because the other part has been lost or is inaccessible. In an action of (1) covenant on a charter party, it appeared that two parts of the deed had been executed, but the plaintiff's part had been lost at sea in a vessel which foundered; and on this ground a rule was obtained to compel the defendant to allow the plaintiff to inspect and take a copy of his part; afterwards the rule was discharged, and Lord Chief Justice Gibbs said, the case did not come within the rule, the defendant not being a trustee as to his possession of the deed.

Where counterpart lost. *Street* v. *Brown.*

Instrument in the hands of one who received it from a party.

In general the court will not interfere to compel a person, not being a party to the suit, to produce documents for inspection; (2) but there is an exception to this rule, if he has obtained possession from a party to the suit. In that case, if it appear that there was but one instrument between the parties, the person obtaining possession of it from one of the parties must be considered as holding it under notice, that he had it in trust to produce it to the other party. Thus in a recent case, in an action of ejectment by a landlord against his tenant, where it appeared that the lessee of the premises in question had mortgaged his interest in them, and deposited the indenture of demise with the mortgagee, the Court of Exchequer made a rule absolute to compel the mortgagee to allow the lessor of the plaintiff to take a copy of the lease. (3) But where a third person is in possession of an instrument by a title paramount to that of the parties to the suit, it seems that the court would not compel him to produce it. (4)

Production for the purpose of stamping.

It appears, in general, whenever a party would be compelled to allow an inspection of a document, he may be called upon to produce it, for the purpose of it's being stamped, so that it may become admissible in evidence at the trial; and in some

(1) Street *v.* Brown, 6 Taunt. 302. Portmore *v.* Goring, 4 Bing. 152. But see Travis *v.* Collins, 2 C. & J. 625.

(2) Rex *v.* Worsenham, 1 Lord Raym. 705. Cocks *v.* Nash, 9 Bing. 721.

(3) Doe d. Morris *v.* Roe, 1 M. & W. 207, and see Harris *v.* Aldrit, 2 Ch. 229.

(4) See Pickering *v.* Noyes, 1 B. & C. 262, and Doe d. Morris *v.* Roe, 1 M. & W. 207.

cases, where the party holding an instrument would not be bound to allow an inspection, he may be compelled to allow the other party to have it stamped. (1) Thus, in the case of *Neale* v. *Swind*, (2) though there had been originally two parts of a document, (the destruction of one of which would not be a sufficient ground for calling upon the party possessed of the other part to allow an inspection,) (3) the court, to prevent the failure of justice which would occur by the exclusion of all evidence upon the production of the unstamped instrument, determined that the party having the counterpart might be compelled to produce it at the Stamp Office; a production for that purpose was considered distinguishable from a production for inspection.

Neale v. *Swind.*

There are some cases in which facility is given for the inspection of private documents, by the express enactments of statutes. The stat. 19 Geo. 2, c. 27, s. 6, enacts, "That in all actions or suits brought or commenced by the assured upon any policy of assurance, the plaintiff in such action or suit, or his attorney or agent, shall, within fifteen days after he or they shall be required to do so in writing by the defendant or his attorney or agent, declare in writing what sum or sums he had assured or caused to be assured in the whole, or what sums he has borrowed at *respondentia* or *bottomre* for the voyage or any part of the voyage." And it has been laid down that "in actions of this nature, a judge at chambers will make an order for the assured to produce to the underwriters, upon *affidavit*, all papers in possession of the former relative to the matter." (4)

Inspection directed by statute.

19 G. 2, c. 27.

Actions on policies of insurance.

The stat. 53 Geo. 3, c. 141, s. 5, enacts, "That in case any person or persons by whom any annuity or rent-charge, of which such particulars as aforesaid are required to be enrolled, shall for the time being be payable, shall be desirous of obtaining a copy of every or any deed, bond, instrument, or other assurance, whereby such annuity or rent-charge was granted, and of such his, her, or their desire shall give twenty-one days'

Annuity deeds.

53 G. 3, c. 141.

(1) See Bateman *v.* Phillips, 4 Taunt. 161.

(2) 3 Cr. & J. 278.

(3) *Supra*, p. 196, n. (1).

(4) Tidd's Prac. 9th edit. 591. The authority, cited for this position, which fully supports it, is Goldschmidt *v.* Marryat, 1 Campb. 562.

notice in writing to the person or persons for the time being entitled to such annuity or rent-charge, such person or persons shall on or before the expiration of such twenty-one days, unless prevented by fire or other inevitable accident,—and in that case, if the assurances shall not be destroyed by such accident, then as soon after as such impediment shall be removed,—send, or deliver to the person or persons requiring the same a copy of every deed, bond, instrument, or other assurance, whereby such annuity or rent-charge was granted, or of such of the assurances as in such notice shall be required; and such last-mentioned person or persons shall at the time of receiving the same, pay to the person or persons furnishing the same a sum after the rate of sixpence for every one hundred words contained in every such copy, and also the reasonable costs of sending or delivering the same, and the person or persons holding the original instrument, by which such annuity or rent-charge shall be secured, shall suffer the person or persons, to whom such copies shall be delivered or sent, to examine the same with the originals, and in case such copies shall not be sent or delivered, or the person or persons holding the original instruments shall refuse to suffer such copies to be examined therewith according to the direction of this act, it shall be lawful for the person or persons by whom the annuity or rent-charge is payable, to take out a summons from any of his Majesty's justices of his Courts of King's Bench and Common Pleas, requiring the person or persons neglecting to send or deliver such copies, or refusing to suffer the same to be examined with the original instrument as aforesaid, to appear before such judge and show cause in the premises, and it shall and may be lawful for the judge before whom such person or persons shall be summoned to make such order for the production of the instrument by which such annuity or rent-charge shall be secured, and for suffering the complainant to take copies thereof and examine the same or the copies delivered with the original instruments and otherwise in the premises as to such judge shall seem meet."

Equitable jurisdiction in other cases.

In some instances the court, in the exercise of it's equitable jurisdiction, will compel a party to allow an inspection of docu-

ments given in evidence by him on a former trial. (1) In cases in which a court of law has not jurisdiction to compel a party to the suit to produce a writing, it has been held, that if the inspection desired be of such a nature as would be obtained by a bill of discovery, the court will stay the proceedings on a refusal to give inspection, until the party applying for it shall have had an opportunity of resorting to a court of equity. (2) But in a later case, (3) the rule was said to be, that a court of law would neither accelerate nor retard the progress of a cause, to defeat or assist any proceedings in equity. In general, however, this object may be obtained by injunction.

Power to grant inspection discretionary.

Though the case in which inspection is sought, be clearly one in which the party in possession of the instrument holds it in trust to produce it for the other party, it seems to be discretionary with the court to compel him to produce it. (4) And in one case, it was said, (5) that a judge, in making an order for the production of an instrument, will, in general, make it a part of the order, and a condition of granting it, that the applicant shall undertake not to make an objection as to the insufficiency of a stamp.

General jurisdiction of court.

It seems, that the common law jurisdiction of the courts of law for enforcing the production of private documents, is given by the pendency of a suit, and by that alone; there appears to be no instance in which a court of law has made a rule for the production of such documents, except where a

(1) See Hewitt *v.* Pigott, 7 Bing. 400. In this case the order for inspection was made upon the party to whom a new trial had been granted, and the court could have enforced it's order under penalty of discharging the rule for a new trial.

(2) Whitter *v.* Cazalet, 2 T. R. 683.

(3) Goldschmidt *v.* Marryat, 1 Campb. 561.

(4) Brown *v.* Rose, 6 Taunt. 283. Beale *v.* Bird, 2 D. & R. 419, *supra*, 817. It is laid down in the marginal note to Reid *v.* Coleman, 2 Cr. & M. 456, that in cases within the rule, there being only one instrument, the party in possession of it has no right to impose terms as a condition for allowing it to be inspected. That case, however, decided only that he had no right to the terms which he sought to impose, but not that the court could not impose terms as a condition of the exercise of their jurisdiction.

(5) By Park, J., in Price *v.* Boulthy, 1 C. & P. 466, and see Bousfield *v.* Godfrey, 5 Bing. 420. Dawson *v.* Macdonald, 2 M. & W. But see Travis *v.* Collins, 2 C. & J. 627

suit has been pending, and where they have been required for the purpose of assisting in the inquiry involved in the suit. (1)

Excuse for non-production.

Where a *primâ facie* case is shown for requiring the inspection of an instrument, or for the production of it in order to be stamped, it seems that the other party, who cannot deny the fact of his having possession, will not be excused from producing it on the ground that it is no longer in his power to do so, without making a very precise affidavit, stating not merely that it is not now in his possession, but also how it ceased to be so, and what has become of it; (2) and it has been said, that if an attachment issue for a contempt in not producing the document, the party in contempt would be obliged to answer on interrogatories. (3)

Documents surreptitiously obtained.

Bousfield v. *Gregory.*

An order had been made for the production of a document, or in default thereof for a copy of the document, which it was admitted the defendant possessed; after this a rule was obtained to set aside that order, on the defendant's affidavit, stating that the original agreement had never been stamped, and that it had been lost or burnt when he changed his residence; on the other side, it appeared by affidavit, that the plaintiff intended to have had it stamped within the time allowed by law, and that it had been deposited in the hands of a mutual friend of the plaintiff and the defendant, from whom the defendant had surreptitiously obtained it, and that it had been recently seen in his possession; the court made the rule absolute, ordering the defendant to produce the agreement if he had it, or, if he had it not, to produce the copy to be stamped; and the copy having been accordingly produced by the defendant, the court ordered, that if the plaintiff should produce, at the trial, the copy of the agreement duly stamped, the defendant should not be permitted to produce the orginal agreement. (4)

(1) See *ex parte* Partridge, 1 Har. & W. 350.

(2) See Cooke *v.* Tanswell, 1 Moore, 465. 8 Taunt. 131, S. C. The two reports differ, but they both agree in this, that the possessor must shew that he has made every effort to comply with the order for the production of the document.

(3) 1 Moore, 465. This point does not appear in the other report of this case.

(4) Bousfield *v.* Gregory, 5 Bing. 420.

When a party claims a right to have an inspection or copy of a writing, he should make a demand for the purpose, and, if he require a copy, he should also offer to pay the costs of making it. On a refusal, a summons should be taken out, to show cause before a judge, why the application is refused. The judge's order, granting or refusing an order, may be reviewed by the court, but it is unusual to make the application in the first instance to the court. It appears, though formerly doubted, that an order to produce a document may be enforced by the court by attachment, (1) if the party refuse to produce it, or destroy it, or make away with it, in fraud of the other party's right to the production. How production enforced. Attachment.

CHAPTER VI.

OF THE PROOF OF PRIVATE WRITINGS.

IN treating of this part of written evidence, it will not be attempted to describe all the various kinds and requisites of private writings,—which would far exceed the limits of the present Work. The inquiry will be confined chiefly to the principles which are applicable generally to the proof of private writings. These principles relate to the proof of the execution of writings by an attesting witness, to the secondary evidence of writings, and to the proof of handwriting. In this order it is proposed to consider the subject.

First, of the proof of attested writings by the evidence of attesting witnesses.

A general rule with respect to the proof of private writings General rule.

(1) Cooke *v.* Tanswell, 1 Moore, 465. Travis *v.* Collins, 2 C. & J. 628.

is, that where an instrument is attested, the attesting witness ought to be produced at the trial to prove it. (1) The rule probably originated in the instance of deeds executed between parties, on the ground that the parties must be considered as having mutually agreed to rest the proof of the instrument upon such testimony, as being that of a person having peculiar knowledge of all the circumstances attending the execution, and which possibly might not be so well known to the parties themselves, or at least to all of them. (2) The Legislature has required, that various instruments should be attested and proved by subscribing witnesses, in certain cases where it has been deemed expedient, on public grounds, to facilitate inquiry into the circumstances under which they have been executed. And the like caution has been adopted by individuals in conferring upon other persons a power of disposition over their property.

Extent of rule.

Though the reason is not always apparent, the rule is understood to apply generally to cases in which a written instrument is attested by a subscribing witness. Thus, attested notices to quit, (3) attested warrants to distrain, (4) attested bills of exchange or promissory notes, are to be proved by the subscribing witness. And, in the case of a notice to quit, the circumstance that the party, upon whom the notice was served, read the notice, and made no objection to it, does not vary the rule. (5)

This rule is so strictly observed that an acknowledgment of the obligor himself, admitting that he executed a bond, (6)

(1) This has been the rule from the earliest times. The ancient process of bringing the subscribing witnesses into court, is stated in Fortescue de Laud. Leg. Ang. c. 32. See also Jenk. Cent. p. 47, ca. 89. In Rex *v.* Harringworth, 4 M. & S. 352, (where the rule was held to apply to settlement cases,) Lord Ellenborough said, that the rule was as "fixed, formal, and universal, as any that can be stated in a court of justice."

(2) Lord Ellenborough, in Rex *v.* Harringworth, 4 M. & S. 354, said, "It does not follow, that because the subscribing witnesses are the plighted witnesses to prove the execution, they must be the best witnesses, for others may know more of the transaction than they; but inasmuch as they are the plighted witnesses, the knowledge they have upon the subject is essential."

(3) Doe d. Sykes *v.* Durnford, 2 M. & S. 62.

(4) Higgs *v.* Dixon, 2 Stark. Ca. 180.

(5) Doe *v.* Durnford, 2 M. & S. 62.

(6) Abbot *v.* Plumbe, 1 Doug. 216, cited by Lawrence, J., 7 T. R. 267, and 2 East, 187. Lord

Rule not dispensed with by admission.

and even an admission by the defendant in an answer to a bill filed against him for a discovery, (1) will not dispense with the testimony of the subscribing witness; for though the party may acknowledge the bond, yet he may not know every circumstance attending the execution; "a fact may be know to the subscribing witness, not within the knowledge or recollection of the obligor, and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction." (2) The rule is precisely the same, whether the acknowledgment is offered as evidence against the party himself who made it, (3) or against a third person; (4) or whether the deed is an existing instrument or cancelled; (5) or whether it is the foundation of the action, or comes in question collaterally as part of the evidence in the cause. (6)

Name on memorandum of sealing.

In a case, where the seal of the Bank of England was affixed by a paper wafered to an indenture, on which paper was written "sealed by order of the Court of Directors of the Governor and Company of the Bank of England, 12th of December, 1833. A. B. Secretary," it was held, that it did not appear that A. B. was an attesting witness. The statement was treated merely as a memorandum, that the party signing was the person deputed by the corporation to affix it's seal. (7)

1. *Exception to the Rule, where Writings are thirty years' old.*

It is a rule, that if an instrument is thirty years' old, it may be admitted in evidence without any proof of it's execution; such instrument is said to prove itself. (8) This rule appears

Ellenborough, in Rex *v.* Harringworth, 4 M. & S. 353, observed, that if ever there was a case in which the rule might reasonably have been relaxed, it was that of Abbot *v.* Plumbe.

(1) Call *v.* Dunning, 4 East, 53. See Bowles and another, assignees of James *v.* Langworthy, 5 T. R. 366.

(2) Le Blanc, J., 4 East, 53.

(3) 4 East, 53.

(4) 1 Doug. 216.

(5) Breton *v.* Cope, Peake, N. P. C. 30.

(6) Manners, *q. t. v.* Postan, 4 Esp. N. P. C. 239. The rule obviously does not apply to express agreements made with reference to a trial, to waive the proof by a subscribing witness; or where the execution is admitted by payment into court.

(7) Doe d. Bank of England *v.* Chambers, 4 A. & E. 412.

(8) Doe d. Spilsbury *v.* Burdett, 4 A. & E. 19; 2 T. R. 471; B. N. P. 255.

to be founded on the general experience of the inconvenience and inutility of searches after attesting witnesses to ancient deeds, and on the expediency of fixing some definite limit to searches of this nature. The danger arising from such a relaxation of general principles is, in some measure, diminished by the operation of the rule, which requires documents to be produced from their proper place of custody; and, in many instances, the circumstances of the instrument having been acted upon, and of the enjoyment of property being consistent with and referable to it, or otherwise, affords a criterion of it's genuineness. (1)

Custody of the old writing.

In the case of *Doe* d. *Neale* v. *Samples*, (2) a deed, thirty years' old, was produced not from the best custody, but from custody sufficiently proper to make the evidence admissible. In the case of *Doe* d. *Wildgoose* v. *Pearce*, (3) a will thirty years' old was brought from the possession of one of the family of the testator, but who was not strictly entitled to the possession; and it was admitted without proof by a subscribing witness. "It is enough," said the judge (Mr. Justice Coleridge), "if the will be brought from a place of deposit, where, in the ordinary course of things, such a document, if genuine, might reasonably be expected to be found."

Exception applies to bonds, &c.

The exception above-mentioned applies generally to deeds concerning lands, to bonds, (4) receipts, (5) letters, (6) and all other ancient writings; and the execution or writing of them needs not be proved, provided they have been so acted upon, or brought from such a place, as to afford "a reasonable

(1) See Vin. Ab. Evidence, A. b. 5, cited 7 East, 291; B. N. P. 255. Fry *v.* Wood, Selw. N. P. 540, n. Forbes *v.* Wale, 1 Bl. 532, cited by Lord Kenyon, 1 Esp. 278; 4 B. & A. 376. As to the custody of old documents, *vide supra*, p. 158.

(2) 3 Ad. & Ell. 151.

(3) 2 Mood. & Rob. 240. Doe *v.* Benyon, 4 Perr. & D. 193.

(4) Governor of Chelsea Waterworks *v.* Cowper, 1 Esp. N.P. C. 275.

(5) D. & Ch. of Ely *v.* Stewart, 2 Atk. 44. Fry *v.* Wood, 1 Selw. N. P. 540. Manby *v.* Curtis, 1 Price, 232. Bertie *v.* Beaumont, 2 Price, 308. Bullen *v.* Michel, 2 Price, 399. 4 Dow. 297. Sir W. W. Wynne *v.* Tyrwhitt, 4 Barn. & Ald. 376.

(6) In Beer *v.* Ward, on the trial of an issue as to the legitimacy of a particular person, a very old letter, purporting to bear the signature of the head of the family, and brought from among the title-deeds kept at the family-seat, was admitted as genuine, without proof of the handwriting, by Dallas, Ch. J., in C. P. sitt. after Mich. T. 1821, S. P. by Lord Tenterden, K. B. sitt. after Trin. T. 1823, on second trial.

presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty." (1)

Applies also to wills.

The rule of computing the thirty years from the date of a deed, is equally applicable to a will; (2) though some doubt was formerly entertained upon this point, on the ground that deeds take effect from their execution, but wills from the death of the testator. (3)

Seal of corporation.

In the case of *Rex* v. *The Inhabitants of Bathwick*, (4) it appears to have been doubted, whether the seal of a court or corporation was within the rule as to thirty years. Lord Tenterden said, it might be argued that it was not within the principle of the rule, because, although the witnesses to a private deed, or persons acquainted with a private seal, may be supposed to be dead, or not capable of being accounted for after such a lapse of time, yet the seals of courts and corporations, being of a permanent character, may be proved by persons at any distance of time after the date of the instrument to which they are affixed.

Rasure, &c. in old writing.

If there is any blemish in the deed by rasure or interlineation, it has been said that the deed ought to be proved, though above thirty years' old, (5) and the blemish satisfactorily explained. In such a case, the jury would have to try, whether the rasure or interlineation was before or after the delivery of the deed; for, if the rasure was before that time, the deed is still valid and binding; it is only after the delivery, that a rasure or interlineation can affect a deed, and even then they are in some cases immaterial. Now, to ascertain the time of delivery, the first and best evidence to be resorted to is the testimony of a subscribing witness, if any can be produced; or, if there is no subscribing witness, other persons may be called, who were present when the deed was delivered; or if no person was present, the time of delivery will be reckoned from the date of

(1) Vin. Ab. tit. Evidence (A. b. 5), cited 7 East, 291. Bull. N. P. 255. Forbes *v.* Wale, 1 Black. 532, cited by Lord Kenyon, 1 Esp. N. P. C. 278. 4 Barn. & Ald. 376. As to the custody of old documents, *vide supra*, p. 204, and 158.

(2) Doe d. Oldham *v.* Wolley, 8 B. & C. 22.

(3) See M'Kenire *v.* Fraser, 9 Ves. 5.

(4) 2 B. & Ad. 648.

(5) Gilb. Ev. 89. Bull. N. P. 255.

the deed. And the fact, of the rasure having been after the delivery, may be proved either by a subscribing witness, or by any other person who saw the rasure made.

Where subscribing witness alive.

The rule, that deeds of thirty years' standing prove themselves, is so well established, that even if a subscribing witness were alive, and in a state to be produced, it has been thought unnecessary to call him for proving the execution. Lord Kenyon is reported to have said, (1) that he remembered a case before Mr. Justice Yates, in which, a deed of that age being produced in evidence, it appeared, that the subscribing witness was then actually in court; but the judge declared, he would not break in upon a rule of evidence so well established, by requiring the subscribing witness to be called, and admitted the deed without further proof. In the case of *Rees* v. *Mansell*, (2) indeed, Mr. Baron Perrot held, that, although a deed may be read in evidence on account of it's antiquity, yet, if on the other side it is shown, that one of the witnesses is alive, he must be produced, or the deed must be rejected; and he cited a case, where a deed was produced in the King's Bench, and it appeared, that Sir Joseph Jekyll was the subscribing witness, upon which the court said, they knew he was alive, and that if he did not come to prove it, the plaintiff must be nonsuited. It was then mentioned to have been ruled by Mr. Justice Yates, that, for the sake of practice, the witness should not be allowed to prove an old deed, even if he attended for that purpose; but Mr. Baron Perrot retained his opinion; "An old deed," he said, "is admitted only on a presumption that the witnesses are dead, but when the contrary is made to appear, they must be called." —If the rule is founded on the mere presumption of the attesting witness's death, then it seems to follow, that where this presumption is contradicted by the fact of his being still alive, the execution of the deed ought to be regularly proved, as in ordinary cases. But if courts of law have adopted the rule, not on the single presumption of a fact (which would be for the consideration of the jury rather than of the court,) but as a general maxim of law, there appears to be no inconsistency in acting generally upon this principle, though in the particular

(1) Marsh *v.* Collnett, 2 Esp. N. P. C. 665. And see Doe d. Spilsbury *v.* Burdett, 4 A. & E. 1.

(2) 1 Selw. N. P. 540, n.

case the subscribing witness may be proved to be alive,—at the same time leaving it to the opposite side to dispute the regularity of the execution, by calling him or any other witness.

Lord Tenterden, in *Doe* d. *Oldham* v. *Wolley*, (1) adverting to the argument, that where the existence of an attesting witness is proved, he ought to be called, observed, that "although the principle, on which deeds after that period are received in evidence without proof of their execution, is, that the witnesses may be presumed to have died, yet that allowing this presumption to be rebutted, would only be a trap for a nonsuit. The party producing the will might know nothing of the existence of the witness till the time of trial. The defendant might have ascertained it, and kept his knowledge a secret up to that time, in order to defeat the claimant."

2. *Exception to the Rule, where the adverse Party, producing the Document, takes an Interest under it.*

A writing, coming out of the other party's possession, to be proved.

Although it is now clearly established, that the fact of a written instrument coming out of the possession of the adverse party will not dispense with the necessity of proving it's execution, (2) yet an exception of great practical importance to the rule which requires the proof of writings by an attesting witness, has been established,—namely, that where a party who claims a beneficial interest under a written instrument, produces it under a notice, he is not entitled to insist on the execution being proved, either by the attesting witness, or in any other manner.

The rule of exception.

Pearce v. *Hooper*.

Thus, in the case of *Pearce* v. *Hooper*, (3) in an action of trespass, where the question was, whether the place in which the trespass was alleged, belonged to the plaintiff, as part of a certain estate; the defendants gave notice to the plaintiff to produce a deed of conveyance, in which the estate had been

(1) 8 B. & C. 24.

(2) Doe d. Wilkins *v.* Marquis of Cleveland, 9 B. & C. 869. Knight *v.* Martin. Gow, 26. Gordon *v.* Secretan, 8 East, 548; overruling Rex *v.* Middlezoy, 2 T. R. 41. Knight *v.* M. of Waterford, 4 Younge & C. 284. It was said by the Ch. Justice, in Pearce *v.* Hooper, 3 Taunt. 62, "Supposing that an heir at law is in possession of a will, and the devisee brings an ejectment, and calls on the heir to produce the will; there, the heir claims not under the will, but against the will, and it would be hard that the will should be taken as proved against him, because he produces it."

(3) 3 Taunt. 62. Carr *v.* Burdiss, 1 Cr., M. & R. 785.

conveyed to the plaintiff by a description, limited to a number of acres, which, it was said, would necessarily exclude the place in question. The plaintiff produced the conveyance; the judge at the trial ruled that the defendants ought to prove the execution, which they were not prepared to do. But on a motion afterwards for a new trial, the Court of Common Pleas were of opinion, that it was not necessary for the defendants to call the attesting witness to prove the execution. The court admitted, that the mere possession of an instrument by one party cannot, in general, absolve the other party who calls for it, from the necessity of producing the attesting witness. "But here," said the Chief Justice, "the plaintiff has no interest in the fee-simple of the estate, if this deed does not convey it: if, then, he produces the deed under which he claims, shall it not be taken to be a good deed, so far as relates to the execution, as against himself?" The other judges concurred, and a new trial was granted.

Orr v. *Morris.*

In the case of *Orr* v. *Morris*, (1) which was an action for the use and occupation of premises, brought against the assignees of a bankrupt, it was held, that the deed of assignment of the bankrupt's effects, produced by the defendants at the trial, under a notice from the plaintiff, was admissible in evidence, without proof of it's execution by the subscribing witness, as it appeared that one of the assignees had continued to occupy the premises for some time after the act of bankruptcy.

Burnett v. *Lynch.*

In an action by a lessee against the assignee of a lease, the plaintiff having proved the execution of a counterpart of the lease, and the defendant having put in the original lease, which was produced by a party to whom he had assigned it, it was held to be unnecessary for the plaintiff to call the subscribing witness to prove the execution of the original lease. (2) So, in an action against a vendor of an estate, to recover a deposit on a contract of purchase, if the defendant after notice produces the contract, the plaintiff need not prove the execution. (3)

Bradshaw v. *Bennett.*

(1) 3 Br. & B. 139.
(2) Burnett *v.* Lynch, 5 B. & C. 589.
(3) Bradshaw *v.* Bennett, 1 Mo. & R. 143.

Roe v. *Wilkins.*

In a recent case, (1) it appeared that one of the lessors of the plaintiff claimed as administrator of a person who had obtained a lease of the premises in question: this lease was in the possession of the defendant, who had received a notice to produce it at the trial. The lease, being called for, was produced by the defendant, and it was insisted that the execution of the instrument must be proved before it could be received. It was then proved on the part of the plaintiff, that the defendant's attorney had stated shortly before the trial, that the defendant claimed under this lease; Lord Denman held, that this dispensed with proof of the execution; and the Court of King's Bench affirmed his opinion.—There was nothing in the lease, nor was it any part of the plaintiff's case, to shew that the defendant claimed any interest under it; but the defendant did, in fact, set up a claim under it, as was shewn afterwards in the defence.

Admission of the attorney as to the party's claim under the instrument.

If a party in a cause impugn a written instrument on the ground of fraud, and the opposite party claims an interest under it, the same rule applies; on it's being called for and produced upon notice, proof of execution will be dispensed with. (2)

The exception relating to an *existing* interest.

A party offered in evidence, without proof of execution, a deed which had been some months in his possession, and which he had received from the adverse party who formerly claimed a benefit under it; it was held, that this former claim by the adverse party would not dispense with proof of the execution. (3)

Where a party claiming an interest under a deed, refuses to produce it after notice,—in consequence of which refusal the other party is obliged to resort to secondary evidence of the deed,—although it appear from the secondary evidence that there were attesting witnesses, it will not be necessary to call one of them; the deed will be taken, as against the party

(1) Doe on several demises of E. Wilkins and John Wilkins *v.* James Wilkins, 4 A. & E. 86. For other examples of the application of the rule dispensing with proof by a subscribing witness, when the opposite party claims under the instrument, see Doe *v.* Wainwright, 1 Nev. & P. 8. Doe *v.* Heming, 6 B. & C. 28.

(2) Carr *v.* Burdis, 1 Cr., M. & R. 785.

(3) Vacher *v.* Cocks, 1 B. & Ad. 145. In Carr *v.* Burdis, 1 Cr., M. & R. 785, Parke, B., observed, that if the deed had been given up before the action, it might have made a difference.

claiming under it, to be duly executed. (1) If he had produced the original deed, the proof of execution would have been dispensed with; (2) and by withholding the deed, and thereby subjecting the other party to inconvenience, he ought not to be entitled to more favour, than if he were to produce it.

3. *Of the Proof of attested Writings, where the Evidence of an attesting Witness is not to be had.*

It has been decided, that where the evidence of none of the subscribing witnesses to an instrument is producible, proof of the handwriting of a subscribing witness will be received.

Death of witness.

Proof of handwriting is received in the case of the subscribing witness's death, (3)

Incompetency.

or incompetency to give evidence from insanity (4) or from infamy of character; (5)

Absence abroad.

in the case also of his being absent in a foreign country, (6) or out of the jurisdiction of our superior courts. (7)

Blindness not sufficient cause.

In the case of the blindness of a subscribing witness, it would be enough, according to an old authority, to prove his handwriting, without producing him as witness. (8) And upon that authority, Mr. Baron Parke adopted the same course, in a case at nisi prius; (9) admitting at the same time, that there was strong reason for requiring the presence of the witness, who, though blind, might recollect the particulars of the transaction. The principle of the general rule undoubtedly applies

Crank v. *Frith.*

to such a case; and it has been recently decided at nisi prius, on a review of all the authorities upon the subject, that the presence of a subscribing witness is not to be dispensed with on account of his blindness. (10) The rule may therefore be considered as settled, in conformity with this last decision.

(1) Doe dem. Rowlandson *v.* Wainwright, 5 Ad. & Ell. 520. And see *infra*, p. 221.

(2) See p. 207.

(3) *Anon.* 12 Mod. 607.

(4) Vin. Ab. Ev. T. b. 48, pl. 12. Bernet *v.* Taylor, 9 Ves. 381. Currie *v.* Child, 3 Camp. 283.

(5) Jones *v.* Mason, 2 Str. 833. Com. Dig. tit. Testmoigne, B. 3.

(6) Coghlan *v.* Williamson, 1 Doug. 93. Wallis *v.* Delancey, 7 T. R. 266, c. Adam *v.* Kerr, 1 B. & P. 360. Glubb *v.* Edwards, 2 M. & Rob. 200.

(7) Prince *v.* Blackburn, 2 East, 250. 1 B. & P. 360. Ward *v.* Wells, 1 Taunt. 161. Hodnett *v.* Forman, 1 Stark. Ca. 90.

(8) Wood *v.* Drury, 1 Lord Raym. 734, ruled by Holt, Ch. J., at N. P.

(9) Pedler *v.* Paige, 1 Mo. & R. 258.

(10) Crank *v.* Frith, 9 Carr. & P. 197. Debt on bond; trial before Lord Abinger.

Subscribing witnesses interested.

If a subscribing witness to an instrument be interested in the subject-matter, both at the time of the attestation, and at the trial, so as to be rendered incompetent, he cannot be examined as a witness to prove the execution; nor is proof of his handwriting sufficient for that purpose. (1) But where a party, knowing the situation of a person whom he requests to attest the execution of the instrument, is afterwards sued upon it, he cannot raise the objection of interest in the attesting witness; (2) and if the attesting witness cannot be produced, his signature may be proved.

Interest acquired after execution.

In some cases, where an attesting witness has acquired an interest in the subject-matter of the instrument, it has been decided, that proof of his handwriting may be received to establish such instrument; as, where he has been appointed executor or administrator, (3) or has married the person to whom the instrument was given. (4) And it seems, that the principle of these cases may be extended to the case of a person entering into partnership. (5) In such cases it is necessary that the evidence of the subscribing witness's handwriting should be received, as, otherwise, parties must lose the rights secured by the instruments attested, or forego accepting of situations important to their welfare.

Interest acquired from the party.

But where a party to the suit has himself caused the disqualification of a subscribing witness, by giving him an interest in the subject-matter of the instrument, it has been held, that evidence of his handwriting is inadmissible; as, where a plaintiff in an action on a charter party communicated to the attesting witness an interest in the adventure, subsequently to the execution of the instrument. (6)

Illness.

Illness is not, in general, a sufficient reason for dispensing with the attendance of an attesting witness. (7) Such a re-

(1) Swire *v.* Bell, 5 T. R. 371.

(2) Honeywood *v.* Peacock, 3 Camp. 196, action on a bail-bond; the witness was a sheriff's officer.

(3) Goss *v.* Tracey, 1 P. Wms. 287. Godfrey *v.* Norris, 1 Str. 34, although it was urged that he might have permitted another to take out administration.

(4) Buckley *v.* Smith, 2 Esp. 697.

(5) By Best, Ch. J., in Howell *v.* Stephenson, 5 Bing. 493.

(6) Hovill *v.* Stephenson, 5 Bing. 493.

(7) Harrison *v.* Blades, 3 Camp. 458, by Lord Ellenborough: the receipts of a tax-gather were offered in evidence; and as he was at the point of death, it was proposed to prove his handwriting. In Jones

laxation of the rule has not yet been made, and it would obviously be liable to great abuse.

Attesting witness not to be found.

The handwriting of attesting witnesses may be received where they cannot be found after strict and diligent inquiry. Every case upon this subject must depend on it's own peculiar

Due inquiry to be shown.

Wardell v. *Fermor.*

circumstances. It may, however, be useful to give a few examples. In the case of *Wardell* v. *Fermor*, (1) evidence of handwriting was admitted, on proof that a commission of bankruptcy had been sued out twelve months before against the subscribing witness, who had not appeared at the time fixed for his surrender.

Burt v. *Walker.*

Where the clerk of the defendant, who was the attesting witness to a bond, on being subpœnaed said, that he would not attend, and the trial had, in consequence of his absence, been put off twice, and inquiry had been made for him at the defendant's house and in the neighbourhood, it was held, that a sufficient foundation had been laid for the reception of secondary evidence, principally on the ground of collusion. (2)

Answer to inquiries.

The answer made to inquiries, whether at public offices, or at the residence of the subscribing witness, or of his relatives, or in his neighbourhood,—even what he has said or written himself,—appears to have been received in some cases. Such evidence appears to be admissible, where it is of an original, and not of a hearsay character; with regard to which, the distinction, as we have seen, often leads to questions of great nicety.

Parker v. *Hoskins.*

In the case of *Parker* v. *Hoskins*, (3) evidence of the handwriting of a subscribing witness was received, an inquiry after him having been made at the Admiralty, from which it appeared by the last report, that he was serving on board some ship, but in what ship it was not known.

v. Brewer, 4 Taunt. 47, Mansfield, Ch. J., said, that "Perhaps in some instances of sickness, the handwriting of a subscribing witness may be proved." See Doe *v.* Evans, 3 C. & P. 221.

(1) 2 Camp. 283.

(2) Burt *v.* Walker, 4 B. & A. 699.

(3) 2 Taunt. 223.

In the case of *Wyatt* v. *Bateman*, (1) a subscribing witness was not produced, but his father proved, that he had parted on bad terms with his son, that his son afterwards enlisted in the army, and that, upon inquiry at the war-office, he was informed that the regiment, in which his son had enlisted, had sailed for India. *Wyatt* v. *Bateman.*

In *Kay* v. *Brookman*, (2) it was held sufficient, for dispensing with the necessity of calling the subscribing witness, to show, that he expressed an intention of leaving the country, and that he had reasons for doing so, in order to avoid a criminal charge, and that his relations had not seen him since he expressed such intention of departing. *Kay* v. *Brookman.*

In the case of *Crosby* v. *Percy*, (3) the Court of Common Pleas held, that evidence of the handwriting of an attesting witness had been properly admitted, after proof that diligent inquiry had been made for him at his usual place of residence, where, in answer to the inquiry, information was received, (and also from the father of the attesting witness,) that he had absconded to avoid his creditors, and was not to be found. *Crosby* v. *Percy.*

In *Prince* v. *Blackburn*, (4) two letters received from the subscribing witness, purporting to be written from America, were received in evidence, to show that he was not within the jurisdiction of the court. In *Cunliffe* v. *Sefton*, (5) inquiry for the subscribing witness to a bond, at the residences of the obligor and obligee, was held sufficient. *Prince* v. *Blackburn.* *Cunliffe* v. *Sefton.*

In *Doe* d. *Beard* v. *Parell*, (6) it was proposed to inquire, whether a subscribing witness had stated where he resided, in order to show that inquiries had been made at his residence, and that the answer to such inquiries was, that he had gone to *Doe* v. *Parell.*

(1) 7 C. & P. 587.
(2) 3 C. & P. 555. See Morgan *v.* Morgan, 9 Bing. 359.
(3) 1 Taunt. 365.
(4) 2 East, 249.
(5) 2 East, 183; see Pytt *v.* Griffiths, 6 B. Moore, 538, *contra.*
(6) 7 C. & P. 617. In Wardell *v.* Fermor, 2 Camp. 282. Lord Ellenborough said, that the proof of search ought to be watched very narrowly. Further upon the subject of search after attesting witnesses, see Miller *v.* Miller, 2 Bing. N. C. 76.

America; evidence was also tendered to the effect, that some seafaring men had said, they had seen the subscribing witness in America; this evidence was rejected as insufficient.

Where subscribing witness fictitious, or unauthorized, or denies, &c.

An instrument, purporting to be attested by a subscribing witness may be proved, as if there were no subscribing witness, where the name of a fictitious person is inserted as the name of an attesting witness; (1) or where the person, who has put his name as attesting witness, did so without the knowledge or consent of the parties; (2) or where the attesting witness, on being called, denies having any knowledge of the execution. (3)

Where several witnesses.

If there are several attesting witnesses, the absence of all must be accounted for, before evidence of handwriting can be given. (4) But when the absence of all the attesting witnesses is accounted for, it will be sufficient to prove the handwriting of one of them. (5)

Proof of writing by proof of party's signature.

The proof of the subscribing witness's handwriting, in the cases above cited, is evidence of the execution of the instrument by the party therein named, whose signature the instrument purports to bear: and for the purpose of proving the execution, that is, that the instrument produced was executed by the party so named, it will not be necessary to prove the handwriting of that party. (6) With a view to establish the *identity* of the party, and to show that the person who executed the instrument is the party to the suit, or the party charged, proof of the party's handwriting may be important, and most satisfactory evidence. In an action on a bond, or on a promissory note or bill of exchange, and in other cases, some evidence of identity will be necessary, to connect the party with the instrument. (7)

(1) Fasset *v.* Brown, Peake, 23.

(2) M'Craw *v.* Gentry, 3 Camp. 232. 4 Taunt. 220.

(3) Grellier *v.* Neale, Peake, 146. Ley *v.* Ballard, 3 Esp. 173. Fitzgerald *v.* Elsee, 2 Camp. 635. Lemon *v.* Dean, *ib.* 636, n. Talbot *v.* Hodson, 7 Taunt. 251. Boxer *v.* Robeth, Gow, 175. Phipps *v.* Parker, 1 Camp. 412, is therefore overruled.

(4) See Cunliffe *v.* Sefton, 2 East, 183.

(5) Adam *v.* Kerr, 1 B. & P. 360.

(6) Prince *v.* Blackburn, 2 East, 250; Adam *v.* Kerr, 1 B. & P. 360; Gough *v.* Cecil, 1 Selw. N. P. MS. case; Milward *v.* Temple, 1 Campb. 375; Kay *v.* Brookman, 7 C. & P. 556.

(7) Nelson *v.* Whittal, 1 B. & A.

Proof of his signature would be decisive; but that proof is not absolutely necessary; and much slighter evidence will be sufficient. Evidence that the defendant was present when the note was prepared by the subscribing witness would serve to connect him with the instrument. (1)

Secondly, of the admissibility of secondary evidence of writings. Secondary evidence.

If a party intend to use a written instrument, he ought to produce the original, if he has it in his possession; he cannot give secondary evidence of writings, until all the sources of primary evidence are exhausted. And it is an established rule, that all originals must be accounted for, before secondary evidence can be given of any one. (2)

1. *Of the Admissibility of Secondary Evidence, when the Writing is in the possession of the adverse party; and of notice to produce.*

In *Sharpe* v. *Lambe*, (3) the point was whether a judge's order on a party to make an admission that a copy of a letter, purporting to be an original letter from him to the other party, was a true copy, would dispense with regular proof accounting for the non-production of the original, and whether without such proof the copy could be received. The court determined that the admission, required by the order, did not amount to an admission that the party wrote a letter of which the alleged copy was a correct copy; and that "the order secured the accuracy of the secondary evidence, but did not give it the effect of primary evidence."

21; Middleton *v.* Sandford, 4 Camp. 34; Whitelocke *v.* Musgrove, 1 Cr. & M. 521, in which case the several authorities were examined, and it was held, that the proof of a subscribing witness's handwriting would not dispense with some evidence of the identity of the party. See also Page *v.* Mann, M. & M. 79; Mitchell *v.* Johnson, M. & M. 176.

(1) Nelson *v.* Whittal, 1 B. & A. 19.

(2) By Park, J., in Alivon *v.* Furnival, 1 Cr., M. & R. 292, in which case the court were not satisfied that there existed any such duplicate original as had the same binding force and effect on the defendant as the one which was accounted for. By Park, J., in Brown *v.* Woodman, 6 C. & P. 206. B. N. P. 254. Rex *v.* Castleton, 6 T. R. 236. Doxon *v.* Haigh, 1 Esp. 409.

(3) 11 A. & E. 805. The order is stated to have been in the usual form, under the general rule.

Where a writing required is in possession of the opposite party.

In general, one party has not the means of compelling the other party to produce any writings in his possession, however necessary they may be for the prosecution of his suit. (1) If such evidence is required, the rule both in civil and in criminal cases, (2) is to give the opposite party or his attorney (3) a regular notice to produce the original, which is in his possession; not, that on proof of the notice he is compellable to give evidence against himself, nor that, if he refuses to produce the paper required, such a circumstance is to be considered as conclusive against him, (4) but the consequence will be, that the other party, who has done all in his power to supply the best evidence, will be allowed to go into evidence of an inferior kind, and may read an examined copy, or give parol evidence of the contents.

Notice to produce, effect of.

Without proof of notice to the opposite party to produce the original writing which is in his possession, secondary evidence cannot, in general, be given of it's contents. (5) This rule has been made with good reason, that parties may obtain the best evidence in their power. When it is traced to the hands of the opposite party, no further evidence can be given of it, without a notice to produce.

Proof of writing in party's possession.

Before this secondary evidence can be admitted, it ought to be clearly shown, that the writing required is in the possession of the other party. (6) The degree of evidence, which may be necessary to prove the fact of possession, will depend so much on the nature of the transaction, and on the particular circumstances of each individual case, that it is scarcely possible to lay down any general rule upon the subject. Slight evidence may be sufficient, in many cases, to raise a presumption that the writing is in the possession of a party, especially, when it

(1) See the case of Entick *v.* Carrington, 19 Howell's St. Tr. 1073.

(2) The Attorney-General *v.* Le Merchant, 2 T. R. 201, n.

(3) 2 T. R. 203, n. Cates q. t. *v.* Winter, 3 T. R. 306.

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

(5) Rex *v.* Stoke Golding, 1 B. & A. 173. Doe d. Phillips *v.* Morris, 3 Ad. & E. 50. Knight *v.* Marquis of Waterford, 4 Younge & C. 284.

(6) It will be competent to the other party to prove that the document has been lawfully out of his possession; and the judge is to decide, upon the evidence on both sides, whether secondary evidence is admissible. Harvey *v.* Mitchell, 2 M. & Rob. 366.

exclusively belongs to him, and regularly ought to be in his possession according to the course of business. In the case of *Henry* v. *Leigh*, (1) the solicitor to a commission of bankrupt proved, that he had been employed by the defendant to solicit his certificate under the commission, and that, looking at the entry of charges, he had no doubt the certificate was allowed; upon this it was presumed, that the certificate came into the defendant's possession.

Or in possession of third persons, when.

In certain cases, although the written instrument, which is required, is not in the possession of the party to the suit, but in the possession of a third person, yet if there is a privity between such third person and the party, or if the instrument may be considered as under the control of the party, a notice to the party may be sufficient. Thus, in the case of *Baldney* v. *Ritchie*, (2) which was an action against the owner of a vessel for goods supplied for the use of the vessel, Lord Ellenborough held, that a notice to the defendant to produce an order, which he had given to the captain, was sufficient to admit the plaintiff into secondary evidence of the contents of the order, though the order itself appeared to be in possession of the captain. On the same principle, a check given by a party to a third person, which would be in the possession of the banker of the party, has been considered as in the possession of the party himself, within the meaning of the rule as to notices for the production of papers. (3) So, in an action against a sheriff, notice to the defendant's attorney to produce a warrant, which, after execution, was returned to the defendant's under-sheriff, has been held sufficient to entitle the plaintiff to give secondary evidence of the contents. (4) In an action against two executors, where a notice had been served upon them jointly, and one had suffered judgment by default, it was held, that the plaintiff might give secondary evidence of a receipt in the possession of that defendant, who had suffered the judgment by

Captain.

Banker.

Under-sheriff.

Executor.

(1) 3 Camp. 502.
(2) 1 Stark. Ca. 338.
(3) Partridge *v.* Coates, R. & M. 156. Burton *v.* Payne, 2 C. & P. 520. Sinclair *v.* Stephenson, 1 C. & P. 582.
(4) Taplin *v.* Atty, R. & M. 164. 3 Bing. 164. In that case, Martin *v.* Bell, 1 Stark. Ca. 415, was distinguished, inasmuch as, in that case, the paper was not traced to the hands of the under-sheriff.

default. (1) And within the same rule, a document deposited in a court of equity by a party to a suit in that court, and ordered by the court to be delivered to the party, but remaining in the possession of the officer of the court, is sufficiently within the control and power of the party to allow of the admission of secondary evidence, after service of notice upon him. (2) In *Bell* v. *Francis*, (3) the minute books of the directors of a company had been seen in the possession of the secretary in the company's office, and he had given up the key of the desk, in which they were kept, to the manager: this was held to be sufficient proof of the books being in the possession of the company.

Independent possession.

But where a paper is in the hands of a person acting in an independent character, and who has a right to the possession of it, notice to the party is insufficient; and this is so, although the party justifies under the authority of that person. (4) So also it has been held to be insufficient in a case where the document, for the production of which a notice had been given, was kept by a stakeholder between the party and a third person. (5)

Form of notice.

The notice to produce should refer to the documents required with sufficient particularity. If there is no reasonable doubt, that the party receiving the notice must have been aware of the particular instrument intended to be produced, that is sufficient. (6) It has been held, that a notice to produce "all

Description of documents.

letters, papers, and documents touching and concerning the bill of exchange mentioned in the declaration," is too general, and that the notice ought to have pointed out the particular letter required. (7)

(1) Beckwith *v.* Benner, 6 C. & P. 682. See the criminal cases of Le Merchant and Colonel Gordon, 1 Leach, 300, n. In the latter case a letter was traced into the possession of the prisoner's servant.

(2) Rush *v.* Peacock, 2 Mood. & Rob. 162.

(3) 9 C. & P. 66.

(4) Evans *v.* Sweet, R. & M. 83. See Rex *v.* Pearce, Peake, 76. Pritchard *v.* Symonds, B. N. P. 254. Whitford *v.* Tuting, 10 Bing. 395.

(5) Parry *v.* May, 1 Mo. & R. 279. A party had delivered to the stamp-office the instrument which he had notice to produce, but on service of the notice did not say, he had not got it; the other party was allowed to give secondary evidence of the contents, Sinclair *v.* Stephenson, 1 C. & P. 585.

(6) Rogers *v.* Custance, 2 M. & R. 179.

(7) France *v.* Lucy, R. & M.

Service on whom.

Notices to produce ought to be served on the attorney, if there is one, and not upon the party in the cause. (1) It is sufficient to give notice to the attorney, even in a *qui tam* action. (2) Where the attorney has been changed, a notice to produce, served on the first attorney, is sufficient to entitle the party to call for the production of the document on the trial. (3)

Time of service. Assizes. Town causes.

With respect to the time of serving the notice to produce, it is the practice to require a notice for the assizes to be served before the commission-day, (4) at least if the party and his attorney do not reside at the assize town. In town causes, service of notice on the attorney in the evening before the trial is, in general, sufficient. (5)

Special circumstances. Possession of attorney.

The reasonableness of the time of serving a notice must depend upon the circumstances of the particular case. Among these circumstances, a very material one is, whether the document required to be produced is from it's nature to be presumed

341. Jones *v.* Edwards, M'Cl. & Y. 139. Morris *v.* Hauser, 2 M. & Rob. 392—Notice to produce may be by parol, Smith *v.* Young, 1 Camp. 440.—If notice be in writing, and also by parol, it will be sufficient to prove the parol notice, Smith *v.* Young, 1 Camp. 440.—If the title of the cause be misdescribed in the notice, it will be bad, Harvey *v.* Morgan, 2 Stark. Ca. 19.

(1) By Gurney, B., Houseman *v.* Roberts, 5 C. & P. 394.

(2) Cates *v.* Winter, 3 T. R. 306.

(3) Doe *v.* Martin, 1 Mo. & R. 242.

(4) Trist *v.* Johnson, 1 Mo. & R. 259. The plaintiff's attorney lived forty miles off from the assize town; the judge ruled, that the service ought to be before the commission-day, to enable the party to bring the papers required: it did not appear where the party resided. A trial for arson came on upon the fifth day after the commission-day; a notice to produce, served on the defendant in gaol on the third day after the commission-day, (his place of residence being ten miles distant), was held insufficient, Rex *v.* Ellicombe, 5 C. & P. 522; 1 Mo. & R. 260, S. C. George *v.* Thompson, 4 Dowl. P. C. 656. Doe d. Curtis *v.* Spitty, 3 B. & Ad. 182, S. P. See also as to service of notice at the assizes, Hargest *v.* Fothergill, 5 C. & P. 303.—Holt *v.* Miers, 9 C. & P. 191; service of notice to produce a letter, left at the office of the plaintiff's attorney, the night before the trial at nisi prius, and after the attorney had quitted his office, held to be too late.—The attorney, on whom notice to produce a paper was served on the commission-day in the assize court, said that the paper was not in existence; after this, there could be no doubt as to the sufficiency of the notice: Foster *v.* Pointer, 9 C. & P. 720.

(5) By Gurney, B., in Atkins *v.* Meredith, 4 Dowl. P. C. 659. In Houseman *v.* Roberts, 5 C. & P. 394, service on the party on Saturday evening for Monday, was held insufficient; and see Sims *v.* Kitchen, 5 Esp. 46. Atkinson *v.* Carter, 2 Chit. 403.

to be in the possession of the client or of the attorney. Where a document was such that it could not be presumed to be in the possession of the attorney, service upon the attorney on the evening before the trial was held not to be sufficient,

Client abroad.

although the client resided in London. (1) Where a person goes abroad, and leaves his attorney to conduct a trial in which he is a party, it is to be presumed that he leaves with him all papers necessary to the conduct of the trial. (2) In a late case, the doctrine in *Bryan* v. *Wagstaff*, was assented to by Lord Tenterden; but he held, that it was for the judge to determine, whether the papers, required to be produced, were so necessarily connected with the cause as to render it probable that they would be delivered to the attorney; and observed, that he was not sure that the rule ought to be extended to a case where the party resided in England. (3)

Non-production, consequence of.

A party called upon to produce a paper, must either produce it when called upon, or not at all; he cannot avail himself of it in a subsequent stage of the cause. Thus, it has been held, that a party, after refusing to produce a document, could not put it into the hand of a witness at a later period of the cause, in order to ask him at what time an interlineation was made in it, (4) or in order to shew that the instrument is attested by witnesses who ought to be called. (5)

When an attested deed is proved to be in the possession of

(1) Atkins *v.* Meredith, 4 Dowl. P. C. 659. The service was at seven o'clock in the evening before the trial; the notice was to produce a tradesman's books.

(2) Bryan *v.* Wagstaff, R. & M. 327. The letter described in the notice was sufficiently connected with the subject of the trial; the notice was served on the evening next but one before the trial.

(3) Vice *v.* Lady Anson, M. & M. 97. Rex *v.* Atwood, K. B. sittings after Hil. T. 1828. The principle of the rule seems to extend to a temporary absence abroad. In the case first cited, Lady Anson was in Scotland; the service on the attorney was between seven and eight o'clock on Saturday evening, and the cause was tried the next Wednesday. See Aflalo *v.* Fourdrinier, M. & M. 334, as to what documents are necessarily connected with a cause. As to various circumstances affecting the question of reasonable notice, see Doe *v.* Grey, 1 Stark. Ca. 283.

(4) Doe d. Higgs *v.* Cockell, 6 C. & P. 525.

(5) Jackson *v.* Allen, 3 Stark. Ca. 74. And see Lewis *v.* Hartley, 7 C. & P. 405.

the opposite party, and is not produced by him after notice to produce, the party giving the notice may give parol evidence of the contents, without calling an attesting witness.(1)

If a party, after receiving notice to produce a paper which is in his possession, refuse to produce it, he places the other party under the difficulty of proving the contents by some secondary proof, and withholds from the court and the jury the original and most authentic evidence. After refusing to produce the paper, he cannot object that it was not duly stamped, or not duly attested; whether it was stamped or attested, the paper itself would best shew, and that he withholds. Nor can he, after forcing the other party to secondary proof, give in evidence the original, for the purpose of contradicting the secondary proof which has been received: by withholding the original, he subjects the other party to some difficulty, but subjects himself also to the inconvenience of having inferior proof brought forward, from which his cause possibly may suffer. But there seems to be no reason why he should be precluded, in consequence of his refusal to produce, from using the paper as evidence in chief, and as part of his own case, if really it forms a part of his defence; for he was not bound to lay open his own case at the call of his adversary, nor to produce the instrument to his own prejudice: if the rule were otherwise, a party might use a notice for the purpose of an attack, and thus might materialy prejudice the other party in his defence.(2)

(1) Cook *v.* Tanswell, 8 Taunt. 450. The name of the attesting witness was mentioned in the notice; but Gibbs, C. J., said, that their knowledge of the name of the attesting witness made no difference in the case: and see Jackson *v.* Allen, 3 Stark. Ca. 74. *Vide supra*, p. 209.

(2) In Doe *v.* Hodson, 4 Perr. & D. 143, the defendant's counsel refused to produce some written receipts for rent, — which the plaintiff's counsel had called for, in order to prove a tenancy under the plaintiff, —and after refusing was not allowed to read them in his address to the jury: this ruling of the judge was confirmed afterwards by the Court of Queen's Bench. It does not appear from the report, *for what purpose*, or with *what view*, the counsel wished to use the receipts which he had refused to produce; but upon that point, the whole case would turn; the ground of the decision, therefore, does not appear. There is no reason for supposing that the receipts formed any part of the defence. If they were read by the counsel with a view to disparage and contradict the secondary evidence produced on the other side, the reading was justly disallowed;

Consequences of refusal to produce.

It has been said, the only consequence of giving a notice to produce is, that it entitles the party giving it, after proof that the document is in the hands of the party to whom it is given, or of his agent, to go into secondary evidence of it's contents, and does not authorize any inference against the party failing to produce it. (1) This, however, cannot be universally true. If, for example, an action be brought by a tradesman, and the right of action were to depend upon the fact, whether credit has been given to one person or to another, the circumstance of the plaintiff withholding his books, in such a case, might warrant the inference, that he had not given credit to the person against whom the action is brought. Whatever rule may be laid down by the courts on this subject, it would not be possible in many cases to prevent a jury from being influenced by such a suppression of evidence; and in some cases the jury might very reasonably be influenced by it. (2)

Books produced, but not used.

If one party calls for books or writings in the possession of the other party, but, when they are produced, declines using them, the mere calling for them will not make them evidence for the adverse party. (3) "It may," said Lord Kenyon, "be matter of observation to the counsel on the other side, that the entries in the books were in favour of his client, but cannot entitle him to offer the books in evidence to the jury. It has been held, that if the party who has called for the books in-

Books inspected.

spects them, he thereby makes them evidence for the other party, although he has not himself used them in evidence. (4)

Time of calling for the production.

The regular time of calling for the production of papers and books is not until the party who requires them has entered upon his case; till that period arrives, the other party may refuse to produce them, and there can be no cross-examination

for he himself, by withholding the originals, was the cause of the defective evidence, which he afterwards wished to expose.

(1) Cooper *v.* Gibbons, 363. Lawson *v.* Sherwood, 1 Stark. Ca. 315.

(2) See by Lord Lyndhurst, Ch. B., in Bate *v.* Kinsey, 1 Cr., M. & R. 41. By Lord Mansfield, in Roe *v.* Harvey, 4 Burr. 2484.

(3) Sayer *v.* Kitchen, 1 Esp. N. P. C. 210.

(4) Wharam *v.* Routledge, 5 Esp. N. P. C. 235. Calvert *v.* Flower, 7 C. & P. 386. But the principle of this rule is not clear; and it seems questionable, whether the rule does not go much too far.

as to their contents, although the notice to produce them is admitted. (1) "The evidence," said Lord Ellenborough, in the latter of the cases here cited, "cannot in strictness be anticipated, although it may be rigorous to insist upon the rule, and a close adherence to it may be productive of inconvenience."

Of Cases where notice to produce Writings may be dispensed with.

The principle of the rule, which requires that a party shall have previous notice to produce a written instrument in his possession, before the contents can be proved as evidence in the cause, will not apply to cases, where, from the nature of the proceedings, the defendant has notice, that the plaintiff means to charge him with the possession of the instrument. It cannot, in such cases, be necessary to give any other notice, than the proceeding itself supplies. In an action of trover, therefore, for a bond, the plaintiff has been allowed to give parol evidence of the contents, to support the general description of the instrument in the declaration, without having given the defendant previous notice to produce the original. (2)

Notice from the proceedings, when sufficient.

In trover.

In an action of assumpsit on a checque, in which the defendant pleaded that it was given for money won at an unlawful game, on which issue was taken, it was ruled at Nisi Prius, that the plaintiff was not obliged to produce the checque on the trial, when called upon to produce it as part of the defendant's evidence, there being no notice given for that purpose by the defendant, and the proceedings on record not dispensing with notice. (3)

When not sufficient.

On a prosecution for stealing a promissory note or other writing, described in the indictment, parol evidence of the contents will be received, without any formal notice to the prisoner to produce the original. In *Aickle's* case, (4) on an indictment

When sufficient in criminal proceedings.

Aickle's case.

(1) Graham *v.* Dyster, 2 Stark. Ca. 23. Sideways *v.* Dyson, 2 Stark. Ca. 49.

(2) How *v.* Hall, 14 East, 274. Scott *v.* Jones, 4 Taunt. 865. Jolley *v.* Taylor, 1 Camp, 143. Butcher *v.* Jarrat, 3 Bos. & Pull. 143. Wood *v.* Strickland, 2 Merivale, 461. Colling *v.* Treweek, 6 B. & C. 398. Whitehead *v.* Scott, 1 Mo. & R. 2.

(3) Read *v.* Gamble, 10 Ad. & Ell. 597.

(4) 1 Leach, Cr. Ca. 330. Butler's case, 13 Howell's St. Tr. 1254,

for stealing a bill of exchange, all the Judge's held, that such evidence had been properly admitted, though it was proved in that case, that the bill had been seen, only a few days before the trial, in a state of negotiation, in the hands of a third person, who had been served with a *subpœna duces tecum*, but who did not appear. In *Layer's* case, (1) on an indictment for high treason, where it was proved, that the prisoner had shewn a person the paper, containing the treasonable matter laid in the indictment, and then immediately put it into his pocket, that person was permitted to give parol evidence of the contents of the paper. In the case of *De la Motte*, (2) on an indictment for a traitorous correspondence with the French government, where the question was, whether examined copies of the treasonable papers, which had been secretly opened at the post-office, and copied, and then forwarded to their place of destination, were admissible in evidence; the Court held, that they might be admitted, after proof that the originals were in the handwriting of the prisoner.

Layer's case.

De la Motte's case.

Inscriptions on banners, &c.

Hunt's case.

A description or copy of a writing, may, for some purposes, be in the nature of original and primary evidence, not of hearsay or secondary evidence; in which case notice to produce will not be necessary. In the case of the *King* v. *Hunt* (3) it was held, that parol evidence of inscriptions and devices on banners and flags displayed at a meeting, and also a copy of resolutions delivered by one of the defendants to a witness, as

which was a prosecution for the forgery of a bond. So in Spragge's case, cited 14 East, 276, for forgery, where the prisoner swallowed the note.

(1) 6 St. Tr. 263. 16 Howell's St. Tr, 170, S. C. Francia's case, 15 Howell's St. Tr. 941. Rex *v.* Moors, 6 East, 421, n.

(2) Cor. Buller, J., and Heath, J., O. B. 1781. 1 East's P. C. 124, from MS. of Gould, J. These copies were rejected on another ground, because the originals had not been traced to the prisoner's possession. See 21 Howell's St. Tr. 737.

(3) 3 B. & A. 574. Some evidence was given that the banners were in the possession of a constable, but this was held not to affect the question. The principle on which the copy of resolutions was received, appears more satisfactory than that on which the reception of the inscriptions on the banners was founded.—In Gorton *v.* Dyson, 1 B. & B. 221, it seems to have been considered that a will upon which the defendant had obtained probate, was primary evidence as against the executors, to prove an acknowledgment in the will. It may have been thought primary evidence, on the ground of the act of court being indorsed on it; it was clearly good secondary evidence.

resolutions intended to be proposed, and which copy corresponded with the resolutions that the witness afterwards heard read from a paper, were admissible without a notice to produce. Notice to produce the banners may be dispensed with, because it is only the general effect of the inscription, that the prosecutor has to prove, and the precise words used form no part of the *corpus delecti.* And the copy of the resolutions had been delivered by one of the defendants, and, therefore, by way of admission, was as good evidence against him, as any that could have been produced.

Proof of unlawful oath taken.

Upon an indictment for administering unlawful oaths, where a witness swore to certain words spoken by the prisoner as the form of oath, the witness holding a paper in his hand at the same time he uttered them, it was held, that no notice to produce the paper was necessary. (1). In such a case, what a prisoner had said would clearly be evidence against him, whether it corresponded with the written paper or not.

Writing given up to a party in fraud of *subpœna.*

Nor does the principle of the rule apply to the case where a party to the suit has fraudulently got possession of a written instrument belonging to a third person; as, where a witness was called on the part of the defendant, to produce a letter written to him by the plaintiff, and it appeared, that, after the commencement of the action, he had given it to the plaintiff; in this case, though a notice to produce had not been given, parol evidence of the contents was admitted, because the paper belonged to the witness, and had been secreted in fraud of the *subpœna.* (2)

Duplicate original or counterpart.

Notice to produce is not required, where the paper offered in evidence is a duplicate original, (3) or a counterpart; (4) or where the instrument to be proved is a notice,—as a notice to quit, a notice of the dishonor of a bill of exchange, or a notice of action. (5) And where an attorney's bill duly signed has

Notice.

Attorney's bill.

(1) Rex *v.* Moors, 6 East, 419, n.

(2) Leeds *v.* Cook, 4 Esp. 256. Doe d. Pearson *v.* Ries, 7 Bing. 724.

(3) By Bayley, J., in Colling *v.* Treweek, 6 B. & C. 398. Philipson *v.* Chace, 2 Camp. 110, by Lord Ellenborough.

(4) Barleigh *v.* Stibbs, 5 T. R. 465. Roe d. West *v.* Davis, 7 East, 363. Mayor of Carlisle *v.* Blamire, 8 East, 487.

(5) Notice to quit, 2 B. & P. 41.

been delivered to the defendant, a copy, though not signed, is admissible in evidence, without proof of notice to produce the original, on the ground that the bill delivered is considered as a notice. (1) A duplicate which has been taken from an original letter, at a single impression, by means of a copying machine, is still only a copy; and, therefore, cannot be read, without a previous notice to the other party to produce the original, (2) or without proof that the copy so taken was afterwards on comparison found to be correct.

Machine copy.

Another exception may be mentioned, in the case of an action by a seaman to recover wages, in which the captain is compellable to produce the ship's articles at the trial, though he has not received a notice for that purpose,—if he would found any objection upon them, or resort to them in making his defence. The statute has introduced an exception to the general rule upon this subject.

Ship's articles.

It seems now to be the better opinion, that neither party will be allowed, either in an examination in chief or in a cross-examination, to inquire into the contents of a deed, merely because the opposite party has the original deed in his possession, in Court, at the time of the trial; and that the opposite party may object to such parol evidence of the contents, on account of his not having received a previous notice to produce the original. In the case of *Doe* on the demise of *Haldane* and *Urry* v. *Harvey*, (4) the Judges of the Court of King's Bench

When the writing is in court, in possession of the other party.

Notice of dishonour, Kine *v.* Beaumont, 3 Br. & B. 288, decided after collecting the opinion of the judges. Ackland *v.* Pearce, 2 Camp. 601. Roberts *v.* Bradshaw, 1 Stark. Ca. 28. Langdon *v.* Hulls, 5 Esp. 157. Notice of action to magistrate, and demand of copy of warrant from constable, 2 B. & P. 39. This rule is founded apparently upon the convenience of general practice.

(1) Colling *v.* Treweek, 6 B. & C. 394, where the general subject was much considered. It was said, that if the copy had been signed, it would have been a duplicate original. As to which, Dallas, Ch. J., in Kine *v.* Beaumont, 3 Br. & B. 288, said, that he could not see any great difference between a duplicate original and a copy made at the time.

(2) Nodin *v.* Murray, 3 Camp. 228. See Holland *v.* Reeves, 7 C. & P. 38. Rex *v.* Watson, 2 Stark. Ca. 129, n. (a), referring to Rex *v.* De Beringer.

(3) Bowman *v.* Manzelman, 2 Camp. 315. St. 2 G. 2, c. 36, s. 8, as to foreign voyages; st. 31 G. 3, c. 39, s. 6, as to the coasting trade.

(4) 4 Burr. 2484. See Doe d. Wartney *v.* Grey, 1 Stark. Ca. 283.

appeared to have differed in opinion upon this point. "In that case, title was deduced to Haldane under a will; but one of the plaintiff's witnesses said, on cross-examination, that Haldane had conveyed all interest in the premises to Urry, before the time of the demise in the declaration, and that the deed was in Court. Upon this it was insisted, that, as the plaintiff's witness proved the title out of Haldane, and as the deed of conveyance was in the court, the deed ought to be produced in evidence to show a title in Urry, the other lessor of the plaintiff. The counsel for the plaintiff, on the contrary, refused to produce the deed, insisting, that the plaintiff ought to recover under the one or the other of the lessors; for, if the one had parted with the title, the other had acquired it. But Mr. J. Aston, who tried the cause, being of opinion, that the plaintiff ought to give further evidence to ascertain the title, under which he was to recover the term, nonsuited the plaintiff; and on a motion afterwards for setting aside this nonsuit, Lord Mansfield, after observing that in the action of ejectment the plaintiff could not recover, except upon the strength of his own title, said, "It was plain the plaintiff had no title under Haldane, who had conveyed away all the interest in the premises to the other lessor, and that as to his claim of a title under Urry, the plaintiff had not proved any title; the jury could not have found for the plaintiff under the deed of conveyance to Urry, unless it were produced, and probably there was something in the deed, which would have shown that Urry had no title." Lord Mansfield laid the principal stress on the fact of the plaintiff's refusing to produce the conveyance from Haldane, which was admitted to be in court. "The want of notice," he said, "was no objection in this case, because they had the deed in court; and the refusal to produce it warranted the strongest presumption, that neither of the lessors had any title." Mr. Justice Aston and Mr. Justice Willes agreed in opinion with Lord Mansfield. But Mr. Justice Yates differed from the rest of the court. "He founded himself," he said, "upon the rules of evidence. The fact of the conveyance coming out on cross-examination could make no difference. The plaintiff's counsel were not obliged to produce the deed, for no man can be obliged to produce evidence against himself;

the only consequence of a notice to produce would have been the admission of inferior evidence." Upon this case it may be observed, that the fact of Haldane's having conveyed away all his interest to Urry seems to have been assumed, as satisfactorily proved: but from the opinion of Mr. Justice Yates, which seems to be the better opinion, it may be collected, that there was no legal proof of any conveyance of title out of Haldane, and that the answer of the witness, upon which the defendant's argument rested, was as inadmissible in evidence on the cross-examination, as it would have been on an examination in chief. The true objection to such evidence is, that the witness was speaking to the contents of a deed, when there had been no notice given to produce the original; and it does not appear to be a sufficient answer to say that the deed is in court; for, if the party had received a regular notice to produce it, he might have come prepared with evidence to repel any inference which the production of the deed might have raised against him. It was expressly decided in *Doe* d. *Wartney* v. *Grey*, (1) that although a party has a written instrument in court, parol evidence of it cannot be given, if there has been no notice to produce.

2. Of the Admissibility of Secondary Evidence, when the Writing is not in the possession of either party.

Where writings are not in the possession of the opposite party, secondary evidence is admissible, wherever the party, requiring their use, is not able to produce them. This inability to produce writings, may arise from various causes. Secondary evidence of writings is admissible, where the party cannot produce the original which is in a foreign country, and not legally removable from it's place of deposit. (2) So where the non-production of an instrument is privileged on

Original in foreign country.

(1) 1 Stark. Ca. 283, see the point, ruled by Lord Kenyon, there referred to. The Court of Exchequer seem to have inclined to the same opinion, in Bate *v.* Kinsey, 1 Cr., M. & R. 41, but not to have considered the rule as settled. See Cook *v.* Hearn, 1 Mo. & R. 201. Doe *v.* Morris, 4 Nev. & M. 598.

(2) Alivon *v.* Furnival, 1 Cr., M. & R. 277, where a letter was filed in the English Court of Chancery, pursuant to an order of that court, it was ruled that secondary evidence was not admissible, it being in the power of either party to produce it, on application to the court, Williams *v.* Munnings, R. & M. 18.

grounds of policy, secondary evidence of it's contents may be given; as where a document is in the hands of an attorney, who is not allowed to produce it from regard to the privilege of his client. (1) Privileged.

Secondary evidence is admissible of writings which are proved to have been destroyed, or which cannot be found, after due inquiry. With regard to what shall be deemed to be due inquiry after a document, in order to let in secondary evidence, cases must very much depend on their particular circumstances, especially upon the importance of the instrument, or the usage or practice which may exist respecting the custody of such documents. (2) Writing destroyed, or lost.

Where an attested instrument is destroyed, and the witness is known, he must be called. (3) Where the attesting witness's name is unknown the instrument must necessarily be treated as if unattested; as, where the plaintiff brought an action on a bond that had been lost, and a witness stated that there were names of attesting witnesses on the bond, but that he did not know the names; Lord Kenyon held, that the plaintiff might recover without the evidence of an attesting witness. (4) In all such cases it is of course to be understood that the absence of the instrument, and the absence also of the evidence of attesting witnesses is satisfactorily accounted for and explained. Attesting witness, if known, to be called.

When it is the duty of a party possessing an instrument to deposit it in a particular place, and it is not found there, the presumption is that it is destroyed: therefore, where an indenture of apprenticeship was traced into the possession of overseers of a parish, it was held sufficient to make search Loss when presumed.

(1) Mills *v.* Oddy, 6 C. & P. 732. Marston *v.* Downes, 1 A. & E. 31. It was held, in this case, that if the judge had done wrong in considering the communication privileged, the defendants could not object, not being privileged parties.

(2) Rex *v.* Stourbridge, 8 B. & C. 98. There was no evidence to show that the overseer to whom the indenture was sent was dead. See M'Gahey *v.* Alston, 2 Mee. & W. 214, as to search in the proper place of deposit for parish documents.

(3) Gillies *v.* Smither, 2 Stark Ca. 528.

(4) Keeling *v.* Ball, Peake Ev. App. 82.

for it in the parish chest, as it was the duty of the overseers to deposit it there. "The degree of diligence to be used in searching for a deed, must depend on the importance of the deed, and the particular circumstances of each case." (1)

Useless papers, when presumed to be lost.

The general presumption is, that a useless instrument will be destroyed. (2) Proof by a witness, that the paper in question was thrown aside as useless, and that he believes it to be lost or destroyed, will be sufficient to let in secondary evidence. This was determined by the Court of King's Bench, in the case of *Mr. Justice Johnson.* (3) A similar point arose, in the

Kensington v. *Inglis.*

case of *Kensington* v. *Inglis,* (4) in the course of which it became necessary to prove the loss of a license: the witness said, it was his practice to destroy or put aside such licenses amongst the waste papers of his office, as not being of any further use, and that he supposed he had disposed of the license in question in the same manner as other licenses for ships, whose voyages had been performed; but he was not sure that it was destroyed. The witness added, he had been afterwards applied to for this license, and searched for it, but he did not recollect whether he had found it or not; though he did not think that he had found it. Lord Ellenborough, adverting to the evidence, in delivering the judgment of the court, said, "We are of opinion, that this evidence satisfies what the law requires in respect of search, and establishes with reasonable certainty the fact of the license being lost. It was not to be expected, that the witness should be able to speak with more confident certainty to a fact, to which his attention would not be particularly drawn at the time on account of any importance being supposed to belong to it."

Brewster v. *Sewell.*

So in the case of *Brewster* v. *Sewell,* (5) (which was an action against the defendant for publishing a libel, charging the plaintiff with having defrauded an insurance company in settling a loss upon a policy against fire,) where it became necessary,

(1) By Best, Ch. J., in Gully *v.* Bp. of Exeter, 4 Bing. 298.
(2) By Bayley, J., in Rex *v.* Farleigh, 6 D. & R. 153.
(3) Rex *v.* Johnson, 7 East, 66.
(4) 8 East, 278, 288.
(5) 3 Barn. & Ald. 296.

in proof of an averment in the pleadings, to account for the non-production of the policy, with a view to give secondary evidence of it's contents, it appeared, that the policy, which had been effected about seven years before, had become useless, in consequence of a second policy having been effected; the policy had probably been returned to the plaintiff after settling the loss. The clerk of the plaintiff's attorney, a few days before the trial of the action, searched for it in the plaintiff's house, not only in every place pointed out by the plaintiff, but also in every place which the clerk thought likely to contain a paper of this description; the question was, whether this was a sufficient search; the Court of King's Bench held, that it was sufficient.

Freeman v. Arkell.

And in the case of *Freeman* v. *Arkell*, where it became necessary to prove the contents of an information, which had been taken before a magistrate, the magistrate proved, that he had delivered the information to the clerk of the peace or to his deputy; the clerk of the peace proved also, that no such information was to be found in the office; that a bill had been presented on the charge in this information, which was rejected by the grand jury, and that it was usual in such cases to destroy the informations; the court held that this was a sufficient search, without calling the deputy clerk; for if the information was delivered to the deputy, it was delivered to him as agent for the clerk of the peace, and not for his own purposes; it should not, therefore, be presumed to be among his private papers, but rather to be among those in the custody of the clerk of the peace. (1)

Power of Attorney, secondary evidence of. *Lord Melville's* case.

On the impeachment of Lord Melville, the Committee of Managers, in order to prove the contents of a letter of attorney, (under which, it was said, Douglas had been authorized by Lord Melville to apply to the Treasury for monies, from time to time, as his paymaster,) offered in evidence an entry in a book, kept in the Exchequer, which book contained entries of all the letters of attorney for the receipt of money at the Exchequer. It was satisfactorily proved, that no such letter had

(1) Freeman *v.* Arkell, 2 B. & C. 494, 497.

been found, on a diligent search, among Douglas's papers shortly after his death; it was proved also, that an official order had been made out for Douglas to receive money, under a letter of attorney; and the fact of Douglas's appointment as paymaster clearly appeared from a letter in Lord Melville's handwriting, dated only two days after the date of the proposed entry. The clerk of the office also proved, that he had made the entry from the original letter of attorney; which entry purported to contain the names of persons, as attesting witnesses to the letter. After argument, the entry was rejected. "There is no legal proof," said the Lord Chancellor, "of Lord Melville's handwriting; it does not appear, whether the attesting witnesses are living or dead; nor does it appear that Mr. Douglas ever received any money under that appointment." For these reasons, it was determined, that the managers had not entitled themselves to read the paper. Upon this, the managers proceeded further, (1) and tendered in evidence a certificate signed by Douglas as paymaster, and given by him to the Navy-office, acknowledging the receipt of money by him at the Exchequer; the managers then produced entries in the bank books, signed by Lord Melville and Douglas, in the common form of opening an account; and afterwards called a witness, whose name and description corresponded with the name and description of one of the attesting witnesses in the proposed entry; and this witness stated that he had some recollection, though very slight, (for the entry bore date about twenty-four years before that time,) of providing a stamp for the power of attorney from Lord Melville to Douglas, and of attesting it at the Navy-pay-office. Upon this evidence, the Lord Chancellor declared his opinion, that the entry was admissible, and the lords allowed it to be read. (2)

Appointment to an office, secondary proof of.

On the hearing of an appeal against an order of removal, (3) the principal question was, whether one person only, or more than one, had been appointed overseer in a particular year;

(1) 29 Howell's St. Tr. p. 723, 739.
(2) *Ibid.* p. 739.
(3) Rex *v.* Stoke Golding, 1 B. & Ald. 173.

the respondents, who, in order to vacate an indenture of apprenticeship, had to prove, that only one overseer had been appointed in that year, had given notice to the appellants to produce all books and writings in their custody and power, relating to the appointments of overseers; the appellants, being called upon to produce under this notice, produced one parish book, which was the only one in existence, and the parish officer, who produced it, proved that no appointments were kept by the parish; the respondents then proceeded to inquire of a witness, as to there having been, in the particular year, one or more overseers; but, on an objection being taken, the Court of Quarter Sessions held, and the Court of King's Bench afterwards confirmed their opinion, that as the appointments had been in writing, parol evidence could not be admitted. "The question," said Lord Ellenborough, "is, whether the justices below have done wrong in rejecting the parol evidence. This is clear that the parol evidence could not be admitted, until the case was ripe for the admission of secondary evidence; now it could not be considered as ripe for that purpose, until the respondent parish had exhausted all the proper means of procuring the primary evidence. Have they done this? First, as to the appointment itself, they gave a notice to the parish; and, supposing the parish had the actual custody, that notice would have been sufficient, but this does not appear. Have they then the legal custody? Certainly not; for the legal custody is in the officer, who is the person most interested in the instrument, and who requires it's production as a sanction for those acts, which he may be called upon to do under it's authority. Now, here there has not been any notice to the overseer himself. I think, therefore," added Lord Ellenborough, "that, as in this case there has been an omission of the means of exhausting the primary evidence, recourse could not be had to that of a secondary nature."

R. v. Stoke Golding.

Some questions have arisen as to the admissibility, and as to the sufficiency, of answers to inquiries made in the course of a search after missing documents,—and this, as well in the case where the persons giving the answers are living, as where

Answers to inquiries in search for a missing paper.

Rex v. *Morton.* they are deceased. (1) In the case of *Rex* v. *Morton*, (2) where it appeared that only one part of an indenture of apprenticeship had been executed, that the pauper and master were both dead at the time of the trial, and that an inquiry for it had been made of the pauper shortly before his death, who said that the indenture had been given up to him after the expiration of his apprenticeship, and that he had burnt it, and an inquiry had also been made of the daughter and sole executor of the master, who said that she knew nothing about it; under these circumstances the Court of King's Bench were of opinion, that a sufficient inquiry had been made to render the parol evidence of the contents admissible.

Rex v. *Rawden.* On an appeal against an order of removal, where the appellants relied on a settlement of a deceased party by apprenticeship, and, in order to let in parol evidence of the indenture, called the widow of the deceased, who stated that her husband in his last illness told her, that he received his indentures from his master at the end of his apprenticeship, and wore them out in his pocket; it was held, that, without further proof of inquiry after this indenture, evidence of the conversation was not admissible. It was said by the court, that the case of *Rex* v. *Morton* was distinguishable, as in that case inquiry had been made of the master's executrix. It was observed, that the evidence tendered was of a dangerous kind, and should be received with caution. (3)

Rex v. *Denis.* On an appeal against an order of removal, it was proved by the pauper, that he had been bound apprentice twenty-three years previous to the trial of the appeal, by an indenture which was signed and sealed, and that he served seven years, and

(1) *Vide infra*, p. 235. It does not appear, upon what principle, the answer of a deceased person can be more admissible than that of a living person, the answer not being against his interest.

(2) 4 M. & S. 48. In the previous case of Rex *v.* Castleton, 6 T. R. 236, the only part of the indenture not accounted for was traced to the possession of a living person, who, in answer to an inquiry for it, said that she could not find it, nor did she know where it was. It was held that this was not sufficient evidence of search. And see Rex *v.* St. Sepulchre, 2 Bott. 353.

(3) Rex *v.* Rawden, 2 A. & E. 156.

that his master had the indentures, and that when his apprenticeship expired, he asked his master for the indentures, who said that the parish officers had them: it was held, that the declarations of the master, who might have been called as a witness, were not admissible, so as to let in secondary evidence of the indentures. It was said by Bayley, J., that the decision in *Rex* v. *Morton*, did not proceed on the ground, that the declaration of the executrix of the master was admissible; but that, if the declaration of the pauper were admissible so as to show a possession of the indenture by him, it showed also that further search and inquiry was unnecessary, because he stated that it had been given up to him, and that he had burnt it. The circumstance that the master was living was apparently relied on in the judgment, and the case of *Rex* v. *Castleton* (1) was considered as directly in point, inasmuch as the indenture, in that case, was traced to a living person, and the account given by that person, that it could not be found, was not considered sufficient for the purpose of admitting secondary evidence. (2)

Rex v. *Castleton.*

Where the master of an apprentice, who was deceased, having had a parish indenture in his possession, failed in business, and an attorney took the management of his affairs and the custody of his papers, which he inspected, but did not find the indenture, it was held, that the proof of these facts afforded a sufficient ground for the admission of secondary evidence, though the master's widow was living, and no inquiry had been made of her respecting it. It was noticed, that the widow was not the executrix, and it was said that it was useless to inquire as to her possession of the indenture, after the evidence of the attorney, who had looked into the master's papers. It was also observed, that in *Rex* v. *Castleton*, above mentioned, the person, of whom inquiry ought to have been made, was proved to have had at one time possession of the indenture. (3)

Rex v. *Piddlehinton.*

(1) 6 T. R. 236.

(2) Rex v. Denis, 7 B. & C. 622. And see Williams v. Younghusband, 1 Stark. Ca. 139, where answer to inquiry after policy of insurance was held not sufficient. Parkins v. Cobbet, 1 C. & P. 282.

(3) Rex v. Piddlehinton, 3 B. & Ad. 462.

Extent of search.

It is not necessary, in order to show a sufficient search, to negative every possibility; it is enough to negative every reasonable probability of anything being kept back. Where an attorney or officer is applied to for documents, the Court will assume, till the contrary is shown, that all the documents relative to the subject are produced. These principles were

McGahey v. *Alston.*

laid down in the case of *McGahey* v. *Alston.* (1) In that case, a check, which had been drawn on the account of a parish, had been delivered to the paying clerk of the parish, and it was shown that the bankers of the parish on the same day paid a sum of that amount, and that their custom was to return the cancelled checks to the paying clerk, and that they were deposited in an apartment in the workhouse; the paying clerk having gone out of office, application was made to his successor for inspection of the checks; he handed to the witness several bundles, which were searched without finding the check in question: it was held, that this was a sufficient search to let in secondary evidence.

When it sufficiently appears, that the sources of primary evidence are exhausted, and that secondary evidence of writings is admissible, the question arises, as to the kind of secondary evidence which may be admitted.

3. *Of the kind of Secondary Evidence, which may be admitted.*

No degrees in secondary evidence.

In secondary evidence there are no degrees, that is, no precedence or superiority in point of admissibility: an attested copy of a written instrument is not of a superior order of proof to an examined copy, nor is an examined copy superior to parol evidence of the contents.

Brown v. *Woodman.*

In the case of *Brown* v. *Woodman,* (2) where the defendant

(1) 2 Mee. & W., 213. It was said, that, in ordinary cases the search was not made as for stolen goods. *Vide supra,* as to the proper place of custody of documents. And further, on the proof of the loss of writings, see Minshull *v.* Lloyd, 2 M. & Wel. 450. As to loss of sheriff's warrant, see Bligh *v.* Wellesley, 2 C. & P. 400. Rex *v.* North Bedburn, Cald. 452. As to loss of assignment commission of bankruptcy before enrolment, see Giles *v.* Smith, 1 Cr., M. & R. 462. Various questions have arisen in the Ecclesiastical Courts respecting proof of the loss of testamentary instruments; see Wargent *v.* Hollings, 4 Hagg. Com. Rep. 249.

(2) 6 C. & P. 206. In Doe *v.*

had given notice to the plaintiff to produce a letter, of which he, the plaintiff, had kept a copy, but the letter was not produced at the trial, it was held, that he might give parol evidence of it's contents, and was not bound to put in the copy. So, where a party, after receiving notice to produce at the trial a notice to quit, refused to produce it; on which a copy of the notice to quit was offered in evidence, bearing the name of an attesting witness, Lord Denman held, and the Court of Queen's Bench afterwards agreed with him, that it was not necessary to call the witness to prove the execution of the original notice. (1)

Parol evidence admissible, though the party may have a copy.

Poole v. *Warren.*

So also in the recent case of *Doe* v. *Ross*, (2) where the plaintiff's counsel tendered in evidence an attested copy of a deed,—the contents of the deed being a necessary part of the plaintiff's case, and in the possession of an attorney, who declined to produce the original at the trial under a *subpœna*,—the copy was objected to, as inadmissible for want of a stamp; the counsel then proposed to prove the contents of the deed by the parol evidence of a witness; and Lord Denman received the evidence. The question as to the admissibility of this evidence came afterwards before the Court of Exchequer, which held that it had been properly admitted, on the ground that there are no degrees in secondary evidence. "No doubt," said Mr. Baron Parke, "an attested copy is more satisfactory, and, in that sense of the word, is superior evidence to mere parol testimony; but to exclude the latter entirely, is a different thing. As soon as a party has accounted for the absence of the original document, he is at liberty to give any kind of secondary evidence. The rule is, that 'no evidence is to be adduced which, *ex naturâ rei*, supposes still greater evidence behind in the party's own

Doe v. *Ross.*

Wainwright, 1 Nev. & P. 8; 5 Ad. & Ell. 520, S. C. several of the judges appeared to be inclined to the opinion, that an abstract of a deed would not be the best secondary evidence, and that if a copy of it had been proved to be in existence, it might have been necessary to give notice to produce the copy; and see by Best, Ch. J., in Munn *v.* Godbold, 3 Bing. 294, as to degrees of secondary evidence. That a counterpart is better secondary evidence than a copy, see Rex *v.* Castleton, 6 T. R. 236; B. N. P. 254. An inscription on a tablet in a church, or on a wall, may be proved by parol, though it is usual to show the witness a copy, Doe *v.* Cole, 6 C. & P. 369.

(1) Poole *v.* Warren, 8 Ad. & Ell. 582.

(2) Doe d. Gilbert *v.* Ross, 8 Dowl. Pr. C. 389.

power and possession.' Now, where parol evidence is tendered, it does not of itself show that there exists any better species of secondary evidence, and consequently, raises no presumption against itself. Does then, the fact, subsequently introduced, of there being an attested copy, alter the nature of the parol evidence? I think not; and that if a party is entitled to give secondary evidence at all, he is entitled to give any secondary evidence in his power. If this were not so, secondary evidence must be classified, and where would the classification end? It would be necessary to distinguish between secondary, tertiary, and quarternary evidence. Nor would it stop even there; for the value of parol evidence may differ; as one witness may have a better memory than another."

Abstract of deed.

Doe v. Wainwright.

An abstract of the contents of a deed of feoffment, compared by a witness with the original deed, which was delivered to the defendant as part of his title-deeds on a sale of the property, is admissible on the part of the plaintiff as secondary evidence of the deed. (1) In the case referred to upon this point, it did not appear, on either side, that there was any copy of the deed in existence; but if that had appeared, the abstract, it is conceived, would still have been competent secondary evidence; for the plaintiff might not have known of the copy,—or, if he had known of it, might not have been able to produce it,—or, if able to produce it, might not have been able to prove it a true copy; and, even if he could have proved it a true copy, how would it have been preferable as evidence to the abstract, or more credible as against the other party, who, being possessed of the original, had full means of curing any defect, omission, or imperfection in the abstract? A party, who, having a deed in his hands, withholds it from inspection, has no right to complain of the inferiority of any kind of evidence that may be brought by the other party, to supply the place of the original: he himself is the cause of the inferior evidence, by keeping back the best. (2) The same principle, which admits of an abstract in such a case as secondary proof, dispenses with

(1) Doe d. Rowlandson *v.* Wainwright, 5 Ad. & Ell. 520.

(2) This agrees with Lord Denman's view of the question: see 5 Ad. & Ell. 523.

the calling of an attesting witness to prove the deed, although it appear from the evidence of the person who compared the abstract, that there were attesting witnesses to the feoffment.(1)

Copy of a copy.

A copy of a copy of a document in the possession of the defendant, who had received notice to produce the document, was offered as secondary evidence of the contents, being produced by a witness, who stated that he had compared it with the first copy, which he had compared with the original document, and that the first copy was still in his possession; Mr. Baron Alderson rejected the proposed proof. (2) This evidence was manifestly defective; it did not appear that the witness had compared the copy produced with the original document. After the rejection of this second copy, parol evidence of the contents of the original document would have been admissible.

Entry of letter, in course of business.

Pritt v. *Fairclough.*

Entries by deceased clerks, regularly made by them, purporting to be copies of letters written in the course of business, are secondary evidence of the contents of the letters; and if it was the duty of the clerks to see that the letters copied by them were sent by the post, the entries might amount to proof of the fact of sending the letters.(3) In *Pritt* v. *Fairclough*, the first cited case, where it appeared that the defendant had acknowledged the receipt of a letter of a particular date, which was not produced at the trial when required, it was ruled, that an entry in a letter-book, (purporting to be a copy of a letter of the same date from the plaintiff to the defendant, and inserted by a deceased clerk, who kept the book according to the course of business, and with great punctuality,) was admissible evidence of the contents of the letter in question. "The rules of evidence," said Lord Ellenborough, "must expand according to the exigencies of society: this entry is reasonable evidence to prove the contents of the letter of the particular date, which the defendant acknowledges he

(1) S. C.

(2) Everingham *v.* Roundell, 2 Mo. & R. 138.

(3) Pritt *v.* Fairclough, 3 Camp. 305. Hagedorn *v.* Reid, 3 Camp. 377. Toosey *v.* Williams, M. & M. 129. See vol. 1, p. 321, as to the principle upon which this kind of evidence is receivable.

received, and which he does not produce upon a notice for that purpose: we know it is the habit of merchants to keep such a book, and a witness has sworn, that the book in question was kept with great punctuality: if the entry in the clerk's handwriting were not admitted, there would be no way in which the most careful merchant could prove the contents of a letter after the death of his entering clerk. I will therefore allow," added Lord Ellenborough, "the entry to be read as *primâ facie* evidence, and the defendant may rebut it by producing the original. (1)

Unstamped copy.

Where a plaintiff had lost his part of an agreement under seal, after it had been duly stamped, and the defendant upon notice, produced his part unstamped, it was held, that the defendant's part, though unstamped, was good secondary evidence." (2)

Copy set out in affidavit.

Pooley v. *Goodwin.*

In *Pooley* v. *Goodwin*, (3) it became necessary, on the part of the plaintiff, to prove an order given by the defendant to a person to pay to the plaintiff monies to a certain amount which should be received by him on his (the defendant's) account: the order was not produced, but diligent search was proved to have been made for it among the plaintiff's papers; upon this, the judge, Lord Abinger, allowed secondary evidence of the order: a paper was then put in, purporting to be an affidavit by the defendant, stating that the defendant had made the order, and setting it out; and it had been admitted by the defendant's attorney to the plaintiff's attorney, that this paper was a true copy of an affidavit sworn by the defendant, (but not filed or used): an objection was made to this secondary proof, on the ground that the order was not proved to have been stamped, nor to have been examined with the original, but the judge permitted the copy to be read: and the Court of

(1) See Roberts *v.* Bradshaw, 1 Stark. Ca. 28. In Lord Melville's case, (29 Howell's St. Tr. 734, 740), an entry of a power of attorney, in the office-books at the Exchequer, was adjudged to be evidence of the contents of the power, after reasonable proof of the loss of the original. *Vide supra*, p. 231.

(2) Munn *v.* Godbold, 3 Bing. 292. Waller *v.* Horsfall, 1 Camp. 501. Garnons *v.* Swift, 1 Taunt. 507, to the same effect.

(3) 4 Ad. & Ell. 94.

King's Bench afterwards confirmed his ruling. "The defendant himself," said Lord Denman, "having set out the order in his affidavit, it must be presumed, in the absence of evidence to the contrary, that it had been duly stamped. But then it was objected, that only a copy of the affidavit was produced; the answer to which objection is, that it was admitted to be a true copy by the defendant's attorney."—In this case, then, it appears, a paper purporting to be a copy of an affidavit made by the defendant, was substituted in the place of the original by virtue of the admission of his attorney, that it was a true copy of the defendant's affidavit; and that part of the copy which purported that the defendant had signed an order as therein set out, was substituted in the place of the original order, (for which a search had been made without effect) by virtue of the admission of the defendant himself in his affidavit; and lastly, this admission by the defendant amounted to a recognition of the order as a valid and available instrument, and was thus good *primâ facie* evidence of it's having been duly stamped.

Recital of a deed in another.

The recital of a deed in another deed is evidence of the recited deed, if the original is lost, against the party who executed the reciting deed, or against any person claiming under him. (1) And when possession has gone along with a deed during many years, the original of which is lost or destroyed, an old copy or abstract may be given in evidence, though not proved to be true, because in such a case it may be impossible to give better evidence. (2)

Old copy or abstract, possession concurring.

Witness speaking to contents of lost writing.

A witness speaking to the contents of a lost writing may assist his recollection by entries in his memorandum-book; but these entries are not in themselves admissible as evidence; so that if the witness has not the memorandum-book at hand, ready to be produced, no objection can be taken on account of it's absence. In the case of *Kensington* v. *Inglis*, before cited, (3) the witness, who proved the loss and contents of a license, had

Memorandum book.

(1) Com. Dig. tit. Evidence (B. 5), Skipwith *v.* Shirley, 11 Ves. 64, 5 B. & C. 601.

(2) Buller, N. P. 254. Registry-book at Custom-house insufficient secondary evidence of an affidavit, on which a certificate of registry was obtained, Teed *v.* Martin, 4 Camp. 90.

(3) 8 East, 279, 289.

kept a memorandum-book, in which he made entries of licenses for his own information, and for the information of the governor of the country, who granted the licenses; he gave it to the governor, but did not know where the book then was, or what the governor had done with it: "As to the non-production of the memorandum-book," said Lord Ellenborough, "that book, if it had existed, and been in the witness's hand ready to be produced, could not have been produced at the trial, in proof of the fact of granting any particular license,—the only use, which it could be allowed to answer, being by way of memorandum, to refresh the memory of the person who made the entries, when he should be called as a witness."

Ancient chartulary evidence of original endowment.

The case of *Bullen* v. *Michel* (1), supplies an example respecting the admissibility of secondary evidence of ancient documents. In that case, on an issue to try whether a particular farm in the parish of S. was discharged of tithes on payment of a modus, the Court of Exchequer determined, that an old ledger or chartulary of the abbey of Glastonbury was admissible, as secondary evidence of the endowment of the vicarage. Two questions arose, one, with respect to the custody, from which this document was produced, which has been before mentioned; the other, (supposing it to have been sufficiently authenticated as to the propriety of it's custody,) whether it could be admitted in evidence between the parties to the issue, the vicar and the occupiers of the farm. With respect to this it appeared, that the chartulary contained an account of matters of a miscellaneous description; among other things, it contained entries, which appeared to be transcripts of contemporaneous documents considered as authentic; and these transcripts purported to give an account of the license of appropriation of the parish, and likewise an account of the several matters of endowment. The original endowment not being in the places where search had been made for it as it's natural places of deposit, the Court held that the chartulary, which had been found in the custody of the Marquis of Bath, and

(1) 2 Price, 399. Judgment affirmed in the House of Lords, 4 Dow. 298. Wolley *v.* Brownhill, 13 Price, 507, 508.

which must, therefore, be considered as having come from the custody of the rector, (for the abbot was formerly the rector,) was admissible evidence. (1) The plaintiff appealed from this judgment to the House of Lords, who affirmed the judgment of the Court of Exchequer. Lord Redesdale, in giving his opinion on that occasion, stated, (2) "that the original instruments, if they could have been produced, would have stood on the same ground as the taxation of Pope Nicholas, inquisitions on the writ of *ad quod damnum*, and a variety of similar evidence, from which the jury may draw their inference. The only question then is, whether the entries in this book are evidence of these two instruments. If the originals could be produced, these entries would not be evidence. But search has been made, and the originals cannot be found: and if we shut our eyes to that sort of inferior evidence in cases where no other can be had, we shall constantly do injustice. The best evidence is often lost through carelessness, the injuries of time, and various other circumstances; and secondary evidence is then admitted, to raise presumption or inference, where no direct evidence can be had. This then is the next best evidence; and perhaps evidence still more inferior might have been admitted, if this could not have been produced. This, however, appears to be the best, after the originals. For these two instruments seem to have been copied by a person employed for the purpose, probably one of the monks, and deposited among the muniments of the abbey, because it was important for the interests of the abbey, that the instruments should be preserved; and for the same reason it might be presumed, that they were faithful copies; at least there appeared to have existed no motive to make them otherwise, and they were found in a situation where they were likely to be kept.

Copy of enrolment of deed.

There has been some difference of opinion on the subject of the admissibility of examined copies of the enrolment of a deed. The Chief Baron Gilbert makes the following distinctions on

(1) Wood, B., differed from the rest of the court on this point. And see 13 Price, 508.

(2) 4 Dow. 324; 2 Price, 399.

this subject; "Where a deed needs enrolment," he says, (as deeds of bargain and sale, by statute 27 Hen. 8, c. 16,) "there the enrolment is the sign of the lawful execution of such deed, and the officer, appointed to authenticate such deeds by enrolment, is also empowered to take care of the fairness and legality of such deeds, and therefore a copy of such enrolment must be sufficient; for when the law has appointed them to be made public acts, the copy of such public acts shall be a sufficient attestation." (1) "But where a deed needs no enrolment, (continues Chief Baron Gilbert,) there, though it be enrolled, the *inspeximus* of such enrolment is not evidence, because, since the officer has no authority to enrol them, such enrolment cannot make them public acts, and consequently cannot entitle the copy of them to be given in evidence; for then, if the deed were doubtful, it were but to enrol it, and bring the copy or *inspeximus* in evidence, and thereby avoid producing a deed that was any way suspicious." (2)

When evidence.

When not evidence.

Mr. Justice Buller, after citing the rule from Chief Baron Gilbert, (that deeds of bargain and sale, enrolled and requiring enrolment, may be given in evidence without proof of the execution,) observes, (3) that "the law may well be doubted, notwithstanding that such deeds of bargain and sale enrolled have frequently in trials at *nisi prius* been given in evidence without being proved. In support of this practice," he adds, "the case of *Smartle* v. *Williams*, (4) is much relied on; but that case is wrong reported, for it appears from the report in Levinz, (5) that the acknowledgment was by the bargainor, and so it is stated in Salkeld's manuscript; besides, it appears from both the books, that it was only a term that passed, and consequently it was not an enrolment within the statute." Mr. Justice Buller then cites a case from Styles's Reports, (6) where Glyn, C. J., is reported to have said, that "if divers persons seal a deed, and but one of them acknowledge the deed, and the

Smartle v. *Williams.*

(1) Gilb. Ev. 86. Baikie *v.* Chandless, 3 Camp. 21. Garrick *v.* Williams, 3 Taunt. 544. Taylor *v.* Jones, 1 Lord Raym. 746; 1 Keb. 117; 1 Salk. 280.

(2) Gilb. Ev. 87; 1 Keb. 117.
(3) Bull. N. P. 256.
(4) 1 Salk. 280.
(5) 3 Lev. 387, S. C
(6) Thurle *v.* Madison, Styl. 462.

deed is thereupon enrolled, this is a good enrolment, and may be given in evidence at a trial, as a deed enrolled." "But it would be of very mischievous consequence," observes Mr. Justice Buller, "to say, therefore, that a deed, enrolled upon the acknowledgment of a bare trustee, might be given in evidence against the real owner of the land, without proving it executed by him. However, that has been the general opinion, and it seems fortified in some degree by statute 10 Anne, c. 18. On the other hand, it seems as absurd to say, that a release, which has been enrolled upon the acknowledgment of the releasor, shall not be admitted in evidence against him, without being proved to be executed, because such release does not need enrolment; and in fact such deeds have often been admitted: and that was the case of *Smartle* v. *Williams;* the deed there did not need enrolment, yet, being enrolled on the acknowledgment of the bargainor, it was read against him without being proved."

Deed enrolled on acknowledgment of trustee.

Copy of enrolment of release evidence against releasor.

In the case of *Smartle* v. *Williams*, above mentioned, an examined copy of the enrolment of a deed of bargain and sale, by which a term of years was assigned, was offered in evidence without any proof of the bargainor's sealing and delivery. It was objected, that the copy of the deed enrolled was not evidence, because the interest assigned, being only a term, passed immediately, and the enrolment afterwards is no more than an enrolment of an obligation: but the Court overruled this objection, and held that the "acknowledgment of the deed by the lessor before the Master in Chancery is good evidence against himself, and against all who claim under him." (1) So in the case of *Lady Holcroft* v. *Smith* (2) a distinction was made between deeds of bargain and sale (enrolled in pursuance of the statute of Henry 8), and other deeds enrolled, and it was held, that a copy of a deed, enrolled for safe custody, would not be evidence otherwise than against the party who sealed it, and all claiming under him. It does not appear from any of the authorities cited by the Chief Baron Gilbert, (excepting

Bargain and sale of a term.

Copy of enrolment evidence against bargainor.

Copy of deed enrolled for safe custody.

(1) 3 Lev. 387. Com. Dig. tit. Evidence (B. 1).

(2) 2 Freeman, 259.

the case of *Smartle* v. *Williams*,) against what party the copy of the enrolment was offered in evidence. If the enrolment had been on the acknowledgment of the bargainor, and offered as evidence against him, there cannot be a doubt of it's being admissible.

Bargain and sale of freehold, pleaded with profert.

With regard to a copy of the enrolment of a deed of bargain and sale, indented and enrolled in pursuance of the statute of Henry 8, it is enacted by statute 10 Anne, c. 18, s. 3, (1) "(which was passed for supplying a failure in pleading or deriving title to lands, &c., conveyed by such deeds of bargain and sale *where the original indentures are wanting*, as often happens, especially where divers lands, &c., are comprised in the same indenture, and afterwards derived to different persons,) that, where any such indenture of bargain and sale enrolled shall be pleaded with a profert, the party so pleading may show forth and produce a copy of the enrolment; and such

Copy of enrolment evidence.

copy, examined with the enrolment, and signed by the proper officer having the custody of the enrolment, and proved upon oath to be a true copy, shall be of the same force and effect as the indenture of bargain and sale would be, if produced." Before this statute, an enrolment of the deed could not have been pleaded; and though a deed had been exemplified under the great seal, yet it was necessary, at common law, to show forth the deed itself under seal, and not the exemplification. (2) So, by the common law, the king's letters patent themselves must have been shown forth in Court, and a *constat* or *inspeximus* of them was not admissible; but by stat. 3 & 4 Ed. 6, c. 4, explained by stat. 13 Eliz. c. 6, "patentees, and persons

Exemplification of enrolment of letters patent.

claiming under them, may make title in pleading by showing forth an exemplification of the enrolment of the letters patent, as if the letters patent themselves were pleaded and shown forth;" and now they are to be given in evidence, in the same manner as if they were pleaded. (3)

Result of cases.

The rule concerning copies of enrolments appears then to be

(1) See also stat. 8 Geo. 2, c. 6, s. 22, concerning deeds of bargain and sale of lands, in the North Riding of Yorkshire.

(2) Co. Litt. 225. b.

(3) Olive *v.* Gwyn, Hardr. 119.

that an examined copy of the enrolment of a bargain and sale of freehold in lands, pursuant to the statute of Henry 8, is as good evidence as an examined copy, of the original itself: and where the original is wanting, (as where it has been lost or destroyed, or where different parcels of land are comprised in the same indenture and afterwards derived to different persons,) (1) a copy of the enrolment signed by the proper officer, who has the custody of the enrolment, and proved by oath to be a true copy, will have the same force and effect as the original itself would have, if produced. (2) But a copy of the enrolment of a bargain and sale of a chattel interest, or of any other deed enrolled for safe custody, is not admissible in evidence, except as against the party acknowledging the deed, or persons claiming under him; and against such party, and against all claiming under him, an examined copy of the enrolment of any deed is admissible, and equivalent to an examined copy of the original deed. (3)

Enrolment of bargain and sale of *freehold*—

of *chattel* interest.

Lastly, Of the Proof of Handwriting.

The simplest and most obvious proof of handwriting is the testimony of a witness, who saw the paper or signature actually written. But a great variety of cases must continually occur where such a direct kind of evidence cannot possibly be procured. The writing may be secret in it's nature; or no person may have been present at the time; or if a person was present, he may be dead or unknown. In this deficiency of positive proof, the best evidence which the nature of the case admits, is the information of witnesses acquainted with the supposed

(1) See preamble of section 3, 10 Anne, c.18.

(2) St. 10 Anne, c. 18, s. 3; 14 East, 231; 1 Schoal. & Lefr. 207.

(3) The enrolment of a bargain and sale under the statute of Henry the Eighth is a record; the date of the enrolment is a material part of the fact of the record, and proof or averment of a different date is not admissible. (The King in aid of Reed *v.* Hopper, 3 Price, 495, 511.) An examined copy of the memorial of an assignment of a judgment (the memorial being required by act of parliament), is evidence of the fact *of the assignment*: and the attested copy of the memorial of the registry of a deed is evidence of the fact *of registry*. (Hobhouse *v.* Hamilton, 1 Schoal. & Lefr. 207.) An examined copy of the enrolment of the memorial of an annuity-deed is evidence of the contents of the original memorial, against a defendant, who prepared and carried the memorial to be enrolled. Baikie *v.* Chandless, 3 Camp. 20; an action against an attorney for negligence in respect to a memorial of annuity.

Evidence of witness who has seen a person write.

writer, who, from seeing him write, have acquired a knowledge of his handwriting: for, in every person's manner of writing, there is a certain distinct prevailing character, which may be discovered by observation, and when once known, may be afterwards applied as a standard to try any other specimens of writing whose genuineness is disputed. A witness may therefore be asked, whether he has seen a particular person write, and afterwards, whether he believes the paper in dispute to be his handwriting. This course of examination evidently involves two questions; first, whether the supposed writer is the person of whom the witness speaks; and, secondly, if he is the person, whether he wrote the paper in dispute. The first is a question of identity; the second a question of judgment, or a comparison, in the mind of the witness, between the general standard and the writing produced. (1)

This kind of evidence, like all probable evidence, admits of every possible degree, from the lowest presumption to the highest moral certainty. It may be so weak, as to be utterly unsafe to act upon; or so strong, as in the mind of any reasonable man to produce conviction. The witness may have been in the constant habit of seeing the person write, day after day, for years together, on common transactions, and in the course of important business. On the other hand, it may be found on inquiry, that he has seen him write only a few words, many years ago, or perhaps only once; or the specimens which he saw may have been slight and imperfect, made in a hurry, at distant intervals, or, from some other cause, not the fair average specimens of his general character or style of writing, but deviations from the common form; in which cases, the impression on the mind of the witness would be imperfect, faint, and inaccurate. But whatever degree of weight his testimony may deserve,—which is a question exclusively for the jury,—it is an

General rule.

(1) "All evidence of handwriting, except when the witness has seen the document actually written, is in it's nature comparison. It is the belief, which a witness entertains upon comparing the writing in question with an exemplar in his mind, derived from some previous knowledge." Patteson, J., in Doe *v.* Suckermore, 2 N. & P. 46.

established rule, that if he has seen the person write, he will be competent to speak to his handwriting. (1)

Witnesses will frequently express the weaker degrees of belief in their minds, by saying they are of *opinion*, or they *think*, that a writing produced is the handwriting of a particular individual. The evidence of a witness, who has seen a person write, and says he thinks a paper is his handwriting, is receivable. (2) The language, which a witness adopts in such cases, varies according to the habits of the individual; one person is over cautious, another rash in drawing conclusions. Besides, the terms applicable to the various degrees of conviction in the mind are seldom used with much precision, even by men of superior education, much less by ordinary witnesses.

Proof by witness acquainted with the party's correspondence.

Another method of acquiring a knowledge of handwriting is by means of a written correspondence. If a witness has received letters on subjects of business, which can be proved to have been written by a particular person, or letters of such a nature as makes it probable that they were written by the hand from which they profess to come, he may be admitted to speak to that person's handwriting. The same questions occur here, as have been before-mentioned in the case where a witness

(1) Lord Preston's case, 4 St. Tr. 446, 447. Francia's case, 6 St. Tr. 70. Layer's case, 6 St. Tr. 275. R. *v.* Dr. Hensey, 1 Burr. 644. De la Motte's case, 21 Howell St. Tr. 810. Eagleton and Coventry *v.* Kingston, 8 Ves. 438, 474. Stranger *v.* Searle, 1 Esp. N. P. C. 14. Garrels *v.* Alexander, 4 Esp. 37. In this last case, the witness had seen the party write only once. Smith *v.* Sainsbury, 5 C. & P. 195. See Lewis *v.* Sapio, M. & M. 39, reversing Powell *v.* Ford, 2 Stark. Ca. 164, where Lord Ellenborough held, that a witness was not competent to prove the full signature of a person, from having seen him write his surname and the initials of his christian name. In De la Motte's case, 21 Howell St. Tr. 810, a witness was allowed to speak to the prisoner's handwriting, who had seen him write only twice. A witness is allowed to speak to the identity of a person's mark, from having seen it affixed by him on several occasions: George *v.* Surrey, M. & M. 516.

(2) See Garrels *v.* Alexander, 4 Esp. 37, where the witness had seen another write once, and, from having seen him write once, *thought* that the signature was that person's handwriting: this evidence was admitted by Lord Kenyon. This case was recognised by Lord Wynford at *nisi prius*. Lord Eldon questioned it's authority, because the witness would not go so far as to express any belief, Eagleton *v.* Coventry, 8 Ves. 473; see 12 Howell, 307. Lord Eldon allows, that it frequently occurred that a witness was pressed too much to speak to his belief.

speaks from having seen the person write; and in addition to these, one other question arises concerning the identity of the person who wrote the letters; and the admissibility of the evidence must depend upon this, whether there is good reason to believe that the specimens from which the witness has derived his knowledge were written by the supposed writer of the paper in question. If this point is clearly proved, the witness who has received the letters will frequently be able to give more satisfactory evidence, than one who has seen the person in the act of writing: for the latter may have seen him write but seldom, or on occasions which were not likely to excite attention; while the other may have had frequent opportunities of re-perusing the letters, and the letters themselves, having been written on subjects of business, will probably have more consistency, and exhibit a fairer specimen of the general character of handwriting.

Proof by witness acquainted with other writings of the party.

It is not only by means of written correspondence, that a witness's knowledge of handwriting may be acquired. A witness will be allowed to give evidence as to handwriting, when he has formed his belief from having seen letters or other documents purporting to be the handwriting of the party, on the contents of which he afterwards communicated personally with the party, or where he has acted upon them by written answers producing further correspondence,—or where the party has acquiesced in some matter, or transacted some business, to which the letters relate,—or where the party and the witness have had some other mode of communication, which, in the ordinary transactions of life, would induce a reasonable presumption, that the letters or documents were the handwriting of the party. (1)

(1) By Patteson, J., in Doe *v.* Suckermore, 2 Nev. & P. 46, citing Lord Ferrers *v.* Shirley, B. N. P. 236. Carey *v.* Pitt, Peake's Add. cases, 130. Thorpe *v.* Gisburne, 2 C. & P. 21. With respect to the necessity of the correspondence being *acted upon*, it is not to be understood that any business must be transacted, or any act done in consequence of it: By Williams, J., in Doe *v.* Suckermore, 1 Nev. & P. 43, citing the authority of Holroyd, J.: see Doe *v.* Wallinger, Manning's Index, 131, where the witness had seen letters of the party in answer to letters written by the witness, but had never done any act in consequence of the receipt of those letters.

Letters forming one side of a correspondence may enable others, besides the party to whom they are addressed, to speak to the handwriting contained in them. A clerk who read the letters when received, or the broker who was consulted upon them, is as competent to judge, whether a signature is that of the writer of the letters, as the merchant to whom they are addressed. (1) The servant, who has habitually carried his master's letters, has an opportunity of obtaining a knowledge of his master's writing, though he never saw him write, or received a letter from him. (1) The knowledge of handwriting may be acquired by these or any other modes of communication between the party and the witness, which, in the ordinary course of the transactions of life, would induce a reasonable presumption, that the letters or documents were the handwriting of the party.

Extent, to which such proof is admitted.

Where a witness's belief is founded on acquaintance with handwriting by any of the above means, the evidence will be admissible, though such acquaintance has been confined to a single specimen; nor is there any limit of time defined by the law, within which the handwriting, which is the foundation of the witness's belief, must have been seen by him. (2) In *Burr* v. *Harper*, (3) the witness's belief was founded on a single specimen; and he was unable to speak to the handwriting, without refreshing his memory at the trial. If the witness is not able to express his belief as to the writing in question, except by comparing it with the specimen which he produces for refreshing his memory, and can only say, that after comparing the two together, he believes the writing to have been written by the same person, this is clearly not admissible as proof of handwriting. (4)

Comparison.

(1) By Lord Denman, in Doe *v.* Suckermore, 2 Nev. & P. 54.

(2) In Eagleton *v.* Kingston, 8 Ves. 467, Lord Eldon says, that a witness may be called to speak to handwriting, who has not seen the party write for twenty years; and that in Horne Tooke's case, Woodfall, who proved his handwriting, had not seen him write for a great length of time.

(3) Burr *v.* Harper, Holt's N.P.C. 420; and see *supra*, p. 249, n. (1)

(4) See *infra*, p. 253 (1).—The speech of Mr. Adam, for Mr. Justice Johnson, 29 Howell, 475, contains many valuable remarks upon the subject of handwriting. Many remarks also upon the subject may be seen in the arguments in Bishop Atterbury's case, 16 Howell, where reference is

Identity of writer.

Where a witness gives evidence of the handwriting of a party whom he has never seen write, the jury must be satisfied that the party, whose handwriting is in dispute, is identified as the person with whose handwriting the witness is acquainted. To prove the handwriting of a member of parliament, the opinion of a clerk employed to inspect franks, has been held insufficient, although the clerk has never had occasion to apply to the member to verify his handwriting. (1) Upon an indictment for sending a threatening letter, tried before Lord Lyndhurst on the Midland Circuit, a postmaster gave evidence, that newspapers had been regularly sent through his office, directed to the prisoner's son, who resided in Jamaica; and that, on one occasion, the prisoner called upon him to inquire about an overcharge of postage for one of these newspapers, and that he had said, that he should write to Sir F. Freeling upon the subject; and that Sir F. Freeling afterwards sent to the postmaster a letter on the subject, purporting to be written by the prisoner: Lord Lyndhurst rejected the evidence, on the ground, that the prisoner had not been sufficiently identified with the person who wrote the directions on the newspapers, or the letter purporting to have been written by the prisoner.

The identity, however, may be proved by other persons besides the witness, who gives evidence of the handwriting. In a case, where the witness had never seen the party whose handwriting he proved, it was held sufficient evidence of identity, that the party lived in the town from which the letters purported to have been written, and that no other person of the same name lived there. (2)

Refreshing of memory.

A witness who has had sufficient means for enabling him to give evidence respecting a person's handwriting, and yet does not retain any distinct impression upon the subject, may be allowed to refresh his memory, at the time of giving his evidence,

made to the writers on the civil law. In the same case, there is much curious matter as to the forging of seals, and of figures in cypher, and as to the evidence of clerks in the post-office.

(1) Batchelor *v.* Sir J. Honeywood, 2 Esp. 714. Carey *v.* Pitt, Peake's Ev. App. 14. See Randolph *v.* Gordon, 5 Pr. 312. Lord Ferrars *v.* Shirley, Fitz. 195.

(2) Harrington *v.* Fry, R. & M. 90.

by looking at a paper from which he has formed his opinion, and which he has kept in his possession; and may then declare his opinion as to the genuineness of the paper in question.(1) In such a case, not only is there no direct comparison by juxta-position of writings; but there is little or no danger of an unfair selection of specimens, for they must be confined to such as the witness has become acquainted with in other ways than for the purpose of giving evidence in the cause; the general character of the handwriting has been acquired incidentally and unintentionally; and the question appears to be, whether the evidence of the witness as to the general character of the handwriting is likely to be more satisfactory, when, perhaps, he trusts to a fleeting impression, which, for want of being renewed, has become faint and indistinct, or after he has had an opportunity of restoring his original impressions by an inspection of the papers from which they were derived.

Evidence as to genuineness of handwriting.

When the genuineness of a signature is questioned, the most satisfactory (if not, technically speaking, the best) evidence to disprove the writing and prove it forged is the testimony of the supposed writer himself, provided he is not an incompetent

(1) Burr *v.* Harper, Holt's N. P. C. 420. See *ante*, p. 251. In Doe *v.* Suckermore, 2 Nev. & P. 51, Patteson, J., said, that in Burr *v.* Harper, comparison of handwriting was received: that the decision was never brought under review, and that he did not think it correct. See Layer's case, 16 Howell, 196, in the examination of the witness Doyley. The case of Filliter *v.* Minchin, in Manning's Index, 131, seems contrary. There seems to be no distinction as to the liberty of using a paper for the purpose of refreshing a witness's recollection concerning handwriting, between the case where he has seen the party write, and where he has acquired a knowledge of handwriting by other means; see by Williams, J., referring to Burr *v.* Harper, in Doe *v.* Suckermore. In Burr *v.* Harper the witness had seen the party sign the paper which he had in his possession. In that case, although Dallas, Ch. J., said, that the perusal of the specimen was to refresh the memory, and not *merely* for the purpose of comparison, yet the witness compared in court the signature in dispute with that which was in his possession; he did not merely compare the signature in dispute with the standard in his own mind as revived. The distinction is, indeed, too refined to be of much service in ordinary practice; but the most correct course would have been, for the witness to lay aside the document with which he refreshed his memory, before the disputed handwriting was shown, and, after looking at this handwriting, to speak to his belief,—not comparing the writings together, but speaking only from the revived impression on his mind, if that would enable him to speak, as to his belief.

witness and can be produced. Next to his evidence, is the information of persons who have seen him write, or been in the habit of correspondence with him. (1)

Imitative handwriting.

The evidence of a witness, who, from habit and practice has acquired experience and skill in judging of the genuineness of handwriting, and who states his belief that a particular writing in an imitative style, and forged, appears to be strictly admissible, although he is not acquainted with the handwriting supposed to be imitated. (2) But many judges have been of opinion, that little or no weight is due to such testimony.

Comparison of handwriting.

In the cases which have been before mentioned, the proof of handwriting is founded on the knowledge of the general character. The witness is supposed to have formed a standard in his mind, and with that standard to compare the writing in question. But a witness will not be allowed to state to a jury the conclusion or belief of his mind, as to a piece of handwriting being that of a particular individual, where that conclusion is made for the purpose of the issue, by means of a comparison of the disputed writing with another written specimen of the same

(1) See *supra*, p. 247, 248.

(2) Such evidence has been received from inspectors of franks, clerks of the post-office, and other persons of skill. See Goodtitle d. Revett *v.* Braham, 4 T. R. 497, a trial at bar, where a clerk to the post-office, accustomed to inspect franks, was allowed to be examined, to prove that certain handwriting was in an imitated, and not a natural hand; and secondly, to prove, that two writings suspected to be in imitated hands were written by the same person. The witness admitted, that his mode of detecting imitations was by observing whether the letters were *painted*, and that, in the case of writings by old people, this was a very fallible criterion. In Carey *v.* Pitt, Peake's Add. cases, 130, Lord Kenyon refused to receive similar evidence from an inspector of franks, saying, that although the evidence had been received in Revett *v.* Braham, yet that he had laid no stress upon it to the jury. In Rex *v.* Cator, 4 Esp. 117, 145, an inspector was admitted to swear that a libel was in a disguised hand; but he was not allowed to give his opinion, whether, upon comparison of the libel with another writing, they both appeared to him to be written by the same person. In Gurney *v.* Langlands, 5 B. & A. 330, Wood, B., rejected similar evidence, and a new trial, moved for on that grond, was refused. Part of the court thought the evidence inadmissible; part thought, that, if admissible, it was not entitled to any weight. See Kemp *v.* Mackrill, Sayer, 132. Stranger *v.* Searle, 1 Esp. 14. In the case of Doe *v.* Suckermore, a witness (an inspector of powers of attorney at the Bank) was allowed, by the judge at the trial, to state, whether he believed a writing, whose genuininess was disputed, to be a genuine or imitated character of handwriting. See 2 Nev. & P. 18, and see *infra*, p. 261.

individual produced in court. (1) A reason frequently assigned for this rule is, that unless a jury can read, they would be unable to institute a comparison, or judge of the supposed resemblance; (2) a reason, however, which appears to be too narrow for a rule of such general application. (3) A second reason is, that this species of evidence might cause inconvenience by raising numerous collateral issues, and often come by surprise against the party to be affected by it. Another and much better reason for rejecting such a comparison is, that the writings, intended as specimens to be compared with the disputed paper, would be brought together by a party to the suit, who is interested to select such writings only as may best serve his purpose; and that they are not likely therefore to exhibit a fair specimen of the general character of handwriting. It has been thought by some an inconsistency in the rules of evidence, to allow a witness to compare in his mind the disputed paper with the impression which a short and transient view of writings may have made upon his memory; yet, on the other hand, not to permit the jury to compare it with writings, proved to be authentic, present in court, and open for inspection. The only answer which occurs to this objection is that before suggested, namely, that the writings, which are produced as specimens, having been selected by an interested party to serve a present purpose, may be open to suspicion, and liable to the imputation of contrivance.

(1) See the observations upon this subject by the judges, in Doe *v.* Suckermore, 2 Nev. & P. 54. By Dallas, Ch. J., in Burr *v.* Harper, Holt's N. P. C. 420. Stranger *v.* Searle, 1 Esp. 14. Clermont *v.* Tullidge, 4 C. & P. 1. Greaves *v.* Hunter, 2 C. & P. 477. It was considered by the judges, in Doe *v.* Suckermore, that if comparison of handwriting was not admissible absolutely, it could not be received in confirmation, though an attempt was made by counsel to reconcile the authorities by this distinction. The case of Allesbrook *v.* Roach, 1 Esp. 351, in which Lord Kenyon received direct evidence of handwriting, by means of collateral documents, is overruled. See Doe d. Perry *v.* Newton, 5 Ad. & Ell. 514.

(2) Macferson *v.* Thoytes, Peake, N. P. C. 20. Brookbard *v.* Woodley, *ib.* n. (b).

(3) See the observations of the judges upon this subject, in Doe *v.* Suckermore, 2 Nev. & P. 54, as to the objection that a jury might not be able to read. By Lord Eldon, in Eagleton *v.* Kingston, 8 Ves. 467. By Dallas, Ch. J., in Burr *v.* Harper, Holt's N. P. C. 420. By Lord Kenyon, in Macferson *v.* Thoytes, Peake, 20.

Jury may compare, when.

Within a recent period, a rule has been established, which amounts to a considerable relaxation of the strictness of the law, in regard to the direct comparison of handwriting. Upon a question respecting the identity of handwriting, the jury may be allowed to take other papers which have been proved to be the writing of the party whose handwriting is disputed,—provided they are part of the proofs in the cause,—and may compare them with the disputed writing, for the purpose of forming their opinion, whether the disputed writing is genuine. (1) The principle on which this relaxation of the old rule has been allowed, is stated to be, that the jury having the documents before their eyes, and being obliged to look at them for another purpose, it would be impossible to prevent their forming some opinion with respect to the papers being like or unlike the disputed writing; and that as the minds of the jury would be influenced by the inspection, it is better for the court to enter into the same examination, and to suggest any observations that may occur as to the value of such evidence.—This reasoning seems not satisfactory. It might be better, perhaps, to hold such papers to be, in themselves, admissible in evidence, and to consider the case as an exception, in principle, to the rule which excludes comparison of handwriting. For the papers, being parts of the *proofs in the cause*, are free from all suspicion of undue selection: and, unquestionably, a comparison by the court and the jury between such papers and the disputed writing would in many cases, perhaps generally, be a better mode of ascertaining the truth, than the evidence of witnesses speaking to handwriting from their memory.

When papers are proofs in the cause.

Papers irrelevant not to be compared.

But it is an established qualification of the last-mentioned rule, that documents, irrelevant to the issues on the record, are not to be received in evidence at the trial, in order to enable a jury to institute such a comparison. (2) Much less can it be permitted to introduce writings, irrelevant to the matters in issue, in order to enable a *witness* to institute such comparison. Thus,

(1) Griffith *v.* Williams, 1 Cr. & J. 47. Doe *v.* Newton, 1 Nev. & P. 4. S. C. 5 Ad. & Ell. 514. Solita *v.* Yarrow, Mo. & R. 133. Eaton *v.* Jervis, 8 C. & P. 273.

(2) Bromage *v.* Rice, 7 C. & P. 548. Griffiths *v.* Williams, 1 C. & J. 47. R. *v.* Morgan, M. & R. 134 n. And see Doe *v.* Suckermore, 1 Nev. & P. 49.

in *Doe* d. *Perry* v. *Newton*,(1) it was held that evidence of handwriting by comparison is inadmissible, except either when the handwriting, acknowledged to be genuine, is already in evidence in the cause, or the disputed writing is an ancient document.

Showing to the witness other papers, irrelevant to the cause, for testing his knowledge.

Writings which are not admissible as evidence in the cause, though purporting to be written by the party whose handwriting is disputed, cannot be put into the witness's hand, to be used for testing his knowledge of the party's style of writing. On an issue whether an acceptance on a bill of exchange was signed by the defendant, witnesses acquainted with the defendant's writing being called to prove the negative, the plaintiff's counsel proposed, in cross-examination, to lay before each of the defendant's witnesses a paper purporting to bear the signature of the defendant, and to inquire of each in turn his opinion whether this was the defendant's signature; this they proposed to do, for the purpose of testing their knowledge of the defendant's handwriting. Lord Denman rejected this evidence, and the Court of Queen's Bench decided, that the proposed paper, not being part of the proofs in the cause, was not admissible. (2) Whether the witness, in such a case, should answer in the affirmative or in the negative,—and whether there should be some resemblance, or none at all, between the two signatures, —it might easily be shown, by plain reasoning, that an inspection by the jury, and a comparison of one signature with the other, could not possibly afford any test fit to be relied upon.

(1) 1 Nev. & P. 1. 5 Ad. & Ell. 514, S. C. It was said by the court, that the case of Griffith *v.* Williams, 1 Cr. & J. 47, was limited to the instance of documents already in evidence in the cause, which were necessarily therefore before the eyes of the jury. The decision in Griffith *v.* Williams is so explained by Bolland, B., in Rex *v.* Morgan, 1 M. & Rob. 134, n. The case of Allesbrook *v.* Roach, 1 Esp. 351, in which Lord Kenyon allowed the signature of a defendant to several bills of exchange to be compared by the jury with his alleged signature to the bill on which that action was brought, must be considered as overruled. See the observations of the court in Doe *v.* Newton, and Doe *v.* Suckermore. See also Bromage *v.* Rice, 7 C. & P. 548. Waddington *v.* Cousins, 7 C. & P. 596. Allport *v.* Meek, 4 C. & P. 267, where the drawer's name was admitted by the acceptance, and Tindal, Ch. J., would not allow it to be left to the jury to compare the drawer's name with the same name in the first indorsement.

(2) Griffiths *v.* Ivory, 11 Ad. & Ell. 322. Hughes *v.* Rogers, S. P. 8 Mees. & Welsb. 123.

Ancient writings.

It is clearly established, that where the antiquity of a writing, purporting to bear a person's signature, makes it impossible for a witness to swear that he has ever seen the party write, it is sufficient that the witness should have become acquainted with his manner of signing his name, by inspecting other ancient writings which bear the same signature, provided these ancient writings have been treated and regularly preserved as authentic documents. (1) A witness may, therefore, be regularly asked, whether he has inspected such ancient writings, in order to acquire a knowledge of the character of the handwriting; and, then, whether he believes the writing in question to be of the same character.

Inspection allowed.

It seems, also, that it is regular to lay ancient writings before a witness at the time of the trial, in the first instance, for the purpose of his inspection, and, after a comparison made in court by the witness between those writings and the writing produced for the purpose of the issue, to inquire as to his judgment and belief. (2)

(1) Several instances occurred of the admission of this kind of evidence in the case of Beer and Ward, on the trial of an issue out of Chancery in C. P. sitt. after Mich. T. 1821, before Dallas, C.J., and, on a second trial, before Lord Tenterden in K. B. sitt. after Trin. T. 1823. Holroyd, J., also admitted such evidence in the case of Doe d. Maddock *v.* Lyne, Leic. Sum. Ass. 1822. See also Brune *v.* Rawlings, 7 East, 282; Morewood *v.* Wood, 14 East, 328; Gould *v.* Jones, 1 W. Bl. 384; Doe *v.* Tarver, R. & M. 143. Evidence of this description was rejected in Brookbard *v.* Woodley, Peake, 21, n. It's admissibility was recognised by the judges in Doe *v.* Suckermore. No particular period of antiquity has been assigned for the introduction of evidence of this description. In Brune *v.* Rawlings, 7 East, 282, the supposed writer had been dead about sixty years. Such evidence seems to be admissible, wherever, in the opinion of the judge, there is a reasonable difficulty in procuring better proof, in consequence of the remote period.

(2) See Doe *v.* Tarver, R. & M. 143, where Lord Tenterden directed a person, who produced a paper bearing the signature of a steward, to compare it with other signatures of the same steward in books belonging to the manor; observing, that he remembered Lawrence, J., directing a Mr. Price, who was accidentally present at a trial, to compare a certain ancient writing with others purporting to be written by the same person. In Brune *v.* Rawlings, 7 East, 282, similar evidence was received by Le Blanc, J., the writer having been dead about sixty years. In Morewood *v.* Wood, 14 East, 328, it does not precisely appear, whether the comparison was made by a witness or by the jury. In none of the cases was any objection made to the mode, in which the witness instituted his comparison, nor is the mode of comparison noticed in the reports with much particularity. It was observed by Lord Denman, C. J., in Doe *v.* Suckermore, that it is not quite clear, whether the mode prescribed by Holroyd, J., (namely, that the witnesss hould acquire a knowledge of the handwriting by inspecting the

The rule in these cases of comparison of ancient writings differs, at least where a comparison is made in Court, from the rule observed as to modern writings. This difference is founded principally on the necessity of the case, or more properly on the consideration, that the inconvenience, which must generally arise from the exclusion of evidence, would preponderate over any occasional inconvenience to be apprehended from distracting the attention of juries, or from embarrassing perhaps in some degree the trial of a cause. It is also to be observed, that the evidence of ancient handwriting, written in different ages, is a matter of science, upon which juries require the assistance of scientific witnesses; and the opinion of a witness is founded in such cases upon safer grounds than the mere similarity of particular letters. "In ancient documents," said Mr. Justice Coleridge, in *Doe* v. *Suckermore*, "it often becomes a pure question of skill,—the character of the handwriting varying with the age, and the discrimination of it being materially assisted by antiquarian researches. This may have naturally assisted in opening the way for the admission of such evidence, even in cases where skill of that particular kind is not necessary." (1)

Standard of handwriting purposely acquired.

Some questions have arisen, whether, consistently with the above rules, a witness may speak to handwriting, not from a direct comparison, but from a standard in his own mind, where that standard has been obtained by the inspection of papers which have been shown to him purposely with a view to a particular cause. In the case of *Stranger* v. *Searle* (2) a witness had seen the alleged writer of a disputed signature write several times, but, on his adding, that this was when the defendant had written his name for the purpose of shewing the witness his manner of writing, Lord Kenyon rejected the evidence, on the ground, that the defendant might write differently

old specimens, and then apply himself to the writing to be proved,) was adopted by Lord Tenterden, Mr. Justice Lawrence and Mr. Justice Le Blanc, and whether the comparison should be made with the idea in the mind of the witness, not with the paper itself. See report of that case, in 2 Nev. & P. 41.

(1) This species of evidence is to a certain extent open to the objection, that the specimens may be unfairly selected. See by Coleridge, J., in Doe v. Newton, 1 Nev. & P. 6; Bolland, J., in Rex *v.* Morgan, 1 M. & Ro. 134, n.

(2) 1 Esp. 14, see this case commented on by Lord Denman, C. J., in Doe *v.* Suckermore, 2 Nev. & P. 56.

from his common mode of writing, through design. But where a witness formed his opinion of the handwriting of a person, from having observed it signed to an affidavit used in the cause, upon a motion to postpone the trial it was held sufficient. (1) Here the writing was not made expressly with a view to the evidence, though probably the attorney might have made himself acquainted with it for the purposes of the trial.

Doe v. *Suckermore.*

In this place must be noticed the case of *Doe* v. *Suckermore,* in which the opinions of the Court of Queen's Bench were equally divided: (2) a very interesting case, in which all former decisions on the proofs of handwriting were reviewed and commented on by the judges. The facts of the case were as

Statement of the case.

follows.—In an action of ejectment, the lessor of the plaintiff claimed as heir at law; the defendant claimed as devisee under the will of the person last seised. The will, under which the defendant claimed, was admitted to bear the signature of the deceased, but it was alleged that the signature of the attesting witnesses were forgeries. These witnesses were all called, and they stated the attestation to be in their handwriting. One of these witnesses admitted, on cross-examination, that the signatures to two depositions, produced by the officer of the Ecclesiastical Court with the will attached to it, and made in a suit in the Ecclesiastical Court, were in his handwriting; he also admitted that eighteen detached signatures of his name, which were also produced in Court, pasted on card-board, were in his handwriting. On the part of the plaintiff, an inspector of powers of attorney at the Bank, was called, who stated it to be his duty to compare the signatures in powers of attorney with former signatures made by the parties. He stated, that he had never seen the witness write, the specimens of whose signatures were now produced. 1. It was proposed to put the depositions into his hands, that he might say, in looking at the signature in the will and at the signatures in the depositions, whether they were in the same handwriting. This evidence was rejected. 2. The witness was then asked, whether he was acquainted

(1) Smith *v.* Sainsbury, 5 C. & P. 196.

(2) Doe d. Mudd *v.* Suckermore, 2 Nev. & P. 16. 5 Ad. & Ell. 703. S. C. Lord Denman and Mr. Justice Williams were of opinion, that the evidence ought to have been received; Mr. Justice Patteson and Mr. Justice Coleridge, that it had been properly rejected.

with the handwriting of the attesting witness; to which he answered, that he had seen, before the trial, the signatures in the depositions, and the specimens which had been produced in Court, (and which had been admitted by the attesting witness to be his handwriting,) and he thought, from his former examinations of those specimens and depositions, that he knew the witness's handwriting.(1) 3. He was then asked, whether he believed the signature of the attesting witness in the will to be written by him? This question was overruled. 4. He was finally asked, whether, on looking at the signature in the will, he believed it to be a genuine or an imitative character of handwriting; he replied, that according to his belief it was an imitation. This evidence was received.

State of facts with reference to the question before the court.

The state of the facts, with reference to the third question, on which the evidence was rejected, is as follows:—an attesting witness to a will, called on the part of the defendant to prove the execution of the will, proved one of the signatures to be his handwriting; he also proved, in his cross-examination, other signatures (produced by the plaintiff's counsel) to be his handwriting;—on the part of the defendant, a witness was called, who had before the trial inspected those other signatures, as to which the attesting witness had been cross-examined, and had been able, as he stated, by means of his inspection, to acquire a knowledge of the character of the handwriting; the counsel for the plaintiff then proposed to ask the witness whether he believed the signature of the attesting witness in the will, to be the handwriting of the witness who had proved the execution of the will. This was not allowed by the judge.

View of the several points.

The evidence first proposed in this case, namely, the witness's answer to the question whether he believed the signature on the will, and the signature on the depositions, and the other

(1) According to the statement of the case by Mr. Justice Coleridge, the examination of the signatures had been made by the witness on the first day of the trial. (See 2 N. & P. 25.) In the statement of the case by the reporter, the witness is said to have seen them before the trial. (2 N. & P. 18.) This apparent variance may be explained thus: the witness saw the signatures before the trial for the purpose of acquiring a knowledge of the character of the handwriting, and of forming his opinion; and saw them again on the first day of the trial, for the purpose of making a final examination, previously to his being called as witness.

detached signatures, to be the same handwriting, and written by the same person,—which question he was to resolve by having those signatures laid before him, for his inspection, and for his comparing them together,—was clearly nothing more than proof by direct comparison, made by means of juxta-position of the documents, and, therefore, properly rejected in conformity with cases before decided.—The evidence, last offered, namely, the opinion of the witness (who was experienced in the examination of handwriting, and employed more especially for ascertaining the genuineness or falseness of written instruments,) upon the question whether the signature on the will was written in a disguised, feigned, or imitative style of writing, or was of a genuine and natural character, was received in conformity with some former decisions.—The question which underwent so much discussion, and upon which finally the judges differed in opinion, was this,—whether a witness who had, before his appearance on the trial, seen the signatures on the depositions, and the detached signatures, and who had thus, as he said, acquired a knowledge of the character of the handwriting, might be asked, whether he believed the signature on the will to be the handwriting of the person who wrote the other signatures which he had seen. The following summary of the arguments on each side of the question may, perhaps, enable the reader to form an opinion for himself upon this subject.

The question before the court.

Against the reception of the evidence it is argued: 1. That this is a new mode of proof, not sanctioned by any decisions, and that the extension of the existing rule would be attended with inconvenience, possibly with danger to the administration of justice. The knowledge of a witness, called to prove or disprove handwriting, must be acquired by one or other of the following modes,—either by seeing the party write, or by seeing letters or other written documents which purport to be the handwriting of the party, and on which he has acted, or respecting which he has had some communication with the party, such as would, in the ordinary transactions of life, induce a reasonable presumption, that the letters or documents were the handwriting of the party. The knowledge, so acquired, is usually, acquired incidentally and unintentionally, under no circumstances of bias or suspicion, and without reference to

Arguments against receiving.

any particular object, person, or document. But this is very different from the means of knowledge here supplied to the witness, who has formed his opinion, as to the character of handwriting, from the inspection of documents put into his hand by the attorney of one of the litigating parties, with reference to a trial immediately about to commence: the knowledge of the witness was acquired only by the inspection of certain signatures, which were selected by the party contesting the genuineness of the signature on the will, and shown to the witness for one particular object and purpose: in all such cases, where such means are resorted to, there must be great danger of a selection unfairly made, such as would not exhibit a fair specimen of the general character of handwriting.—2. The mode of proof, now proposed, is, in effect, a comparison of handwriting; and direct comparison by a witness, (except in the single case of ancient writings,) has been uniformly rejected. The rule of law, which excludes direct comparison by a witness, while it admits the opinion of another witness who has formed a standard or impression in his mind (by one of the recognized modes before mentioned) as to the general character of the handwriting, and who compares with that standard the writing in dispute, must be founded on this principle, that proof by such direct comparison would in most cases be unsatisfactory and fallacious. The comparison even of a fair specimen with a disputed writing is generally unsatisfactory, and may be expected to lead to fanciful and unsound conclusions. The knowledge of the general character of handwriting, which a witness has acquired incidentally and unintentionally, or naturally, and without bias or suspicion, is far more satisfactory than the most elaborate comparison of even an experienced person, called by the one side or the other with a view to a particular object.—3. By the reception of the proposed evidence, serious inconveniences and great embarrassment to juries would be occasioned by the number of collateral issues, to which the evidence might give rise. Perhaps the genuineness of the specimens or documents, from which the witness has acquired his knowledge of the handwriting, may be disputed: in that case, an issue would arise, on each of the documents, whether the writer of the disputed signature wrote those documents. Or, if the genuineness of the signatures or documents were undisputed, a question might

arise, whether they were fairly or partially selected, and whether they exhibit a true standard as to the general character of the handwriting: in that case, a complication of issues still more perplexing, must be the consequence.—4. If evidence of the kind proposed is to be admitted for disproving, it must be equally admissible for proving handwriting; if admissible for proving or disproving the handwriting of a witness, it must be equally admissible for proving or disproving the handwriting of a party to the suit, or to prove or disprove the handwriting of a prisoner tried for forgery. "Thus a conviction of forgery might pass on the opinion which a single witness might form, founded solely on the examination of signatures or of a single signature, presented to him the night before by a prosecutor, who need not be called as a witness on the trial, to explain when and where such specimen had been procured, or from how many selected;—the prisoner on the other hand, being wholly unprepared to enter into any explanation. It is no answer to this to say, that a similar result might follow upon the evidence of a witness who had seen the prisoner write his name but once. That is an extreme case, upon a principle not objectionable in itself;—for no one can deny, that seeing a party write is at least one correct mode of acquiring a knowledge of his handwriting. Here, the danger is in the principle itself, namely, that selected specimens may be made the standard from which the witness is to judge."

Arguments for receiving.

For the reception of the proposed evidence, it is argued: There is no rule of law which declares that the knowledge of handwriting, requisite for enabling a witness to form his opinion as to the general character, shall be acquired only by one or other of the modes specified—namely, from seeing a person write, or by means of correspondence,—and by no other mode. It is true, those are the ordinary and recognized modes; but they are not the only modes, nor exclusive of all others,—if other media of proof can be suggested which appear reasonable and satisfactory, and which are not contrary to decided cases. No case has yet been decided, which excludes the proposed evidence. The consequences of excluding knowledge so obtained may be in the highest degree injurious to the interests of truth. Instances

may be supposed in prosecutions for forgery, when information may not be attainable by the ordinary modes, and in which evidence of the kind here proposed, might be completely satisfactory, and at once lead to an acquittal. A case has, indeed, been put, in which, it is supposed, such evidence would operate unjustly, and to the prisoner's prejudice. Such a thing is possible, but not probable; and it is to be remembered, evidence tending to conviction is always more scrupulously weighed by the judge, and more likely to be distrusted by the jury, than evidence tending to acquittal. Besides, there are ample securities against danger of injustice in such cases, and against all undue operation of this, as of any other kind of evidence; the counsel sifts it, the judge weighs it, and the jury give the full benefit of doubt: in all such cases, the result need not be feared.—Much stress has been laid on the inconvenience of collateral issues, which, it is supposed, might result from the admission of the proposed evidence,—but which would probably occur in very few cases. Under the existing rules for the proving or disproving of handwriting, collateral issues may arise on the evidence of witnesses in various instances that might be suggested; but this has never been allowed to be a good reason for excluding their testimony. Such an objection does not relate to the *quality* or *sufficiency* of the evidence, and ought not to be allowed to exclude in any case. If the evidence is right in its quality, and adequate for the purpose for which it is intended, it should be received; if it is not such, it should be rejected—but not rejected from any apprehension of collateral issues. To admit such a principle, in the present case, would be to introduce into the law of evidence a new rule of exclusion.—It has been objected, that the proof offered was in effect only comparison of handwriting. That it was not *comparison*, in point of *fact*, according to the true meaning of that term, is quite clear: whether it was *equivalent* only, is another question, on which nothing need be said, the point under discussion being as to the reception or rejection of the evidence, not as to its weight. The witness acquired his knowledge of the character of the handwriting, in this case, from seeing specimens before the trial; and the question, proposed to him, was with reference to that knowledge, and that only. If such

evidence is to be rejected as unsatisfactory or insufficient, what is to be said, when the means of knowledge are derived from a bygone correspondence of considerable standing? Suppose a person to have seen another sign or write one or more papers, or to have received one or more letters from him, but that, from length of time, his general recollection has become so faint and indistinct as to render him unable to form an opinion,—he would still be allowed, at any time before the trial, even shortly before his examination, to peruse and study such papers and letters, for the purpose of reviving his memory, and may afterwards give evidence for proving or disproving the disputed writing. Those papers and letters may come from the possession of the attorney in the cause, and he may have selected them as the best materials for serving his purpose; still the witness may revive his memory from these sources, and will not be excluded from giving evidence.—This leads to the only remaining objection, which is, that the documents, from which the witness acquired his knowledge, were selected by one of the parties, for a particular object; and that they may have been unfairly selected, and in that case would exhibit an unfair standard, by which the witness might be misled. But this argument will not justify the absolute exclusion of the proposed evidence. In almost all cases, where the genuineness of handwriting is disputed, there is a selection of witnesses, and selection of evidence, and for a particular object,—but this has never been considered a good reason for the exclusion of evidence. Whether the documents were selected unfairly, partially, and with intent to mislead or deceive,—or, on the other hand, whether they were fairly selected, and brought forward *bonâ fide*, for the purpose of affording correct information,—are questions, fit to be considered in estimating the value and weight of the evidence when admitted; but it ought not to be presumed, that there was such contrivance in the selection, as would justify exclusion.

Remarks on the case.

A few additional remarks are submitted for the consideration of the reader.—The objections, founded on the supposed inconveniencies likely to arise from collateral issues, or from the selection of papers, appear to have been fully answered, and

may properly, as it is conceived, be laid out of the case. The single question which will then remain, is whether the proposed evidence can be admitted, consistently with the principle of the established rules. Now, the principle is, that all evidence of handwriting is founded on the belief which a witness entertains, upon comparing the writing in question with an exemplar in his mind, derived from some previous knowledge of the handwriting of the person whose writing is disputed. (1) According to this principle, a witness, called to give evidence of handwriting, is supposed to have seen some writing which has been written by that individual whose writing is in question; there must be, therefore, some proof from which the jury, or the judge (when he has to decide without a jury) may reasonably presume that the writings, on which the witness has formed the exemplar in his mind, were written by that individual; and any mode of proof, by which the jury may reasonably be satisfied on that head, appears to be admissible within the plain meaning of the principle above mentioned. The thing wanted, to enable the witness to give evidence of handwriting, is an exemplar formed by him upon the sight of some genuine writing; but the proof of the genuineness of the writing from which the exemplar is formed, need not be confined exclusively to that witness alone; any other person, who can prove the writing to be genuine, is competent, and equally admissible. One witness may prove certain papers to have been written by the person whose writing is in dispute; and another witness, who from having seen those papers, has formed an exemplar in his mind, may declare his opinion whether the same person who wrote those papers wrote also the writing in question. Here two witnesses are employed instead of one; but there can be no objection to this,—the facts proved by them severally being independent of each other, and unconnected in their nature. The proofs altogether are complete, and perfectly legitimate within the principle. It will be useful to bear in mind these remarks, as the difference of opinion among the

(1) "All evidence of handwriting," said Mr. Justice Patteson, "except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind, derived from some previous knowledge." 5 Ad. & E. 730.

judges arose from the different construction put by them on the principle of the rule. Mr. Justice Patteson, after laying down the principle in the words before cited, proceeds thus: "That knowledge" (namely, the witness's previous knowledge of the person's handwriting) "may have been acquired either by seeing the party write, or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents, &c.—or by any other mode *of communication between the party and the witness*, which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party." (1) Here a limitation is imposed on the mode of proving the genuineness of the documents; and the proof is confined to the witness who is called to give evidence as to the writing in dispute. This restrictive limitation is objected to; the judges who considered the proposed evidence admissible, would lay down the rule in more general terms, and to this effect,—that the previous knowledge, requisite to enable the witness to form an exemplar in his mind, may be derived from any writings which can be shown, *either by him or by any other witness*, to have been the handwriting of the person whose writing is in question. The modes of proof pointed out by the learned judge are the ordinary modes; but they are not the only modes by which the fact may satisfactorily be proved; there is no injunction in the law of evidence against the use of any other mode whatever, which may be adequate for the purpose; and this is the first case in which such a restrictive rule has been laid down. (2) The

(1) 5 Ad. & E. 731.

(2) Lord Denman, after observing that a witness who has acquired knowledge of handwriting from *ancient* documents, may give an opinion whether any particular writing was made by the same person; and that the process, therefore, resorted to in the case then before the court, had been recognized as a process which might enable one man to form a competent opinion as to the writing of another, proceeds thus: "Pausing here for a moment, I must fairly say, I think the syllogism complete. Opinion is evidence of handwriting, where it is founded on knowledge obtained from inspection of documents proved to be written by the same party. The opinion tendered here was founded on such knowledge. If any rule, excluding such evidence had been promulged by competent authority, I should at once have yielded my own views. I find no such rule laid down; nor can I deduce one from the mere

ordinary modes may be sufficient in ordinary cases. But it may happen, as Lord Denman observed, that the means of obtaining such previous requisite knowledge from any one who has either seen the person write, or held correspondence with him, may be unattainable; if all other modes of proof are therefore to be excluded, injustice may be the consequence. Suppose an action were brought against an executor on a written instrument alleged to have been made by the testator, which the defendant contests as a forgery, and that no witness who ever saw the testator write or ever had correspondence or communication with him, can be brought forward on the part of the defendant to speak to the handwriting in question; but suppose writings can be produced, which were found among the testator's papers, and which are admitted by the plaintiff himself to have been written by the testator,—can there be any objection, in principle, against receiving evidence of the belief of a person who has inspected those writings, and who declares that he has made himself acquainted with the character of the handwriting? When the writings, seen by the witness, are admitted by the opposite party to have been written by the person whom he charges with having written the instrument in question, the jury would be satisfied that the writings are genuine, and if upon these genuine writings the exemplar has been formed in the mind of the witness, nothing seems to be wanting, the proof appears complete. This is precisely the kind of evidence which was tendered in the principal case. Surely, the evidence is not defective from the circumstance that the witness has acquired his knowledge of the testator's handwriting, without having had previous personal communication with him. One material part of the requisite proofs is supplied by the witness, (namely, his opinion on comparing the disputed writing with the exemplar which he has formed from the sight of certain papers); the other part of the proofs (namely, the proof of the genuineness of those papers) is supplied not by the same witness, but from a quarter unimpeachable and conclusive:

circumstance, that opinion of handwriting has hitherto been formed on other means of forming one. The consequences of excluding knowledge so obtained may be in the highest degree injurious to the interests of truth." 5 Ad. & E. 741.

both together make the proof complete.—As to the effect of such evidence, compared with that most commonly given, nothing need be said, the only point to be considered being its admissibility. Some will think this mode of proof superior to the other, as being the result of attention, observation, and experience. Others prefer the evidence of a witness who has acquired his knowledge of writing accidentally and unintentionally. Where there is such difference of opinion, the most prudent course might be, not to exclude either kind of evidence, but to admit both, and give to each its due weight. It may be laid down as a first principle, that exclusion is generally an evil, and admission generally safe, right, and wise. It is certain, the administration of justice in our courts has suffered, not from the too free admission of evidence, but from too rigid exclusion.

Sydney's case.

At the close of this subject, it may not be unsuitable to refer the reader to some of our earlier State Trials, for the purpose of seeing how the judges of those days used to regulate their practice as to the proof of handwriting.—On the trial of Algernon Sydney, as appears from the printed report of that case, (1) three witnesses were called to prove a paper to be his handwriting; the first said, he had seen the prisoner write the indorsement upon several bills of exchange, and that he believed the paper to have been written by him; this evidence was objected to as a comparison of handwriting, but admitted: —the second witness said, he had not seen the prisoner write more than once, but that he had seen his indorsement upon bills, and that the paper was very like it:—the third witness said, he had seen several notes, which had come to him with the indorsement of the prisoner's name, and that he had paid them, and he had never been called to account for mis-payment: the whole of this evidence was received. The prisoner, in his defence, still insisted, that nothing but the comparison of handwriting had been offered, as proof against him; and the act of Parliament, which reversed his attainder, states the admission of this evidence as one of the grounds of the illegality of his conviction. The act recites, among other particulars, that "there had not been sufficient legal evidence of

(1) 3 St. Tr. 302; 8 Howell St. Tr. 467, S. C.

any treasons committed by him, there being produced a paper found in his closet, supposed to be his handwriting, which was not proved by any one witness to have been written by him; *but the jury was directed to believe it, by comparing it with other writings of his.*" (1) However, if the printed report of the trial is correct, something more than the mere comparison of handwriting was laid before the jury; for, according to that report, the first witness had seen the prisoner write his name several times. And though it may be objected to the testimony of the two last witnesses, that the indorsements, mentioned by them, were not sufficiently proved to have been written by the prisoner, that objection will not apply to the other witness, whose evidence was certainly admissible. The same kind of evidence was admitted in *Lord Preston's* case within a year after the reversal of Sydney's attainder, and has been since received in many cases of great authority. (2)

Ferrers v. Shirley.

The first reported case, in which the admissibility of proof of handwriting, founded on a written correspondence, appears to have been decided, is the case of *Lord Ferrers* v. *Shirley*. (3) Upon a feigned issue out of Chancery, directed to be tried at bar, whether a deed, pretended to have been executed by the Earl Ferrers in the year 1683, was his deed or not, several witnesses were called to swear to the handwriting of the subscribing witnesses then dead, and amongst others one J. J., who would have sworn to the name of J. Cottington, whose name was on the deed as a witness, because he had seen several letters written by Cottington: whereupon he was asked, whether he had ever seen Cottington write? to which he answered, that he never had, nor ever saw the person that wrote the said letters, but that his master (to whom the letters were written for the rent of a part of the estate of the late Earl Ferrers, which his said master held,) informed him, they were the letters of Cottington, the Lord Ferrers' steward, who was the person

(1) Cited in Layer's case, 6 St. Tr. 279.

(2) See observations, on the act for reversing Algernon Sydney's attainder, by Lord Denman, Ch. J., in Doe *v.* Suckermore, 1 Nev. & P. 58.—That the printed report of the trial was altered by Jeffreys, see 9 St. Tr. 865, n.

(3) Fitzg. 195.

petended to have attested the deed in question. His testimony was hereupon objected to, because he could not say with any certainty, whether or not the writer of the letters was the same person that attested the deed; for Cottington, who was supposed to write the letters, might have got some other person to write those very letters for him; and the counsel insisted, that in all cases where a witness would swear to handwriting, he must be able to say, that he saw such a person write. The Court rejected the witness, because he could not ascertain the identity of the person. But Lord Raymond said, "It was not necessary in all cases, that the witness should have seen the person write to whose hand he swears; for where there has been a fixed correspondence by letters, and it can be made out that the party writing such letters is the same man that attested a deed, that will entitle a witness to swear to that person's hand, though he never saw him write." Page, J., said, "If a subscribing witness to a deed lives in the West Indies, whose handwriting is to be proved in England, a witness here may swear to his hand, by having seen the letters of such person written by him to his correspondent in England, because, under at least the difficulty will be great, to prove the handwriting of such subscribing witness." But Lord Raymond differed, and said, "that these special circumstances could not vary the reason of the thing." It was further objected to the same the special circumstances of that case, there is no other way, or witness, that he should produce the letters, that the Court and the jury might be able to judge of the resemblance between the handwriting of the letters and that on the deed; but this was overruled by the Court, "because the witness might well have acquired a knowledge of the character of Cottington's handwriting, by having seen several letters written by him." The rule to be deduced from this case is, that a witness may be admitted to speak to a person's handwriting, if he has seen letters, which can be proved to have been written by him; but that this antecedent proof of the identity of the person is indispensably necessary, and further, that hearsay evidence of identity is totally inadmissible. The case, reported to have been put by Page, J., is not very clearly stated. If it is understood to mean, that, where a subscribing witness resides abroad,

slighter proof of his signature may be given than is necessary in other cases, it certainly cannot be supported; but if the meaning is, that his signature may be proved in the same manner as if he were dead, by a witness who has seen letters proved to be of his writing, the case is warranted by many later authorities, which have been already mentioned.

Another authority, in support of the rule laid down in *Lord Ferrers* v. *Shirley*, is *Layer's* case, (1) on a trial for high treason, where the witness, (who had received letters from the prisoner on business, five years before, which he answered, and transacted the business according to the directions in the letters, and had been paid for it,) was allowed to speak to the handwriting of a treasonable paper charged upon the prisoner; and, though the witness in this case had seen the prisoner write some years before the receipt of the letters, yet, independent of that circumstance, his evidence was adjudged to be admissible. If he had formed his judgment of the prisoner's handwriting from these letters alone, "if the case had gone no further," said the Chief Justice, "nobody could have doubted but that, according to the usual course and rules of evidence, the paper ought to be read." With respect to the interval of time that has elapsed since the witness saw the prisoner write, or received letters from him, that is a circumstance not to exclude him from giving evidence, but to be left, with all the other circumstances of the case, to the consideration of the jury. *Layer's case.*

This rule of evidence appears not to have been settled at the time of the memorable trial of the seven bishops, who were tried for a libel in the fourth year of James II. In the course of that trial, a witness, called to prove the signature of one of the bishops, said he had received letters from him on business, and that he had done what the letters required, and that he believed the signature in question to be the bishop's handwriting, but could not swear that those letters were written by him. (2) This was the strongest evidence in the case, except- *Seven bishops' case.*

(1) 6 St. Tr. 275. See also Gold v. Jones, 1 Black. Rep. 384, S. P. Wade v. Broughton, 3 Ves. & Beam. 172. R. v. Mr. Justice Johnson, 29 Howell St. Tr. 441. Harrington v. Fry, Ry. & Mo. N. P. C. 90.

(2) 4 St. Tr. 338.

ing the proof of the archbishop's signature, which was proved by one who had seen him write. Mr. Justice Powell thought it an objection to the evidence before mentioned, that the witness had never seen the bishop write; and that the receipt of the letters was not sufficient, unless he could also swear who had written them. A long and desultory argument ensued on the admissibility of the paper in question,—the counsel for the prosecution insisting that the signatures of the bishops had been proved, and the counsel on the other side, that the proof was insufficient. Mr. Justice Powell said, (1) "he thought the paper had not been sufficiently proved to be subscribed by the bishops. It is too slender a proof for such a case. "I grant you," he added, "in civil actions a slender proof is sufficient to make out a man's hand, as by a letter to a tradesman or a correspondent, or the like; but in criminal cases, such as this, if such a proof is allowed, where is the safety of your life, or any man's life here?" The judges were equally divided in opinion, and the paper was not allowed to be read.—Thus it appears, that at that time the rule of evidence, which has been mentioned, was not admitted in criminal cases, though even then it was acknowledged to be reasonable in cases of a civil nature. But this distinction is no longer made. If the rule is true in the one case, it must be equally true in the other; for the rules of evidence, which are the laws of truth, must be uniform and universal. (2)

CHAPTER VII.

OF THE ADMISSIBILITY OF EXTRINSIC EVIDENCE WITH REFERENCE TO WRITTEN INSTRUMENTS.

WHEN litigating parties apply to a court for the legal construction of a written instrument, and lay before it the

(1) P. 345.

(2) See the cases of Lord Preston, Francia, Dr. Hensey, and De la Motte, in the State Trials, where this species of evidence was received.

instrument to be construed by itself alone, no question arises as to the admissibility of extrinsic evidence: the parties are content to have the exposition of the court, without reference to circumstances *dehors* the instrument; and the court will construe the instrument by itself, according to the settled rules applicable to the case—taking the whole of the writing together, and putting such a construction upon it as may best give effect to the intention of the party at the time of making the instrument, so far as that intention can be collected from the words used by him in the instrument.

Words taken in their common sense.

In construing a written instrument, the court will understand the words used in it in their plain, ordinary, and proper sense, unless they have generally, in respect to the subject-matter, acquired a peculiar sense distinct from the popular sense of the words; or unless the context evidently points out that they must—in the particular instance, and in order to effectuate the immediate intention of the parties—be understood in some other special and peculiar sense. (1)

Meaning of words by context.

Another established rule is, that words of common import may be construed out of their ordinary and primary sense, and may have a secondary sense assigned to them, if such appear clearly from the context to have been the intention of the parties. Words of legal import also—though *primâ facie* to be taken as used in their technical sense, and according to their strict acceptation—may have a different sense assigned to them, if the instrument contain a plain demonstration, that the parties used them in a different sense. "What amounts to that plain demonstration must in each case depend on the language used, and the circumstances under which it is used; and this is not a question to be determined by reference to reported cases, but by a careful consideration of the language and circumstances in the particular case under discussion." (2)

(1) By Lord Ellenborough, C. J., in his judgment in Robertson *v.* French, 4 East, 135.

(2) See opinion of Patteson, J., in Doe *v.* Perratt, on writ of error, in the House of Lords, 10th May, 1842. The question in this case was as to the construction to be put upon the word "heir," in a will. Hill *v.* Grange, 1 Plowd. 170, (cited by Williams, J., on the same occasion,) is another example in the case of a lease by deed.

Section I.

Of the General Principles which regulate the admission of Extrinsic Evidence, for aiding the construction of Written Instruments; and of Evidence to identify the subject-matter or Person.

As it commonly happens that persons use language in written instruments, with reference to the situation in which they are placed, or to the state of their family or property, or to other circumstances relating to themselves individually, and, therefore, often use the same language in various senses and with various intention—and as it is the duty of the court to give effect to the intention of the party in using the language of the instrument—it necessarily follows, that proof of such circumstances and situation is legitimate evidence, and admissible in every case where it can assist the court in the construction of the instrument, and in discovering the intention in the words used. Without such evidence, it is obvious, the real intention of the parties would, in the greater number of cases, be unknown and unaccomplished. Our reports show, that such evidence has been received from the earliest times to a certain extent,—though it is only in the later decisions that the principle, upon which it is receivable, has been clearly and satisfactorily explained. The reception of such evidence is not to be considered an *exception* to the rules for the construction of written instruments, but is itself a substantive and original principle, concurrent and co-operating with the other principle before mentioned, which requires that words in a written instrument should be taken and construed in conformity with the context.

It may now be laid down as a settled rule, that the intent of a party is to be ascertained from the meaning of the words in the instrument, and from those words alone, with the aid of such extrinsic evidence as the law permits to be used in order to enable a court to discover the meaning of the terms in the instrument, and to apply them to the particular facts of the case. (1)

(1) See the opinion of Parke, B., in Shore v. Wilson, (Lady Hewley's case) on writ of error, in the House of Lords, 10th May, 1842, on a

In the following instances, extrinsic evidence is clearly admissible for the purpose of enabling a court to construe written instruments, and to apply them practically:

Rule laid down by Parke, B.

1. Where the language of the instrument is such as the court does not understand, it is competent to receive evidence of the proper meaning of that language; as, when it is written in a foreign tongue. It is competent also to receive such explanatory evidence, where technical words or peculiar terms are used, or indeed any expressions which at the time the instrument was written, had acquired an appropriate meaning, either generally, or by local usage, or amongst particular classes. (1) This description of evidence is admissible in order to enable the court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate. (2)

Where words are used in a peculiar sense.

Evidence to identify the person or thing.

2. For the purpose of applying the instrument to the facts, and of determining what passes by it, or who take an interest under it, a second description of evidence is admissible, viz., every *material* fact that will enable the court to identify the person or thing mentioned in the instrument, and to place the court, whose province it is to declare the meaning of the words of the instrument, as near as may be, in the situation of the parties to it. (3) *

question as to the meaning of certain old deeds executed by Lady Hewley.

(1) By Parke, B., in Shore *v.* Wilson, on writ of error, 10th May, 1842. The following authorities are cited by him in support of this proposition: The Attorney General *v.* The Plate Glass Company, 1 Anstr. 39; Goblett *v.* Beachey, 3 Sim. 24; Smith *v.* Wilson, 3 B. & Ad. 728; Richardson *v.* Watson, 4 B. & Ad. 787; Clayton *v.* Gregson, 5 Ad. & E. 302.

(2) By Parke, B., in Shore *v.* Wilson, cited in (1).

(3) By Parke, B., in Shore *v.* Wilson, cited in p. 277. "The numerous authorities for this position," added Mr. Baron Parke, "are referred to in Vice-Chancellor Wigram's excellent Treatise on the admission of Extrinsic Evidence, under the 5th proposition."—To Vice-Chancellor Wigram's Treatise, which is in the hand of every lawyer, it will be necessary to refer continually, in the present chapter.—The reader will find a clear and useful summary of the law on this subject, in a Treatise on Evidence, just published, written by Professor Greenleaf, of Harvard University, in America.

* This rule corresponds with that stated in the fifth proposition in

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From the context of the instrument and from those two descriptions of evidence—with such circumstances as the court may by law, without evidence, of itself notice—it is its duty to construe and apply the words of the instrument; and no extrinsic evidence of the intention of the party, from his declarations, whether at the time of his executing the instrument, or before, or after that time, is admissible—the duty of the court being to declare the meaning of what is *written* in the instrument, not of what was *intended* to have been written.(1)

Rule laid down by L. C. J. Tindal.

In the same case of *Shore* v. *Wilson*, from which the above extracts of Mr. Baron Parke's opinion have been cited, Lord Chief Justice Tindal laid down the rule in the following terms: "The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or as to the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that, in such case, evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the

(1) By Parke, B., in the case last cited. An exception to this general rule, in the case of what is called a *latent ambiguity*, was adverted to by the learned judge, and will be afterwards noticed.

Vice-Chancellor Wigram's Treatise, where the rule is laid down with reference to the construction of wills, as follows:

"For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.—The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words." See p. 51, 3rd ed.

party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself."

Then, after observing that the true interpretation of every instrument is that which will make the instrument speak the intention of the party at the time when it was made, the Lord Chief Justice proceeds to say: "Where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for reason and common sense agree, that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the intepretation of instruments written in a foreign language—in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed,—in cases where terms of art or science occur—in mercantile contracts, which in many instances use a peculiar language employed by those only who are conversant in trade or commerce—and in other instances, in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases, evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the court or judge to construe the instrument, and to carry such real meaning into effect."

"But," contin[illegible] Lord Chief Justice, "whilst evidence is admissible [illegible]stances for the purpose of making the written in[illegible] speak for itself, which, without such evidence, would be either a dead letter, or would use a doubtful tongue, or convey a false impression of the meaning of the party.

I conceive the exception [rule] to be strictly limited to cases of the description above given, and to evidence of the nature above detailed; and that in no case whatever is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, any more than by express parol declarations made by the party himself, which are universally excluded; for the admitting of such evidence would let in all the uncertainty before adverted to; it would be evidence, which in most instances could not be met or countervailed by any of an opposite bearing or tendency, and would in effect cause the secret undeclared intention of the party to control and predominate over the open intention expressed in the deed."

Rule laid down by Lord Abinger.

The rule upon this subject was laid down with great clearness also by Lord Abinger, C. B., in *Doe* v. *Hiscocks*, (1) in the case of a will. "The object in all cases," said the Lord Chief Baron, "is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprized of the persons and circumstances that are the subjects of his allusions or statements; and, if those are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate, and often necessary evidence, to enable us to understand the meaning and application of his words.

"Again,—the testator may have habitually called certain persons or things by peculiar names, by which they were not

(1) 5 M. & W. 367.

commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence, to show the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will."

Instances will now be given, to show the use and application of these general principles in particular instances; and, in the first place, to illustrate the leading rule, before mentioned, namely,—"Where the language of the instrument is such as the court does not understand, it is competent to receive evidence of the proper meaning of that language; as, when it is written in a foreign tongue. It is competent also to receive such explanatory evidence, where technical words or peculiar terms are used, or, indeed, any expressions which, at the time the instrument was written, had acquired an appropriate meaning, either generally, or by local usage, or amongst particular classes. (1) Rule.

Evidence is admissible to shew that the word *close*, which in its general and ordinary sense means *inclosure*, is used in the country, where the land is situate, in another sense denoting a *farm*, (2)—or to explain words of art, or words in a statuary's will relating to tools or articles used in the business of a statuary, (3)—or to explain words in a lease relating to a Evidence explanatory of words used.

(1) *Vide supra*, p. 277, first rule laid down by Parke, B., in Lady Hewley's case.

(2) See by Parke, J., in Richardson *v.* Watson, 4 B. & Ad. 799.

(3) Goblett *v.* Beechey and others, executors of Nollekens, 3 Sim. 24; S. C. more fully reported in Vice-Chancellor Wigram's treatise, App. 1, p. 185. Inquiry was directed to be made into the meaning of a word, "bankers," in the will of the deceased; and it appeared from the evidence taken, that the word signified certain materials used in the business of a statuary. Under the word *mod* in one of the codicils, the plaintiff claimed the money produced by the sale of the testator's *models*. Evidence of the testator's declarations, that he said, on hearing his will read over, he meant his *models* by the word *mod*, and that he intended the plaintiff to have his models, was rejected; and there can be no doubt, this was right, on principle. If it could have been shown that he was in the habit of speaking of his models by the word *mod*, and of describing them by that word, such evidence, it is conceived, would have been clearly admissible. In that case the thing bequeathed would be described by a *nickname*, and might be so explained; as, in some cases, *legatees* have been described by nicknames, and the

particular branch of business, as, of mining, (1) or farming, or managing a warren. (2) In all these cases, and in others of a similar kind, the evidence offered in explanation of the terms in question, is for the consideration of the jury (or of the judge, where a judge decides without a jury,) who will have to determine whether the term was used by the party in a peculiar sense, with reference to the usage, the business, the trade, &c., to which the evidence relates. The admission of extrinsic evidence, in such cases, is absolutely necessary: without it, the written instrument might become mute and unmeaning, only because a judge is not also a statuary, farmer, or merchant. If he were all these, an inquiry into the meaning of terms of art, trade, &c., might be useless and unnecessary.

Limitation of the rule.

But it is to be remembered, that the *declarations* of the party himself, as to the sense in which he intended to use the particular term in question, are not receivable in evidence. (3) Nor can any kind of extrinsic evidence be admitted, if the testator, or party to the instrument, has shown, by the language which he has himself used in some other part of the writing, what sense he intended to put upon the term. For instance, where the question is as to the meaning of the word *close* in a particular part of a will, if it appear that the testator has used the same word in other parts of his will in its general and ordinary sense of *inclosure*, evidence would not

Where the meaning appears on the will.

description explained by extrinsic evidence, that the testator called them by that name. See *dictum* of the Master of the Rolls (Sir Lloyd Kenyon) in Andrews *v.* Dobson, 1 Cox, 425.

(1) Clayton *v.* Gregson, 5 A. & E. 302. This was an action against a lessee of a coal mine; the issue was, whether the defendant got the demised coal *below the level* of the bottom of the mine. The defendant's counsel tendered evidence to show that the word *level*, according to the custom and understanding of miners (coal miners), had reference to the drainage; this evidence was refused, on the ground that there was no reference to such custom and understanding in the deed. The Court of King's Bench determined, that it ought to have been received.

(2) Smith *v.* Wilson, 3 B. & Ad. 728: action on a covenant, in a demise of a rabbit warren by deed, to leave at the end of the term so many *thousand* rabbits. Evidence was received, that the word *thousand*, as applied to the subject matter (rabbits) meant, in that part of the country, where the contract was made, *one hundred dozen*; and the Court of King's Bench determined that it had been properly received.

(3) *Vide supra*, p. 280, line 5; and Goblett *v.* Beechey, before cited, p. 281, (3), where such evidence was rejected by the Master of the Rolls; and other cases in this and the next section.

be admissible to shew, that in that part of the country where the land is situate, the word is understood to mean a *farm*: (1) here the testator has declared his own meaning in the instrument itself, which is much better evidence of intention than any inference from extrinsic and presumptive evidence.

Writing in cypher, or foreign language.

If any part of a will is written in cypher, or in an unknown character, or in a foreign language, the evidence of witnesses who understand the language or the cypher, is clearly admissible for the purpose of declaring and interpreting the contents of the will, and for enabling the court to understand the testator's meaning. In this way the court makes the testator speak in a language that can be understood.

Where illegitimate children claim under the word "*children*."

If a testator bequeath property to his *children*, that term must be understood in its strict legal sense; and legitimate children, if there are any, will take the bequest. (2) But the court will, if required, look into the state of the testator's family, and receive evidence that, at the time of making his will, he had not any legitimate children, but had some illegitimate, who were adopted into his family, and treated by him as his children; and, upon such proof, the court might understand the testator to mean, by the words he has used, that they should be the objects of his bounty, and take the bequeathed property. Here the strict technical sense of the word *children* is waived, and the more popular and ordinary sense given to it, that the bequest may not be inoperative, which the testator, who must have meant something, never could have intended: thus the most probable meaning of the testator, in using the words in his will, is ascertained by means of extrinsic evidence.

Gill v. *Shelley*.

In *Gill* v. *Shelley*, (3) * a testatrix made a devise of the

(1) *Vide supra*, p. 281; and Richarson *v.* Watson, 4 B. & Ad. 787, 799, by Parke, B.

(2) See 1 Ves. & B. 466, and cases there referred to.

(3) The abstract of this case is from the report in Vice-Chancellor Wigram's Treatise, p. 42. S. C. reported in 2 Russ. & M. 336. See other cases, upon the same subject, collected in Vice-Chancellor Wigram's Treatise, p. 43, 44.

* The case of Gill *v.* Shelley, and the case of Doe *v.* Beynon, next

residue of her estate to certain classes of persons mentioned in her will, and amongst them included the *children* of the late Mary Gladman. The contesting parties were the personal representatives of the *only legitimate child* born of Mary Gladman, and an illegitimate child of Mary Gladman. Proof was admitted that the illegitimate child was born before the marriage of Mary Gladman; and that the facts of her birth and illegitimacy, and of the subsequent marriage of her mother, and of the birth of the legitimate child, and the fact also of Mary Gladman having only one legitimate child, were all known to the testatrix; it was proved also, that the testatrix was on terms of intimacy with Mary Gladman from a period before the marriage until her death, and clothed and maintained the illegitimate child. Upon this state of facts it was contended, on behalf of the illegitimate claimant, that as no circumstances existed before or at the date of the will, or could possibly arise after the date of the will, (Mary Gladman, to whose "*children*" the devise was made, being then dead) with reference to which the testatrix could have used the word "*children*" in its proper sense, the court must look into the circumstances of the testatrix's family, and see whether any person had, by reputation, gained the name of a child of Mary Gladman, as otherwise the word "*children*" in the will could not be satisfied. On the other side it was argued, and cases were cited to shew, that children and illegitimate children cannot take together under the general description of "*children*;" but the reply to this was, that such a rule applies only to cases in which the word "*children*" is used to denote a class, and not where (as in the present case) the word clearly described particular individuals. The Master of the Rolls decreed that the claimant, though

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cited, illustrate the 3rd proposition in Vice-Chancellor Wigram's Treatise, which is as follows:

"Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are *insensible with reference to extrinsic circumstances*, a court of law may look into the existing circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable."

illegitimate, was entitled to share in the residue with the representative of the legitimate child.

Doe v. *Beynon.*

One other very recent case may be added in illustration of the same principle. In *Doe* v. *Beynon,* (1) a testator devised real property to his niece for life, and after her decease to her three daughters (naming them) as tenants in common. It appeared in evidence that the niece was married, and had by her marriage three daughters, named as described in the will. The defendant was one of these daughters. The two other daughters were dead; one of them, named *Elizabeth*, having died a few weeks after birth, and some years before the date of the will. The lessor of the plaintiff, whose christian name was *Elizabeth*, claimed as an *illegitimate* child of the niece: she was born eleven months after her mother became a widow, and three years before the date of the will. Mr. Justice Erskine, who tried the cause, held that the words of the will *primâ facie* imported legitimate children, and that although the *illegitimate* daughter might be included, it lay on the lessor of the plaintiff to shew that the testator so intended; he therefore required some proof that the testator intended to include the *illegitimate* daughter Elizabeth in the devise in question: he also held, that in order to establish or rebut this proposition, evidence might be admitted of all the circumstances of the family, the intercourse which the testator had with his niece and her children, and his knowledge of their number and names. Such evidence was therefore admitted; and the jury found their verdict for the defendant, being satisfied that the testator intended Elizabeth, the legitimate daughter, whom he did not appear to have known to be dead, and not to have intended the lessor of the plaintiff, of whose existence he was ignorant, and whose birth had been studiously concealed from him. The Court of Queen's Bench afterwards determined that the ruling of the judge was correct, and that the evidence had been properly received.

But in such cases, proof of the testator's *declarations*, either

(1) 4 P. & D. 193, A. D. 1840. The facts of the case, as here stated, are principally taken from Lord Denman's judgment.

Declarations as to intention not admissible.

at the time of making the will, or before, or after that time, as to his *intention* in making the bequests, would not be admissible. It is possible, if such declarations could be admitted, the intention in favour of the illegitimate children might be proved to absolute certainty; the rule, however, is settled, for the reasons before mentioned, that evidence of intention, as contradistinguished from the expressed words of the instrument, is never to be admitted. "The court is to ascertain, not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words which he has used." (1)

Rule.

The second rule laid down by Mr. Baron Parke in Lady Hewley's case, is as follows: "For the purpose of applying the instrument to the facts, and determining what passes by it, or who takes an interest under it, proof is admissible of every *material* fact that will aid the court to indentify the person or thing mentioned in the instrument, and place the court, whose province it is to declare the meaning of the words of the instrument, as near as may be, in the situation of the parties to it. (2) This rule, which is laid down in very general and comprehensive terms, and is on that account the more valuable, applies equally to the construction of wills, deeds, contracts, and all other written instruments under which any interest passes.

Evidence to identify the person or thing.

Shore v. *Wilson* (*Lady Hewley's* case).

In the case of *Shore* v. *Wilson* above cited, the general question was concerning Lady Hewley's intention, as expressed in two old deeds of 1704 and 1707, and what description or classes of persons were the objects of her bounty at the time those deeds were executed; and the question proposed for the opinion of the judges was, whether the extrinsic evidence adduced in the cause was admissible for the purpose of determining who are entitled, under the terms "Godly preachers of Christ's Holy Gospel," "Godly persons," and the other descriptions contained in those deeds, to the benefit of Lady

(1) See by Parke, J., in Doe v. Gwillim, 5 B. & Ad. 129.

(2) *Vide supra*, p. 277.

Evidence as to persons described in ancient instruments.

Hewley's bounty. The Lord Chief Justice Tindal, in delivering his opinion, said, "When a doubt has been once raised as to the meaning of these words, the court, by which that doubt is to be decided, has a right to inform itself, and is bound, if possible, to learn what was the acknowledged and received sense and meaning which those expressions bore at the time when Lady Hewley lived, and, as near as may be, at the time of the execution of those deeds; and for that purpose, all extrinsic evidence calculated to throw light upon the meaning of those words at that time is clearly admissible. Of that description are public records and documents throwing light upon the religious history of the times; the language of the statute book, and every enactment relating to the state and condition of the church, and of the religious sects then known in England; contemporary history; contemporary treatises and tracts upon the religious tenets held by the different sects; the works of men of acknowledged eminence and weight in their respective persuasions, published and circulated at that period; and the early contemporaneous application of the funds of the charity itself by the original trustees under the deeds. All extrinsic evidence of this nature was strictly and properly admissible for the purpose of explaining the sense in which the language contained in the deeds was used at the time, and in which it is now to be construed. But the evidence just described is that which is presumed to be in the mind of the judge or court; it is evidence which they furnish to themselves by reading, research and reflection, not that which they receive from the mouth of witnesses; and on this account all the extrinsic evidence which was actually given in the cause, for the purpose of determining who were entitled under the particular terms and expressions used in the deeds,—such as the evidence of witnesses, examined in the cause, as to the religious opinions of the Presbyterians, and of other Protestant dissenters in the time of Lady Hewley; their interpretation of the terms used in the deeds; and their evidence of the religious opinions of Lady Hewley herself, was inadmissible. The production also of the will of Sir John Hewley and of Lady Hewley, in proof of the private religious opinions of Lady Hewley, appear to me, both in respect to

the point to which they were produced, and to the character of the evidence itself, not admissible by law."

Mr. Baron Parke said: "Extrinsic evidence is by law admissible, according to the *first* rule referred to, (1) to shew that these terms had acquired by usage a peculiar meaning, either amongst a particular class to which Lady Hewley belonged, or in the peculiar locality where she dwelt; or the court might have informed itself from history and other general sources of information, of the meaning of the language used at that particular time, for there are authorities in which it has been laid down, that "e court may take notice of the meaning of all English words, and even those used in particular parts of the country, in a different sense from their ordinary sense. (2) Evidence was therefore admissible, that amongst Protestant dissenters, or a peculiar sect of them, or generally amongst all persons at that time, these words, though of a general nature, had acquired a more limited meaning, and were confined to a certain description only of such preachers; and supposing it to have been proved that a particular class had always used and understood these words in a restricted sense, it would have been unquestionably permitted to prove that Lady Hewley belonged to that class. When the appropriate meaning of these expressions has been established by competent evidence, then the deed is to be read, as if the equivalent expressions were substituted, and no further evidence of the peculiar sect or religious opinions, or any other circumstance attending the parties to the deed, is admissible to control or limit their meaning. Further, such evidence is not, in my judgment, material to enable the court to construe the deed within the meaning of the *second* rule.(3) Upon this question, also, the analogous authorities are clear and decisive. In *Goodinge* v. *Goodinge*, (4) there was a bequest to such of the testator's nearest relations as the executors should think poor and objects of charity. Lord Hardwicke rejected evidence to shew that the testator meant to use general words in this or

(1) *Vide supra*, p. 277.
(2) 1 Rolle's Abr. 525, pl. 7; 1 Rolle's Abr. 86, pl. 1.
(3) *Vide supra*, p. 278.
(4) 1 Ves. sen. 231.

that particular sense. In like manner, in *Edge* v. *Salisbury*, (1) in *The Queen* v. *Howard*, (2) and in *Strode* v. *Russell*, (3) parol evidence under similar circumstances was refused. So, in this case, if it had been established by conclusive evidence, or from other legitimate sources, that the words "Godly preachers" had meant "Protestant dissenting ministers," no parol declaration of Lady Hewley, that she intended only a particular class or sect, or individuals with particular opinions, would have been admissible; nor could evidence of her conduct, character, habits, or opinions, have been receivable to raise an inference of such intention. The deed must speak for itself; no matter what she intended to have done, even though it should be proved from her own mouth; still less, what it may be supposed she would have wished to have done. The sole question is, what is the meaning of the words in the deeds? And if these, of themselves, or with the aid of evidence of a peculiar signification attached by usage, mean all of a certain class,—for instance, all such Protestant dissenting ministers as the trustees should from time to time select,—it matters not that her own religious opinions would make such a disposition unlikely; in such a case, *quod voluit non dixit.*"

Evidence as to names or designations of the persons claiming.

There are many cases where claimants under written instruments have been designated not by their proper name, but imperfectly described, who yet have satisfied the court by evidence that they were the persons intended. Extrinsic evidence is admissible in such cases for the purpose of identifying the person, and to shew that the claimant comes within the description in the instrument; but not to introduce into the instrument a new name or another description. Thus a claimant would be admitted to shew by evidence that the testator used to call him by the name mentioned in the will as a nickname, and that there was no person bearing that name known to the testator: upon such evidence, the court would have to determine, whether the testator did not intend to designate him by the name he has used. (4)

(1) Ambl. 70.
(2) 1 Brown's Ch. Cases, 31.
(3) 2 Nev. 621.
(4) Masters v. Masters, 1 P. Wms. 421. *Vide supra*, p. 281, (3); and see cases collected in Vice Chan-

Beaumont v. Fell.

In *Beaumont* v. *Fell,* (1) a testator bequeathed a legacy to *Catherine Earnley;* no person bearing that name appeared to claim it; parol evidence was admitted, to show that Gertrude Yardley was the person meant; and the decree of the Master of the Rolls established the will in her favour. The reception of some parts of the evidence, namely, that produced for the purpose of shewing that the attorney, employed to draw the will, had misunderstood the testator, and written down a wrong name by mistake;—and the fact of the testator having referred the attorney to his wife and another person for information, who declared that Gertrude Yardley was the person intended—and the testator's declarations as to his intention of providing for Gertrude Yardley, would not now be warranted according to the late decisions. (2) But, it has been considered, that the judgment of the court in that case may be supported on the proof of the facts, that the testator was accustomed to address Gertrude Yardley by the name of *Gatty,* (which was thought to be a familiar name spoken short for *Gertrude,*) and that there was no such person as *Catherine Earnley.* (3)

Thomas v. Thomas.

In the case of *Thomas* v. *Thomas,* (4) the testator devised to his *granddaughter, Mary Thomas,* of Llechlloyd, in Merthyr parish. It appeared in evidence, that, at the time of his death, he had a granddaughter of the name of Elinor Evans, (lessor of the plaintiff in the first count,) who lived in the place and parish named in the will, and also a *great-granddaughter, Mary Thomas,* (the defendant,) the only person of that name

cellor Wigram's Treatise, p. 54, n. (c), and in Mr. Jarman's Treatise on Wills, p. 381—383.

(1) 2 P. Wms. 141; 2 Eq. Ca. Ab. 366, pl. 8. In Dowset *v.* Sweet, Ambl. 174, a legacy was given to *John* and Benedict, *sons* of John Sweet. John Sweet had only two sons, named *James* and Benedict; it was proved also that the testator used to call James by the name *Jacky.* The Lord Chancellor held that James was entitled to the legacy, on the facts first proved, independently of the fact last mentioned.

(2) See Miller *v.* Travers, and Doe *v.* Hiscocks, stated *infra;* and *vide supra,* p. 284. Proof of similar declarations of the testator, as to his intention, was received in Price *v.* Page, 4 Ves. 680, which would not now be received.

(3) See judgment of Lord Abinger in Doe *v.* Hiscocks, *infra,* p. 324.

(4) 6 T. R. 671. There was a demise to the plaintiff by the *granddaughter Elinor Evans;* and another demise by the heir at law. The defendant was the *great granddaughter* Mary Thomas. See Lord Walpole *v.* Lord Cholmondeley, 7 T. R. 138. The reader will find the cases on this subject collected in Mr. Jarman's Treatise on Wills, p. 374, &c.

in the family, but who lived in another place, and had never been in Merthyr parish; the plaintiff's counsel at the trial offered parol evidence, to shew that the person who drew the will had made a mistake in the name of the devisee; and Mr. Justice Lawrence received the evidence, subject to the opinion of the court on its admissibility. As however, the jury found for the defendant on the first count, it became unnecessary to consider that question. (1) After this finding of the jury, the question was between Mary Thomas and the plaintiff on a demise from the heir at law; and in this part of the cause, the defendant's counsel tendered evidence of declarations made by the devisor before the time of the making of his will, expressive of his regard of the plaintiff, and of his intention to give her the premises in dispute. This evidence was rejected, on the ground that nothing *dehors* the will could be received, to shew the intention of the testator, which could only be collected from the words of the will itself, after the removal of any latent ambiguity in the description of persons or other terms in the will. This opinion was afterwards affirmed by the Court of King's Bench. "If there had been no person," said Lord Kenyon, "to answer the description of *granddaughter, living at Llechlloyd, in Merthyr parish,* I should have rejected the description, and have said that the devise applied to Mary Thomas [the defendant]; but it appears, that there is another person answering *that part* of the description, who is also in another part of the will an object of the testator's bounty. Then, as there are two parts of the description not answering to Mary Thomas, who is named in this clause of the will, we are left to conjecture, who was meant by the devisor; but the law will not allow an heir at law to be disinherited by conjecture, and with regard to the question respecting the rejection of evidence, it was properly rejected, the supposed declarations having been made by the testator long before the will was made." (2)

(1) The parol evidence as to the alleged mistake in the name of the devisee, would now be rejected as inadmissible. See Miller *v.* Travers, *infra*, p. 300.

(2) Lord Kenyon added, that if they had been made *at the time of the making of the will*, he should have thought them admissible in evidence. This last observation as to the admissibility of the testator's declarations, that he intended

Andrews v. *Dobson.*

In *Andrews* v. *Dobson*,(1) a legacy was bequeathed to "*James, the son of Thomas Andrews, of Eastcheap, printer.*" It appeared from the evidence, that there was no person of the name of Thomas Andrews, in Eastcheap; but there was *James* Andrews, a printer, who lived there; and this James Andrews had one son, named Thomas, by his first wife, who was related to the testator; he had also a son by a second wife, named James, who was in no manner related to the testator. The plaintiff was the son by the first wife, and claimed the legacy, insisting the testator meant *Thomas, the son of James Andrews*, instead of *James, the son of Thomas Andrews.* The Master of the Rolls, Sir Lloyd Kenyon, said, that although there were cases in which legacies had been left to persons by nicknames,(2) and evidence had been admitted to shew, that the testator usually called them by those names, he thought the present case was beyond all precedent, and dismissed the bill for inquiry.—Here, the object of the suit was to make a material alteration in the will, for the purpose of correcting a misdescription made by mistake, and to substitute the plaintiff, as legatee, in the place of the person misdescribed.

Evidence to identify the thing described.

The same rule for the reception of evidence applies to the thing described in a written instrument, no less than to the persons described. Extrinsic evidence is admissible for identifying the thing as well as the person intended by the maker of the instrument, that is, to enable the court to interpret his words, and to determine whether the description applies to the thing claimed. It is obvious that some kind of extrinsic evi-

to give to Elinor Evans the premises in question, is not reconcileable with the principle maintained in the recent cases of Miller *v.* Travers, and Doe *v.* Hiscocks, *vide infra*, p. 300. The question of the *admissibility* of the testator's declaration of intention does not appear to be in any degree affected by the *time* when they were made: whether made before the will, at the same time, or afterwards, they are on the same footing with respect to *admissibility*: but in point of *effect*, (if they could be admitted,) they would vary according to circumstances. See Doe d. Allen *v.* Allen, 4 Jurist, 985; stated also at length in Mr. Jarman's Treatise on Wills, p. 853. The cases as to the relative effect of these several declarations are referred to in Vice Chancellor Wigram's Treatise, p. 162.

(1) 1 Cox, 425. Holmes *v.* Custance, 12 Ves. 269.

(2) The cases in which it has been held that a nickname is a sufficient description are collected in Vice Chancellor Wigram's Treatise, p. 54 (*c*).

dence, even in the simplest case,—except where the mere exposition of the instrument, taken by itself alone, is required of the court,—is indispensably necessary, and therefore admissible.

For this purpose of enabling the court to interpret the instrument, and determine the rights of the several claimants, proof may be necessary, and is therefore admissible, of the nature, the situation, or the qualities of the thing mentioned in the instrument,—of the manner in which the property has been used,—of a testator's family and affairs,—of his profession, calling or business,—of the general state of his property, and his position with reference to the objects to which his will refers,—or of other circumstances in which he was placed, and knew himself to be placed, at the time of making his will. (1) "It may be laid down as a general rule," said Mr. Justice Parke, in *Doe* d. *Templeman* v. *Martin*, (2) "that all facts relating to the subject-matter and object of the devise, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in the will."

Upon the same principle, if a party to an instrument, in describing the subject-matter, refer to some exclusive fact, or to some other written instrument, it may be indispensably necessary to obtain information of the fact or instrument referred to, for the purpose of identifying the subject-matter, and ascertaining the party's intention.

It was with the full knowledge of the situation and circumstances in which the party stood, that he made the instrument; and it is only by the same kind of knowledge that the court

(1) The following cases may be referred to as examples:—Doe d. Jersey *v.* Smith, 2 Brod. & Bing 553. Lowe *v.* Manners, 5 B. & A. 917. Lowe *v.* Lord Huntingtower, stated in Miller *v.* Travers, *infra*, p. 306. Mosley *v.* Massey, stated *ib.*, *infra*, p. 307. Selwood *v.* Mildmay, *infra*, p. 307. Goodtille *v.* Southern, *infra*, p. 307. Cases stated in Doe *v.* Hiscocks, *infra*, p. 319. See also Doe *v.* Martin, 4 B. & Ad. 785. Richardson *v.* Watson, 4 B. & Ad. 787, tried Spr. Ass. A. D. 1832, decided H. T. 1833. Doe *v.* Holtom, 4 A. & E. 76. Doe v. Webster, 4 P. & D. 270.

(2) 4 B. & Ad. 785.

can be enabled to interpret his words. Such evidence places the court, to a certain degree, in the situation of the party, and thus enables it the better to understand his meaning. (1) Some examples will now be given, to illustrate these principles.

Evidence of situation of party.

Evidence of the situation or residence of the parties may be necessary, for the purpose of assisting the court in putting a construction on instruments that are not clearly expressed.

Masters v. *Masters.*

In the case of *Masters* v. *Masters*, (2) where the testator, after having bequeathed a legacy to the poor of two hospitals in Canterbury (naming them), bequeathed another sum in his codicil "to all and every the hospitals," the second bequest was adjudged not to be void for uncertainty, but to have been intended for all the hospitals in Canterbury, as it appeared in evidence that the testator lived in Canterbury, and had in his will taken notice of two hospitals in that city.

Estate.

It may often be of importance to inquire, what estate the devisor or grantor had at the time of making his deed or will; for the construction may vary, in some cases, according to the estate or quantity of interest in the subject-matter. (3) If a person grant an estate for life generally, without saying whether for his own life or for the life of the grantee, evidence is admissible to show, what interest the grantor had in the premises; for if he was tenant in fee, the grantee would have an estate for his own life; but, if he was tenant in tail or for life only, then the grantee would have an estate for the life of the grantor. (3) Or, if a testator bequeath a sum in a particular stock, it will be a specific legacy, if he has that stock at the time; not specific, if he has it not. (3) Evidence is therefore admissible, in such a case, to show, what was the state of the property at the time he made his will; and the construction

State of property.

(1) See by Parke, J., in Doe *v.* Martin, 1 Nev. & M. 524; by the Lord Chancellor in Grey *v.* Sharp, 1 Myl. & K. 602; and Vice Chancellor Wigram's Treatise, p. 77.

(2) 1 P. Wms. 420. See also Harris *v.* Bishop of Lincoln, 2 P. Wms. 133. Sir J. Eden *v.* Earl of Bute, 3 Bro. Parl. C. 79. Doe *v.* Burt, 1 T. R. 701. Selwood *v.* Mildmay, 3 Ves. 310. 6 Ves. 396. 13 Ves. 174. 15 Ves. 514. Herbert *v.* Reid, 16 Ves. 481. Page *v* Leapingwell, 18 Ves. 466. Doe d. Chevalier *v.* Huthwaite, 3 Barn. & Ald. 632.

(3) See Mr. Justice Bayley's judgment, in Smith *v.* Doe d. Lord Jersey, 2 Brod. & Bing. 551.

upon the will is one way or the other, according to the result. So, in the case of *Doe* on the demise of *Freeland* v. *Burt*, (1) where the question was, whether a cellar, for the recovery of which the action was brought, passed under a lease from the lessor to the defendant, as appurtenant to a yard, which was described in the lease by its abuttals, and as having been late in the occupation of A.; evidence was adjudged to be admissible, on behalf of the plaintiff, to show, that the cellar was, at the time of the execution of the lease, in the occupation of another tenant B.; here the defendant claimed the cellar, not as specifically demised, but as appurtenant to the demised yard, upon the general maxim of law, *cujus est solum, ejus est usque ad cœlum et ad inferos*;" and the proposed evidence would clearly show, it could not have been the intention of the parties, that the cellar should pass by the lease to the defendant. "Where there is a conveyance in general terms," said Mr. Justice Buller, "of all that acre called Blackacre, every thing which belongs to Blackacre passes with it: and then the rule which has been mentioned, *primâ facie* obtains; but whether parcel or not of the thing demised, is always matter of evidence."

Doe v. *Burt.*

Another case, in which evidence of the state and amount of the testator's property has been admitted, is the case of *Fonnereau* v. *Poyntz*; (2) where Lord Thurlow received the evidence, not to control a bequest, which was distinctly and accurately described, but because it was uncertain, upon the whole context, whether the testator meant so much *per annum* or so much as a gross sum. Lord Thurlow decided the case, as a case of ambiguity. And Lord Alvanley, in observing on this case, says, (3) "Lord Thurlow's only doubt was, whether parol evidence was admissible to ascertain, whether the testator did not mean capital, but *he had no doubt he must know all the circumstances of his affairs.*" (4) In the construction, however, of wills free from ambiguity, the general rule is, that evidence

Circumstances of testator.

Fonnereau v. *Poyntz.*

(1) 1 Term Rep. 701.

(2) 1 Bro. Ch. C. 472; cited and commented on by Mr. Justice Bayley, in Smith *v.* Doe d. Lord Jersey, 2 Brod. & Bing. 552.

(3) 3 Ves. 320.

(4) On this case of Fonnereau *v.* Poyntz, see also 3 Merivale, 319, 320.

of the value of the estate devised, or of the amount of the testator's property, will not be admitted in order to raise an argument in favour of a particular construction; whatever may be the amount, the general rule of construction must prevail. (1)

State of property.

Smith v. *Doe* d. *Lord Jersey.*

In the case of *Smith* v. *Doe* on the demise of the Earl of Jersey, (2) where the principal question was on a clause of re-entry in a lease, under the execution of a power in a deed of marriage-settlement, by which the settler was authorized to demise by indenture such premises as were then leased for lives, &c. and so as the ancient accustomed rents were reserved, &c. and so as the lease contained *a power of re-entry* for non-payment of the rent reserved, &c., the House of Lords determined that it was allowable to prove, that the usual and accustomed form of leases (by which the estate, settled in the marriage-settlement, had been demised, as well before as after the date of the settlement) had contained *a conditional proviso of re-entry* similar to the one in the indenture, whose validity was then disputed. "This evidence," said Mr. Justice Bayley, in his judgment in the House of Lords, (3) "is not admitted, to produce a construction contrary to the direct and natural meaning of the words, nor to control a provision which was distinct and accurately described; but because there is an ambiguity upon the face of the instrument, (for the deed of settlement required the leases to contain *a power of re-entry* generally, *on non-payment of rent,* and there are various forms of powers of re-entry); because an indefinite expression is used, capable of being satisfied in more ways than one. I look to the state of the property at the time, to the estate and interest which the settler had, and the situation in which the settler stood with regard to the property settled, to see, whether that estate, or interest, or situation, will assist us in judging what the settler meant by that indefinite expression."

(1) Doe d. Handson *v.* Fyldes, Cowp. 833. Standen *v.* Standen, 2 Ves. jun. 592. Richardson *v.* Edmonds, 7 T. R. 640. Doe *v.* Dring, 2 Maule & Selw. 455. Bootle *v.* Blundell, 1 Merivale, 216. Jones *v.* Tucker, 2 Merivale, 537. Attorney General *v.* Grote, 3 Merivale, 316.

(2) 2 Brod. & Bing. 473.

(3) 2 Brod. & Bing. 553. 5 Barn. & Ald. 387.

Extrinsic evidence has been admitted in many cases, for shewing the true description, situation, qualities, or other incident of the subject-matter, or for shewing the true name, relationship, residence or other designation of the person mentioned in the instrument,—with a view to aid the court in the construction of the instrument, and enable it to give effect to the expressed intention of the party, without contravening the language used by him. In such cases, it often happens that the court is able to employ the healing power of the maxim, "*falsa demonstratio non nocet, cum de corpore constat.*" (1)

Reference to extrinsic facts.

It may be that the subject of a devise is described by reference to some extrinsic fact; in such a case, it is not only competent, but absolutely necessary, to admit extrinsic evidence for ascertaining that fact, and, through that medium, to ascertain the subject of the devise. This is not done with a view to explain the will, or add to its contents. The evidence is intended only to ascertain what is included in the description which the testator has given of the thing devised. When there is a devise of an estate purchased by A., or of a farm in the occupation of B., it must be shewn by extrinsic evidence, what estate it was that A. purchased, or what farm was in the occupation of B., before it can be known what is devised. (2) So, where a testator made a direction in his will, respecting a certain mode of payment for a house, which amounted in effect to a devise of so much of the produce of timber, ordered to be cut down, as should be sufficient to pay for the house, the Master of the Rolls held, that there was nothing in the fact referred to (namely, an antecedent order for cutting down timber) which could justly make it less a subject of extrinsic evidence, than the facts in the other cases above alluded to. The moment it is shown that it was a given number of trees, or a quantity of trees amounting to a certain fixed value on a certain estate, which the testator had ordered to be cut down, the subject of

Sandford v. Raikes.

(1) Examples, Day *v.* Trig, 1 P. Wms. 286, *vide infra*, p. 308. Door *v.* Geary, 1 Ves. sen. 255. Doe d. Smith *v.* Galloway, 5 B. & Ad. 43; S. C. 2 Nev. & M. 340. Richardson *v.* Watson, 4 B. & Ad. 779.

(2) 1 Merivale, 653, by Sir W. Grant.

the devise is rendered as certain as if the number, value, or situation of the trees had been specified in the will. (1)

Reference to some other instrument.

Where the instrument in question refers to some other written instrument, it may be necessary for the purpose of understanding the intention of the party, to look out of the one into the other, and to connect and incorporate the two.

Molineux v. *Molineux.*

In *Molineux* v. *Molineux*, (2) a testator gave by his will to his three children certain rents and annuities, by the description "such several annuities, or annual rents as are expressed in several writings signed with my hand, and sealed with my seal, according to the true meaning of the said writings." In a special verdict the jury found, of what rents and annuities he had signed and sealed writings; and it was held, that they passed under the will. The court said, it was a good devise in writing of the rents themselves, for it refers to the writing, whatever it is, as if it were specially limited in the will. And it was added, that for the same reason, in *Fairfax's case*, it was resolved by the opinion of the Chief Justices, and the counsel of that court, that where one makes a deed of feoffment to divers uses, and makes no livery, and after by his will devises the land to such persons, and in such manner as he appointed by his deed of feoffment, it was a good devise of the land. But they all held, that a will cannot refer to words only without writing.

Where a disposition of property can only operate by a writing, (as in case of a will,) an instrument referring to another must describe it so clearly, that by the description it may be identified; to allow parol evidence to shew an intention to connect two instruments together, where there is no reference to a foreign instrument, or where the description of it is insufficient, would be to give it an effect independent of the writing, and contrary to the provision of law, which require the whole disposition to be expressed. (3) But it seems to be

(1) Sandford *v.* Raikes, 1 Merivale, 646, 653. See also Ongley *v.* Chambers, 8 Moore, 665. Stubbs *v.* Sargon, 2 Kee. 255.

(2) Cro. Jac. 144.

(3) Brodie *v.* St. Paul, 1 Ves. jun. 330. Smart *v.* Prujean, 6 Ves. 566. Coles *v.* Trecothick, 9 Ves.

no violation of this rule, to admit evidence for the purpose of discovering the meaning of words used, in order to ascertain what instrument the reference means. The description must be compared with instruments, to which it may possibly refer; if the description is in some respects erroneous, the erroneous part may be rejected; if there are several instruments, evidence must be admitted to shew which was meant. In the case of *Hodges* v. *Horsfall*, (1) an instrument, purporting to be an agreement for a lease, contained a clause for the erection of additions according to a plan agreed upon; it appeared that three distinct plans existed for making the additions alluded to: an objection was made that parol evidence was inadmissible, to determine which plan was meant. Lord Lyndhurst, in giving judgment, said, "I am of opinion on the authority of all the cases, and especially the case in 1 *Schoales* and *Lefroy*, where Lord Redesdale has considered the subject very fully, that as the written agreement refers specifically to a plan, if there be parol evidence, clear and satisfactory, to identify the particular plan, evidence may be properly admitted for the purpose of so identifying it." (2)

Hodges v. *Horsfall.*

Section II.

Of the Admissibility of Evidence of the Testator's Intention in making a Devise; and of Extrinsic Evidence, for explaining Ambiguities.

In many of the cases before referred to, when the question has been, whether a party used a description or words in a written instrument in a peculiar sense, or in some other than their ordinary or primary signification, evidence of all facts and

249. Oliver *v.* Cooke, 1 Sch. & Lef. 22. Boydell *v.* Drummond, 11 East, 153. And see the judgment of Holroyd, J., in Kenworthy *v.* Schofield, 2 B. & C. 948.

(1) 1 Russ. & M. 116.

(2) See also Sanderson *v.* Jackson, 2 B. & P. 238; and the observations of the Lord Chancellor in the House of Lords, in Dillon *v.* Harris, 4 Bligh. N. S. 343. Shortreede *v.* Cheek, 1 Ad. & Ell. 57.

circumstances from which the court or jury might reasonably infer the party's intention in using the words in question, has been freely admitted. But in none of those cases was the declaration by the party himself as to his intention in using the words, allowed to be received as evidence. And it might be thought, on the true principles of the law of evidence, that in no case whatever could the declarations of the party, as to his intention, be admitted to aid the court in the construction of his written instrument.* But, it seems, there is one excepted class of cases, which is absolved from this principle. (1)

Miller v. *Travers.*

The case of *Miller* v. *Travers*, has decided that evidence of the testator's intention is not admissible, where the purpose and effect of the evidence would be to introduce into the will a new devise or new words not used by him. It has decided also, that for such purpose, no extrinsic evidence of any kind is admissible. Extrinsic evidence will be freely received for the purpose of giving to the words used in the will a construction consistent with the real situation of the testator, and consistent with the language which he has himself used; but no evidence can be received to introduce into the will new words,—which would be, in effect, to introduce an intention not apparent in the will itself.

In *Miller* v. *Travers*, (2) the question was on the admissibility of parol evidence of the testator's intention to include in his will a subject-matter of devise not mentioned in it. The plaintiff filed his bill against the defendants for the purpose of

(1) The class of cases here referred to, is that mentioned in Doe *v.* Hiscocks; *vide infra*, p. 322.

(2) 8 Bing. 244. East. T. 1832. And see Doe *v.* Holton, 4 A. & E. 76. Mich. T. 1835.

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* The term "declarations of intention" is intended to include all statements declaratory merely of the intention of the party, such as oral declarations, drafts of wills, directions for wills, and other evidence of the same kind. Some declarations may be evidence of a material *fact*, and in that point of view admissible, though objectionable as a declaration merely of *intention*: thus, for instance, in such a case as that put by Lord Coke (*vide infra*, p. 383), if the testator, who once had two sons of the same name, were to say, at the time of making his will, that he believed his elder son to have been long dead, and intended his younger son by the name in the will, this would be evidence of a material fact (as to *his belief*), and as such admissible.

established the will of Sir John Miller. One of the defendants, Elizabeth Wheatley, was the sister and heiress at law of the testator. Upon the hearing of the cause, the Vice-Chancellor ordered that the parties should proceed to a trial at law on the issue, whether Sir John Miller did devise his estates in the county of Clare, and in the county of Limerick, and in the city and county of the city of Limerick, or either and which of them, to the trustees mentioned in his will, and their heirs, in which issue the plaintiff in the cause was to be the plaintiff, and the heiress at law and her husband defendants.

Against this part of the decree, the defendant, Elizabeth Wheatley, appealed. Upon the hearing of the appeal, the Lord Chancellor requested the assistance of the Lord Chief Baron Lord Lyndhurst, and of Lord Chief Justice Tindal, and their joint opinion was delivered by Lord Chief Justice Tindal, in the Court of Chancery, in the following terms :—

" The main question betweeen the parties," said Lord Chief Justice Tindal, is this, " Whether parol evidence is admissible to shew the testator's intention, that his real estates in the county of Clare should pass by his will?

" This question arises upon facts, either admitted or proved in the cause, which are few and simple. The testator by his will, duly executed, devised 'all his freehold and real estates whatsoever, situate in the county of Limerick, and in the city of Limerick,' to certain trustees therein named and their heirs. At the time of making his will he had no real estate in the county of Limerick, but he had a small real estate in the city of Limerick, and considerable real estates situate in the county of Clare.

" The real estate in the city of Limerick is admitted to have passed under the devise; but the plaintiff contends that he is at liberty to shew by parol evidence, that the testator intended his estates in the county of Clare also to pass under the same devise.

Miller v. *Travers.*

Statement of proposed evidence.

"The general character of the parol evidence which the plaintiff contends he is at liberty to produce, in order to establish such intention in the devisor, is this; first, that the estate in the city of Limerick is so small, and so disproportioned to the nature of the charges laid upon it, and the trusts which are declared, as to make it manifest there must have been some mistake; and in order to shew what that mistake was, the plaintiff proposes to prove, that in the copy of the will which had been submitted to the testator for his inspection, and had been approved and returned by him, the devise in question stood thus, 'All my freehold and real estates whatsoever situate in the counties of Clare, Limerick, and in the city of Limerick;' and to prove also, that the testator directed some alterations to be made in other parts of his will, and that the same copy of the will, accompanied with a statement of the proposed alterations, was sent by the testator's attorney to his conveyancer, in order that such alterations might be reduced into proper form; and that upon such occasion the conveyancer, besides making the alterations directed, did by mistake, and without any authority, strike out the words 'counties of Clare,' and substitute the words 'county of' in lieu thereof, so as to leave the devise in question in the same precise form as it now stands in the executed will. The plaintiff further proposes to prove, that a fair copy of the will so altered was sent to the testator, who, after having kept it by him for some time, executed the same in the manner required by law, without adverting to the alteration above pointed out. Indeed, without entering more minutely into the detail of the evidence, it may be taken, for the purpose of the argument, that if parol evidence was admissible by law, the evidence tendered in this case would be sufficient to establish, beyond contradiction, the intention of the testator to have been to include his estates in Clare in the devise to the trustees.

Reason for rejecting the evidence.

"Upon the fullest consideration, however, it appears to the Lord Chief Baron and myself, that admitting it may be shewn from the description of the property in the city of Limerick, that *some* mistake may have arisen, yet, still, as the devise in

question has a certain operation and effect, namely, the effect of passing the estate in the city of Limerick, and as the intention of the testator to devise any estate in the county of Clare cannot be collected from the will itself, nor without altering or adding to the words used in the will, such intention cannot be supplied by the evidence proposed to be given. *Miller v. Travers.*

"It may be admitted, that in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence, upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim "*Ambiguitas verborum latens verificatione suppletur.*" Rule as to admission of evidence for removing a difficulty caused by evidence.

But the cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other, and to neither of which can the present case be referred. The first class is where the description of the thing devised, or of the devisee, is clear upon the face of the will; but upon the death of the testator it is found, that there are more than one estate or subject-matter of devise, or more than one person, whose description follows out and fills the words used in the will: as where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale: or where a man devises to his son John, and he has two sons of that name. In each of these cases respectively parol evidence is admissible to shew which manor was intended to pass, and which son was intended to take.(1) The other class of cases is that in which the description, contained in the will, of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every par- Two classes of cases. 1. Where more than one person or one thing are shown to answer the description. 2. Where the description is shown to be true in part, not in every particular.

(1) Bac. Max. 23. Hob. Rep. 32. Edward Altham's case, 8 Rep. 155.

Miller v. *Travers.*

ticular: as where an estate is devised called A., and is described as in the occupation of B., and it is found, that though there is an estate called A., yet the whole is not in B.'s occupation; or where an estate is devised to a person whose surname or christian name is mistaken; or whose description is imperfect or inaccurate. In this latter class of cases parol evidence is admissible, to shew what estate was intended to pass, or who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence.

Distinction between those cases and the case under consideration.

But the case now before the Court does not appear to fall within either of these distinctions. There are no words in the will which contain an imperfect, or, indeed, any description whatever of the estates in Clare. The present case is rather one in which the plaintiff does not endeavour to apply the description contained in the will to the estates in Clare, but in order to make out such intention is compelled to introduce new words and a new description into the body of the will itself.

The testator devises all his estates in the county of Limerick and the city of Limerick. There is nothing ambiguous in this devise on the face of the will. It is found, upon inquiry, that he has property in the city of Limerick which answers to the description in the will, but no property in the county. This extrinsic evidence produces no ambiguity, no difficulty in the application of the words of his will to the state of the property as it really exists. The natural and necessary construction of the will is, that it passes the estate which he has in the city of Limerick, but passes no estate in the county of Limerick, where the testator had no estate to answer that description.

The plaintiff, however, contends that he has a right to prove that the testator intended to pass not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare, and that the will is to be read and construed as if the word Clare stood in the place of or in addition to that of Limerick.

Miller v. *Travers.*

But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect, as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted.

Now, the first objection to the introduction of such evidence is, that it is inconsistent with the rule which reason and sense lay down, and which has been universally established for the construction of wills, namely, that the testator's intention is to be collected from the words used in the will, and that words which he has not used cannot be added. *Denn* v. *Page.* (1)

The evidence proposed inadmissible.

But it is an objection no less strong, that the only mode of proving the alleged intention of the testator is, by setting up the draft of the will against the executed will itself. As, however, the copy of the will which omitted the name of the county of Clare was for some time in the custody of the testator, and, therefore, open for his inspection, which copy was afterwards executed by him with all the formalities required by the Statute of Frauds, the presumption is, that he must have seen and approved of the alteration, rather than that he overlooked it by mistake. It is unnecessary to advert to the danger of allowing the draft of the will to be set up as of greater authority to evince the intention of the testator than the will itself, after the will has been solemnly executed, and after the death of the testator. If such evidence is admissible to introduce a new subject-matter of devise, why not also to introduce the name of a devisee, altogether omitted in the will? If it is admissible to *introduce* new matter of devise, or a new

(1) 3 T. R. 87.

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devisee, why not to *strike out* such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made *in form* by the testator in his lifetime, would *really* be made by the attorney after his death; that all the guards intended to be introduced by the Statute of Frauds would be entirely destroyed, and the statute itself virtually repealed.

Parol evidence not admissible to add a new subject matter, or new devisee.

Upon examination of the decided cases on which the plaintiff has relied in argument, no one will be found to go the length of supporting the proposition which he contends for; on the contrary, they will all be found consistent with the distinction above adverted to,—that an uncertainty, which arises from applying the description contained in the will either to the thing devised, or to the person of the devisee, may be helped by parol evidence; but that a new subject-matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself.

Lowe v. Lord Huntingtower.

Thus, in the case of *Lowe* v. *Lord Huntingtower* (1), in which it was held that evidence of collateral circumstances was admissible, as of the ages of the several devisees named in the will, of the fact of their being married or unmarried, and the like, for the purpose of ascertaining the true construction of the will; such evidence, it is to be observed, is not admitted to introduce new words into the will itself, but merely to give a construction to the words used in the will consistent with the real state of his property and family; the evidence is produced to prove facts, which, according to the language of Lord Coke in 8 Rep. 155, "*stand well* with the words of the will."

Standen v. Standen.

The case of *Standen* v. *Standen* (2) decides no more, than that a devise of all the residue of the testator's real estate, where he has no real estate at all, but has a power of appointment over real estate, shall pass such estate over which he has the power, though the power is not referred to. But, this

(1) 4 Russ. Rep. 581 n.

(2) 2 Ves. jun. 589.

proceeds upon the principle that the will would be altogether inoperative, unless it is taken that the testator meant, by the words used in the will, to refer to the power of appointment. *Miller v. Travers.*

The case of *Mosley* v. *Massey and Others* (1) does not appear to bear upon the question now under consideration. After the parol evidence had established that the local description of the two estates mentioned in the will had been transposed by mistake, the county of Radnor having been applied to the estate in Monmouth, and *vice versâ;* the court held that it was sufficiently to be collected, from the words of the will itself, which estate the testator meant to give to the one devisee, and which to the other, independent of their local description: all, therefore, that was done, was to reject the local description, as unnecessary, and not import any new description into the will. *Mosley v. Massey.*

In the case of *Selwood* v. *Mildmay* (2) the testator devised to his wife part of his stock in the 4 per cent. annuities of the Bank of England; and it was shewn by parol evidence, that at the time he made his will, he had no stock in the 4 per cent. annuities, but that he had had some, which he had sold out, and had invested the produce in long annuities. And in this case it was held, that the bequest was in substance a bequest of stock, using the words as a denomination, not as the identical *corpus* of the stock: and as none could be found to answer the description but the long annuities, it was held that such stock should pass rather than the will be altogether inoperative. This case is certainly a very strong one; but the decision appears to us to range itself under the head, that "*falsa demonstratio non nocet,*" where enough appears upon the will itself to shew the intention after the false description is rejected. *Selwood v. Mildmay.*

The case of *Goodtitle* v. *Southern* (3) falls more closely *Goodtitle v. Southern.*

(1) 8 East, 149.
(2) 3 Ves. jun. 306.
(3) 1 M. & S. 299. The court held also that a written notice from the testator to that other person had been properly admitted in evidence, to show that the testator considered the part of the lands occupied by him to be parcel of the farm called Trogues farm. This

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within the principle last referred to. The devise was "of all that my farm called Trogues Farm, now in the *occupation of A. C.*" Upon looking out for the farm devised, it is found that part of the lands which constituted Trogues Farm are in the occupation of another person. It was held, that the thing devised was sufficiently ascertained by the devise of "Trogues Farm," and that the inaccurate part of the devise might be rejected as surplusage.

Day v. *Trigg.*

The case of *Day* v. *Trigg* (1) ranges itself precisely in the same class. There the devise was of all "the testator's *freehold* houses in Aldersgate-street," when, in fact, he had no freehold, but had leasehold houses there. The devise was held in substance and effect to be a devise of his houses there; and that as there were no freehold houses there to satisfy the description, the word "freehold" should rather be rejected than the will be totally void.

But neither of these cases afford any authority in favour of the plaintiff; they decide only that where there is a sufficient description in the will to ascertain the thing devised, a part of the description which is inaccurate may be rejected, not that anything may be added to the will; thus, following the rule laid down by Anderson, C. J., in *Godb. Rep.* 131.:—"An averment to take away surplusage is good, but not to increase that which is defective in the will of the testator."

On the contrary, the cases against the plaintiff's construction appear to bear more closely on the point. In the first place, it is well established, that where a complete blank is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator. *Hunt* v. *Hort* (2), and in many other cases.

Now the principle must be precisely the same, whether it is

was evidence of a *fact*, very distinguishable from a declaration of intention, and strictly admissible on a question of boundary, or of the appurtenancy of lands.

(1) 1 P. Wms. 286; and see Doe d. Dunning *v.* Cranstoun, 7 M. & W. 1.

(2) 3 Bro. C. C. 311.

the person of the devisee, or the estate or thing devised which is left altogether in blank. And it requires a very nice discrimination to distinguish between the case of a will, where the description of the estate is left altogether in blank, and the present case, where there is a total omission of the estates in Clare. *Miller* v. *Travers.*

In the case *Doe d. Oxenden* v. *Chichester* (1) it was held by the House of Lords, in affirmance of the judgment below, that in the case of a devise of "my estate of Ashton," no parol evidence was admissible to shew that the testator intended to pass not only his lands in Ashton, but in the adjoining parishes, which he had been accustomed to call by the general name of his Ashton estate. The Chief Justice of the Common Pleas, in giving the judgment of all the Judges, says, "If a testator should devise his lands, *of* or *in* Devonshire or Somersetshire, it would be impossible to say that you ought to receive evidence that his intention was to devise lands ought of those counties." Lord Eldon, then lord chancellor (in page 90 of the report,) had stated in substance the same opinion. The case so put by Lord Eldon and by the Chief Justice is the very case now under discussion. *Doe* v. *Chichester.*

But the case of *Newburgh* v. *Newburgh*, decided in the House of Lords on the 16th of June 1825, appears to be in point with the present. In that case, the appellant contended that the omission of the word "Gloucester" in the will of the late Lord Newburgh proceeded upon a mere mistake, and was contrary to the intention of the testator at the time of making his will, and insisted that she ought to be allowed to prove, as well from the context of the will itself as from other extrinsic evidence, that the testator intended to devise to her an estate for life as well in the estates in Gloucester, which was not inserted in the will, as in the county of Sussex, which was mentioned therein. The question, "whether parol evidence was *Newburgh* v. *Newburgh.*

(1) 4 Dow. P. C. 65. See also Doe d. Brown *v.* Brown, 11 East, 441. Doe d. Browne *v.* Greening, 3 M. & S. 171. Doe d. Tyrrel *v.* Lyford, 4 M. & S. 550. Doe d. Preedy *v.* Holtom, 5 Nev. & M. 391. S. C. 4 A. & E. 76. The cases on this subject are stated in Mr. Jarman's Treatise on Wills, p. 360.

admissible to prove such mistake, for the purpose of correcting the will and entitling the appellant to the Gloucester estate, as if the word 'Gloucester' had been inserted in the will," was submitted to the Judges, and Lord Chief Justice Abbott declared it to be the unanimous opinion of those who had heard the argument that it could not be admitted.

As well, therefore, upon the authority of the cases, and more particularly of that which is last referred to, as upon reason and principle, we think the evidence offered by the plaintiff would be inadmissible upon the trial of the issue, and that it would therefore be useless to grant the issue in the terms directed by the vice-chancellor." (1)

From the decision in *Miller* v. *Travers*, this principle and general rule may be deduced, that no extrinsic evidence of the testator's intention is admissible, for the purpose of introducing new words, and a new description, into the body of the will itself,—in other words, for the purpose of introducing into the will an intention not apparent upon the face of the will: and the reason given for this rule is, because the testator's intention is to be collected from the words used in the will, and that words which he has not used cannot be added.

The particular kind of evidence, also, which was proposed in that case, is adverted to by the Chief Justice; and the danger and inconvenience, which would result from admitting such evidence, are strongly pointed out. "The effect of such evidence would be, that the will, though made *in form* by the testator in his lifetime, would really be made by the attorney after his death; and that all the guards, intended to be introduced by the Statute of Frauds, would be entirely destroyed, and the statute itself virtually repealed."

The subject now leads to the consideration of cases in which some uncertainty or ambiguity has occured, with reference

(1) The Lord Chancellor expressed his concurrence with this judgment, and determined that the issue could not be granted as ordered by the Vice Chancellor; and the order of the Vice Chancellor was accordingly reversed.

either to the thing intended to pass, or to the person intended to take. Lord Bacon says, in his comment on one of the maxims of law, (1) there are two kinds of ambiguities of words, the *ambiguitas patens*, and the *ambiguitas latens*. The latent ambiguity is defined by him, as it is now generally understood, to be "that which seemeth certain and without ambiguity, for any thing that appeareth upon the deed or instrument; but

Ambiguities.

(1) This comment of Lord Bacon being referred to in the judgments in the three cases of Miller *v.* Travers, Doe *v.* Needs, and Doe *v.* Hiscocks, is given below at length *

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* The rule referred to, and Lord Bacon's comment upon it, are as follows:—

"*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.*" Bac. Elem. Reg. 23.

"There be two sorts of ambiguities of words, the one is *ambiguitas patens*, and the other *latens*; *patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity.

Ambiguities of words.

"*Ambiguitas patens* is never holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed.

Ambiguitas patens.

"Therefore if a man give land to I. D. et I. S. *et hæredibus*, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was, the inheritance should be limited.

Uncertaintity in limitation of estate.

"So if a man give land in tail, though it be by will, the remainder in tail, and add a *proviso* in this manner: Provided that *if he, or they, or any of them* do any, &c., (according to the usual clauses of perpetuities) it cannot be averred, upon the ambiguities of the reference of this clause, that the intent of the devisor was, that the restraint should go only to him in the remainder, and the heirs of his body, and that the tenant in tail in possession was meant to be at large.

"Of these, infinite cases might be put, for it holdeth generally that all ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some case by election, but never by averment, but rather shall make the deed void for uncertainty.

Ambiguitas latens.

But if it be *ambiguitas latens* then otherwise it is, as if I grant my manor of S. to I. S. and his heirs, here appeareth no ambiguity at all: but if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact, and therefore it shall be holpen by averment, whether of them was that the party intended should pass.

"So if I set forth my land by quantity, then it shall be supplied by election, and not averment.

"As if I grant ten acres of wood in Sale, where I have an hundred acres, whether I say it in my deed or no, that I grant out of my hundred acres, yet here shall be an election in the grantee, which ten he will take.

"And the reason is plain, for the presumption of the law is, where the thing is only nominated by quantity, that the parties had indifferent intentions which should be taken, and there being no cause to help the uncertainty by intention, it shall be holpen by election.

Latens. there is some collateral matter out of the deed that breedeth the ambiguity."

Two classes of ambiguities. Of this kind of ambiguity, as Lord Chief Justice Tindal lays down, there are two separate classes, distinguishable from each other. "The first class," he says, "is where the description of the thing devised, or of the devisee, is clear upon the face of the will; but, upon the death of the testator it is found, that there are more than one estate, or more than

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Election. "But in the former case the difference holdeth, where it is expressed, and where not; for if I recite, whereas I am seised of the manor of North S. and South S. I lease unto you *unum manerium de S.*, there it is clearly an election. So if I recite, whereas I have two tenements in St. Dunstan's, I lease unto you *unum tenementum*, there it is an election, not averment of intention, except the intent were of an election, which may be specially averred.

"Another sort of *ambiguitas latens* is correlative unto these; for this ambiguity spoken of before is when one name and appellation doth denominate divers things; and the second, when the same thing is called by divers names.

"As if I give lands to Christ Church in Oxford, and the name of the corporation is *Ecclesia Christi in Universitate Oxford*, this shall be holpen by averment, because there appears no ambiguity in the words, for this variance is matter in fact; but the averment shall not be of intention, because it doth stand with the words.

"For in the case of equivocation the general intent includes both the special, and therefore stands with the words: but so it is not in variance, and therefore the averment must be of matter that do endure quantity and not intention.

"As to say, of the precinct of Oxford, and of the University of Oxford, is one and the same, and not to say that the intention of the parties was, that the grant should be to Christ Church in that University of Oxford."

In the above comment, when Lord Bacon says,—"If I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all; but if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter of fact, *and therefore it shall be holpen by averment whether of them was that the party intended should pass*;"—he must be understood (it is conceived) as saying nothing more than that the ambiguity, which is shewn to be matter of fact (by proof that there are two manors, each named S.) may be removed by matter of fact, that is, by proof of any facts that can shew, which of the two he intended to pass by the words of the grant. Thus, proof of such a fact as this, that shortly before the grant the grantor contracted to sell *North* S. to another person, and that the contract was still pending and in progress, would be strong evidence to shew that by the grant of his manor of S. he intended *South* S. should pass. This is an averment of *fact*, upon a question of intention, which would help the court and jury to solve the ambiguity, and give effect to the grant; and the averment of fact consists of an act done by the grantor himself, viz., his previous contract to sell the other manor; but *declarations by the grantor of his intention* to grant the manor of South S., would not, it is conceived, be within the principle, or even the plain import, of the rule laid down by Lord Bacon.

one person, whose description follows out and fills the words used in the will."—"The other class of cases is that in which the description, contained in the will, of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular." (1)—Lord Bacon notices only the former of these kinds of latent ambiguity, namely, that where there is more than one person, or more than one thing, answering the description in the instrument. This ambiguity, he says, may be *holpen by averment*, that is, (as it is conceived) by averment *of fact* to show the intent.

Lord Bacon's comment as to the *ambiguitas patens* has caused some embarrassment, both among writers and readers. *Patens.*

"*Patens*," he says, "is that which appears to be ambiguous upon the deed or instrument." So far all is clear, and this appears to be the true definition of the patent ambiguity: it is nothing more nor less than an ambiguity apparent in the words of the instrument itself. Then he proceeds to state,—not as part of the *definition*, but as a *proposition of law*, —"*Ambiguitas patens* is *never holpen by averment*;" and in a few lines lower, he lays down, "ambiguity of words by *matter within the deed* may be holpen by construction, and in some cases by election, but shall never be *holpen by averment*, but rather shall make the deed void for uncertainty." This must be understood in one of two ways; either with reference to the context, or as a general proposition. Did Lord Bacon intend to lay down this proposition with reference to the instances of the *patens ambiguitas* before mentioned by him, restricting it to those instances only? or did he intend to lay down, as a general proposition of law, that *no ambiguity of words* by matter within a deed shall be helpen by averment,—that is, that no extrinsic evidence shall be admitted to clear up any ambiguity whatever, that is apparent in the instrument itself? The language used by Lord Bacon is so strong, clear, and unrestrictive, it appears, upon the whole, most probable that he did intend to lay down such a general proposition. There seems to be little doubt also, that in the age when Lord Bacon wrote, this general proposition was good law, and that at that time no kind of ambiguity, apparent in the instrument

(1) *Vide supra*, p. 303.

itself, could have been cleared up, or construed by the aid of extrinsic evidence. Lord Bacon seems to have held, that no instance of ambiguity, *apparent in the instrument*, could be holpen by averment, that is, by extrinsic evidence. But this certainly is not law at the present time. (1) It is true, all the patent ambiguities mentioned by Lord Bacon, (which are ambiguities or uncertainties in the *limitation of estates*,) would be now, as they were then, considered incurable by evidence *dehors* the instrument: but various other instances might be suggested, where the ambiguity is apparent on the face of the instrument, and yet extrinsic evidence would be admissible. (2) Extrinsic evidence would unquestionably be admissible for the purpose of showing that the uncertainty, which appears in the instrument, does not in point of fact exist, and that the intent of the party, though uncertainly and ambiguously expressed, may yet be ascertained by proof of facts to such a degree of certainty, as to allow of the intent being carried into effect. Some ambiguities apparent in an instrument do not admit of the application of extrinsic evidence, and are utterly incurable, and render the instrument void: on the other hand, there are cases of apparent ambiguity, which do admit of explanation by matter of fact, and in which the court might give effect to the intention of the party consistently with the words used in the instrument.

An example, given by V. C. Wigram in his Treatise, will illustrate and enforce this part of our subject: (3) "Suppose a legacy to one of the children of A. by her late husband B.: suppose, further, that A. had only one son by B., and that this fact was known to the testator. The necessary consequence, in such a case, of bringing the words of the will into contact with the circumstances to which they refer, must be to determine the identity of the person intended. No principle or rule of law would, it is conceived, preclude a court from

(1) See what Bayley, J., says (in Doe *v.* Smith, 2 B. & B, 545) respecting the admissibility of evidence in that case, on this very ground, because there was an ambiguity on the face of the ground: *vide supra*, p. 296. See also in Colpoys *v.* Colpoys, Jac. 451, the opinion of the Master of the Rolls, which is still fuller and stronger to the point. And see Lampon *v.* Corke, *infra*, p. 351.

(2) See what the Master of the Rolls says in Colpoys *v.* Colpoys, before cited.

(3) Page 66.

acting upon the evidence of facts, by which the meaning of an *apparently ambiguous* will, would, in such a case, be reduced to certainty. It is the form of *expression* only, and not the *intention*, which is ambiguous. It would be quite another question, if A. had more than one son, or if her husband were living."—The result, therefore, appears to be, with regard to an ambiguity apparent on the face of the instrument, that there is no peremptory rule of law, which, in all instances, should exclude the reception of extrinsic evidence; and that, although some descriptions are so uncertain as to be beyond the reach of extrinsic evidence, and incurable, others are capable of explanation, and, when sufficiently explained, may admit of being carried into effect. (1)

First kind of *latens ambiguitas.*

With regard to an *ambiguitas latens*, of whatever kind, it may be laid down as a general rule, that whenever there appears to be, in the facts of the case, some difficulty or ambiguity in applying the words of a will to the thing which is the subject-matter of the devise, or to the person of the devisee, this difficulty or ambiguity, which is introduced by the admission of extrinsic evidence, may be removed by the admission of further evidence upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will. (2) And proof of all *material facts* is admissible, from which the intent of the party, in using the expressions of the will, may be inferred,—or (which is the same thing) proof of every *material fact* that will enable the court to identify the person or thing designated in the will.

In the case of an ambiguity, therefore, of the class first mentioned by Lord Chief Justice Tindal, (that is, where more than one person answers to the description in the will,) extrinsic evidence of facts, calculated to explain who was the person really intended to take, would be admissible: this clearly appears from the comment of Lord Bacon, and from the *dicta* in *Cheyney's case* and *Altham's case.* (3) But would

(1) The case of Doe *v.* Needs, afterwards mentioned, clearly shows that an ambiguity, although apparent on the face of the will, may yet admit of extrinsic evidence, and be removed by it. See also Lampon *v.* Corke, *infra*, p. 351.

(2) *Vide supra*, p. 203, Lord Chief Justice Tindal's judgment.

(3) *Vide infra*, p. 332.

Doe v. *Needs.*

one particular species of extrinsic proof, namely, evidence of the *testator's declarations of his intention*, be admissible, or should such evidence be rejected as defective, and bad in its nature? The case of *Doe* v. *Needs* has decided this question in the *affirmative*,—that such declarations of the testator are admissible.

Doe v. *Needs.*

In the case of *Doe* d. *Gord* v. *Needs*, (1) it appeared that a testator made a devise to Geoge Gord, the son of *John* Gord; another devise to George Gord, the son of *George* Gord; and a third devise (which was the subject of dispute,) to *George Gord, the son of Gord.* The lessor of the plaintiff was George Gord, the son of *George* Gord, who claimed the premises devised to George Gord, the son of Gord, under the description of George Gord *the son of Gord;* and in support of his claim, declarations by the testator were offered in evidence, in which he declared that he intended George Gord, the son of *George* Gord, to take in remainder the premises devised to George Gord, *the son of Gord.* This evidence was objected to, but received.

Mr. Baron Parke, who delivered the judgment of the court, after referring to another point in the case unnecessary to be here mentioned, proceeded to the question of the admissibility of the proposed evidence. "The only point," he said, "remaining to be considered is, whether evidence was properly admitted of the devisor's declarations, to shew what person he meant to designate by the description of 'George Gord, *the son of Gord.*' And we are of opinion that such evidence was properly admitted.

"If, upon the face of the devise, it had been uncertain whether the devisor had selected a particular object of his bounty, no evidence would have been admissible, to prove that he intended a gift to a certain individual: such would have been a case of *ambiguitas patens*, within the meaning of Lord Bacon's rule, (2) which ambiguity could not be holpen by averment; for to allow such evidence would be, with respect to that subject, to

(1) 2 M. & W. 129. Mich. T. 1836. See also Doe *v.* Allen, 4 Per. & D. 220. Tr. T. 1840.

(2) Bac. Elem. Reg. 23. *Vide supra*, p. 311.

cause a parol will to operate as a written one; or, adopting the language of Lord Bacon, 'to make that pass without writing, which the law appointeth shall not pass but by writing.' But here, on the face of the devise, no such doubt arises. There is no *blank* before the name of Gord the father, which might have occasioned a doubt whether the devisor had finally fixed on any *certain* person in his mind. The devisor has clearly selected a particular individual as the devisee. *Doe* v. *Needs.*

"Let us then consider what would have been the case, if there had been no mention in the will of any *other* George Gord the son of a Gord: on that supposition there is no doubt, upon the authorities, but that evidence of the devisor's intention, as proved by his declarations, would have been admissible. Upon the proof of extrinsic facts, which is always allowed in order to enable the court to place itself in the situation of the devisor, and to construe his will, it would have appeared that there were at the date of the will *two* persons, to each of whom the description would be equally applicable. This clearly resembles the case put by Lord Bacon of a *latent* ambiguity, as where one grants his manor of S. to J. F. and his heirs, and the truth is that he has the manors both of North S. and South S.; in which case Lord Bacon says, 'it shall be holpen by averment, whether of them was that which the party intended to pass.' The case is also exactly like that mentioned by Lord Coke in *Altham's case*; (1) 'if A. levies a fine to William his son, and A. has two sons named William, the averment that *it was his intent* to levy the fine to the younger is good, and *stands well with the words of the fine.*' Another case is put in *Counden* v. *Clarke*, (2) which is in point; 'if one devise to his son John, where he has two sons of that name:' and the same rule was acted upon in the recent case of *Doe* v. *Morgan*. (3) The characteristic of all these cases is,

(1) 8 Rep. 155 a.
(2) Hob. 32.
(3) 1 C. & M. 235, Mich. T. 1832. See note below.*

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* Doe d. Morgan *v.* Morgan, 1 C. & M. 235, Mich. T. 1832. The testator, Evan Morgan, devised to his wife certain premises for her life, and after her death to his *nephew, Morgan Morgan* in fee. Then he *Morgan* v. *Morgan.*

Doe v. *Needs.*

that the words of the will *do* describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever: it only enables the court to reject one of the subjects, or objects, to which the description in the will applies; and to determine which of the two the devisor understood to be signified by the description which he used in the will. This subject has been most ably discussed by Mr. Wigram, in his excellent Treatise on the rules of law respecting the admission of extrinsic evidence in the interpretation of wills.

"There would, then, have been no doubt whatever of the admissibility of evidence of the devisor's intention, if the devise to 'George, the son of Gord,' had stood alone, and no mention had been made in the will of George the son of *John* Gord, and George the son of *George* Gord. But does the circumstance that there are two persons named in the will, each answering the description of 'George, the son of Gord,' prevent the application of this rule? We are of opinion that it does not. In truth, the mention of persons by those descriptions in other parts of the will has no more effect for this purpose, than proof by extrinsic evidence of the existence of such persons—and that they were known to the devisor—would have had: it shews that there were two persons, to either of whom the description in question would be applicable, and that such two persons were both known to the devisor: and the present case really amounts to no more than this, that the person to whom the imperfect description appears on the

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devised other premises, in his own occupation, to his *nephew, Morgan Morgan, of the village of Mothvey*, after his (the testator's) decease. He devised also other premises, in his own occupation, to the *above said Morgan Morgan*, after his decease. It appeared from the evidence, that the testator had two nephews of the name of Morgan Morgan; one of them resided in the *village of Mothvey*, in the county of Carmathen, the other (the lessor of the plaintiff) resided in another county. On the part of the defendant, it was insisted, that the evidence presented a *latent ambiguity*, and to remove this ambiguity the counsel tendered evidence of the testator's declarations, contemporaneous with the will; this evidence was received, and the verdict was for the defendant. A motion was afterwards made for a new trial, on the ground of the inadmissibility of this evidence; but the court, after taking time to consider, refused the rule.

parol evidence to apply, is described in other parts of the same will by a more full and perfect description, which excludes any other object than himself. Still he is pointed out in the devise itself by a description, which, so far as it goes, is perfectly correct. In the case of *Doe* v. *Morgan* above referred to, precisely the same circumstance occurred." (1) *Doe* v. *Hiscocks.*

The kind of ambiguity which occurred in the case of *Doe* v. *Needs*, belongs to the first class mentioned by Lord Chief Justice Tindal. (2) But besides this, there is another class of *latent* ambiguities mentioned by him,—that in which the description of the thing intended to be devised, or of the person intended to take, is true in part, but not true in every particular. Extrinsic evidence of facts is clearly applicable to this last class of cases, no less than to the other, and precisely upon the same principle, and on the same authority. But would evidence of *the testator's declarations of his intention* be admissible in this class of cases, as it has been adjudged to be in the other? The case of *Doe* v. *Hiscocks* has decided this question in the *negative*,—that such evidence is not admissible. Second kind of *ambiguitas latens.*

The case of *Doe* d. *Hiscocks* v. *Hiscocks* (3) decided, that in a case of erroneous description of a devisee, evidence of facts might be given for the purpose of shewing which of two claimants the testator intended should take, (4) but that evidence of the *declarations of the testator*, as to his intention in using words to designate the person, was not admissible. *Doe* v. *Hiscocks.*

In *Doe* v. *Hiscocks*, the lessor of the plaintiff claimed the premises in dispute under the will of Simon Hiscocks, the grandfather of the lessor of the plaintiff (Simon Hiscocks), and also

(1) Jones *v.* Newman, Sir W. Blackstone, 60, and Careless *v.* Careless, 1 Mer. 384, are instances of the same kind of ambiguity; and extrinsic evidence was received to clear it up; but no declarations of intention appear to have been tendered in evidence. Declarations appear to have been received in Doe d. Allen *v.* Allen, 4 Per. & D. 220.

(2) *Vide supra*, p. 303.

(3) 5 M. & W. 363, Trin. T. 1839.

(4) This point was rather admitted than decided. It had been before decided in many cases. *Vide supra*, p. 303.

Doe v. Hiscocks. of the defendant (John Hiscocks,) whereby the testator devised the premises in question to his son, John Hiscocks, for life; and on the decease of the said John Hiscocks, to his grandson, *John* Hiscocks, *eldest son* of the said John Hiscocks, for life; and, on his decease, to the first son of the body of his said grandson, *John* Hiscocks, &c. The question in the cause between the two grandsons turned entirely on the devise "to the *grandson, John Hiscocks, eldest son* of the said John Hiscocks."

At the time of making the will, John Hiscocks, the son of the testator, had issue by a *first* marriage *Simon* Hiscocks, the lessor of the plaintiff; and had issue by a *second* marriage, *John* Hiscocks, the defendant, and other children. It appeared also, that the estate had come to the testator from the father of his son's second wife. Thus, neither of the parties in the cause answered fully the description of them in the will: the lessor of the plaintiff was the *eldest son of the testator's son, John* Hiscocks, but he was named *Simon*, not *John*,—and the devise was to the grandson *John, eldest son* of the testator's son; the defendant, named *John*, was the eldest son only by a second marriage, and so not the *eldest son* of the testator's son. Under these circumstances, the plaintiff's counsel tendered in evidence the instructions given by the testator for his will, and also declarations made by him after it's execution, to shew that the lessor of the plaintiff (Simon) was the person in his contemplation, as the object of his bounty at the time of making the will. This evidence was objected to, but received by the judge, and the plaintiff had a verdict.

Lord Abinger, after stating the facts of the case, and observing that the devise in question did not, both by name and description, apply to the lessor of the plaintiff, (who was the *eldest son*, but whose name was *Simon*, not *John*,) nor to the defendant, (whose name was *John*, but who was not the eldest son), proceeded as follows:—"It must be admitted, that it is not possible altogether to reconcile the different cases that have been decided on this subject; which makes it the more expedient to investigate the principles upon which any evidence

to explain the will of a testator ought to be received. The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this, is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained, without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate, and often necessary evidence, to enable us to understand the meaning and application of his words.

Doe v. *Hiscocks.*

Evidence to explain meaning of words.

"Again—the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to shew the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will. (1)

"But there is another mode of obtaining the intention of the testator, which is, by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous.

Evidence of declarations when admissible.

(1) These general principles have been before mentioned, *vide supra*, p. 280; but they are are again inserted here, that the judgment may be read entire.

Doe v. *Hiscocks.*

"Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will,) the testator intended to express.

"Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case, there is what Lord Bacon calls 'an equivocation,' *i. e.*, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shews what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction.

"It appears to us, that in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will.

Review of cases.

"It must be owned, however, that there are decided cases which are not to be reconciled with this distinction in a manner altogether satisfactory. Some of them, indeed, exhibit but an apparent inconsistency. Thus, for example, in the cases of *Doe* v. *Huthwaite*, (1) and *Bradshaw* v. *Bradshaw*, (2) the only thing decided was, that, in a case like the present, *some* parol evidence was admissible. There, however, it was not decided

(1) 3 B. & Ald. 632. The court held that evidence of the state of the testator's family and other circumstances was admissible; and that the jury might find, on such evidence, whether the testator had made a mistake in the name of the devisee.

(2) 2 You. & Coll. 72.

that evidence of the testator's intention ought to be received. The decisions, when duly considered, amount to no more than this, that where the words of the devise, in their primary sense, when applied to the circumstances of the family and the property, make the devise insensible, collateral facts may be resorted to, in order to shew that in some secondary sense of the words—and one in which the testator meant to use them—the devise may have a full effect. Thus, in *Cheyney's case*, (1) and in *Counden* v. *Clarke*, (2) an averment is taken in order to shew which of two persons, *both equally described* within the words of the will, was intended by the testator to take the estate; and the late cases of *Doe* d. *Morgan* v. *Morgan*, (3) and *Doe* d. *Gord* v. *Needs*, (4) both in this court, are to the same effect. So in the case of *Jones* v. *Newman*, (5) according to the view the court took of the facts, the case may be referred to the same principles as the former. The court seem to have thought the proof equivalent only to proof of there being two J. C.'s, strangers to each other, and then the decision was right, it being a mere case of what Lord Bacon calls equivocation. *Doe* v. *Hiscocks.*

"The cases of *Price* v. *Page*, (6) *Still* v. *Hoste*, (7) and *Careless* v. *Careless*, (8) do not materially vary in principle from those last cited. They differ, indeed, in this, that the equivocal description is not entirely accurate; but they agree in its being (although inaccurate) equally applicable to each claimant; and they all concur in this, that the inaccurate part of the description is either, as in *Price* v. *Page*, a mere blank, or, as in the other two cases, applicable to no person at all. These, therefore, may fairly be classed also as cases of equivocation; and in that case, evidence of the intention of the testator seems to be receivable.

"But there are other cases not so easily explained, and

(1) 5 Rep. 68.
(2) Hob. 32.
(3) 1 C. & M. 235. *Vide supra*, p. 317.
(4) 2 M. & W. 129. *Supra*, p. 316.
(5) 1 W. Bl. 60.
(6) 4 Ves. 680.
(7) 6 Madd. 192.
(8) 19 Ves. 604. 1 Meriv. 384.

Doe v. *Hiscocks.*

which seem at variance with the true principles of evidence. In *Selwood* v. *Mildmay*, (1) evidence of instructions for the will was received. That case was doubted in *Miller* v. *Travers*, (2) but perhaps, having been put by the Master of the Rolls as one analogous to that of the devise of all a testator's *freehold* houses in a given place, where the testator had only *leasehold* houses, it may, as suggested by Lord Chief Justice Tindal in *Miller* v. *Travers*, be considered as being only a wrong application to the facts of a correct principle of law.

Selwood v. *Mildmay.*

Hampshire v. *Peirce.*

Again, in *Hampshire* v. *Peirce*, (3) Sir John Strange admitted declarations of the intentions of the testatrix to be given in evidence, to shew that by the words, 'the four children of my niece Bamfield,' she meant the four children by the second marriage. It may well be doubted whether this was right, but the decision on the whole case was undoubtedly correct; for the circumstances of the family and their ages, which no doubt were admissible, were quite sufficient to have sustained the judgment without the questionable evidence. And it may be further observed, that the principle with which Sir John Strange is said to have commenced his judgment, is stated in terms much too large, and is so far inconsistent with later authorities.

Beaumont v. *Fell.*

"*Beaumont* v. *Fell*, (4) though somewhat doubtful, can be reconciled with true principles, upon this ground, that there was no such person as Catherine Earnley, and that the testator was accustomed to address Gertrude Yardley by the name of Gatty. This, and other circumstances of the like nature, which were clearly admissible, may perhaps be considered to warrant that decision; but there the evidence of the testator's declarations, as to his intention of providing for Gertrude Yardley, was also received; and the same evidence was received at Nisi Prius in *Thomas* v. *Thomas*, and approved on a motion for a new trial, by the dicta of Lord Kenyon and Mr. Justice

(1) 3 Ves. jun. 306. *Vide supra*, p. 307, in Lord Chief Justice Tindal's judgment.

(2) 8 Bing. 244 1 M. & Scott, 342. *Supra*, p. 307.

(3) 2 Ves. Sen. 216.

(4) 2 P. Wms. 141.

Lawrence. But these cases seem to us at variance with the decison in *Miller* v. *Travers*, which is a decision entitled to great weight. If evidence of intention could be allowed for the purpose of shewing that by Catherine Earnley and Mary Thomas, the respective testators meant Gertrude Yardley and Elinor Evans, it might surely equally be adduced to prove, that by the county of Limerick, a testator meant the county of Clare. Yet this was rejected, and we think rightly. We are prepared on this point (the point in judgment in the case of *Miller* v. *Travers*) to adhere to the authority of that case. *Doe* v. *Hiscocks.*

"Upon the whole, then, we are of opinion, that in this case there must be a new trial. Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is to determine whether the description means the lessor of the plaintiff or the defendant. The description, in fact, applies partially to each, and it is not easy to see how the difficulty can be solved. If it were *res integra*, we should be much disposed to hold the devise void for uncertainty; but the cases of *Doe* v. *Huthwaite*, *Bradshaw* v. *Bradshaw*, and others, are authorities against this conclusion. If, therefore, by looking at the surrounding facts to be found by the jury, the court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will. If the evidence does not enable the court to give such a direction to the jury, the defendant will indeed for the present succeed; but the claim of the heir-at-law will probably prevail ultimately, on the ground that the devise is void for uncertainty."—The court being of opinion that the parol evidence ought not to have been received, a new trial was granted.

The two judgments in *Miller* v. *Travers* and *Doe* v. *Hiscocks* have been of great service in settling the general principle, on which parol evidence is admissible for explaining the language of wills, and for removing ambiguities. They have explained

some questionable cases, and may be considered as having set aside not a small number of reported cases, in which the testator's declarations were formerly held to be admissible, (1) and as establishing at least the *general* rule that such declarations ought not to be received.

Kind of ambiguity in *Doe* v. *Hiscocks.*

In *Doe* v. *Hiscocks* there was an erroneous description of the person intended,—a description not appearing on the face of the will itself to be erroneous, but proved to be such by evidence. The designation of the person was both by name and by description of relationship; this appeared to be erroneous, on the proof of the state of the family, and on the facts of the case; and the extrinsic evidence, which was received, was not able to clear away the uncertainty. Part of the designation was correct; and if there had been only one person to whom the designation could apply, the description might have been sufficient; in that case the lessor of the plaintiff might have recovered upon the principle, "*falsa demonstratio non nocet, cum de personâ constat.*" But there was another person to whom the other part of the designation applied: so that the entire description was not correct as to either, but correct in parts as to each. The declarations of the testator might have solved the difficulty between the two claimants. The court, however, in conformity with the principle of common law, and the well-settled rules of evidence, determined that the evidence of the testator's instructions for his will, and his declarations as to the person whom he intended to take, were inadmissible, and had been improperly received. To admit such evidence, would in effect be admitting the testator himself to settle the matter in dispute, by his own declarations, to be proved "by the uncertain testimony of slippery memory." (2)

(1) The cases here referred to, in which the testator's declarations of his intention were held to be admissible, but in which, if they were to occur again, such evidence would not now be received, are the following: Hampshire *v.* Peirce, 2 Ves. sen. 216, *vide supra*, p. 324. Thomas *v.* Thomas, 6 Term R. 671, *vide supra*, p. 324. Price *v.* Page, 4 Ves. jun. 680. Hodgson *v.* Hodgson, 2 Vern. 593. Beaumont *v.* Fell, 2 P. Wms. 140, *vide supra*, p. 324. These cases are shortly stated in Vice-Chancellor Wigram's Treatise, p. 108—110.

(2) See Countess of Rutland's case, 5 Rep. 26, where the rule is laid down against receiving the *nude averments of parties*, in matters in writing; and the inconvenience and danger of such averments are

It will be remembered, the question to be solved in *Doe* v. *Hiscocks*, was a *question of intention*,—what did the testator intend by the description in the will? and *declarations* of his intention were held not to be admissible for removing the ambiguity. On the other hand, in *Doe* v. *Needs*, where the question also was as to the testator's intention,—in the instance of an ambiguity somewhat differing in kind from that in the former case,—the declarations of intention were held to be admissible. In the former, no less than in the latter case, extrinsic evidence of *facts* was admissible to shew the intention, but the objectionable evidence of *declarations* was rejected.

The exception in the case of *Doe* v. *Needs* to the general rule which excludes the testator's declarations of his intention, is recognised and sanctioned in the case of *Doe* v. *Hiscocks*, and declared to be the *only exception* that ought to be made. "There is but *one case*," said Lord Abinger, "in which it appears to us that this sort of evidence of intention (that is, 'evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature,') can properly be admitted, and that is, when the meaning of the testator's words is neither ambiguous nor obscure, and when the devise is on the face of it perfect and intelligible, but from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words of the will), the testator intended to express." Then, after giving the instance of a testator devising his manor of S., having *two manors*, one called North S., the other South S.,—in which case, (as the court held,) the testator's declarations of his previous intention are receivable;—Lord Abinger says, "It appears to us, that,

pointed out by Lord Coke. See also *supra*, p. 306, in Chief Justice Tindal's judgment, as to the general mischievous consequences of such evidence.—For a specimen of the loose and unsatisfactory nature of this kind of evidence, the reader is referred to the statements in the special case in Richardson *v.* Watson, 4 B. & Ad. 787; and for a specimen of the dangerous effects of such evidence in the disposition of property, and on the interests of parties, he may be referred to Goblet *v.* Beechey (the case of Nollekens's will, *supra*, p. 281), where the evidence of a woman servant, as to declarations of intention, (if acted upon), would have put into the pocket of the person who had been in the employ of the testator, and for whom she was witness, between seven and eight hundred pounds.

in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will."

Remarks on *Doe* v. *Needs*.

Some remarks on the rule laid down in *Doe* v. *Needs*, and a short inquiry into the principle of the rule, are submitted for the reader's consideration. The question which the writer would venture to propose,—if he may be allowed to propose it in the presence of such high authority, without incurring the imputation of presumption,—is whether, in the case of an ambiguity like that in *Doe* v. *Needs*, the declarations of the testator might not, upon true principles of law, be properly rejected, as they were in *Doe* v. *Hiscocks*.

In the case of *Doe* v. *Needs*, there were two persons, each answering the description in the will, *so far as it went*,—for the description was not full and complete, containing only the *surname*,—each of these persons was *the son of Gord*, and each claimed the premises in dispute under that description, one as the son of *George* Gord, the other as the son of *John* Gord. The fact of there being two persons answering the description was disclosed, not by extrinsic evidence, as usually happens in such cases, but by the will itself: this circumstance, however, could not reasonably make any material difference with reference to the question as to the admissibility of extrinsic evidence. There being, in fact, an ambiguity as to the person intended,—in whatever way that ambiguity was disclosed, whether by evidence in the will itself, or by evidence *dehors* the will,—the question was, whether the particular kind of evidence tendered, namely, the declarations of the testator, declaratory of his intention as to the person whom he intended in the devise, could be admitted for removing the ambiguity. The court determined, that this evidence had been properly admitted; and the evidence, being admitted and believed, would have the effect of *adding* a word to the description, and of inducing the court and jury to read the description in the will ("the son of Gord,") as if it had been written "the son of *George* Gord."

It appears, from *Doe* v. *Hiscocks*, that where two persons claim as devisees under a description in a will, if it should happen that each answers the description in part only, not in every particular,—proof of the testator's declarations, naming which of the two he intended, can not be received: but, according to the doctrine in *Doe* v. *Needs*, if each answers the description in all its particulars, then the declarations may be received: yet, in each case, the question is the same—what did the testator intend by the words which he used in the will?

The rule laid down in *Doe* v. *Needs*, it is admitted, applies to the *thing devised* no less than to the *devisee*. To put an instance, for shewing the application of the rule in each case:—Suppose a person to leave his horse by will, thus: "I give my *black cropped* horse to my youngest son." Suppose the testator had no horse of that description, but that he had a *grey* cropped horse, and a *black* horse not cropped: here, according to *Doe* v. *Hiscocks*, the son would not be allowed to give in evidence the declarations of the testator as to his intention in making the bequest. But, now, vary the kind of ambiguity, and suppose the testator had *two* black cropped horses; there, according to the case of *Doe* v. *Needs*, the declarations of the testator, as to which of the two he intended his son to take, would be admissible.

There can be no doubt, with reference to the *second* class of ambiguities mentioned by Lord Chief Justice Tindal, (to which class belongs the ambiguity in *Doe* v. *Hiscocks*,) the rejection of the evidence of the testator's declarations is right in principle, although extrinsic evidence *of facts* to show his intention would be admissible. It is clear, also, with reference to the *first* class of ambiguities, (to which class the case of *Doe* v. *Needs* belongs,) parol evidence of the intent of the testator, that is, evidence *of facts* from which the intent of the testator may be inferred, might be received. But upon what principle is it, that the *testator's declarations of his intention*, the most objectionable of all kinds of evidence, can be admitted in this latter case, while it is rejected in the former?—are the declarations of intention by a party to any other kind of written

instrument—a deed, for instance, or written agreement—admissible, in the case of such an ambiguity? (for it is certain, the same rule, if sound in principle, must be applicable to *deeds* as well as to *wills*,)—could the *party himself* be a witness, to declare his intention?

For the explanation of the principle, the treatise of Vice Chancellor Wigram is referred to, with high approbation, by Mr. Baron Parke. His explanation is as follows: "As to those cases in which the description in the will is applicable indifferently to, and sufficiently describes, more than one subject, the principle upon which they proceed may perhaps be explained; for in such cases, although the words do not *ascertain* the *very* subject intended, they do *describe* it. The person, held entitled in these cases, has answered the description in the will. The effect of the evidence has only been to confine the language within one of its natural meanings. The court has merely rejected, and the intention which it has ascribed to the testator (sufficiently expressed) remains *in* the will: 'an averment to take away surplusage is good, but not to increase that which is defective in the will of the testator.' Or, perhaps, the more simple explanation is, that the evidence only determines *what subject was known to the testator* by the name or other description he used."(1)* Mr. Baron Parke in explaining the principle states:(2)

(1) Page 115, art. 152. (2) *Vide supra*, p. 318.

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* The rule as laid down by Vice Chancellor Wigram in his 7th proposition (p. 101) with reference to this class of ambiguities, lays down the rule, that *evidence of intention* is admissible. And this is unquestionably correct, if by *evidence of intention* we are to understand evidence *of facts* to shew intention. But evidence of the *testator's declarations* as to his intention is something different. He does not there lay down, that evidence *of the testator's declarations of intention* can be admitted. His seventh proposition is as follows:—"Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, courts of law, in certain special cases, admit extrinsic *evidence of intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose. These cases may be thus defined: Where the object of a testator's bounty, or the subject of disposition (*i. e.* the *person* or *thing* intended) is described in terms which are applicable indifferently to more than one *person or thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator."

"The characteristic of all these cases is, that the words of the will *do* describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever: it only enables the court to reject one of the subjects, or objects, to which the description in the will applies; and to determine which of the two the devisor understood to be signified by the description which he used in the will."

It is perfectly true, that the testator's declarations, if admitted, would not *vary the instrument* in any respect; they are not liable to objection, therefore, on that ground. It is true also, that their *effect* in the two cases (of *Doe* v. *Needs* and *Doe* v. *Hiscocks*) would be different, on account of the difference of the two kinds of ambiguity. But it is difficult to understand, how the above reasoning satisfactorily explains or justifies the reception of this particular kind of evidence. That extrinsic evidence of *facts* may be admitted to prove the testator's intention, is unquestionable: for when the fact is proved, that there are two persons who answer fully the description in the will, then the question immediately occurs, Which of the two was intended? extrinsic evidence, therefore, from which the intention may reasonably be inferred, must necessarily be received; but the legitimate and well-principled evidence for proving intention is, not the proof of *declarations* made by the person whose intention is the very point in dispute, but the proof of *material facts*. The reasoning in the two explanations above given, and also in that given by Lord Abinger, justifies the reception of *extrinsic evidence* for the purpose of shewing the intention; but it does not appear to justify the reception of such extrinsic evidence as the testator's declarations.

Danger of receiving such evidence.

It is conceived that there is, in principle, an objection to the reception of the declarations of intention. When a person executes a written instrument (whether a will or deed, or written agreement,) he must be supposed to express and embody in the instrument all he has to say of his intention; thenceforward his intention is to be collected only from the instrument, reference also being allowed, when necessary, to surrounding material facts

and existing circumstances. Facts may, of course, be referred to for explaining an ambiguity, and proving the intention, so far as they can be applied for that purpose consistently with the language of the instrument; but the party himself ought not to be allowed to add anything in the way of explanation, or for declaring his intention; all he had to say of his intention, he must be supposed to have conclusively said, when he executed the instrument. This, it is conceived, is the principle of common law, and of sound reason, applicable alike to all written instruments; and the ground and reason on which the principle is founded, must obviously be on account of the great danger and inconvenience which would result from evidence of declarations,—well described by Lord Coke, as "the nude averments of parties, to be proved by the uncertain testimony of slippery memory." (1) If declarations are alleged to have been made at the time of executing the instrument, the danger is that they may be mistaken, or misunderstood, or misrepresented, or possibly altogether an invention. If they are alleged to have been made before or after that time, what complete assurance have we in all cases, that the intention of the party, at the time of executing the instrument, was the same as before that time, or had not been altered afterwards? (2)

No reference is made, either in *Doe* v. *Needs* or in *Doe* v. *Hiscocks*, to any case decided before the Statute of Frauds, in which the averments or declarations of a party to a deed or other written instrument,—as to his intention in using language, descriptive of the subject-matter which is afterwards shewn to be ambiguous,—were ever allowed to be given in evidence. It is believed, no instance of that kind, in the case of a *deed*, can be produced either before or since the Statute of Frauds. But certain *dicta*, to be found in one of Lord Bacon's comments, in *Cheyney's case*, and *Altham's case*,* are referred

(1) See Countess of Rutland's case, 5 Rep. 26. *Vide supra*, p. 306, Lord Chief Justice Tindal's judgment.

(2) *Vide supra*, p. 326, n. (1)

* Lord Bacon's comment has been already given in p. 311; the passages, relied upon in *Cheyney's* and *Altham's case*, will now be added,

to as authorities to warrant the decision in *Doe* v. *Needs*: which *dicta* establish the position,—and it is conceived, they establish nothing more,—that in the case of one particular kind

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from which the reader will judge for himself of their true purport and meaning.

LORD CHEYNEY'S CASE, 5 Rep. 68 b.

Sir Thomas Cheyney made his will in writing, and thereby devised divers manors to his son H. in tail, remainder to Thomas Cheyney of Woodley in tail male, on condition that *he or they or any of them* shall not alien, &c. And the question was between the heir-general and divers purchasers, whether he should be received to prove that it was the intent and meaning of the devisor to include his son and heir within these words of the condition (*he or they*), and not only to restrain Thomas Cheyney, of Woodley, and his heirs male of his body. But Wray and Anderson, Chief Justices, on conference had with other justices, resolved, that he should not be received to such averment out of the will; (1) for the will concerning lands, &c., ought to be in writing, and the constructions of wills ought to be collected from the words of the will in writing, and not by any averment out of it; for it would be full of great inconvenience, that none should know by the written words of a will what construction to make, or advice to give, but it should be controlled by collateral averments out of the will. But if a man has two sons both baptized by the name of John, and conceiving that the elder (who had been long absent) is dead, devises his land by his will in writing to his son John generally, and in truth the elder is living; in this case the younger son may, in pleading or in evidence, allege the devise to him, and if it be denied he may produce witnesses to prove his father's intent, (2) that he thought the other to be dead, or that he, at the time of the will made, named his son John, the younger, (3) and the writer left out the addition of the younger.—And no inconvenience can arise, if an averment in such case be taken in case of a devise by will; for he who sees such will, whereby land is devised to his son John, cannot be deceived by any secret invisible averment, for when he sees the devise to his son John, he ought, at his peril, to inquire which John the testator intended, which may easily be known by him who wrote the will, and others who were privy to his intent; (4) and if no direct proof can be made of his intent, then the devise is void for the uncertainty.

Where two persons answer a description in a will, proof, by witnesses, of the testator's intent, is admissible.

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(1) That is—averment of intent to be proved by matter of fact out of the will.

(2) The mode of proof, or kind of evidence, is not adverted to; it must be supposed, that the proof here meant is to be in the ordinary way, namely, *proof of facts*, from which the intent may be inferred. So in Crounden *v.* Clarke, Hob. 32, where it is said, "If I devise land to my son John, having two of that name, *averment who was meant* shall make this certain;" the sense of the words, filled up, must be '*averment as to the person meant, proved by evidence*,' that is, proved by *evidence of facts*, in the regular and ordinary way.

(3) That is—named him *as his living son* (the other being supposed to be dead.) This is a *fact*, and whether it occurred at the time of making the will, or before, or after that time, might be proved as a fact, and would be material. But how different this is from proof that he said at the time of the will made, "*I intend, by the description in the will, my younger son to have the land.*"

(4) That is—inquiry may be made, *as to any facts which can shew the testator's intention*, both of the person who wrote the will and of others who were privy to his intent, and who can prove it by such facts. See note (2), *supra*.

of ambiguity, averment may be made of the intent of the party, and evidence admitted to prove his intent. This, it is presumed, means only that evidence of *facts* may be admitted; not the least intimation is given, that such an objectionable species of evidence as that in question, namely, the *declarations of a party* as to his intention, is admissible. We proceed now to other decided cases.

Where the ambiguity is cleared up by the context.

In such a case of ambiguity as that mentioned in *Doe* v. *Needs*—where more than one person, or more than one subject matter of devise, answers fully the description in the will—if the context of the will itself shews which of the persons, or which of the subject-matters was intended, it has been decided, that evidence of the testator's declarations is not admissible.

Doe v. *Westlake.*

Thus, in *Doe* v. *Westlake*, (1) where the devise was as follows: "I give and devise to *Matthew* Westlake, my brother, and to Simon Westlake, my brother's son, all my messuage, &c." It appeared in evidence that the testator had three brothers, Thomas, Richard, and Matthew, *each* of whom had a son of the name of *Simon*. It was insisted, that this established a

(1) 4 B. & A. 57. And see Holmes *v.* Custance, 12 Ves. 269.

EXTRACT FROM ALTHAM'S CASE, 8 Rep. 155.

When two persons or two manors answer a description in a fine, averment may be made, out of the grant, of the conusor's intent, and is triable by the jury.

If A. levies a fine to William, his son, to have and to hold to him and his heirs, upon this fine the judge cannot make question for any matter of law; but now the party comes and avers matter in fact, and saith, that A. had two sons named William, an elder, and a younger, and his intent was to levy the fine to William, the younger; this averment out of the fine is good of this matter of fact, which well stands with the words of the fine, and shall be tried by the country. But if a man by deed gives goods to one of the sons of I. S., who has divers sons, here he shall not aver which son he intended, for by judgment in law upon this deed this gift is void for the uncertainty, which cannot be supplied by averment. So if a man levies a fine of the manor of Soure, or of the manor of Dirtleby, to two *et hæredib'*, and in truth there is the manor of North Soure and South Soure, or Great Dirtleby and Little Dirtleby, in this case issue may be taken *dehors*, which manor the conusor intended to pass, for that is matter of fact not apparent in the fine, whereof the judge cannot take conusance; but it stands well with the fine, and shall be tried by the jury: but where the words are in the limitation of the estate to two *et hæredibus*, that is apparent in the fine, and by judgment of law these words *et hæredibus* are uncertain and void, and no averment *dehors* can make that good, which, upon consideration of the deed, is apparent to be void. So if a man makes a feoffment to one and his heirs, no averment can be taken that the intent of the parties was, that the feoffee should have but an estate to him and the heirs of his body, for such averment would be against the judgment of the law, which appears to the judges upon the view of the deed.

latent ambiguity in the will, and evidence was tendered of declarations by the testator that he had intended to bequeath his property to Simon Westlake, the son of *Richard* Westlake (the defendant); and this evidence was received. The jury, however, gave their verdict for the plaintiff: a new trial was applied for, on the ground that the verdict was against evidence; but the court refused a rule. The Lord Chief Justice Abbott laid down, that, *in point of legal construction*, the devise must be construed to be to Simon the son of Matthew; when the testator was speaking of his brother's son, he must be understood as speaking of the son of that brother who was then particularly in his mind. Matthew Westlake was the brother then in the mind of the testator; and consequently Simon Westlake, his son, must be the person intended. "I cannot entertain the least doubt, said the Lord Chief Justice, that he intended by this devise to give the property to Simon the son of Matthew Westlake. If that be so there was no ambiguity in the will, and *therefore the evidence ought not to have been received.*" Here the evidence tendered was not *material*, because, if received, it could not be allowed to have any effect according to the principles of legal construction.

Richardson v. Watson.

One other case may be added on this subject, in which there was a question as to the admissibility of extrinsic evidence, in an instance of a similar kind of ambiguity. The devise was as follows: (1) "I give and devise the close in Kirton aforesaid, now in the occupation of John Watson, to, &c." It was proved that the testator, at the time of making his will, had two closes in Kirton, separated from each other by intervening properties, and known by different names. Evidence was received at the trial of what took place on the occasion of the testator's giving instructions for the making of a former will, two years before the making of the will in question; and the evidence was given by the attorney who made the former will, but who did not make the last. Part of this evidence tended to show that the testator at that time intended to give to the devisee *the land* in the occupation of John Watson, (which would

(1) Richardson *v.* Watson, E. T. 1833, 4 B. & Ad. 787; argued on a special case.

include both the closes), and it was argued by counsel, that the term "the close" must be taken to mean "the land;" but to this argument there was a decisive answer given by the testator himself, who, in other parts of his will, had used the word "*closes*," thereby shewing, that by the word "close" he did not mean "land" generally, but meant to use the word in its ordinary sense of *inclosure*. Lord Denman thought it very doubtful, whether the evidence of the former will, and what took place preparatory to it, was admissible. The other judges said nothing on that point. All agreed, that the evidence could not have any effect, as it would only show that the testator intended to devise some close in the occupation of the person named, but did not designate which of the two; and they held the will to be void for uncertainty. It became unnecessary to enter into the question of *admissibility*, since the evidence was useless, if admitted: but on examination it will be found, that much the greater part of the evidence, if not the whole, was certainly inadmissible.

Section III.

Of the admissibility of evidence of Usage with reference to commercial and other contracts.

Cases will now be mentioned, in which evidence of usage has been admitted, in aid of the construction of written instruments. This evidence has been received for explaining or filling up terms used in commercial contracts, policies of insurance, negotiable instruments, and other writings of a similar kind,—when the language, though well understood by the parties, and by all who have to act upon it in matters of business, would often appear to the common reader scarcely intelligible, and sometimes almost a foreign language. The terms used in these instruments are to be interpreted according to the recognised practice and usage, with reference to which the parties are supposed to have acted; and the sense of the

words, so interpreted, may be taken to be the appropriate and true sense intended by the parties. (1)

In an early case, where an insurance was on a ship from London to the East Indies, warranted to depart with convoy, the court held that this clause of warranty must be construed according to the usage among merchants, that is, from such place where convoys are to be had. (2) So where the insurance was on goods till landed, and the defence to the action was that the plaintiff had been guilty of unreasonable delay in landing, the court held that the question could only be decided by proof of the usual practice of the trade,—with which every underwriter is supposed to be acquainted, whether the practice has been recently or long established. (3)

Charty party.

To explain a term in a charter-party, proof of its mercantile acceptation and meaning is admissible; as, to explain the term "cotton in bales," (4) or to show that in mercantile transactions *good* barley and *fine* barley signified different things. (5)

Bowman v. Horsey.

In *Bowman* v. *Horsey* (6) evidence of usage of trade was admitted to explain the terms used in a receipt-bill, which had been given by the defendant to the plaintiff, who had sold to a third person goods specified in the bill, and, by direction of the buyer, sent them to the defendant, sending at the same time the receipt-bill for his signature. The bill was signed by the defendant, and purported that the goods specified were received *on account* of the plaintiff *for* the buyer. The defendant, having shipped the goods in the name of the buyer under his order, was sued in an action of trover; and at the trial it

(1) As to the general principle, see by Lord Hardwicke, in Baker *v.* Paine, 1 Ves. sen. 459; and in Blunt *v.* Cumyns, 2 Ves. sen. 331.

(2) Lethulier's case, 2 Salk. 443. Selby *v.* Ewer, 1 Doug. 72. Chaurand *v.* Angerstein, Peake, N. P. C. 43. Anderson *v.* Pitcher, 2 B. & P. 164.

(3) Noble *v.* Kennoway, 1 Doug. 510. See Ougier *v.* Jennings, 1 Camp. 505, n. Moone *v.* Guardians of Witney Union, 3 Bing. N. C. 817. Vallance *v.* Dewar, 1 Camp. 503. Haynes *v.* Holliday, 7 Bing. 587. Bold *v.* Rayner, 1 M. & W. 343. Powell *v.* Horton, 2 Bing. N. C. 668. Hutchinson *v.* Bowker, 5 M. & W. 535.

(4) Taylor *v.* Briggs, 2 C. & P. 525.

(5) Hutchinson *v.* Bowker, 5 M. & W. 535.

(6) 2 M. & R. 85.

was insisted, on the part of the plaintiff, that the receipt-bill must be construed according to the general usage of the trade, and that although the defendant was to attend to the directions of the buyer, as to *preparing and packing* the goods, yet he was still to hold them subject to the further orders of the plaintiff, and not to part with them without his authority. Lord Abinger held, that there was an ambiguity in the language of the instrument, as it appeared that the defendant was to hold the goods for one person, and yet on account of another; and, therefore, that this case came within the general rule, that upon a mercantile instrument evidence of usage may be given in explanation of an ambiguous expression.

The same rule as to other contracts.

The same rule which admits evidence of custom and usage to annex incidents to written contracts in commercial transactions, extends also to contracts in other transactions of life, wherein known usages have prevailed and been established: this has been allowed upon the presumption, that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract also with reference to those known usages. (1) Thus, in an action upon a contract for the sale of a thousand deals, it would be competent to shew that the word *thousand* meant, according to the usage and common understanding of the place where the contract was made, something more than it would in its ordinary sense. (2)

Usage with reference to farming leases.

Wigglesworth v. *Dallison.*

In *Wigglesworth* v. *Dallison*, (3) a tenant was allowed an away-going crop, though there was a formal lease under seal. The lease was entirely silent on the subject of such a right; and Lord Mansfield said, the custom did not alter or contradict the lease, but only superadded a right which was consequential to the taking,—as a heriot may be due by custom, although not mentioned in a grant or lease.

(1) See judgment by Parke, B., in Hutton *v.* Warren, 1 M. & W. 474.

(2) See in Smith *v.* Wilson, 3 B. & Ad. 728, by Parke, B., and *vide supra*, p. 282.

(3) 1 Doug. 201, 1 M. & W. 474. See also Holding *v.* Pigott, 7 Bing. 465. Wigglesworth *v.* Dallison is one of the leading cases selected by Mr. Smith, in his work. The reader will find there many remarks on this and other cases connected with the subject.

In *Senior* v. *Armitage*, (1) in an action by a tenant against his landlord for a compensation for seed and labour, under the denomination of tenant-right, the court held, that though there was a written contract between the landlord and the tenant, the custom of the country would still be binding, if not inconsistent with the terms of the contract; and that not only all common-law obligations, but those imposed by custom also, were in full force, if the contract did not vary them. The written instrument in this case contained an express stipulation, that all manure made on the farm should be spread on it, or left at the end of the tenancy, without payment of any compensation. But such a stipulation was held not to exclude by implication the tenant's right to receive a compensation for seed and labour. The court appear to have held that the custom would operate, unless it could be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by it. *Senior* v. *Armitage.*

In *Hutton* v. *Warren*, (2) the tenant held under a lease the glebe land and tithes of a parish: the lease contained a stipulation, that the plaintiff should spread and consume on the glebe three parts in four of the manure arising from the tithes as well as from the glebe land, and leave on the land for the use of the landlord all the manures not spread or bestowed on the premises, for which the landlord was to pay a reasonable price: the court held, that these stipulations did not preclude the tenant from recovering a reasonable allowance for seed and labour bestowed on the arable land in the last year of his tenancy. "The custom of the country," said Mr. Baron Parke, "as to the obligation of the tenant to plough and sow, and the corresponding obligation of the landlord to pay for such ploughing and sowing in the last year of the term, are in no way varied. The only alteration made in the custom is, that the tenant is obliged to spend more than the produce of the farm on the premises, being paid for it in the same way as *Hutton* v. *Warren.*

(1) Holt N. P. C. 197. S. C. stated fully and explained by Parke, B., in Hutton *v.* Warren. Bayley, J., had non-suited, on the ground of there being a written agreement between the parties.

(2) 1 M. & W. 466, judgment delivered by Parke, B., in which all the cases to that time are fully stated and commented on.

he would have been paid for that which the custom required him to spend."

Webb v. *Plummer.*

On the other hand, in the case of *Webb* v. *Plummer,* (1) the customary right of the outgoing tenant was excluded by plain inference from the terms of the lease. The tenant covenanted, among other things, to spend all the produce on the premises, to carry out manure on specified parts, &c., and the landlord was to pay for the fallowing land, and for the carrying out the manure, but nothing for the manure itself. The claim in the action was for a customary allowance for *foldage,* which was a mode of manuring the ground: the court held, that as there was an express provision for some allowance or payment on quitting, in consideration of the things covenanted to be done, but an omission of *foldage,* the customary obligation to pay for the latter was excluded.

Usage excluded by the lease inferentially.

Usage with reference to other leases.

Evidence of usage has been admitted also in other cases, with reference to the construction of leases or agreements between landlord and tenant. In *Smith* v. *Wilson,* (2) before mentioned, such evidence was admitted for the purpose of shewing, that a word, used in a lease by deed, was to be taken in a sense other than its ordinary one, and that the parties by the word *thousand* meant *one hundred dozen.*

As to day of demise.

Forley v. *Wood.*

In *Forley* d. *the Mayor, &c. of Canterbury* v. *Wood,* (3) where the tenancy was from Michaelmas to Michaelmas, Lord Kenyon permitted evidence to be given, that by the custom of the county of Kent, such a tenancy from Michaelmas generally was considered to be from *old* Michaelmas. A similar point

(1) B. & A. 750, stated by Parke, B., in Hutton *v.* Warren. See also Roberts *v.* Barker, 1 Cr. & M. 808.

(2) 3 B. & Ad. 728, *vide supra,* p. 282. See also Clayton *v.* Gregson, *supra,* p. 282.

(3) Cited in Doe *v.* Lea, 11 East, 312, approved by Abbott, C. J., in Doe *v.* Benson, 4 B. & A. 589; approved also in Denn *v.* Hopkinson, 3 D. & R. 508, where extrinsic evidence was admitted to show that by *Ladyday,* in a written lease, (not under seal) *old* Ladyday was meant. The extrinsic evidence received there was probably evidence of custom; though it is not mentioned in the report. This may be inferred from the circumstance that the court cited Doe *v.* Benson and Forley *v.* the Mayor of Canterbury, as authorities which ought to decide the case then under consideration.

occurred in *Doe* d. *Hall* v. *Benson*, (1) where a parol lease was from Lady day, and, in support of a notice to quit on *old* Lady day, evidence of the custom of the country (to reserve rents on *old* Lady in such tenancies) was adjudged to be admissible, for ascertaining what the parties meant by using the expression Lady day in their original agreement. *Doe* v. *Benson.*

In *Doe* d. *Spicer* v. *Lea*, (2) the defendant having held the premises for many years as assignee of a lease by deed, continued to hold them after the expiration of the term without any new agreement. The original tenant first held the premises by parol from old Michaelmas, and after a few years took the lease by deed (which was afterwards assigned to the defendant), to hold from the Feast of St. Michael. The judge at the trial held that the tenant must be considered as having held, after the expiration of the term, according to the terms in the lease, in which the demise to hold from the Feast of St. Michael, generally, must mean from *new* Michaelmas, and that this could not be explained by parol evidence to mean *old* Michaelmas,—but that the lease was conclusive. The court above were of opinion, that no extrinsic evidence could be given to explain the time of holding stated in the deed, which must be taken to be from *new* Michaelmas, since the act of Parliament for altering the style,—unless, as Lord Ellenborough observed, there had been some reference in the deed itself to the prior holding; and that the tenant continued afterwards under the terms of the lease. This decision was cited in the above mentioned case of *Doe* v. *Benson*, in argument, against the admissibility of evidence of custom. But Lord Chief Justice Abbott made a distinction between the two cases, observing, that "In *Doe* v. *Lea*, the letting was by *deed*, and the rule of law is that evidence is not admissible to explain a deed:" and Mr. Justice Holroyd said, "The case of *Doe* v. *Lea* was decided upon a principle of law, not applicable to the case under consideration; for there the letting was by *deed*, which is a solemn instrument, and therefore *Doe* v. *Lea.*

(1) 4 B. & A. 588; Forley v. Wood was cited as an authority, and approved.

(2) 11 East, 311: the notice given was to quit at *old* Michaelmas. The case of Forley v. Wood was cited by the counsel for the plaintiff.

parol evidence was inadmissible to explain the expression *Lady day* there used,—even supposing that it was equivocal."

One remark may be made upon this case of *Doe* v. *Lea*. The lease, it will be remembered, was considered by the judge at *nisi prius*, and by the Court of King's Bench, to be *conclusive:* the court held, that *no extrinsic evidence* could be received for explaining the time of holding stated in the deed. That lease, however, had expired: the defendant had long ceased to hold under it, when he received the notice to quit. Suppose, then, that after the expiration of the term the parties made a parol agreement for a tenancy from *old* Michaelmas, was it not competent to them to prove this? or, if no direct proof of that agreement could be produced, was it not competent to shew that it was the general custom of the country to let land, and take rent, on *old* Michaelmas day,—and that on that day the defendant entered, and on that day used to pay rent?—From such evidence the jury might reasonably presume that the tenancy commenced from *old* Michaelmas,—in which case the notice would be regular, and the plaintiff entitled to recover. If, indeed, after the expiration of the deed, the old state of things continued as before, the tenant occupying and paying rent as before, the necessary inference would be that the parties intended that the rent-day mentioned in the lease should be the day observed between them, and Michaelmas day, used in the lease generally, would mean *primâ facie* Michaelmas according to the *new* style, and, in that case, the notice would be irregular. With reference to the *lease*, the notice was wrong; but with reference to a *fresh* holding, according to the custom of the country, (and there could be no legal objection to their adopting the Michaelmas of the *old* style,) the notice might have been right. And, it should seem, the landlord ought to have been allowed to shew, if he could, a new holding, and that, at the end of the old lease, a new tenancy from year to year commenced from *old* Michaelmas. It may be further observed, with reference to the reason suggested by the court in *Doe* v. *Benson* in support of the decision in *Doe* v. *Lea*,—namely, that the lease (under which the defendant had at first held) was by *deed*, and that, as deeds were *solemn things*, no extrinsic evidence could be

received as to the meaning which the parties intended to put on the word Michaelmas,—there are several cases of later date, in which it has been determined that evidence of usage is admissible to shew that words in *deeds* may be taken in some other than their ordinary acceptation; such are *Smith* v. *Wilson*, and *Clayton* v. *Gregson*, before stated. (1)

General result.

Evidence of usage has been admitted in the foregoing instances of contracts relating to transactions of commerce, trade, farming or other business,—for the purpose of defining what would otherwise be indefinite, or to interpret a peculiar term, or to explain what was obscure, or to ascertain what was equivocal, or to annex particulars and incidents which, although not mentioned in the contracts, were connected with them, or with the relations growing out of them; and the evidence in such cases is admitted, with the view of giving effect, as far as can be done, to the presumed intention of the parties.

Where the language of the contract itself manifests an intention to exclude the operation of usage, evidence of usage cannot be admitted. And in all cases in which this evidence is admitted, it must be presumed that the usage was known to the contracting parties, and that they contracted in reference to it, and in conformity with it. With this understanding, the reception of evidence of usage is not only justifiable in principle, but absolutely necessary; and without it, the intention of the parties would be often defeated. Usage may be proved, though not general; it may be local, and to a small extent—or professional—or only in a particular branch of business, or among a particular class of persons. Even the usage, or rather the practice, of an individual firm with which a party has contracted, may be resorted to as a medium of exposition, if it may be reasonably inferred that he contracted in reference to such practice.

Cutter v. *Powell.*

This doctrine of admitting evidence of usage, in the construction of mercantile contracts, is strongly illustrated by the case of *Cutter* v. *Powell*, (2) which was an action of assumpsit, brought by an administratrix for work and labour

(1) Smith *v.* Wilson, *supra*, p. 282. Clayton *v.* Gregson, *supra*, p. 282.

(2) 6 T. R. 320.

Contract for service on board a ship.

done by the deceased. It appeared that the captain of a ship had given a note to the deceased, by which he promised to pay him a sum of money, provided he proceeded on a voyage, and continued to do his duty as second mate, to the port of destination. The second mate died on the voyage, and the question was, whether the plaintiff could recover in this general action any portion of the wages for the time the deceased had served. An inquiry had been made, by direction of the court, relative to the usage of merchants on this kind of agreement, but no settled usage could be ascertained, one way or the other. Lord Kenyon, in delivering his opinion, after stating that the deceased stipulated to receive the larger sum, if the whole duty were performed, and, unless the whole were performed, to receive nothing, added, that on this particular contract, his opinion was at present formed; "At the same time," said Lord Kenyon, "if we were assured that these notes are in universal use, and that the commercial world have received and acted upon them in a different sense, I should give up my opinion." And Mr. Justice Lawrence said, "With regard to the common case of an hired servant, to which this case has been compared, such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he does not continue in the service during the whole year. So if the plaintiff in this case could have proved any usage, that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage. But if this is to depend altogether on the terms of the contract itself, the plaintiff cannot recover anything."

Evidence of usage not admissible to contradict a written contract.

Parkinson v. *Collier.*

The rule for admitting evidence of usage must be taken always with this qualification, that the evidence proposed is not repugnant to or inconsistent with the contract. It ought never to be allowed to vary or contradict the written instrument, either expressly or by implication. Therefore, in an action on a policy of insurance "on the ship, till moored at anchor twenty-four hours, and on the goods till discharged and safely landed," evidence having been admitted that, by the custom of

the trade, the risk on the goods, as well as on the ship, expired in twenty-four hours, the Court of King's Bench granted a new trial on that ground, and on the new trial the evidence was rejected. (1)

Evidence of usage of trade, which contradicts the express words of a contract, is clearly inadmissible. (2) Thus, in *Blackett* v. *R. Ex. Ass. Company*, (3) in an action on a policy (in the usual form) upon ship and boat, and other furniture, evidence of usage that the underwriters never pay for the loss of boats slung upon the quarter, was held to be inadmissible at the trial, and this ruling was confirmed by the Court of Exchequer. "The objection," said the Lord Chief Baron, Lord Lyndhurst, "to the parol evidence is, not that it was to explain any ambiguous words in the policy, or any words which might admit of doubt, or to introduce matter upon which the policy was silent, but that it was at direct variance with the words of the policy, and in plain opposition to the language it used, namely, that whereas the policy imported to be upon ship, furniture, and apparel generally, the usage is to say, that it is not upon furniture and apparel generally, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain." *Blackett* v. *R. Exch. Ass. Co.*

In *Cross* v. *Eglin*, (4) in an action on a contract for the sale of "*about* 300 quarters (*more or less*) of foreign rye," shipped on board a certain ship (named), and for some other grain, evidence was offered, and received at the trial, that when the words "more or less" are used in a contract for grain, it is contrary to the custom of merchants to require the purchaser to accept so large an excess over the amount specified, as was offered by the seller. Lord Tenterden thought it was immaterial, in the present case, whether the evidence was properly *Cross* v. *Eglin.*

(1) Parkinson *v.* Collier, Park. Insur., last ed. p. 47, 653.

(2) Yeates *v.* Pim, 2 Marshall, Rep. 141. S. C. Holt. N. P. C. 95.

(3) 2 Tyrw. 266. 2 Cr. & J. 244.

(4) 2 B. & Ad. 106, tried before Parke, J. : a motion for new trial was made on the ground of the inadmissibility of this evidence. In Reading *v.* Menham, 1 M. & R. 234, evidence of the custom of the trade among coachbuilders was received, with reference to a written contract for the letting of a carriage; the usage was in exact conformity with the plain legal construction of the contract.

received or not: for if it was received properly, the verdict was right; if not, it was for the court to put their construction on the contract; and his opinion was, that the excess of quantity was greater than the terms of the contract warranted. Parke, J., and Patteson, J., said nothing upon the question as to the admissibility of the evidence, being of opinion that the seller, against whom the verdict passed, had not made out any right to insist on the plaintiff's taking the whole of this quantity of grain. But Littledale, J., entertained some doubt on that question; the words "about," and "more or less," seemed to him to be words of general import, and in that point of view, he thought there was much difficulty in receiving the proposed evidence to ascertain their meaning.

The usage in a public office, from which a note or bill issues, will not be allowed to control the legal import of the instrument. (1)

In an action against a person as seller, on a contract note in the defendant's name, where the defence was that he acted only as broker, proof that it was the custom of the place, where the parties lived, to send in brokers' notes without disclosing the principal's name, was adjudged to be inadmissible. (2) The object of the evidence tendered was to alter the written contract.

Usage explaining ancient grants.

If the language of ancient charters is become obscure from its antiquity, or the construction is doubtful, the constant and immemorial usage under the instrument may be resorted to for the purpose of explanation, (3) though it can never be admitted to control or contradict the express provisions of the instrument. Such continued usage is a strong practical exposition of the meaning of the parties: and modern usage, of forty or fifty years' duration, is evidence not only for that period, but evidence also from which it may be presumed, if nothing is shown to the contrary, that the same course was pursued in earlier

(1) Hogg *v.* Snaith, 1 Taunt. 347.

(2) Magee *v.* Atkinson, 2 M. & W. 440.

(3) R. *v.* Varlo, Cowp. 248. Gape *v.* Handley, 3 T. R. 288 n. R. *v.* Bellringer, 4 T. R. 810. R. *v.* Osbourne, 4 East, 333. Bailiff, &c. of Tewkesbury *v.* Bricknell, 2 Taunt. 120. R. *v.* Mayor of St. Alban's, 12 East, 559. R. *v.* Mayor, &c. of Stratford-upon-Avon, 14 East, 348. R. *v.* Mayor, &c. of Chester, 1 Maule & Selw. 101. Mayor of London *v.* Long, 1 Camp. 22. Chad *v.* Tilsed, 2 Brod. & Bing. 406.

times. (1) Even in the case of an act of Parliament, universal usage has been referred to as a proper expositor where the language is doubtful. (2) Lord Coke, on commenting on the statute of Gloucester, says, that when any claimed before the justices in eyre any franchises by ancient charter, if the words were general, and a continual possession was pleaded of the franchises claimed, or if the claim was by old and obscure words, and the party in pleading expounded them to the court, and averred continual possession according to that exposition, the entry was ever *inquiratur super possessionem et usum*; "and this," adds Lord Coke, "I have observed in divers records of those eyres, agreeably to that old rule, *optimus interpres rerum usus.*" (3)

The uniform course of modern authorities fully establishes the rule, that however general the words of ancient grants may be, they are to be construed by evidence of the manner in which the thing has been always possessed and used. (4) Thus, on an information to set aside an election to a perpetual curacy, it appeared that the impropriate rectory, out of which the curacy arose, had been granted in trust for the use of the parishioners and inhabitants of a parish for ever: on the part of the relators it was insisted, that the right of nomination to the vicarage ought to be confined to inhabitants paying scot and lot, or to persons paying to church and poor; and on the part of the defendants, that it extended to all house-keepers in general; Lord Hardwicke, in delivering his judgment, said, "Some sort of limitation is allowed by both sides to have been put by usage on the liberality of the grant, and in the construction of ancient grants and deeds there is no better way of construing them than by usage, and *contemporanea expositio* is the best way to go by;" and since in this case there was evidence of housekeepers having constantly voted, Lord Hardwicke held, that this usage ought to prevail. (5)

Attorney-Gen. v. Parker.

(1) By Richardson, J., 2 Brod. & Bing. 406.

(2) Sheppard *v.* Gosnold, Vaugh. 169; and see R. *v.* Scott, 3 T. R. 604.

(3) 2 Inst. 282.

(4) Weld *v.* Hornby, 7 East, 199. R. *v.* Osbourne, 4 East, 327.

(5) The Attorney-General *v.* Parker and others, 3 Atk. 576. The Attorney-General *v.* Forster, 10 Ves. 335.

Nor does it make any difference with respect to the admissibility of evidence of immemorial usage, for the purpose of aiding the construction of ancient instruments, whether the instrument be a charter granted by the crown, or merely a private deed. Thus, in the case of *Withnell* v. *Gartham*, (1) where the question was, on the construction of an ancient deed granting to the minister and churchwardens of a parish the power of appointing a schoolmaster, whether all the churchwardens must concur, or whether the act of the majority was sufficient, and the jury found the usage to be in favour of the appointment by a majority, Lord Kenyon, in speaking of the usage, and adverting to an argument which had been insisted on (namely, that the court ought to reject the evidence of usage, because the instances proved were not as ancient as the deed, and also because usage cannot be let in to explain a private deed), said, that if the first reason were sufficient to reject the usage, it would be difficult to know, how far such an objection might extend: in many cases, a party undertakes to prove a custom from the time of legal memory; but that proof is generally established by evidence of facts done at a much later period. And as to the second objection, Lord Kenyon said, there was no difference in that respect between a private deed and a king's charter; in both cases, evidence of usage might be given to expound them.

Withnell v. *Gartham.*

Thus, also, in the case of *Stammers* v. *Dixon*, (2) in an action for entering the plaintiff's close, where the defendant pleaded that the close was copyhold, and justified under a grant from the lord, and by the command of the copyholder; in support of this plea, the defendant proved that the person under whom he justified, and all those whose estate he had, for a long course of years had constantly taken the forecrop of grass and pasturage from the close, and then proved, by court rolls of the manor, admissions to a copyhold tenement "of three acres of meadow," (which was admitted to be the close in question), but every other benefit of the land, except the fore-

Stammers v. *Dixon.*

(1) 6 T. R. 388. See Lady Hewley's case, *supra*, p. 286.

(2) 7 East, 200. Wadley *v.* Bayliss, 5 Taunt. 752. Lord Petre *v.* Blencoe, 4 Gwill. 1484.

crop, had been enjoyed by those from whom the plaintiff claimed. Mr. Justice Heath, who tried the cause, was of opinion, "that, although the terms of the surrender and admission were sufficiently comprehensive to pass the soil and freehold, yet, as in ancient grants the legal import might be restrained by long and concomitant usage, which might be taken as evidence of the original intent of the parties in making the grant, so here the grant might be restrained by the received usage, and only pass the 'forecrop,' which would not carry the soil. And the Court of King's Bench agreed in this construction of the written evidence; and held, that the terms of the admissions were not incompatible with the plaintiff's right, and might receive a construction conformable to the usage.

It appears from some of the cases above cited, that the words of an instrument, in themselves conveying a general right to an estate, may in certain cases be limited and restrained by the manner in which the right has for a length of time been actually enjoyed. But in the *construction* of a legal instrument, where the question is whether a party is bound by his covenant to do a certain act (as, for example, to grant a renewal of a lease), courts of law will not consider the acts of the parties or their interpretation of the instrument. In one case, indeed, where it was doubtful, whether a covenant for renewal extended to a perpetual renewal, and the parties had renewed four times successively, the Court of King's Bench held that the legal effect was a perpetual renewal, on the ground that the parties themselves had, by their own acts, put a construction on the covenant, and that the court could not say the contrary. (1) But this decision has been frequently disapproved of, (2) and a different rule is now established. "It cannot be a legal mode of construction," said the Master of the Rolls, in a case of this kind, "that a party who has done an act, which he was not bound to do, or from a mistake, should therefore be bound for ever, without the power of retracting."

Covenant not to be construed by the *party's acts.*

(1) Cooke *v.* Booth, Cowp. 819.

(2) Baynham *v.* Guy's Hospital, 3 Ves. 298. Eaton *v.* Lyon, 3 Ves. 694. Iggulden *v.* May, 7 East, 237. 2 New. Rep. 452. Clifton *v.* Walmsley, 5 T. R. 566. On this subject, see Sir B. Sugden's Treatise on the Law of Vendor and Purchaser, vol. 2, p. 255.

Section IV.

Of the Rule that Written Instruments are not to be varied or contradicted by Extrinsic Evidence.

General rule. It is a general rule of law, that extrinsic evidence cannot be admitted to contradict, add to, substract from, or vary the terms of a will, deed, or written agreement. First, with respect to wills:—

Wills. A will must be understood to contain the testator's whole mind and intention on the subject-matters of devise; and no part of his intention can be looked for *dehors* the will. Extrinsic evidence cannot, therefore, be admitted for filling up a blank, where the name of the devisee is totally omitted, (1)—or for supplying a devise which has been omitted by mistake, (2)—or to alter an estate,—or to introduce a new subject-matter of devise, or a new devisee. (3) The judgment of Lord Chief Justice Tindal, in *Miller* v. *Travers,* before stated, contains all the information necessary for illustrating and enforcing the principle of this rule, which admits of no exception.—The rule is founded on the principles of the common law, independently of the Statute of Wills; (4) but that statute made the observance of it still more necessary and more obligatory. (5)

Deeds. The same rule applies to deeds and written agreements. Extrinsic evidence is not admissible to contradict, add to, subtract from, or vary the terms of a deed. (6) "It would be inconvenient," says Lord Coke, "that matters in writing, made

(1) Hunt *v.* Hort, 3 Bro. C. C. 311. *Vide supra,* in Miller *v.* Travers, p. 808.

(2) Lady Newburgh's case, 5 Madd. 364.

(3) See Miller *v.* Travers, *supra,* p. 305.

(4) See by Lord Hardwicke, in Parteriche *v.* Powlet, 2 Atk. 383, and see Hogg *v.* Snaith, 1 Taunt. 347.

(5) See Lord Cheyney's case, *supra,* p. 333.

(6) Countess of Rutland's case, 5 Rep. 26. For examples, see Buckler *v.* Millerd, 2 Vent. 107. Tinney *v.* Tinney, 3 Atk. 8. 1 Wils. 34. Lord Irnham *v.* Child, 1 Dickens, 554. Brydges *v.* D. of Chandos, 2 Ves. 417. Haynes *v.* Hare, 1 H. Black. 659. Clifton *v.* Walmesley, 5 T. R. 567. Ex parte Hooper, 2 Rose, B. C. 328.

by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by an averment of parties, to be proved by the uncertain testimony of slippery memory; and it would be dangerous to purchasers and all others in such cases, if such nude averments against matter in writing should be admitted."

Bond.

In an action of debt, on a bond conditioned to pay a sum of money on a certain day, the defendant cannot show that the bond was intended as an indemnity against another bond. (1)

Consideration.

A deed of assignment, which is expressly alleged, in the body of the deed, to be made in consideration of a certain sum of money paid down at the time of the execution, estops the assignor from showing that no money passed. (2)

Where deed ambiguous.

Lampon v. Corke.

But if the payment of the consideration is not conclusively and unambiguously stated in a deed, the truth of the matter may be proved, when it is necessary for the ends of justice. Thus, in *Lampon* v. *Corke*, (3) in an action of assumpsit, where the question was whether the plaintiff was estopped from recovering the amount of consideration stated in a deed of release, the deed recited that the releasee had previously *agreed to pay* the amount for the possession of certain premises, and that in consideration of the said sum *being now so paid as hereinfore mentioned, &c.*, then followed an acknowledgment of the receipt of the money,—and on the back there was indorsed a receipt for the sum. "The plaintiff," said Mr. Justice Holroyd, "is entitled to our judgment, unless he is estopped either by the deed of release or by the receipt indorsed on it. As to the latter, it is sufficient to observe, that, not being under seal, it cannot amount to an estoppel, but can only be evidence for the jury, capable of being rebutted by the other circumstances in the case: and if so, then, as it is admitte hat no such payment has actually been made, this receipt becomes of no importance. As to the deed, the question seems to me to depend on the

(1) Mease *v.* Mease, Cowp. 47. Fitzgibb. 75. Shelling *v.* Farmer, 1 Stra. 646. Butcher *v.* Butcher, 1 New. Rep. 113.

(2) Rowntree v. Jacob, 2 Taunt. 141. Baker *v.* Dewey, 1 B. & Cress. 707.

(3) 5 B. & A. 606.

construction to be given to the words already referred to, "in consideration of the said sum of 40*l.* being now so paid, as *hereinbefore is mentioned.*" If the deed had absolutely stated a payment, unaccompanied by such words of reference, the case would be very different. But, here, there are words of reference; and we must, therefore, look to the prior part of the deed, and there we find no statement of actual payment, but only of an agreement to pay. It seems to me, therefore, that this does not amount to an estoppel, so as to shut out the plaintiff from proof of the truth of the transaction. Estoppels are odious in the law, and, being so, they ought not to be allowed, unless they are very plainly and clearly made out. That is not the case in this deed; and, therefore, I think, it is no estoppel."

Doe v. *Webster.*

In *Doe* d. *Norton & another* v. *Webster*, (1) in an action to recover possession of land as parish-property, it appeared that the land in question had been purchased by the defendant at a sale by auction, and was described in the hand-bill containing the conditions of sale as "all that messuage, &c., in the occupation of, &c., (*except* a certain quantity of land, therein particularly described);" but in the conveyance afterwards executed, the parcels were described as in the hand-bill, with some variation, and the exception was omitted. The question at the trial was, whether the excepted parcel of land passed by the conveyance. To shew that this parcel was not part of the land sold, the hand-bill, containing the exception, signed by the defendant, and a verbal admission by the defendant that he had not bought the parcel in question, were received as evidence at the trial; and the verdict was for the plaintiff. But the Court of Queen's Bench determined that this evidence ought not to have been received, as it contradicted the deed, and, if admitted, would have the effect of altering the deed by introducing an exception; a new trial therefore was granted.

Parcels in conveyance not to be varied by printed conditions of sale.

Murley v. *M'Dermott.*

In the case of *Murley* v. *M'Dermott*, (2) a hand-bill, used

(1) 4 P. & D. 270.

(2) 3 Nev. & P. 356: the hand-bill was given in evidence on the part of the defendant: it contained a description of the land to be sold by auction, and described the property, bought by him, as having so many feet of frontage.

Where the deed itself refers to matter extrinsic.

for reference at a sale by auction, was held admissible on a question of *parcel* or *no parcel*. The plaintiff and defendant were purchasers of two lots at a sale from the same owner: the lot which each purchased was described in his deed by a reference to the occupation of the then tenant, and there were words to pass all that was "known or reputed to be parcel" of such occupation. There was evidence to shew that the hand-bill in question was circulated in the sale-room before and at the time of the sale, and that it was seen by the person who attended as the plaintiff's agent, and who had bought for him. Under these circumstances, the court thought the hand-bill admissible, not to control the language of the deed, or to construe it, but to apply it.

Proof of another consideration.

It is an established rule, that a party may prove some other consideration besides that expressed in the deed, provided it is consistent with the consideration expressed. Thus, if a deed of bargain and sale is expressed generally to be made "for divers good considerations," it may be averred and proved, that the bargainee gave money or other valuable consideration. (1) That such an averment may be taken, which stands with the deed, says Lord Coke, although it be not expressly comprised in the deed, is proved by the case of *Villers* and *Beamont* (2)* where the consideration in a deed of bargain and sale of lands was stated to be a sum of money, but it was averred and found by the jury, that the indenture was made

Villers v. Beamont.

(1) 2 Roll. Ab. 786, (N.) 1 Rep. 176. Lord Cromwell's case, 2 Rep. 76. Bedell's case, 7 Rep. 38. Willes, 677. 17 Ves. 192.

(2) 2 Dyer, 146, a. Vernon's case, 4 Rep. 3, S. P. And see Craythorne *v.* Swinburne, 14 Ves. 170.

* In the case of Villers and Beamont, (2 Dyer, 146, a.) an elaborate argument is to be found in support of the position, that "where a consideration is expressed in a deed of gift or grant, no other cause can be averred; but, if no cause is expressed, that a cause may then be averred out of the deed." The report adds, "that three judges argued to the contrary, and that the effect of that which is found by the assignment of, 'as well in consideration of the said marriage, &c. as of the sum,' &c. *is contained within the indenture, and so their finding is not contrary to it.*" All the authorities agree, that, where the deed is not impeached for fraud or other illegal matter, no consideration can be averred or proved contrary to that expressed in the deed; and further, the cases referred to in the text appear to have established, that it is not considered to be contrary to or inconsistent with a deed, to prove another consideration in addition to the consideration expressed.

"as well in consideration of marriage (to make it a jointure in bar of dower) as of the said sum of money;" and it was adjudged, that, although there was a particular consideration mentioned in the deed, yet an averment might be made of another consideration, which stood with the indenture, and which was not contrary to it. *A fortiori*, adds Lord Coke, the averment may be made, where no consideration is mentioned, but the deed is general "for divers good considerations;" for then the averment (that the bargainee gave money, &c.) is but an explanation and particularising of the general words of the deed, which include every manner of consideration; and in all these cases, the matter so averred is traversable and issuable. And Lord Hardwicke has held, that where no consideration is expressed in the deed, a party claiming the benefit of a trust under the deed, may prove a valuable consideration. (1)

R. v. Scammonden.

In a case of settlement, where the question was, whether a settlement had been gained by the purchase of an estate within the statute 9 Geo. 1, c. 7, s. 5, parol evidence was adjudged to be admissible to show that the parties, after having agreed upon twenty-eight pounds as the purchase money, (which was the consideration expressed in the deed of conveyance,) made a subsequent unwritten agreement before the execution of the deed, that the consideration should be increased to thirty-pounds, and that the latter sum was actually paid. (2) The party offering the evidence in this case, being a stranger to the deed, could not be estopped (although the parties to the deed might have been,) from proving the truth of the fact as to the amount of the consideration for the purchase of the estate, upon which amount the settlement would depend. (3)

Rule as between third parties.

Rex v. Laindon.

Rex v. *Laindon*, (4) another settlement case, may be here conveniently noticed. The case on the part of the appellants, in answer to the case of the respondents, was that the pauper

(1) Peacock *v.* Monk, 1 Ves. 128.

(2) R. *v.* Scammonden, 3 T. R., 474. R. *v.* Mattingley, 2 T. R. 12. R. V. Olney, 1 M. & S. 387. Doe d. Chandler *v.* Ford, 3 A. & E. 649.

(3) And see R. *v.* Llangunnor, 2 B. & Ad. 616. R. *v.* Cheadle, 3 B. & Ad. 838. R. *v.* Wickham, 11 Ad. & Ell. 517.

(4) 8 T. R. 379; and see 14 Ves. 170; 14 East, 544. R. *v.* Northwingfield, 1 B. & Ad. 912.

had gained a subsequent settlement in the respondent parish as a yearly servant, under a written agreement. The substance of the agreement was, that the one party, the pauper, should serve the other for three years to learn the business of a carpenter, at a certain rate of payment by the day. The respondents, with a view to show that the agreement was in truth to serve as an *apprentice*, not as a hired servant, (in which case, no settlement could be gained under it,—the instrument not being stamped as an indenture of apprenticeship, and therefore void,) offered parol evidence, that, at the time of executing the agreement, the pauper agreed to give the master a sum of money as a premium to teach him the trade, which premium he paid, and that it was further agreed that he was not to be employed in any other work than that of a carpenter, and that he was not otherwise employed. This evidence was objected to as contradicting the written agreement, but was received; and the court of quarter sessions decided that the pauper was not hired to serve the master as a yearly servant, but that the relation intended to be formed between them, and actually formed, was that of master and apprentice; consequently, that no settlement was gained. The Court of King's Bench held, that the evidence had been properly received, and confirmed the order of sessions. Mr. Justice Lawrence said, that the parol evidence was not offered for the purpose of contradicting the written agreement, but to ascertain a fact collateral to the written instrument, in order to explain the intention of the parties, the instrument being in some measure equivocal; and Mr. Justice Le Blanc said, the parol evidence was admissible as evidence of a fact collateral to the written instrument.—It is to be observed, the controversy in this case was between two parishes, who were not parties to the agreement; and the question to be determined was, whether the relation between the master and the pauper was one of master and hired servant, or of master and apprentice; and there can be no doubt that it was competent to these parties, who were strangers to the written instrument, to prove the entire agreement and the whole truth of the matter, upon which the settlement would depend. If an *action* had been brought against the *master* for not instructing the other party as an *apprentice*, the question

Rule as between third parties.

as to the admissibility of the evidence would have assumed a very different form; and the decision might have been different.

Evidence as to delivery of deed.

The delivery of a deed may be proved to have been either before or after the day when it purports to have been made, the date being considered a formal part only, and not the essence of the deed. In an action of debt upon a bond, the plaintiff may declare on a bond bearing date on a certain day, and prove the delivery on another day (1); or, may state in his pleading, that the deed was made and concluded on a different day from that on which the deed itself professes to have been made. (2)

Policy of insurance not to be varied by parol evidence.

Policies of insurance are within the rule before laid down; they cannot be contradicted or varied by extrinsic evidence. A written agreement, made by the parties before the time of signing the policy, is not admissible, if inconsistent with the terms of the policy. Thus, in an early case, where, in an action on a policy of insurance from Archangel to Leghorn, the defendant attempted to shew that the agreement before the subscription of the policy was, that the adventure should begin only from the Downs, the court would not admit the evidence. (3)

Charter parties.

The same rule of course applies to charter parties. In a case where a ship was chartered to wait for convoy at Portsmouth, Lord Kenyon would not suffer a parol agreement to be set up on the other side to substitute Corunna for Portsmouth. (4)

Contract for seamen's wages,

In the case of contracts of hiring between masters of ships and seamen,—though they are directed by statute to be in writing, under a penalty to be inflicted on the master, and it nas not been decided that they are void if unwritten,—still, when once reduced into writing, they cannot be varied or added to by parol. Thus it was ruled in the Court of Common Pleas, that a mate in a slave-ship could not, on the ground of

(1) Goddard's case, 2 Rep. 4 b.

(2) Stone *v.* Ball, 3 Lev. 348. Hall *v.* Cazenove, 4 East, 477.

(3) Kaines *v.* Knightly, Skin. 54, S. C., referred to in Bates *v.* Grabham, 2 Salk. 444, but misstated. Weston *v.* Emes, 1 Taunt. 115. Uhde *v.* Walters, 3 Campb. 16. *Vide supra*, p. 344, cases in which it has been determined that evidence of usage is not admissible to contradict.

(4) Leslie *v.* De la Torre, cited 12 East, 583.

a verbal promise, claim the perquisite of the price of a negro slave beyond the wages due to him by certain written articles of agreement, executed between the master, officers, and crew. (1)

Promissory note.

In an action on a promissory note or bill of exchange, the defendant will not be allowed to give evidence of an agreement between him and the plaintiff at the time of making the note, that it should be renewed, and that payment should not be demanded on its becoming due. (2) Nor is parol evidence admissible to shew, that a note, purporting to be payable on demand, was intended by the parties to be payable only on a contingency; (3) or that a note, payable on a certain day, was intended to be payable on some other day. (4) That the note was given on an illegal consideration, may certainly be proved, for a reason afterwards given; (5) but the general rule is, that no parol evidence can be received inconsistent with the terms of the note.

Written agreements.

By the rule of common law, independently of the Statute of Frauds, parol evidence could not be received to contradict a written agreement; the written instrument must be considered as containing the true agreement between the parties, and as furnishing better evidence than any which can be supplied by parol. (6) The reason assigned by Lord Coke against admitting parol evidence to contradict the terms of a deed, is very general, and applies to the case of a written agreement, though writing may not have been absolutely necessary. "It would be inconvenient," he says, "that matters in writing, made on consideration, and which finally import the certain truth of the *agreement* of the parties, should be controlled by an averment of the parties, to be proved by the uncertain testimony of slippery memory." (7)

(1) White *v.* Wilson, 2 Bos. & Pull. 116.

(2) Hoare *v.* Graham, 3 Campb. 57. Hogg *v.* Snaith, 1 Taunt. 347.

(3) Rawson *v.* Walker, 1 Starkie, N. P. C. 361. Woodbridge *v.* Spooner, 3 Barn. & Ald. 233. Moseley *v.* Hanford, 10 B. & C. 729. Foster *v.* Jolly, 1 C., M. & R. 703. Adams *v.* Wordley, 1 M. & W. 378.

(4) Free *v.* Hawkins, 1 Moore Rep. C. P. 535. 8 Taunt. 92, S. C.

(5) See *infra*, p. 367.

(6) 2 Atk. 383. Sayer, 189. 2 Bro. Ch. C. 219. 7 Ves. 218. 4 Taunt. 786. 2 Barn. & Cress 634.

(7) 5 Rep. 26.

"By the general rules of the common law," said Lord Denman, in his judgment in *Goss* v. *Lord Nugent*, (1) "if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to, or subtract from, or in any manner to vary or qualify the written contract."

Thus, where there has been a contract in writing for the sale of goods, specifying the quantity and the price, neither of the contracting parties would be allowed to give evidence of conversations *previous to*, or *contemporaneous with* the bargain, for the purpose of proving that the price was to be different, or that a different quantity was to be delivered; for this evidence would directly contradict the written memorandum, which must be considered as expressing the final intention and understanding of the parties at the time of the contract. For the same reason, if the time of carrying away the goods is not expressed in the agreement, (in which case a reasonable time is allowed,) evidence will not be admitted to shew that the purchaser verbally agreed to carry them away immediately after the purchase. (2)

Where a written engagement is absolute and positive for payment of a certain sum on a certain day, proof of an oral agreement, made at the same time, is not admissible to shew that the payment was to be prolonged, (3) or that it was to depend upon a contingency, (4) or that it was to be made out of a

(1) 5 B. & A. 64. See also by Lord Hardwicke, in Parteriche *v.* Powlet, 2 Atk. 384; and Clinan *v.* Cooke, 1 Schoal. & Lef. 35.

(2) Greaves *v.* Ashlin, 3 Camp. 426. Williams *v.* Jones, 5 Barn. & Cress. 108. See Jefferey *v.* Walton, 1 Starkie, N. P. C. 267, where, in an action for not taking proper care of a horse, which the defendant had hired, the time of hiring and the price were proved by a written memorandum, and it was proved by parol evidence that the defendant agreed to be liable for all accidents. It does not appear from the report whether the written memorandum was signed by the defendant; if it was not signed, it could not be considered as any part of the agreement. See also Knapp *v.* Harden, 1 Gale, 47; Reay *v.* Richardson, 2 Cr., M. & R. 427; Ingram *v.* Lea, 2 Camp. 521.

(3) Hoare *v.* Graham, 3 Camp. 57. Ford *v.* Yates, 2 Scott, N. S. 645.

(4) Rawson *v.* Walker, 1 Stark. Ca. 361.

particular fund, (1) or that rent reserved in the written agreement was to commence from a later day than that named in the agreement. (2)

Contract or sale of land, within the Statute of Frauds.

The same rule applies with still greater force to all written agreements which are required by the Statute of Frauds to be in writing. (3) They cannot be contradicted, or added to, or subtracted from, or substantially varied, by parol evidence; (4) such evidence would defeat the statute, and introduce that uncertainty, which it was the object of the legislature as far as possible to suppress. Thus in *Meres* v. *Ansell*, (5) in an action upon a written agreement for the grass and vesture of hay from off a close of land, on the trial of which action Lord Mansfield admitted evidence that it was agreed by parol when the written agreement was made, that the party should not only have the hay, but also the possession of the soil and the produce of that and another piece of land, the whole Court of Common Pleas afterwards decided that this evidence was inadmissible, as it annulled and substantially altered and impugned the written agreement. So in *Preston* v. *Merceau*, (6) *

Meres v. Ansell.

Preston v. Merceau.

(1) Campbell *v.* Hodgson, 1 Gow. R. 74.

(2) Henson *v.* Coope, 3 Scott, N. Ca. 48.

(3) By St. 29 C. 2, c. 3, s. 4, it is enacted, that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

(4) Binstead *v.* Coleman, Bunb. 65. Parteriche *v.* Powlet, 2 Atk. 383. Portmore *v.* Morris, 2 Br. C. C. 219. Hare *v.* Shearwood, 1 Ves. 241. Jackson *v.* Cater, 5 Ves. 688. 7 Ves. 218. Meres *v.* Ansell, 3 Wils. 275. Wain *v.* Warlters, 5 East, 10. Hope *v.* Atkins, 1 Price, 143. Bartlett *v.* Pickersgill, 1 Cox. Ch. C. 15.

(5) 3 Wils. 275; and see Mease *v.* Mease, Cowp. 47; Cuff *v.* Penn, 1 M. & S. 21; Hope *v.* Atkins, 1 Price, 143.

(6) 2 Black. 1249.

* In the case of Preston *v.* Merceau, above cited, Mr. Justice Blackstone, after stating that the court could neither alter the rent nor the term, the two things expressed in the agreement, is reported to have added, "that, with respect to collateral matters, it might be different; the plaintiff might show, who was to put the house in repair, or the like, concerning which nothing is said." But this opinion is not consistent with the principle established in Meres *v.* Ansel (3 Wils. 275), Rich *v.* Jackson (4 Bro. Ch. C. 515), Powell *v.* Edmunds (12 East, 6), and several

where the rent for a house was specified in a written agreement to be twenty-six pounds a year, and the landlord, in an action for use and occupation, proposed to shew by parol evidence that the tenant had also agreed to pay the ground-rent, the court refused to admit the evidence.

Rich v. *Jackson.*

In *Rich* v. *Jackson,* (1) a tenant, having paid the land-tax, brought an action to recover it back from his landlord, and gave in evidence a written memorandum of agreement in the plaintiff's handwriting, which specified the rent and terms, but was silent respecting the payment of taxes; the defendant offered parol evidence that, previously to the drawing up of the memorandum, it had been mentioned and was understood by the parties, that the rent was to be paid clear of all taxes: this evidence was rejected, and the Court of Common Pleas afterwards, on a motion for a rule to shew cause why the verdict should not be set aside, adjudged the evidence to be inadmissible, and refused the rule.

Powell v. *Edmunds*

Upon the same principle, the verbal declarations of an auctioneer at the time of sale are not admissible in evidence for the purpose of varying, or adding to, or explaining the printed conditions of sale. (2) Thus, where the conditions described only the number and kind of timber trees to be sold by lot, but said nothing as to the weight of the timber, the defendant, in an action brought against him for not completing his purchase according to the conditions, was not allowed to prove that the auctioneer at the sale had warranted the quantity of timber to amount to a certain weight; and the Court of King's Bench was of opinion that this evidence had been properly rejected. (3)

(1) 4 Bro. Ch. C. 515. 6 Ves. 334, n. S. C.

(2) Gunnis *v.* Erhart, 1 H. Bl. 289. Jenkinson *v.* Pepys, cited 6 Ves. 330. Higginson *v.* Clowes, 15 Ves. 516. Clowes *v.* Higginson, 1 Ves. & Beam. 524. Winch *v.* Winchester, 1 Ves. & Beam. 378. Ogilvie *v.* Foljambe, 3 Merivale, 53. Bradshaw *v.* Bennett, 5 C. & P. 48. Shelton *v.* Livius, 2 C. & J. 416.

(3) Powell *v.* Edmunds, 12 East, 6. Jones *v.* Edney, 3 Camp. 285.

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other cases above mentioned, which plainly show that parol evidence is not admissible either to vary, or to add to, the terms of the written agreement. To add a new term, or to define what was before indefinite, is in effect to make a material variation.

Lord Ellenborough said, "the purchaser ought to have had it reduced into writing at the time, if the representation, then made as to the quantity, swayed him to bid for the lot. If the parol evidence were admissible in this case, in what instance might not a party by parol testimony superadd any term to a written agreement?—which would be setting aside all written contracts, and rendering them of no effect. There is no doubt that the warranty as to the quantity of timber would vary the agreement contained in the written conditions of sale."

Goss v. *Lord Nugent.*

In the case of *Goss* v. *Lord Nugent*, (1) the plaintiff contracted by a written agreement to sell to the defendant several lots of land described in a particular, and to make out a good title to them; a deposit, stipulated in the agreement, was paid by the defendant: it was afterwards discovered that a good title to one of the lots could not be made; the defendant, on being informed of this by the plaintiff's attorney, told him he would accept the title notwithstanding that defect; possession of the whole was then delivered to him; but the defendant afterwards refused to complete the purchase, objecting to the defect of title as to the one lot, and refusing to pay the remainder of the purchase money,—for the recovery of which the action was brought. The question was, whether the agreement for the purchase of the several lots, subject to the waiver above mentioned as to one of the lots, could be enforced at law. The court held, that the object of the Statute of Frauds (2) was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only. But the contract, now sought to be enforced, was not a contract entirely in writing; it was a new contract which the parties had made, and that new contract was to be proved partly by the former written agreement, and partly by the new verbal agreement: the court, therefore, held, according to the general effect and meaning of the Statute of Frauds, that the contract, brought forward by the plaintiff, being a contract not wholly in writing, could not be enforced at

(1) 5 B. & Ad. 58. Lord Denman delivered the judgment of the Court.

(2) See the clause referred to, in p. 359, n. (3).

law. (1) In the course of the argument Mr. Justice Parke observed, "Assuming that a written contract concerning land may be *wholly* waived by a new agreement not in writing, —here, there has not been a waiver of the entire agreement, but of a part of it only, and the effect of that waiver is to substitute for the original contract a new one which is to be proved partly by matter in writing, and partly by oral testimony." The same principle applies to cases where oral evidence is offered to shew a variation of part of a contract relating to an interest in lands, though that part might have been good of itself without writing.

Contract for the sale of goods, within Statute of Frauds.

When a contract is made for the sale of goods, and the bargain has been reduced into writing, pursuant to the 17th section of the Statute of Frauds, parol evidence would not be admitted to show, that the parties agreed to vary the quantity of goods to be delivered. (2) If the time for the delivery of the goods is stipulated and fixed by the contract, a verbal alteration of the time would be an alteration of the written contract; and from the decision in *Goss* v. *Lord Nugent* it seems to follow, that a written contract for the sale of goods, varied by an oral stipulation as to the time of delivery (or any other material particular), could not now be enforced at law.

There are cases, however, (*Warren* v. *Stagg*, and *Cuff* v. *Penn*) in which it has been held that a verbal alteration of the time of delivery, or of the particular mode of delivery, may be enforced as part of the contract,—these particulars being considered no essential parts of the contract. In the former of those cases, *Warren* v. *Stagg*, (3) proof of a verbal agreement was al-

Warren Stagg.

(1) If this had been a case *at common law*, uncontrolled by the Statute of Frauds or any other statute, the decision would have been different. "If, said Lord Denman, the present contract were not subject to the control of any Act of Parliament, we think that it would have been competent for the parties, by word of mouth, to dispense with requiring a good title to be made to the lot in question, and that the action in such a case might have been maintained."

(2) The 17th section of 29 Car. 2, c. 3, enacts, in certain cases, that a contract for the sale of goods shall not be allowed to be good, unless some note or memorandum in writing, of the bargain, shall be made and signed by the party, &c.

(3) Point ruled by Buller, J.; cited in 3 T. R. 591. On this and the next case see Goss *v.* Lord Nugent, 2 N. & M. 35.

lowed to prolong the time limited in a written contract, for the delivery of a certain quantity of barley; on the ground, that it was only a continuance of the original contract, and a forbearance on the part of the plaintiff for a longer time. In the second case, *Cuff* v. *Penn*, (1) where the question was whether, after a part delivery of goods, which according to the written contract were to be delivered at fixed times, a verbal agreement to extend the time for the delivery of the remainder was good, the Court of King's Bench held that it was good; for this was not a parol variation of the contract, but what had been done was only in performance of the original contract: the parties agreed to a substitution of other days, instead of those originally specified for its performance, but still the contract remained. Of these two cases, Mr. Justice Parke, after remarking that the Statute of Frauds requires a note or memorandum in writing of contracts for the sale of goods of the value of ten pounds, observed, in *Goss* v. *Lord Nugent*, he never could understand the principle on which those cases proceeded, for the new contract, to deliver within the extended time, must then be proved partly by written and partly by oral evidence.

Cuff v. *Penn.*

It seems to be generally understood, that executory written agreements, not under seal, may before breach be discharged and abandoned by a subsequent unwritten agreement, as well in cases where the original contract is required by the Statute of Frauds to be in writing, as where writing is unnecessary. Agreements, not by specialty, whether written or unwritten, are classed on the same level, and denominated agreements by parol; there is no such third class recognised by the law of England as contracts in writing not under seal; if they are merely written, and not specialties, they are called parol, or, more properly, simple contracts. (2) It follows, therefore, that to admit evidence of an unwritten agree-

Executory written agreements discharged by parol.

Rule at law.

(1) 1 M. & S. 21. In Wilson *v.* Hart, 7 Taunt. 295; 1 Moore, 45, S. C. parol evidence was admitted to show that a written contract, purporting to be made between A. & B. as seller and buyer, was in fact made by B., not on his own account, but as agent for a third person. See Magee *v.* Atkinson, 2 M. & W. 440; *supra*, p. 346.

(2) Rann *v.* Hughes, 7 T. R. 350, n.

ment, for the purpose of showing an abandonment or discharge of a previous written agreement, would not be to dissolve the agreement by matter of an inferior nature. Nor does the Statute of Frauds contain any provision respecting the dissolution of agreements: it prescribes the manner of revoking wills, and in many cases makes a written memorandum necessary in order to establish and enforce agreements; but, as to the discharge or abandonment of executory agreements, the statute is entirely silent, leaving the case as it stood at common law. The 17th section enacts, in certain cases, that "*a contract for the sale of goods* shall not be allowed to be good, unless some note or memorandum in writing of the bargain shall be made and signed," &c.; but an agreement to waive that contract, before any breach has been committed, is not a contract for the sale of goods, and may therefore be binding, though not reduced into writing. So, the fourth section enacts, that "no action shall be brought *upon any contract or sale of lands*, &c., or any interest in or concerning them, unless the agreement, upon which the action shall be brought, or some memorandum or note thereof, shall be in writing," &c.: this is very different from enacting, that all contracts or agreements *concerning* land shall be in writing—terms so general and comprehensive, that, if they had been introduced into the act, they might be considered as including an agreement for the *waiver* of a purchase-contract, as well as the original agreement itself. The section only provides, "that *no action shall be brought upon any contract or sale of lands*," &c.; but it does not proceed to enact, that in case an action is brought, and the defence set up is a dissolution and abandonment of the agreement, some note or written memorandum is also necessary to give effect and validity to such subsequent agreement.

Written contract (at common law) varied by one subsequent unwritten.

It appears from the judgment in *Goss* v. *Lord Nugent*, (1) that a written contract which is not required by any statute to be in writing, may be varied as to some of its terms by a subsequent unwritten contract, and that in this altered form it may be enforced. It appears also to be the inclination of the

(1) 5 B. & Ad. 65. *Vide supra*, p. 361.

mind of the court, that such a written contract, (that is, a contract not required to be in writing), may be dissolved and abandoned altogether by an unwritten contract. "It is to be observed, said Lord Denman," that the statute does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought, unless they are in writing. And as there is no clause in the Act which requires the dissolution of such contracts to be in writing, it should seem that a written contract concerning the sale of lands may be still waived and abandoned by a new agreement not in writing, so as to prevent either party from recovering on the contract that was in writing."

Written contract (at common law) dissolved by one subsequent unwritten.

On a bill filed in a court of equity for the specific performance of a written agreement, it appears to be the better opinion, that the defendant may insist that the agreement has been since discharged merely by parol between the parties. (1)

Rule in equity.

In the case of *Buckhouse* and *Crossby* (2), indeed, where a bill was filed for the specific performance of a contract for the sale of an estate, and the defendant insisted that the contract had been discharged by parol, in support of which the case of *Gorman* v. *Salisbury* was cited as an authority, Lord Hardwicke is reported to have declared, that "though he would not say, that a contract in writing could not be waived by parol, yet he should expect in such a case a very clear proof, and the proof in the case before him he thought very insufficient to discharge a contract in writing;" Lord Hardwicke then observed, that the Statute of Frauds requires all contracts and agreements concerning land to be in writing (3), and that an agreement to waive a purchase-contract is as much an agreement concerning land as the original contract; however, he added, there was

(1) Gorman *v.* Salisbury, 1 Vern. 240, cited and approved by Sir J. Strange, in Legal *v.* Miller, 2 Ves. 299, and in Pitcairne *v.* Ogbourne, 2 Ves. 376, and cited by Lord Chancellor Redesdale in 1 Schoal. & Lef. 39. 2 Ves. 229, S. P. 1 Ves., jun., 404, S. P. 17 Ves. 356. Robinson *v.* Page, 3 Russ. 119. And see Goss *v.* Lord Nugent, 5 B. & Ad. 58, 2 N. & M. 34.

(2) Eq. Cas. Ab. 32.

(3) This is not quite correct. See the last page, and p. 359, n. (3).

not any occasion then to determine the point.* And in the case of *Bell* v. *Howard*, (1) Lord Hardwicke, after noticing an objection on the part of the defendant, against decreeing an execution of written articles for the sale of an advowson, (namely, that the plaintiff had waived the articles) is reported to have said, "It is certain, an interest in land cannot be parted with, or waived, by naked parol without writing; but added, "that articles may by parol be so far waived, that, if the party come into a court of equity to have a specific execution of them, such parol waiver will rebut the equity which the party before had, and prevent the court from executing them specifically."

Price v. *Dyer.* But in a later case on this subject (2), where the plaintiff prayed a specific performance of an agreement for a lease, under which the plaintiff had taken possession, and afterwards, as the defendant stated in his answer, the parties mutually abandoned the terms of the written agreement, and made another agreement by parol, the Master of the Rolls, observing upon the argument for the defendant, "that the agreement was waived, and that a written agreement may be so far waived by parol, that the court will refuse the interposition of its equitable jurisdiction to enforce it," said, that, as he conceived there was not in the case before him any waiver within the

(1) 9 Mod. 302.
(2) Price *v.* Dyer, 17 Ves. 356—363. See also 9 Ves. 250.

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* In this case of Buckhouse and Crossby, the waiver was not between the purchaser and vendor, but between a former and a subsequent purchaser. The material facts of the case will be found to be, that A., seised of lands in fee-simple, mortgaged them to the defendant, and afterwards authorized his attorney to sell the estate, who sold it by parol agreement to the plaintiff; A. being informed of this sale, wrote to the plaintiff, acquainting him that he accepted the purchase-money; afterwards A., by letter, offered the estate for the same money to a third person, who agreed with him for the purchase on behalf of the defendant, and accordingly A. by indenture conveyed the premises to the defendant in consideration of 300 guineas then paid. Before this conveyance, C., who treated for the purchase on behalf of the defendants, had notice of the plaintiff's title, but, being examined as witness for the defendant, swore that, before the conveyance was executed to him, the plaintiff agreed, that all prior contracts between him and A. should be void, and that it should be referred to A., whether the plaintiff or the defendant should be the purchaser, and that A., being written to, gave the preference to the defendant.

meaning of the dicta or the decisions upon the subject, it was not necessary for him to give any precise opinion upon the point; "but," he added, "as at present advised, I incline to think, upon the doctrine of this court, such would be the effect of a parol waiver clearly and satisfactorily proved. The waiver, spoken of in the cases, is an entire abandonment and dissolution of the contract, restoring the parties to their former situation. No such thing was for a moment in the contemplation of the parties. All that they at any time meant, was to add to, or modify, the terms of the original agreement." The bill was accordingly dismissed, but without costs.

Proof of fraud, &c. admissible.

It is a settled principle of law, that a party to a deed or written agreement, may plead, as a defence to an action, and prove by evidence, the illegality of the instrument; and it appears to be generally understood, that a party is not restrained from pleading any matter which shows that the instrument was given upon an illegal consideration, whether it be consistent with the instrument or not. (1) This principle holds universally, whether the instrument is illegal by common law, or declared to be so by statute law. Thus, a party may plead, and prove by evidence, that the instrument is void, by reason of fraud, usury, compounding of felony, &c. (2) A deed may be avoided on the ground of fraud; but the objection is not to come from one who is a party or privy to it, for no man can allege his own fraud, in order to invalidate his own deed. (3)

The rule which allows a party to impeach an instrument as illegal and void, is as old as the other general rule before mentioned, which disallows of evidence to contradict and vary a written instrument; and both alike are conducive to the ends of justice,—the one, for giving security and effect to valid instruments—the other, for annulling such as are illegal, and for putting an end to transactions which never ought to have existed. If this power of annulling, by means of extrinsic

(1) See what is said by Lord Ellenborough in Paxton *v.* Popham, 9 East, 421.

(2) Buckler *v.* Millerd, 2 Ventr. 107. Collins *v.* Blantern, 2 Wils. 347. Paxton *v.* Popham, 9 East, 408. Bull. N. P. 173. The case of Collins *v.* Blantern is one of the leading cases in Mr. Smith's Selection, and the reader will find all the cases collected in the notes.

(3) 3 Barn. & Ald. 369.

evidence, were not allowed, the other rule would be made a shelter for injustice.

Usury.

In an action of debt upon a bond, the defendant may plead that the bond was given for an usurious consideration, though a different and a legal consideration may be recited in the instrument. (1)

Fraud in case of a deed.

When fraud is imputed, the party insisting on the fraud may prove any consideration, however contrary to the averment in the deed, to show the fraudulent nature of the transaction. Thus, where the considerations, mentioned in the deed, were ten thousand pounds and natural love and affection, the lords commissioners of the great seal directed an issue, to try whether natural love and affection formed any part of the consideration, the estates conveyed by the deed being worth thirty thousand pounds. On an appeal, this was confirmed; and the jury, on the trial of this issue, finding that natural love and affection constituted no part of the consideration, the deed was afterwards set aside by the Court of Chancery. (2)

Filmer v. *Gott.*

Fraud in case of a will.

For the purpose of setting aside a will, on the ground of fraud, extrinsic evidence is admissible as in other cases. In *Doe* d. *Small* v. *Allen* (3) evidence was tendered, that the testator, at the time of the execution of the will, (which was impeached as having been obtained by fraud,) inquired whether it was the former will, and was answered that it was the same, whereas in fact it was a different will. This evidence was refused at the trial, but decided by the court above to be admissible. "Evidence may be given," said Lord Kenyon, "to show that a will was obtained by fraud; and the effect of the evidence offered in this case, was to show that one paper was obtruded on the testator for another, which he intended to execute:" or, as Mr. Justice Grose said, "When the testator asked for a duplicate of his former will, the persons about him substituted another instead of it."

Doe v. *Allen.*

(1) Buckler *v.* Millerd, 2 Ventr. 107.

(2) Filmer *v.* Gott, 4 Bro. Parl. C. 234, 2nd edit.

(3) 8 T. R. 147. Doe *v.* Hardy, 1 M. & R. 525.

Evasion of stamp act.

Upon the same principle, where indentures or other writings are not available in evidence, unless the consideration paid or contracted for is truly expressed in the instrument, it may be proved that a greater sum than is mentioned was actually paid, or that the writing does not contain the whole of the agreement, but that some of the terms of the agreement were omitted, for the purpose of evading the provisions of the stamp acts. (1)

In these and similar cases, the general reason against admitting parol evidence will not apply; the danger is, not that the admission of such evidence would introduce fraud or uncertainty, but that fraud would be assisted by its exclusion, the whole object of the evidence being to expose and defeat a secret fraud.

Party charged with fraud not allowed to prove any other consideration.

But although a party, who impeaches a deed for fraud, may prove a different consideration, the party *charged* with the fraud will not be allowed to prove any other consideration in support of the instrument. Thus, where a bill was filed to set aside, as fraudulent, a conveyance expressed to be made in consideration of an annuity, and on the part of the defendants it was objected, that the grantor of the estate had often declared, "he would rather that his kinsman, one of the defendants, should have the estate in consideration of this annuity, than any other person for a more valuable consideration, and that he was willing to give the premises to his kinsman;" the Master of the Rolls, after stating, that the deed and the answer had put the defence on another ground, declared that it would be of mischievous consequence, and liable to the danger of perjury which the Statute of Frauds intended to prevent, to suffer parol evidence to prove blood and kindred to have been the consideration of this conveyance. (2)

(1) R. *v.* Scammonden, and R. *v.* Laindon, *supra*, p. 354.

(2) Clarkson *v.* Hanway, 2 P. Wms. 203. 2 Schoal. & Lef. 501. Doe d. Roberts *v.* Roberts, 2 B. & A. 368.

PART THE THIRD.

CHAPTER VIII.

OF THE ATTENDANCE OF WITNESSES.

THE process which our courts of law have instituted for the purpose of compelling the attendance of witnesses, is the writ of subpœna *ad testificandum*. This writ commands the witness to appear at the trial, to testify what he knows in the cause, under the penalty of 10*l*., to be forfeited to the king. And the stat. 5 Eliz. c. 9, s. 12, (which refers to the process of courts of record for the attendance of witnesses, as process well known and then in use, (1) gives an additional remedy, by enacting that "if any person (upon whom any process out of a court of record shall be served, to testify concerning any cause or matter depending there, and having tendered to him, according to his countenance or calling, such reasonable sum of money for his costs and charges, as, with regard to the distance of the place, is necessary to be allowed), do not appear according to the tenor of the process, not having a lawful and reasonable cause to the contrary, he shall forfeit for every such offence 10*l*., and yield such further recompense to the party grieved, as, by the discretion of the judge of the court out of which the process issues, shall be awarded."

Subpœna.

5 Eliz. c. 9.

Subpœna *duces tecum*.

If a witness has in his possession any deeds or writings,

(1) See 9 East, 484.

which are required at the trial, a special clause must be inserted in the subpœna, called a *duces tecum*, commanding him to bring them with him. When the writings are in possession of the adverse party or his attorney, notice should be given to produce them; and if, after proof of a reasonable notice, they are refused, secondary evidence of the contents will be admitted. It will not be necessary to give notice to the defendant in person; giving it to his attorney will be sufficient even in penal actions. (1)

Notice.

This writ of subpœna *duces tecum*, as well as the other writ of subpœna *ad testificandum*, is compulsory upon the witness. And though it will be a question for the consideration of the judge at the trial, whether in any particular case the actual production of writings should be enforced, yet the witness ought always to have them ready to be produced, if required, in obedience to the judicial mandate. (2) From the earliest times, our courts of law, in order to give effect to their proceedings, have resorted to these compulsory measures for the production of evidence; measures obviously essential to the existence and constitution of courts of justice.

Some rules have recently been made by the courts to diminish the expense of proving written documents. By a rule of H. T. 2 Wm. 4, (3) it is ordered, "that the expense of a witness, called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and he shall have refused or neglected." A similar rule promulgated at the same time, (4) applies to the expense of a witness called to

Regulations as to costs of proving documents.

(1) Attorney-General *v.* Le Merchant, 2 T. R. 203, n. Cates q. t. *v.* Winter, 3 T. R. 306. See form of writ, Tidd's Forms, 283.

(2) Amey *v.* Long, 9 East, 485. Field *v.* Beaumont, 1 Swanst. 209. If a witness who has been served with the writ of subpœna, has delivered the papers, &c. in fraud of the subpœna, to the opposite party who does not produce them, secondary evidence may be given of them, without a previous notice to produce. Leeds *v.* Cook, 4 Esp. 256.

(3) Reg. VI.

(4) Reg. VII. See the rule, as to what the summons must state.

prove any written instrument stated upon the pleadings. In the latter case, however, a summons to admit the execution must be taken out before a judge, who has power to give a party the right to his costs of such proof, not only if the party refuses to make an admission, but also if he does not think it reasonable to require it. Neither of these rules give any new right to costs; they merely restrict the right of the successful party to his costs, if he has not observed their provisions. A much more effectual provision, to diminish the expense of proving a document which a party improperly refuses to admit, is one which awards, as a penalty against him, the costs of the proof whatever may be the result of the trial: this is contained in the rules of H. T. 4 Wm. 4, which alter materially the previous law of costs. The judges were empowered to make the latter rules by the stat. 3 & 4 Wm. 4, c. 42, s. 15. The effect of them is that if a party, upon receiving notice of an intention to offer in evidence the written or printed documents described in the notice, shall refuse to do so, and a judge, upon a summons taken out, shall think he ought reasonably to be required to admit them, he will be subject to pay the costs of the proof made necessary by his refusal, whatever may be the result of the cause. (1) It is in the discretion of the judge, before whom the summons is taken out, to give the costs of the application and inspection. (2) If the party, who produces the documents in evidence, shall not have required the other party to admit them, or if the judge shall not, by indorsement upon the summons, have declared that he did not think it reasonable to require the admission of the writings, the costs of proof will not be allowed. (3) The admission of documents under these rules merely dispenses with the necessity of proving them, and waives no right of objecting to the admissibility of them, when proved. (4)

(1) Reg. H. T. 4 W. 4, reg. 20. See the rule and the form therein given for the description of the documents intended to be given in evidence.

(2) *Ibid.*

(3) *Ibid.*

(4) It is presumed that this is quite clear upon the language of the rules; all doubt, however, is removed by the form of the notice given in the rules, which is to admit "saving all just exceptions to the admissibility of such documents as evidence."

Service of subpœna.

The writ of subpœna, when sued out, is to be regularly served on the witness; and as only four witnesses can be included in one writ of subpœna, (1) several writs are frequently necessary. In order to save expense, it is settled that service of a ticket, containing the substance of the writ, will be as effectual as service of the writ itself. (2) The writ or ticket should be served personally on the witness, (3) and in reasonable time before the day of trial, that he may suffer the less inconvenience from his attendance on the court. (4) Notice to a witness in London at two in the afternoon, requiring him to attend the sittings at Westminster in the course of the same evening, has been held to be too late. (5) It has been said, that if the witness, whose attendance is required, be a married woman, it will be necessary to serve the subpœna upon her personally, and the tender of the expenses should be made to her, and not to her husband. (6) If a cause appointed for one sitting be made a *remanet*, the subpœna must be re-sealed and re-served. (7)

When.

Privilege from arrest.

Witnesses, as well as the parties in a suit, are protected by courts of justice, and privileged from arrest, during the necessary time consumed by them in going to the place where their attendance is required, in staying there for the purpose of such attendance, and in returning thence. (8) And, in ordinary

(1) Cowp. 846.

(2) Goodwin *v.* West, Cro. Car. 522, 540. Maddison *v.* Shore, 5 Mod. 355, S. P.

(3) Smalt *v.* Whitmill, 2 Stra. 1054. Wakefield's case, Rep. temp. Hard. 313, S. P.

(4) Hammond *v.* Stewart, 1 Stra. 509.

(5) 2 Tidd. Pr. 806.

(6) This case of Goodwin *v.* West, Cro. Car. 522, 540; 1 Jones, 430, S. C. is usually referred to as the authority for this position, but in the report in Croke no such point appears, the service being stated to have been on the wife, and the tender of expenses made to her. In the report by Sir W. Jones, the facts are differently stated, *viz.* that the service and tender were made to the defendant in the suit for the penalty, and that, upon objection being made that the party ought to be served, the court overruled it. The report by Sir W. Jones is inconsistent and unintelligible. The report in Croke shows that service and tender to the wife would be sufficient, and it is no authority for saying, that the service on the husband would be insufficient. It is evidently safer to pursue that course which has been held good, *viz.* to serve the wife with the writ, and tender her the expenses.

(7) Sydenham *v.* Rand, 24 G. 3, K. B., cited from MS. in 2 Tidd. Pr. 805.

(8) 2 Roll. Ab. 272. Lightfoot *v.* Cameron, 2 Black. Rep. 1113. Meekins *v.* Smith, 1 H. Bl. 636. Randall *v.* Gurney, 3 Barn. & Ald. 252.

cases, it is not necessary for the protection of a witness, that he should have been served with a subpœna, if, upon application to him, he consented to attend without one.(1) A

For what time. reasonable time is allowed to the witness for going and returning; and in making this allowance the courts are disposed to

To whom. be liberal. (2) This privilege has been extended to a party in the suit attending on an arbitration under an order of nisi prius, (3) or on the execution of a writ of inquiry, (4) and to persons attending the Insolvent Debtors' Court. (5) A bankrupt, also, attending a meeting of commissioners in pursuance of a notice, and witnesses attending upon summons, are protected from arrest at the suit of a creditor. (6) And, by the Mutiny Act, witnesses are privileged from arrest during their necessary attendance on courts martial, in the same manner as witnesses attending a court of law. A witness is not privileged from being arrested by his bail: the bail may take him, after he has finished his evidence, for the purpose of surrendering him. (7)

Habeas corpus ad testificandum.

A subpœna can have no effect, where the witness is in custody, or on board a ship under the command of an officer, who refuses to allow his attendance. The course, in such case, is to sue out a writ of *habeas corpus ad testificandum;* (8) for which purpose application ought to be made to the court or to a judge, upon affidavit of the party applying, stating that he is a material witness, and willing to attend. (9) Upon this appli-

(1) Lord Kenyon, C. J., in Arding *v.* Flower, 8 T. R. 536. 1 Tidd. Pr. 195.

(2) 2 Blac. Rep. 1113. Hatch *v.* Blisset, Gilb. Cas. 308, cited 2 Stra. 986. 13 East, 16, n. (*a.*) Willingham *v.* Matthews, 2 Marshall, Rep. 57. See Randall *v.* Gurney, 3 Barn. & Ald. 252, and Tidd. Pr. 195, where the cases on this subject are collected. The later cases are collected in Strong *v.* Dickenson, 1 M. & W. 493.

(3) Spence *v.* Stuart, 3 East, 89. Randall *v.* Gurney, 3 Barn. & Ald. 252.

(4) 4 Moore, 34.

(5) 6 Taunt. 356.

(6) 5 G. 2, c. 30, s. 5. 6 G. 4, c. 16, s. 117. Arding *v.* Flower, 8 T. R. 534. 2 Blac. Rep. 1142. Kinder *v.* Williams, 4 T. R. 377. Spence *v.* Stuart, 3 East, 89. *Ex parte* Byne, 1 Ves. & Beam. 316. 1 Tidd. Pr. 200.

(7) *Ex parte* Lyne, 3 Stark. N. P. R. 132. Lord Tenterden refused to discharge him on motion.

(8) Tidd. Pr. 809. *Ex parte* Tillotson, 1 Stark. N. P. C. 470. See form of affidavit in Tidd's Forms, p. 283.

(9) Rex *v.* Rodham, Cowp. 672. On the trial of Sir John Friend for high treason, Lord C. J. Holt, on the application of the prisoner, or-

cation the court in its discretion will make a rule, or the judge will grant his *fiat* for a writ, (1) which is then sued out, signed, and sealed. (2) The writ should be left with the sheriff or other officer, who will be bound to bring up the body, on being paid his reasonable charges. If the witness be a prisoner of war, he may be examined on interrogatories, but cannot be brought up without an order from the Secretary of State. (3)

It has been doubted, whether persons in custody could be brought up as witnesses by writ of *habeas corpus*, to give evidence before any other courts except those at Westminster; but now, by stat. 43 G. 3, c. 140, it is enacted, that a judge of either of the courts may, at his discretion, award such writ for bringing a prisoner, detained in any gaol in England, before a court martial, or before commissioners of bankrupt, commissioners for auditing the public accounts, or other commissioners acting by virtue of any royal commission or warrant. And the stat. 44 G. 3, c. 102, authorizes the judges of the court of King's Bench, or Common Pleas, or Exchequer, in England or Ireland, or justices of oyer and terminer or gaol delivery (being such judge or baron), to award writs of *habeas corpus* for bringing prisoners detained in gaol before any of the courts, or any sitting at *nisi prius*, or before any court of record in these parts of the United Kingdom, to be there examined as witnesses in any civil or criminal cause. By the same act, justices of great sessions in Wales and the county palatine of Chester have the same authority within the limits of their jurisdiction. The application for a writ of *habeas corpus* under this statute ought to be made to a judge out of court. (4)

43 G. 3, c. 140.

44 G. 3, c. 102.

No witness is bound to appear in civil cases, unless his reasonable expenses, for going to and returning from the trial, and for his reasonable stay at the place, be tendered to him at the

Payment of expenses.

dered his clerk to prepare a warrant for a *habeas corpus*, 4 St. Tr. 600, fol. ed. 13 Howell's St. Tr. 3. And see Layer's case, Fortesc. Rep. 396.

(1) Rex *v.* Burbage, 8 Burr. 1440.

(2) Tidd. Pr. 809.

(3) Furly *v.* Newnham, 2 Doug. 419.

(4) Gordon's case, 2 Maule & Selw. 582.

time of serving the subpœna; nor, if he appears, is he bound to give evidence, till such charges are actually paid or tendered, (1) except he reside within the weekly bills of mortality, and be summoned to give evidence within them, in which case it is usual to leave a shilling with the subpœna ticket. (2) The necessity of this previous tender arises from the special provision in the act of Elizabeth, before cited. If a necessary witness is brought over from a foreign country, whether brought after or before the commencement of an action, the reasonable expenses both of his coming to this country, and of his subsistence here pending the action, and of his return, will be allowed in the taxation of costs, provided he is brought over *bonâ fide* for the purposes of the particular action. (3) Now, however, as witnesses out of the jurisdiction of the courts may be examined on interrogatories, it would seem, that a special ground must be shown, to entitle a party to the costs of bringing a witness from abroad. With respect to compensation for loss of time, the general rule is, that it ought not to be allowed; (4) some compensation has been usually allowed to medical men and attornies, but not to others.

Foreign witness.

For loss of time.

Remedies for non-attendance.

If a witness, who has been duly served with the writ, and has had a tender of the reasonable expenses, omit to attend at the trial without a sufficient cause, he is liable to be proceeded against in one of three ways. The first and more usual course of proceeding is by attachment for a contempt of the process of the court, (5) which appears to be as ancient as the common

Attachment.

(1) Chapman *v.* Pointon, 2 Stra. 1150: 13 East, 16. n. *a.* S. C. more fully stated. Bowles *v.* Johnson, 1 Blac. Rep. 36. Fuller *v.* Prentice, 1 H. Blac. 39. Hallett *v.* Mears, 13 East, 15. *Ex parte* Roscoe, 1 Merivale, Rep. 191.

(2) 3 Blac. Com. 369. Tidd. Pr. 806.

(3) Tremain *v.* Faith, 6 Taunt. 88. 1 Marshall, 563, S. C. Though a witness is not called on the trial, the Master may exercise a discretion in allowing his expenses, if there were reasonable ground for supposing his evidence would be admissible, and he required. Rushworth *v.* Wilson, 1 B. & C. 267.

(4) Moor *v.* Adam, 5 Maule & Selw. 156. Willis *v.* Peckham, 1 Brod. & Bingh. 515. Lowry *v.* Doubleday, 5 Maule & Selw. 159, (*b.*) Severn *v.* Olive, 3 Brod. & Bing. 72. 6 Moore, 239, S. C. The legality of allowing, in taxation of costs, a compensation to any witnesses for loss of time, was doubted in Collins *v.* Godefroy, 1 B. & Ad. 957; and that case decided that an action can not in any case be maintained for such a compensation.

(5) 2 Lord Raym. 1528. 1 Stra.

law itself. (1) In order to ground this summary proceeding, it will be necessary to show misconduct in the witness, as, negligence and inattention to the process of the court, and also to prove that the witness was personally served, (2) and that his reasonable expenses were paid or tendered at the time of the service of the subpœna. (3) Whenever a party is sought to be brought into contempt, it must be shown affirmatively to the court that every thing has been done which was necessary to secure his attendance. (4) If it appear by the notes of the judge of the trial, or upon affidavit, that the testimony of the witness could not have been material, the rule for an attachment will not be granted. (5) It is not necessary, to make a witness liable for disobedience to a subpœna, that the jury should have been sworn. (6)

A second remedy is by a special action on the case for damages, at common law. (7) The third and last, is an action on the stat. 5 Eliz. c. 9, s. 12, for the penalty of 10*l.*, and also for the further recompense recoverable under that statute. This action for a further recompense will not lie, unless the amount has been previously assessed by the court, out of which the process issued; neither the jury nor the judge at *nisi prius* being competent to make the assessment. (8) When the assessment has been made, an action of debt will lie. Action.

The means of compelling the attendance of witnesses in criminal cases are of two kinds; (9) first, by process of subpœna, for disobedience to which the person served with the process is liable to an attachment: (10) or, secondly, the justice or coroner, In criminal cases. Subpœna.

510. 2 Stra. 810, 1064, 1150. Cowp. 846. Doug. 561. Blandford *v.* De Tastet, 5 Taunt. 260. Horne *v.* Smith, 6 Taunt. 9. 1 Marshall, 410, S. C. Barrow *v.* Humphreys, 3 Barn. & Ald. 598.

(1) See Pearson *v.* Isles, Doug. 561. Amey *v.* Long, 9 East, 483.

(2) 2 Stra. 1054. Garden *v.* Cresswell, 2 M. & W. 319.

(3) *Supra*, p. 376. Tidd. Pr. 806.

(4) Garden *v.* Cresswell, 2 M. & W. 319.

(5) Dicas *v.* Lawson, 1 Cr., M. & R. 934.

(6) Mullett *v.* Hunt, 1 Cr. & M. 752, overruling Bland *v.* Swaffham, Peake, N. P. C. 60.

(7) Pearson *v.* Isles, Doug. 561.

(8) *Ibid.*

(9) 2 Hale, P. C. 281. Bennet *v.* Watson, 3 Maule & Selw. 1.

(10) Rex *v.* Ring, 8 T. R. 585. The subpœna in this case issued from the crown-office, requiring the witness to appear at the ensuing assizes in the country; and the Court of K. B. granted an attachment. Disobedience to a subpœna issued by the Court of Quarter Ses-

Recognizance.

who takes the information of witnesses, may, at the time of taking it, or at any time before the trial, bind them over to appear, and, if they refuse to come and to be bound over, may commit them for a contempt. (1) This proceeding by recognizance is the ordinary and more effectual method.

Subpœna for prisoner.

In prosecutions for misdemeanors the defendant has been, from the earliest times, allowed the writ of subpœna. But prisoners have no right, by the common law, to this process in capital cases, without the special order of the court. (1) Formerly, in such cases, a prisoner was put upon his trial under a twofold disadvantage; he was unable to compel the attendance of witnesses, and, if they voluntarily attended, their evidence, not being given on oath, received less credit than the evidence on the part of the prosecution. *

7 W. 3, c. 3. In case of treason.

By stat. 7 W. 3, c. 3, s. 7, all persons indicted for any high treason, whereby corruption of blood may ensue, shall have the like process of the court, where they shall be tried, to compel their witnesses to appear for them, as is usually granted to compel witnesses to appear against them.

1 Ann. st. 1, c. 9. In case of felony.

And now, as the stat. 1 Ann. st. 1, c. 9, s. 3, enacts, that all witnesses, on behalf of a prisoner on a trial for treason or felony, shall be sworn in the same manner as witnesses for the crown, and be liable to all the penalties of perjury, process of subpœna may be taken out by the prisoner in any case whatever.

For attendance in any part of the United Kingdom.

In order to provide for the appearance of witnesses, to answer in cases where warrants are not usually issued, and to give evidence in criminal prosecutions in any part of the United

45 G. 3, c. 92.

Kingdom, it is enacted by stat. 45 G. 3, c. 92, s. 3, and s. 4, that the service of a writ of subpœna or other process in any one of the parts of the United Kingdom, shall be as effectual

sions is no contempt of that court. (1) 4 Blac. Com. 359. 2 Hawk. Rex v. Brownell, 1 Ad. & E. 602. P. C. c. 46, s. 17.

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* Many instances occur among the early State Trials, of witnesses refusing to come into court to be examined on behalf of the accused; and there are some, in which witnesses have been peremptorily sent out of court by the judge, and not allowed to give evidence.

to compel his appearance in any other of the parts of the same, as if the process had been served in that part where the person is required to appear. And if the person served does not appear, the court, out of which the process issued, may transmit a certificate of the default, in the manner specified by the act, and the court, to which the certificate is transmitted, may punish the person for his default, as if he had refused to appear to process issuing out of that court; provided it appear, that a reasonable and sufficient sum of money, to defray the expenses of coming and attending to give evidence and of returning, was tendered to the person making default, at the time when the subpœna or other process was served upon him. (1)

Tender of expenses.

In civil proceedings, as we have seen, a witness is not obliged to attend or give evidence, unless his expenses are duly tendered; but, in criminal prosecutions, witnesses are bound to appear unconditionally. (2) On the other hand, it is reasonable and highly expedient, that, when they attend on behalf of the public, a fair compensation should be given them for their trouble and necessary expense. Formerly, however, the law provided no means for reimbursing them; a defect in our judicial administration, which was at length remedied by stat. 27 G. 2, c. 3, s. 3. This statute enacts, that "when any poor person shall appear on recognizance to give evidence against another accused of grand or petit larceny or other felony, the court may, on the oath of such person, and on consideration of his circumstances, in open court order the treasurer of the county or place, in which the offence shall have been committed, to pay such sum of money as to the court shall seem reasonable, for his time, trouble and expense."

Compensation for attendance in criminal cases.

Costs in felonies.

27 G. 2, c. 3.

As this statute extended only to poor persons who appeared on recognizance, and not to such as appeared on subpœna to give evidence, it was afterwards deemed reasonable by the legis-

(1) This statute is confined to cases where the witness, making the default, is out of the jurisdiction of the court, to which the certificate is transmitted. Rex *v.* Brownell, 1 Ad. & E. 602.

(2) 4 Hawk. b. 2, c. 46, s. 173. 2 Hale, P. C. 282. See also preambles of stat. 27 G. 2, c. 3, s. 3, and stat. 18 G. 3, c. 19, s. 7.

lature, that every person so appearing on recognizance or subpœna, should be allowed his reasonable expenses; and also, in case of poverty, a satisfaction for his trouble and loss of time. The stat. 18 G. 3, c. 19, s. 8, therefore enacted, "that where any person shall appear on recognizance or subpœna, to give evidence as to any grand or petit larceny or other felony, whether any bill or indictment be preferred or not to the grand jury, it shall be in the power of the court, provided the person shall, in the opinion of the court, have *bonâ fide* attended in obedience to such recognizance or subpœna, to order the treasurer of the county or division, in which the offence shall have been committed, to pay him such sum as to the court shall seem reasonable, not exceeding the expenses which it shall appear to the court the said person was *bonâ fide* put unto by reason of the said recognizance and subpœna, making a reasonable allowance, in case he shall appear to be in poor circumstances, for trouble and loss of time."

18 G. 3, c. 19.

Expenses of attendance in case of felony.

58 G. 3, c. 70, s. 4.

More ample allowance of expenses.

The stat. 58 G. 3, c. 70, s. 4, provides, that, in cases of felony, the court, before whom a person shall be prosecuted or tried, shall be empowered (at the request of any person bound to prosecute, or subpœnaed to give evidence, and who shall appear to prosecute or give evidence, or who shall appear to the court to have been active in the apprehension of a person accused of some one of the offences mentioned in several recited acts), to order the sheriff or treasurer of the county to pay to the prosecutor and witnesses, and to the person concerned in such apprehension, as well the costs, charges, and expenses, which the prosecutor shall be put to in preferring the indictment, as also such sum of money as to the court shall seem reasonable and sufficient to reimburse them for their expenses in attending before the grand jury to prefer the indictment, and in carrying on the prosecution, and also to compensate them for the loss of time and trouble in the apprehension and prosecution. (1) The 8th section further provides, that no person shall be entitled to any such costs or expenses for attending the court, unless he shall have been bound by

Sect. 8.

(1) The opinion of the judges, on the construction of this section, is stated in the Crown Circ. Comp. p. 10, 9th edit.

recognizance, or have previously received a subpœna to attend, or a written notice for that purpose from the prosecutor, his agent, or his attorney.

The stat. of 7 G. 4, c. 64, s. 22, enacts, that the court before which any person shall be prosecuted or tried for any felony, shall be authorized and empowered, at the request of the prosecutor, or of any other person who shall appear on recognizance or subpœna, to prosecute or give evidence against any person accused of any felony, to order payment to the prosecutor of the costs and expenses, which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution of such sum of money, as to the court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein; and although no bill of indictment be preferred, it shall still be lawful for the court, when any person shall, in the opinion of the court, *bonâ fide* have attended the court in obedience to any such recognizance or subpœna, to order payment unto such person of such sum of money as to the court shall seem reasonable and sufficient to reimburse such person for the expenses, which he or she shall have *bonâ fide* incurred by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpœna, and also to compensate such person for trouble and loss of time; and the amount of expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all the other expenses and compensation shall be ascertained by the proper officer of the court.

7 G. 4, c. 64.

Costs of indictment.

Costs of attendance.

If no bill of indictment preferred.

Expenses of attending before examining magistrate.

The act, last mentioned, gives authority also to the court in certain cases of *misdemeanor*, to order the payment of the costs

Costs in misdemeanors.

and expenses of prosecutions. This statute provides, that where any prosecutor or other person shall appear before any court on recognizance or subpœna, to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving any stolen property, knowing the same to have been stolen; of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, or any assault committed in pursuance of any conspiracy to rais the rate of wages, of knowingly and designedly obtaining any roperty by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury; every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorized and empowered to order the same in cases of felony; and, although no bill of indictment be preferred, it shall be lawful for the court, where any person shall have *bonâ fide* attended the court, in obedience to any such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony: Provided, that in cases of misdemeanor the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate. The misdemeanor of concealing the birth of a child is brought within this statute by the recent act, 1 Vict. c. 44. Provision is made for the expense of medical and other witnesses attending coroners' inquests by the stats. 6 & 7 W. 4, c. 89, and 1 Vict. c. 68.

Misdemeanors enumerated.

Allowance, if no bill of indictment preferred.

1 Vict. c. 44.

1 Vict. c. 68.

Tender in criminal cases.

It has been doubted whether a witness may not lawfully refuse to obey a subpœna on a criminal prosecution, as well as in a civil suit, unless he has a tender of his reasonable expenses; and the doubt is suggested in consequence of a provision in the stat. 45 Geo. 3, c. 92, before mentioned, which (after enacting that service of subpœna of a witness in any one of the parts of the

United Kingdom, for his appearance on a criminal prosecution in any other of the parts of the same, shall be as effectual as if it had been in that part where he is required to appear), provides that he shall not be punishable for default, unless a sufficient sum of money has been tendered to him, on the service of the subpœna, for defraying his expenses of coming, attending, and returning. One object, which the legislature had in view, was to provide for the appearance of witnesses in any of the parts of the United Kingdom, and they are therefore subject to punishment for non-attendance. On the other hand, as the expenses of going from one of the parts of the United Kingdom to either of the other parts would necessarily be great, they were allowed to insist on the payment of their reasonable charges, previous to the journey; a provision more especially necessary at the time of passing this statute, when, in some parts of the kingdom, witnesses were not entitled to any compensation for attending to give evidence in criminal cases. (1) But as there is no statute respecting a tender of expenses in the case of a criminal prosecution, except that mentioned above (which is confined to the case, where the process is served in one of the parts of the United Kingdom for the appearance of the witness in another of the parts), and as the tender of expenses in civil suits is under the special provision of an act of parliament, the general rule in ordinary cases (whether of felony or misdemeanor) appears to be, that witnesses, making default on the trial of criminal prosecutions, are not exempted from attachment on the ground that their expenses were not tendered at the time of the service of the subpœna; (2) although the court would have good reason to excuse them for not obeying the summons, if, in fact, they had not the means of defraying the necessary expenses of the journey.

(1) In Ireland, the expenses of witnesses in case of felony were first allowed by st. 55 G. 3, c. 91.

(2) See a MS. case cited in Burn's Justice, vol. 1. 1076, (by D'Oyly & Williams), in which a witness, objecting to give evidence until his expenses were paid, was compelled to do so by the judge. Acc. Rex *v.* Cooke, 1 C. & P. 321. In the latter case, the indictment had been removed by *certiorari*, and the witness was called by the defendant.

Commissioners of bankrupt.

6 G. 4, c. 16, s. 33.

Sect. 35.

Commissioners of bankrupt may summon any persons whom they believe capable of giving information concerning the trade, dealings, or estate of the bankrupt, &c., and if the witness does not come at the time appointed, they may order him to be apprehended. Every witness summoned to attend before commissioners shall have his necessary expenses tendered to him, in the same manner as a tender is required on service of subpœna to witnesses in actions at law.

Justices.

Magistrates out of sessions have not, in general, any authority to compel the attendance of witnesses for the purpose of a summary trial, except under the special provision of acts of parliament. When a statute requires justices of the peace to take the examination of persons bringing a prisoner before them on suspicion of felony, it incidentally gives them a power to examine upon oath, and to summon by their warrant any other persons who appear to be material witnesses for the prosecution, to come before them and give evidence. And it may be laid down as a general rule, that whenever magistrates are authorized by act of parliament to hear and determine, or to examine witnesses, they have incidentally a power to take examinations on oath. (1)

Courts martial.

55 G. 3, c. 108, s. 28.

Commissioners of inclosure.

41 G. 3, c. 100.

Witnesses who neglect to attend on courts martial after being duly summoned, are liable to be attached in the Court of King's Bench, &c., as if they had neglected to attend a trial in some criminal proceeding in that court. And commissioners of inclosure, under the general inclosure act, stat. 41 G. 3, c. 100, ss. 33, 34, have a power to summon in writing any person within a certain distance, to appear before them and to be examined; and if the person summoned refuse to appear, he will be subject to a penalty.

Where a reference to arbitration has been made by any rule of court, or by a judge's order of *nisi prius* in an action, or in

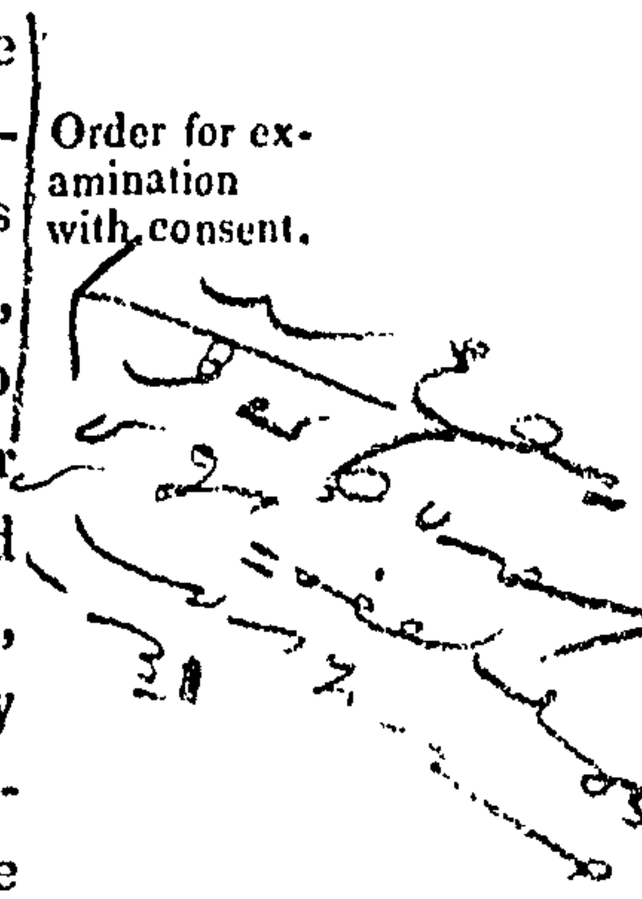
(1) Dalt. Jus. c. 6. Lamb. 517. 12 Rep. 131. And see stat. 15 G. 3, c. 39, which gives such power for the purpose of levying penalties and making distresses.

pursuance of an agreement to refer containing a clause that the submission may be made a rule of court, the court making such rule or order, or any judge, may by a rule or order command the attendance of any person to be examined as a witness, or the production of any document. (1) 3 & 4 W. 4, c. 42.

Witness abroad.

Formerly when a material witness resided abroad, or was going abroad, and could not attend at the trial, the party requiring his testimony might have moved the court in term-time, or have applied to a judge in vacation, for a rule or order to have him examined on interrogatories *de bene esse* before one of the judges of the court, if the witness resided in town, or, if he resided in the country or abroad, before commissioners specially appointed and approved by both parties. (2) The rule or order for such examination could not have been obtained without the consent of both parties, as the depositions would be only secondary evidence. Without this consent, therefore, the court would not have given the plaintiff leave to examine upon interrogatories an attesting witness to a deed, or to give the examination in evidence at the trial, on the ground that the witness was incapacitated by illness from attending, and unlikely ever to be able to attend, though it appeared by affidavit that the defendant had at one time admitted the execution of the deed; nor would the court, on that ground, have granted a rule for dispensing with the attendance of the witness. (3) But though the court would not have compelled the other party to consent, yet, if necessary, it would have assisted the party applying by putting off the trial (that there might have been an opportunity of filing a bill in equity,) until the consent was obtained, or the witness returned; and if, after all, the defendant refused, the court would not give him judgment as in case of a nonsuit. (4)

Order for examination with consent.



Costs of examination.

When a party, after obtaining leave by consent, examined witnesses abroad on

(1) 3 & 4 W. 4, c. 42, s. 40. See the act for the requisites to be contained in the rule or order. Disobedience to a regular rule or order will be treated as a contempt of court.

(2) 2 Tidd. Pr. 810.

(3) Jones *v.* Brewer, 4 Taunt. 47.

(4) Furley *v.* Newnham, 2 Doug. 419. Mostyn *v.* Fabrigas, Cowp. 174. Calliard *v.* Vaughan, 1 Bos. & Pull. 211.

depositions, he would not have been entitled to any allowance, in the taxation of costs, for the expense of taking the depositions, although he might have succeeded in the action. (1) The same rule prevailed in the Court of Chancery; if a party applied to that court for a commission to examine witnesses, he must have paid the expenses.

Examination of witnesses abroad; by statute.

A partial remedy for the defects of the law was applied by the stat. 13 Geo. 3, c. 63, s. 40, 44, by which, where a cause of action arose in India, or an offence had been committed there, which it was intended to be tried in this country, the evidence upon interrogatories of witnesses resident in India may be obtained. (2) The evidence of witnesses in India may also be obtained in support of a bill for a divorce in Parliament, by the provisions of stat. 1 Geo. 4, c. 101; and in the case of a prosecution for an offence committed abroad by any person employed in the public service, the evidence of witnesses resident abroad may be obtained in the mode pointed out by stat. 42 Geo. 3, c. 85. (3) The stat. 54 Geo. 3, c. 15, which was passed for the purpose of facilitating the recovery of debts in the courts of law in New South Wales, prescribes the mode of obtaining the affidavits of witnesses resident in this country, and makes them equivalent to *vivâ voce* proof in open court, or to examinations under commissions. (4)

13 G. 3, c. 63.

1 G. 4, c. 101.

42 G. 3, c. 85.

54 G. 3, c. 15.

Cases not provided for by the above statute.

The remedies provided by these statutes are very partial; except in the cases thus specially described, the evidence of witnesses, who would be unable to attend by reason of absence in foreign countries, or by reason of dangerous illness, or permanent infirmity, could not be obtained. To prevent a failure of justice from any of these circumstances, the courts of law resorted to the equitable jurisdiction exercised in the manner above stated, to extort a consent from a reluctant party to the examination by interrogatories of witnesses whose *vivâ voce* testimony it was impossible to obtain; but where such con-

(1) Stephens *v.* Crichton, 2 East, 259. Taylor *v.* Royal Ex. Ass. Comp. 8 East, 393.

(2) As to the practice under this stat., see Tidd's Pr. 813.

(3) Rex *v.* Jones, 8 East, 31.

(4) Francisco *v.* Gilmore, 1 Bos. & Pul. 177. Atkins *v.* Palmer, 4 B. & A. 377.

sent was withheld, the party seeking for a commission to examine witnesses could only obtain it by filing a bill in equity, thus instituting a new suit auxiliary to the suit at law. (1)

This subject attracted the notice of the commissioners appointed to inquire into the practice of the Court of Chancery, and afterwards of the commissioners of inquiry into the proceedings of the Courts of Common Law; and their reports expressed a strong opinion, that the courts of law should be invested with full power of examining witnesses by interrogatories, such power to be exercised by the authority and under the control of the court in which the evidence, when obtained, would be produced.

Remedy by st. 1 W. 4, c. 22.

To carry into effect their recommendation, the stat. 1 Wm. 4, c. 22, was passed. The objects of that statute are threefold: First, to provide for the examination on oath of witnesses abiding out of the jurisdiction of the courts of law at Westminster, but within the dominions of the British crown. Secondly, to provide for the examination of witnesses abiding within the jurisdiction of the courts of law at Westminster, but whose personal attendance might be prevented by illness or some other cause. Thirdly, to provide for the examination of witnesses abiding in foreign countries not subject to the crown of Great Britain. The first section, reciting the stat. 13 Geo. 3, c. 63, and that "certain powers are therein given, and provisions made for the examination of witnesses in India in the cases therein mentioned," enacts, "That all and every the powers, authorities, provisions, and matters contained in the said recited act, relating to the examination of witnesses in India, shall be and the same are hereby extended to all colonies, islands, plantations and places under the dominion of His Majesty in foreign parts, and to the judges of the several courts therein, and to all actions depending in any of His Majesty's courts of law at West-

Section 1.

Powers as to the examination of witnesses in India, extended to the colonies, &c. and to all actions in the courts at Westminster.

(1) Report of commissioners into the practice of Chancery, page 109; and 2nd Rep. of Commiss. of Com. Law, p. 23.

minster, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisidiction of the court, to the judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses, (1) under a writ or commission (2) issued in pursuance of the authority hereby given, will be necessary or conducive to the due administration of justice, (3) in the matter wherein such writ shall be applied for."

Section 2. Judges, to whom the commission is directed, empowered to enforce the attendance of witnesses.

By the second section it is enacted, "That when any writ or commission shall issue under the authority of the said recited act, or of the power hereinbefore given by this act, the judge or judges, to whom the same shall be directed, shall have the like power to compel and enforce the attendance and examination of witnesses, as the court, whereof they are judges, does or may possess for that purpose in suits or causes depending in such court." (4)

Section 3. Costs of writs to be in the discretion of the Court.

By the third section it is enacted, "That the costs of every writ or commission, to be issued under the authority of the said recited act, or of the power hereinbefore given by this act, in any action at law depending in either of the said courts at Westminster, and [the costs] of the proceedings thereon, shall be in the discretion of the court issuing the same."

Section 4. Courts at Westminster, &c. may order the examination of witnesses, or a commission for that purpose.

The fourth section provides for the examination of witnesses whether within or without the jurisdiction of the courts of law at Westminster. It enacts, "That it shall be lawful to and for each of the said courts at Westminster, and also the Court of Common Pleas of the county palatine of Lancaster, and the Court of Pleas of the county palatine of Durham, and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise,

(1) See Cunliffe *v.* Whitehead, 3 Dowl. P. C. 634.
(2) See Clay *v.* Stephenson, 5 Nev. & M. 318.
(3) See Oughnan *v.* Parish, 4 Dowl. P. C. 29. Abraham *v.* Newton, 8 Bing. 274.
(4) See Clay *v.* Stephenson, 3 Ad. & Ell. 807.

before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just."

Section 5. Compelling attendance of witnesses, or production of documents.

The fifth section enacts, "That when any rule or order shall be made for the examination of witnesses within the jurisdiction of the court, wherein the action shall be depending by authority of this act, it shall be lawful for the court, or any judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person, to be named in such rule or order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order, and to direct the attendance of any such person to be at his own place of abode, or elsewhere, if necessary or convenient so to do; and the wilful disobedience of any such rule or order shall be deemed a contempt of court, and proceedings may be thereupon had by attachment (the judge's order being made a rule of court before or at the time of the application for an attachment), if, in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, shall be also served together with or after the service of such rule or order: Provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compellable to produce at a trial of the cause."

Disobedience to be deemed a contempt of court.

Payment of expenses.

Proviso as to production of documents.

Sections 6, 7, 8. Examination of witnesses in custody, &c.

By other sections (1) provision is made for the examination of witnesses in custody, whose evidence is required; that all examinations shall be taken on oath or affirmation, false evidence being also specially declared to be subject to the penalties of perjury; and that the persons appointed to take an examination may make a special report, upon the conduct or absence of any witness or other person thereon or relating thereto.

Section 9. Costs of the order for examination may be made costs in the cause.

By the ninth section, except in the cases before specially provided for, the costs of the proceedings shall be costs in the cause, unless otherwise directed either by the judge making such rule or order, or by the judge before whom the cause may be tried, or by the court.

Section 10. Restriction as to the reading of examinations or depositions without consent of the party.

The tenth section requires as a condition to the substitution of the evidence thus obtained for the *vivâ voce* testimony, that "it shall appear to the satisfaction of the judge that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial; in all or any of which cases the examinations and depositions certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions."

Section 11. Proviso as to Court of Pleas of Durham.

The eleventh section enacts, "That no order shall be made in pursuance of this act by a single judge of the Court of Pleas of the county palatine of Durham, who shall not also be a judge of one of the said courts at Westminster."

It is not compulsory on the courts of law to exercise the powers given them by this statute, and in practice they exercise a discretion by either refusing a rule or order altogether, or granting it on terms adapted to prevent the abuse of the statute to purposes of oppression or delay. In general, the

(1) Sections 6, 7, 8.

examination is made by interrogatories previously prepared; but it may be directed that the witnesses shall be examined and cross-examined *vivâ voce*, or partly *vivâ voce* and partly on interrogatories. (1) If taken *vivâ voce* the answers are reduced into writing, and returned to the court from which the process issued.

Material witness absent.

If the defendant is unable to proceed to trial on account of the absence of a material witness, he may move the court in term-time, or apply to a judge in vacation, on an affidavit stating the facts, to put off the trial till the next term; or in the Common Pleas, if necessary, to a more distant period. (2) An application to put off a trial beyond the existing sittings, or from sittings to sittings, is not allowed on the part of the plaintiff; for he has the power at any time of withdrawing the record, if he is not prepared to try the cause. But where, from the sudden indisposition of a witness, who may be able to attend in the course of a day or two, or for any other temporary reason, the plaintiff is prevented from trying his cause in its order in the paper, yet has ground to believe that he shall be able to try before the sittings are over, it would be too much to make him, in such a case, withdraw his record; and a judge at *nisi prius* will therefore make an order for the trial to stand over, till the witness is likely to attend. (3) It is a rule in the Court of Common Pleas, that the trial of a cause can never be put off on the consent of the parties and counsel, at the sittings at *nisi prius*, but the plaintiff must either proceed to try or withdraw his record. (4)

Motion to put off trial.

Order for cause to stand over.

Before the court will consent to put off the trial on account of the absence of a material witness, it will require to be satisfied that injustice would be done by refusing the application, and that the party, who makes the application, has not conducted himself unfairly, nor been the cause of any improper delay. (5)

Court to be satisfied as to ground of postponement.

(1) Pole *v.* Rogers, 3 Bing. N. C. 780.

(2) Pr. Reg. 368. Tidd. Pr. 770. See form of affidavit in Tidd. App. 266.

(3) Ansley *v.* Birch, 3 Camp. 333, by Lord Ellenborough.

(4) 2 Taunt. 221.

(5) Saunders *v.* Pittman, 1 Bos. & Pull. 33.

The rule will not be granted to the defendant, after he has pleaded a sham plea, by which a trial has been lost, unless he consent to pay money into court; (1) nor, where the testimony of the absent witness is intended to set up an odious defence, (as, that the plaintiff is slave to the defendant, and therefore cannot recover in the action, or that he is an alien enemy, &c.); (2) nor will it grant the rule for the purpose of giving the defendant an opportunity, which he has once lost by his own neglect, of applying to a court of equity for a commission. (3)

Affidavit in support of motion.

When a motion is about to be made to a judge at *nisi prius* for putting off the trial of a cause on account of the absence of a witness, notice should first be given to the plaintiff's attorney, with a copy of the intended affidavit. This affidavit ought regularly to be made by the defendant himself; but if he is abroad or out of the way, it may be made by his attorney or a third person. (4) The affidavit generally states that the person absent is a material witness, without whose testimony the defendant cannot safely proceed to trial; that he has endeavoured without effect to get him subpœnaed; and that he is in hopes of procuring his future attendance. (5)

(1) Tidd. Pr. 770.
(2) Robinson *v.* Smyth, 1 Bos. & Pull. 454.
(3) Calliard *v.* Vaughan, 1 Bos. & Pull. 212.
(4) Peake, N. P. C. 97.
(5) See form of affidavit, Tidd. Pr. Appx. 266.

CHAPTER IX.

OF THE EXAMINATION OF WITNESSES.

SECTION I.

Of the Rules to be observed in the several stages of the Examination of Witnesses.

The ordinary mode of proceeding in the courts of Common Law, preparatory to the examination of a witness, is to swear him in chief, unless an objection is made to his competency; but in case of such an objection, the practice formerly was to examine him on the *voire dire*, and this was so strictly observed, that if a witness was once examined in chief, he could not afterwards be objected to on the ground of interest. (1) But, in later times, the rule has been to a certain extent relaxed, and now, if it should be discovered in any stage of the trial, before the close of a witness' examination and before his dismissal, that he is interested, his evidence will be rejected. This course is as much for the convenience of the court, as for the purposes of justice. For the examination of a witness, to discover whether he has any interest in the cause, is frequently to the same effect as his examination in chief; it, therefore, saves time, and is more convenient, that the witness should be sworn in chief in the first instance; and if it should afterwards appear, in the progress of the examination, that he is interested, it will then not be too late to take the objection. (2)

Examination as to interest on the *voire dire*.

This relaxation of the ancient rule does not extend so far as to allow counsel in cross-examination to ask the witness every sort of question which might be proper on the *voire dire*. For

Cross-examination as to interest.

(1) See Lord Lovat's case, 9 St. Tr. 639, 646, 704.

(2) Turner v. Pearte, 1 T. R. 717. Perigal v. Nicholson, 1 Wightw. 64. Stone v. Blackburn, 1 Esp. N. P. C. 37. Peeching v. Gower, Holt N. P. C. 313.

example, after an examination in chief a witness is not to be cross-examined as to the contents of a will which is not produced in court,—under which it is suggested that he takes some interest,—although such questions might be properly asked in an examination on the *voire dire*. (1)

As to interest arising from written instruments.

In general, questions as to competency may be asked notwithstanding that they relate to the contents of written instruments; but if a witness produce a written instrument, referring to it as that to which the questions relate, it must be read, according to the usual course in other cases. (2)

Evidence on the *voire dire* commented on.

Testimony coming out on examination upon the *voire dire* may be commented upon as testimony to the jury. Thus, where the plaintiff, to refresh the memory of the defendant's witness, in examining him on the *voire dire* in respect to a guarantee, had put into his hands a letter, he insisted in his reply on commenting upon this as evidence to the jury; and it was allowed, though objected to. (3)

Objection removed on the *voire dire*.

Perryman v. *Steggall*.

In *Perryman* v. *Steggall*, (4) in an action on two promissory notes, the fact of the notes having been signed for the accommodation of a person whom it was intended to call as witness, was opened by the plaintiff's counsel; when he was called to give evidence, the defendant's counsel objected to him as interested,—on which the counsel on the other side proposed to ask him on the *voire dire*, whether he was discharged under the Insolvent Debtors' Act; this was objected to on the ground that no question had been put for the defendant on the *voire dire*, but was allowed. Here, the defendant's counsel, by availing himself of the admission in the opening speech, and using it as the ground work of his objection, placed himself in the same situation, as if he had examined on the *voire dire*.

Order of examinations.

When a witness has been regularly sworn, he is first examined by the party who produces him; after which the other party is at liberty to cross-examine; and then the party who first called

(1) Howell *v.* Lock, 2 Camp. 14.
(2) Butler *v.* Carver, 2 Stark. Ca. 434.
(3) Paul *v.* White, 5 C. & P. 237.
(4) 5 C. & P. 197.

him may re-examine. This closes the examination of the witness. The office of the examination in chief is to lay before the court and the jury the whole of the information of the witness that is relevant and material; the office of cross-examination is to search and sift, to correct, and supply omissions; the office of re-examination, to explain, set right, repair damages, and put in order.

The examination of witnesses is conducted in open court, in the presence of the parties, their attorneys and counsel, and the judge and jury, in view of the public, who have thus an opportunity of observing the understanding, demeanour, and inclination of the witnesses.

An objection to a witness on a trial for high treason, as having been misdescribed in the list of witnesses furnished under the statute (7 Ann. c. 21, s. 14,) must be taken in the first instance, before the witness is examined: the formal objection is considered as waived, by allowing the examination to proceed. (1)

Examination of witnesses apart.

It may, in some cases, be thought advisable to examine witnesses separately and out of the hearing of each other, with a view to obviate the danger of a concerted story among them, and to prevent the influence which the account given by one may have upon another. For this purpose, the court, on the application of counsel, will order the witnesses on both sides to withdraw. An attorney in the cause, whose attendance is necessary in court to instruct his counsel, is usually excepted from this order. (2)

Order by the court.

Breach of such order; consequence of.

If a witness, who has been ordered to withdraw, continue in court, it will be in the judge's discretion whether or not the witness, after notice and breach of the order, shall be examined. (3) It appears to have been stated by Mr. Baron

(1) R. *v.* Watson, 2 Stark. Ca. 158.

(2) Pomeroy *v.* Baddeley, Ry. & M. 430. Everett *v.* Lowdham, 5 C. & P. 91.

(3) Parker *v.* M'William, 6 Bing. 683. R. *v.* Colley, 1 M. & M. C. 329. Beamon *v.* Ellice, 4 C. & P. 585. R. *v.* Wyld, 6 C. & P. 380. Thomas *v.* David, 7 C. & P. 350.

Alderson, (1) that the circumstance of a witness having remained in court in disobedience to an order of withdrawal, is not a ground for rejecting his evidence, and that it merely affords matter of observation; and he referred to a case in which a new trial was granted, on the ground that a witness' evidence had for this reason been rejected. (2) This seems to be the safest and justest course,—not to exclude his evidence altogether, but to admit it subject to such remarks as the circumstances may warrant,—for, otherwise, an innocent party, possibly both parties, might be made to suffer a serious injury from the carelessness of a witness, or perhaps from his ill designs and ill-will. A reluctant or hostile witness might thus accomplish his purpose, and defeat the party.

Cross-examination.

The power of cross-examination is generally allowed to afford one of the best securities against incomplete, garbled, or false evidence; great latitude, therefore, is allowed in the mode of putting questions.* The rule, however, is subject to certain

R. *v.* Murphy, 8 C. & P. 307. In revenue cases, in the Exchequer, the rule of practice is said to be inflexible, that a witness continuing in court after such an order, cannot afterwards be examined. Attorney General *v.* Bulpit, 9 Price, 4. But it is possible such an inflexible rule might in some cases work injustice. In revenue causes, no less than in others, the judge must be allowed to exercise his discretion in the matter; his judgment and conscience ought not to be bound by any such inflexible regulation.

(1) Cook *v.* Nethercote, 6 C. & P. 741

(2) See note in the report of Cook *v.* Nethercote, 6 C. & P. 741.

* Sir William Blackstone has referred, in his Commentaries, (B. 3, c. 23,) to a well-known passage in Quintilian, which gives some excellent hints on the art of cross-examination. "Primum est, nosse testem. Nam timidus terreri, stultus decipi, iracundus concitari, ambitiosus inflari potest; prudens vero et constans vel, tanquam inimicus et pervicax, dimittendus statim, vel non interrogatione, sed brevi interlocutione patroni, refutandus est: aut aliquo, si continget, urbanè dicto refrigerandus; aut, si quid in ejus vitam dici poterit, infamiâ criminum destruendus. Probos quosdam et verecundos non aspere incessere profuit; nam sæpé, qui adversus insectantem pugnassent, modestiâ mitigantur. Omnis autem interrogatio aut *in causâ* est, aut *extra causam*. *In causâ*, (sicut accusatori præcepimus,) patronus quoque altius, unde nihil suspecti sit, repetitâ percontatione, priora sequentibus applicando, sæpe eo perducit homines, ut invitis, quod prosit, extorqueat. Ejus rei, sine dubio, nec disciplina ulla in scholis, nec excertitatio traditur; et naturali magis acumine aut usu contingit hæc virtus. * * *Extra causam* quoque multa, quæ prosint, rogari solent de vitâ testium aliorum, de suâ quisque,—si turpitudo, si humilitas, si amicitia accusatoris, si inimicitiæ cum reo, in quibus aut dicant aliquid quod prosit, aut in mendacio vel cupi-

limitations, with respect to the relevancy of the questions to the matters in issue, and with reference to the examination in chief.

Witness, producing papers, and not sworn.

Before entering upon cross-examination, a preliminary question may arise, whether the witness has so far given evidence in chief as to entitle the opposite party to cross-examine. If a witness is called by a party merely for the purpose of producing a written instrument belonging to the party, which is to be proved by another witness, he need not be sworn, and, if he is not sworn, he will not be subject to cross-examination. (1)

Justice producing an information.

In *Simpson* v. *Smith*, (2) in an action for maliciously and without probable cause making a charge of felony before a justice against the plaintiff, and causing him to be apprehended, the plaintiff's counsel having called upon the justice to produce the information taken by him, which was accordingly produced, was proceeding to prove the information by the justice's clerk, when it was insisted by the defendant's counsel, that he should be allowed to cross-examine the justice, who had produced the information; but Mr. Justice Holroyd held that this could not be done, and that the plaintiff's counsel might proceed to prove the information in the regular manner.

Rule in such case, if witness sworn.

If a witness is sworn, and gives some evidence,—as, for instance, to prove an instrument—however formal the proof may be, he is to be considered a witness for all purposes; and this, although he may be substantially the real party in the suit, and the party on the record a mere nominal party. (3)

(1) Davis *v.* Dale, M. & M. 514, 515. Perry *v.* Gibson, 1 Ad. & E. 48. Summers *v.* Moseley, 2 C. & M. 477. Rush *v.* Smith, 1 C. M. & R. 94. Read *v.* James, 1 Stark. Ca. 132. R. *v.* Murlis, M. & M. 515.

(2) Nott. Summ. Ass. 1822, MS.

(3) Morgan *v.* Brydges, 2 Stark. Ca. 314. Where a witness has been asked only one immaterial question, and his evidence is stopped by the judge, the other party has no right to cross-examine him. Creevy *v.* Carr, 7 C. & P. 64.

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ditate lœdendi deprehendantur. In primis interrogatio debet esse circumspecta; quia multa contra patronos venusté testis sæpe respondet, eique præcipuè vulgo favetur. Tum verbis quam maximè ex medio sumptis; ut qui rogatur (is autem est sæpius et imperitus) intelligat, aut ne intelligere se neget, quod interrogantis non leve frigus est." Quintil. Inst. Orat. lib. v. c. 7. Upon this subject, the reader may be referred to Mr. Alison's Practice, p. 546; and to Mr. Evans on cross-examination, in his edition of Pothier, vol. 2, p. 233.

Witness sworn by mistake.

If a witness is sworn, and would be competent to give evidence for the party calling him, the other party will be entitled strictly, according to the general rule, to cross-examine him, although he has not been examined in chief. (1) But if the counsel of one of the parties call a witness by mistake, and discovers the mistake before he puts a question to him, the witness, though sworn, will not be subject to cross-examination. (2)

Cross-examining to matters irrelevant.

It is a general rule that a witness cannot be cross-examined as to any fact, which, if admitted, would be collateral and wholly irrelevant to the matters in issue, for the purpose of contradicting him by other evidence, and in this manner to discredit his testimony. (3) And if the witness answer such an irrelevant question before it is disallowed or withdrawn, evidence cannot afterwards be admitted to contradict his testimony on the collateral matter. (4) The point for consideration, therefore, is, what question or what matter is wholly irrelevant?

What matter irrelevant.

Cross-examining to contrary statements.

On this subject, it has been long settled that it is not relevant to inquire of a witness, whether on some former occasions he has not given a different and contrary representation of the same matter; this inquiry is made in order to lay a foundation for proof of contradictory statements.

Attempting to persuade a witness to stay away.

Harris v. *Tippet.*

It has been ruled, that an inquiry of a witness in cross-examination, whether he had not attempted to dissuade another witness examined on the opposite side, from being present at the trial, is so far immaterial to the issue, that if the witness answer in the negative (namely, that he never made such an attempt,) evidence to contradict him on that point would not be admissible. (5) Yet, certainly it might be of great importance, in some cases, especially where there is a striking discrepancy between the evidence of the two witnesses, to show that the one has been guilty of a dishonest and corrupt attempt to seduce

(1) Rex *v.* Brooke, 2 Stark. Ca. 473. Philips *v.* Eamer, 1 Esp. N. P. C. 357.

(2) Clifford *v.* Hunter, 3 C. & P. 16. Rush *v.* Smith, 1 C., M. & R. 94; 4 Tyr. 675. Wood *v.* Mackinson, 2 M. & R. 273.

(3) Spencely *v.* De Willott, 7 East, 108.

(4) Harris *v.* Tippet, 2 Camp. 638.

(5) Harris *v.* Tippet, 2 Camp. 637, by Lawrence, J. See Thomas *v.* David, p. 399, *infra*.

the other from appearing at the trial; and it seems strictly relevant to the matters in issue, and to the whole cause; and it may sometimes be necessary for the discovery of truth. If it were proved, in cross-examination, that the defendant himself had induced the witness to make such a dishonest attempt upon the most material witness on the other side, that surely would be very much like an admission by the defendant of the truth and justice of the plaintiff's claim.

Attempting to suborn a witness. *Lord Stafford's* case.

On the trial of Lord Stafford, (1) proof was admitted on the part of the prisoner, that Dugdale, one of the witnesses for the prosecution, had endeavoured to suborn witnesses to give false evidence.

Using revengeful language against the adverse party. *R. v. Yewin.*

It is not irrelevant, on the trial of a prisoner, to inquire in cross-examining a witness, whether, in consequence of being charged with robbing the prisoner, he had not said that he would be revenged upon him; and if the witness deny having used such a threat, evidence may be given to contradict him. (2)

Evidence on former trial, between the same parties.

Where the question turned on the consideration that passed for discounting a bill on which the action was brought, Lord Tenterden held that what a witness said on a former trial between the same parties respecting another bill, which was discounted at the same time, and under the same circumstances, was not collateral matter. (3)

Opinion of witness as to the result of the cause.

The opinion of a witness, called by the defendant, as to the defendant's chance of success, or the merits of his defence, is not matter upon which he can be afterwards contradicted, if he denies the statement imputed to him. (4)—The rule might be otherwise, if he had expressed, beyond a mere opinion, ill-will against the opposite party, or excess of zeal as a witness.

Thomas v. *David.*

In the case of *Thomas* v. *David*, (5) in an action on a pro-

(1) 7 Howell, St. Tr. 1400.
(2) R. *v.* Yewin, 2 Camp. 638, n. by Lawrence, J. See R. *v.* St. George, 9 C. & P. 489.
(3) Meagoe *v.* Simmons, 3 C. & P. 76.
(4) Elton *v.* Larkins, 5 C. & P. 385.
(5) 7 C. & P. 350.

missory note, the execution of which by the defendant was disputed, a female servant of the plaintiff, who appeared on the note to be the attesting witness to the defendant's signature, was called as a witness for the plaintiff; being asked in cross-examination, whether she did not constantly sleep in the same bed with him, she denied the fact. It being then proposed to call a witness to prove the fact, the counsel on the other side objected, that the effect of such evidence would be only to contradict the witness on a collateral point; but Mr. Justice Coleridge is reported to have said, "Is it not material to the issue, whether the material witness, who comes to support the plaintiff's case, is his kept mistress? If the question had been, whether the witness had walked the streets as a common prostitute, I think that would have been collateral to the issue, and that if the witness had denied such a charge, she could not have been contradicted; but here the question is, whether the witness had contracted such a relation with the plaintiff as might induce her the more readily to conspire with him to support a forgery,—just in the same way as if she was the sister or daughter of the plaintiff, and had denied the fact." The evidence was accordingly admitted.

Connection of witness with the party calling.

Cross-examining to handwriting on a paper.

If a party by the cross-examination of a witness obtain proof of the handwriting of a paper shown to the witness, the opposite party has a right to see the paper, for the purpose of examining the witness as to the paper being, as alleged, the plaintiff's handwriting. (1) By proving a document on the cross-examination of a witness, the party will not be compelled to put it in as evidence before he enters upon his own case, even though he has desired the witness to read it. (2) If the counsel in cross-examining puts a written paper in the witness's hand, and question him upon it, and the answers are such as may have an effect, the opposite counsel has a right to see the paper, and to re-examine upon it; but if the cross-examination on the paper has entirely failed, the opposite counsel has no right to see the paper. (3)

(1) By Bosanquet, J., in Russell *v.* Rider, 6 C. & P. 416.
(2) Holland *v.* Reeves, 7 C. & P. 36.
(3) R. *v.* Duncombe, 8 C. & P. 369.

Witness examined on one side, afterwards called on the other.

It is reported to have been ruled at *nisi prius*, that if a witness has been once examined by a party, the privilege of cross-examination by the opposite party continues in every stage of the cause; so that if he should call the same witness to prove his case in reply, he might ask him leading questions.(1)—In the case referred to, the witness might possibly have shewn a strong bias in favour of the first party that called him, and on this account, perhaps, a greater scope was granted to the opposite party, than is usually allowed. But it may happen, on the other hand, that the party calls a witness unwillingly, from necessity, knowing him at the time to be favourable to the opposite party: in such a case, to allow the opposite party, on calling him afterwards as his own witness, to put leading questions, would be giving him an unreasonable advantage. In all cases of this description, the mode of proceeding must be decided by the judge, in the exercise of his discretion.

Leading questions to a witness.

Leading questions, that is, such as instruct a witness how to answer on material points, are not allowed in the examination in chief; in cross-examination they are allowed.(2) These rules proceed partly on the supposition that the witness is favourable to the party who calls him, and opposed to his adversary; accordingly the rule, first mentioned, is relaxed, wherever it clearly appears that the witness is hostile, or that a more searching mode of examining him is necessary to elicit the truth. A party, in preparing to support his case by testimony, has the opportunity of examining the witnesses before the trial, and of producing at the trial those only, whose testimony he thinks most likely to serve him,—the assumption, therefore, that the witness is favourable to the party who calls him, is not unreasonable; and in practice, the fact is well known to support it.

Reason for prohibiting.

Questions are objectionable as leading, not only when they directly suggest the answer which is desired, but also when they embody a material fact, and admit of an answer by a simple

(1) Dickenson *v.* Shee, 4 Esp. N. P. C. 67.

(2) See Parkin *v.* Moon, 7 C. & P. 408. The policy of these rules, as well as of almost every other rule of the English law, is attacked by Jeremy Bentham. See Rationale of Judicial Evidence, B. 3, c. 3.

negative or affirmative, though neither the one nor the other is directly suggested. In this case, as well as in those where direct leading questions are put, the evidence, so drawn from the witness, is not his genuine unassisted testimony, but a statement artfully contrived, shaped and coloured by professional skill, with a complete knowledge of the facts which the party seeks to establish. If such a mode of examination were allowed, it must frequently happen that a witness would not state the whole of a transaction, but a part only would be elicited, and that to serve a particular purpose; the chance also of detecting discrepancies in false or erroneous testimony would be much diminished. Nor would these inconveniencies be entirely removed by the power of cross-examination, which, as it must often be conducted without any previous knowledge of the answers to be given by the witness, is not a counter-balance to the facility afforded in the examination in chief, of presenting a selected and concerted portion only of the facts.

If this reasoning is to be considered as the foundation of the prohibition of leading questions, it evidently does not apply in the same degree to a question suggestive of some material fact which the witness has inadvertently omitted in his answers to an examination strictly and regularly conducted. No rules, however, can be laid down as to the questions which such a state of things might permit; this part of the administration of the law must be left entirely to the discretion of the presiding judge, who will consider the demeanour of the witness, the questioning of the counsel, and all the other circumstances of the case.

Suggestion to help memory.

When an omission is caused by want of memory, a suggestion may be permitted to assist it. Thus, where a witness, called to prove the partnership of the plaintiffs, was not able at the moment to specify the several names of the partners, a number of names, including those of the partners, was allowed to be suggested to the witness, for the assistance of his memory. (1) There are other cases in which some suggestion

(1) Acerro *v.* Petroni, 1 Stark. Ca. 100. See cases in which plans may be put into a witness' hand. Rex *v.* Hadden, 2 C. & P. 84. Beamon *v.* Ellice, 4 C. & P. 585.

may be allowed to be given to a witness,—as, where he is called to prove a delivery of goods, consisting of numerous items, or delivered at various times. Such cases evidently do not fall within the principle which prohibits leading questions.

Introductory questions.

Questions which are intended merely as introductory, and which, whether answered in the affirmative or negative, would not be conclusive on any of the points in the cause, are not liable to the objection of leading. If it were not allowed to approach the points in issue by such questions, the examination of witnesses would run to an immoderate length. For example, if two defendants are charged as partners, a witness may be properly asked such a question as this, whether the one defendant has interfered in the business of the other. (1)

Unwilling witness

If a witness should appear to be in the interest of the opposite party, or unwilling to give evidence, the court may deem it right to relax the rule against leading questions, and allow the examination in chief to assume something of the form of cross-examination. It is entirely in the discretion of the judge to determine how far he will allow the examination in chief to be by leading questions. (2)

Where an issue has been directed, with power to examine one of the parties as witness, it will be competent to the counsel of the opposite party to cross-examine him; because, as party, he must be considered as necessarily adverse. (3) But, in general, the fact of a witness being an unwilling or adverse witness is to be ascertained by the nature of his evidence, his manner of answering, and his demeanour, before the unrestricted power of leading can be given: it is not enough, for instance, in a prosecution, that the witness is intimate with the prisoner,—or that he has been informed against

(1) Nicholls *v.* Dowding and another, 1 Stark. Ca. 81. Cases as to the identification of the person of a prisoner, the prisoner being pointed out to the witness, and the witness being asked whether that is the person: R. *v.* Watson, 2 Stark. Ca. 128. R. *v.* Berenger, *ibid.* 129, n.

(2) R. *v.* Murphy, 8 C. & P. 306. Bastin *v.* Carew, Ry. & Moo., N. P. C. 127. R. *v.* Chapman, 8 C. & P. 558.

(3) Clarke *v.* Saffery, 1 Ry. & Mo. 126.

by the prosecutor,—to justify the counsel in beginning at once with cross-examination. (1)

Leading for the purpose of contradicting a former witness.

To what extent may leading questions be put in an examination in chief, when the object is to prove that another witness, examined on the opposite side, has on some former occasion made a different and contradictory statement? If, for example, a witness on his cross-examination were to deny, that he ever gave a different account of the transaction, or that, in conversing upon the subject with a third person, he used certain words or expressions imputed to him, would it be competent to the counsel in examining that third person in chief as his witness for the purpose of contradicting the former witness, to ask him, in the first instance, whether the former witness, in conversing with him, said so and so, or used such and such expressions? This form of putting the question is certainly not uncommon, and frequently passes without objection. But a very little consideration will show, that such a leading question is irregular. For, in the first place, it must evidently be quite unnecessary to lead the witness to such a length; it would be sufficient to lead him up to the subject of the conversation; and, that being done, the most regular course would be, to inquire generally, what the former witness said, or what account he gave, relative to the transaction in question, thus leaving him, as in fairness he ought to be left, to the use of his own memory. If the witness has a distinct recollection of the conversation, and of the representation made by the other person, whose account is now disputed, he requires only to have his attention directed to the subject, to enable him to speak what he knows: if he has not that distinct recollection, he is ill-qualified to contradict the other witness, as to the expressions supposed to have been used by him; in other words, he is incompetent for the purpose for which he is called. The plea of necessity, therefore, altogether fails. But the principal objection to such leading questions appears to be, that they suggest the desired answer so broadly and obviously, that a

(1) R. *v.* Ballty, 8 C. & P. 745; and see R. *v.* Farr, 8 C. & P. 768.

witness of the dullest intellect and weakest memory can hardly fail to take the hint, and may easily shape his evidence, if he is so disposed, as may best serve the interest and wishes of the party who calls him. In effect, the question puts into the mouth of the witness the very words, which he is to echo back either in the affirmative or in the negative; thus supplying a forgetful witness with a false memory, and an artful witness with a prompt and concerted answer. Is there, then, anything in the nature of this particular case, which ought to exempt it from the general rule applicable to examinations in chief? On the contrary, if there is any case, in which that general rule against leading ought to be strictly maintained, it is the one now under consideration, where a witness is called for the purpose of proving the account, given by another witness, to be inconsistent with some former statement, supposed to have been made by him. Whether the question at issue between the two witnesses, is a question of credit, or whether it is to be considered rather as a question of mere memory, leading is, in either point of view, equally objectionable. If it is a question of memory, the only fair way of trying it, is by allowing the witness to speak for himself unprompted, as his own memory may suggest. If the question is one of credit, then it is undoubtedly due to the witness whose veracity is impeached, that the contradictory statement, supposed to have been made by him, should be distinctly proved, without the aid of leading, and without any undue influence. Upon the whole, therefore, the most unexceptionable and proper course appears to be, to ask the witness, who is called to prove a contradictory statement made by another witness, what that other witness said relative to the transaction in question, and not in the first instance to ask, in the leading form, whether he said so and so, or used such and such expressions. (1) After an answer has been given to such inquiry, it would be proper, for the purpose of making the contradiction more complete, to ask whether the former witness has, or has not used the expressions imputed to him.

In the case of *Courteen* v. *Touse*, (2) Lord Ellenborough *Courteen* v. *Touse.*

(1) See Edmonds *v.* Walter, 3 Stark. Ca. 8. Hallett *v.* Cousens, 2 M. & R. 239.

(2) 1 Camp. 43.

allowed the counsel for the defendant to put a leading question to a witness called by him, in order to contradict a witness who had been called by the plaintiff. In that case, one of the witnesses of the plaintiff, having been cross-examined as to the contents of a letter received by him from the plaintiff, (which letter had been lost,) and having mentioned in his cross-examination some particular expressions as part of the contents, witnesses were called on the part of the defendant to speak to the contents of the same letter, and Lord Ellenborough allowed the defendant's counsel to ask one of the witnesses, who had first stated all he recollected of the letter, whether it contained the particular words and expressions as represented by the plaintiff's witnesses.—Here the object of the cross-examination was (not, as in the case above supposed, to show that a former witness had given two different representations of the same transaction,) but to ascertain a material fact in the case by means of the plaintiff's letter; and as the plaintiff's witness had stated what he conceived to be the language of the letter, and the defendant's witness on the other side had given his account of it's contents, it then became perfectly reasonable to allow the question, whether the letter contained particular expressions, as represented by the witness on the other side, or any to that effect. Lord Ellenborough held, that "after exhausting the witness's memory," (not, however, by leading questions, but by examining him in the regular manner,) "the witness might then be asked, whether it contained a particular passage, recited to him, which had been sworn to on the other side,—for otherwise it would be impossible ever to come to a direct contradiction."

Leading in cross-examination.

Leading questions are admitted in the cross-examination of a witness, where much larger powers are given to counsel than in the original examination. Witnesses under cross-examination may be led immediately to the point, on which their answers are required. (1) If they betray a zeal against the cross-examining party, or show an unwillingness to speak fairly and impartially, they may be questioned with minuteness as to particular facts, or even particular expressions. There

Unwilling witness.

(1) See Hardy's case, 24 Howell's St. Tr. 755, by Buller, J.

can be no danger in leading too much, where the witness is obstinately determined not to follow.

Willing witness.

On the other hand, instances frequently occur, where the witness is adverse to the party who calls him, and leans strongly to the other side: here there must be some restrictions as to the form and manner of cross-examining. It often happens, that a witness in cross-examination waits only for a hint to shape a favourable answer, and is in effect the witness of the cross-examining party, though technically called the witness of the opposite side. To put strong leading questions to such a witness without limitation or reserve is substantially preparing a statement for him, and appears to be inconsistent with justice and a fair trial.

Hardy's case.

An instance of the kind here described occurred on the trial of Hardy for high treason.(1) A witness, who was a member of the same corresponding society as the prisoner, having been examined on the part of the prosecution, and having made, on his cross-examination, a favourable representation of the political opinions and designs of the society, was asked, whether some of the members had not used certain expressions on the subject of petitioning; upon which the Lord Chief Justice Eyre reminded the counsel, that he could not put the very words into the witness's mouth; that this was contrary to the practice of his court and to his opinion. And on the following day, when the subject occurred again, Mr. Justice Buller referred to the rule laid down by the Chief Justice, as the correct rule of practice; and added, "You may lead a witness upon a cross-examination to bring him directly to the point as to the answer; but cannot go the length, as was attempted yesterday, of putting into the witness's mouth the very words, which he is to echo back again."(2)

Re-examination limited to the points of cross-examination.

The re-examination of a witness is not to extend to any new matter, unconnected with the cross-examination, and which might have been inquired into on the examination in chief. Parkin *v.* Moon, 7 C. & P. 408.

(1) 24 Howell's St. Tr. 659.
(2) 24 Howell's St. Tr. 755. See

If new matter is wanted, the usual course is to ask the judge to make the inquiry: in such cases, he will exercise his discretion, and determine how the inquiry, if necessary, may be most conveniently made, whether by himself or by the counsel.

R. v. Beezley.

In *R.* v. *Beezley*,(1) the counsel for the crown, by the direction of the court, called witnesses named on the back of an indictment for murder, to give the prisoner's counsel an opportunity of cross-examining, but put no question to them, and they were cross-examined; one of them, on being cross-examined by the prisoner's counsel, stated many facts in the prisoner's favour. The counsel for the crown then proposed to inquire of him as to something which took place at an earlier part of the day, on which the deceased was killed; but this was disallowed by the judge, who said, the inquiry must be strictly a re-examination, and no question could be asked, which did not arise out of the cross-examination, and concluded by ruling that the counsel could not enter into a fresh examination of the witness as to new facts against the prisoner.—The new facts, which it was proposed to give in evidence, were probably not contained in the witness's deposition. The judge in that case, doubtless, exercised a sound discretion. But if the facts stated in the prisoner's favour had been contrary to, or inconsistent with the witness's deposition, and if the inquiry into the new facts would prove the evidence given for the prisoner to be untrue, under such circumstances the course proposed would probably have been allowed.

Witness, on bill of indictment, called by prosecutor to be examined on part of prisoner: re-examining to new facts.

Rule relaxed, when.

In a cause tried before Lord Chief Justice Best, he allowed the counsel for the plaintiff, after closing his case, to call a witness to prove the dishonour of a note, without which proof the action must have failed; he said he would always allow a party to adduce fresh evidence on points of this kind, which went to sustain the justice of the case, and was little more than

Giles v. Powell.

(1) 4 Car. & P. 200, before Littledale, J. The cases connected with this subject are, R. *v.* Simmonds, 1 C. & P. 84. R. *v.* Bodle, 6 C. & P. 186. R. *v.* Harris, 7 C. & P. 581. The points in these cases are stated in Mr. Granger's edition of Roscoe, Dig. Ev. Cr. C. last ed. 150.

matter of form. (1) And in a cause tried before Park, J., where the plaintiff's counsel stated, after the close of his case, that he had omitted to prove a fact in it's proper place, because it was so plain that he supposed it would not be disputed, the judge allowed him to supply the proof, though it was objected to. (2)—In all such cases, the judge is entrusted with the general rule, to enforce or relax it in his discretion; it will frequently happen, that the relaxation of the rule is proper and absolutely necessary in the administration of justice.

A judge has, of course, full power in all cases, civil or criminal, to order witnesses to be recalled for re-examination, in any stage of the case before it is finally disposed of. (3) And in a criminal case, where a witness was so re-examined by the judge after the close of the prisoner's defence, the prisoner's counsel was allowed to cross-examine again. (4)

Evidence in reply limited to defendant's case.

The same principle is observed, with reference to the conduct of the entire cause, as to the restriction on evidence in reply to the defendant's case. After the close of the case for the defendant, the general rule is that the evidence in reply must bear directly or indirectly upon the subject-matter of the defence, and ought not to consist of new matter unconnected with the defence, and not tending to controvert or disprove it. This is the general rule, made for the purpose of preventing confusion, embarrassment, and waste of time: but it rests entirely in the discretion of the judge, whether it ought to be strictly enforced or remitted,—as he may think best for the discovery of truth, and the administration of justice.

R. v. *Stimpson.*

In a prosecution for larceny, the case proved on the part of the crown was that the goods were stolen, and found in the

(1) Giles *v.* Powell, 2 C. & P. 259. The rule was severely enforced in Brown *v.* Giles, 1 C. & P. 118, where the accidental omission of a necessary piece of evidence was the cause of a non-suit: thus the plaintiff was made to suffer for the casual oversight of his counsel.

(2) I have by an oversight omitted the names and report of this case; and have not been able to recover them.

(3) R. *v.* Remnant, R. & R. 136.

(4) R. *v.* Watson, by Taunton, J., 6 C. & P. 653. Counsel were not employed for the prosecution.

possession of the prisoner; in the defence, the daughter of the prisoner proved that he bought the goods of a third person. In reply, the counsel for the prosecution called that person, and attempted to prove by him, that he had seen the prisoner steal the goods; but this inquiry was stopped, and he was confined by the court to the question whether he had sold the goods to the prisoner, which, if disproved, would be an answer to the defence set up by the prisoner. (1)—This was carrying the rule very far, as the fact of seeing the prisoner steal the goods would be strong proof that he did not buy them.

Knapp v. *Haskall.*

In an action for work and labour, (2) surveyors having been called for the defendant to prove, that in a certain year they surveyed the work, and that then the plaintiff's charges were 100*l.* too much, the plaintiff's counsel offered in evidence, in reply, a letter from the defendant's attorney, written two years before that year, for the purpose of showing that the charges were only 60*l.* too much; an objection was taken, that it was not evidence in reply, and did not contradict the defendant's case: and Lord Tenterden was of that opinion. Here the evidence tendered, even supposing it to be equivalent to an admission by the defendant himself, would not disprove the positive evidence of the defendant's valuers; the only effect it could have, would be to show that their valuation was too low, that is, it would have been evidence in chief for the plaintiff,—but to prove a less demand than had been originally set up, and, in that point of view, somewhat inconsistent with the plaintiff's original case.

Whittingham v. *Bloxham.*

In an action of trover, or for damage done to the plaintiff's goods, if a witness on the part of the defence were to prove that the goods were the property of a third person, that person might be called by the plaintiff to prove the negative, that they were not his property; but the further proof, that they were the plaintiff's property, would, strictly speaking, be evidence in chief, rather than in reply. (3)

(1) R. *v.* Stimpson, 2 C. & P. 415.
(2) Knapp *v.* Haskall, 4 C. & P. 590.
(3) Whittingham *v.* Bloxham, 4 C. & P. 597.

Refreshing memory by memoranda.

A witness will be allowed to have his memory, respecting anything upon which he is questioned, refreshed by means of written memoranda. There seem to be three classes of cases, in which this may be allowed:—first, where the writing serves only to revive or assist the memory of the witness, and to bring to his mind a recollection of the facts;—secondly, where the witness recollects having seen the writing before, and though he has no independent recollection of the facts mentioned in it, yet remembers that, at the time he saw it, he knew the contents to be correct;—thirdly, where it brings to the mind of the witness neither any recollection of the facts mentioned in it, nor any recollection of the writing itself, but which, nevertheless, enables him to swear to a particular fact, from the conviction of his mind on seeing a writing which he knows to be genuine; as, for instance, where a banker's clerk is shown a bill of exchange which has his writing upon it, from which he knows that the bill has passed through his hands, though he has no recollection of that fact, nor of his writing anything upon the bill. (1) In the two latter classes of cases, the witness must, on seeing the writing, be able to depose positively to the facts to which he is examined, although he may have no present recollection of them independently of the writing. (2)

The writing need not be produced, when.

In the first class of cases, where the memory of a witness has been revived by the previous inspection of a writing, it is not necessary, as a condition of the admission of his oral testimony, that the writing should be produced in court;(3) the case seems to differ only in degree from many others in which memory is revived by reference in the mind of a witness to any circumstance, to which his attention may have been drawn with a peculiar degree of force. The absence, however, of the writing might afford matter of observation. If it is produced, the counsel for the other party has a right to see it, and cross-examine from it. (4)

(1) See Rex *v.* St. Martin's, Leicester, 2 Ad. & E. 210.

(2) See also by Bayley, J., in Maugham *v.* Hubbard, 8 B. & C. 16. *Vide infra*, p. 411.

(3) Kensington *v.* Inglis, 8 East, 273. Burton *v.* Plummer, 2 Ad. & E. 341.

(4) Rex *v.* Hardy, 24 Howell's St. Tr. 824. Sinclair *v.* Stevenson,

When the writing must be produced.

Where a writing has not the effect of reviving the witness's memory, (as in the two last classes of cases above mentioned,) but yet enables him to speak positively to a fact, so that his testimony depends upon his inference from the writing, the writing must be produced, and his testimony is admissible as proof of the fact. (1)

Unstamped, or other inadmissible writing may be used for this purpose.

In this last case, namely, where a witness speaks positively to a fact from seeing a written paper, though he does not distinctly remember the fact therein stated, it is material to consider, in what mode, and through what medium, the fact is proved,—whether it is proved by the written paper, or by parol testimony; for if it were taken as proved by the writing, and not by the parol testimony of the witness, the question would then arise, whether a writing, which, from the nature of the subject-matter, would require a stamp, can be used by the witness, if unstamped. It is clear, in the case proposed, the fact is proved by the parol testimony of the witness, not by the writing: the writing alone could not be admitted, as the proper and legitimate evidence of the fact; nor can it be justly said, that the writing itself becomes evidence from being used by the witness. This point has been decided in the case of *Maugham* v. *Hubbard and another*, (2) assignees of *Lancaster*. The bankrupt, being called to prove a receipt of money by him from the plaintiff, stated, that in November, 1822, 20*l.* were received from the plaintiff, and not carried to the account: a rough cash-book, kept by the plaintiff, was then put into his hands, in which there was the following entry, "4th Nov. 1822, Dr. R. Lancaster, check 20*l.*, R. L." The witness then said, "the entry of 20*l.* in the plaintiff's book has my initials, written at the time; I have no recollection that I received the money; I know nothing but by the book; but seeing my initials, I have no doubt that I received the money." The paper not having been stamped, the admis-

Maugham v. *Hubbard.*

1 C. & P. 582. Rex *v.* Ramsden, 2 C. & P. 603.

(1) Doe *v.* Perkins, 3 Tr. R. 754. Tanner *v.* Taylor, *ibid.* n. Howard *v.* Canfield, 5 Dowl. P. C. 417. R. *v.* St. Martin's, Leicester, 2 A. & E. 215, by Patteson, J. Sinclair *v.* Stevenson, 1 C. & P. 582. Lloyd *v.* Freshfield, 2 C. & P. 325.

(2) 8 B. & C. 14. Loyd *v.* Freshfield, 2 C. & P. 325. Henry *v.* Lee, 2 Chit. Rep. p. 124.

sion of this evidence was objected to, but Lord Tenterden was of opinion, that though it was not itself admissible in evidence to prove the payment of the money, the witness might use it to refresh his memory, and that his saying, he had no doubt that he had received the money, was sufficient evidence of the fact. On a motion being made for a new trial, Lord Tenterden said, "Here the witness, on seeing the entry signed by himself, said, he had no doubt that he had received the money. The paper itself was not used as evidence of the receipt of the money, but only to enable the witness to refresh his memory; and when he said that he had no doubt he had received the money, there was sufficient *parol evidence* to prove the payment." Mr. Justice Bayley added, "Where a witness, called to prove the execution of a deed, sees his signature to the attestation, and says, he is thereby sure that he saw the party execute the deed, that is sufficient proof of the execution of the deed, though the witness should add, that he has no recollection of the fact of the execution of the deed." (1)

Witness speaking positively, only from seeing his writing in the instrument.

Where a witness on looking at a written paper has his memory so refreshed, that he can speak to the facts from a recollection of them, his testimony is clearly admissible, although the paper may not have been written by him. (2) So also, where the witness recollects that he saw the paper, when the facts were fresh in his memory, and remembers that he then knew the particulars therein mentioned to be correctly stated, his testimony is admissible. (3) But where the witness neither recollects the fact, nor the truth of the account in writing, and the writing was not made by him, his testimony, so far as it is founded on the written paper, would be objectionable, as hearsay; the witness can be no more permitted to

Memorandum, by whom written.

(1) And see another instance of this kind in Rex *v.* St. Martin's, Leicester, 2 A. & E. 213. In Jacob *v.* Lindsay, 1 East, 640, an unstamped paper was used as a memorandum; see p. 414, *infra.*

(2) Duchess of Kingston's case, 20 How. St. Tr. 619. Henry *v.* Lee, 2 Chitty's Rep. 124. Doe *v.* Perkins, 3 T. R. 749. Jacob *v.* Lindsay, 1 East, 460. Burton *v.* Plummer, 2 Ad. & E. 341, and see the judgment of Patteson, J., in Rex *v.* St. Martin's, Leicester, 2 Ad. & E. 215.

(3) Burrough *v.* Martin, 2 Camp. 112. Burton *v.* Plummer, 2 A. & E. 341, by Lord Denman; and see Jacob *v.* Lindsay, 1 East, 460.

give evidence of his inference from what a third person has written, than from what a third person has said.

No precise time, within which the writing must be made.

Upon the question, as to the time when the written memorandum should have been made,—whether it must be contemporaneous with the fact, or recently after the fact, or how long after it may be made,—the decisions, as might be expected, lay down no precise rule. There seems to be no good reason for saying, that a writing is not to be allowed for the purpose of refreshing a witness's memory, unless made contemporaneously with the fact which it records; but certainly it ought to have been made either at that period, or recently after, or at the utmost before such a length of time has elapsed, as to render it probable that the memory of the witness might have become deficient. The principle being adopted that a witness's memory may be assisted by a written paper or memorandum, it follows that no precise limited time can consistently be fixed, within which a writing must be shown to have been made, before it can be used by the witness. A memorandum made long after the fact, may be to some witnesses of much greater use, than even a contemporaneous memorandum will be to others. The effect of a memorandum in assisting a witness will depend upon the state of his memory, and the time when the memorandum was made,—which will vary in different cases. (1)

Extracts taken by others.

A witness cannot refresh his memory by extracts made by another person from minutes or memoranda made by the witness himself. This appears from the following case, cited by Lord Kenyon: (2) A motion was made in Chancery to

(1) In the case referred to below in Doe *v.* Perkins, the Lord Chancellor said, "In some cases, a man may use papers at law, but I have known some judges (and I think I adhered chiefly to that rule myself) let them use only papers drawn up as the facts happened, and all other papers I have bid them put in their pockets; and if any had been offered, which were drawn by the attorney, I should have reprimanded him severely. As to dates and names, which are merely technical, it is quite another thing." In Sandwell *v.* Sandwell, Comb. 445, the expression attributed to Holt, C. J., is, that the memorandum must have been made "*presently*." In Jones *v.* Stroud, 2 C. & P. 196, it was said by Best, C. J., that it must have been made "*near* the time." This *nearness*, it is evident, cannot be fixed by any arbitrary rule.

(2) In Doe *v.* Perkins, 3 T. R. 752. And see 2 A. & E. 215.

suppress depositions, on a certificate from the commissioners that the witness refreshed her memory by minutes, consisting of six sheets of paper of her own handwriting, the substance of which she declared she had set down from time to time, as the facts occurred to her memory; that five of the six sheets were drawn up in the form of a deposition by the plaintiff's solicitor, whom she had requested to digest her notes, and reduce them to some order, and that after he had done so, she transcribed, and altered them, wherever it was necessary to make them consistent with her meaning. The Lord Chancellor, in giving judgment, said, "Should the court connive at such proceedings as these, depositions would really be no better than affidavits; for should a witness be permitted to use a paper, especially one drawn up by the attorney of one of the parties, though from memoranda furnished by the witness, I might as well let the attorney draw an affidavit for her, and use that instead of a deposition."

Copies not to be used as memoranda, when.

It has been held, that a witness cannot be permitted to refresh his memory by a copy of a writing, (not in the nature of a duplicate original,) though the copy was made by himself, and though the writing itself might have been used for that purpose. This must be taken with some limitation. In *Jones* v. *Stroud*, (1) it was ruled by Best, C. J., that a witness could not use a copy of a contemporaneous memorandum, which copy was made six months after the facts, though the witness stated that the original could not be found, and that, when lost, it was illegible from being covered with figures. And in the case of *Burton* v. *Plummer*, (2) Patteson, J., said, "The copy of an entry, made by the witness contemporaneously, does not seem to be admissible for the purpose of refreshing a witness's memory. The rule is, that the best evidence must be produced; and that rule appears to me to be applicable, whether a paper be produced as evidence in itself, or used merely

(1) 2 C. & P. 196. If the original could have been admitted as substantive evidence in itself, there was sufficient proof here for admitting the secondary proof; but this point could not arise, as the writing (whether the copy or the original memorandum) was not to be used as evidence *per se.*, but merely for a collateral purpose, to assist the witness in giving his testimony.

(2) 2 A. & E. 343.

to refresh the memory."—But if a witness were to prove that he made a memorandum as to a certain fact, (the delivery of goods for instance), and sometime afterwards, according to his usual course, copied the memorandum correctly into a book, and then destroyed the original memorandum, there can be no doubt in such case that the witness might refresh his memory by the copy, as well as by the original writing if it had been in existence: for if the original had been admissible as substantive proof of the fact, the copy would have been not less so.

Writing read over to witness.

Lord Kenyon, in the case of *Vaughan* v. *Martin*, (1) allowed a deposition, formerly made by an aged witness, to be read to him at a trial to refresh his memory. And in *Catt* v. *Howard*, (2) where a blind witness had received money, and given an unstamped receipt for it, Lord Tenterden permitted the receipt to be read to him in court for the same purpose.

Written account admitted by the other party.

Jacob v. *Lindsay.*

Unstamped paper used as a memorandum.

Where a plaintiff had entered an account in writing of goods and money, which from time to time were forwarded to the defendant, and the defendant had, by his signature, at the foot of each page, admitted the truth of the items, but the writing itself could not be given in evidence for want of receipt stamps; it was held, that the plaintiff might prove that, upon calling over each article to the defendant, he admitted the receipt, and that the witness, who heard him, might refresh his memory by referring to the account. (3)

(1) 1 Esp. 440.
(2) 3 Stark. Ca. 3.
(3) Jacob *v.* Lindsay, 1 East, 460. And that an unstamped paper may be used as a memorandum, *vide supra*, p. 410.

Section II.

Of the Privilege of Witnesses in refusing to answer.

The privilege of witnesses in not being compellable to answer questions which may affect their personal rights, is a matter of frequent occurrence, and of some importance. The cases to be considered are those where the witness may, by answering, subject himself to a criminal prosecution, to a penalty, or forfeiture, or to civil process; and, lastly, where the answering of the question may be degrading to character.

A witness cannot be compelled to answer any question, the answering of which may expose, or tend to expose, him to a criminal charge, or to any kind of punishment. (1) He is exempted by his privilege from answering not only what will criminate him directly, but also what has any tendency to criminate him; and the reason is, because otherwise question might be put after question, and though no single question may be asked which directly criminates, yet enough might be got from him by successive questions whereon to found against him a criminal charge. (2)

Where the answering might subject to criminal charge, &c.

It is the province of the court to decide whether a proposed question has a tendency to criminate a witness; and it is the

The court to determine as to the tendency.

(1) Sir J. Freind's case, 4 St. Tr. 6, S.C. 10 Howell's St. Tr. 1090. Lord Macclesfield's case, 6 St. Tr. 649, S. C. 16 Howell's St. Tr. 1149. Rex *v.* Lord G. Gordon, 2 Doug. 593. Title *v.* Grevet, 2 Lord Raym. 1008. 16 Ves. Jun. 242. Hardy's case, 24 Howell's St. Tr. 720. Trial of De Berenger and others, by Gurney, p. 195. Cates *v.* Hardacre, 3 Taunt. 424. Parkhurst *v.* Lowten, 2 Swanst. Ch. R. 216. See also 16 C. 2, s. 1, c. 12, s. 4, and Preamb. of st. 46 G. 3, c. 37. Acts of indemnity are often passed, to absolve witnesses from penalties and prosecutions, on account of transactions of which they are required to give evidence; such as st. 45 G. 3, c. 126, in the impeachment of Lord Melville; and st. 1, 2 G. 4, c. 21, on the inquiry respecting elections at Grampound; and many others of the same kind.

(2) R. *v.* Slaney, 5 C. & P. 213. Cates *v.* Hardacre, 3 Taunt. 424. See also Paxton *v.* Douglas, 19 Ves. 227: Claridge *v.* Hoare, 14 Ves. 59: Swift *v.* Swift, 4 Hagg. Eccl. R. 154.

duty of the court, while it protects the witness in the due exercise of his privilege, to take care that he does not, under the pretence of defending himself, screen others from justice, or withhold evidence which he might safely give. The court will require to be satisfied that the witness is acting an honest part, and that he may incur danger by answering; when satisfied of this, it will allow the privilege; to force him to reveal particulars, might lead to a prosecution, against which he has a right to protect himself. In a case where a witness stated that there was no consideration for a bill of exchange, and then refused to declare the particulars of the want of consideration, because it would criminate him, Lord Tenterden allowed the witness his privilege, and ordered the whole of his statement to be struck out. (1)

Privilege of witness, not of party.

The privilege of refusing to answer is the privilege of the witness, not of the party; for that reason, Lord Tenterden refused to allow counsel to support by argument the privilege as belonging to the party whom he represented. (2)

This privilege must belong to the witness on a principle of natural justice. The right to refuse to answer in such cases is a right of self defence; if he has a right to defend himself against a criminal charge, he must have as full a right not to expose himself to such a charge by giving evidence, and not to be accessory to his own ruin. The judge, therefore, always feels it to be his duty to apprize a witness of his privilege, as soon as a question is asked which may place him in danger.

Waiver of privilege.

A witness may waive his privilege, and answer at his peril. From the nature of the right it may be inferred, that he will be at liberty to answer, or refuse to answer, any questions at his discretion; and that his consenting to answer some questions ought not to bar his right to demur to others. On the other hand, it is only reasonable that he should not be allowed, by any arbitrary use of his privilege, to make a partial statement of facts to the prejudice of either party. Upon this principle,

(1) Dandridge *v.* Corden, 3 C. & P. 11. Watson *v.* Bevern, 1 Carr. C. 363.

(2) Thomas *v.* Newton, M. & M. 48, n. And see Mann. Dig. Witness, 222. S. P. Adey's case, 1 Moo. & R. 94.

Lord Tenterden seems to have held, in the case of *East* v. *Chapman*, (1) that if a witness waive his privilege so far as to answer part of the questions tending to subject him to an indictment, he cannot be exempted from answering the remainder, but must give the whole truth.

Indictment for rape.

On an indictment for a rape, the woman is not obliged to answer whether on some former occasion she had not a criminal connection with other men, or with particular individuals; (2) nor is evidence of such criminal intercourse admissible. (3)

Question of bastardy.

On an appeal against an order of bastardy, a person cannot be compelled to acknowledge himself the father of a bastard child; but there is no objection to his being sworn, and, if he chooses, he may confess the fact. (4)

Case of libel.

In an action for a libel, which was published by the defendant in a voluntary affidavit sworn extra-judicially before a magistrate, it has been held that the magistrate's clerk is not bound to answer, whether he wrote the affidavit, and delivered it to the magistrate; because, it is said, the bare copying out of a libel is criminal. (5)

Accomplice.

An accomplice, admitted to give evidence against his associate in guilt, is bound to make a full and fair confession of the whole truth as to the offence which is the subject-matter of the prosecution, but not bound to answer as to his share in other offences in which he was not concerned with the prisoner; for he is not protected from a prosecution for such offences. (6)

Where the

A witness is privileged from answering a question, the

(1) M. & M. 47. 2 C. & P. 571, S. C. And see Dixon *v.* Vale, 1 C. & P. 279. Austin *v.* Poiner, 1 Simons, 348.

(2) Hodgson's case, 1 Russ. & Ry. Cr. C. 211. Dodd *v.* Norris, 3 Campb. 519. R. *v.* Pitcher, 1 C. & P. 85. And see Cundell *v.* Pratt, stated *infra*, p. 428.

(3) Hodson's case, 1 Russ. & Ry. Cr. C. 211.

(4) Rex *v.* St. Mary's Nottingham, 13 East, 57, n.

(5) Maloney *v.* Bartley, before Wood, B., 3 Campb. 210. A bill of exceptions was tendered, but afterwards dropped.

(6) West's case, Vol, 1, p. 28.

answering may subject to penalty or forfeiture.

answering of which might subject him to a penalty or forfeiture of any kind. The declaratory statute, 46 G. 3, c. 37, (1) implies that a witness may legally refuse to answer a question, which has a tendency to expose him to a penalty or forfeiture of any nature whatsoever. At the time of passing that act, when the general privileges of witnesses were much discussed, it was proposed to insert in the act a proviso, that no mortgagee, or *bonâ fide* purchaser, or possessor of an estate, should be compelled to answer any question, the answering of which might probably tend to defeat his title, or incur a forfeiture of his estate. This proviso was afterwards withdrawn. However, several of the judges, who on that occasion were of opinion that the liability to a civil action or to a pecuniary charge ought not to exempt a witness from answering questions, yet considered the probability or danger of incurring a forfeiture of estate to be a legal ground of exemption.(2) In Courts of Equity, it is an established principle, that a party is not bound to answer, so as to subject himself to pains or penalties, or to any kind of punishment, or to any forfeiture of interest. (3)

Where the answering may subject to a civil suit.

Lord Melville's case.

A witness cannot legally refuse to answer a question relevant to the matter in issue, on the ground that his answer might subject him to a civil suit. In Lord Melville's case, considerable doubts were entertained upon this point, some judges being of opinion that he was not compellable to answer such questions, and others being of a contrary opinion.*

(1) *Vide infra*, p. 421.

(2) See cases cited in n. (1), p. 417, *supra*. Roberts *v.* Allatt, *infra*, p. 428, where a witness was compelled to answer, the time for suing for penalties having expired. See Cates *v.* Hardacre, 3 Taunt. 424, that a witness is not compellable to answer a question which may subject him to the penalties of usury. And see Jackson *v.* Benson, 1 Y. & J. 32.

(3) The cases upon this subject are collected in Mitford's Treat. on Chanc. Pleadings, p. 157—163. See Roberts *v.* Allatt, stated *infra*, p. 428.

* This subject was much discussed, and referred to the Judges for their opinion. It appears from the Parliamentary Debates, that a bill had been brought into the House of Lords, to indemnify witnesses from criminal prosecutions and from civil process, to which they might be exposed by giving evidence. The indemnity from *criminal* prosecutions was agreed to: but some doubts arising with respect to the indemnification from *civil* process, several questions were referred to the Judges with the view of ascertaining whether persons were legally justified in refusing to answer questions, the result of which might subject them to

To settle the rule of law on this subject, the stat. 46 G. 3, c. 37, was introduced, which declares that a witness cannot legally refuse to answer a question relevant to the matter in issue, (the answering of which has no tendency to accuse himself, or to expose him to a penalty or forfeiture of any nature whatsoever), on the ground that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit. 46 G. 3, c. 37.

Where the answering may degrade the witness' character.

The last case to be mentioned on this subject is, where a question is asked not relevant to the matters in issue, the answering of which has a direct tendency to degrade the witness's character, though it may not subject him to a criminal prosecution. If a witness, for instance, were to be asked, whether he had not suffered some infamous punishment, or if any other question of the same kind were asked, imputing criminality to the witness in some past transaction, and not relevant to the matters in issue, would he be compellable to answer? The inquiry here made, it is to be observed, relates only to such questions as are not relevant to the matters in issue; for if the transaction, to which the witness is interrogated, form any part of the issue, he will be obliged to give evidence, however strongly it may reflect upon his character.

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a civil suit. (6 vol. Parl. Deb. p. 167.) Three questions were proposed; the object of the first and second was to ascertain, whether a witness could demur to a question, the answering of which might render him liable to an action for debt, or to a suit for the recovery of the profits of public money; the object of the third was to ascertain, whether a witness, who on making a full and fair disclosure was to be excused from certain debts, could be legally objected to on the ground of his being interested. (P. 222.) The Lord Chief Justice Mansfield, who delivered the opinion of the judges, stated, that upon the two first questions they were divided in opinion; and that on the third question they were unanimously of opinion that a witness, in the situation described, could not be rejected on the ground of interest, since whatever might be offered on condition of his making a fair and full disclosure, could legally make no difference with respect to his evidence, the witness being bound by his oath, by law, morality and honour, to declare the truth, the whole truth, and nothing but the truth. (P. 223.) The House of Lords then called upon the Judges to deliver their opinions *seriatim* on the proposed questions. (P. 226, 227.) The Judges accordingly delivered their opinions in order. Four of the Judges (Lord Chief Justice Mansfield, Grose, J., Rooke, J., and Thomson, J.) were of opinion, that a witness was not compellable to answer any question, the answer to which might subject him to a civil action: the other Judges, together with the Lord Chancellor, and Lord Eldon, were of the contrary opinion. (P. 234, 245.)

There seems to be no reported case, in which this point has been solemnly determined; and, in the absence of all express authority, opinions have been much divided. The advocates for a compulsory power in cross-examination maintain, that as parties are frequently surprised by the appearance of a witness unknown to them, or, if known, entirely unexpected, without such power they would have no adequate means of ascertaining what credit is due to his testimony; that on the cross-examination of spies, informers, and accomplices, this power is more particularly necessary; and that if a witness may not be questioned as to his character at the moment of trial, the property and even the life of a party must often be endangered.—

Reasons for compelling the witness to answer.

Those, on the other side, who maintain, that a witness is not compellable to answer such questions, argue to the following effect. They say, the obligation to give evidence arises from the oath, which every witness takes; that by this oath he binds himself only to speak touching the matters in issue; and that such particular facts as these—whether the witness has been in gaol for felony or suffered some infamous punishment, or the like,—cannot form any part of the issue, as appears evident from this consideration, that the party, against whom the witness is called, would not be allowed to prove such particular facts by other witnesses. They argue, further, that it would be an extreme grievance to a witness, to be compelled to disclose past transactions of his life, which may have been since forgotten, and to expose his character afresh to evil report and obloquy, when perhaps by subsequent conduct he may have recovered the good opinion of the world; that if a witness is privileged from answering a question, though relevant to the matters in issue, because it may tend to subject him to a forfeiture of property, with much more reason ought he to be excused from answering an irrelevant question to the disparagement and forfeiture of his character; that in the case of accomplices, in which this compulsory power of cross-examination is thought to be more particularly necessary, the power may be properly conceded to a certain extent, because accomplices stand in a peculiar situation, being admitted to give evidence only under the implied condition of making a full and true confession of the whole truth; but even accomplices are not to

Reasons against.

be questioned, in their cross-examination, as to other offences in which they have not been concerned with the prisoner: (1) lastly, that with respect to witnesses, in general, the best course to be adopted, both in point of convenience and justice, is to allow the question to be asked, at the same time allowing the witness to shelter himself under his privilege of refusing to answer, and, if he refuses, to leave it to the jury to draw their own conclusion as to his motives for such refusal.

Authorities.

Although there appears not to be any express solemn decision on the point, whether a witness is compellable to answer questions degrading to his character, yet several opinions have been pronounced by judges of great authority, from which it may be collected that the witness is not compellable to answer such questions. They are as follows:—

Witness not compellable to answer.

Cook's case.

1. In *Cook's* case, reported in the State Trials, (2) where a question arose, whether a juryman, who had been challenged, might be examined as to his having asserted the guilt of the prisoner before the trial, C. J. Treby said, "You may ask upon the *voire dire*, whether he has any interest in the cause, nor shall we deny you liberty to ask, whether he is qualified acccording to law by having a freehold of sufficient value; but that you may ask a juror (3) *or witness* every question that will not make him criminous, that is too large. *Men have been asked, whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny, but they have not been obliged to answer;* for although their answer in the affirmative will not make them criminal, nor subject them to punishment, yet they are matters of infamy, and *if it be an infamous thing, that is enough to preserve a man from being bound to answer.* A pardoned man is not guilty; his crime is purged. But merely for the reproach of it, *it shall not be put upon him to answer a question, whereon he will be forced to forswear or disgrace himself.* So, *persons have been excused from answering, whether they have been*

(1) West's case; see vol. 1, p. 28. 153.
(2) 4 St. Tr. 748, S. C. 13 Howell's St. Tr. 334. S. C. 1 Salk.
(3) See also Co. Litt. 158, b.

committed to Bridewell as pilferers or vagrants, &c.; yet to be suspected is only a misfortune and shame, no crime. The like has been observed in other cases of odious and infamous matters, which are not crimes indictable."

Freind's case. 2. On the trial of Sir John Freind for high treason, (1) a question arose as to the propriety of asking a witness, whether he was a Roman Catholic. The court determined, that the question could not be asked, as the witness might, by his answer, subject himself to several penalties. C. J. Treby, on that occasion, said, "No man is bound to answer any questions, that will subject him to penalties *or to infamy*. If you should ask him, whether he were a deer-stealer, or whether he were a vagabond, or any other thing that will subject him to punishment either by statute or by common law, or whether he be guilty of a petty larceny, or the like, the law does not oblige him to answer any such questions."

Layer's case. 3. In *Layer's* case, (2) on an indictment for high treason, the prisoner insisted that a witness should be examined on the *voire dire*, whether he had a promise of pardon, or some other reward, for swearing against him. The point was argued by his counsel, and overruled by the court. The Lord Chief Justice Pratt said, "You see, the most you can make of it is, that it is an objection to his credit; and if it goes to his credit, must he not be sworn, and his credit left to the jury? He must be examined as a legal witness. But *if this man, under expectation or promise of a pardon, comes here to swear that which is not true, and you would ask him to that, he is not obliged to answer it. Nobody is to discredit himself,* but always to be taken to be innocent, till it appear otherwise. If *they who ask the question, insinuate any thing like that,* (namely, that the witness can give no evidence except what is false,) *it ought not to have an answer;* but if he has a promise of pardon if he gives true evidence, it is no objection to his being a

(1) 4 St. Tr. 259, S. C. 11 Howell's St. Tr. 1331. This opinion of Chief Justice Treby was approved of by Lord Ellenborough, in the case of Rex *v.* Lewis, 4 Esp. N. P. C. 225.

(2) 6 St. Tr. 259, S. C. 16 Howell's St. T. 161.

witness, or to his credit." And Mr. Justice Fortescue Aland, referring to a case cited, where a similar point was made and overruled, said, "The reason the court gave, (for holding that it was improper to ask this question on the *voire dire*,) was, that if he had this promise, such promise was made either to speak the truth, or to speak a falsehood; *if it were to give just and true evidence, there was no harm in it; and if it was a promise of pardon for speaking what was not true, the witness was not bound to answer that question.*" In this case, the question put to the witness tended to the support of a charge of perjury against him, and clearly could not be properly put on the *voire dire* as a ground of disqualification.

The question may legally be asked.

Whether questions of such a description may not be legally asked, is a very different point from that before considered, whether the witness is compellable to answer. It may be just to allow a witness the privilege of not answering in certain cases; but that the party, against whom the witness appears, shall not be allowed to ask the question, and force him to his privilege, is a proposition, which, if carried into practice, might often be attended with dangerous consequences.

Cases which seem *contrà*.

There are two decisions, (*R.* v. *Lewis* and *Macbride* v. *Macbride*,) in which it would seem from the reports to have been held, that a question, the answering of which may have the effect of degrading the witness' character, cannot properly be asked.

R. v. *Lewis.*

The case of *Rex* v. *Lewis*, (1) was a prosecution for an assault. The report states, that the prosecutor, *who was a common informer, and a man of a suspicious character*, was asked, in the course of the cross-examination, *whether he had not been in a house of correction*; Lord Ellenborough, it is said interposed, and stated that this question should not be asked. In support of this opinion, he referred to the rule laid down by Chief Justice Treby, before mentioned, that a witness is not bound to answer any question, the object of

(1) 4 Esp. N. P. C. 225. See Frost *v.* Holloway, *infra*, p. 428.

which is to degrade or render him infamous; and added, that he thought the rule ought to be adhered to. Now, it seems probable from the reasoning of Lord Ellenborough, and from the former part of the report, which states that the witness was a common informer and of a suspicious character, (which shows, that questions reflecting upon his character had been already asked without objection, and had been also answered,) it seems probable from these circumstances, that the witness, on being questioned as to the particular fact of his having been in a house of correction, either appealed to the court for protection, or showed an unwillingness to answer; and if, after this, the question had been repeated, it might be thought necessary to interpose, and intimate that the witness could not be compelled to answer, and that the question, therefore, ought not to be pressed; this shows the application of the rule, which Lord Ellenborough cited as having been laid down by Chief Justice Treby, as to the privilege of the witness in not answering, which would have been cited prematurely, if the single point in discussion were, whether the question could *in the first instance* be legally asked. The observations here made will, perhaps, have more weight, when it is remembered, that Lord Ellenborough continually permitted such questions to be asked without the slightest disapprobation, a fact well known to all who are acquainted with the practice of that great master of the law of evidence.

Macbride v. *Macbride.*

Macbride v. *Macbride,* (1) was an action of assumpsit; a woman having given evidence of the plaintiff's demand, was asked on the cross-examination, whether she did not live in a state of concubinage with the plaintiff, when Lord Alvanley interposed, and is reported to have said, he thought questions as to the general conduct might be asked, but not such as went immediately to degrade the witness.

O'Coigley's case.

On the trial of O'Coigley and O'Connor, (2) a question was asked in cross-examination, which cast an imputation on the witness, and the counsel was not allowed to repeat the question

(1) 4 Esp. N. P. C. 242. *Vide supra,* p. 399, Thomas *v.* David.

(2) 26 Howell's St. Tr. 1353.

or follow it up by another. But here the witness had first appealed to the court for protection: so that this decision is an authority to show that the witness is not compellable to answer, rather than that the question cannot regularly be asked.

Cases permitting the question.

On the other hand, there are many cases in which questions of this description have been allowed by the court. The opinion before cited, of Chief Justice Treby and of the other judges, upon the point whether the witness is compellable to answer, imply, that there is no objection, in point of law, to *asking* the question, but that the objection arises in a later stage of the cross-examination, namely, when an attempt is made to *compel* him to answer. They are as strong authorities for the one position as for the other. The same observation may be made also with respect to the statute before referred to; which seems to imply that there is no legal objection to a question, which may even subject the witness to forfeiture, although, if the question is asked, he may legally refuse to answer. (1) In addition to this, it may be observed, the common practice of courts of justice, before the most approved judges, will abundantly furnish instances of such questions being asked, and not being disallowed as contrary to the rules of law; and it is difficult to see how a question can be deemed properly illegal, when, if the witness chooses to answer, his answer must undoubtedly be received as evidence.

R. v. *Edwards.*

In the case of *Rex* v. *Edwards*, (2) on an application to bail a prisoner, the court allowed the counsel to ask one of the bail, whether he had stood in the pillory for perjury: the question was objected to, but the objection was overruled.

R. v. *Watson.*

In *Watson's* case, for high treason, questions of this description were frequently asked; and it may be inferred from the opinions of the judges, on an argument in that case, that such questions are regular. (3)

(1) 46 G. 3, c. 37. *Vide supra*, p. 421.

(2) 4 T. R. 440.

(3) See Gurney's Report of Watson's trial, 288—291. An instance occurred also in Lord Cochrane's

Frost v. *Holloway.*

The case of *Frost* v. *Holloway* (1) goes much further: the witness was there compelled to answer a degrading question. Mr. Scarlet, in cross-examining a witness, asked him, whether he had not been tried for theft at Reading. The witness refused to answer, and appealed to Lord Ellenborough, whether he was bound to answer such a question. Lord Ellenborough said, "If you do not answer the question, I will commit you;" adding, "you shall not be compelled to say whether you were guilty or not."

Cundell v. *Pratt.*

In the case of *Cundell* v. *Pratt*, (2) a witness was asked, on cross-examination, whether she was not cohabiting in a state of incest with a person named, but Lord Chief Justice Best interposed, and stopped the question. The report states, it was contended that counsel had a right to put questions tending to degrade witnesses, for the purpose of trying their character, on which the Chief Justice said, he did not forbid the question on that ground, but as a protection to a witness from giving an answer, which might expose him to punishment, adding, "if they are protected beyond this, from questions that tend to degrade them, many an innocent man would unjustly suffer."

Roberts v. *Allatt.*

In the case of *Roberts* v. *Allatt*, (3) a witness objected to state, whether the transaction, to which he was a party, and in respect of which a bill of exchange (the subject of the suit) was given, was not a settlement of a balance of stock-jobbing time bargains, on the ground that his answer might subject him to penalties; but as it appeared that the time for suing for the penalties was passed, and no proceeding had been commenced against the witness, Lord Tenterden held that he was bound to answer. Here compulsion was used, although the question put reflected on moral character.

Effect of refusing to answer.

The refusal of a witness to answer a question which imputes

trial, p. 419, by Gurney; and in Hardy's case, 24 Howell's St. Tr. 726. See also 11 East, 311.

(1) Sittings in K. B. after H. T. 1818, MS. note, communicated to the author by Mr. Gurney, who was counsel in the cause. See Roberts *v.* Allatt, *infra*, (3.)

(2) M. & M. 108.

(3) M. & M. 192. And see Rex *v.* Reading, 7 How. St. Tr. 296. Rex *v.* Earl of Shaftesbury, 8 How. St. Tr. 817.

discredit, generally has an effect unfavourable to character, and excites suspicion,—whether reasonably and justly, must depend upon the sort of person produced, and the question put. A man of high honour and character may be disposed to refuse with scorn and indignation to answer a question which he feels as an insult; and to infer dishonour from his silence might be the height of injustice. In *Millman* v. *Tucker*, (1) where a witness was asked, whether he had not been convicted of forging coalmeters' certificates, Lord Ellenborough told him he need not answer; and afterwards directed the jury, that the witness, having availed himself of the privilege, was not thereby at all discredited. Lord Ellenborough added that had he himself been asked such a question, he should have refused to give an answer, for the sake of the justice of the country, and to prevent such an examination. In *Rose* v. *Bakemore*, (2) a witness refused to answer a question, whether he had not published a libel, and the counsel pressed the jury to infer from the refusal, that he had done so; when Abbott, C. J., interposed, saying, no such inference ought to be made; and that there was an end of the protection of a witness, if a demurrer to the question were to be taken as an admission of the fact inquired into.

Millman v. *Tucker.*

Rose v. *Bakemore.*

Assuming that a question is not irregular, merely from its tendency to degrade the witness's character, and that the witness is not compellable to answer, yet, if he chooses to give an answer, the party asking the question will be bound by his answer, and cannot be allowed to falsify it by evidence. "You may ask the witness," said Lord Ellenborough in *Watson's* case, (3) "whether he has been guilty of such a crime (improperly asking him in a degree, because you are calling upon him, under the sanction of his oath, to answer that which he is not bound to answer, for no man is bound to criminate himself); but if, from a desire to exculpate himself from the imputation of crime, he gives an answer, it has been held by many of our judges, and I never knew it ruled to the contrary, that, having put such question, you must be bound by the answer.

Answer, if given, conclusive.

Watson's case.

(1) 2 Peak, N. P. C., p. 222.
(2) 1 Ry. & M. N. P. R. 384. See Watson's case, 2 Stark. Ca. 153, 157.
(3) Gurney's Rep. 2 vol. 283. 32 Howell, St. Tr. 490, S. C.

The court is not a court to try a collateral question of crime, and it would be unjust if it were; for how can the party be prepared with a case of exculpation, or with an answer to any evidence which may be produced to charge him? there is no possibility of a fair and competent trial upon that subject, and, therefore, in no instance is it done."

R. v. *Rudge.*

In the case of *R.* v. *Rudge*, (1) the principal witness for the prosecution admitted that he had been suspected and his house searched, but denied that it was for any well-founded charge; he denied also several particular facts imputed as grounds of suspicion. For the defence, a witness was called to impeach his character, and as the counsel was proceeding to inquire into the circumstances denied by him, Lawrence, J. interposed, saying, the only way in which a witness could be discredited, was by general evidence of persons acquainted with him, as to their belief of his credibility on oath; that if the witness was himself asked as to any particular part of his conduct, his answer must be taken: and that he would not permit counsel, by asking questions of the witness himself as to his conduct on particular occasions, to avoid the general rule which the law had laid down for the ascertaining of credibility, and to entitle himself to go into evidence of particular facts, and, under pretence of contradicting the witness, to call witnesses who should give a history of his whole life.

Section III.

Of the several modes of impeaching the credit of the opposite party's witness. And of the right of a party to disprove or question the evidence of his own witness.

1. Proof of general character.

First, The party, against whom a witness is called, may examine other witnesses as to his general character. To im-

(1) 2 Peak, N. P. C. 232.

peach the credit of a witness, says Mr. Justice Buller, (1) you can only examine to his general character, and not to particular facts,—that is, not to particular facts, which, if true, would impeach his character for veracity: and the reason given is, that every man may be supposed capable of supporting his general character, but it is not likely he should be prepared to answer to particular facts, without notice; and unless his general character and behaviour are in issue, he has not notice.

Particular criminatory facts denied by witness, cannot be proved if irrelevant.

If a witness, on being questioned whether he has not been guilty of a felony or of some infamous offence, deny the charge, the party, against whom the witness has been called, will not be allowed to prove the truth of the charge: (2) such evidence is not admissible, either for the purpose of contradicting, or of discrediting him. This principle has been established by many cases of great authority. In the case of *Rookwood*, who was tried for high treason, (3) the point was considered as too clear for argument:—"Look ye," said Lord Chief Justice Holt, "you may bring witnesses to give an account of the general tenor of the witness's conversation; but you do not think, that we will try at this time, whether he be guilty of robbery." And on the trial of *Layer* for high treason, (4) Lord North and Grey being called on behalf of the prisoner to give a report of the character which one of the witnesses for the prosecution had given of himself much to his disadvantage, the Lord Chief Justice Pratt said to the prisoner's counsel, "You know what the rule of practice and evidence is, when objections are made to the credit and reputation of the witness; you cannot charge him with particular offences: for if that were to be allowed, it

Rookwood's case.

Layer's case.

(1) Bull. N. P. 296. See also Rookwood's case, 4 St. Tr. 693. S.C. 13 Howell's St. Tr. 210. Layer's case, 6 St. Tr. 298, 316, S. C. 16 Howell's St. Tr. 246, 284. De La Motte's case, 21 Howell's St. Tr. 811. Sharp *v.* Scoging, Holt. N. P. 541.—In some instances in the State Trials, evidence of particular facts appears to have been admitted; as in Lord Castlemain's case, 7 Howell's St. Tr. 1102, 1110; Cranburn's case, 13 Howell's St. Tr. 261; and Harrison's case, 12 Howell's St. Tr. 862: but no objection was made to the evidence, in those cases.

(2) Rookwood's case cited *infra*, (3); Layer's case, *infra*, (4). Rex *v.* Watson, 2 Starkie, N. P. C. 149. 32 Howell's St. Tr. 490. S.C. Sharpe *v.* Scoging, Holt, N. P. C. 541. The same rule is observed in the Courts of Justice in Scotland; see Burnet's Treatise of Crim. Law of Scotland, p. 397.

(3) 4 St. Tr. 693. S. C. 13 Howell's St. Tr. 211.

(4) 6 St. Tr. 298, 316, S. C. 16 Howell's St. Tr. 246, 286.

would be impossible for a man to defend himself. You are not to examine to particular facts, to charge the reputation of any witness; but you are to ask, in general, what is his character and reputation." And in summing up the case to the jury, the Chief Justice said, "The reason, why particular facts are not to be given in evidence to impeach the character of the witness, is that, if it were permitted, it would be impossible for that witness, having no notice of what will be sworn against him, to come prepared to give an answer to it; and thus the characters of witnesses might be vilified, without having any opportunity of being vindicated."

Watson's case.

The same point was much discussed in the late trial of *Watson* for high treason; and the principle, above laid down, which had been settled so long before, was again recognised and fully confirmed. (1)

Mode of examining to general character.

The regular mode of examining into the general character of a witness is by inquiring of the witnesses, who are called to impeach it, whether they have the means of knowing his general character, and whether, with such knowledge, they would believe him on his oath. (2)

Evidence in reply.

In reply, the other party may cross-examine the witnesses who have given evidence against the general character of a former witness, as to their means of knowledge, and the grounds of their opinion; or may impeach their general character, and by fresh evidence support his own witness's general character for veracity.

2. Proof of contradictory statements.

Secondly, The credit of a witness may be impeached by proof,—provided the witness has been previously cross-examined as to such alleged statements,—that he has made statements out of court on the same subject, contrary to what he swears at the trial. (3) This evidence of contradictory statements

(1) Vol. ii. p. 288, Gurney's Rep. 32 Howell's St. Tr. 490, 492, S.C. *Vide supra*, p. 429, and Carpenter *v.* Wall, 11 Ad. & E. 803.

(2) Rookwood's case, 4 St. Tr. 693, S. C. 13 Howell's St. Tr. 210. Mawson *v.* Hartsink, 4 Esp. N. P. C. 102. See Carpenter *v.* Wall, 11 Ad. & E. 803.

(3) De Sailly *v.* Morgan, 2 Esp.

is produced for the purpose of exciting doubt and distrust against his testimony as to the particular transaction on which the discrepancy arises, and, in some cases, to raise suspicion as to the truth of his testimony in general.

Proof by letter, deposition, &c.

A letter written, or a deposition signed by him, may be used as evidence to contradict his testimony; the letter or deposition being first regularly proved. An examined copy of an answer in Chancery is sufficient proof of the answer, for the purpose of contradicting a witness. (1) A conviction before a magistrate, purporting to set out the deposition of a witness, is not admissible as proof of such deposition. (2)

Verbal statements.

The verbal declarations or statements of a witness, made on some former occasion to a third person, are frequently given in evidence by the party against whom the witness appears, with the view of showing that his several accounts of the particular transaction, on which he has been examined, are inconsistent and contradictory.

Rules relating to cross-examination as to contradictory *verbal* statements.

Before the evidence of verbal contradictory statements can be received in evidence against a witness, it will be necessary, in the first instance, to prepare the way for its reception by cross-examining him as to the supposed contradictions which are afterwards to be brought forward against him. This course of proceeding is indispensable, from a principle of justice due to the witness; for as the direct tendency of the evidence is to impeach his veracity by contrasting his present statement with that supposed to have been made by him to some other person, common justice requires, that, before his credit is attacked, he should have an opportunity of declaring, whether he ever made such statement to that person, and of explaining, in the re-examination, the nature and particulars of the conversation, under what cir-

N. P. C. 691. Christian *v.* Coombe, 2 Esp. N. P. C. 489. Whether a party can ask his own witness as to his having given a different account, and prove the fact, if he deny it, will be considered at the end of the present section.

(1) Ewer *v.* Ambrose and another, 4 B. & Cr. 25.

(2) Rex *v.* Howe, 6 Esp. N. P. C. 125. 1 Camp. 461, S. C.

cumstances it was made, from what motives, and with what design. The former account, given by him in conversation, may have been only partially heard, or misunderstood, or partly forgotten, or intentionally misrepresented; and where the variance between his present statement upon oath, and the former statement as reported by a third person, may be as much owing to the mistake of the one witness as to the misrepresentation of the other, it will be necessary that the memory and credit of both witnesses should be fairly tried and contrasted. With this view, not only the particulars of the conversation on which it is intended to contradict the witness, should be distinctly suggested to the witness before any contradiction is attempted, (1) but he must be asked as to the time, place, and person involved in the supposed contradiction. (2)

Where a witness neither admits nor denies, such verbal statement may be proved.

Crowley v. *Page.*

In a case where a witness was asked as to a contradictory verbal statement, which he neither admitted nor denied, Parke, B., held that evidence of the statement was admissible. (3) "Evidence," said the learned judge, "of statements by witnesses on other occasions relevant to the matter at issue, and inconsistent with the testimony given by them on the trial, is always admissible in order to impeach the value of that testimony; but only such statements as are relevant are admissible, and in order to lay a foundation for the admission of such contradictory statements, and to enable the witness to explain them (and, as I conceive, for that purpose only,) the witness may be asked, whether he ever said what is suggested to him, with the name of the person to whom, or in whose presence he is supposed to have said it, or some other circumstance sufficient to designate the particular occasion. If the witness, on the cross-examination, admits the conversation imputed to him,

(1) See the opinion of the judges, in the course of the proceedings in the House of Lords, on the bill of pains and penalties; p. 575, of the printed evidence. Some of the preceding remarks have been suggested by that opinion. The opinion of the judges, on the several points, which arose during these proceedings, are reported also in 2 Brod. & Bing. p. 286, 315. And see Carpenter *v.* Wall, 11 Ad. & E. 803.

(2) By Tindal, C. J. in Angus *v.* Smith, M. & M. 473.

(3) Crowley *v.* Page, 7 C. & P. 791. See Pain *v.* Beeston, 1 M. & R. 20. Dunn *v.* Aslett, 2 M. & R. 122. As to examining witnesses in criminal cases respecting other statements before the magistrates; see the rules of the judges, *supra*, p. 179.

there is no necessity for giving further evidence of it; but if he says he does not recollect, that is not an admission, and you may give evidence on the other side to prove that the witness did say what is imputed,—always supposing the statement to be relevant to the matter at issue. This has always been my practice. If the rule were not so, you could never contradict a witness who said he could not remember."

Statement relating to the witness's moral character (material to the issue), but offered by way of contradicting.

When the witness's moral character is relevant to the issue and to the ground of the action, expressions used by the witness, of such a kind that the very use of them shows a want of moral character, may be proved without the previous inquiry of the witness as to having made them,—unless they are also contradictory to the witness's evidence upon material facts in the cause, in which case the previous inquiry will be necessary. Thus, in *Carpenter* v. *Wall,*(1) in an action for the seduction of the plaintiff's daughter, the daughter, who was a witness for the plaintiff, was asked in cross-examination whether she knew a particular person (named,) and she denied it. It was proposed, for the defence, to ask a witness whether the daughter had said that the person, before named, was the father of the child, and had seduced and left her. The evidence was objected to, because the daughter had not been first asked, whether she had ever made such statements. Lord Denman refused to allow the question to be put, and the court above decided that it had been properly refused. When the case was brought before the court, Lord Denman said, if the language had been offered in evidence, as showing that the witness went about in a light manner saying things of this description, he would not have rejected it: but that the evidence was put pointedly as bearing upon particular facts which she had stated. The court decided, that the declarations could not be made evidence, without first asking the witness if she had ever uttered them,—unless they had been offered merely as showing misconduct: here they were offered as contradiction.

Carpenter v. *Wall.*

Cross-examination as to other declara-

The rule, that a witness ought to be cross-examined as to contradictory statements, before they can be admitted in evidence

(1) 11 Ad. & E. 803.

tions or acts done, (touching the cause) which discredit.

to impeach the credit of his testimony, has been extended not only to contradictory statements, but also to other declarations of the witness, and to acts done by him through the medium of declarations or words; so that if it is intended to offer evidence of former declarations of a witness, or of acts done by him, touching the cause, not with a view to *contradict* his statement upon oath, but for the purpose of *discrediting* him as a corrupt witness, or as one who would corrupt other witnesses, in this case also it has been determined, that the witness should be previously questioned as to them, in the cross-examination. This appears from an answer of the judges to a question put to them by the House of Lords, in the course of the proceedings before referred to. (1) The question was in the following words: "If a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination, as to declarations made by him, or as to acts done by him, to procure persons corruptly to give evidence in support of the prosecution, whether it would be competent to the party accused to examine witnesses in his defence for the purpose of proving such declarations or acts, without first calling back the witness to be examined or cross-examined as to the fact, whether he ever made such declarations, or did such acts?" Another question was the following: "If a witness, called on the part of a plaintiff or prosecutor, gives evidence against the defendant, and if, after the cross-examination of the witness by the defendant's counsel, they discover that the witness, so examined, has corrupted, or endeavoured to corrupt, another person to give false testimony in such cause; whether the defendant's counsel may not be permitted to give evidence of such corrupt act of the witness, without calling him back?" The judges were of opinion, on both questions, that the proposed proof could not be adduced without a previous cross-examination of the witness as to the subject-matter. "The general rule," said the Lord Chief Justice, "and the general practice is this: if it be intended to bring the credit of a witness into question by proof of anything that he may have said or declared touching the cause, the witness is first asked upon cross-examination, whe-

(1) Page 905, of the printed minutes of evidence.

ther or no he has said or declared that which is intended to be proved."

Cross-examination as to contradictory *written* statements.

The rules of cross-examination as to contradictory written statements, supposed to have been made by the witness, were much discussed in the same proceedings, in the House of Lords. On one occasion, in the course of those proceedings, (1) a letter was shown to a witness on cross-examination, and, on being questioned as to the handwriting, she affirmed, that she could not say whether it had been written by her. The counsel then proceeded to cross-examine the witness, as to her having written certain particulars in a correspondence with her sister. This mode of cross-examination was objected to; on which occasion, the following question was put by the House of Lords to the judges for their opinion: (2) "Whether a party would be allowed, in cross-examining a witness, to represent, in the statement of a question, the contents of a letter; and then to ask the witness, whether he wrote such a letter to any person with such contents, or contents to the like effect, without having first shown the letter to the witness, and asked him whether he wrote it, and without his admitting that he wrote the letter?" The judges were of opinion, that the question must be answered in the negative; and the reason of their opinion was, "That the contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence. The proper course, therefore, is to ask the witness, whether the letter is of his handwriting; if the witness admits it to be his handwriting, the cross-examining counsel may, at his proper season, read that letter as evidence; and when the letter is produced, then the whole of the letter is made evidence. One of the reasons (continued the Lord Chief Justice) for the rule requiring the production of written instruments, is in order that the court may be possessed of the whole. If the course, here proposed, should be followed, the cross-examining counsel may put the court in

(1) In the case of the witness Louisa Demont, page 328, 334, of the printed evidence.

(2) Printed evidence, page 334. 2 Brod. & Bing. 286. See 3 Barn. & Cress. S. P. 749, l. 15.

possession only of a part of the contents of the written paper; and thus the court may never be in possession of the whole, though it may happen that the whole, if produced, might have an effect very different from that which might be produced by the statement of a part." The writing, therefore, if in existence and producible, ought to be produced and shown to the witness. When it is produced, the cross-examining counsel may, if he thinks proper, show the witness only a part, or only one or more lines of the letter, and not the whole of it; and may ask the witness whether he wrote such part, or such one or more lines.(1) If the witness does not admit that he wrote the part shown to him, he cannot be cross-examined as to the contents of the letter, for the reason already given; namely, that the paper itself ought to be produced, in order that the whole may be seen, and the one part explained by the other.(2) If, on the other hand, the witness should admit that he wrote the letter, still the rule with respect to cross-examining as to the contents is precisely the same: the counsel cannot inquire of the witness whether or not such statements are in the letter; the letter itself must be read, to show whether it contains such statements.(3) With respect to the proper time for reading the letter, the ordinary rule is that it shall be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case; this is the ordinary course; but if he suggests to the court, that he wishes to have the letter read immediately, in order to found certain questions upon the contents, which cannot well or effectually be done without reading the letter itself, in that case, for the more convenient administration of justice, the letter is permitted to be read at the suggestion of the counsel; still, however, it must be considered as part of the evidence of the cross-examining counsel, and subject to all the consequences of his having it so considered.(4)

Writing to be shown to the witness.

If the witness does not admit his writing.

If the witness admits.

Proper time for reading it in evidence.

(1) The opinion of the judges on the second question in the case of the same witness, page 335, of the printed evidence. 2 Brod. & Bing. 286.

(2) Answer of the judges to the second part of the second question, p. 335, of the printed evidence.

(3) Opinion of the judges, in answer to another question, in the case of the same witness, p. 337, of the printed evidence. 2 Brod. & Bing. 288.

(4) Opinion of the judges, in

Cross-examining as to lost writing.

The rule, above laid down, for cross-examining a witness as to the contents of a letter or other written paper, is applicable, at the furthest, only to a case in which the writing is supposed to be in existence. This appears to be clear, from considering the opinion of the judges, and the circumstances out of which the question arose. The letter written by the witness, was, in that case, actually in the possession of the cross-examining counsel, produced by him, and shown to the witness; the question, referred to the judges, proceeds upon the supposition of the letter being producible; and the entire reasoning on which their opinion is founded, expressly refers to the case of an existing paper. They held, in the case proposed, that the counsel could not cross-examine as to the contents of a letter, which was produced and shown to the witness; because "the contents of every written paper are to be proved by the paper itself, and by that alone, if the paper be in existence." But if the paper be not in existence, this reasoning will not apply. If, therefore, a letter, written by the witness, is proved to have been lost or destroyed, (in which case, the only mode of contradicting him would be by producing afterwards some secondary evidence of the contents of the letter,) it would be reasonable and proper to allow the counsel to cross-examine the witness as to the contents of such letter. This, indeed, appears to be the only regular mode of proceeding: for, as the credit of the witness may be afterwards impeached by proof of the contents of the lost letter, no less than by the production of an original letter, justice requires that the witness should first have an opportunity, in his own defence, of entering into a full statement of what he has written; and this statement is not inferior, in its kind as evidence, to any other secondary proof of the contents, that may be afterwards produced to contradict him. This latter circumstance distinguishes the case from that before mentioned, in which the witness's letter was in the possession of the cross-examining counsel, and that letter, if produced, would have been the best, and, as the judges held, the only legitimate proof of its contents. It may, perhaps, be suggested, that, since the proof of the loss or

answer to the second part of the last-mentioned question & Bing. 289. 2 Brod.

destruction of the writing is strictly necessary, before the counsel in such case can cross-examine as to its contents, the introduction of such antecedent proof might occasion great inconvenience, by disturbing the regular progress of the cause, and distracting the attention. But when this inconvenience is likely to be felt in any great degree, it will be always in the power of the judge, if he shall think proper, either to admit, in the first instance, the witness's statement of the contents of the writing, or to reserve the power of cross-examining as to its contents, until the time has arrived when the counsel on the opposite side shall enter upon his case.

Cross-examining as to witness *representing* or *saying* to some person.

Another discussion in the Queen's case, connected with this subject, arose on a question put by the cross-examining counsel to a witness, which was as follows:—"Whether he had ever represented to any person, after he had left the service of the Princess, that he had taxed himself with ingratitude towards a generous mistress?" On this, the attorney-general submitted that the question should be put, whether he had so represented himself *in conversation;* for that, if the representation was in writing, the writing itself should be produced, before the question could be put. After an argument upon the point, the following question was put to the judges: "Whether, according to the established practice in the courts below, counsel in cross-examining are entitled, if the counsel on the other side object to it, to ask a witness whether he has made representations of a particular nature, not specifying in his question whether the question refers to representations in writing or in words." The Lord Chief Justice, in delivering the opinion of the judge, (1) observed, that they felt some difficulty in giving a distinct answer to that proposition, as they did not remember an instance of a question having been asked by the cross-examining counsel precisely in those words, and they were not aware of any established practice distinctly referring to such a question. The Lord Chief Justice then adverted to the rule of law respecting the examination of a witness as to a contract or agreement, in which case, if the counsel on the one side were

(1) Page 446. 2 Brod. & Bing. 292.

to put a question generally as to the contract, the ordinary course is for the counsel on the other side to interpose an intermediate question, whether the contract referred to was in writing, and if the contract should appear to have been in writing, then all further inquiry would be stopped, because the writing itself must be produced. With reference to this established rule they considered the question proposed to them, and were of opinion, that the witness could not properly be asked, on cross-examination, whether he had *written* such a thing, the proper course being to put the writing into his hands, and ask him whether it be his writing; they held also, that if the witness were asked, whether he had *represented* such a thing, they should direct the counsel to ask, whether the representation had been made *in writing*, or by words; and if in consequence he should ask whether it had been made *in writing*, the counsel on the other side would object to the question; but if he should ask, whether the witness had *said* such a thing, the counsel would undoubtedly have a right to put that question.—The counsel were then called in, (1) and were informed that if, on cross-examination, they inquired of a witness, whether he had made representations of any particular nature, stating the nature of those representations, they should in their inquiry ask the witness first, "whether he made the representations by parol or in writing?"—The attorney-general of the Queen inquired, whether he might be at liberty to alter his question, and put it thus: "Did you ever make any representation in writing concerning your real or supposed ingratitude towards so generous a witness as Her Royal Highness?" The counsel were then directed to withdraw, and, on their being recalled, the counsel for the Queen were asked, whether they wished to withdraw the question; upon which the attorney-general for the Queen stated that he begged to withdraw the question, to save the necessity for further discussion. The examination then proceeded, and letters were put into the witness's hands, which he admitted to be his handwriting.

As the object of cross-examining a witness respecting a for- Re-examina-

(1) Page 447.

tion as to former statements of a witness.

mer statement, supposed to have been made by him, is to impeach the truth and credit of his testimony; so, on the other hand, the object of the re-examination is to give him an opportunity of showing the consistency of his statements, and of vindicating his character. Upon this subject, it is material to consider, how far the witness may be re-examined as to other parts of the same statement. If that which the witness has stated, in answer to the question on his cross-examination, arose out of the inquiries of the person with whom he had the conversation, the witness may be asked in the re-examination what those inquiries were. (1) He may also be asked, what induced him to give to that person the account which he has stated in the cross-examination. (1) The general rule is, that counsel have a right, upon re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also an explanation of the motive, by which the witness was induced to use those expressions; he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motive of the witness. (1) And as many things may pass in one and the same conversation relating to the subject of the conversation, which yet do not relate to his motive, or to the meaning of his expressions, the counsel are not entitled to re-examine to such parts of the conversation.

Re-examination as to statements by a *party*.

A distinction was made on one occasion between a conversation which a witness may have had with a *party to the suit*, and a conversation with a *third* person. The conversations of a *party to the suit*, relative to the subject-matter of the suit, are in themselves evidence against him in the suit, and if a counsel chooses to ask a witness as to any thing that may have been said by an adverse party, the counsel for that party (as was thought on the occasion referred to) would have a right to lay before the court the whole that was said by his client in the same conversa-

(1) See the account of the proceedings in the House of Lords, above referred to, p. 453, 454, of printed evidence, in the case of the witness Giuseppe Sacchi. 2 Brod. & Bing. 294.

tion; not only so much as may explain or qualify the matter introduced by the previous examination, but even the matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; on the ground 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 of what he said on the same occasion.*

The reasoning in the case above referred to and the grounds of the supposed distinction were considered by the Court of King's Bench in a very recent case; (1) when that Court, after full consideration of the argument on both sides, overruled the distinction, and adopted the more safe and intelligible principle, that the office of re-examination is to be confined to showing the true colour and bearing of the matter elicited by cross-examination, and that new facts or new statements, not tending to explain the witness's previous answers, ought not to be admitted. The question arose in an action for a malicious arrest, upon a debt for money lent by the defendant to the plaintiff, which it was suggested was given to him. The plaintiff called his attorney as a witness; he happened to have been present at the trial of a prosecution for perjury, instituted by the plaintiff against a witness in the action in which he had been arrested. The defendant's counsel inquired of him in cross-examination, whether the plaintiff had not, on the trial for perjury, stated that he himself had been insolvent repeatedly, and remanded by the Court. This question was not objected to. On his re-examination the same witness was asked, whether the plaintiff had not also, on that occasion, given an account of circumstances out of which the arrest had arisen,

Prince v. *Samo.*

(1) Prince *v.* Samo, 7 Ad. & El. 627. 3 Nev. & P. S. C.

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* The question here referred to which was proposed to the judges in the Queen's case is not here inserted, because it is at once so abstract and particular, as not to be of general importance. The reasons, above stated, are selected from the judgment of the Lord Chief Justice. Some difference of opinion occurred on this subject among the judges. Mr. Justice Best differed in opinion from the other judges; the Lord Chancellor also and Lord Redesdale were of a different opinion.

and what that account was,—for the purpose of laying before the jury proof that the arrest was without cause or malicious, of which facts there was scarcely any, if any, evidence. It was objected, that the eliciting of a detached expression of the plaintiff did not make every thing that fell from him at that time evidence in his own favour. Lord Denman was of this opinion, and disallowed the question on the ground, "that the witness might be asked as to every thing said by the plaintiff when he appeared on the trial of the indictment, that could in any way qualify or explain the statement as to which he had been cross-examined, but that he had no right to add any independent history of transactions wholly unconnected with it." The propriety of this ruling was brought before the Court, on a motion for a new trial. The Court, recognising the rule above laid down as to the re-examination of a witness respecting statements made by himself, extended the same rule to evidence given by him of statements made by the party calling him, and observed that the doctrine, giving a larger power in the latter case, depended upon the opinion of Lord Tenterden, which, strictly considered, was as to this point extra-judicially delivered; that it was not in terms adopted by Lord Eldon or any of the other Judges, who concurred in the answer to the proposed question; that it was expressly denied by Lords Redesdale and Wynford, and that it did not rest on any authority. The Court added, "In our opinion the reason of the thing would rather go to exclude the statements of a party making declarations, which cannot be disinterested. Nothing would be more easy than to find, or imagine examples of the extreme injustice, that might result from allowing such statements to be received; but none can be stronger than the actual case. Because the plaintiff was shown to have said that he was insolvent, he would have been allowed, without any reference to his own insolvency, to prove, by his discourse at the same period, every averment in his declaration, with every circumstance likely to excite prejudice and odium against the defendant; and if this were evidence, the jury would be bound to consider, and might give full effect to it, and thus award large damages for an injury, of which no particle of proof could be given, excepting the plaintiff's own assertion."

Re-examination, as to objectionable evidence in cross-examination.

In general, if a witness on cross-examination voluntarily give inadmissible evidence, it will not be inserted in the Judge's notes, nor can it be treated as evidence in the cause; for an adverse witness cannot obtrude evidence against a party on cross-examination, which he could not give in chief; but if a party choose to cross-examine the witness as to inadmissible facts, the other party is entitled to re-examine him as to evidence so given. (1)

Former consistent statements, not evidence in reply, as confirmation.

Chief Baron Gilbert was of opinion, that the party, who called the witness against whom contradictory statements have been proved, might show that he affirmed the same thing before on other occasions, and that he is still consistent with himself. (2) This, however, has been doubted, and with good reason. Mr. Justice Buller lays it down, that such evidence is clearly not admissible in chief, and it seems doubtful, he adds, whether it is so in reply. (3) And Lord Chief Justice Eyre is represented as having rejected such evidence, even when offered on behalf of a defendant, in a prosecution for perjury.*—It may

(1) Blewett *v.* Tregonning, 3 Ad. & El. 584. 5 N. & M. 308, S. C.

(2) Gilb. Ev. 135. Hawk. P. C. b. 2, c. 46, s. 48. And see Lutterel *v.* Reynell, 1 Mod. 282, and Sir J. Freind's case, 4 St. Tr. 613. 13 Howell's St. Tr. 32, S. C.; see also Harrison's case, 12 Howell's St. Tr. 861; in which cases this confirmatory evidence was offered *in chief;* —which would not now be allowed.

(3) Bull. N. P. 294. And see Parker's case, 3 Dougl. 242.

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* So said by Lord Redesdale, in the Berkeley peerage case, 5th June, 1811. The occasion of the discussion which took place, was as follows: One of the peers inquired of a witness, who had been cross-examined and re-examined, as to statements made by Lady Berkeley on a former occasion, respecting her supposed marriage. The solicitor-general suggested to the committee, whether this was the regular course of proceeding, and stated what he conceived to be the general rule upon the subject. The admissibility of the former statements was then much discussed. After the arguments of counsel on both sides, Lord Redesdale said, he had always understood, that, for the purpose of impugning the testimony of a witness, his declaration at another time might be inquired into, but not for the purpose of confirming his evidence. And the Lord Chancellor expressed his decided opinion, that this was the true rule to be observed by the counsel in the cause; but considering the house as in some degree standing both in the situation of the counsel for the claimant, and of the counsel against the claimant, he was of opinion, that the question might be properly asked by the house, though it could not be asked by the counsel on one side; but with respect to the answer to the question, it might be the subject of future consideration, whether it ought to stand upon the minutes as evidence. The question respecting the former representations of Lady Berkeley was therefore repeated by one of the Lords, and the answer entered among the minutes, subject to future revision. MS.

be observed on this kind of evidence in general, that a representation without oath can scarcely be considered as any confirmation of a statement upon oath. It is the oath that confirms; and the bare assertion, that requires confirmation. The probability is, that in almost every case the witness, who swears to certain facts at the trial, has been heard to assert the same facts before the trial; and it is not so much in support of his character, that he has given at other times the same account, as it would be to his discredit, that he should ever have made one different. The imputation on his veracity results from the fact of his having contradicted himself, and this is not in the least controverted or explained by the evidence in question. If a witness has made a statement a hundred times in one way, and a hundred times another way directly contrary, the only inference must be, that he is utterly destitute of all title to credit. (In one point of view, however, a former statement by the witness appears to be admissible in confirmation of his evidence; and that is, where the counsel on the other side impute a design to misrepresent from some motive of interest or relationship: in that case, perhaps, in order to repel such an imputation, it might be proper to show, that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts.)

Character of attesting witness deceased.

If an attesting witness to a will or deed impeach it's validity on the ground of fraud, and accuse other subscribing witnesses, who are dead, of being accomplices in the fraud, the party claiming under the instrument may give evidence of their general good character: for, if living, they might be produced as witnesses, and their character might then be the subject of examination; and, after their death, an opportunity ought to be given to show what credit is to be attached to their attestation. (1) The only mode left, in such a case, of doing

(1) Doe dem. Walker *v.* Stephenson, 3 Esp. N. P. C. 284. 4 Esp. N. P. C. 50; cited and approved in 1 Camp. 210. Provis *v.* Reed, 5 Bing. 435. But it seems, that evidence of statements made by a deceased witness is not admissible, either for the purpose of supporting or impeaching his character; not even, with respect to the latter point, if the statement amount to a confession of forgery of the instrument in question. See Stobart *v.* Dryden, 1 M. & W. 615.

justice to the person impeached, is by inquiring into his general character.

In the common case, where a witness for the plaintiff asserts one thing, and a witness for the defendant asserts another, and direct fraud is not imputed to either, evidence to general character is not admissible. (1)

It is proposed now to inquire, whether a party can be allowed to produce evidence for the purpose of disproving or questioning the testimony of his own witness, although such evidence would have the effect of throwing discredit upon the witness. It is clear, a party is not to be sacrificed to his witness; he is not represented by him, nor ought he to be identified with him, or bound by all he may say. On the other hand, a party ought to be placed under such restrictions, as may be necessary for preventing unfair or dishonest practice. If a party produces a witness, knowing him at the time to be a man of infamous character, and that witness in giving evidence disappoints or deceives him, he ought not to be allowed to prove his infamy for the purpose of destroying the effect of his evidence. Knowing the infamy of his character, he had more reason to suspect and disbelieve, than to trust him: nor has he any just ground to complain that his cause is prejudiced by false evidence, as he could expect nothing less from such a witness; and he suffers not unjustly for using a witness whom he knew to be infamous.—

Whether a party may discredit his witness by general evidence.

But if a party, not acting himself a dishonest part, is deceived by his witness,—or if a witness, professing himself a friend, turns out an enemy, and after promising proof of one kind gives evidence directly contrary,—is the party to be restrained from laying the true state of the case before the court? The common sense of mankind might be expected to answer this proposition in the negative, and to decide that the true state of the case should be made known.—Further, if a witness, whether from mistake, from ignorance, or from design, gives evidence unfavourable to the party who calls him, is the party to be restrained from calling other witnesses to prove facts

Whether he may prove contradictory statements.

Whether he may prove facts to be otherwise.

(1) Bishop of Durham *v.* Beaumont, 1 Campb. 207.

different from those which he has represented. All must agree that such proof of a different state of facts ought to be allowed.

A party cannot discredit by *general* evidence.

In the first place, it is laid down, that a party will not be permitted to discredit his own witness by *general* evidence. "This," says Mr. Justice Buller, "would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him." (1) The meaning of this rule is, that a party after producing a witness can not prove him to be of such a general bad character, as would render him unworthy of credit.

Facts may be proved to be otherwise.

But if a witness state facts against the interest of the party that called him, another witness may be called by the same party to disprove those facts: for "such facts are evidence in the cause, and the other witness is not called directly to discredit the first, but the impeachment of his credit is incidental only, and consequential." (2) The object of such evidence is to correct some supposed misstatement, or to rectify an error; and if such evidence were to be excluded, the consequences would be most injurious to the administration of justice, as well in criminal as in civil cases.

Alexander v. *Gibson.*

In the case of *Alexander* v. *Gibson*, (3) where the question was whether the defendant's servant, who had been employed to sell a horse, had warranted him sound, and the servant swore, on being called by the plaintiff, that he had not given any warranty, Lord Ellenborough allowed the plaintiff to call another witness to prove that at the time of the sale the servant had expressly warranted its soundness. "There can be no

(1) Bull. N. P. 297.

(2) Bull. N. P. 297. Alexander *v.* Gibson, 2 Campb. 556. Richardson *v.* Allan, 2 Stark. Ca. 334. Bradley *v.* Ricardo, 8 Bing. 57. In Lowe *v.* Joliffe (1 Black. Rep. 365, referred to by Lord Denman in Wright *v.* Beckett, stated *infra*) which turned on the validity of a will. All the attesting witnesses swore to the insanity of the testator, when the will was executed; but they were contradicted by other evidence, and the will was established. And see Pike *v.* Badmering, cited 2 Stra. 1096, a.

(3) 2 Campb. 556.

rule of law," said Lord Ellenborough, "by which the truth on such an occasion is to be shut out, and justice perverted." In this manner, a statement of facts by the former witness may be disproved to any extent; and thus even the whole of his evidence, if disproved, might be repudiated.

Friedlander v. London Assurance Company.

In the case of *Friedlander* v. *The London Assurance Company,* (1) an action on a policy of insurance against fire, an issue was joined as to the quantity and value of the goods on the insured premises at the time of the fire; several witnesses were called to prove the sale of goods to the plaintiff, and the delivery of them on the premises; one witness, called for the same purpose, being shewn an invoice and letter in his own handwriting, admitted on his examination in chief that he wrote the invoice, but denied that he sent any goods, and said that the invoice was made out by him after the fire, in the presence of the plaintiff's son and of his shopman (who had both been examined before as witnesses), that the letter was in fact written in London at the plaintiff's house and by his desire, and that the plaintiff's son and shopman had persuaded him to say he sent the goods. It was then proposed to recal those two persons to prove that the invoice was not made, nor the letter written in the manner alleged, and that they had not acted as stated. Lord Tenterden rejected the evidence, but the Court of King's Bench granted a new trial, on the ground, that the proffered evidence went to prove a material fact relevant to the issue, and not merely collateral, and that by such evidence a party might contradict his own witness.

The effect of such proof.

The contrariety of statement, introduced by this adverse proof, has not necessarily the effect of repudiating the *whole* of the former witness's testimony; it would be against all justice to require that the whole of a man's testimony should be struck out, because a witness sets him right as to a single fact. (2) Strictly speaking, no part of his evidence is to be struck out; the whole must be for the consideration of the jury, who may believe and adopt a part, or disbelieve and reject the whole.

(1) 4 B. & Ad. 193.

(2) Bradley *v.* Ricardo, 8 Bing. 57.

Such proof admissible, though it may discredit.

It may be observed that the power which a party has of disproving the facts sworn to by his own witness, and of proving them to be directly otherwise, is not limited or qualified from regard to the effect which may be thereby produced unfavourable to the witness's credit. The proof thus given may indirectly throw the utmost discredit on the witness, and convince the jury that he has designedly deceived them, still, it is conceived, the party will be at liberty to prove such contrary facts. "There is no rule of law by which the truth on such an occasion is to be shut out, and justice perverted."

Proof of a contrary statement, whether admissible.

Whether it be competent to a party to prove that a witness called by him, who has given evidence against him, has made at other times a statement contrary to that made by him at the trial, is a question on which there has been some difference of opinion. Such a contrary statement, it is clear, cannot be admitted as proof of the facts therein asserted: it can only be admitted, if admissible at all, for the purpose of neutralising, or raising doubt and suspicion as to those parts of the witness's testimony with which the contrary statement is at variance.—

Reasons against.

The common objection to this evidence is that it would necessarily discredit the witness; that the party ought not to have called him, if he had not considered him worthy of credit; and that having called him, he must take him for better and for worse, and can not afterwards discredit him.—

Reasons for admitting.

For the admissibility of the proposed evidence, it may be said that this course is necessary as a security against the contrivance of an artful witness, who otherwise might recommend himself to a party by the promise of favourable evidence, (being really in the interest of the opposite party,) and afterwards by hostile evidence ruin his cause; and that the power of proving contradictory statements ought to be the same, whether the witness is called by the one party or the other: that such a power is necessary for the purpose of placing the witness fairly and completely before the court, and for enabling the jury to ascertain how far he deserves to be believed: that the ends of justice are best attained, by allowing the fullest power for scrutinizing and correcting evidence, and that in the administration of criminal justice especially, the exclusion of

the proof of contrary statements might be attended with the worst consequences. With respect to the objection that a party has no right to put a witness into the box as a witness of credit, and afterwards call other witnesses to discredit him, it proceeds upon the supposition that the party first acted on one principle, and afterwards, being disappointed by the witness, turns round and acts upon another,—thus imputing to the party something of double dealing or dishonest practice. But it is evident that this does not apply to the case where a party, having given credit to a witness, is deceived by him, and first discovers the deceit at the trial of the cause. (1) To reject the proposed evidence in such a case, and repress the truth, would be to allow the witness to deceive both jury and party, and might work serious injustice.

The cases upon this subject are, as follows:

On the trial of Warren Hastings, the opinion of the judges was taken by the Lords, upon a question involving this point, although the circumstances were not such as to raise it distinctly. A witness, named Bean, (2) professing forgetfulness, or speaking indeterminately on a point, was asked by the managers for the Commons, whether he had not been examined before a committee of the House of Commons, and whether he had not before that committee answered the following question in the following manner:—*Q.* "Who was to pay Mehipnarain the allowances stipulated for him by the Governor General?" *A.* "Doorgbijey Sing." (3)—The inquiry being objected to, the opinion of the judges was required by the Lords, (4) and a question submitted to them, the terms of which are embodied verbatim in the answer delivered by the Lord Chief Baron, expressing their unanimous opinion, (5) "That where a witness, produced and examined in a criminal pro-

(1) Such was the case in Wright *v.* Becket. The general principles on this subject are fully stated by Lord Denman in that case. *Vide infra*, 456—459.

(2) Mill's History of British India, Book, 6, c. 2.

(3) Jour. Dom. Proc., 29th Feb. 1788.

(4) *Ibid.*

(5) Jour. Dom. Proc., 10th April, 1788.

ceeding by a prosecutor, *disclaims all knowledge* of any matter so interrogated, it is not competent for such prosecutor to pursue such examination, by proposing a question containing the particulars of an answer supposed to have been made by such witness before a committee of the House of Commons, or in any other place, and by demanding of him, whether the particulars, so suggested, were not the answers he had so made." This decision goes too far: there is express authority for a modification of the rule, at least to a certain extent, namely, to allow a party to *propose* such a question to the witness, and to receive his answer, although, if the answer is unfavourable, it may be held to be conclusive.

R. v. *Oldroyd.*

In the case of *Rex* v. *Oldroyd*, (1) on a trial for murder, before Mr. Baron Graham, in 1805, several witnesses having been called for the prosecution, the prisoner's counsel observed the name of another witness indorsed on the bill of indictment; but the counsel for the prosecution declined to call her. The judge thought it his duty to call her; and her evidence went to an acquittal. The judge then cast his eye over her deposition taken before the coroner, and finding it totally at variance with what she swore at the trial, caused that deposition to be proved, and in summing up to the jury threw her testimony out of the case. The twelve judges, on consideration, confirmed the judge's proceeding; Lord Ellenborough and C. J. Mansfield observing, that they thought the *prosecutor* had the same right as the judge.

Ewer v. *Ambrose.*

The case of *Ewer* v. *Ambrose*, (2) furnishes materials for both sides of the argument on this question. There, a witness having been called on the part of the defendant to prove a partnership between himself and the defendant, and having denied that fact, an answer of the witness in Chancery, wherein he admitted himself to be partner, was offered in evidence by the defendant's counsel, and admitted. The judge left it to

(1) R. & R., C. C. R. 88; stated by Lord Denman, in Wright *v.* Beckett. *Vide supra*, p. 78.

(2) 3 B. & C. 749. This case was stated by Lord Denman, in Wright *v.* Beckett.

the jury to find for the plaintiff or the defendant, according as they gave credit to the witness's answer in Chancery, or to his testimony in court. The jury having found for the defendant, the Court of King's Bench directed a new trial, on the ground that the answer, if admissible at all, could only be received to contradict the witness, and not to substantiate any fact. Whether it was admissible as contradiction, the case did not require the court to decide. Mr. Justice Bayley appeared to be of opinion (though it was unnecessary to decide) that the answer was inadmissible; but upon that point Mr. Justice Holroyd, and Mr. Justice Littledale, abstained from expressing any opinion. Mr. Justice Holroyd, however, after observing that the answer was clearly not admissible to prove substantively the partnership, proceeded thus: "But it is a very different question, whether it was not evidence to destroy the credit of the witness as to the particular fact to which he swore.

Bernasconi v. Fairbrother.

In *Bernasconi* v. *Fairbrother,* (1) Lord Denman permitted an attorney to prove that the witness of the party for whom he appeared, had immediately before the trial made to him a statement quite opposite to what he swore at the trial. An act of bankruptcy was established by no other witness; the plaintiff was nonsuited, and moved for a new trial, on the ground of surprise.

Wright v. Beckett.

Similar evidence was received by Lord Denman in the case of *Wright* v. *Beckett.* (2) In this case of *Wright* v. *Beckett,* an action of trespass *quare clausum fregit,* where the question was whether the plaintiff had the exclusive right to the soil of a piece of land, the plaintiff's counsel, having examined four witnesses to prove that the plaintiff and his predecessors had immemorially exercised acts of ownership over it, called a fifth witness to establish the same fact. That witness on being examined contradicted the other four witnesses; upon which the plaintiff's counsel asked him, whether he had not given a different account of the facts to the plaintiff's attorney two

(1) This statement is in Wright v. Beckett.

(2) 1 M. & R. 414. Trial in Court of Common Pleas, at Lancaster, Sum. Ass. 1834.

days before? This question was objected to, on the ground that the obvious tendency of the question put by the plaintiff was to discredit his own witness. Lord Denman, C. J., overruled the objection, and the question was put: but the witness gave an evasive answer to the question. The counsel then called the plaintiff's attorney, and proposed to inquire of him whether the witness had given to him, upon the occasion referred to, an account of the facts different from that given on the trial. This was also objected to: but the Lord Chief Justice allowed the question to be put. The attorney answered the question in the affirmative, and added that he took down in writing the account given by the witness, which was read over to him, and he said it was quite correct; the plaintiff's attorney then read the written account to the jury.

The Lord Chief Justice, in summing up the case to the jury, told them they were not to look upon the statement, given by the witness to the attorney, as evidence of the facts therein stated: they were only to receive that statement by way of neutralizing the effect of the evidence which the witness had unexpectedly given in court.

The jury having found a verdict for the plaintiff, a motion was made, and a rule granted, for shewing cause why there should not be a new trial. After cause shewn before Lord Denman and Mr. Baron Bolland, time was taken for considering the question; finally, they differed in opinion, and delivered their judgments at length.

Judgment of Lord Denman.

Lord Denman, after stating the facts of the case, said, he retained his first opinion. "The case," Lord Denman said, "was brought to this simple point,—to which of the witnesses was credit due: if to the first four, the plaintiff was entitled to the verdict; if to the last, the defendant. On this issue alone the event of the cause depended. The defendant enjoyed the privilege of assailing the credit of those who were opposed to his interest: the plaintiff must have the same right with respect to that witness who unexpectedly turned against him, unless he is debarred by some strict rule of law.

"I find no such rule, but many decisions which must have proceeded on the opposite principle. There is a passage, indeed, upon this subject in *Buller's Nisi Prius*, to which, as I understand it, I most fully subscribe. (1) 'A party never shall be permitted to produce general evidence to discredit his own witness; for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him. But if a witness prove facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only.'

"But I consider the meaning of this to be, that no party shall produce a witness whom he knows to be infamous, and whom he has therefore the means of discrediting by *general evidence*. No inference arises that I may not prove my witness to state an untruth, when he surprises me by doing so in direct opposition to what he had told me before. In this case the discredit is consequential, and the evidence is not general, but extremely particular, and subject to any explanation which the witness may be able to afford. The rule laid down in *Buller's Nisi Prius*, therefore, appears to me inapplicable.

"Two dangerous consequences are, however, apprehended from admitting the former statement of a witness in contradiction to his testimony on the trial. Now, I must observe in passing, that the judge's apprehension of possible danger on admitting certain evidence, cannot create a rule for excluding it. The legislature may make such a provision, or the rule may have so far prevailed in practice as to be properly considered parcel of the common law. But if, instead of acting on established rules, we were now conferring on what rules it would be best to establish, the inconvenience of precluding the

(1) Page 297.

proof tendered strikes my mind as infinitely greater than that of admitting it. For it is impossible to conceive a more frightful iniquity than the triumph of falsehood and treachery in a witness who pledges himself to depose to the truth when brought into court, and in the meantime is persuaded to swear, when he appears, to a completely inconsistent story.

"The dangers on the other hand, though doubtless very fit subjects of precaution in the progress of a trial, exist at present in an equal degree, with reference to modes of proceeding which have never yet been questioned.

"The most obvious and striking danger is that of collusion. An attorney, it is said, may induce a man to make a false statement without oath, for the mere purpose of contradicting by that statement the truth, which, when sworn as a witness, he must reveal. The two parties concerned in this imagined collusion must be utterly lost to every sense of shame as well as honesty. But there is another mode by which their wicked conspiracy could be just as easily effected. The statement might be made, and then the witness might tender himself to the opposite party, for whom he might be first set up, and afterwards prostrated by his former statement. This far more effectual stratagem could be prevented by no rule of law.

"The other danger is, that the statement, which is admissible only to contradict the witness, may be taken as substantive proof in the cause. But this danger equally arises from the contradiction of an *adverse* witness: it is met by the judge pointing out the distinction to the jury, and warning them not to be misled. It is not so abstruse but that judges may explain it, and juries perceive its reasonableness; and it is probable that they most commonly discard entirely the evidence of him who has stated falsehoods, whether sworn or unsworn."

Lord Denman then referred to the cases before mentioned of *Alexander* v. *Gibson* (1) and *Lowe* v. *Joliffe* (2), as establishing

(1) *Vide supra*, p. 446. (2) *Vide supra*, p. 444, n. (1)

that a party may so far contradict the witness he calls, as to prove by others the fact which that witness denies: and then proceeded to consider the question, whether, for the purpose of showing the witness's statement to be correct, a party may be allowed to contradict his own witness, not by others, but by his own previous and contradictory assertions. Upon this point Lord Denman, citing the decision in the case of *R.* v. *Oldroyd*, (1) observed, "This decision does not incur the danger of collusion, as the parties who conducted the prosecution neither called nor contradicted the witness. But it proves that a former declaration may be given in evidence to contradict what the same witness has sworn to on the trial, notwithstanding the danger of that declaration being believed, and acted on as evidence in the cause: and it prepares the mind for considering the very question now before us. For the prosecutor would have undoubtedly been justified in expecting the evidence in court to agree with that given before the coroner, and in summoning the witness into the box with that expectation. If he had done so, and had heard her gainsay the deposition from which he examined her, could he have been prevented from neutralising the evidence, and defeating the attempted fraud by laying that deposition before the jury?" This decision Lord Denman considered a conclusive authority for the principle now under controversy.

Lord Denman referred to the case of *Ewer* v. *Ambrose* (2), as furnishing materials for both sides of this argument; and observed, that if the answer, tendered as evidence in that case, could not have been received at all, the same man might defeat on the same day, a suit in Chancery, and an action at law, by swearing in the former to the affirmative, and in the latter to the negative of the same proposition.

Then, adverting again to the general principle,—"If the witness professing to be mine has been bribed by my adversary to deceive me,— if, having taught me to expect the truth from him, he is induced by malice or corruption to turn round upon

(1) *Vide supra*, p. 452. (2) 3 B. & C. 746. *Supra*, p. 452.

me with a newly invented falsehood, which defeats my just right, and throws discredit on all my other witnesses, — must I be prevented shewing the jury facts like these? Suppose that in some dispute happening in the street a by-stander declares his name to one of the contending parties, and his readiness to prove his conduct blameless; that he attends the solicitor, and gives in his deposition to the same effect, but, when sworn in open court, takes part with the adversary. The question then is, whether he is to be believed, or the other witnesses called by the same party. Some one in court happens to know him, and whispers to the attorney, 'He has deceived you in every way; he has given you a false name; he is the adversary's brother and partner: moreover, he has been for years notoriously infamous.' Or, suppose such a trial for misdemeanor as some that have lately revolted the public mind; and that some stranger, after voluntarily offering his testimony to a calumniated man, should unexpectedly side with his false accuser? If the rule against *discrediting* your own witness must be strictly construed, these deceptions cannot be exposed. You will be told that you have called him; you must take him for better and for worse, and must be bound by all his statements. Or, if you are permitted, by reason of your late discovery of these facts, to prove them for your own necessary protection, this must be because the rule cannot apply to a case where such facts are brought to your knowledge after you have placed him in the witness-box. The rule, therefore, is limited by that condition; and you shall be at liberty to discredit your witness by such evidence, because you have been deceived and surprised. Can any reason then be assigned, why, when equally deceived by his denying to-day what he asserted yesterday, you should be excluded from shewing the contradiction into which, from whatever motive, he has fallen? It is clear that, in civil cases, the exclusion might produce great injustice, and, in criminal cases, improper acquittals and fraudulent convictions.

"The result is, that finding no direct authority compelling the exclusion of such evidence, and some which appear to me on principle to prove it admissible, and thinking that truth and

justice may be most materially affected by that exclusion, I am bound to abide by the course I pursued at Nisi Prius, and must give my judgment against making the rule absolute."

Judgment of Bolland, B.

Mr. Baron Bolland was of opinion, that the rule applicable to this question was that which had been relied upon by the defendant's counsel, *viz.*, that a party in a cause is not to be permitted to give evidence of a fact for the purpose of discrediting his own witness, unless such fact would of itself be evidence in the cause; but that where such fact is relevant to the issue, and so *per se* evidence in the cause, such proof is to be allowed to be given, although it may collaterally have the effect of discrediting the testimony of his own witness. He considered the passage cited from Mr. Justice *Buller's Nisi Prius*, taken altogether, as warranting this distinction; for, after having laid it down that a party shall not be permitted to give general evidence to discredit his own witness, the learned writer goes on to state, "But if a witness prove facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise, for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only." By these words, the learned writer points out in what manner and to what extent a party shall be allowed to impeach the credit of his own witness, in contradistinction to that *general evidence* of which he had made mention just before. The cases of *Ewer and Another* v. *Ambrose and Another*, (1) and *Friedlander* v. *The London Assurance Company*, (2) were decided upon the principles laid down in the above rule.

"I think," said the learned judge, "great weight is due to the argument founded on the danger of collusion; it is, indeed, in my mind, the main objection to the reception of the evidence.

"The case of *Rex* v. *Oldroyd* (3) has been much relied on for

(1) 3 B. & C 746. *Supra*, p. 452.
(2) 4 B. & Adol. 193. *Supra*, p. 449.
(3) *Vide supra*, p. 452.

the plaintiff. I cannot, however, consider the case itself, as decided by the judges upon the point before them, as an authority upon the question in the present case: the only assistance afforded to the plaintiff by that case is to be derived from the opinion thrown out by Lord Ellenborough, and Mansfield, C. J., which appears at the end of the report. The learned judge concluded thus: "All doubt upon this point is set at rest since the decision of *Ewer* v. *Ambrose*. (1) With the exception of the opinion of the two learned judges in *Rex* v. *Oldroyd*, the authorities are uniform in establishing that a party cannot contradict his own witness but by giving evidence of facts bearing upon the issue. (2) It was open to the plaintiff to do so in the present case, but he was not at liberty to prove that his witness had previously made a different statement to the attorney, because that was a matter not relevant to the issue in the cause; nor was the statement entitled to such weight, as a contradiction, as to have the power of neutralising the evidence, (one of the reasons urged for it's admission,) it not having been given upon oath. It furnished a sufficient apology for putting the witness in the brief, and for calling him, but could go no further. In the case of *Ewer* v. *Ambrose*, the evidence by which it was sought to contradict the witness, was his answer in Chancery. In *Rex* v. *Oldroyd*, the contradiction was supported by the witness's deposition before the coroner. For these reasons, I am of opinion, the evidence of the attorney was improperly received at the trial."

Upon a review of these arguments, it is conceived, the reader must come to the conclusion that the superior force of reasoning is decidedly with Lord Denman. The argument of Mr. Baron Bolland for the rejection of the proposed evidence appears to be unsatisfactory. The passage in *Buller's Nisi Prius* is relied upon as the chief support in point of law; but that passage was

(1) But the question upon the admissibility of the answer in that case, as evidence to *contradict* the witness, was not decided. A new trial was awarded on a different ground, namely, because the answer had been received as *proof of the facts therein stated.*

(2) But the learned judge in his argument has not cited any authority which establishes that proposition.

undoubtedly misconstrued by him, and is, as Lord Denman shows, wholly inapplicable.—He laid great stress also on the supposed danger of collusion, which might be practised by a *party*, if such proof were allowed,—not adverting to another danger, much more serious and more likely to occur, if such proof should be rejected,—the danger of collusion by *witnesses*. —The objection of *irrelevancy* is not well founded: the proposed evidence was certainly relevant, inasmuch as it bore directly and very materially on the evidence of the witness, which was itself relevant; further, the relevancy of proof of contradictory statements is sufficiently apparent from the rule of practice which admits such proof when tendered by a party against a witness on the *opposite side*; and it cannot be less relevant, when tendered by him against *his own* witness.

Dunn v. *Aslett.*

Lord Denman acted upon the same principle in *Dunn* v. *Aslett*, (1) an action of assumpsit on the warranty of a horse, where one of the plaintiff's witnesses having, on cross-examination, stated facts tending to show that the warranty had not been broken, the plaintiff's counsel inquired of him, whether he had been living with the defendant and the defendant's witnesses, since he had been in the town: this was objected to, on the ground that a party cannot discredit his own witness, and that the plaintiff ought not to have called him, unless he was a witness to whom credit was to be given. But Lord Denman allowed the question. He referred to the case of *Wright* v. *Beckett*, in which, he said, he had formed his opinion after much consideration, and still retained that opinion; and on the same principle, he thought a party calling a witness may examine him as to any fact tending to show that he had been induced to betray that party.

Cases, contrà.

Two cases must now be mentioned, in which the decisions have been contrary.

In the case of *Holdsworth* v. *The Mayor of Dartmouth and*

(1) 2 Mo. & Rob. 122. Winter Sp. Ass. 1838.

Holdsworth v. *M. of Dartmouth.*

Others, (1) an action of debt on bond, in which the defendant pleaded fraud and covin, one of the defendant's witnesses having on *cross-examination* represented the giving of the bond as an honest transaction, the defendant's counsel was allowed to ask the witness, whether he had not told the defendant's attorney that it was a shameful transaction; this the witness denied. The counsel then proposed to inquire of the attorney, whether the witness had said to him that the transaction was shameful. The judge, Mr. Baron Parke, thought the proposed inquiry inadmissible, and that it made no difference, whether the fact (concerning which the inquiry was proposed,) was elicited on examination in chief, or on cross-examination. "The effect and object of the evidence," said that learned judge, (according to the report of the case,) "is to discredit the witness. It goes to his general credit to show that he has given a different account of the matter before; and it is a clear rule that a party has no right to put a witness into the box as a witness of credit, and when he gives unfavourable evidence, to call testimony to discredit him."

R. v. *Ball.*

In the case of *R.* v. *Ball,* (2) a witness for the prosecution having stated, in the examination in chief, that she had been examined before the committing magistrate, and that her statements had been taken by him in writing, and that she then gave the same account as on the trial, the counsel for the prosecution proposed to prove that her statements before the magistrate were wholly inconsistent with the account given at the trial; But Mr. Justice Erskine, after conferring with Mr. Justice Patteson, refused to receive the evidence, on the ground that the party calling a witness cannot call another witness, or give evidence not otherwise admissible, for the purpose of contradicting and directly discrediting him.

The chief objection, then, to the proposed evidence appears to be this, that a party after calling a witness as a *witness of credit* shall not be allowed to *discredit* him. At first sight,

(1) 2 Mo. & R. 153. Exeter Sum. Ass. 1838.

(2) R. v. Ball and others, cor. Erskine, J. Staff. Ass. 1839. 8 C. & P. 745. And see R. v. Farr, cor. Patteson, J. Monm. Ass. 1839. 8 C. & P. 768.

this has the semblance of a principle of plain dealing. But let the same proposition be expressed in other terms,—as near the facts of the case, if not nearer,—and let it run thus: A party, after giving credit to a witness for speaking truth, shall not, although deceived by him, be allowed to show that the witness has deceived. The proposition so expressed might, to an unlearned reader, appear scarcely consistent with the principles of justice. The proposition asserts a *fact* as the foundation of the rule,—that a party by calling a witness places him in the box as a *witness of credit*. But is this the fact? The party does not vouch for his credit, nor ought he to be treated as if he had given such voucher. He may know little, perhaps nothing, of the witness's character, or may believe it to be doubtful, and yet may not unreasonably give him credit for the truth of his statements,—not however intending thereby to vouch for him as a *witness of credit;* and if in such cases the witness deceives him, his deceit ought to be exposed, and his evidence weighed in the scales of truth. But, it is said, he shall not give evidence to *discredit* his own witness. The answer to this is, that the witness ought not to receive more credit than he deserves, and if he has given different statements of the same transaction, no wrong is done to him by proving them. Whether such proof may discredit him at all, or to what extent, the jury are to determine: the object of the party may be to discredit, and the witness may deserve to be discredited; but the duty of the judge is to search out the truth, and to take care that the exact degree of credit due to each witness, and not more, shall be fairly and justly apportioned.

CHAPTER X.

OF BILLS OF EXCEPTIONS, AND DEMURRERS TO EVIDENCE.

Bills of exceptions.

THE competency of witnesses, and the admissibility of evidence are to be decided by the judge who tries the cause; and from his judgment there is an appeal by a bill of exceptions. An appeal also may be made, in the same manner, from the discretion or opinion of the judge as to the sufficiency of the evidence to maintain the plaintiff's claim. (1)

Amendment after sealing.

After the bill has been sealed, it may be amended; thus, in *Culley* v. *Doe* d. *Taylerson*, (2) where the record stated the exceptions to have been made *after* verdict found, the court ordered the record to be amended.

At common law, a writ of error could not be brought for any error in law, which did not appear on the record; and therefore, where the plaintiff or defendant alleged anything *ore tenus*, which was overruled by the judge, the party aggrieved had no redress. (3) To remedy this defect, it was enacted by

13 Ed. 1.

stat. 13 Ed. 1, c. 31, "if one impleaded before any of the justices allege an exception, praying that the justices will allow it, that, if they will not, and if he write the exception, and require the justices to put their seals to it, the justices shall do so, and if one will not, another shall."

Whether in criminal cases.

This statute extends to the plaintiff as well as to the defend-

(1) 1 Black. Rep. 556, Cowp. 161.

(2) 11 Ad. & E. 1008.

(3) 2 Inst. 426.

ant, (1) and to a trial at bar as well as at *nisi prius*. (2) But it has been doubted, whether it extends to criminal cases. Lord Coke, in his exposition of the statute, states, that it extends to all actions, real, personal, and mixed; but of criminal cases he makes no mention. In the case of Sir H. Vane, (3) who was tried for high treason, the court refused to sign a bill of exceptions, "because," they said, "criminal cases were not within the statute, but only actions between party and party." From this authority, Mr. Serjeant Hawkins infers only that a bill of exceptions is not allowable on an indictment for treason or felony. (4) "Whether a bill lies not in any criminal case," said Lord Hardwicke, "is a point not settled." (5) It was allowed in the case of *The King* against *Lord Paget and Others*, on an indictment for a trespass, (6) and also on an information in the nature of a *quo warranto*. (7) But Lord Hardwicke, in the case before referred to, after saying "that he had known a bill of exceptions allowed in informations in the Court of Exchequer, which are civil suits for the king's debt," added, "it has never been determined to lie in mere criminal proceedings in other courts." (8)

Quarter sessions.

A bill of exceptions cannot be allowed by the justices of the peace at the quarter sessions, on the hearing of an appeal against an order of removal. (9) It can be used only on a writ of error, and therefore where a writ of error will not lie, there cannot be a bill of exceptions. (10) And on the trial of a feigned issue out of the Court of Chancery, a party is not entitled to a bill of exceptions. (11)

When tendered.

A party cannot avail himself of a bill of exceptions, unless he insist upon the exception at the trial. If he waives it, he

(1) 2 Inst. 427.

(2) Thurston *v.* Slatford, 3 Salk. 155; Adm. *per cur.* in Duchess of Grafton *v.* Holt, Skin. 354. Rowe *v.* Brenton, 3 M. & R. 266. Rex *v.* Smith, 2 Show. 287, *contra*.

(3) 1 Lev. 68; Kel. 15. S. C. 1 Sid. 65, S. C.

(4) Pl. Cr. b. 2, c. 46, s. 210.

(5) Rex *v.* Inhabitants of Preston, Rep. temp. Hard. 251.

(6) 1 Leon. 5.

(7) Rex *v.* Higgins and others, 1 Ventr. 366. See also Rex *v.* Nutt, 1 Barnardist. 307, a prosecution for a libel.

(8) Rep. temp. Hard. 251. Rex *v.* Stratten and others, 21 Howell's St. Tr. 1187.

(9) See n. (8) *supra*.

(10) Bull. N. P. 316.

(11) Bullen *v.* Michel, 2 Price, 416. Wood, B., dissent.

acquiesces, and cannot resort back to the exception after a verdict. The statute appoints not any precise time for tendering a bill of exceptions; but the nature and reason of the thing requires, that the exception should be reduced to writing, when taken and disallowed: not that the exceptions need be drawn up in form; but the substance must be reduced to writing while the thing is transacting, because it is to become a record. (1)

When a bill of exceptions has been tendered, the court will not grant a motion for a new trial, unless the bill of exceptions be abandoned. (2) And if a party, who has tendered a bill of exceptions, bring a writ of error, before he has procured the judge's signature, he thereby waives the bill of exceptions, and will not be permitted afterwards to tack or append the bill to the writ of error. (3)

Demurrer to evidence.

A demurrer to evidence is a proceeding, by which the judges whose province it is to determine questions of law, are called upon to declare, what the law is upon the facts in evidence. And it is analogous to the demurrer upon facts alleged in pleading. (4)

Object of.

When the admissibility of the evidence has been established, the question, how far it conduces to the proof of the facts, which are to be ascertained, is not for the judge to decide, but for the jury exclusively. And when the jury have ascertained the fact, if a question arises, whether the fact thus ascertained maintains the issue joined between the parties, or, in other words, whether the law arising upon the fact is in favour of one or other of the parties, that question is for the judge to decide. (5) Ordinarily, he declares to the jury, what the law is upon the fact which they find, and then they compound their verdict of the law and fact. But if the party wishes to withsons, the court will allow the bill of exceptions to be tacked to the record *nunc pro tunc.* Taylor *v.* Willans, 2 B. & Ad. 846.

(1) By Holt, C. J., Wright *v.* Sharpe, 1 Salk, 288.

(2) 2 Chit. Rep. 272.

(3) Dillon *v.* Parker, 1 Bing. 17. But it seems this rule is not imperative, and that when the bill of exceptions has been delayed from the fault of the defendant above, or for other sufficient rea-

(4) See the judgment of Eyre, C. J., in Gibson and Johnson *v.* Hunter, 2 H. Bl. 205, 206.

(5) 2 H. Bl. 205.

draw from the jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence. (1)

It is reasonable, that either party should have such a power of referring to the court to decide, what the inference of law is upon the facts; as the jury may refuse to find a special verdict, in which case the facts would not appear on the record. On the other hand, as it is the peculiar province of the jury to ascertain the truth of facts and the credibility of witnesses, the party ought not to be allowed, by a demurrer to evidence, or any other means, to refer the trial of such questions to another tribunal. A demurrer must therefore admit the truth of all facts, which the jury might find in favour of the other party upon the evidence laid before them, (2) whatever the nature of that evidence may be, whether of record, or in writing, (3) or by parol. (4) According to Alleyn's report of the case of *Wright* v. *Pindar*, it was resolved, "that he that demurs upon the evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the court; and if the matter of fact is uncertainly alleged, or it is doubtful whether it be true or no, because offered to be proved only by presumptions or probabilities, and the other party demurs thereupon, he that alleges this matter cannot join in demurrer with him, but ought to pray the judgment of the court, that he may not be admitted to his demurrer, unless he will confess the matter of the fact to be true." And now it is an established rule, that in a demurrer to circumstantial evidence, the party, offering the evidence, is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion, which the proposed evidence conduces to prove. (5)

What it admits.

(1) 2 H. Bl. 206. 2 Barn. & Cress. 443.

(2) And by Eyre, C. J., in delivering the opinion of the judges in Gibson *v.* Hunter, 2 H. Bl. 209, it must distinctly admit upon the record "every *conclusion* which the evidence tendered *conduced* to prove." If this be so, a sufficient reason is shown, why a demurrer to evidence stops the cause; as to the issue to which the evidence relates, there would then be nothing left for the jury to try.

(3) Baker's case, 5 Co. Rep, 104.

(4) Wright *v.* Pindar, Alleyn, 18. 2 H. Bl. 207.

(5) Gibson and Johnson *v.* Hunter, 2 H. Bl. 187. Cocksedge *v.* Fanshaw, 1 Doug. 119—134.

When all matters of fact are admitted, the case is ripe for judgment in matter of law upon the evidence, and may then be properly withdrawn from the jury; and being entered on record, it will remain for the decision of the judges. (1)

Not in the King's case.

If in an information, or any other suit, evidence be given for the King, and the defendant offers to demur upon it, the King's counsel cannot be compelled to join in demurrer, but in such case the court ought to direct the jury to find the special matter; and upon that they shall adjudge the law. (2)

The whole proceeding upon a demurrer to evidence is under the control and direction of the judge at *nisi prius*, or of the court on a trial at bar. (3) "The court," said Mr. Justice Doddridge, "in the case of *Worsley* v. *Filisker*, (4) may deny and hinder a party from demurring, by over-ruling the matter in demurrer, if it seem to them to be clear in law:" and, in that case, the court did over-rule the demurrer, and left the case to the jury. If the judge over-rule the demurrer improperly, that may be made the subject of a bill of exceptions. (5)

Form of drawing up.

Where a demurrer to evidence is admitted, it is usual for the court or judge to give orders to the associate to take a note of the testimony: this should be signed by the counsel on both sides, and the demurrer is then affixed to the postea. (6)

Assessment of damages.

Upon a demurrer to evidence, the damages may be assessed conditionally by the jury before they are discharged; or they may be assessed by another jury, upon a writ of inquiry, after the demurrer is determined. (7)

(1) 2 H. Bl. 208.
(2) 5 Co. Rep. 104. Bull. N. P. 313.
(3) 2 H. Bl. 208.
(4) 2 Roll. Rep. 119. Bull. N. P. 314. 2 H. Bl. 208.
(5) 2 H. Bl. 209.
(6) Bull. N. P. 313.
(7) Herbert *v.* Walters, 1 Lord Raym. 60. Plowd. 410. 1 Doug. 222, n. In Miller *v.* Warre, 1 C. & P. 239, Mr. Justice Park ruled, that "on a bill of exceptions, the case always goes to the jury, but on a demurrer to evidence, it is otherwise."

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