A

PRACTICAL TREATISE

OF THE

LAW OF EVIDENCE,

&c.

VOL. III.

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A

PRACTICAL TREATISE

OF THE

LAW OF EVIDENCE,

AND

DIGEST OF PROOFS,

IN

CIVIL AND CRIMINAL PROCEEDINGS.

THIRD EDITION,

WITH CONSIDERABLE ALTERATIONS AND ADDITIONS.

By THOMAS STARKIE, Esq.

OF THE INNER TEMPLE, ONE OF HER MAJESTY'S COUNSEL.

VOL. III.

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LAW OF EVIDENCE.

VOL. III.

NEGLIGENCE (*l*).

General principle.

NEGLIGENCE may be considered, 1st, generally as a test of civil or criminal liability. A gross and vicious disregard of the interests of others is not distinguishable either in point of moral guilt, or evil results, from a malicious intention to injure; and therefore, where a man so uses even that which is his own carelessly and negligently, and without a reasonable degree of care and caution not to injure others, where injury is likely to ensue, he is usually not only civilly but even criminally responsible for the consequences (*m*). It may be regarded as an important and fundamental principle of adjudication in cases where a loss occasioned by spoliation or fraud must fall on one or other of two innocent persons, that he through whose negligence or want of caution the injury has been effected should bear the loss (*n*).

In the next place negligence may be regarded as a species of fraud, being a breach of some undertaking, either express or implied. In this point of view its effect will at present be considered.

Particulars of proof.

Where the plaintiff complains of an injury resulting from the negligence or unskilful conduct of the defendant, in the performance of some work or duty undertaken by the latter, he must, whether the action be framed in contract or in *tort*, prove, 1st, The contract or undertaking on the ground of which the defendant acted (*o*). 2dly, The negligence of the defendant. 3dly, The loss which has resulted from it, according to the allegations in the declaration (*p*); or so much of these essentials as is put in issue by the new rules (*q*); the degree of negligence which is essential to the action varies much in reference to circumstances. According to the soundest principles of morality, the very foundation of the law itself (*r*), "whoever undertakes

(*l*) As to the cases in which negligence in the performance of a contract may be set up as a defence to an action for remuneration for services performed, vide *supra*, 105, and *infra*, tit. WORK AND LABOUR.

(*m*) See tit. MURDER.—NUISANCE. The maxim of the English as well as of the civil law is, *sic utere tuo ut alienum non hedas.*

(*n*) If a banker pay the money of a customer on a forged order, the banker and not the customer, who gave no authority, must bear the loss. *Hall* v. *Fuller*, 5 B. & C. 750. And see *Smith* v. *Mason*, 6 Taunt. 76. But where the customer draws a draft so negligently that a stranger easily alters the sum to a larger one, the loss must fall upon the customer. *Young* v. *Grote*, 4 Bing. 253. The same principle applies where a negotiable security is taken without sufficient caution. See *Snow* v. *Peacock*, 3 Bing. 108. *Supra*, tit. BILL OF EXCHANGE; *infra*, tit. TROVER.

(*o*) *Supra*, p. 57. 282. As to parties to the action, vide *supra*, 284. 297. Variance from allegations, *supra*, 297, *& seq.* And *Hill* v. *Tucker*, 1 Taunt. 7, and tit. PARTIES.

(*p*) As to variance, vide *supra*, 58. 284. 299; and Vol. I. tit. VARIANCE. In an action by an infant against a surgeon for mal-treatment, the allegation that the plaintiff employed him is not material, the declaration being framed as on a branch of duty. *Gladwell* v. *Steggall*, 5 Bing. N. C. 733; 8 Sc. 60.

(*q*) *Supra*, tit. CASE. *Infra*, tit. NUISANCE. And see the new rules, *infra*, tit. RULES.

(*r*) Paley's Moral Philosophy, 144.

Where the defendant acted without reward.

another man's business, makes it his own, that is, promises to employ upon it the same care, attention and diligence, that he would do if it were actually his own; for he knows that the business was committed to him with that expectation, and with no more than this." This principle seems to govern all cases where one man acts *gratuitously* for another, whether the business in which he acts does or does not import particular skill and knowledge. If the party act *gratuitously* and in a situation which does not import particular skill and experience, and act *bonâ fide* to the best of his ability, and with as much discretion as he would exercise in his own affairs, he is not liable to an action for any loss which ensues (*s*).

Thus, where a merchant voluntarily, and without reward, undertook to enter a parcel of goods at the custom-house, for the plaintiff, together with a parcel of his own, and made the entry under a wrong denomination, in consequence of which the goods were seized, it was held, that having acted *bonâ fide*, and to the best of his knowledge, he was not liable (*t*). But it seems that in such a case, if a ship-broker, or clerk in a custom-house, had undertaken to enter the goods, although gratuitously, such a mistake in making the entry would have amounted to gross negligence, since his situation and employment would then have necessarily implied a competent degree of knowledge in making such entries (*u*).

Although in each of the preceding cases the agent acted gratuitously, in the former he was not liable, because he acted to the best of his ability, which was all that he engaged to do: in the latter, he impliedly undertook to exert a degree of skill and knowledge which he failed to do.

Most then of the cases of this nature, if not all, resolve themselves into a question of understanding and compact. Lord Holt, in the case of *Coggs* v. *Bernard* (*x*), held, that the mandatory was liable, because in such a case

(*s*) See 1 H. B. 162. Ld. Loughborough says, "I agree with Sir W. Jones, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is liable only for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence."

(*t*) *Shiells* v. *Blackburn*, 1 H. B. 158.

(*u*) See Ld. Loughborough's observations, 1 H. B. 162. If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence, if he undertook, *gratis*, to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man of a different employment or occupation, for his gratuitous assistance, who either does not exert all his skill, or administers improper medicines, to the best of his ability, such person is not liable.

(*x*) 2 Lord Ray. 809. Where a law agent in Scotland was employed to place out money on heritable security, and in preparing the heritable bond he drew it up as a public holding (as under the superior lord), although the precept of sasine made no reference to any particular manner, yet held, that as it must be necessarily referred to the manner of holding specified in the deed, and no confirmation by the lord had been obtained, the bond was, as against subsequent incumbrancers, a mere nullity, and the omission such gross negligence or ignorance that the agent was bound to make good the loss sustained by his employer. *Stevenson* v. *Rowand*, 1 Dow & C. 104.

Where the respondents, a mercantile house, received a commission from a party for whom they had before purchased stock, to sell it out when it reached to or above a certain price; held, that from such time they made the stock their own, and were liable to account to their employer for the price, with interest, allowing the dividends he had afterwards received in ignorance of the stock having ever reached the price stated. *Bertram* v. *Godfrey*, 1 Knapp, 381.

In an action by the shippers for loss of goods, against the owners, it is no defence that the owners chartered the ship to the master by an instrument which in substance amounted to nothing more than the appointment of a master, upon an undertaking by him that the ship should earn a certain sum, and all beyond should be for

a neglect is a *deceit* to the bailor: for when he trusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him; and a breach of trust undertaken voluntarily will be a good ground of action.

Where the defendant undertook, &c. for reward.

Where a party receives a *reward* for the performance of certain acts, he is by law answerable for any degree of neglect on his part: the payment of the money may be considered as an insurance for the due performing of what he has undertaken (*y*).

And it seems, that in general, where a person professes himself to be of a certain business, trade or profession, and undertakes to perform an act which relates to his particular employment, an action lies for any injury resulting either from *want of skill* (*z*) in his business or profession, or from negligence or carelessness in his conduct (*a*).

In some instances, as in the cases of carriers (*b*) and innkeepers (*c*), the undertaking results as a legal obligation incident to the character in which the defendant undertakes to act; and it is consequently sufficient to show that the plaintiff dealt with him in that character, without proof of any special undertaking or agreement.

Proof of negligence.

2dly. The question of negligence is usually one of fact for the jury. The question may be either one of law, where the case falls within any general and settled rule or principle; or of fact, where no such rule or principle is applicable to the particular circumstances, and where therefore the conclusion of negligence in fact must be found, or excluded by the jury (*d*).

his own benefit, but all loss to be made good by him; and the plaintiffs are not prevented by a knowledge of that instrument from recovering. *Colvin* v. *Newberry*, 8 B. & C. 166; and 2 M. & Ry. 47.

The law implies a duty in the owner of a ship, whether a general one or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course; where there had been a deviation without any justifiable cause, during which the cargo (of lime), in consequence of tempestuous weather, became heated and took fire, and the cargo and vessel entirely lost; held that the owner was liable, and that the wrongful act of the master was a sufficiently proximate cause of the loss. *Davis* v. *Garrett*, 6 Bing. 716.

(*y*) See the observations of Wilson, J. in *Shiells* v. *Blackburn*, 1 H. B. 161. He adds, that where the undertaking is gratuitous, and the party has acted *bonâ fide*, it is not consistent either with the spirit or policy of the law to render him liable in an action.

(*z*) See *Shiells* v. *Blackburn*, 1 H. B. 158. *Moore* v. *Morgue*, Cowp. 480. Puff. lib. 5, c. 4, s. 3. As to actions against attornies, vide *supra*, 112. See also tit. CARRIERS; and B. N. P. 73, where the general rule is laid down, that in all cases where a damage accrues to another by the negligence, ignorance, or misbehaviour of a person in the duty of his trade or calling, an action on the case will lie; as, if a farrier kill my horse by bad medicines, or refuse to shoe (*quære*), or prick him in the shoeing.

(*a*) *Seare* v. *Prentice*, 8 East, 348; where it was held, that case would lie against a surgeon for want of skill, as well as for negligence.

(*b*) *Supra*, 282.

(*c*) It has been held, that, though an innkeeper refuse to take charge of goods till a future day, because his house is full of parcels, yet that he is still liable for the loss if the goods be stolen during the time while the plaintiff stops as a guest. *Bennet* v. *Mellor*, 5 T. R. 273.

(*d*) See the case of *Moore* v. *Morgue*, Cowp. 479, where, in an action by a merchant against his agent, for negligence in not insuring goods, Lord Mansfield directed the jury generally, that if they thought there was gross negligence, or that the defendant had acted *malâ fide*, they should find for the plaintiff; if, on the contrary, they were of opinion that he had acted *bonâ fide*, and to the best of his judgment, then they should find for the defendant. And see *Reece* v. *Righy*, 4 B. & A. 202; where it was left by Abbott, L. C. J. as a question of fact for the jury, whether the defendant, an attorney, had used reasonable care in the conduct of a cause. In the case of *Russell* v. *Hankey*, which was an action against a banker, the defendant having received bills from cor-

In an action against a coach-owner for negligence, proof that the coach broke down, and that the plaintiff was greatly bruised, is *primâ facie* evidence that the injury arose from the unskilfulness of the driver, or the insufficiency of the coach (*e*).

Damage. 3dly. As to the proof of the damage resulting to the plaintiff, see the titles ASSUMPSIT, &c. (*f*).

NOTICE (*g*).

General rules. THE laws and statutes of the realm, and many other matters of universal interest, are presumed to be known to all (*h*). In matters of private concern the fact of notice, or knowledge of particular facts, is often an essential and important circumstance to constitute civil or even criminal (*i*) liability; and this is, in ordinary cases, matter of proof.

It is a rule of law that every one who has an interest in land shall take notice, at his peril, of acts concerning the land (*j*). It is also a general rule that notice is unnecessary where the fact lies equally within the knowledge of both parties (*k*).

respondents in the country, to whom they had been indorsed, had given them up to the acceptor, on receiving cheques for the amount, and Lord Kenyon nonsuited the plaintiff. The Court afterwards refused a rule *nisi* to set aside the nonsuit. See further as to proof of the defendant's breach of undertaking, *supra*, 101. And see 3 Taunt. 117. A broker is employed to insure goods from Gibraltar to Dublin, the principal stating, that he would take the risk from Malaga to Gibraltar Bay; the broker is guilty of gross negligence in insuring *at and from* Gibraltar. He should have stated that the goods were loaded at Malaga, and have effected the insurance at and from Gibraltar Bay. *Park* v. *Hammond*, 2 Marsh. 180. If mice eat the cargo, and thereby occasion no small damage to the merchant, the master must make good the loss, because he is guilty of a fault; yet if he had cats on board his ship he shall be excused. Roccus. s. 58. Abbott on shipping, 241. Where the master filled the boiler of a steam-engine at night, in winter, with water, and a frost ensuing, the water was frozen and a pipe burst, and water in consequence escaped into the hold and did damage there; it was held that the jury were warranted in finding that the loss was occasioned by the defendant's negligence, and not by the act of God. *Siordet* v. *Hall*, 4 Bing. 107.

(*e*) *Christie* v. *Griggs*, 2 Camp. 79. *Curtis* v. *Drinkwater*, 2 B. & Ad. 169. If the coach be insufficient the owner is liable although the defect be out of sight, and not apparent on an ordinary examination. *Sharp* v. *Gray*, 9 Bing. 457; and see *Israel* v. *Clarke*, 4 Esp. C. 259. *Aston* v. *Heaven*, 2 Esp. C. 533. *Goodman* v. *Taylor*, 5 C. & P. 410. *Supra*, tit. CARRIERS.

(*f*) See also tit. CASE, ACTION ON. Where the defendant, a postmaster, agreed to deliver letters in a particular mode, and by mistake omitted to deliver one for two days, which contained a returned bill, but the plaintiff might have given notice of dishonour in due time by sending a special messenger for the purpose, though he might be too late to do so by the post, it was held that he was not liable in damages to the amount of the bill. *Hordern* v. *Dalton*, 1 C. & P. 181.

(*g*) In what case a notice by a public company amounts to the exercise of option to purchase, see *R.* v. *Hungerford Market Company*, 4 B. & Ad. 327. As to notice of the appointment as constable at leet, see *Fletcher* v. *Ingram*, 5 Mod. 127. As to notice of a prior deposit of title deeds, see *Plumb* v. *Fluitt*, 2 Anst. 432.

(*h*) *Supra*, Vol. 1. and Index, tit. NOTICE. Ignorance of the law excuses no man; not that all men know the law, but because it is an excuse every man will make, and no man can tell how to confute him. Selden.

(*i*) Notice is requisite in order to make the rescuer of a felon from the custody of a private person guilty of felony. 1 Hale, P. C. 606.

(*j*) 5 Co. 113. Com. Dig. *Condition*. L. 9. If therefore a woman lessor marry, the lessee ought to take notice, and pay the rent to the husband; and if he pay it to the wife, without the husband's consent, he shall pay it again to the husband. Cro. J. 617.

(*k*) Hardr. 42. 11 Mod. 48. Chitty on Pleading, 321. As to cases where an averment of notice is necessary, see Com. Dig. tit. *Pleader*, C. 73. Where the act on which the plaintiff's demand arises is secret, and lies within his own knowledge,

General rules.

Every one must take notice at his own peril whether his act be legal. If *A.* having a right of way over the land of *B.*, the latter stop it up and let the land to *C.*, an action lies against the latter for continuing the stoppage, though he had no notice (*l*).

It is uniformly held, in the case of executions, that an act done after notice, is done at the peril of the actor (*m*).

The want of notice is usually sufficient to rebut an inference of acquiescence or of a waiver of a forfeiture; and therefore where the receipt of rent is relied on as evidence of a waiver of a forfeiture, it is of importance to show that at the time the landlord had notice of the forfeiture (*n*). Notice of forfeiture in such cases is a material and issuable fact (*o*).

If several be bound under an obligation to do a particular act, notice to one is notice to all (*p*). If notice be given to the principal, notice to his agent is unnecessary, for it is the business of the principal to give notice to the agent (*q*). But it seems that in general, where it is necessary to prove notice to a man in a matter which concerns his trade or business, it is usually sufficient to prove notice to his servant or agent (*r*). A notice of prior title to the attorney is equivalent to notice to the client himself (*s*), provided it arise out of the same transaction (*t*).

The same person being co-executor and co-partner, his knowledge of a transaction in the latter capacity affects the right of the executor to sue (*u*).

Where an Act of Parliament enacts that no action shall be brought for anything done or performed in execution or under the authority of the Act, unless notice be previously given, such a notice is necessary in those cases only where the party against whom the action is brought had reasonable ground for supposing that what he did was authorized by the Act (*x*).

an action cannot be maintained without notice given. Per Holroyd, J., *Bickerton* v. *Burrell*, 5 M. & S. 383. Com. Dig. *Pleader*, C. 73.

(*l*) 1 Roll. R. 222; Ray. 424. And see *Prince* v. *Allington*, Cro. Eliz. 918. So a sheriff may become liable for the tort of his predecessor. Ray. 424. Or a gaoler for the detention of prisoner under a lawful writ, but in a place to which the writ did not extend. *Lambert* v. *Bessey*, Ray. 421; sed. vid. *infra*, 745.

(*m*) Per Lord Mansfield, in *Moss* v. *Gallimore*, Doug. 269.

(*n*) See tit. EJECTMENT.

(*o*) 2 Will. Saund. 207. c. *Pennant's Case*, 3 Rep. 646. *R.* v. *Harrison*, 2 T. R. 430.

(*p*) Mo. 555.

(*q*) *Mayhew* v. *Eames*, 3 B. & C. 601.

(*r*) *Supra*, tit. CARRIER. Facts coming to the knowledge of a party's agent or counsel, are notice to the party. *Norris* v. *La Neve*, R. T. Hardw. 329.

(*s*) *Merry* v. *Abney*, 1 Ch. C. 38. *Brotherson* v. *Holt*, 2 Vern. 594. 609; 1 Bro. C. C. 244.

(*t*) Fitzg. 207; 3 Atk. 291; Bac. Ab. Ev. A. 2.

(*u*) —— v. *Adams*, 1 Young, 117.

(*x*) *Cooke* v. *Leonard*, 8 B. & C. 351, where the defendants had removed a dromedary from a private stable, and attempted to justify under a local Act, which (*inter alia*) prohibited the exhibition of any beast in the streets. So in *Lawton* v. *Miller*, cited Ib., where a custom-house officer seized a man going abroad, thinking he was an artificer. *Mayne* v. *Palmer*, 2 B. & C. 729, where a justice exacted a fee from a publican for renewing his licence. *Secus*, where the Act is done *bonâ fide*, and may reasonably be supposed to be within the statute; as where a magistrate being authorized to commit a party for riding on the shafts of a cart, committed him for being on the shafts whilst the cart was standing still. *Bird* v. *Gunston*, cited by Bayley, J. 8 B. & C. 354. And see *Beechey* v. *Sides*, 9 B. & C. 806; *supra*, 588 (*c*), 596 (*q*).

Where the defendant, a fenreeve of a parish, conceiving the plaintiff to be trespassing without any authority, had, after desiring him to desist, caused him to be apprehended; held, that having reason to suppose he was acting under 7 & 8 G. 4, c. 30, s. 4, he was entitled to notice of action. *Wright* v. *Wales*, 5 Bing. 336. Where a scavenger, appointed by the Commissioners of Sewers for London,

General rules.

A particular Act of Parliament, giving further protection to magistrates, does not dispense with the necessity of giving notice under the general statute 24 Geo. 2 (*y*).

The rule in equity is, that whatever is sufficient to put a party upon inquiry is good notice (*z*).

Direct proof.

The proof is either direct or presumptive; direct where actual notice has been given either orally or in writing (*a*).

Notice to produce a notice, when unnecessary.

Although it be a general rule that secondary evidence shall not be admitted as to the contents of any written document in the possession of the adversary, unless notice has been given to produce it, yet notice to produce the latter notice is unnecessary, for the obvious reason, that if it were, the same necessity would extend to every successive notice *ad infinitum*. Doubts have sometimes occurred at *Nisi Prius* upon the question, to what notices the exception extends (*b*), and whether it applies to notices in general, such as notices of the dishonour of bills of exchange, &c. In principle, it seems to be clear that the exception is limited to the case of a notice to *produce some other document* for the purpose of evidence in the cause; all other cases of notice are within the general rule, but not within the exception. The particular contents of a notice to quit may be as essential to the cause as those of any other document, and it may therefore be as material to require the best evidence in that case as in any other. Such a document is essentially distinguishable from a mere formal notice to produce an instrument in evidence: its contents create or vary the rights of the litigant parties; it is part of the *res gestæ*; and the objection which excludes the necessity of proving a notice to produce a notice, namely, that an infinite series of such notices would be equally necessary, is wholly inapplicable, the nature and object of the two documents being entirely different.

In an action against the surety, on an indemnity bond conditioned to pay to the plaintiffs what should be due from the principal, within six months after *notice*, Lord Ellenborough held, that in order to let the plaintiff into proof of a written notice to the defendant, of the balance due, the usual preparatory proof of notice to produce the document was necessary; for the notice to the surety to pay the money was not a mere formal notice, but

seized a cart and horse (supposed to contain cinders), and assaulted and imprisoned the driver (plaintiff), and beat the horse; held that it was within the section of the local Act 57 G. 3, c. 19, s. 136, requiring 21 days' notice of action for anything done in pursuance and by authority of that Act. *Breedon* v. *Murphy*, 3 C. & P. 574. Where the treasurer of the West India Dock Company was sued in trover for goods deposited in the company's warehouses; held that he was entitled to the 14 days' notice given by 39 G. 3, c. 69, s. 185, although he had delivered over the goods upon an indemnity, it being the act of the company through him. *Sellick* v. *Smith*, 11 Moore, 459. The protection under statutable provisions of this description is not confined to actions of tort. Under such provisions in a local Act, a toll-collector is entitled to notice. *Greenway* v. *Hurd*, 4 T. R. 553; *Waterhouse* v. *Keen*, 4 B. & C. 200. *Secus* in case of a contract made by an officer, to whom similar provisions are applicable under a local Act. *Fletcher* v. *Grenwell*, 4 Dowl. P. C. 166.

(*y*) *Rogers* v. *Broderip*. 9 D. & R. 194.

(*z*) *Smith* v. *Low*, 1 Atk. 490. The knowledge of a practice among publicans to deposit leases with their brewers has been held to be such notice as ought to put a prudent man upon inquiry, so as to give an equitable mortgage by the deposit of the copy of a court roll a priority over a legal mortgage. *Whitbread* v. *Jordan*, 1 Young, 303. *Ex parte Warren*, 19 Ves. 202. *Winter* v. *Lord Anson*, 3 Russ. 493.

(*a*) Where a statute requires reasonable notice, it is not essential that the notice should be in writing. 5 B. & A. 539.

(*b*) Vide *supra*, 364.

a statement of what was due (*c*). The same principle seems also to apply to notices of the dishonour of bills of exchange (*d*), notices to quit (*e*), and all other notices which are part of the *res gestæ*, upon the contents of which the legal rights and situation of the litigant parties materially and essentially depend (*f*).

How proved.

The Judges have resolved that a written copy of a letter, giving notice of the dishonour of a bill of exchange, and made at the same time, was sufficient without proof of notice to produce the original (*g*). This case, however, seems to have been decided on the ground that the action was brought on the very bill to which the notice related; in a later case it was held (*h*), that an examined copy of a letter giving notice of the dishonour of a bill of exchange (not the subject of the action) was not receivable in evidence, without notice to produce the original.

It seems to be sufficient in all cases to prove the service of a duplicate notice (*i*). Notice to produce a document may be served, as has been seen, either on the adverse party or his attorney (*k*), in criminal as well as civil proceedings (*l*). Service at the dwelling-house is sufficient, unless some statute requires personal service (*m*). Some instances of presumptive evidence of service have already been referred to (*n*). Evidence of a notice by parol is usually sufficient (*o*).

Service of an order of removal by justices must either be by the delivery of the order itself, or by leaving a copy of the order and at the same time producing the original (*p*). Where notice is alleged, it is not sufficient to

(*c*) *Grove & another* v. *Ware*, 2 Starkie's C. 174.

(*d*) In *Langdon* v. *Hulls*, 5 Esp. C. 157, and *Shaw* v. *Markham*, Peake's C. 165, notice to produce the letter containing notice of the dishonour of a bill was held to be necessary; in *Ackland* v. *Pearce*, 2 Camp. C. 601, the proof of the notice to produce was held to be unnecessary; so in *Roberts* v. *Bradshaw*, 1 Starkie's C. 28.

(*e*) Vide *supra*, p. 417.

(*f*) And, as it seems, the same principle also applies to notices of action to justices and others required by particular statutes. It is essential that the Courts should see that the requisitions of the particular statute have been complied with, and this is best proved by means of the notice itself or by proof of a duplicate original.

(*g*) *Kine* v. *Beaumont*, 3 B. & B. 288.

(*h*) By Abbott, C. J. in *Lawrence* v. *Palmer*, 1 M. & M. 32.

(*i*) *Jory* v. *Orchard*, 2 B. & P. 41. *Gotlieb* v. *Danvers*, 2 Esp. C. 455. *Anderson* v. *May*, 2 B. & P. 237. *Philipson* v. *Chase*, 2 Camp. 110. *Supra*, Vol. I. tit. WRITTEN EVIDENCE. And (*semble*) there is no difference between a duplicate original and a copy made at the time. *Kine* v. *Beaumont*, 3 B. & B. 288.

(*k*) *Supra*, Vol. I. tit. WRITTEN EVIDENCE. *Attorney General* v. *Le Merchant*, 2 T. R. 201. *Cates* v. *Winter*, 3 T. R. 306; Peake's Ev. 115. Where there is an agent in town, notices in the course of the cause ought to be given to him, and not to the attorney in the country; per Buller, J., *Griffiths* v. *Williams*, 1 T. R. 711; and see *Hayes* v. *Perkins*, 3 East, 568. As in the case of executing a writ of inquiry. Ibid.

Service of a copy on any person resident at or belonging to the place, entered by an attorney in the book of the Clerk of Pleas of Exchequer, is good service; R. G. Excheq. M. and Tr. 1 W. 4. Service of rules, notices and orders, must be made before nine at night; R. G. Hil. 2 W. 4. It is not essential, except in cases of attachment, that the original should be shown, unless demanded. Ib.

(*l*) Ibid.

(*m*) Per Mansfield, C. J., *Waters* v. *Taylor*, Westm. June 24, 1813. *Logan* v. *Houlditch*, 1 Esp. C. 22. Where notice is to be given at the place of abode, it seems that notice given at a place of business where neither of the plaintiffs slept, but a servant only, is not sufficient. *Johnson* v. *Lord*, 1 M. & M. 444. Where notice is required, proof ought to be given in the first instance as the foundation for the other evidence. Ib.

(*n*) See the case of *Champneys* v. *Peck*, *supra*, 110. 228.

(*o*) *Supra*, Vol. I. tit. WRITTEN EVIDENCE. *R.* v. *Justices of Surrey*, 5 B. & A. 439. But the properest course is to serve a written notice; and Gould, J., at Exeter, held a parol notice to produce a deed to be insufficient.

(*p*) *R.* v. *Alnwick Inhab.*, 5 B. & A. 184.

prove circumstances which excuse notice (*q*); but it is sufficient to prove a notice which, under the particular circumstances, was given within a reasonable though not within the usual time (*r*).

Presumptive and constructive notice.

In some instances presumptive evidence of notice is sufficient; as by showing that the notice was contained in a newspaper which the party to be affected with the notice usually read (*s*). It has been held, that a recital in a deed is constructive notice of the contents to a party to the deed (*t*). But notice of the contents of the deed cannot be inferred from the mere fact that the witness attested the execution of the deed by a surety.

The mere fact that *A.* subscribed a paper writing as a witness, is not in itself sufficient to charge him with notice of the contents (*u*).

Where the father and uncle of the lessor of the plaintiff, being seised in tail, each granted a lease for ninety-nine years of one-third of the premises, and the jury found expressly that the lease had been confirmed by the lessor of plaintiff's, it was held that the father's lease, being only voidable by the issue in tail and not void, he could not, after ten years receiving rent from the lessee, be supposed to have acted in ignorance of his right (*x*).

General principle as to notice of legal proceedings.

It is a rule of law, founded on the first principles of natural justice, that no judgment shall be pronounced against one who has not had notice given of the proceedings, and an opportunity to defend himself.

Where trustees under a turnpike Act had power to turn roads through private grounds, and if they could not agree with the proprietors, to summon a jury to inquire of damages, an inquisition under the Act was set aside, because it did not appear on the face of the proceedings that any notice had been given to the owners of the land (*y*).

Upon an appeal against a conviction upon the 5 Geo. 4, c. 83, s. 4, of a party as a rogue and vagabond for indecent exposure in a public place, it was held that a notice of appeal, stating as a ground that he was not guilty of the offence, was sufficient, and signified that all the ingredients of the offence were disputed (*z*).

(*q*) *Supra*, 229.

(*r*) *Field* v. *Thrush*, 8 B. & C. 387.

(*s*) See tit. PARTNERS. Proof of notice being advertised in a county newspaper is not sufficient proof of notice to a party, without some proof that he took in the paper in question. *Norwich and Lowestoff Navigation Company* v. *Theobald*, 1 M. & M. 153. Where notice was to be published in the Northampton and Cambridge newspapers, there being but one at each place, it was held to be sufficient to advertise in those, although others were afterwards established. *Tibbetts* v. *Yorke*, 5 B. & Ad. 605.

(*t*) *Prosser* v. *Watts*, 6 Madd. 59. Title-deeds, as laid before a counsel or attorney, or any thing which could not be supposed to make an impression on the memory, shall not be taken as constructive notice. *Ashley* v. *Bayley*, 2 Ves. 370. As to the effect of a Registry Act as notice, see Lord Redesdale's judgment in *Bushell* v. *Bushell*, 1 Sc. & Letroy, 103.—Lord Hardwicke, in *Hide* v. *Dodd*, 2 Atk. 204, said, that the Register Act (7 Anne, c. 20) is notice to everybody, and the meaning of it was to prevent parol proofs of notice, for it was only in cases of fraud that the Courts have broke in upon the statute, though one incumbrance was registered before another; as in *Ld. Forbes* v. *Nelson*, 4 Bro. P. C. 189. *Blades* v. *Blades*, 1 Eq. Ab. 358, pl. 12; and see *Cheval* v. *Nichols*, 1 Stra. 664. There may be some cases divested of fraud, but then the proof must be extremely clear; clear notice is a proper ground for relief, but a suspicion of notice, though strong, is not sufficient to justify the Court in breaking in upon an Act of Parliament. *Hide* v. *Dodd*, 2 Atk. 204; and see *Le Neve* v. *Le Neve*, 1 Ves. 64; 1 Atk. 254; *Chandos* v. *Brownlow*, 2 Ridg. P. C. 428; *Johnson* v. *Stainbridge*, 3 Ves. 478.

(*u*) *Harding* v. *Curthorne*, 1 Esp. C. 57.

(*x*) *Doe* d. *Southouse* v. *Jenkins*, 5 Bing. 469.

(*y*) *R.* v. *Bagshaw*, 7 T. R. 363. And see *R.* v. *Mayor of Liverpool*, 4 Burr. 2244.

(*z*) *R.* v. *Justices of Newcastle-upon-Tyne*, 1 B. & Ad. 393. A notice of appeal against a distress for an assessment under a Highway Act may be within six days after the levy, although not within six days after the warrant granted. *R.* v. *Justices of Devon*,

As to notice of disputing the steps of bankruptcy, in an action by the assignees of a bankrupt (*a*), notice of an act of bankruptcy (*b*), of the dishonour of a bill of exchange (*c*), notice to prove value given for a bill of exchange (*d*), of non-responsibility by carriers (*e*), of a distress by a landlord (*f*), of notice to quit by a landlord (*g*), of disputing the value, &c. in an action for goods sold and delivered (*h*), of a robbery, &c. in an action against the hundred (*i*), by the husband not to trust the wife (*k*), notice in actions against justices (*l*), constables, &c., in actions against revenue officers, &c. (*m*), or a dissolution of partnership (*n*), of abandonment in an action on a policy of insurance (*o*), in actions for malicious trespasses (*p*), of trial (*q*),—see those titles respectively. General principle as to notice of legal proceedings.

NUISANCE.

Under the present title, the evidence relating to some *torts* or *nuisances* to persons or personal property, and 2dly, to real property, will be considered, which are unconnected with any immediate contract, but which do not amount to trespasses, the damage being purely consequential. In an action for a wrongful act, or nuisance to his person, or personal property, the plaintiff must prove (*r*), 1st, a wrongful act or omission by the defendant; 2dly, the consequential damage to his own person or property. Heads of proof.

First. The rule of common law is that of the civil law, *sic utere tuo ut alienum non lædas*; and an action is maintainable to recover damages for any injury resulting to the person or property of the plaintiff, from the care- Proof of the nuisance.

1 M. & S. 411. The notice need not disclose the ground on which the appellant objects to the distress. Ib. As to notice of an appeal from a commissioner's direction in writing previous to an award, see *R.* v. *Nicholls*, 1 A. & E. 245.

(*a*) *Supra*, 123.
(*b*) *Supra*, 169.
(*c*) *Supra*, 225.
(*d*) *Supra*, 221.
(*e*) *Supra*, 288.
(*f*) *Supra*, 300.
(*g*) *Supra*, 415.
(*h*) Vide *infra*, tit. Vendor and Vendee.
(*i*) *Supra*, 530.
(*k*) *Supra*, 544.
(*l*) *Supra*, 580.

(*m*) *Infra*, Where, in an action against commissioners, &c. the plea was that the injury arose from so negligently making sewers running under, through, &c. the plaintiff's house, and the evidence was that the sewer did not run close to the plaintiff's house, but to five others; and that the house was damaged, and fell, in consequence of the fall of a stack of chimnies in one of those others; it was held to be sufficient. *Jones* v. *Bird*, 5 B. & A. 837. A notice of action to a trustee for having lent his horses for the repair of a road, must state all the ingredients in the offence, and therefore (it has been held) must state that he was an acting trustee at the time. *Towsey* v. *White*, 5 B. & C. 125.

(*n*) *Infra*, tit. Partners.

(*o*) *Infra*, tit. Policy, &c.

(*p*) *Infra*, tit. Trespass.

(*q*) *Infra*, tit. Trial.

(*r*) In an action for nuisance either to personal or real property, as well as in all other actions on the case, the plea of the general issue operates only as a denial of the breach of duty or wrongful act, and not of the inducement; and the latter if not denied need not be proved. See Case, Action on, and the New Rules, *infra*, tit. Rules; and *Dickens* v. *Gosling*, 1 Bing. N. C. 558. *Frankum* v. *Earl of Falmouth*, 4 N. & M. 333. See *Hayne* v. *Sharpe*, 7 C. & P. 755. *Underwood* v. *Burrows*, 7 C. & P. 26. In case for keeping a ferocious animal, the general issue puts the *scienter* in issue. *Hayne* v. *Sharpe*, 7 C. & P. 755. In an action on the case for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. See the New Rules. In an action for negligent driving, the plea of not guilty admits the fact of the carriage having been driven by the defendant's servant. *Emery* v. *Clark*, 2 Mo. & R. 260. So also the fact of a cart being driven by him or in his possession, as stated in the indictment. *Taverner* v. *Little*, 5 Bing. N. C. 678.

lessness and negligence of the defendant, or of his agent, in the use or management of his own property (*s*).

Nuisance. Mischievous animal.

The evidence in an action for the negligent keeping (*t*) of an animal, which has, in consequence, occasioned damage to the plaintiff, must of course be governed by the pleadings. If the declaration allege that the defendant *knew* that his dog, or other animal, was accustomed to bite *sheep*, or to bite *mankind*, the allegation must be proved, although the action might have been sustained without that averment (*u*). If it be alleged that the defendant knew that the dog was accustomed to bite sheep, it is not enough to show that it had attempted to bite a man (*x*). Where the declaration alleged that the dog was accustomed to bite mankind, proof that the defendant had warned the witness to beware of the dog, lest he should

(*s*) As if he exercise unruly horses in an improper place (*Michael* v. *Alestree*, 2 Lev. 172), or entrust a dangerous instrument, such as a loaded gun, to an indiscreet agent. *Dixon* v. *Bell*, 1 Starkie's C. 287. Or where his barge having been sunk by accident in a navigable river, he neglects to give proper notice of the fact, as by placing a buoy over the spot. *Harmond* v. *Pearson*, 1 Camp. 517. Or the occupier of a house neglects to fence-in a dangerous area, although it has immemorially remained open. *Coupland* v. *Hardingham*, 3 Camp. 396. In an action for leaving open the area of defendant's house, it appeared that there had been a thoroughfare through an unfinished street for five years; held that the jury were warranted in presuming that it was used with the full assent of the owners of the soil, and a dedication presumed to justify the allegation that it was a common public highway. *Jarvis* v. *Dean*, 3 Bing. 447. A corporate body entrusted with a power from the exercise of which mischief may result to the public, is bound to use the greatest caution. *Weld* v. *Gas Light Company*, 1 Starkie's C. 189. So if a person place dangerous traps in his own ground, baited with flesh, so near to the highway, or to the grounds of another, that dogs passing along the highway, or kept in his neighbour's grounds, are likely to be attracted, and the plaintiff's dogs are in consequence injured. *Townsend* v. *Wallace*, 9 East, 277. See *Holt* v. *Wilkes*, 3 B. & A. 304. In an action against the defendant, for negligence in forming a hayrick, in consequence of which it took fire, Patteson, J. directed the jury to consider whether the defendant had acted as a man of ordinary skill and prudence would have acted, or whether, through his negligence and carelessness, the plaintiff's property had been consumed. *Vaughan* v. *Menlove*, 7 C. & P. 527; 3 Bing. N. C. 468. The defendant, a publican, in letting down, after dark, casks into his cellar, left open the flap, and the plaintiff fell in; held, that it being for the private advantage of the defendant, he was bound to take proper care to prevent injury, and that it was for the jury to say whether the defendant had sufficiently protected the public against danger at that hour, and whether the plaintiff had himself used due caution. *Proctor* v. *Harris*, 4 C. & P. 337. Where the flap of a cellar-door opening into the street, being used in letting down goods, fell against the plaintiff's leg and broke it, held that the defendants were bound to have the door secured with such precautions as, under all ordinary circumstances, would prevent its falling down; and that if, whilst so secured, it fell from the improper act of a third person, over whom they had no control, the defendants were not liable, but the party injured must resort to the wrongdoer. *Daniels* v. *Potter*, 4 C. & P. 262. Where trustees, under an order for stopping up a turnpike-road in order to furnish the plaintiff, an owner of land, with a new access to his field, obtained from the defendant, an adjoining owner, a licence to remove part of his hedge, which he was liable to keep in order, and they prostrated it, but omitted to put up a gate, or any fence, from the new road; held, that being wrongdoers, and acting under the licence of the defendant, he was responsible. *Winter* v. *Charter*, 3 Y. & J. 308.

(*t*) The harbouring a dog about a man's premises, or allowing him to be or resort there, is a sufficient keeping. *M'Cane* v. *Wood*, 5 C. & P. 2, *cor.* Ld. Tenterden.

(*u*) *Hartley* v. *Hallinwell*, 2 Starkie's C. 214; 1 B. & A. 620. And see *Judge* v. *Cox*, 1 Starkie's C. 285. It seems that the owner of a fierce and unruly dog is bound to secure him without notice. Ibid. and *Jones* v. *Perry*, 2 Esp. C. 482. And common report that a dog is mad renders it incumbent on the owner to confine him. Ibid. See this case differently reported, Peake's Ev. 292, 5th ed. The owner of a wild ferocious animal, such as a lion or bear, which escapes and occasions damage, is liable, without any proof of notice of the animal's ferocity. B. N. P. 76. *R.* v. *Huggins*, 2 Ld. Ray. 1583.

(*x*) Ibid. But where a dog accustomed to worry sheep was left at large, and bit a horse, the owner was held to be liable. *Jenkins* v. *Turner*, 1 Ld. Raym. 110.

Nuisance. Mischievous animal.

be bitten, was held to be *primâ facie* evidence of the allegation to be left to the jury (*y*); although mere proof that the dog was fierce, and usually tied up, and that the defendant afterwards promised to make some compensation, has been held to be insufficient (*z*). It must also be proved that the owner knew the propensity of the animal (*a*).

Scienter.

The plea of not guilty puts the *scienter* in issue (*b*).

It is no answer to the action, where the defendant knew the vicious propensity of the animal, to prove that the party injured was himself guilty of some imprudence or negligence in the transaction; as that the plaintiff trod upon the defendant's dog whilst it was lying at his door, the defendant being aware that the dog was accustomed to bite (*c*). And where the owner, knowing that his dog had been bitten by another dog which was mad, instead of destroying the animal, as it was his duty to have done as soon as he knew him to be in danger of so dreadful a malady, fastened him up, and the child of the plaintiff coming near the dog, irritated him with a stick, upon which the dog flew at him and bit him, and the child in consequence died of hydrophobia, it was held that the plaintiff might recover from the owner of the dog the expenses of the apothecary (*d*).

A man has a right to keep a fierce dog for the protection of his property, but not to place it in the approaches to his house, so as to injure persons exercising a lawful purpose in going along those paths to his house (*e*). But if the injury arise from the plaintiff's incautiously going into the defendant's yard after it has been shut up, and being bitten by a dog accustomed to bite, let loose for the night to protect the yard, no action will lie (*f*).

Some doubt has existed on the question whether the owner of land, who places traps or spring-guns on his premises, is liable in respect of mischief which consequentially ensues to men or dogs trespassing on the property. It has been held, that at all events he is not liable if the party injured had notice of the fact (*g*).

(*y*) *Judge* v. *Cox*, Starkie's C. 285.

(*z*) *Beck* v. *Dyson*, 4 Camp. 198.

(*a*) Ibid. and 12 Mod. 555. An offer on the part of the defendant to settle the matter, if it could be proved that his dog had bit the plaintiff's cattle, was held to be some evidence of the *scienter*, but of little weight. *Thomas* v. *Morgan*, 2 C. M. & R. 496. Proof that the dogs were of a savage disposition, and had bit other people's cattle, was held to be no evidence of the defendant's knowledge of their being accustomed to bite cattle. Ib.

(*b*) *Thomas* v. *Morgan*, 2 C. M. & R 496.

(*c*) *Smith* v. *Pelate*, 2 Str. 1264.

(*d*) *Jones* v. *Perry*, 2 Esp. C. 482. See the cases on this subject, *Mason* v. *Keeling*, 12 Mod. 332; 1 Ld. Raym. 606. *Bayntine* v. *Sharp*, 1 Lutw. 90. *Buxendine* v. *Sharp*, 2 Salk. 662.

(*e*) Per Tindal, C. J., *Sarch* v. *Blackburn*, M. & M. 505. And see *Blackman* v. *Simmons*, 3 C. & P. 138; *Bird* v. *Holbrook*, 4 Bing. 628.

(*f*) *Brock* v. *Copeland*, 1 Esp. C. 203,

(*g*) See the case of *Dean* v. *Clayton*, 1 Moore, 203; 2 Marsh, 577; 7 Taunt. 489. The defendant had placed sharp spears in his premises in such a manner that a hare would run under them, but a dog pursuing a hare would be wounded, and there were several public footpaths through the defendant's woodland not fenced off, and on the outside of the woodland notices were painted that dog-spikes were set therein; a hare was started by the plaintiff's dog in the land of *J. T.*, which adjoined the defendant's woodland, in which land of *J. T.* the plaintiff had liberty to sport; the dog started the hare in the land of *J. T.*, pursued it, the plaintiff using every means in his power to prevent such pursuit, into the woodland of the defendant, and ran against a spike and was killed. The Judges of the Court of Common Pleas were equally divided on the question, whether an action was maintainable. In the later case of *Ilott* v. *Wilkes*, 3 B. & A. 304, for setting spring-guns on the defendant's lands, and negligently leaving them there, whereby the plaintiff (a trespasser) was injured, it was held to be a good defence to show that the plaintiff had *notice* that the guns were set there. In the case of *Bird* v. *Holbrook*, 4 Bing. 628, it was held that a party was liable in respect of mischief occasioned by the setting of spring-guns without notice

Proof of negligence.

In an action against the owner or driver of a stage-coach for negligence, some degree of blame must of course be proved, either in respect of the furniture and equipage of the coach itself (*h*); the skill of the driver or his knowledge of the road, or his exercise of a competent judgment and discretion under the particular circumstances (*i*). It is not sufficient merely to show that if he had kept the left side of the road the accident would not have happened; for where there is no other carriage on the road, a coachman may drive on any part of it (*k*). Nor is he bound to keep to the left side of the road, provided he leave sufficient room for other carriages which meet him on their proper side (*l*). But where he may adopt either of two courses, one of which is safe, the other hazardous, he adopts the latter at his peril (*m*), even although he drive on his own side of the road (*n*). And one who deviates from the proper side of the road imposes, as it seems, upon himself the necessity of using a greater degree of caution than might otherwise have been requisite (*o*).

When occasioned wilfully.

If in an action on the case for negligent driving or steering, it turn out that the injury was occasioned *wilfully*, the action, it has been said, cannot

in the daytime in a walled garden. See the stat. 7 & 8 G. 4, c. 18.

(*h*) The coachman must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also with lights by night. Per Best, C. J., in *Crofts* v. *Waterhouse*, 3 Bing. 321. The owner is liable, although the defect be not visible. *Sharpe* v. *Gray*, 9 Bing. 457.

(*i*) He is blameable if he has not exercised the soundest judgment; if he could have exercised a better judgment, the owner is liable. Per Lord Ellenborough, *Jackson* v. *Tollett*, 2 Starkie's C. 39. And see *Dudley* v. *Smith*, 1 Camp. 167; *supra*, 208.

(*k*) *Aston* v. *Heaven*, 2 Esp. C. 533. But where the defendant was driving on the wrong side of the road (which was of considerable breadth), and the plaintiff's servant, being on horseback, without any reason crossed over to the side on which the defendant was driving, and on endeavouring to pass the horse was killed; although Lord Kenyon held that he had voluntarily put himself in the way of danger, and that the injury was of his own seeking, the Court of K. B. refused to disturb a verdict found for the plaintiff. *Cruden* v. *Fentham*, 2 Esp. C. 685. In an action for running down the plaintiff's vessel, which was at the time sailing by or against the wind, the defendant's vessel sailing before the wind, and with studding-sails set, at night; the Court, doubting the propriety of such conduct, granted a new trial, after a verdict for the defendant. *Jameson* v. *Drinkald*, 12 Moore, 148. In an action for running down the plaintiff's barge, held that he could only recover upon proof that the accident arose from the want of care and caution on the part of the defendant's servants, and not if it happened from any state of tide or other circumstances which persons of competent skill could not guard against; or if the plaintiff's barge were placed so as that persons using ordinary care would be liable to run against it; or if it might have been avoided but for the negligence of the plaintiff's own servants, in not being on board whilst the vessel was in a situation liable to danger. *Lack* v. *Seward*, 4 C. & P. 107. To enable a party to maintain an action for an injury to his ship by the unskilful navigating of the defendant's ship, the injury must be attributable entirely to the fault of the crew of the latter; if there has been want of care on both sides, the action cannot be maintained. *Vanderplank* v. *Miller*, 1 M. & M. 169. The rule as to ships meeting at sea was found by the jury to be, that the ship which is going to windward is to keep to windward, and the ship which has the wind free is to bear away; in such cases the question is not as to which of the ships first struck, but whose negligence it was by which the injury was caused. *Handasyde* v. *Wilson*, 3 C. & P. 528. A steam vessel being more under command, and having seen the other vessel, is bound to give way. *Shannon*, 1 Hag. 174.

(*l*) *Wordsworth* v. *Willan*, 5 Esp. C. 273. See also *Wade* v. *Lady Carr*, 2 D. & R. 255. The Court there said, that whatever might be the law of the road, it was not to be considered inflexible and imperative; and that, in the crowded streets of the metropolis, situations and circumstances might frequently occur where a deviation from what was termed the law of the road, would not only be justifiable, but absolutely necessary.

(*m*) *Jackson* v. *Tollett*, 2 Starkie's C. 37.

(*n*) *Mayhew* v. *Boyce*, 1 Starkie's C. 423.

(*o*) *Pluckwell* v. *Wilson*, 3 C. & P. 528.

be maintained; trespass is the proper remedy (*p*). But if it be occasioned by the *negligence* of the driver of the carriage, or pilot of the vessel of the defendant, although he himself be present, the proper remedy is by action on the case (*q*). Proof of negligence.

Whenever the injury is forcible and immediate, but not wilful, case will lie for the negligence (*r*). And it seems that whenever consequential damage is occasioned even by wilful violence, the trespass may be waived, and the plaintiff may recover in an action on the case, in respect of the consequential damage (*s*).

Where the action is brought against the defendant for the negligence of his agent, it is necessary to prove, not merely that the servant, or other person whose negligence occasioned the damage, was the servant of the defendant, but also that the mischief was occasioned in the transacting the business of the master; for the latter is not responsible for any substantive *tort* committed by the agent whom he employs, unconnected with the employment and authority delegated to him (*t*). It seems to be sufficient to show that the agent was engaged in driving the carriage, or steering the ship, of his principal, or in the performance of any other duty in which agents are usually employed (*u*). Such evidence, however, is not conclusive; for if a servant were to take a horse out of a stable in defiance of his master's orders, the latter would not be responsible for the mischief which ensued (*x*), any By the defendant's agent.

(*p*) *Day* v. *Edwards*, 5 T. R. 648, on demurrer. *Savignac* v. *Roome*, 6 T. R. 125, in arrest of judgment. *Tripe* v. *Potter*, 6 T. R. 128, n. *Ogle* v. *Barnes*, 8 T. R. 188. *Kingston* v. *Booth*, Skin. 228. *Middleton* v. *Fowler*, 1 Salk. 282. *Bowcher* v. *Nordstrom*, 1 Taunt. 568. *Macmanus* v. *Crickett*, 1 East, 106.

(*q*) *Huggett* v. *Montgomery*, 2 N. R. 466. 2 H. B. 443.

(*r*) *Morton* v. *Hordern*, 4 B. & C. 223.

(*s*) Per Holroyd, J. Ib. And see *Brunscomb* v. *Bridges*, 3 Starkie's C. 171.

(*t*) In *Brady* v. *Giles*, 1 Mo. & R. 494, it was left to the jury, as a question of fact, whether the servants were acting as the agents of the person hiring a carriage, or the owner. The defendant in that case was a carriage-jobber in London; he had furnished Mr. M'Kinley with a barouche and four horses, for a two days' excursion to Windsor; the horses were driven by two of the defendant's postilions. There was no evidence that the hirer or his party interfered as to the manner of driving. Lord Abinger refused to nonsuit the plaintiff. He intimated his opinion, that the Court of K. B. had taken an erroneous course in allowing such a question to be discussed as matter of law; he considered it to be matter of fact, and that it was impossible to lay down any rule of law on the subject. The jury found for the plaintiff. The legal principle which governs such liabilities seems to be this, that in respect of a negligent act done by an agent, his employer is liable; the damage ought to fall rather on the party who has trusted and employed a negligent agent, than on the plaintiff, who is wholly free from blame. In the case of the hirer of a carriage and horses, to be driven by the servant of the lender, the latter, who has selected the agent, is the party really in fault: it is not to be expected that one who hires a carriage for a day should be burthened with the making inquiry as to the character and skill of the lender's servant; there is no negligence in his presuming that one of competent skill will be supplied, and where that is not done, the hirer, if liable to the party injured, would be entitled to recover over against the lender. Where, therefore, no negligence in point of selection is attributable to the hirer, it should seem to be a convenient rule that not he, but the lender only, should be considered liable. A landlord, who does not personally interfere in making a distress, is not liable for the negligence of his broker, in not delivering a copy of his charges, and of the costs, &c. to the person whose goods are levied upon. *Hart* v. *Leach*, 1 M. & W. 560. A master is liable for the negligent driving of his servant, although he was driving improperly, and in a direction different from that ordered by his master. *Heath* v. *Wilson*, 2 Mo. & R. 181. *Secus*, if the servant take out the carriage for purposes of his own, and without authority. Ib.

(*u*) In *Michael* v. *Alestree*, 2 Lev. 172, it was held, that an action was maintainable against the master for damage done by his servant in exercising his horses in an improper place, though he was absent; because it should be *intended* that the master sent the servant to exercise horses there.

(*x*) See the observations of Buller, J., 3 T. R. 762. But where a servant took a horse of another person out of his master's

Negligence by an agent.

more than he would be for any other act of the servant done of his own authority, and without the assent of the master (*y*). And in general, if a servant being ordered to do a lawful act, exceed his authority, and thereby commit an injury, the master is not liable (*z*). An averment that the injury was occasioned by the negligent act of the master, will be supported by evidence that it was occasioned by the negligent act of the servant (*a*), as in an action for the negligent driving of the defendant's cart. So an averment that damage was done by the driver of the waggon of *A.*, against whom alone the action is brought, is satisfied by evidence that such damage was done by a person employed by *B.* to drive the waggon; *A.* and *B.* being partners under an agreement to conduct and manage the waggon each for his own stages (*b*). The name painted on a coach is evidence of ownership (*c*).

Where there is an intermediate agent, or more than one, the maxim of law is *respondeat superior*; the maxim is founded on the principle that he who expects to derive advantage from an act which is done by another for him, must answer for the injury which a third person may sustain from it (*d*); and the action ought to be brought either against the very party who committed the injury, or against the principal (*e*). Thus, where *A.* the owner of a house which he had never occupied, contracted with *B.* to repair it, and *B.* contracted with *C.* to do the work, and *C.* with *D.* to furnish the materials, and the servant of *C.* placed a quantity of lime on the public road adjoining the house, in consequence of which the plaintiff's carriage was overturned, it was held that *A.* the owner was liable for the damage sustained (*f*). So where the owner of a house demised by lease, covenanted

stable, and going on his master's business, rode over the plaintiff, and the defendant having first admitted the horse to be his, refused to tell his name, it was held that this was sufficient evidence to show that the servant was riding the horse with the master's assent; and the Court refused to disturb a verdict for the plaintiff. *Goodman* v. *Kennett*, 1 M. & R. 241.

(*y*) See *Macmanus* v. *Crickett*, 1 East, 106. *Boucher* v. *Noidstrom*, 1 Taunt. 568.

(*z*) *Kingston* v. *Booth*, Skinn. 228. *Middleton* v. *Fowler*, 1 Salk. 282. But if the master order his servant to do an act, in the doing of which a trespass is the necessary, or even the natural consequence, the master is liable even in trespass. *Gregory* v. *Piper*, K. B. after Easter Term 1829. Even although the master limited his authority, by directing the servant not to commit a trespass.

(*a*) *Boucher* v. *Fromont*, 6 T. R. 659. And see *Waland* v. *Elkins*, 1 Starkie's C. 272; *infra*, tit. PARTNERS; and *Fromont*, v. *Coupland*, 2 Bing. 170, and see below, tit. TRESPASS. So where a stable-keeper let horses for a day to draw the carriage of the hirer to Epsom, which were driven by the servant of the stable-keeper, it was held that the latter was liable for accidents occasioned by the postboy's negligence. *Dean* v. *Braithwaite*, 5 Esp. C. 35, cor. Lord Ellenborough; and see *Samuel* v. *Wright*, ib.; *Smith* v. *Lawrence*, 2 M. & Ry. 1. *Goodman* v. *Rennel*, 1 M. & P. 241. The master is liable for damage done through the improper driving of his cart, although his servant was not driving at the time of the accident, but had entrusted the reins to a stranger who was riding with him. *Booth* v. *Winter*, 7 C. & P. 76.

(*b*) *Waland* v. *Elkins*, 1 Starkie's C. 272. Where one of several proprietors of a stage-coach was driving when the accident happened, it was held that all were liable for his negligence, although the plaintiff might perhaps have been entitled to sue the one who drove, in trespass. *Moreton* v. *Hardern*, 4 B. & C. 223.

(*c*) It is required to be done under the st. 50 Geo. 3, c. 48, s. 7. *Barford* v. *Nelson*, 1 B. & Ad. 511.

(*d*) Per Best, C. J., in *Hull* v. *Smith*, 2 Bing. 160.

(*e*) See *Stone* v. *Cartwright*, 6 T. R. 411. Per Ld. Kenyon, *Bush* v. *Steinman*, B. & P. 404. *Hern* v. *Nicholls*, 1 Salk. 289. *Jones* v. *Hart*, 2 Salk. 441; 1 Bl. Comm. 431; Inst. Lib. 4, tit. 5, s. 1; Dig. Lib. 9, tit. 3. *Littledale* v. *Lord Lonsdale*, 2 H. B. 267. 299. In an action against *A.* and *B.* for obstructing lights, it is sufficient to show that the latter, though but a mere agent, superintended the work and gave directions. *Wilson* v. *Peto*, 6 Moore, 47.

(*f*) *Bush* v. *Steinman*, 1 B. & P. 404. *Matthews* v. *West London Waterworks*, 3 Camp. 403. And see *Flower* v. *Adam*, 2 Taunt. 314. And see *Weld* v. *Gas*

to repair it, and employed workmen for that purpose, the landlord, and not the tenant, was held to be liable for a nuisance in the house, occasioned by the negligence of the workmen (*g*). The principle of responsibility is, that the agent is the mere instrument of the defendant, and that it is incumbent upon him to select an agent of competent skill and ability, and to exercise a control and authority over him, in order that others may not be injured (*h*). Hence, where the supposed agent acts under a paramount authority, and not under that of the supposed principal, the latter is not responsible. It was held that the captain of a sloop of war was not answerable for damage done in running down a vessel, the mischief occurring during the watch of the lieutenant, and whilst he had the actual management of the vessel by virtue of his office and duty as lieutenant, and so acted independently of any authority from the captain (*i*). Negligence by an agent.

By the Pilot Act, 52 Geo. 3, c. 39, s. 30, an owner or master of a vessel is not liable for any damage occasioned by the incompetence of a pilot taken on board according to the provisions of the Act (*k*). But the pilot is liable for personal misconduct, although a superior officer be on board (*l*). But where damage is occasioned to another vessel, although a pilot was on board, it is a question of fact for the jury whether, at the time the accident happen, the defendant's vessel was under the direction of a pilot (*m*).

Public commissioners or their clerks, who are entrusted with the conduct of public works, are not liable for the negligence of the workmen employed

Light Company, 1 Starkie's C. 189. *Henley* v. *Mayor of Lynn*, 5 Bing. 91. Where engineers were employed by the defendant to erect a steam-engine on the defendant's premises, which adjoined to the plaintiff's, and the engine exploded through the mismanagement of the defendant's servant, the engineer being present, the action was held to be maintainable. *Wilts* v. *Hague*, 2 D. & R. 33. See *Bowcher* v. *Noidstrom*, 1 Taunt. 568; *infra*, note (*k*). Where defendant hired a pair of horses to his own carriage for the day, which were driven by the servant of the party letting them out, and an injury happened through his negligent driving; held, per Abbott, L. C. J., and Littledale, J., that the hirer was not liable in an action on the case for the injury sustained; *contra* Bailey and Holroyd, Js. *Laugher* v. *Poynter*, 8 D. & R. 556; 6 B. & C. 126. *Semble*, that the owner of a barge is not responsible for an injury occasioned by the negligence of a person to whom he has lent her. *Scott* v. *Scott & others*, 2 Starkie's C. 438, cor. Best, J., 1818.

(*g*) *Leslie* v. *Pounds*, 4 Taunt. 649. So where the defendant employed a bricklayer to make a sewer, and the latter leaving it open, the plaintiff broke his leg. *Sly* v. *Edgley*, 6 Esp. C. 6; and see *Coupland* v. *Hardingham*, 3 Camp. 398; *supra*, 733; 5 B. & C. 559.

(*h*) 1 Bl. Comm. 431. Where a man entrusted a loaded gun to a young mulatto girl, and mischief resulted from the accidental discharge of the instrument in her hands, he was held to be responsible. *Dixon* v. *Bell*, 1 Starkie's C. 287.

(*i*) *Nicholson* v. *Mouncey*, 15 East, 384.

(*k*) *Bennett* v. *Martin*, 7 Taunt. 258; 1 Moore, 4; Holt's C. 359. And see *Fletcher* v. *Braddick*, 2 N. R. 182. Before the stat. a master was not discharged of his responsibility for the acts of his crew, although they acted under the direction of the pilot, who by the regulations of a statute had the temporary management of the ship. *Bowcher* v. *Noidstrom*, 1 Taunt. 568. The statutable exemption extends to damage done by the piloted ship to others. *Ritchie* v. *Bowsfield*, 7 Taunt. 309. And see *Carruthers* v. *Sydebotham*, 4 M. & S. 77. But not to vessels having on board pilots appointed for other places than those expressly named in the preamble or purview of the Act. *Attorney-general* v. *Case*, 3 Price, 302.

(*l*) *Stort* v. *Clements*, Peake's C. 107. *Huggett* v. *Montgomery*, 2 N. R. 466. And see *Lowe* v. *Cotton*, 12 Mod. 472. 477; 5 Mod. 455; Carth. 487; Salk. 17; Lord Raym. 650; where three of the Judges, contrary to the opinion of Holt, C. J., held that the postmasters were not liable for the loss of exchequer bills lost by the default of clerks in office. As to the personal responsibility of officers, see *Macbeath* v. *Haldimand*, 1 T. R. 172. *Unwin* v. *Wolsely*, 1b. 674.

(*m*) *Cutts* v. *Herbert*, 3 Starkie's C. 12. And see 1b. as to proof of a pilot's appointment; and qu. whether the renewal of an appointment by sub-commissioners, when an appointment under the seal of the Trinity House has been proved, be sufficient.

by those with whom they have contracted for the execution of such works. In such cases, the action for negligence occasioning an injury ought to be brought against the contractor and his servants (*n*).

Against an occupier, &c.

In an action against the defendant for not repairing his fences, it is necessary, in addition to evidence of the obligation to repair, and of the damage which has resulted from the neglect, to prove that the defendant is the *occupier* of the estate liable to the repair (*o*). But where the owner of a house is bound to repair it, he, and not the occupier, is liable for the damage occasioned by the neglect to repair (*p*).

Proof of damage.

Thirdly. It must be shown that *damage* resulted to the plaintiff (*q*), as alleged in the declaration, from the act or omission of the defendant (*r*).

Where a public nuisance has been committed by the defendant, as by obstructing the King's highway, the plaintiff cannot support a private action without proving, as alleged in the declaration, that he has sustained some special and particular damage beyond that which is suffered by other subjects (*s*); as by a hurt to himself or his horse, from falling into a trench cut in a public highway (*t*).

Where the defendant had re-moored his barge across a public navigable creek, by means of which the plaintiff, who was navigating along the creek, was forced to unload his barge, and carry his goods inland at a considerable expense, it was held to be a special damage, sufficient to support the action (*u*). So where the plaintiff was obliged, in consequence of an obstruction of a public road, to carry his tithes by a longer and more inconvenient way (*v*). In such an action the proximate cause of the mischief

(*n*) *Hall* v. *Smith*, 2 Bing. 156, where the action was brought against commissioners under a lighting and paving Act, for digging a ditch in a street, and leaving the same without light or guard, &c., *per quod* the plaintiff fell in and was injured, &c. And see *Harris* v. *Baker*, 4 M. & S. 27. In *Sutton* v. *Clarke*, 1 Marsh. 429, it was held that the defendant, a trustee under a turnpike Act, was not liable for an injury occasioned by the making of a drain, although he had directed it to be made in an improper manner, but had given the order after having taken the best advice he could obtain. One acting for the public (gratuitously) is not liable for the negligence of the artificer. *Hall* v. *Smith*, 2 Bing. 156.

(*o*) *Cheatham* v. *Harrison*, 4 T. R. 318.

(*p*) *Payne* v. *Rogers*, 2 H. B. 349. But such an action does not lie against the inhabitants of a county for not repairing a public bridge. *Russel* v. *Devon*, *Inhab.* 2 T. R. 667.

(*q*) It is not essential that the plaintiff should be the owner of the property: it is sufficient if he have the use of it for the time. Thus a gratuitous bailee of a horse may maintain an action for negligence in not repairing a fence, which the defendant is bound to repair, by means of which the horse is injured. *Booth* v. *Wilson*, 1 B. & A. 59. A., the supposed owner of a shop and goods, allows *P.* to reside there, and act as owner in the sale of the goods; *P.* may maintain an action for an injury to the goods by negligent driving whilst under the care of his servant. *Whittingham* v. *Bloxham*, 4 C. & P. 597. The plaintiff was allowed to call *A.* in reply, to negative ownership in *A.* Ib.

(*r*) *Supra*, tit. CASE and tit. LIBEL. Where the plaintiff's horse escaped through a defect of the defendant's fences into his close, and was there killed by the falling of a haystack, it was held that the damage was not too remote to prevent the action being sustainable. *Powell* v. *Salisbury*, 2 Y. & J. 390. And see *Anon.* 1 Vent. 264. *Holbatch* v. *Warner*, Cro. Jac. 665. Where by the improper act of the defendant, in throwing packs of wool out of a loft instead of using a crane, the plaintiff was deprived of his presence of mind and ran into the danger; held, that it was for the jury to say whether the injury was not occasioned by the wrongful act of the defendant. *Woolley* v. *Scovell*, 1 Mo. & R. 105.

(*s*) 1 Inst. 56. *Hubert* v. *Grove*, 1 Esp. C. 48. *Iveson* v. *Moore*, 1 Lord Raym. 486; 12 Mod. 262; Willes, 74, n. It is said that the mere obstruction of the plaintiff's business, by merely delaying him on the road for a short time, will not support an action, the injury being but consequential. P. C. *Paine* v. *Patrick*, Carth. 91.

(*t*) Carth. 191.

(*u*) *Rose* v. *Miles*, 4 M. & S. 101.

(*v*) *Hart* v. *Bassett*, T. Jones, 156. The Court said that the plaintiff had sus-

should be stated in the declaration; and if the remote cause alone be alleged, it will not be competent to the plaintiff to give the intermediate causes in evidence (*w*). Proof of damage.

A defendant liable in respect of damages to the plaintiff's vessel by collision, is not entitled to deduct a sum paid by an insurer in respect of the same damage (*x*).

In an action for an injury occasioned by the negligence of another, the defendant may show that the damage was occasioned by mere accident, no blame being imputable to the defendant or his agent (*y*). It is a good defence (*z*) to show that the injury so far arose from the negligence of the plaintiff himself, that he might, by ordinary care and caution, have avoided the injury. Thus, one who is injured by riding against an obstruction in a public highway, cannot recover damages if it appear that he was riding violently, and without ordinary care; and that with due care he might have seen and avoided the obstruction (*a*). And although the defendant's negligence be the primary cause of consequential injury to the plaintiff, yet if the proximate and immediate cause be the unskilfulness of the plaintiff, it seems that the latter will not be entitled to recover (*b*). As where *A.* placed rubbish in the highway, and the dust blown from it frightened the horse of *B.*, which carried him nearly in contact with a waggon, to avoid which *B.* unskilfully rode over other rubbish, and was overthrown and hurt (*c*). But where, in consequence of unskilful driving, a stage-coach was likely to be overturned, and an outside passenger, with a view to his own safety, jumped off, and his leg was broken, it was left to the jury to say whether he did this rashly and without sufficient cause, or from a reasonable apprehension of danger (*d*). Evidence in defence.

In an action for a nuisance to the plaintiff's real property (*e*), he must, in

tained a particular damage; for the labour and pains which he had been forced to take with his cattle and servants, by reason of this obstruction, might be of more value than the loss of a horse, which was sufficient to support an action. See also *Chichester* v. *Lethbridge*, Willes, 73.

(*w*) *Fitzsimmons* v. *Inglis*, 5 Taunt. 534.

(*x*) *Yates* v. *Whyte*, 4 Bing. N. C. 272.

(*y*) See *Crofts* v. *Waterhouse*, 3 Bing. 321. *Lack* v. *Seward*, 4 C. & P. 106. *Supra*; and where the plaintiff's case rests on a mere presumption of negligence from the defendant's coach breaking down, the latter may show that it had recently been examined, when no defect was discovered, and that the coachman was a skilful driver, and was driving at a moderate pace. *Christie* v. *Griggs*, 2 Camp. 81

(*z*) As to the proper plea for admitting evidence of any particular defence, see above, tit. CASE, and the rules of H. T. 3 & 4 W. 4, below, tit. RULES. As to the competency of witnesses for the defendant, see Vol. I, p. 125.

(*a*) *Butterfield* v. *Forrester*, 11 East, 60. *Chaplin* v. *Howes*, 3 C. & P. 554. Although the defendant be guilty of negligence, yet if the plaintiff might by ordinary care have avoided the consequences, and did not, he is to be regarded as the author of his own wrong; per Parke, B., in *Bridge* v. *The Grand Junction Railway Co.*, 3 M. & W. 244. *Williams* v. *Holland*, 10 Bing. 112; 6 C. & P. 23. So in the case of running down a ship. A plaintiff, however, may recover although he might have prevented the collision, provided he was in no degree in fault in not endeavouring to prevent it. *Vennall* v. *Ganner*, 1 C. & M. 21.

(*b*) 2 Taunt. 314.

(*c*) *Flower* v. *Adam*, 2 Taunt. 314.

(*d*) *Jones* v. *Boyce*, 1 Starkie's C. 493, cor. Ld. Ellenborough, C. J.; the jury found for the plaintiff, damages 400 *l.* And see *Cruden* v. *Fentham*, 2 Esp. C. 685. *Williams* v. *Holland*, 6 C. & P. 24; 10 Bing 112. *Woolf* v. *Beard*, 8 C. & P. 373. And see above.

(*e*) In general, case lies for an injury to the house or land of another; as for building a house which overhangs the land of another, and causes the rain to fall upon it and injure it. (See *Penruddock's Case*, 5 Rep. 100. *Bowry* v. *Pope*, 1 Leon. 168; Cro. Eliz. 118.) *Batin's Case*, 9 Rep. 53, b. So for any injury to lands or houses which renders them useless, or even uncomfortable for the purposes of habitation, an action lies; as for the erection and use of a smith's forge (*Bradley* v. *Gill*,

Proof of possession, &c.

case the matter be put in issue by proper pleas, prove, 1st, his possession (*f*) of the house or land, or his reversionary interest (*g*); or if an incorporeal right be affected, his title to it (*h*). 2dly. The act of nuisance done by the defendant. 3dly. The damage resulting to the plaintiff's right.

Variance.

All actions for nuisances affecting real property, whether corporeal or incorporeal, are local in their nature, and must be proved to have been committed within the county in which the action is brought (*i*). But in general, unless the declaration contain a precise local description of the

Lutw. 69); a privy (*Styan* v. *Hutchinson*, cor. Ld. Kenyon, Sitt. after Mich. 40 Geo. 3, cited 2 Selw. N. P. 1047); a pig-stye (*Aldred's Case*, 9 Rep. 59); a lime-kiln (Ibid. per Wray, C. J.); a tobacco-mill (*Jones* v. *Powell*, Hutt. 136). So for the corruption of water by drugs, by means of which water running through the plaintiff's premises is rendered less serviceable for the use of his cattle. In a house four things are desired: *Habitatio hominis, delectatio inhabitantis, necessitas luminis, salubritas aeris.* *Aldred's Case*, 9 Co. 57. Where the defendant erected a stove with a chimney, for the purpose of having a fire in a saddle-room adjoining his stables, which were situated behind the defendant's house in Spring-Gardens, and the smoke occasioned inconvenience to the plaintiff, whose house was also situated in Spring-Gardens, at the distance of 40 or 50 yards from the chimney, by injuring the furniture in the drawing-room, &c., it was held to be a nuisance. *Lord Colchester* v. *Ellis*, cor. Abbott, C. J. It is otherwise where the defendant's act is attended simply with *inconvenience* to the plaintiff; as where he merely cuts off a prospect from the house by building a wall, but does not exclude the light (*Knowles* v. *Richardson*, 2 Mod. 55; 9 Rep. 586); or by opening a new window disturbs the privacy of the plaintiff (per Eyre, C. J. cited by Le Blanc, J. 3 Camp 82). The only remedy in such a case is to obstruct the window by a wall built on the plaintiff's premises. In *Street* v. *Tugwell* (41 Geo. 3, cited 2 Selw. N. P. 1047), an action was brought for keeping a number of pointers so near the plaintiff's house that his family were disturbed in the enjoyment of it, and prevented from sleeping during the night; and the jury found for the defendant, although he adduced no evidence. A new trial is said to have been refused; and yet it seems to be difficult to distinguish between a nuisance occasioned by the establishing a dog-kennel near a man's house, and the use of a forge or mill. An action will also lie against the proprietor of tithes for not removing them from the soil within a reasonable time (8 T. R. 72), provided the tithe has been duly set out, the wheat in the sheaf (*Shallcross* v. *Jowle*, 13 East, 261), and hay in the cock, after being tedded. *Mayes* v. *Willett*, 3 Esp. C. 31. *Newman* v. *Morgan*, 10 East, 5. *Blaney* v. *Whitaker*, 23 Geo. 3, cited Ibid. *Halliwell* v. *Trappes*, 2 Taunt. 55. A plaintiff having demised a cottage without excepting mines, may maintain an action on the case against one who injures the cottage by excavating coal, although it be doubtful whether the injury was occasioned by getting the coal under the cottage or under adjoining land. *Ruine* v. *Alderson*, 4 Bing. N. C. 702. An action lies for erecting a hay-rick near the plaintiff's house, at the extremity of the defendant's land, with such gross negligence that, by its spontaneous ignition, the plaintiff's house is burnt. *Vaughan* v. *Menlove*, 3 Bing. N. C. 468. So where a lessee overcharges his floor with weight, whereby it falls into the plaintiff's cellar below. *Edwards* v. *Hallinder*, 2 Leon. 93. Or the defendant builds a house overhanging that of the plaintiff, whereby the rain falls upon the plaintiff's house. *Batin's Case*, 9 Rep. 53, b. An action is not maintainable in respect of the reasonable use of a person's rights, although it be to the annoyance of another; as if a butcher or brewer exercise his trade in a convenient place. Com. Dig. *Action on the Case for Nuisance*, C. See *R.* v. *Cross*, 2 C. & P. 483. *R.* v. *Watts*, M. & M. 281. So an action does lie in respect of that which becomes a nuisance only by reason of some modern alteration made by the plaintiff himself; as where he opens a new window, in consequence of which only the nuisance exists. *Laurence* v. *Obee*, 3 Camp. 514.

(*f*) If a prescriptive right be alleged, such right must be proved. (See tit. PRESCRIPTION.) But although it was formerly held to be necessary to allege a right by prescription (*Bowry* v. *Pope*, 1 Leon. 168; Cro. Eliz. 118), it is now settled that a general averment of a right, as incident to the plaintiff's possession of house or land, is sufficient. *Supra*, tit. DISTURBANCE; and see the cases cited *infra*, note (*o*.)

(*g*) *Vide* tit. REVERSION.

(*h*) *Supra*, tit. DISTURBANCE.

(*i*) *Mersey and Irwell Navigation* v. *Douglas*, 2 East, 497. Where no local description is alleged in an action for a nuisance, the property will be presumed to be situated in the county specified in the margin (*Warren* v. *Webb*, 1 Taunt. 379). An averment, that the defendant suffered a water-spout to be out of repair at *A.*, in the county of *B.*, was held to be an averment that it was situated there (Ibid.) The general rule is, that the *venue* in the margin may aid, but cannot hurt.

nuisance, the local situation will be ascribed to *venue*, and will not require precise proof (*k*). Where a declaration for damaging the plaintiff's wharf alleged that it was situate near the river Thames, to wit, at Kingston, in the parish of St. Saviour, Southwark, in the county of Surrey, and it appeared in evidence that there was no such place as Kingston in that parish, it was held that the description might be referred to *venue* (*l*). Variance.

The evidence to prove the right, as claimed, is either direct or presumptive: direct, as where there is an express grant of a right of way. So the title may arise by implication of law. Where, for instance, a man conveys land to another which is inaccessible except through his own lands, he grants, by implication of law, such a way for the enjoyment of the land (*m*). So if a man, who has built a private house on his land, sells the house, neither he nor any one who derives title to the adjacent land from him can obstruct the lights (*n*). Proof of an incorporeal right.

In an action for a nuisance to an *incorporeal* right, as for obstructing the plaintiff's lights, evidence of an uninterrupted use and enjoyment of the lights for the space of twenty years will raise a *primâ facie* presumption of a legal title so to enjoy them (*o*). Presumptive evidence.

(*k*) *Hamer* v. *Raymond*, 5 Taunt. 789; 1 Marsh. 363; *supra*. tit. CASE; and see tit VARIANCE.—VENUE.

(*l*) *Hamer* v. *Raymond*, 5 Taunt. 789. And see tit. PENAL ACTION.

(*m*) Com. Dig. tit. *Chimin.* D. 3; 2 Cro. 170; Mod. Ca. 4. *Chichester* v. *Lethbridge*, Willes, 71. *Howton* v. *Frearson*, 8 T. R. 50. A lodger in a house has a right to the use of the knocker, door-bell, staircase and water-closet, in the use of which if the landlord obstruct him, case lies. *Underwood* v. *Thomas*, 7 C. & P. 26. It was held to be no answer under the general issue, that the water-closet had become useless before the defendant removed it. But evidence was admitted in mitigation of damages, that the plaintiff and his family were bad lodgers, and that the defendant did the acts complained of in order to get rid of them. *Ib.*

(*n*) *Palmer* v. *Fletcher*, 1 Lev. 122. One who builds a new house on his own land cannot recover against the owner of adjacent land for digging in his own land, *per quod* the wall of his house is weakened and falls. *Wyatt* v. *Harrison*, 3 B. & Ad. 871; and see *Wilde* v. *Minsterley*, Com. Dig. Action on Case for Nuisance (C.); 2 Roll. Ab. Trespass (I.) 1. *Palmer* v. *Fletcher*, 1 Sid. 167. A. being the owner of two adjoining houses, grants a lease of one to *B.* and then leases the other to *C.*, there then being in that house certain windows. *B.* accepts a new lease from *A.*; *B.* cannot alter his tenement so as to obstruct *C.*'s lights, although they have not existed for 20 years. *Couts* v. *Gorham*, M. & M. 396; and see *Riviere* v. *Bower*, R. & M. 24. *Swansborough* v. *Coventry*, 9 Bing. 309. *Compton* v. *Richards*, 1 Price, 27.

Where a body corporate is bound to discharge an obligation for the benefit of the public, an indictment lies for the general injury to the public, and an action on the case for any special or particular injury to an individual. *Mayor, &c. of Lyme Regis* v. *Henley* (in error), 3 B. & Ad. 77. Although the obligation be not an immemorial one. *Ib.*

Where a corporation held under a grant from the Crown of a borough, quay, and all tolls, immunities, &c., with a direction to repair sea-walls, it was held that a party suffering loss by the walls being suffered to fall into decay, may maintain an action against the corporation for damages. *Henley* v. *Mayor, &c. of Lyme Regis*, 5 Bing. 91.

(*o*) *Cotterell* v. *Griffiths*, 4 Esp. C. 69. *Darwen* v. *Upton*, cited 2 Will. Saund. 175, a. *Lewis* v. *Price*, cited Ib. *Dougal* v. *Wilson*, cited Ib. *Hubert* v. *Groves*, 1 Esp. C. 148. *Daniel* v. *North*, 11 East, 372. *Lawrenee* v. *Obee*, 3 Camp. 514. *Lord Guernsey* v. *Rodbridges*, Gil. Eq. R. 3; Com. Dig. Temps. G; *infra*, tit. PRESCRIPTION. — TIME. *Supra*, tit. DISTURBANCE. So a right of way will be presumed from an enjoyment of twenty years. *Campbell* v. *Wilson*, 3 East, 294. *Keymer* v. *Summers*, B. N. P. 74; 3 T. R. 197. So, although every person is entitled to the benefit of the water that flows over his land, without diminution or alteration, yet an adverse right may exist, founded on the occupation of another; and although the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it has existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream, subject to such adverse right. Twenty years exclusive enjoyment of the water, in any particular

Incorporeal right. Presumptive evidence.

Where there is a grant of a franchise, the exercise of the right is evidence of the value and extent of the right. The owner of an ancient market may, by evidence of the constant exercise of the right, show that he is entitled to it, to the exclusion of any sale of marketable commodities by an inhabitant in his private house or shop (*p*). The lord of the market may determine in what particular place within the district it shall be held (*q*).

Market.

It is no variance that the market is alleged to be held on specified days of the week, without the exception of days on which the holding is prohibited by a general statute (*r*).

If the lord of a market permits part of the space in which the market is held to be occupied otherwise than for the sale of marketable commodities, to the partial exclusion of the vendors of marketable commodities, he cannot maintain an action for selling beyond the limits of the market, without proof of notice to the defendant that there was room for him in the market on the particular occasion (*s*).

A legal title may also be presumed from a period of enjoyment short of twenty years, if other circumstances render it probable that such a right has been acquired by grant or otherwise; on the other hand, an enjoyment for a longer period is but presumptive evidence tending to prove the right; and the presumption may be rebutted by positive evidence to the contrary, or by evidence which explains the forbearance of the other party to interrupt the enjoyment of the privilege consistently with his right to interrupt it (*t*).

Thus the evidence of a title to a right of way, or to the use of lights derived from enjoyment by the claimant, and the acquiescence of others, for the space

manner, affords a conclusive presumption of the right of the party so enjoying it, derived from grant, or Act of Parliament; but less than twenty years' enjoyment may or may not afford such a presumption, accordingly as it is attended with circumstances to support or rebut the right. Per Lord Ellenborough, *Beeley* v. *Shaw*, 6 East, 214; and see *Balston* v. *Benstead*, 1 Camp. 463. And see tit. WATERCOURSE, PEW, and PRESCRIPTION; and now see the stat. 2 & 3 W. 4, c. 71, by which the law on this subject is now governed. Where a nuisance is of a permanent nature, an action lies at the suit of the reversioner, as well as of the tenant in possession. *Biddlesford* v. *Onslow*, 3 Lev. 209. A reversioner cannot sue for a mere trespass, although done with a view to claim a right, if the act during the tenancy be not injurious to the reversion. *Barter* v. *Taylor*, 4 B. & Ad. 72. But the reversioner may sue for an injury to his right, although the nuisance may easily be removed. *Shadwell* v. *Hutchinson*, M. & M. 350. A landlord may maintain an action against his tenant, in respect of anything done to destroy evidence of title. *Young* v. *Spencer*, 10 B. & C. 152.

(*p*) *Mosley, Bart.* v. *Walker*, 7 B. & C. 40; and see *The Prior of Dunstable's Case*, 11 H. 8. 10, a.; 8 Co. 127; Com. Dig. *Market*, F. 2.; Vin. Ab. tit. *Market*. *Bailiffs of Tewkesbury* v. *Bricknell*, 2 Taunt. 133. But *semble* that the mere right to the franchise does not, *per se*, confer such an exclusive privilege. And *semble*, that the grantee of a new right of market cannot compel persons carrying on trade there in their shops to desert them and frequent the market. Ib.

(*q*) *Curwen* v. *Salkeld*, 3 East, 538; 7 B. & C. 54.

(*r*) *Mosley* v. *Walker*, 7 B. & C. 40. For where the law raises the exception, it need not be stated in pleading. *Comyns* v. *Boger*, Cro. Eliz. 185.

(*s*) *Prince* v. *Lewis*, 5 B. & C. 360. *Sceus*, where the defendant, at the time of selling marketable goods in his own house adjoining to the market, had a stall in the market which he might have used; the jury finding that he had no reasonable cause for selling in his own house. *Mosley* v. *Walker*, 7 B. & C. 40.

(*t*) See tit. PRESCRIPTION; PRESUMPTION, and *supra*, note (*o*). The same rule prevails in general with respect to incorporeal rights, easements, and privileges claimed in the lands of another; as in the case of a right of way. *Campbell* v. *Wilson*, 3 East, 294. *Keymer* v. *Summers*, B. N. P. 74; 3 T. R. 157. *Wood* v. *Veal*, 5 B. & A. 454. In *R.* v. *Barr*, 4 Camp. 16, the way had been used for 30 years by the public, during a succession of tenancies, the owner having had notice, &c.; Lord Ellenborough held, that it was evidence that the way had been used with his assent. But see *Wood* v. *Veal*, 1 B. & A. 454.

Incorporeal right.

of twenty years, may be rebutted by proof that the adjoining property was in the occupation of a tenant under a lease; for the landlord is not bound by the *laches* of the tenant (*u*).

The right acquired by length of enjoyment is commensurate with the nature and extent of the enjoyment. Thus, if the plaintiff prescribe for a window to a malthouse, he cannot maintain an action for erecting a wall by means of which his window is generally darkened, if it appear that sufficient light is still admitted for the occupation of the plaintiff's building as a malthouse (*x*). But where an ancient window has been enlarged, the owner of the adjoining premises is not at liberty to obstruct any part of the original window, although the unobstructed part of the new window be larger than the old one (*y*), and although he may possess no means of reducing the new window to its original size.

Defendant's agency.

Secondly. The plaintiff must of course prove some act or omission (*z*) constituting a nuisance on the part of the defendant. The evidence to prove the act to have been done by the defendant, or by his authority, is of too obvious a nature to require comment (*a*). It is sufficient to prove that the defendant either erected the nuisance, or that being the alienee of the land he continued the nuisance (*b*), or that having erected the nuisance he let the premises and received rent from his tenant (*c*). After damages have been recovered for the erection of a nuisance, another action is still maintainable for the continuance of the same nuisance by the defendant. And where the plaintiff had recovered from a tenant for years, who afterwards underlet the premises on which the nuisance was erected, to a sub-tenant, and an action for the continuance of the nuisance was brought against the former tenant, the Court held that the action was maintainable, for the defendant had transferred the premises with the original wrong, and by his demise had affirmed the continuance of it (*d*); and the plaintiff might in such case proceed against the sub-lessee (*e*); but in such case it has been said that notice to the latter is necessary (*f*). Where the damage has resulted from an omission by he defendant, as in neglecting to repair a public road, his

(*u*) *Daniel* v. *North*, 11 East, 372. There the lights had been used by the plaintiff, and enjoyed without interruption for the space of twenty years, during the occupation of the opposite premises by a tenant; and it was held, that this did not conclude the landlord without knowledge of the fact. And see *Bradbury* v. *Grinsell*, 2 Will. Saund. 175, d. e. *Campbell* v. *Wilson*, 3 East, 294. *Cooper* v. *Barber*, 3 Taunt. 99. And *Infra*, tit. PRESCRIPTION.—PRESUMPTION.—TIME.

(*x*) *Martin* v. *Goble*, 1 Camp. 322. See the *East India Company* v. *Vincent*, 2 Atk. 83.

(*y*) *Chandler* v. *Thompson*, 3 Camp. 80, cor. Lord Ellenborough. See *Cherrington* v. *Abney*, 2 Vernon, 646. *Beeley* v. *Shaw*, 6 East, 208.

(*z*) Case for non-repair of fences is maintainable against the occupier only. *Cheetham* v. *Hampton*, 4 T. R. 318. Unless the owner, though not in possession, be bound to repair. *Payne* v. *Rogers*, 2 H. B. 349.

(*a*) *Supra*, tit. AGENT. A landlord who employed workmen to do repairs in a house in the possession of his tenant, who was bound to repair, and directed the repairs, was held to be liable for a nuisance occasioned by the negligence of the workmen. *Leslie* v. *Pounds*, 4 Taunt. 649; see tit. NEGLIGENCE. In an action for obstructing lights, a clerk who superintends the work complained of, and alone directs the workmen, is liable as a co-defendant. *Wilson* v. *Peto*, 6 Moore, 47. Proof of the employment of an agent by *A.* to pull down the house of *A.*, which adjoins the house of *B.*, is evidence against *A.*, in an action by *B.* against *A.* for injuring his house, without calling the agent. *Peyton* v. *Governors of St. Thomas's Hospital*, 4 M. & R. 625.

(*b*) *Penruddock's Case*, 5 Rep. 100.

(*c*) *R.* v. *Pedley*, 3 N. & M. 627; 1 Ad. & Ell. 822.

(*d*) *Rosewell* v. *Prior*, Salk. 460; W. Jones, 272; Cro. Jac. 373. 555.

(*e*) Ibid. and *semble* against both, for one was but the agent of the other in doing the wrong.

(*f*) *Penruddock's Case*, 5 Co. 100; sed vide *supra*, 728. Where a notice to remove a nuisance had been served on the defen-

Defendant's agency.

obligation must be proved (*g*). Where an action is brought for neglecting to remove tithes, it seems that it is necessary to prove a notice to the defendant of their having been set out (*h*). If the injury were occasioned in part by the negligence of the plaintiff's as well as of the defendant's agent, the action is not maintainable (*i*).

Where a house, in respect of which a nuisance has been committed, has been aliened, the alienee may maintain an action for the continuance of the nuisance, after request made to abate or remove the nuisance (*k*). And it should seem that proof of such request is unnecessary in order to enable the alienee to maintain an action against a wrong-doer, who is guilty of a continuing nuisance, by neglecting to remove it.

The defendant's act must not only be detrimental, but wrongful, either in respect of the doing such act at all, or the doing it in an improper manner. An action does not lie against a man for pulling down his own house, by means of which the adjacent house falls for want of shoring (*l*). So if a party build a house on his own land, which has previously been excavated to its extremity for mining purposes, he has not a right to support from the adjoining land of another, unless such a right can be either expressly proved or presumed (*m*). In such cases, therefore, no action lies, for no wrong is done by the defendant in merely using his own. Yet even in such instances, if a party having a right so to use his own, do it in a wasteful, negligent, and improvident manner, so as to occasion greater injury to his neighbour than was necessary, or than would in the ordinary course of doing the work have been incurred, he is liable. As where the owner of the house injured neglects to shore it up, and the defendant by pulling down his house in a negligent and careless manner, enhances the risk to the plaintiff's premises (*n*).

An action does not lie against trustees or commissioners, in respect of

dant's predecessor, Abbott, C. J. held that having been delivered on the premises to the occupier for the time being, it bound a subsequent occupier. *Salmon* v. *Bensley*, R. & M. 189.

(*g*) 1 Inst. 56, a. n. Hargr. ed. The action will not lie where a parish or county is bound to repair a highway. *Russell* v. *Men of Devon*, 2 T. R. 671.

(*h*) 3 Burr. 1892. But the common law does not require notice to be given in general of the intention to set out tithes, either predial or of animals. *Kemp* v. *Filewood*, 11 East, 358; 1 Roll. Ab. 643, tit. DISMES, x. pl. 1. *Body* v. *Johnson*, Somerset Summer Assizes, 1815, cor. Dampier, J. cited 2 Sel. N. P. 1052. But a special custom may render such a notice necessary. *Butter* v. *Heathly*, 3 Burr. 1891.

(*i*) *Hill* v. *Warren*, 2 Starkie's C. 377, where the action was brought for negligence in taking down a party-wall, and it appeared that the plaintiff appointed an agent to superintend the work jointly with the defendant's agent, and that both agents were to blame. Where a canal company being bound to repair the banks, brought case against the owner of adjoining lands for digging clay-pits, whereby the plaintiff's banks gave way, &c.; held that it ought to have been presented as a question of fact to the jury, whether at the time of the alleged cause of complaint the bank was in such a state as the Act of Parliament required, and the owner of adjoining lands was entitled to expect; and not merely whether the falling of the bank was occasioned by the digging of the pits by the defendant. *Stafford Canal Co.* v. *Hallen*, 6 B. & Cr. 317.

(*k*) *Penruddock's Case*, 5 Rep. 101, a; Willes, 583; Cro. J. 555; *supra*, 728.

(*l*) *Peyton* v. *Mayor of London*, 9 B. & C. 725. The owner of a house not ancient, cannot recover against the owner of the adjoining land for merely, and without apparent negligence, digging away that land so that the house falls in. *Wyatt* v. *Harrison*, 3 B. & Ad. 871.

(*m*) *Partridge* v. *Scott*, 3 M. & W. 220. *Semble*, after a lapse of 20 years from the time when the owner of the adjoining land first knew or had the means of knowing that the land had been excavated, a grant may be presumed.

(*n*) *Walters* v. *Pfiel*, M. & M. 365. See *Trower* v. *Chadwick*, 3 Bing. N. C. 334. *Dodd* v. *Holme*, 1 Ad. & Ell. 493. Where a dock company was authorized by an Act to make a swing-bridge across a public highway, by the opening of which the public were delayed, held that a party

damage occasioned by them in the execution of their powers, unless it be for an *excess* (*o*), or vexatious abuse of authority (*p*), or at least a careless and negligent exercise of their authority.

Damage, &c.

Thirdly. It is sufficient to prove, that by reason of the nuisance the plaintiff cannot enjoy his right in as full and ample a manner as formerly. In an action for obstructing lights, it is not necessary to prove a total privation; it is sufficient in general to show that the plaintiff cannot (in consequence of the obstruction) enjoy the light in as free and beneficial a manner as before (*q*).

Evidence of damage.

So the plaintiff may prove that the stream which flows through his land is diminished in quantity, or that its quality has been affected, and that it is less wholesome for cattle, or less fit for any other purpose to which it may have been applied. Proof of an abridgment of the means and power of exercising the right is sufficient, without evidence to show that any positive damage has resulted to the plaintiff. Thus, it is sufficient to prove an obstruction of a way to which the plaintiff is entitled over the defendant's land, without showing that any special damage has been occasioned by the obstruction (*r*).

seeking damages for such delay, must make out that it was unnecessary; if the company do all that can be expected of reasonable men, availing themselves of such means as they ought, they will not be liable. *Wiggins* v. *Boddington*, 3 C. & P. 544. Where the plaintiff alleged his possession of a dwelling-house, belonging to and supporting which were certain foundations of a certain pine wall which he was then enjoying and of right ought to enjoy, and then alleged the wrongful excavating by the defendant of his soil adjoining such foundation, which was thereby weakened and sunk, and the plaintiff's house supported thereon injured; held, that such averment amounted to an averment, not of property, but of an easement on such foundations; and proof being given, and the evidence establishing such easement on the foundations of the defendant's pine wall, and showing that the excavation caused the injury through the careless mode in which it was done, the action was maintainable. *Brown* v. *Windsor*, 1 Cr. & J. 20. Where the defendants removed an adjoining building, on the footing of whose walls those of the plaintiff also in part rested, it was held, that having given previous notice, the question was, whether the defendants had used reasonable and ordinary care in the work; and if they had, that they were not answerable for any injury which the plaintiff's building had sustained. *Massey* v. *Goyder*, 4 C. & P. 161. If *A.* and *B.* have lands contiguous, and after *A.* has erected a house extending to the boundary of his land, *B.* negligently, unskilfully, and improperly digs his own soil, so that *A.*'s land is injured, an action lies. *Dodd* v. *Holme*, 1 Ad. & E. 493. But *qu.* if he be bound to protect his neighbour in making the excavation without negligence, either in the case of a new house or of one 20 years old.

(*o*) See *Leader* v. *Moxon*, 3 Wil. 461; 2 Bl. 924. There the defendants had exceeded their authority, by raising the pavement so high as to obstruct the plaintiff's windows. Per Bayley, J., in *Boulton* v. *Crowther*, 2 B. & C. 708. *Harris* v. *Baker*, 4 M. & S. 27.

(*p*) *Boulton* v. *Crowther*, 2 B. & C. 703, where the gravamen was that the trustees of a road had raised the highway so as to obstruct the plaintiff's entrance. The trustees had power under the Act to improve the road, and the jury found that the defendants had not acted arbitrarily, carelessly or oppressively, and it was held that the defendants were not liable. See also *The Plate Glass Comp.* v. *Meredith*, 4 T. R. 794. In *Jones* v. *Bird*, 5 B. & A. 837, it was held that commissioners were liable for an act done by them in discharge of their authority, but it was expressly found that they had acted carelessly and negligently. 2 B. & C. 711. In general, one who is in the exercise of a public function, without emolument, and which he is compellable to execute, acts without malice, according to the best of his skill and diligence, is not liable in respect of consequential damage arising from his act. *Sutton* v. *Clarke*, 6 Taunt. 29.

(*q*) *Cotterell* v. *Griffiths*, 4 Esp. C. 67. *Pringle* v. *Wernham*, 7 C. & P. 377. *Wells* v. *Ody*, 7 C. & P. 410. *R.* v. *Neil*, 2 C. & P. 485. But see *Back* v. *Stacey*, 2 C. & P. 465; *Parker* v. *Smith*, 5 C. & P. 438. The merely preventing an excess in the use of ancient lights, beyond the extent to which they were formerly enjoyed, is not actionable. Com. Dig., Action on the Case for Nuisance, C. It seems that windows in an enlarged house, and in a different situation from the original one, are not entitled to the same privilege of protection. *Blanchard* v. *Bridges*, 4 Ad. & Ell. 176.

(*r*) *Allen* v. *Ormond*, 8 East, 4. Even

Evidence of damage.

Where a market or fair of the defendant is held on a different day from the plaintiff's, it is a question of fact for the jury, whether the former be a nuisance to the latter (*s*).

Proof in defence.

It is not only a good defence (*t*) to show that the obstruction was erected by the leave and licence of the plaintiff, but even where the licence has subsequently been recalled, to show that the erection was made under a parol licence from the plaintiff at the defendant's expense, the expenses not having been tendered to the defendant (*u*).

But an easement in the land of another cannot (it has been held) be created but by grant (*x*).

It was held to be no defence that the window in question was to be deemed a nuisance under the stat. 14 G. 3, c. 78, having been built upon a party-wall, no conviction having taken place (*y*).

The Building Act, 14 G. 3, c. 78, s. 43, which authorizes the raising of a party fence wall, does not protect from liability in respect of any collateral damage which results, as by darkening the windows of the adjoining house (*z*).

A window which has been completely closed up with bricks and mortar for twenty years, is no longer privileged (*a*); so if a party has, by his mode of discontinuing the enjoyment of lights, evinced an intention never to resume the enjoyment, he cannot afterwards maintain an action against the defendant for a subsequent erection which prevents him from using his right, although twenty years have not elapsed (*b*).

It is no defence that the nuisance had been carried on for ten years before the plaintiff was possessed of his term in the premises, and that the noise complained of was essential to the defendant's trade (*c*).

Plea in trespass, for throwing down the plaintiff's chimnies, that they adjoined a highway, and in consequence of the destruction of the adjoining house, were in danger of falling and endangering the lives of the King's subjects passing along the said highway; held that, if made out, the plea was a good answer to the action (*d*).

An indictment lies for keeping a ruinous house adjoining to highway (*e*).

Where a trade in its nature was a nuisance, but from the place where

although such way has been used by the public for more than twelve years. In the case of *Taylor* v. *Bennett*, 7 C. & P. 239, which was an action for disturbing the plaintiff in the use of a well, by putting rubbish into it, it was held, that if the water was thereby rendered shallower, and the water made inconvenient for use, the plaintiff would be entitled to recover; but that if the effect merely were to make the water muddy for a time, the damage was too minute to sustain the action.

(*s*) *Yard* v. *Ford*, 2 Saund. 172; Stat. H. 4, 5 & 6. A market beyond the distance of twenty miles *non est vicinum*, Fl. l. 4, c. 28, s. 13; Com. Dig. *Market*, C. 2; *et poterit esse vicinum, et infra predictos terminos et non injuriosum*; but if held on the same day, it is said that it will be intended to be to the nuisance. F. N. B. 184, a.; 2 W. Saund. 174, n. (2).

(*t*) As to the necessity for a special plea, see above.

(*u*) *Winter* v. *Brockwell*, 8 East, 308. The obstruction there was a sky-light over the defendant's area, which prevented the access of the light and air through a window to the plaintiff's dwelling-house.

(*x*) *Hewlins* v. *Shippam*, 5 B. & C. 221, where the plaintiff claimed a right to have a gutter or drain across the defendant's land; and see Co. Litt. g. n. 42 a., 85 a., 169; 2 Roll. Ab. 62; Shep. Touch. 231; Gilb. Law. of Ev. 96. *Fentiman* v. *Smith*, 4 East, 107, where Lord Ellenborough lays it down distinctly, that the title to have water flowing in the tunnel over the plaintiff's land could not pass by parol licence without deed.

(*y*) *Titterton* v. *Conyers*, 1 Marsh, 140.

(*z*) *Wells* v. *Ody*, 1 M. & W. 452.

(*a*) *Lawrence* v. *Obee*, 3 Camp. 514.

(*b*) *Moore* v. *Rawson*, 3 B. & C. 332.

(*c*) *Elliotson* v. *Feetham*, 2 Bing. N. C. 134.

(*d*) *Dewey* v. *White*, 1 M. & M. C. 56.

(*e*) *R.* v. *Watt*, 1 Salk. 357.

carried on was not such unless it occasioned more inconvenience than before, it was held that an increase in the business, by improvements in the mode of conducting it, did not render it indictable, unless there was an increase of annoyance (*f*). Proof in defence.

Where commissioners, for the protection of lands which it was their duty to protect, erected a groin which had the effect of exposing adjoining lands to the inroads and force of the sea, it was held that they were not liable to make compensation to such owners, but that as against a common enemy they must protect themselves (*g*).

A party is indictable for a public nuisance on a road, by the erection of building upon it, although liable to a summary conviction (*h*).

Lord Hale, *de portibus maris*, holds that the question of nuisance or no nuisance is one of fact for the jury (*i*). It seems to be no defence to an indictment, for that which is of itself a nuisance, that some collateral advantage is conferred on a portion of the public (*k*).

A plan, showing not merely the streets but supposed position of the carriages, in an action for negligent driving, was rejected, as too leading a representation of the fact in dispute (*l*).

Where, upon the accident occurring, some persons in the defendant's carriage gave their address, and said, that "any damage would be paid for;" held that the address given, but not any other statement, was admissible (*m*).

OFFICE COPY.

An office copy is admissible in evidence in the same cause and in the same court; but not in a different court, nor in a different cause in the same court (*n*).

OFFICERS (*o*).

By the stat. 7 & 8 G. 4, c. 53, which consolidates the previous statutes relative to the excise and customs, various provisions are made for the pro-

(*f*) *R.* v. *Watts*, 1 M. & M. 281.

(*g*) *R.* v. *Commrs. of Pagham Sewers*, 8 B. & C. 355.

(*h*) *R.* v. *Gregory*, 5 B. & Ad. 555.

(*i*) It may however, in some instances, be a question of law arising upon the facts.

(*k*) In *R.* v. *Ward*, K. B. Mich. T. 1835, Denman, L. C. J. observed, "If it were to be held, that against the disadvantage to the public ought to be weighed an advantage to a particular part of the public from the act charged as a nuisance, it would be impossible for juries to decide the case, and it would be to desert the plain principles of law." He said, that *R.* v. *Russel*, 6 B. & C. 566, had been doubted, and probably would, on consideration, be further doubted.

(*l*) *Beamon* v. *Ellice*, 4 C. & P. 585.

(*m*) *Ibid.*

(*n*) Per Ld. Mansfield, in *Denn* v. *Fulford*, Burr. 1177. See *Burnand* v. *Nerot*, 1 Carr. & P. 578. And see APPENDIX.

(*o*) An election to an inferior vacates a superior office, if they be incompatible. *Milward* v. *Thatcher*, 2 T. R. 81. A conviction before a recorder *de facto* is good; per Buller, J. Ib. Where by the charter the common clerk was bound to attend corporate meetings and take minutes of the proceedings, for neglect of which he might be amerced; and he also received a salary which might be varied in amount, or discontinued, at the pleasure of the mayor, aldermen and bailiffs; held, that an alderman could not hold such office, it being incompatible, and that the acceptance of the one vacated the other. *R.* v. *Tizzard*, 9 B. & C. 418. Where the affidavit, on an application for a *quo warranto*, for exercising an office alleged to have been vacated by the acceptance of a second office incompatible with the first, only stated the belief that he exercised the second office, but did not show any valid appointment thereto, it was held to be insufficient. *R.* v. *Day*, 9 B. & C. 708.

tection of officers. Sect. 114 provides that no action shall be brought against any officer, or any person acting in his aid or assistance, unless a month's previous notice (*p*) in writing shall have been delivered to such officer or person, or left at the usual place of his abode, by the attorney or agent who shall intend to sue out the writ, &c., expressing the cause of action, with the time when and place where it arose; and the name and place of abode of the person or persons in whose name such action is intended to be brought, and the name and place of abode of such attorney or agent.

Sect. 115 limits the suit to three calendar months after the cause of action shall have arisen, requires the venue to be laid in the proper county, enables the defendant to plead the general issue, and, after a verdict, &c. for the defendant, awards treble costs.

Sect. 116 enables the defendant to tender amends, and to plead the tender in bar, if not accepted.

Sect. 119 provides that where, on the trial of an information for the condemnation of any goods seized under any Act relating to the revenue of excise, the Court shall certify that there was probable cause for the seizure, the plaintiff, on action brought, shall not be entitled to more than 2*d.* damages.

The steward of a court-baron is a judicial officer, and trespass does not lie against him for the mistake of his bailiff in taking the goods of *B.* under a precept commanding him to take the goods of *C.* (*q*).

The nomination of an officer may be without deed (*r*).

OVERSEER (*s*).

See CHURCHWARDEN.

Appointment of.

In order to justify an appointment of overseers for a subdivision of a parish, it should be shown that otherwise the parish could not reap the benefit of the statute 43 Eliz. c. 2 (*t*). But where a parish consisted of four townships, and had always, since the statute, had more than four overseers, it was held that each township was entitled to have separate overseers (*u*). And where the two districts of which a parish consisted, had from the 43d

(*p*) The notice must state the plaintiff's place of abode at the time of delivering the notice. Where the notice stated the plaintiff's place of abode at the time when the cause of action arose, but did not state his place of abode at the time when notice was given (which was five weeks after the injury), the notice was held to be insufficient. *Williams* v. *Burgess*, 3 Taunt. 127. As to the description of the place of abode, vide *supra*, tit. JUSTICES; and *Wood* v. *Folliot & others*, 3 B. & P. 152.—If the notice be not proved at the trial, the defendant will be entitled to a verdict, and no evidence can be received.—See also stat. 23 Geo. 3, c. 70; 6 Geo. 4, c. 80, s. 108; and see tit. JUSTICE.

(*q*) *Holroyd* v. *Breare*, 2 B. & A. 473. It is incident to every public office, that the party should be in a situation to discharge the duties of it. And he cannot act by deputy; per Ld. Kenyon, in the matter of *Bryant*, 4 T. R. 716. See *R.* v. *Ferrand*, 3 B. & A. 260.

(*r*) Salk. 467; Com. Dig., OFFICER, D. 5.

(*s*) All the overseers of a parish, &c. constitute but one joint officer; and a payment by or to one, is a payment by or to all. *R.* v. *Bartlett*, 1 Bott. 206. But one of several churchwardens cannot release or give away the funds of the church. They are *quasi* a corporation. Cro. Ja. 234; Burn's Ecc. Law, 292. They may appoint a bailiff. See tit. REPLEVIN.—CHURCHWARDENS. The Court will grant a mandamus to two justices to issue their warrant under the 50 Geo. 3, c. 49, at the instance of one of the succeeding overseers, although the rest refuse to concur. *R.* v. *Pascoe*, 2 M. & S. 343.

(*t*) *R.* v. *Uttoxeter*, 1 Doug. 346; Cald. 84. Although it appear that since the year 1648 the parish has constantly had more than four overseers, and though the hamlet part has immemorially had a constable of its own. Ib.

(*u*) *R.* v. *Horton*, 1 T. R. 3741.

of Eliz. down to the 13th and 14th C. 2, agreed to separate in the maintenance of the poor, and that separate overseers should be appointed, on condition that the rateable property, whether situated in the one or the other district, should be rated where the occupiers resided; and, in pursuance of this agreement, the districts had maintained their poor separately, and had separate overseers, constables, &c.; it was held, that the evidence clearly showed that the parish, at the time of the agreement, could not reap the full benefit of the statute of Elizabeth, and that the separation was valid, and the appointment of overseers for the whole parish was bad (*r*). Appointment of.

Whether or not a parish can have the benefit of the statute of Elizabeth is a fact which the sessions ought to find, and not merely evidence of the fact (*w*).

The appointment of an overseer may be by parol (*x*).

An order of sessions, appointing overseers for a parish, which, though large, is able to reap the benefit of the statute, is a nullity (*y*).

Two overseers, one of whom is sole churchwarden, do not form a body corporate within the meaning of the statute 49 G. 3, c. 12, s. 17, and the parish property does not vest in them (*z*).

Where a pauper had been put in possession of a cottage 40 years ago, by the then existing overseers of the poor, and had continued in the parish pay, and the cottage had been from time to time repaired, until two years ago, when the pauper disposed of it to the defendant, and went away, and no act had been done to acquire a tenancy under the present overseers, it was held that they could not recover (*a*).

Under the 55 Geo. 3, c. 137, it is sufficient to state goods to be the property "of the overseers for the time being" (*b*).

It is the duty of overseers to keep the possession of indentures of parish apprentices, if they come into their possession, and to deposit them in the parish chest; and a presumption arises, from not being found there, that they are lost (*c*).

In an action against an overseer for not returning the surplus arising on a distress for poor-rates, a formal demand is necessary under the statute 27 G. 2, c. 20, s. 2 (*d*). A plaintiff cannot recover against several overseers money lent to one without the concurrence of the rest, unless all the rest have expressly promised to repay the money lent; for it is contrary to the duty of an overseer to borrow money for parochial purposes (*e*). Where money has been paid by a party at the sole request of one overseer, and without the knowledge of the others, and no demand is made upon them till they are out of office, it is a question for the jury whether, under the special circumstances, the party ought not to be considered as having relied on the sole responsibility of the overseer on whose request he acted (*f*). Action against.

In an action against an overseer for refusing to permit an inspection of

(*v*) *R.* v. *Walsall*, 2 B. & A. 157. See also *Lane* v. *Cobham*, 7 East, 1. *R.* v. *Leigh*, 3 T. R. 746.

(*w*) *R.* v. *Watson*, 7 East, 214.

(*x*) *Anon.* Lofft, 434. And see *R.* v. *Morris*, 4 T. R. 552. *R.* v. *Walsall*, 2 B. & A. 557.

(*y*) *Peart* v. *Westgarth*, 3 Burr. 1610; Cald. 90.

(*z*) *Woodcock* v. *Gibson*, 4 B. & C. 462.

(*a*) *Doe* v. *Clarke*, 14 East, 488. *R.* v. *Went*, Russ. & Ry. C. C. L. 359.

(*b*) *R.* v. *Went*, Russ. & Ry. C. C. L. 359.

(*c*) *R.* v. *Trowbridge*, 8 B. & C. 96.

(*d*) *Simpson* v. *Routh*, 2 B. & C. 682. And an improper tender does not render such a demand unnecessary. Ib.

(*e*) *Massey* v. *Knowles*, 3 Starkie's C. 65.

(*f*) *Malkin* v. *Vickerstaff*, 3 B. & A. 89.

Action against.

the rate-book, under the statute 17 Geo. 2, c. 3, s. 2, it is necessary to show that a demand was made at a reasonable time and place. Where the demand was made at a parishioner's own house, and not at the overseer's, at eight o'clock in the evening, it was held that the demand was not sufficient (*g*). Nor can the plaintiff recover unless he shows that he has been injured by the refusal (*h*).

The right to inspect churchwardens' and overseers' accounts, under 17 Geo. 2, c. 38, is not general, but a mere private right, and the applicant ought to show some public ground for desiring to inspect them, to entitle himself to the remedy by mandamus; and it is no answer to the application that a penalty is imposed for refusing, which is given not as a compensation to the party complaining, but to punish the offender, and for the relief of the poor (*i*). So a mandamus to a mayor, &c. to permit the party to have inspection of the records of a court leet, will be refused, unless good reason is assigned (*j*).

Where, in an action against a guardian of the poor for having supplied the poor with provisions, against the statute 55 Geo. 3, c. 139, s. 6, it was alleged that he had the ordering and directing of the poor of one parish, and it appeared in evidence that he had the ordering and directing of the poor of that parish, and also others, united under the statute 22 Geo. 3, c. 83, s. 43, and that he had supplied goods to the master of the workhouse, who had contracted for supplying the poor at so much per head; it was held that the evidence was sufficient (*k*). But it was held, that an overseer, who had an interest in coals supplied nominally by another for the use of the poor, was not liable without proof that they were supplied with a view to profit (*l*). And as the statute only prohibits the supplying a workhouse or the poor of a parish generally, it was held that an overseer who, under an order for the relief of the poor, paid him part in money, and the rest, with the pauper's consent, in shop goods, was not liable to a penalty (*m*).

PAROL EVIDENCE.

General principle.

The great principle which regulates the admission or rejection of parol evidence in relation to written instruments has already been adverted to (*n*).

Where written instruments are appointed, either by the immediate authority of law, or by the compact of parties, to be the permanent repositories and memorials of truth, it is a matter both of principle and of policy to exclude any inferior evidence from being used, either as a substitute for such instruments, or to contradict or alter them. Of *principle*, because such instruments are in their own nature and origin entitled to a much higher degree of credit than that which appertains to parol evidence; of *policy*, because it would be attended with great mischief and inconvenience if those instruments upon which men's rights depended were liable to be impeached and contradicted by loose collateral evidence.

Consistently with the principles already adverted to, it is a general rule

(*g*) *Spenceley* v. *Robinson*, 3 B. & C. 658.

(*h*) Ib.

(*i*) *R.* v. *Clear*, 4 B. & C. 899; and 6 D. & Ry. 393.

(*j*) *R.* v. *Maidstone, Mayor of, &c.*, 6 D. & R. 334.

(*k*) *West* v. *Andrews*, 5 B. & A. 77; and see 5 B. & A. 328.

(*l*) *Skinner* v. *Rucker*, 3 B. & C. 6; S. C. 4 D. & R. 628.

(*m*) *Procter* v. *Mainwaring*, 3 B. & A. 145. But see *Pope* v. *Backhouse*, 2 Moore, 186.

(*n*) Vol. I. tit. Best Evidence.

that oral evidence shall in no case be received as *equivalent* to, or as a *substitute* for, a written instrument, where the latter is required by law (*o*), or to give effect to a written instrument, which is *defective* in any particular which by law is essential to its validity (*p*); or to *contradict*, *alter*, or *vary* (*q*) a written instrument, either appointed by law, or by the compact of private parties, to be the appropriate and authentic memorial of the particular facts which it recites; for by doing so, oral testimony would be admitted in usurpation of a species of evidence decidedly superior in degree. General principle.

But parol evidence is admissible to *defeat* (*r*) a written instrument, on the ground of fraud, mistake, &c. or to *apply* it to its proper subject-matter (*s*), or in some instances, as ancillary to such application, to *explain* the meaning of doubtful terms (*t*), or to *rebut* presumptions arising extrinsically. In these cases the parol evidence does not usurp the place or arrogate the authority of written evidence, but either shows that the instrument ought not to be allowed to operate *at all*, or is essential in order to give to the instrument its legal effect.

Inasmuch as the rejection of parol evidence, where it is placed in competition with written evidence, usually arises from the consideration that to admit it would be to allow the weaker evidence to usurp the place of the stronger, and to render the most solemn, authentic, and permanent instruments of evidence which the law can devise, uncertain, inoperative, and ineffectual, the extent to which the principle operates, and the rules deducible from that principle, will, perhaps, be exhibited in the clearest point of view by reference to the different purposes for which parol testimony can be offered in relation to written instruments. Parol evidence, in general, may be offered for three purposes in relation to written evidence: *First*, in OPPOSITION to written evidence, where it is offered with a view to *supersede* the use of written evidence, and to supply its place, or to *contradict* it, or to *vary* its effect, or wholly to *subvert* such evidence, by showing that it has no legal existence, or no legal operation in the particular case; or *secondly*, it is offered in AID of written evidence, in order either to *establish* a particular document, or to *apply* it to its proper subject-matter, or to *explain* it; or to rebut some *presumption* which affects it; or as secondary evidence, where the original is unattainable (*u*); or *thirdly*, it is used as *original and* INDEPENDENT evidence to prove a particular fact, without regard to written evidence of the fact, not being excluded by any rule of law. Not admissible to supersede, &c. by supplying omissions.

I. In the first place, parol evidence is never admissible to *supersede* the use of written evidence, where written proof is required by the law.

Where the law, for reasons of policy, requires written evidence, to admit oral testimony in its place would be to subvert the rule itself. The same observation applies where the law prescribes a certain form of written evidence; to allow a defect in the instrument to be supplied by oral evidence, would be, *pro tanto*, to dispense with the law. Hence, in general, where the law requires a formal written instrument (*x*), if the document offered in evidence be *defective*, so that it cannot operate without collateral aid, the defect cannot be supplied by oral testimony. Thus, if in a will the name of To supersede written evidence. By supplying defect, &c.

(*o*) *Infra*, 754.
(*p*) *Infra*, 755.
(*q*) *Infra*, 757.
(*r*) *Infra*, 765.
(*s*) *Infra*, 768.
(*t*) *Infra*, 775.
(*u*) *Supra*, Vol. I. WRITTEN EVIDENCE.
(*x*) See the Stat. of Frauds, *supra*, 482.

Not admissible to supersede, &c.

the intended devisee or legatee be omitted, or a blank be left for the description of the estate, or amount of the legacy, these omissions cannot be supplied by oral testimony as to the real intention of the testator (*y*). And although different writings may, by internal reference, be connected together so as to constitute one entire instrument within the Statute of Frauds, yet they cannot be connected by mere oral testimony (*z*), neither can any defect in the writing be supplied by oral evidence (*a*).

In cases where a written document is not absolutely essential in point of law to give a legal operation to that which is to be proved, as it is in cases under the Statute of Frauds and of Wills, yet if an authentic written memorial be constituted by law, parol evidence cannot, in general, be substituted for it; for being appointed by law for the purpose of evidence, it must be considered as the best evidence (*b*). Thus, in general, judgments and judicial proceedings must be proved by means of the record. The examination of a prisoner before a magistrate upon a charge of felony cannot be proved by parol, unless it has been expressly shown that the examination was not taken, as the statutes require, in writing (*c*).

The same principle applies where private parties have by mutual compact constituted a written document the witness of their admissions and intentions (*d*).

Written contracts.

To admit oral evidence as a substitute for instruments, to which, by reason of their superior authority and permanent qualities, an exclusive weight and authority is given by the solemn compact of the parties, would be to substitute the inferior for the superior degree of evidence; conjecture for fact; and presumption for the highest degree of legal authority; loose recollection, and uncertainty of memory, for the most sure and faithful memo-

(*y*) *Baylis* v. *Attorney-general*, B. N. P. 298; 2 Atk. 240. *Woollam* v. *Hearn*, 7 Ves. 211. Where the testatrix made a disposition in favour of Lady ———, and the will contained other provisions in favour of Lady Hort, and she was appointed a trustee in the will by the name of Dame Hort, Lord Thurlow held that the blank could not be supplied by parol evidence. *Hunt* v. *Hort*, 3 Bro. C. C. 311. In *Abbott* v. *Massey* (3 Ves. 148), where a legacy was given to Mrs. G——, Lord Loughborough referred it to the master to ascertain who Mrs. G. was, who was there described by initial letter only. But see Sir D. Evans's observations upon this case in his edition of Pothier, vol. ii. p. 204. See also *Baylis* v. *Attorney-general*, 2 Atk. 239. Where a will mentioned George the son of *George* Gord, and also George the son of *John* Gord, a bequest to George the son of *Gord*, was explained, by means of the testator's declarations, to mean George the son of *George Gord*. *Doe* v. *Needs*, 2 M. & W. 129. Where a blank was left for the Christian name, parol evidence was admitted to shew who was intended. *Price* v. *Page*, 4 Ves. 680.

(*z*) *Supra*, 483.

(*a*) *Supra*, 482. So an agreement, referring to such parts of another instrument as had been read by one party to another, is not sufficient within the statute, because it is imperfect without parol evidence; but an instrument which is conformable to the statute may by reference include the contents of another which is not so. *Brodie* v. *St. Paul*, 1 Ves. jun. 326. Although parol evidence be not admissible to aid an imperfect instrument (*Hallidy* v. *Nicholson*, 1 Price, 404), yet where a question arises as to which an instrument is admissible but not decisive evidence, such parol evidence is admissible for the purpose of explanation. See *R.* v. *Laindon*, 8 T. R. 379.

(*b*) *Supra*, Vol. I. tit. BEST EVIDENCE. The appellants having proved that the pauper occupied a tenement of 10*l.* per annum, and paid rent and taxes for it, the respondents attempted to prove by parol that the letting was to the pauper and two others; on cross-examination it appeared that the letting was by a written instrument; held that it was necessary to produce it. *R.* v. *Rawdon*, 8 B. & C. 708.

(*c*) *Supra*, tit. ADMISSION.

(*d*) *Supra*, tit. ASSUMPSIT. Where a demise offered in evidence contained words struck out (of a printed blank form), it was held that the Court might look at the parts struck out in order to ascertain the meaning of the parties as to the remainder. *Strickland* v. *Maxwell*, 2 C. & M. 539; but see *Doe* v. *Pedley*, 1 M. & W. 670.

rials which human ingenuity can devise, or the law adopt—to introduce a dangerous laxity and uncertainty as to all titles to property, which, instead of depending on certain fixed and unalterable memorials, would thus be made to depend upon the frail memories of witnesses, and be perpetually liable to be impeached by fraudulent and corrupt practices. In short, the great advantages which are peculiar to written evidence would be, in a great measure, if not entirely sacrificed (*e*).

Not admissible to supersede, &c. written contracts.

As oral evidence is inadmissible for the purpose of supplying an omission in an instrument where written evidence is required by law, because to admit it would virtually be to give to oral the superior force of written evidence, and occasion that to pass by parol which by law ought not to pass but by writing, it is upon the same principle inadmissible to give any effect to a written instrument which is void in law for inconsistency, repugnancy, or ambiguity in its terms; for if a meaning could be assigned, by the aid of extrinsic evidence, to that which was apparently destitute of meaning, or if the same instrument could be made to operate in different ways, according to the weight of oral evidence, it is plain that the effect and result would depend, not upon the terms of the instrument, but upon the force and effect of the oral evidence, and thus the latter would virtually be substituted for the former. What degree of ambiguity and uncertainty will avoid a will, deed, or other instrument, is a question of law.

Where the instrument is defective.

An important distinction has already been adverted to between ambiguities which are *apparent* on the face of an instrument, and those which arise merely extrinsically in the *application* of an instrument of clear and definite intrinsic meaning to doubtful subject-matter. An ambiguity, apparent on reading an instrument, is termed *ambiguitas patens*; that which arises merely upon its application, *ambiguitas latens*. The general rule of law is, that the latter species of ambiguity may be removed by means of parol evidence, the maxim being, "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur*" (*f*). On the other hand, it is a settled rule that such evidence is inadmissible to explain an ambiguity *apparent* on the face of the instrument (*g*).

Apparent and latent ambiguities.

By *apparent* ambiguity must be understood an ambiguity inherent in the words, and incapable of being dispelled either by any legal rules of construction applied to the instrument itself, or by evidence showing that terms in themselves unmeaning or unintelligible, are capable of receiving a known conventional meaning. The great principle on which the rule is founded is, that the *intention* of parties should be construed not by vague evidence of their *intentions, independently of the expressions* which they have thought fit to use, but by the *expressions themselves*. Now those expressions which are incapable of any legal construction and interpretation (*h*) by the rules of art, are either so because they are in themselves merely unintelligible, or

(*e*) See *Countess of Rutland's Case*, 5 Rep. 26. *Haynes* v. *Hare*, 1 H. B. 659. *Buckler* v. *Millard*, 2 Vent. 107. *Clifton* v. *Walmesley*, 5 Tr. 564; 3 Atk. 8; 1 Wils. 34. *Mease* v. *Mease*, Cowp. 47. It would be inconvenient (observes Ld. Coke) that matters in writing, made 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 rude averments against matter in writing should be admitted.

(*f*) See Lord Bacon's Reading on the Statute of Uses.

(*g*) *Ambiguitas patens* is never holpen by averments. Regula 25.

(*h*) It is a general rule that a patent ambiguity is always, if possible, to be removed by construction and not by averment. *Colpoys* v. *Colpoys*, 1 Jac. 451.

Not admissible to supersede, &c. by removing an apparent ambiguity.

because, being intelligible, they exhibit a plain and obvious uncertainty (*i*). In the first instance, that is, where the terms used are in themselves simply unintelligible to an ordinary reader, the case admits of two varieties: the terms, though at first sight unintelligible, may yet be capable of having a certain and definite meaning annexed to them by extrinsic evidence, just as if they are written in a foreign language, or if mercantile terms are used, which amongst mercantile men bear a distinct, clear and definite meaning, although others do not comprehend them (*k*): they may, on the other hand, be capable of no distinct and definite interpretation. Now it is evident that to give effect to an instrument, the terms of which, though apparently ambiguous, are yet capable of having a distinct and definite meaning annexed to them, is no violation of the general principle, for in such a case effect is given not to any loose conjecture as to the intent and meaning of the party, independently of the expressions used, but to the *expressed* meaning; and that, on the other hand, where either the terms used are incapable of any certain and definite meaning, or being in themselves intelligible are clearly uncertain, equally capable of different applications, to give any effect to them by extrinsic evidence as to the intention of the party, would be to make the mere intention operate independently of any definite expression of such intention. By *apparent* ambiguity, therefore, must be understood an inherent ambiguity, which cannot be removed either by the ordinary rules of legal construction, or by the application of extrinsic and explanatory evidence, which show that expressions *primâ facie* unintelligible, are yet capable of conveying a certain and definite meaning.

This distinction is an immediate result from the general principles already specified. If an instrument which is in itself wholly devoid of meaning, according to the usual and ordinary rules of legal construction, or which is so indefinite and ambiguous as to be equally capable of several different constructions and applications, might have one particular definite meaning annexed to it by means of extrinsic oral evidence, it is plain that the oral evidence, and not the writing, would produce the definite effect. On the contrary, where the oral evidence is used to annex a definite meaning to the written expressions, or to point the application to this or that subject-matter, the oral evidence does not usurp the authority of the written instrument: it is the instrument which operates: the oral evidence does no more than assist its operation by assigning a definite meaning to terms capable of such explanation, or by pointing out and connecting them with the proper subject-matter.

According to these principles, parol evidence is never admissible to explain an ambiguity which is not raised by extrinsic facts (*l*). Thus, upon a

(*i*) As where an estate is left by will to one of the three sons of *J. S.* without specifying which.

(*k*) Thus where a creditor, together with other creditors, agreed to certain resolutions to watch a commission of bankrupt, supposed to be fraudulent, "and to contribute in the usual way," it was held that parol evidence was admissible to show that by that expression it was meant that each creditor should contribute in proportion to his claim against the bankrupt, without mutual responsibility. *Taylor* v. *Cohen*, 4 Bing. 53. So in the case of a will where its characters are difficult to be deciphered, or its language is unintelligible to an ordinary reader, the testimony of persons skilled in deciphering writing, or who understand the language, is admissible for the purpose of explanation. *Goblet* v. *Beechey*, 3 Sim. 24. *Masters* v. *Masters*, 1 P. Wms. 421. *Norman* v. *Morrell*, 4 Ves. 769. So if the testator express himself in terms peculiar to a particular trade or calling. *Smith* v. *Wilson*, 3 B. & Ad. 728. *Doe* v. *Watson*, 4 B. & Ad. 787. *Attorney-general* v. *Plate Glass Company*, 1 Aust. 39.

(*l*) *Doe* v. *Westlake*, 4 B. & A. 57.

devise to one of the sons of *J. S.*, who has several, evidence is not admissible to show that one in particular was meant (*m*); and the devise is void for uncertainty (*n*).

Not admissible to vary, &c.

As oral evidence is inadmissible either as a substitute for a written instrument required by law, or to give effect and operation to such an instrument where it is defective, it follows *à fortiori* that it is not admissible to contradict, or even to vary, any instrument to which an exclusive operation (*o*) is given by law, whether that exclusive quality result from a peremptory rule of law, or from private compact.

To contradict or vary a written agreement.

Where the terms of an agreement are reduced to writing, the document itself, being constituted by the parties as the true and proper expositor of their admissions and intentions, is the only instrument of evidence in respect of that agreement, which the law will recognize so long as it exists, for the purposes of evidence (*p*). If the parties have contracted by deed, as the obligation under seal imports greater deliberation and more solemnity than a mere written agreement which is not under seal, no evidence, whether oral or written, which is not under seal, can be admitted to contradict or to vary it (*q*).

(*m*) 2 Vern. 624–5; 6 Co. 68, b.; 2 P. Wms. 137; *infra*, 763; 47 Ed. 3, 16, b. In *Harris* v. *Bishop of Lincoln*, 2 P. Wms. 135, where a man limited his estate by will to his own right heirs by his mother's side, Ld. Macclesfield held that he might mean either the heir of his mother's father, or of his mother's mother, and admitted parol evidence to prove which he meant; *qu.*

(*n*) Ibid.

(*o*) As to the cases in which a written instrument has such an operation, vid. *infra*, 785.

(*p*) *Supra*, ASSUMPSIT; and see *Preston* v. *Merceau*, 2 Bl. R. 1249. *Rolleston* v. *Hibbert*, 3 T. R. 406. *Hodges* v. *Drakeford*, 1 N. R. 270. *Pym* v. *Blackburn*, 3 Ves. 34. It is a general rule, that where an agreement has been reduced to writing, evidence of oral declarations, though made at the same time, shall not be admitted to contradict or to alter it. A written agreement, however, where it is not under seal, may be altered by the addition of new terms by an oral agreement, which, in fact, constitutes a new agreement, incorporating the former one; or, as has been seen, such an agreement may be wholly discharged by parol, before any breach has occurred, *supra*, p. 103; and *Lord Milton* v. *Edworth*, 6 Bro. P. C. 587. In such cases it is obvious that the evidence is adduced, not to vary the terms of an existing original agreement, but to show that it has been superseded or discharged. And in *Bywater* v. *Richardson*, 1 Ad. & Ell. 108, it was held that a written warranty of the soundness of a horse might be limited to 24 hours, by rules painted on a board at the place of sale. And see *Jeffery* v. *Watson*, Starkie's C. 267. What took place in Court previous to a rule being made is inadmissible, the Court can only look to the rule itself. *Edwards* v. *Cooper*, 5 C. & P. 277. The auctioneer's declarations, where there are printed conditions, are inadmissible. *Gunnis* v. *Erhart*, 1 H. B. 289; *Powell* v. *Edmonds*, 12 East. 6. Evidence of usage at the Navy-office is inadmissible to enlarge written terms. *Hogg* v. *Snaith*, 1 Taunt. 347.

(*q*) Where a deed stated the purchase-money on the sale of land to have been paid, it was held that evidence was inadmissible to prove an agreement at the time that part should be satisfied by work to be done by the purchaser, and that the money had not in fact been paid. *Baker* v. *Dewey*, 1 B. & C. 704. Where parties contract by deed, *assumpsit* will not lie; for where a man resorts to a higher security the law will not raise an *assumpsit* (*Toussaint* v. *Martinnant*, 2 T. R. 100); as where a surety takes a bond from his principal (Ib.) So a plaintiff cannot recover in *indebitatus assumpsit* upon an executed consideration, where the contract was by deed (*Atty* v. *Parish*, 1 N. R. 104). The only excepted case is that of debt for rent, which rests on peculiar grounds (Hardr. 332. *Warren* v. *Consett*, 8 Mod. 107; Com. Dig. tit. *Pleader*, O. 15. *Kemp* v. *Goodall*, 1 Salk. 277). And where a subsequent parol agreement is inconsistent with a deed, the agreement cannot be set up against the deed (see the case of *Leslie* v. *De la Torre*, cited 12 East, 583). But an action of *assumpsit* may be maintained upon an agreement subsequent to the making a deed of charter-party, the parol contract not being inconsistent with the contract by deed (*White* v. *Parkins*, 12 East, 578). Where the obligor of a *respondentia* bond promised, by indorsement upon it, to pay the amount to *any* assignee, it was held that an as-

Not admissible to vary, &c.

Where *A.* agreed to take *B.* into partnership as an attorney, no time being mentioned, it was held that the partnership commenced from the time of the agreement, and that evidence was inadmissible to show that the agreement was not to take effect until *B.*, who was not then an attorney, should be admitted (*r*).

Extend or limit terms of agreement.

Where the issue was on the plea of *plenè administravit*, evidence that the defendant, upon executing a bond of submission to arbitration, had agreed to pay what should be awarded to be due, was rejected, as being either contradictory of or in addition to the agreement in the bond (*s*). So, oral evidence is not admissible to show that a bond, conditioned for the payment of money to the wife in case she survived, was intended in lieu of dower (*t*). Nor is such evidence admissible to show that a clause of redemption was omitted in an annuity-deed, lest it should render the transaction usurious (*u*). So, although it is an established rule that a party may aver another consideration which is *consistent* with the consideration expressed, no averment can be made contrary to that which is expressed in the deed (*v*).

Where the conveyance is mentioned to be in consideration of love and affection, as also for other considerations, proof may be given of any other, for this is consistent with the terms of the deed (*w*). But if one specific consideration be alone mentioned in the deed, no proof can be given of any other, for this would be contrary to the deed; for where the deed says it is in consideration of such a particular thing, it imports the whole consideration, and negatives any other (*x*). The case where no consideration is expressed in the deed, is, according to Lord Hardwicke, a middle case; and he held the proof of a valuable consideration in such a case was admissible (*y*). But in general, as will be seen, evidence as to the real consideration is in all cases admissible with a view to prove fraud (*z*).

Where *A.* granted an annuity for his own life to *B.*, which was secured by

signee might maintain *indebitatus assumpsit*. *Fenner* v. *Mears*, 2 Bl. 1269; but this was doubted by Lord Kenyon, in *Johnson* v. *Collins*, 1 East, 104, and by Bayley, J., in *White* v. *Parkins*, 12 East, 582.

(*r*) *Williams* v. *Jones*, 5 B. & C. 109; and see *Boydell* v. *Drummond*, 13 East, 142.

(*s*) *Pearson* v. *Henry*, 5 T. R. 6: the evidence was rejected at the trial; and upon motion for a new trial the propriety of the rejection was not disputed. 1 Bro. C. C. 54. 93. And see the Observations of Blackstone, J., in *Preston* v. *Merceau*, Bl. 1250; and *infra*.

(*t*) See *Mascall* v. *Mascall*, 1 Ves. 323; and *infra*, 762, note (*f*).

(*u*) *Ld. Irnham* v. *Child*, 1 Bro. C. C. 92. *Ld. Portmore* v. *Morris*, 2 Bro. C. C. 219. *Hare* v. *Shearwood*, 3 Bro. C. C. 168; 1 Ves. J. 241. But where a man and woman, being about to marry, conveyed their lands to trustees, in trust, to dispose of the rents as the wife, without the consent of the husband, should appoint; notwithstanding which the husband received the rents during his life, and the wife after his death filed a bill in equity for an account, the Court admitted parol evidence to prove, that before the settlement was made, the husband and wife agreed that the premises should be in trust for them during their joint lives, and that they were settled otherwise merely to protect them from sequestration by Cromwell; and on that ground relieved against a covenant in the settlement, by which the trustees were bound to pay the rents as the wife should appoint. *Harvey* v. *Harvey*, 2 Ch. C. 180; Fitz. 213. But where articles were reduced to writing, and signed by the parties, and afterwards drawn up at length, and executed, Reynolds, B. held that the articles could not be restrained by the memorandum, there being no reference from the articles to the memorandum. *Lloyd* v. *Wynne*, 5 G. 2; 1 Ford. 136.

(*v*) *Mildmay's Case*, 1 Rep. 176. *Bedell's Case*, 7 Rep. 39; 2 Roll. Ab. 786.

(*w*) Per Lord Hardwicke, *Peacock* v. *Monk*, 1 Ves. 128. And see the case of *Villers* v. *Beaumont*, 2 Dyer, 146, a. *Vernon's Case*, 4 Rep. 3.

(*x*) Ibid. And see *Green* v. *Weston*, Say. 209; and *Stratton* v. *Rastall*, 2 T. R. 366.

(*y*) *Peacock* v. *Monk*, 1 Ves. 128.

(*z*) *Infra*, 765.

a bond and warrant of attorney, and judgment was entered, the Court would not, after the death of *B.*, permit the attorney of *B.* to prove a parol agreement that *A.* should be at liberty to redeem the annuity on terms (*a*).

Not admissible to vary, &c. a written agreement.

Where the agreement was, that *A.* for certain considerations, should have the produce of Boreham Meadow, it was held that he could not prove by parol that he was to have both the soil and produce of Millcroft and Boreham Meadow (*b*). One who executes an instrument in his own name cannot defeat an action by showing that he did so merely as agent for another (*c*). So in an action on a bond conditioned for payment absolutely, the defendant cannot plead an agreement that it should operate merely as an indemnity (*d*). Where a modern lease uses the term Michaelmas, evidence is inadmissible to show that *Old* Michaelmas was meant (*e*).

In an action of trespass, where the defendant insists upon a release executed by the plaintiff, and in terms including the trespass in question, the plaintiff cannot defeat the effect of the release by proof that the arbitrators who awarded the release have not taken into their consideration the particular trespass (*f*).

Upon the same principles evidence is inadmissible of a parol agreement prior to or contemporary with the written instrument, and which varies its terms; as to show that a note made payable on a day certain was to be payable upon a contingency only (*g*), or upon some other day (*h*), or not until the death of the maker (*i*).

Where a policy was on an adventure from Archangel to Leghorn, the defendant was not allowed to prove an agreement, previous to the signing of the policy, that the adventure should begin from the Downs only (*k*).

(*a*) *Haynes* v. *Hare*, 1 H. B. 659; and per Ld. Thurlow, nothing can be added to a written agreement, unless there be a clear subsequent independent agreement varying the former; but not where it is matter passing at the same time with the written agreement. *Rich* v. *Jackson*, 4 Bro. C. C. 519. *Ld. Portmore* v. *Morris*, 2 Bro. C. C. 219.

(*b*) *Meres* v. *Ansell*, 3 Wils. 275. And see *Hope* v. *Atkins*, 1 Price, 143.

(*c*) *Magee* v. *Atkinson*, 2 M. & W. 440. But in an action on a written contract between the plaintiff and a third party, evidence on the part of the plaintiff is admissible to show that the contract was in fact made by the third party, not on his own account but as the agent of the defendant. *Wilson* v. *Hart*, 7 Taunt. 295.

(*d*) *Mease* v. *Mease*, Cowp. 47; 2 N. R. 597.

(*e*) *Doe* v. *Lea*, 11 East, 312. Where a written agreement stipulates that goods are to be taken on board *forthwith*, it cannot be shown by parol that in *two days* was meant. *Simpson* v. *Henderson*, M. & M. 300.

(*f*) *Shelling* v. *Farmer*, Str. 646.

(*g*) *Rawson* v. *Walker*, 1 Starkie's C. 361; 1 C. M. & R. 703. Where a note was on the face of it absolute, it was held that parol evidence to show that it was only to be paid on certain terms, which had not been complied with, was inadmissible. *Moseley* v. *Hanford*, 10 B. & C. 729. And see *Adams* v. *Woodley*, 1 M. & W. 374. It is not, it seems, competent to a party who appears on the face of a promissory note to be a principal, to show that he is merely a surety. *Price* v. *Edmunds*, 10 B. & C. 578. See *Fentum* v. *Pocock*, 5 Taunt. 192. Where a note was given by the defendant's wife, *dum sola*, expressed to be, "for value received by my late husband," held that it was not competent to the defendant to give in evidence that it was executed only by the wife as an indemnity, being inconsistent with the terms of the note itself. A party, although he may show a failure of or an illegal consideration, cannot show that it was a different one. *Ridout* v. *Bristow & Ux*, 1 C. & J. 231; and 1 Tyr. 84. And see *Rawson* v. *Walker*, 1 Starkie's C. 361.

(*h*) *Free* v. *Hawkins*, 1 Moore, 28; 7 Taunt. 278.

(*i*) *Woodbridge* v. *Spooner*, 3 B. & A. 233. Or till certain estates had been sold, the defendant being the payee and but a surety; or to show that a transfer of a ship, which was absolute on the bill of sale, was intended as a security only. *Robinson* v. *M'Donnell*, 2 B. & A. 134.

(*k*) *Kaimes* v. *Knightly*, Skinn. 54. *Uhde* v. *Walters*, 3 Camp. 16. *Weston* v. *Emes*, 1 Taunt. 115. *Note*, the case of *Kaimes* v. *Knightly*, is cited in *Bates* v. *Graham*, 2 Salk. 444, but mis-stated.

Not admissible to vary, &c. a written agreement.

Where a ship was chartered to wait for convoy at *Portsmouth*, it was held that evidence could not be received of an agreement to substitute *Corunna* for Portsmouth (*l*).

In general, where a contract has been reduced into writing, nothing which is not found in the writing can be considered as part of the contract (*m*).

Where a contract is entered into for the sale of goods, and a bill of sale is afterwards executed, the bill of sale is the only evidence of the contract which can be received (*n*), and parol evidence of the agreement cannot be received, even although the written instrument of sale be inadmissible for want of a stamp (*o*).

By addition, &c.

The same rule applies if such parol agreement *add* to the terms expressed. Thus, in the case of *Preston* v. *Merceau* (*p*), the landlord, in an action for use and occupation, under a written agreement for rent at 26*l.* per annum, was not allowed to show, *in addition*, by parol evidence, that the tenant had also agreed to pay the ground-rent. Mr. J. Blackstone is said in that case to have observed, that although the Court could neither alter the rent, nor the terms which were expressed in the agreement, yet that with respect to collateral matters it might be different; the plaintiff might show who was to put the house into repair, or the like, concerning which nothing was said. The question, how far collateral matter may be proved by parol, will be considered hereafter (*q*); at present it may be observed, that to permit terms to be engrafted by mere parol evidence upon a written agreement, would be attended with all the danger, laxity and inconvenience, which the general rule is calculated to exclude; for an agreement might by such additional terms be as effectually altered as if the very terms of the agreement had been changed by the operation of parol evidence.

Where an agreement specifies only the rent and the term, but is silent as to repairs, it is obvious that such an agreement may be as completely varied by proof of an additional stipulation that the landlord should lay out a specific sum in alterations, as by evidence that the rent shall be diminished, without any stipulation as to repairs. Cases in which the additional terms constitute in fact a new agreement, incorporating the former written terms (*r*), or continuing the former con-

(*l*) *Leslie* v. *De la Torre*, cited 12 East, 583. *Note*, that the charter-party was *under seal*.

(*m*) P. C. in *Kain* v. *Old*, 2 B. & C. 634. *Note*, that the first agreement was in writing, but void for not reciting the certificate of the ship's registry. And see *Meyer* v. *Everett*, 4 Camp. 22. *Gardner* v. *Gray*, 4 Camp. 144. *Powell* v. *Edmonds*, 12 East, 6. *Hope* v. *Atkins*, 1 Price, 143. *Pickering* v. *Dowsing*, 4 Taunt. 779; and *Countess of Rutland's Case*, *supra*. And tit. WARRANTY.

(*n*) *Lano* v. *Neale*, 2 Starkie's C. 105. The previous contract there was for a ship, 40 tons of iron kintlage, &c.; the bill of sale was of a ship, together with all stores, &c. in the usual form, and silent as to kintlage; and held that the vendee could not recover for non-delivery of the kintlage.

(*o*) Per Ld. Kenyon, in *Rolleston* v. *Hibbert*, 4 T. R. 413. And see *Drakeford* v. *Hodges*, 1 N. R. 270; where it was held, that if a parol warranty or agreement to assign be reduced to writing, and the assignment be afterwards legally executed, the warranty cannot be proved by parol.

(*p*) *Preston* v. *Mereeau*, 2 Bl. 1249. So in *Rich* v. *Jackson*, 4 Bro. C. C. 515, where an agreement specified the rent and the term, but was silent as to taxes, the Court refused to receive parol evidence on the part of the lessor, that previous to the drawing up of the memorandum it had been agreed and understood by the parties that the rent was to be paid clear of all taxes.

(*q*) *Infra*, 781, 787, &c.

(*r*) Where one written instrument refers to another, from which it requires explanation, with sufficient certainty, the latter is virtually incorporated with the former, and may be said to give effect to it. But it is a general rule of law, that an instrument properly attested, in order to incorporate another instrument not attested, must de-

tract (*s*), or amount to a substantive collateral agreement (*t*); those also, where certain terms are engrafted upon an agreement, which is silent on the point, by some known custom, or general understanding (*u*); and lastly, those where the instrument offered as evidence to prove a collateral fact, has, in the particular instance, no exclusive operation (*x*), fall, as will be seen, under a different consideration. To vary, &c. by the addition of terms.

At present, assuming the particular instrument to be that which the parties have agreed upon as the evidence of their intentions in respect of the particular transaction, the only question is, whether the parol evidence, which is adduced to superadd something to the written agreement, does not vary that agreement; if it does, it is inadmissible.

Where the conditions of sale 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 for not completing his purchase according to the conditions, was not permitted to prove that the auctioneer had, at the sale, warranted the timber to amount to a certain weight; for if that representation induced him to become the purchaser, he ought to have had it reduced to writing at the time (*y*). Lord Ellenborough, in that case, observed, that if such evidence were admissible, 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. In such cases it is to be presumed that the parties, in expressing their intention, have expressed the whole of it, subject to those incidents and consequences which the law annexes to the terms which they have used.

Where no date is inserted in a deed, date is construed to mean delivery; but where a date is given, and an act is to be done at a certain time from the date, the party bound cannot allege a different time of delivery (*z*).

Where a written agreement for the sale of goods is silent as to the time of delivery, the law implies a contract to deliver them within a reasonable time, to be judged of according to the circumstances. In such a case evidence is inadmissible of a contemporaneous oral contract by the purchaser to take them away immediately (*a*).

Parol evidence is also inadmissible for the purpose of altering the legal operation of an instrument, by evidence of an *intention* to that effect, which Intention to alter the legal operation of an instrument.

scribe it so as to be a manifestation of what the paper is which is meant to be incorporated, in such a way that the Court can be under no mistake. Per Ld. Eldon, C. *Smart* v. *Prujean*, 6 Ves. 565.

(*s*) *Supra*, 757; and see *Warren* v. *Stagg*, 3 T. R. 591; *Cuff* v. *Penn*, 1 M. & S. 21; *Lord Milton* v. *Edworth*, 6 Bro. P. C. 587.

(*t*) *Granville* v. *Duchess of Beaufort*, 1 P. Wms. 114; 2 Vern. 648; and *supra*, 757.

(*u*) *Infra*, 786.

(*x*) *Infra*, 787.

(*y*) *Powell* v. *Edmonds*, 12 East, 6. And see *Buckmaster* v. *Harrop*, 13 Ves. 471; *Shelton* v. *Livius*, 2 C. & J. 411; *Higginson* v. *Clowes*, 15 Ves. 516; *Jenkinson* v. *Pepys*, cited 6 Ves. 330; *Meres* v. *Ansell*, 3 Wils. 275; *Rich* v. *Jackson*, 4 Bro. C. C. 515; *Gunnis* v. *Erhart*, 1 H. B. 289. But where, previous to the sale of a leasehold estate by auction, the purchaser promised the vendor to indemnify him against the covenants entered into by the lessee, a specific performance was decreed, although the terms of the sale were silent as to such indemnity. *Pember* v. *Mathers*, 1 Bro. P. C. 54.

(*z*) *Styles* v. *Wardle*, 4 B. & C. 908; Co. Litt. 46, b.; Com. Dig. *Fait.* b.; 2 Cro. 264; and *supra*, tit. DEED. *Armit* v. *Breame*, 2 Ld. Raym. 1076. But where a lease dated Lady-day 1783, purported to commence on Lady-day *last past*, evidence was admitted to show that the lease was in fact executed after the date, and consequently that the term commenced Lady-day 1782, not 1783. *Steele* v. *Mart*, 4 B. & C. 272.

(*a*) *Greaves* v. *Ashlin*, 3 Camp. 426. *Hallilcy* v. *Nicholson*, 1 Price, 404.

Intention to alter the legal operation of an instrument.

is not expressed in the instrument (*b*). Thus the defendant cannot be admitted to prove that at the time of making a promissory note it was agreed, that when the note became due payment should not be demanded, but that the note should be renewed (*c*).

So also parol evidence is inadmissible to show that a bond, purporting to be absolute, was *intended* merely as an indemnity, and that the plaintiff has not been damnified (*d*); or to show that the directions of a will were intended to operate in satisfaction of a bond (*e*); or that a bond given by the husband before marriage, conditioned to secure 400 *l.* to the wife, in case she survived the husband, was given in lieu of dower (*f*).

To extend or limit, &c.

Where a man gave a bond that his executors should, within six months after his death, pay 5,000 *l.* to trustees, in trust, to apply the interest to the maintenance of his natural son till he should attain the age of twenty-one, and then to pay him the principal, but in case he should die before the father, or under the age of twenty-one, then in trust over; and by his will directed his trustees to lay out 15,000 *l.* in trust, to pay 200 *l.* a year to his said son till twenty-five, and then to pay him the principal, with remainder over if he died before that age, the Chancellor refused to admit parol evidence of declarations alleged to have been made by the testator, for the purpose of explaining the will, and showing it to be in satisfaction of the bond (*g*).

Where a man conveyed his estate to certain uses, reserving to himself the power of changing or revoking them, and afterwards conveyed it to trustees, in trust, to pay his debts, and then in trust to re-convey, it was held that a proof of a declaration by one of the trustees under the latter deed, that the party did not intend to revoke the former by the latter, was inadmissible (*h*).

Intention of a testator to vary the terms of a will.

Parol evidence of the *intention* of the testator is in no case admissible to contradict the express terms of a will (*i*).

(*b*) In equity, however, it seems that parol evidence is admissible to show that the testator intended that specific legacies should be paid out of particular funds (*Cliff* v. *Gibbons*, Ld. Raym. 1524). But not to show that a testator intended to exempt his personal estate from debts. See *Reeves* v. *Newenham*, 2 Ridg. 21. 35. 44.

(*c*) *Hoare* v. *Graham*, 3 Camp. 57. *Hogg* v. *Snaith*, 1 Taunt. 347. *Supra*, 241, 242.

(*d*) *Mease* v. *Mease*, Cowp. 47.

(*e*) *Jeacock* v. *Falkener*, 1 Bro. C. C. 295.

(*f*) *Finney* v. *Finney*, 1 Wils. 34. But where a man who had agreed to settle 100 *l.* a year on his intended wife, finding himself ill, made his will, and afterwards left her 100 *l.* a year, and recovering, married her, Clarke, B. held, that evidence was admissible to show that he intended her one of the annuities only. *Mascall* v. *Mascall*, 1 Ves. 323.

(*g*) *Jeacock* v. *Falkener*, 1 Bro. C. C. 295.

(*h*) By Reynolds, B. and by the Chancellor and Master of the Rolls. *Fitzgerald* v. *Fancomb*, Fitz. 207.

(*i*) A testator having copyhold estates in North C. and South C., devises to his wife all his wines, &c., in addition to the settlement made her on his copyhold estate; to his niece *M.* the rents and profits of his new inclosed freehold cow-pasture close in North C. during the life of his wife; and after the decease of his wife, to two nephews, his furniture, &c. and all his copyhold estates in North C. and South C. It was held, that as there was no ambiguity on the face of the will, or in the application of it, the testator having copyhold estates in North C. and South C. which answered the description, extrinsic evidence was not admissible to show that the description in the settlement included a freehold close, which was mistakenly enumerated there as *copyhold*; and that by all his copyhold estates in North C. and South C., this freehold passed, although the settlement was referred to in the will; and that other documents not referred to were inadmissible for that purpose. *Doe* d. *Brown* v. *Brown*, 11 East, 441. A testator gave one of his debtors certain messuages, and after other legacies and devises gave all the rest of his estate, not thereby devised, to his executors, or such

Intention of a testator to vary the terms of a will.

Where a legacy was given to *A. B.*, and in case of his death to his wife, and the wife after his death received the legacy, and the question at law was, whether she received the legacy in her own right, or as her husband's representative, it was held that evidence was inadmissible to prove that the testator when he was in *extremis* had declared his intention to be, that the husband should have the interest only during the life of the wife, and that if she survived him she should have the principal (*k*).

Where a father by his will made his three brothers, who were presbyterians, together with a clergyman, guardians of his children, in general terms, King, Chancellor, on a bill filed by the three against the clergyman, to have the children delivered up to them, rejected parol evidence of directions alleged to have been given by the testator, that the children should be educated as presbyterians; and he said, that as that was not expressed in the will, parol evidence was no more admissible in the case of a devise of a guardianship than in the case of a devise of land (*l*).

Oral declarations of the testator cannot be received for the purpose of explaining his intention (*m*), even where it is apparently ambiguous on the face of the will. Where the testator, after mentioning his wife and niece in his will, afterwards gave a particular estate to *her* for life, the Lord Chancellor refused to receive parol evidence to show which was meant (*n*).

So such extrinsic evidence is inadmissible to alter the *legal construction* of words, or to effect a legal presumption arising from the construction (*o*).

Where a legacy was given *A. B.* who was dead at the time, it was held, that evidence was not admissible to show the intent of the testator that the legacy should be transmissible (*p*).

Where a devise was to the son of the devisor, and the heirs of his body, on condition that he, they, or any of them, should not aliene, discontinue, &c.; parol evidence was held to be inadmissible to show the *intention* of the devisor, that the condition should extend to the son and his heirs (*q*).

So it was held to be inadmissible to show that the testator did not intend to pass the reversion and remainder in fee of certain settled lands, by a devise of all lands, tenements and hereditaments out of settlement (*r*).

An estate was devised in trust to receive the profits for three years, and if the heiress of the devisor should marry Lord *G.* within that time, in trust for her, for life, with remainder to her children in strict settlement; and if the marriage should not happen, in trust for Lord *F.*; the marriage did not

of them as should act, and made that debtor and *J. S.* his executors. They both acted, and *J. S.* filed a bill against the debtor for a proportion of his debt; the debtor offered parol evidence to show that the testator meant that the debt should be extinguished, and that he gave the attorney who drew the will instructions to release it, but that the attorney, and a counsel whose opinion was taken, were of opinion that the debt would be released by implication. But Lord Talbot said that the cases went no further than to let in parol evidence to rebut an equity or resulting trust; but as the residuary clause directed the property not before disposed of by the will to be divided between the executors, and as the debt in question had not been previously disposed of by the will, the evidence contradicted the express words of the will. *Brown* v. *Selwin*, Ca. Temp. Talbot, 240; 7 Bac. Ab. 337, 6th edit.

(*k*) *Lowfield* v. *Stoneham*, Str. 1261.

(*l*) *Storke* v. *Storke*, 3 P. Wms. 51. But see 2 Ves. 56.

(*m*) 2 Vernon, 624.

(*n*) *Castleton* v. *Turner*, 3 Atk. 258. *Hampshire* v. *Pearce*, 2 Ves. 216.

(*o*) Per Ld. Talbot, 2 Bro. C. C. 821.

(*p*) *Maybank* v. *Brookes*, Bro. C. C. 84.

(*q*) *Cheney's Case*, 5 Co. 68. 2 Bro. C. C. 821.

(*r*) *Strode* v. *Falkland*, 2 Vernon, 621; but it is stated by Salkeld that the decree was reversed; according to Vernon, it was compromised.

take place; and it was held that parol evidence was inadmissible of a declaration by the testator that Lord *G.*'s refusal should not disinherit his heir-at-law (*s*).

To vary legal construction, &c.

Upon a question of legal construction upon the terms of a will, whether the devisor gave an estate for life, or an estate in fee, Lord Holt was of opinion that the intention of the devisor must be collected, not from collateral matters, but from the will itself; but the other Judges were against him, and their opinion was confirmed in the Exchequer Chamber (*t*). And in some other instances the Courts have taken into consideration the state and circumstances of the family, in order to enable them the better to construe the testator's real intention as to the *personal* estate (*u*).

Where, however, extrinsic evidence is allowed to operate so far as to give to the terms of a will a different construction from that which the terms abstractedly imply, the rule seems to be carried farther than is warranted by principle or analogy (*x*).

Where evidence was offered of the value of an estate charged with sums of money payable to the sisters of the devisee, as an argument in favour of a particular construction, the Court of King's Bench held that it was nugatory and inadmissible as matter of proof, although it might have been of great weight had the Court been called upon to make a will for the testator (*y*).

(*s*) *Bertie* v. *Falkland*, Salk. 231; Vern. 333.

(*t*) *Cole* v. *Rawlinson*, Salk. 234. See *Doe* v. *Fyldes*, Cowp. 833. *Doe* v. *Dring*, 2 M. & S. 455. *Bootle* v. *Blundell*, 1 Merivale, 316. *Richardson* v. *Edmonds*, 7 T. R. 640. *Standen* v. *Standen*, 2 Ves. jun. 593. Vin. Ab. tit. *Devise*, Y. 2, pl. 10. *Pepper & Ux* v. *Winyeve*, Bac. Ab. tit. *Wills*, 367, 6th edit.

(*u*) See the cases cited in the preceding note; and see *Baldwin* v. *Karver*, Cowp. 312; where Lord Mansfield observed, that all cases upon the construction of wills depend upon the particular penning of the wills themselves, and the state of the families to which they relate; and in the case of *Jones* v. *Morgan*, (cited in *Lytton* v. *Lytton*, 4 Bro. Ch. 1,) the same learned Judge observed, that to construe a will the *intent* is to be taken from the whole will together, applied to the subject-matter to which the will relates. Sir D. Evans, 2 Pothier, 212, remarks also, that Lord Loughborough, in quoting the opinion of Lord Mansfield, took notice of different cases in which certain words were held to apply to a failure of issue at a certain period, although taking the words strictly, and construing them without considering the circumstances, would have imported a general failure of issue. (Vide *Lytton* v. *Lytton*, 4 Bro. Ch. 1.) In the case of *Masters* v. *Masters*, (1 P. W. 420,) the testator, after bequeathing a legacy to two particular hospitals in Canterbury, by his codicil bequeathed another sum "*to all and every the hospitals.*" As the testator had by his will taken notice of two hospitals in Canterbury, and as it appeared *in evidence* that he lived there, it was held, that the intention sufficiently appeared to apply the latter bequest to the hospitals in Canterbury. And see the distinction taken by Lord Thurlow in *Jeacock* v. *Falkener*, 1 Bro. C. C. 296.

(*x*) See Lord Hardwicke's observations in *Blinkhorne* v. *Feast*, 2 Ves. 28. *Strode* v. *Russell*, 2 Vern. 624. *Castleton* v. *Turner*, 3 Atk. 258. *Petit* v. *Smith*, 1 P. Wms. 9. *Brown* v. *Langley*, 2 Barn. 118. *Brown* v. *Selwin*, C. Temp. Talbot, 240. *Jeacock* v. *Falkener*, 1 Bro. C. C. 296. The doctrine once prevailed that a Court might receive evidence which was inadmissible before a jury; that, however, has since been denied, per Buller, J. 2 H. B. 522.

(*y*) *Doe* v. *Fyldes*, Cowp. 833. In *Oates* v. *Brydon*, 3 Burr. 1895, Ld. Mansfield went into an inquiry as to value, in order to found an argument upon the result, as to the construction of a will, and in order to show that property of such small value could not be intended to be the subject of particular limitations; but the same learned Judge seems to have been of a different opinion in the case of *Doe* v. *Fyldes*, just cited, where he concurred with the other Judges; and in *Goodtitle* v. *Edmonds*, 7 T. R. 635, Ld. Kenyon intimated that the case of *Oates* v. *Brydon* had not been satisfactory to the profession, and that he believed that Lord Mansfield had afterwards doubted whether he had proceeded upon substantial grounds. In the case of *Beugough* v. *Walker*, (15 Ves. 514,) the Master of the Rolls said, "You cannot refer to extrinsic evidence to construe a will, but you may to show with reference to what a will was made."

In the late case of *Doe* d. *Oxendon* v. *Sir A. Chichester* (*z*), it was observed by Sir V. Gibbs, that courts of law had been jealous of extrinsic evidence for the purpose of explaining the intention of a testator; and that he knew of one case only in which it is permitted, that is, where an ambiguity is introduced by extrinsic circumstances. To vary legal construction, &c.

The objection does not apply where evidence is offered not for the purpose of *contradicting* or *varying* the effect of a written instrument of admitted authority, but where on the contrary it is offered in order to *disprove* the legal existence, or rebut the *operation* of the instrument. To do this, is not to substitute mere oral testimony for written evidence, the weaker for the stronger, but to show that the written ought to have no operation whatsoever; an object which must usually be accomplished by oral evidence. Admissible to disprove, &c.

As a written instrument in general derives its authenticity from the aid of external evidence, it may in like manner be defeated. Thus a written instrument may be impeached by extrinsic evidence, on the ground of fraud, even in the case of a record (*a*). Fraud.

So also in the case of a private agreement oral evidence is admissible to prove a fraudulent omission (*b*). Where there was an agreement for a lease, evidence was admitted of a parol agreement that the rent should be clear of all taxes, but that the plaintiff reduced the agreement to writing without mentioning that point, and that the defendant could not read (*c*). In order to impeach a will, and to show that it had been fraudulently submitted to a testator for his signature, parol evidence was admitted, that at the time of signing the will he asked whether the contents were the same with those of a former will, and that he was answered in the affirmative (*d*). So it may be shown that one will was substituted for another (*e*). So in general it may be shown that fraud and imposition were practised upon a party to an instrument, by a fraudulent omission, or misrepresentation of the contents, especially if the party were illiterate (*f*).

And it is a general principle of law, that where a statute makes a deed void, as for a charitable or superstitious use, or where it is void at common law, as being *contra bonos mores*, the proof of invalidity may be collected not only from the instrument itself, but from circumstances which, though they do not appear on the face of the deed, may be taken into consideration (*g*).

Again, in the case of all covenants to stand seised to uses, a party is at liberty to prove other considerations than those mentioned in the deed (*h*).

In the case of *Filmer* v. *Gott* (*i*), where the considerations mentioned in

(*z*) 4 Dow. 65; *infra*, 774.

(*a*) B. N. P. 173. *Paxton* v. *Popham*, 9 East, 421. *Doe* v. *Allen*, 8 T. R. 147. *R.* v. *Mattingley*, 2 T. R. 12. *Supra*, tit. FRAUD; and see tit. FORGERY. But such evidence is not admissible to defeat a record by showing a rasure, &c.; as that a rasure was made in a precept since it was issued. *Dickson* v. *Fisher*, Burr. 2267; and tit. JUDGMENT, Vol. II.

(*b*) *Lord Irnham* v. *Child*, 1 Bro. C. C. 92; 3 Atk. 389.

(*c*) *Jones* v. *Statham*, 3 Atk. 388. Note, the agreement was executory.

(*d*) *Doe* d. *Small* v. *Allen*, 8 T. R. 147.

(*e*) Ibid.

(*f*) 3 Atk. 389. As where a mortgagee draws the mortgage deed and omits the covenant for redemption. So where there were to be two mortgage deeds, an absolute one and a defeasance, it was held that the mortgagor might prove an agreement to execute the latter. Ibid.

(*g*) Per Holroyd, J., in *Doe* d. *Welland* v. *Hawthorn*, 2 B. & A. 96. And therefore a lease to trustees may be avoided by a subsequent declaration of trust by some of the trustees. 2 B. & A. 96. See as to superstitious uses, 1 Ed. 6, *Carey* v. *Abbott*, 7 Ves. 490.

(*h*) Per Ld. Kenyon, 3 T. R. 475.

(*i*) Cited by Ld. Kenyon, in *R.* v. *Scammonden*, 3 T. R. 474; 7 Bro. P. C. 70.

Admissible to disprove, &c.

the deed were 10,000*l.*, 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 being worth 30,000*l.* On appeal to the House of Lords, it was held that the commissioners had done right; and the jury finding that natural love and affection formed no part of the consideration, the deed was afterwards set aside by the Lord Chancellor.

Although a party, in order to prove fraud, may adduce extrinsic evidence to show the inadequacy of the consideration when compared with the value of the estate, the party who claims under the deed cannot be admitted to show a consideration in support of it, different from that which is expressed. Upon a bill to set aside a conveyance of an estate of inheritance worth 40*l.* a year, conveyed to the defendant by an infirm old man of the age of seventy-two, in consideration of an annuity of 20*l.*, it was held, that the defendant was not at liberty to show blood and kindred to have been the real consideration of the conveyance, and to prove that the grantor had often declared that he had rather that his kinsman (one of the defendants) should have the estate for this annuity than any other person for a valuable consideration (*j*).

In cases also where the public have an interest in the real nature of a transaction between two parties, they are not bound by the representation made in the private agreement, but may impeach it *pro tanto*, as to any misrepresentation; for this misrepresentation may properly be considered as a species of fraud upon the public. Thus, although the private deed of conveyance of an estate expressed 28*l.* to be the purchase-money, it was held, that as between two contending parishes, it was competent to one of them (*k*) to show that the real consideration was 30*l.*, in order to establish a settlement under the statute (*l*). And, in general, extrinsic evidence is admissible for the purpose of avoiding a particular instrument, on the ground of a fraud attempted to be practised on the revenue; as by proof that under the particular circumstances the instrument ought to have been differently stamped (*m*).

To avoid, &c. illegality.

Parol evidence is also, in general, admissible for the purpose of showing that an instrument is void on the ground of some illegality committed by the parties; as that it is void for usury, or because it is given to secure a gaming debt, or founded upon some illegal consideration (*n*). And, in general, where a statute avoids an instrument which does not fully state the consideration on which it is founded, extrinsic evidence is admissible to show that the directions of the statute have not been complied with.

Mistake.

Oral evidence is also admissible for the purpose of correcting a mistake (*o*); a practice more frequent in courts of equity than of common law (*p*). In such cases, especially where recourse is had to equity for relief,

(*j*) *Clarkson* v. *Hanway & al.*, 2 P. W. 203.

(*k*) *R.* v. *Scammonden*, 3 T. R. 474; see also *R.* v. *Laindon*, 8 T. R. 379. *R.* v. *Mattingley*, 2 T. R. 12; and *infra*, 791.

(*l*) 9 Geo. 1, c. 7, s. 5.

(*m*) *Supra*, 254, and *infra*, tit. STAMP.

(*n*) An agreement, varying from the condition of the bond, may be pleaded, to show that the bond was founded on an illegal agreement. *Greville* v. *Atkins*, 9 B. & C. 462. *Supra*, 101, 245. So that it has been obtained by *duress*, 765.

(*o*) A contract, apparently usurious, may be shown to be legal by evidence of a clerical error. *Anon.* 1 Freem. 253. *Booth* v. *Cooke*, ib. 264.

(*p*) The usual, and certainly the safer course, in case of a mistake, is to apply to a court of equity for relief, in the first instance; but a party is not obliged to resort to equity for relief; and there seems to be no reason why such evidence should not be

the extrinsic evidence is not offered to contradict a valid existing instrument; but to show, that from accident or negligence the instrument in question has never been constituted the actual depository of the intention and meaning of the parties. To show mistake.

Where parties covenanted to convey an estate, in trust, to raise 30,000 *l.* to pay off debts and incumbrances, with remainder over, parol evidence was admitted to show that it was the concurrent intention of all the parties to raise that sum in addition to the sum of 24,000 *l.*, with which the estate was encumbered (*q*).

In cases also of marriage settlements, where mistakes have been committed, and, in consequence, the deeds have varied from the instructions of the parties, they have been rectified by a court of equity (*r*). The same has also been done in instances of mercantile and other contracts (*s*). Where two persons entrust a third to draw up minutes of their intention, a mistake of his may, it has been held, be relieved against (*t*). Cases of this nature are nearly of kin to those of fraud; it is, in point of conscience and equity, an actual fraud to claim an undue benefit and advantage from a mere mistake, contrary to the real intention of the contracting parties.

Where a party at the time of executing a deed pointed out a mistake, which the other agreed to rectify, but afterwards refused to do so, parol evidence of the fact was held to be admissible, on the ground of fraud (*u*).

Such evidence ought not, for obvious reasons, to be allowed to prevail, unless it amount to the *strongest possible proof* (*x*). The most satisfactory evidence for this purpose consists of the written materials and instructions which were intended by the parties to be the basis and ground-plan for the construction of the intended instrument (*y*).

Where a mistake was alleged to have been made in a settlement by an attorney's clerk, the Court would not allow it to be corrected by the mere testimony of the attorney himself, who had received oral instructions for the preparation of the deeds; nothing appearing in the hand-writing of the parties to show that a mistake had been committed (*z*).

In general, where a written document is given in evidence as containing

received by way of defence in a court of law.

(*q*) *Shelburne* v. *Inchiquin*, 1 Bro. C. C. 338. The evidence, however, proved to be insufficient, and no more than 30,000 *l.* was ordered to be raised. The decree was affirmed in the House of Lords. See also *Baker* v. *Paine*, 1 Ves. 457. *Towers* v. *Moore*, 2 Vern. 98.

(*r*) *Barstow* v. *Kilrington*, 9 Ves. 59. *Randal* v. *Randal*, 2 P. W. 469.

(*s*) See *Henkle* v. *Royal Exchange Assurance Comp.* 1 Ves. 317. *Thomas* v. *Fraser*, 3 Ves. jun. 399; 10 Ves. 227. And see 1 Atk. 545. *Baker* v. *Paine*, 1 Ves. 456.

(*t*) 1 Bro. C. C. 350.

(*u*) Per Ld. Talbot, 1 Bro. C. C. 54. *South Sea Co.* v. *Oliffe*, 2 Ves. 374. *Pitcairne* v. *Ogbourne*, Ibid.

(*x*) Per Ld. Hardwicke, in *Henkle* v. *The Royal Exchange Assurance Co.*, 1 Ves. 318. In that case, upon a bill to rectify a mistake in a policy of insurance, the principal evidence consisting in the deposition of an agent of the company, who had transacted business for them, the Court held that it was not sufficiently certain to be relied on. Ld. Hardwicke, C. J., in that case observed, that the Court of Chancery had jurisdiction to relieve against plain mistakes in contracts in writing, as well as against fraud; so that if reduced into writing, contrary to the intention of the parties, that, on *proper proof*, would be rectified. Ld. Eldon, C., in a subsequent case, observed on the looseness of this expression, as it left it to every Judge to say, "whether the proof was that *proper proof* which ought to satisfy him."

(*y*) *Baker* v. *Paine*, 1 Ves. 457.

(*z*) *Hardwood* v. *Wallis*, cited 2 Ves. 195. Hence it seems that the Court, in such cases, will not rely on mere parol evidence alone. And see the *dictum* of Sir Thomas Clarke to that effect, 1 Dickenson, 295. And see *Shergold* v. *Boone*, 13 Ves. 373. 376.

To avoid, &c.

an admission by the adversary, parol evidence is admissible to explain it, or to show that it originated in mistake (*a*).

The principle on which evidence is received to explain mistakes in matters of contract between private persons, does not extend to the admission of evidence to show that a mistake or alteration has been made in records: those memorials having been made and kept under the immediate authority of the law, and by officers in whom confidence is for that purpose reposed, it is to be concluded that they have been correctly made, and faithfully preserved (*b*). But such evidence is admissible to show a mistake in a memorial not of record; as a court-roll (*c*).

Fraud.

Such extrinsic evidence is also admissible for the purpose of proving fraud. Thus, although a buyer of goods under a written contract cannot show a previous parol contract for the purpose of varying the terms of the written one, he may show by extrinsic evidence that the seller, by some fraud, prevented him from discovering a defect which he knew to exist (*d*).

To discharge, &c.

It is obvious that the general exclusive principle is also inapplicable in all cases where the party admits that the deed or other instrument did once legally exist as such, but offers extrinsic proof to show that it has been discharged by some subsequent instrument or agreement (*e*), or by the receiving payment or satisfaction (*f*).

To give effect to a written instrument.

II. In the next place, extrinsic parol evidence is admissible generally to *give effect* to a written instrument, by *establishing* its authenticity, *applying* it to its proper subject-matter, and also, as ancillary to the latter object, for the purpose, in some instances, of *explaining* expressions capable of conveying a definite meaning by virtue of that explanation, and of annexing customary incidents; and also, in other instances, for the purpose of removing *presumptions* arising from extrinsic facts which would otherwise obstruct such application.

To establish, &c.

Whenever an instrument is not proved by mere production, it must necessarily derive its credit and authenticity from extrinsic evidence (*g*).

To apply.

In the next place, it is always necessarily a matter of extrinsic evidence to *apply* the terms of an instrument to a particular subject-matter, the existence of which is also matter of proof. A difficulty in this case occurs, where, although the terms of the instrument be sufficiently definite and distinct, the objects to which it is to be applied are not equally so, and where it is doubtful whether the description applies at all to the particular object pointed out by the evidence, or whether it be not equally applicable to several distinct objects.

Latent ambiguity.

The general rule has already been adverted to, that a *latent ambiguity* (that is, an ambiguity arising from extrinsic evidence) may be removed by

(*a*) *Holsten* v. *Jumpson*, 4 Esp. C. 189; and see 1 T. R. 182.

(*b*) *Reed* v. *Jackson*, 1 East, 355. In *Hall* v. *Wiggett*, 2 Vern. 547, an entry in the steward's book, and parol proof by the foreman of the jury of copyholders, was admitted to show that a feme covert had surrendered the whole of her copyhold estate, although the surrender on the roll, and admission, were but of a moiety. And see *Towers* v. *Moore*, 2 Vern. 98. Amendments in records are, in numerous instances, made by the Courts themselves, on proper application.

(*c*) 1 Leon. 289. *Kite* v. *Queutin*, 4 Co. 25. *Towers* v. *Moore*, 2 Vern. 98. *Hill* v. *Wiggett*, Ib. 547, and *supra*, 767. *Walker* v. *Walker*, Barnard, 215. Scriven on Copyholds, 378.

(*d*) *Kain* v. *Old*, 2 B. & C. 634, citing *Pickering* v. *Dowson*, where it was so laid down by Gibbs, C. J.

(*e*) *Supra*, tit. DEED, ASSUMPSIT; and *supra*, 757, note (*p*).

(*f*) *Supra*, ACCORD AND SATISFACTION.

(*g*) *Supra*, Vol. I. WRITTEN EVIDENCE.

extrinsic evidence. The illustration most usually given of the operation of this rule is that of a description in a will of a devisee, or of an estate, where it turns out that there are two persons, or two estates, of the same name and description. Where the testatrix devised an estate to her cousin John Cluer, and there were two persons, father and son, of that name, evidence was admitted to show that John Cluer, the son, was meant (*h*). Latent ambiguity.

So in Lord *Cheney*'s case (*i*), it was held, that if a testator, having two sons of the same name of baptism, and supposing the elder, who had long been absent, to be dead, devise his land to his son generally, the younger son may be permitted to prove the intent of the father to devise to him, and to show that, at the time of the devise, he thought that the other son was dead, or that at the time of making his will, he named his son John *the younger*, and the writer left out the addition.

According to Lord Coke, no inconvenience can result if an averment be taken in such a case, for he who sees the will by which the land is devised cannot be deceived by any secret averment; when he sees the devise to the testator's son generally, he ought, at his peril, to inquire which son the testator intended, which may easily be known by him who wrote the will, and by others who were privy to the intent; and if no direct proof can be made of his intent, then the devise is void for uncertainty (*k*).

So if a person grant his manor of *S.* generally, and it appear that he has two manors of *S.* (south *S.* and north *S.*), parol evidence is admissible to show which was intended (*l*).

Where the testator gave 100 *l.* to the four children of Mrs. Bamfield, and it appeared that she had four children by Mr. Bamfield, her latter husband, and two children by Mr. P. her first husband, a declaration by the testator that he had provided for the four children of Mrs. B., but would give nothing to P.'s children, was admitted in evidence to show who were meant by the description of the four children in the will (*m*).

So if a man, having two manors of the same name, levy a fine of one, without distinguishing which, parol evidence is admissible to show which was meant (*n*).

Parol evidence is admissible for the purpose of raising such an ambiguity (*o*). And in the case of a will, &c., the declarations made by the testator *at the time* of making the will are admissible in order to explain an ambiguity of this nature.

Where the testator devised to his grand-daughter, *Mary Thomas* of *Llechloyd*, and it appeared that he had a grand-daughter of the name of *Ellenor Evans*, at *Llechloyd*, and a great grand-daughter, *Mary Thomas*, who lived elsewhere, evidence on the part of *Ellenor Evans* was admitted to prove, that when the will was read over to the testator, he said that there was a mistake in the name of the woman to whom he intended to give the

(*h*) *Jones* v. *Newsam*, 1 Bl. 60. Yet if there be father and son of the same name, it is usually to be presumed that the father is meant by the name used simply, and without the addition of 'the younger.'

(*i*) *Lord Cheney's Case*, 5 Rep. 58, b. See also *Careless* v. *Careless*, 1 Merivale, 354.

(*k*) 5. Rep. 58.

(*l*) Bac. El. Rule 23.

(*m*) *Hampshire* v. *Pearce*, 2 Ves. 216; and note, that in the same will, the testator having subsequently given 300 *l.* to the children of Mrs. *B.*, Sir John Strange, the Master of the Rolls, held that the declaration was inadmissible as to the 300 *l.*, being contradictory of the will.

(*n*) *Partridge* v. *Strueye*, Plow. 85, b. *Mears* v. *Ansell*, 3 Wilson, 376.

(*o*) 6 T. R. 671; 1 Bro. C. C. 85. 342. 350.

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house, but that there was no occasion to alter it, as the place of abode and the parish would be sufficient (*p*). But in the same case it was held that evidence was properly rejected of declarations made by the testator at *other times* previous to the making of his will, of his great regard for the defendant *Mary Thomas*, and of his intention to give the house to her (*q*).

As an ambiguity arising from too great generality of description may be removed by oral evidence, which restrains and confines, and applies that description to a single object, although, on the mere comparison of the terms with several objects, they may be equally applicable to more than one; so it is a rule that a redundant and superfluous description, which is inapplicable to an object *well ascertained* by previous or subsequent description, will not prevent such application. Thus, where property was given to *A.* and *B.* legitimate children of *C. D.*, it was held that *A.* and *B.* the illegitimate children of *C. D.* were entitled to take (*r*). So if a grant be made to *William*, bishop of Norwich, the name of the bishop being *Richard*, the grant will be good, the intention being sufficiently clear and apparent (*s*). So if a devise be made to John, the son of *J. S.*, and *J. S.* has but one son, whose name is James (*t*).

Upon the same principles, if the description in the instrument apply *partially* to each of two persons, but to neither of them entirely, so that a doubt arises which was intended, oral evidence is admissible to remove it. For as an erroneous and superfluous description will not prevent the application of the description which in part is certain, and as a description equally applicable to two objects may be ascertained and fixed by external evidence, it seems to follow, that where the description, although redundant and partially erroneous, is still limited to two or more objects, to whom it is equally applicable, then the generality may be further limited by means of extrinsic evidence (*u*).

It is observable that in the case of a will, evidence for the purpose of giving effect to the maker's intention, has been more liberally admitted than in the case of any other instrument, and in some instances to a greater extent than is strictly warranted by any general principle. Some authorities on this subject have already been referred to, and others will be cited under the head of WILLS. It will however be proper in this place briefly to refer to the general principles and rules which govern this large class of cases, either in common with others of a similar nature, or as peculiar to the class.

First, then, evidence of the facts and circumstances in respect of which

(*p*) *Thomas* v. *Thomas*, 6 T. R. 671.

(*q*) Ibid. by Lawrence, J. at the trial; the admission of the evidence was afterwards approved of by the Court of K. B. And see 8 Vin. Ab. 312, pl. 29; 2 Ves. 216.

(*r*) *Standen* v. *Standen*, 2 Ves. jun. 589; see 2 Pothier, by Sir D. Evans, 210. Where a woman made a will in favour of a person whom she described to be her husband, and it appeared that he had another wife, Arden, Master of the Rolls, held that the disposition was void; but this was founded not on any defect in the description, but on the principle, that where a legacy is given to a person in a character which he has falsely assumed, and which alone can be supposed to be the motive of the bounty, the law will not permit him to avail himself of it. Where the description is true in part, but not true in every particular, parol evidence is admissible provided there be enough to justify the reception of the evidence. *Millar* v. *Travers*, 8 Bing. 248. See *Careless* v. *Careless*, 1 Meriv. 384. *Beaumont* v. *Field*, *supra*.

(*s*) Co. Litt. and Evans's Pothier, vol. 2, 209.

(*t*) *Dowsett* v. *Sweet*, Amb. 175. *Bradwin* v. *Harper*, Amb. 174. See also *Parsons* v. *Parsons*, 1 Ves. 166. *Fonnereau* v. *Pointz*, 1 Bro. C. C. 472.

(*u*) See the case of *Thomas* v. *Thomas*, 6 T. R. 671, above cited.

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the terms of a will are to be applied are necessarily admissible for the purpose of applying them in the strict and primary sense (*v*); and it is an inveterate rule, founded on plain and obvious principles, that where the terms of the instrument are capable of application in their strict and primary acceptation, they must be applied in that sense and no other (*w*). But, secondly, where it appears from evidence of the material facts, that the terms of a will are incapable of application in their strict primary acceptation, evidence is admissible to show that they are still capable of application in a secondary sense, in order so to apply them. In other words, evidence of material extrinsic facts and circumstances (*x*) is admissible simply in aid of the

(*v*) That is where such primary sense is not limited or confined by the rules of legal construction. The great principle is to give effect to the testator's intention in the first place, and within certain limits, by using the words not in their strict primary sense, but in that which was manifestly intended by the testator. See *Hoyle* v. *Hamilton*, 4 Ves. 437; 2 Eden, 196, n. (*a*), and the cases there cited; and Wigram's Examination, &c., p. 14. And where the sense is not so limited and confined by the context, although the terms are to be applied in the first instance according to their primary sense and acceptation, yet where they are, upon the evidence, incapable of such application, then, in furtherance of the same principle of effectuating the testator's intention, they may, if capable, and within certain limits, be applied in a secondary sense. Where however the sense in which a term is used is determined by the context, or by the testator's own exposition of his meaning, the term can no longer be applied in evidence in a popular or secondary sense, for this would be to use his words in a sense different from that intended by the testator. Thus where the testator by his use of the word *close* showed that he meant to use it in its ordinary sense of inclosure, it was held that it could not afterwards be applied by the aid of extrinsic evidence to comprehend several inclosures, as meaning, in the popular sense in which the word was used in that part of the country, a *farm*. *Doe* v. *Watson*, 4 B. & Ad. 799.

(*w*) In the case of a demise of "my real estate," property subject to a power will pass if the devisor have no real estate; but if there be any real estate on which the words can operate, it is otherwise. *Napier* v. *Napier*, 1 Sim. 28. *Lewis* v. *Lewellyn*, 1 Turn. 104. Sugden on Powers, c. v. s. 56 *a*. The word *child* may be applied by evidence to an illegitimate child, where an application, according to the strict legal meaning of the word, is of necessity excluded; but if no such necessity exist, the word must be used in its strictly legal sense. *Godfrey* v. *Davis*, 6 Ves. 43. *Cartwright* v. *Vawdrey*, 5 Ves. 530. *Swain* v. *Kennerley*, 1 V. & B. 469. *Harris* v. *Lloyd*, 1 Turn. & R. 310. And see Wigram's Examination, &c., p. 16, 2d edition. *Miller* v. *Travers*, 8 Bing. 244; *infra*, tit. WILL. A power over a personal estate will not pass under the words "my personal estate," whether the testator at the time of making the will had any personal estate or not, because the words are applicable to such personal estate as *may* possibly be afterwards acquired. *Andrews* v. *Emmett*, 2 Bro. C. C. 297. *Nannock* v. *Horton*, 7 Ves. 391. *Jones* v. *Tucker*, 2 Mer. 533. Wigram's Examination, &c. 2d ed. p. 16, and the cases there cited. In *Druce* v. *Dennison*, 6 Ves. 385, it was indeed held that, for the specific purpose of raising a case of election, extrinsic evidence was admissible to show that the testator by the words "my personal estate," meant personal estate subject to a power. This case, however, as is observed by Mr. Wigram, p. 27, stands opposed to a strong current of authorities. In further illustration of the general rule above stated, the case of *Doe* d. *Richardson* v. *Watson*, 4 B. & Ad. 799, may be cited. The question was whether two closes of land passed under the word *close*, and it was held that they did not; and Parke, J. observed, "Generally speaking, evidence may be given to show that the testator used the word *close* in the sense which it bore in the country where the property was situate, as denoting a farm, but here such evidence was not admissible, because it is manifest that in this will the testator used the word *close* in its ordinary sense, as denoting an inclosure; for the word *closes* occurs in other parts of the will. See also *Roys* v. *Williams*, 3 Sim. 573. *Doe* d. *Westlake* v. *Westlake*, 4 Dow. P. C. 65. *Doe* v. *Bower*, 3 B. & Ad. 453. *Doe* d. *Templeman* v. *Martin*, 4 B. & Ad. 771. Lord Bacon, in his comment on his 13th maxim, *Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram*, states the rule thus, "If I have some land wherein all the demonstrations are true, and some wherein part of them are true and part false, then shall they be intended words of true limitation to pass only those lands wherein all those circumstances are true."

(*x*) It seems to be a general rule that all facts relating to the subject and object of the devise, as to the possession of the

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construction of a will. And, thirdly, it is a general rule that not only material facts, but also declarations made by the testator are under certain circumstances admissible, when necessary in order to ascertain the person or thing intended, that is, the object of the testator's bounty, or the subject of disposition, where the terms are applicable indifferently to more than one person or thing (*y*): of the operation of this rule several instances have already been given. The authorities go still further: it has been held that difficulties arising in the application of the terms of a will from defect in the description of the person or thing intended, may be removed by the aid of extrinsic evidence, even although no part of the description be perfectly correct. One of the strongest instances to this effect is the case of *Beaumont* v. *Fell* (*z*). A will was made in favour of *Catherine Eardley*, and evidence was allowed to show that *Gertrude Yardley* was the person meant; no such person as Catherine Eardley appearing to claim the legacy. Evidence was admitted to prove that the testator's voice, when he made his will, was very low and scarcely intelligible; that the testator usually called Gertrude Yardley by the name of Gatty, which the scrivener who made the will might easily mistake for Katy; and that the testator referred the scrivener to his wife for the name of the legatee, and she afterwards declared that Gertrude Yardley was the person intended.

Where the testator gave a legacy to John and Benedict, sons of John Sweet, and John Sweet the father had two sons only, viz. James and Benedict, evidence was admitted to prove that the testator used to address James Sweet by the name of "Jackey" (*a*). Where a legacy was given in moieties, one to Ann, the daughter of Mary Bradwin, the other to the children of Mary Bradwin, another daughter of the first-named Mary Bradwin, and it appeared that when the will was made Ann Bradwin was dead, having left two children, but that Mary Bradwin the daughter was living, and single, the Master of the Rolls held that evidence was admissible to explain the legacy (*b*).

The apparent impossibility of reconciling upon principle the giving effect to a description inapplicable to any subject with the undisputed law that even in the case of a legacy evidence is inadmissible to fill up a blank (*c*), seems to induce the necessity of at once placing the reception of such evidence upon the footing of a peremptory and arbitrary exception to general rules and principles, and to exclude all attempts at reconciliation. In the case of a blank, the effect of the evidence might simply be to supply a name mentioned by the testator: in the case of a total misdescription, evidence is ne-

testator or other person, the mode of acquisition, local situation, and distribution of the property, are admissible to ascertain the meaning of a will. See the observations of Parke, J., *Doe* v. *Martin*, 4 B.&Ad. 785.

(*y*) See note (*w*). Thus the word child may be construed to mean an illegitimate child. *Gill* v. *Shelley*, Wigram's Examination, &c., p. 31; and see *Steede* v. *Berrier*, 1 Freem. 292. 477. The words "my real estate" may be shown to mean a power. *Lewis* v. *Lewellyn*, 1 Turn. 104. *Denn* v. *Roake*, 5 B. & C. 720; Sug. on Powers, c. 5, ss. 5, 6. And see in further illustration of this rule, Wigram's Examination, &c. p. 29. *Napier* v. *Napier*, 1 Sim. 28. *Wilkinson* v. *Adam*, 1 V. & B. 422. *Beachcroft* v. *Beachcroft*, 1 Mad. 436. *Bayly* v. *Snelham*, 1 Sim. & Stu. 78. *Woodhouslie* v. *Dalrymple*, 2 Mer. 419.

(*z*) 2 P. Wms. 141. See also Ld. Thurlow's *dictum* in *Maybank* v. *Brooks*, 1 Bro. C. C. 85. And see *Brown* v. *Langley*, 2 Barn. 18.

(*a*) *Dowsett* v. *Sweet*, Ambl. 175; and see 1 Bro. C. 31. 85. See also *Masters* v. *Masters*, 1 P. W. 421.

(*b*) *Bradwin* v. *Harper*, Ambl. 374.

(*c*) In the case of *Beaumont* v. *Fell*, the Master of the Rolls, although he admitted the evidence, said, "If this had been a grant, nay, had it been a devise of land, it had been void by reason of the mistake both of the christian and surname."

cessary not simply to *supply* but to *substitute* a description. The distinction between a latent mistake and one which is patent is at best but technical, and it seems to be very questionable whether Lord Bacon's rule, as to ambiguities, be applicable to the case not of a double meaning but to simple deficiency of description (*d*). Latent ambiguity.

It has been said, that as before the statute a nuncupative will would have been good, the Courts might, notwithstanding the statute which required a will to be in writing, use extrinsic evidence as before. This is an argument which, carried to its full extent, would go far to repeal the statute altogether, and which is wholly at variance with several decisions on other branches of the Statute of Frauds. It has also been (*e*) urged, that the admission of such evidence is no violation of the statute, for this reason, that the names of persons having no intrinsic meaning, the will is rectified without any addition to the sense. Were this argument well founded, it would warrant the reception of extrinsic evidence to supply a blank. As the main purpose of a will is to ascertain *what* the testator meant to give, and to *whom*, it would certainly be singular that, under a statute requiring such meaning to be expressed in writing, it should be unnecessary that either the person or thing should be so described; neither does the case seem to be properly within the scope of the principle that an ambiguity created by evidence may be removed by evidence (*f*). There is a wide distinction between evidence which raises an ambiguity by showing that the words are capable of several applications, and that which shows that it is incapable of any application either in a primary or secondary sense; and there is an equally wide distinction between evidence which applies words in their natural sense to one of several objects, one or other of which must certainly have been intended, and evidence to annex a meaning to terms of themselves inapplicable.

In general, where there is any doubt as to the extent of the subject devised by will, or demised or sold, it is matter of extrinsic evidence to show what is included under the description as parcel of it (*g*). The question being To prove whether parcel or not.

(*d*) See Wigram's Examination, &c. 98. 135.

(*e*) Roberts on the Statute of Frauds, 16, 17.

(*f*) See 1 W. Bl. 60; 7 T. R. 148; 1 Bro. C. C. 350; Sug. Ven. 137; 1 Phill. Ev. 531, 7th ed.; 2 Roberts on Wills, p. 13.

(*g*) *Doe* v. *Burt*, 1 T. R. 701. Buller, J. said, whether parcel or not of the thing demised, is always matter of evidence. See *Kearslake* v. *White*, 2 Starkie's C. 508, where it was held, that the demise of a messuage, with all rooms and chambers thereto belonging and appertaining, included all that was occupied together as the entire messuage at one and the same time, and that the demise did not include a room which had once formed part of the messuage, but which had been separated from it for many years anterior to the demise. *Herbert* v. *Reid*, 16 Ves. 481. In *Doe* d. *Beach* v. *Earl of Jersey*, 3 B. & C. 870, under a demise by the testator of all his Briton Ferry estate, it was held, that accounts of deceased stewards of former owners, in which they charged themselves with the receipt of various sums of money on account of the owners, were admissible in evidence to show that particular lands had gone by the name of the Briton Ferry estate. See *Goodtitle* v. *Southern*, *infra*. So in the case of a written agreement to convey all those brickworks in the possession of *A. B.*, parol evidence is admissible of what passed at the time of the agreement, to show what was intended to pass. *Paddock* v. *Fradley*, 2 C. & J. 90. Where a fine was levied of twelve messuages in Chelsea, and it appeared that the cognisor had more than twelve messuages in Chelsea, parol evidence was admitted to show which were meant. *Doe* v. *Wilford*, R. & M. 88. There being a devise of Trognes Farm, in the occupation of *M.*, it may be shown that *M.* was not tenant. *Goodtitle* v. *Southern*, 1 M. & S. 299. Where a deed purported to grant all the coal mines in the lands in the occupation of widow *K.* and son, and the grantor had not at that time any lands in the occupation of widow *K.* and son, and the deed

Latent ambiguity. To prove whether parcel or not.

whether a description in a lease (*inter alia*) of a piece of ground, late in the occupation of *A.* (the piece of ground being a yard, then in the occupation of *A.*), a cellar and certain wine-vaults under it, passed, evidence was admitted to prove, that at the time of the lease the cellar and vaults were not in the occupation of *A.* but were under lease to *B.* another tenant of the lessor, and that the defendant never claimed them until the expiration of *B.*'s lease. But where a subject-matter exists, which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity; and no evidence can be admitted for the purpose of applying the terms to a different object (*h*). In the case of *Doe* d. *Sir A. Chichester* v. *Oxenden* (*i*), the question was, whether parol evidence could be admitted to show that the testator, by a devise of his *estate at Ashton,* intended to devise all his maternal estate, consisting of two manors in the parish of Ashton, and one in the adjoining parish; the Court, after hearing two arguments, decided against the evidence. Sir J. Mansfield, C. J., in giving judgment, referred to the cases of *Beamont* v. *Fell* (*k*), and *Dowset* v. *Sweet* (*l*); and distinguished the present case, on the ground that in those *the will would have had no operation unless the evidence had been received*; whereas in the present the will would have an *effective operation to pass all the estate within the parish of Ashton,* without the evidence proposed; that in the other cases the evidence was admitted to explain that which otherwise would have had no operation, and that it was safer not to go beyond that line. The same question was afterwards brought before the House of Lords (*m*), where judgment was given corresponding with that of the Court of Common Pleas.

was founded upon a contract of sale executed some months before, to which the grantor's land steward was the subscribing witness; held that, for the purpose of explaining the latent ambiguity in the deed, letters written by the latter to the grantees respecting the sale to them by the grantor of the coal mines in the deed, and purporting to be written by his directions, were admissible evidence, without showing an express authority from the grantor to write them. *Beaumont* v. *Field,* 1 B. & A. 247. Devise to *S. H.*, second son of *T. H.*, when in fact he was the third son, evidence of the state of the testator's family and other circumstances was admitted to show the mistake in the name. *Doe* v. *Huthwaite,* 3 B. & A. 632.

(*h*) See *Lord Walpole* v. *Lord Cholmondeley,* 7 T. R. 138, and the observations of Sir D. Evans, 2 Evans's Pothier, 210. And see *Carruthers* v. *Sheddon,* 6 Taunt. 14. So where words have acquired a precise and technical meaning, Ib. Per Lord Kenyon, 6 T. R. 352. *Mounsey* v. *Blamire,* 4 Russ. 384. And although the mere name of a devisee in a will be applicable to several, parol evidence of application is not admissible if it can be collected from the will who was intended. *Doe* v. *Westlake,* 4 B. & A. 57.

(*i*) 3 Taunt. 147; 4 Dow, 65.

(*k*) 2 P. Wms. 140; and also to the case of *Whitbread* v. *May,* 2 Bos. & Pull. 593, where the question was as to the effect of a codicil, by which the testator revoked a former general devise of all his estates, so far as it related to his estate at Leeshill in the county of Wilts, and *Hearne* and Buckband in the county of Kent. The testator had lands in *Hearne,* and several other parishes, all of which he had purchased by one contract from one person; evidence was offered to show that the testator meant to revoke the devise, not only as to the lands in the parish of *Hearne,* but also as to all the lands in other parishes purchased at the same time; the evidence was received at the trial, subject to the opinion of the Court of C. B., which was equally decided upon the question. See *Doe* d. *Brown* v. *Brown,* 11 East, 441. See also *Doe* v. *Lyford,* 4 M. & S. 550.

(*l*) Amb. 175; *Supra,* 772.

(*m*) *Doe* d. *Oxenden* v. *Sir A. Chichester,* 4 Dow, 65, in an action brought by the devisee against the heir at law. The question on the admissibility of the evidence having been referred to the Judges, Sir V. Gibbs, C. J. of C. P., delivered their unanimous opinion, that the evidence ought not to be admitted. In delivering that opinion, he observed, "The Courts of Law have been jealous of extrinsic evidence to explain the intention of a testator, and I know only of one case in which it is permitted; that is, where an ambiguity is introduced by extrinsic circumstances. There, from the necessity of the case, extrinsic evidence is admitted to explain the ambi-

To explain a charter, &c.

In the next place, extrinsic evidence is admissible for the purpose of construing ancient charters, explaining the meaning of the terms of contracts, to which a peculiar and technical sense has been annexed, by custom and usage. Also, for the purpose of showing the consequences and incidents, which, by virtue of a known and established custom, are by presumption of law appurtenant to the general terms of a contract.

When it is said that oral evidence shall not be admitted to explain an ambiguity or uncertainty apparent on the instrument, this must be understood of such defects as render the instrument in point of law inoperative; for it is not every species or degree of doubt or uncertainty which may occur upon the reading of an instrument, that will thus wholly avoid it; on the contrary, many difficulties of this nature may be removed by legal construction, acting upon certain settled rules and maxims, and there are some kinds of obscurity and doubt which may be dispelled by the aid of extrinsic evidence, as in the instances of ancient charters and mercantile contracts. In *ancient charters* words are often to be found of doubtful import from their antiquity; the particular terms may have become obscure, or even obsolete; but it would be highly unreasonable, as well as inconvenient, that on this account the whole should perish; the terms were probably understood when the instrument was made; and it is also probable that the usage and practice then conformed, and that they have since continued to conform, with the real meaning and sense of those expressions; and hence such ancient and continuing usage may with reason and prudence be resorted to as the expositors of such doubtful terms (*n*) and phrases; more

guity. For example, where a testator devises his estate of Blackacre, and has two estates called Blackacre, evidence must be admitted to show which of the Blackacres is meant. So if one devises to his son John Thomas, and he has two sons of that name. So if one devises to his nephew William Smith, and has no nephew answering the description in all respects, evidence must be admitted to show which nephew the testator meant, by a description not strictly applying to any nephew. The ambiguity there arises from an extrinsic fact or circumstance; and the admission of evidence to explain the ambiguity is necessary to give effect to the will; and it is only in such a case that extrinsic evidence can be received. It is of great importance that the admission of extrinsic evidence should be avoided, where it can be done, that a purchaser or heir at law may be able to judge from the instrument itself what lands are or are not to be affected by it. Here the devise is of all the devisor's estate at Ashton, for there is no difference between the words 'Estate of Ashton' and 'Estate at Ashton,' and he has an estate at Ashton which satisfies the description." And see *Doe* v. *Morgan*, 1 C. & M. 235.

(*n*) In the case of *The Attorney-general* v. *Parker* (3 Atk. 576), Lord Hardwicke observed, that 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. In *R.* v. *Varlo*, (Cowp. 248), Lord Mansfield observed, "supposing the terms of the charter doubtful, the usage is of great force; not that usage can overturn the clear words of a charter; but if they are doubtful, the usage under the charter will tend to explain the meaning of them." Lord Coke, in his comment on the Stat. of Glo'ster, 2 Inst. 282, observes, that "ancient charters, whether they be before the time of memory or after, ought to be construed as the law was when the charter was made, and according to ancient allowance;" and again, "when any claimed, before the justices in eyre, any franchises by an ancient charter, though it had express words for the franchises claimed, or if the words were general and a continual possession pleaded of the franchises claimed, as if the claim was by old and obscure words, and the party in pleading, expounding them to the Court, and averring continual possession according to that exposition, the entry was ever, '*Inquiratur super possessionem et usum*,' &c. which I have observed in divers records of those eyres, agreeable to that old rule, '*Optimus interpres rerum usus*.'" However general the words of ancient deeds may be, they are to be construed, as Lord Coke says, by evidence of the manner in which they have been possessed and used. Per Ld. Ellenborough, in *Weld* v. *Hornby*, 7 East, 199. Long user may serve to explain an ambiguous Act of Parliament. *Stewart* v. *Lawton*, 1 Bing. 377. To explain what is meant by "tithes" in a

To explain ancient charters.

especially where the charter concerns the public interests of a large body, who would not, it may be presumed, have acquiesced in an illegal interpretation and application of its terms. Such evidence may be considered as somewhat analogous to the practice of the Courts, in considering the usage supplied by the precedents as to the construction of a doubtful statute, except that in the latter case the Courts themselves notice the contemporaneous and subsequent construction put upon the statute (*o*); but in the case of a charter, the usage, if not admitted, must be ascertained as a fact by a jury.

Such evidence in aid of the construction of a doubtful charter is also founded in part upon considerations of legal policy and convenience, for the purpose of quieting litigation, and supporting long-continued and established usages (*p*).

In the case of *Withnell* v. *Gartham* (*q*), Lawrence, J. observed, "if there be any ambiguity in this deed, usage is admissible to explain it; and the argument of convenience or inconvenience from this or that construction of a deed creates that sort of ambiguity that should be explained by usage."

In the case of *The King* v. *Osborn* (*r*), by the terms of the charter the power of electing aldermen was committed to the mayor and *commonalty*. According to the *usage*, the term *commonalty* included aldermen; and the Court were of that opinion and construed the charter accordingly (*s*). Usage was, on the same principle, admitted as explanatory evidence as to the mode of presentation, where a presentation to a curacy had been given by deed ninety years before to the *parishioners* and *inhabitants* of Clerkenwell (*t*). Also, in order to show that an Act, which by the terms of a charter was committed to the mayor, aldermen and burgesses, or the greater part of them, was well executed by the majority present at a regular meeting, although not by a majority of the whole number (*u*); that a presentation given by a charter to the mayor, aldermen and burgesses, was properly executed by the mayor and aldermen only (*x*); that the justices of a county have a concurrent jurisdiction with the justices of a borough (*y*), under the particular charter; again, where the power of appointing a schoolmaster was

crown grant, contemporaneous leases and other extrinsic evidence and testimony are admissible to show the kind of tithes intended to be conveyed. *Linton School* v. *Scarlett*, 2 Y. & J. 330.

(*o*) See 1 T. R. 728.

(*p*) See the observations of Buller, J. 3 T. R. 288.

(*q*) 6 T. R. 388. Where the nomination of a curate was, by a deed of 1656, given to the "inhabitants," it was held that the word was properly explained by past usage to mean "all housekeepers."

(*r*) 4 East, 327.

(*s*) Lord Ellenborough said, that without resorting to any assistance from contemporaneous and subsequently continuing usage (to which, however, in such cases, upon the best authorities in the law, resort may allowably be had), on the face of the charter itself, by a fair construction of it, commonalty does include aldermen.

(*t*) *Attorney-general* v. *Parker*, 3 Atk. 576.

(*u*) *R.* v. *Varlo*, Cowp. 248. But as to the *decision* in this case, vid. *infra*, 777, note (*b*). See also *R.* v. *Osborn*, 4 East, 333. *Bailiff of Tewkesbury* v. *Bricknell*, 2 Taunt. 120. *R.* v. *Mayor of Chester*, 1 M. & S. 101. *Chad* v. *Tilsed*, 2 B. & B. 409. *R.* v. *Mayor, &c. of Stratford-upon-Avon*, 14 East, 348. *Mayor of London, &c.* v. *Long*, 1 Cowp. 22. *Weld* v. *Hornby*, 7 East, 199. See also *R.* v. *Mayor of St. Alban's*, 12 East, 559.

(*x*) *Gape* v. *Handley*, 3 T. R. 288, n.

(*y*) *Blankley* v. *Winstanley*, 3 T.R. 279. Note, Buller, J. observed, that "Usage consistent with the charter has prevailed for 190 years past; and if the words of the charter were more disputable than they are, I think that ought to govern the case. There are cases in which the Court has held that settled usage would go a great way to control the words of a charter; and it is for the sake of quieting corporations that this Court has always upheld long usage, where it was possible, though recent usage would perhaps not have much weight."

given to the minister and churchwardens, to show that an appointment by the minister and a majority of the churchwardens is good (*z*). To explain ancient charters.

It is not essential to the admissibility of evidence of usage that the instances proved should be as ancient as the deed; a custom from time of legal memory is frequently established by evidence of facts done at a much later period (*a*).

Where, however, the terms of an ancient charter are not in themselves doubtful, either from the use of equivocal and obscure terms, or in point of legal construction, evidence of usage can no longer avail; its legitimate object is to remove doubts; its functions therefore cease where no doubt exists; and to admit it in such a case would be not to obviate, but to create, doubts.

Where a statute constituted a body of 48, with power, in conjunction with certain others, to do corporate acts in the town of Northampton, it was held than an usage of 300 years' continuance was unavailable to show that the attendance of a majority of 48 was not requisite, the general question having been already settled, that where such powers are delegated to a definite body, the attendance of a majority of that body is essential (*b*).

To decide whether the construction of a charter be so doubtful as to admit of explanation from usage, or whether, on the other hand, the terms be so intelligible in their usual plain and ordinary natural sense, or by necessary construction of law, with reference to antecedent decisions, is obviously a pure question of law (*c*). The ambiguity, to require such aid, must clearly be such as arises upon reading the instrument itself, independently of any extrinsic considerations; and unless a doubt arise from that source, usage can avail nothing; for if it be consistent with the legal construction of the deed, it is unimportant; if it be contrary to such construction, to admit it would be, not to explain, but to subvert, an authentic instrument by the aid of presumption and opinion. In the case of *Stammers* v. *Dixon* (*d*), where the ancient admissions of the copyholders were to land by the description of trees *acras prati*, it was held that evidence was admissible to show, from acts of enjoyment, that the admission must be construed to mean *primo tonsura* only. Even in the case of a statute universal usage has sometimes been resorted to for the purpose of explaining doubtful terms (*e*). And in the case of *Withnell* v. *Gartham* (*f*), it was held that

(*z*) *Withnell* v. *Gartham*, 6 T. R. 388.

(*a*) See Lord Kenyon's observations in *Withnell* v. *Gartham*, 6 T. R. 388; where the question was upon the construction of an ancient deed, granting to the minister and churchwardens of a parish the power of appointing a schoolmaster.

(*b*) *R.* v. *Miller*, 6 T. R. 268; and see *R.* v. *Bellringer*, 4 T. R. 810. There the charter of Bodmin gave power to a definite body, which was exercised by a majority of the subsisting body, but not by a majority of the definite number. Usage was adduced to show that a majority of the definite number was essential; but the Court declined to decide upon the validity of the usage alleged, being of opinion, upon the construction of the charter, and without reference to usage, that a majority of the whole definite body was requisite.

(*c*) See the observations of Sir D. Evans on this head; 2 Evans's Pothier, 219, *§ sequent.*

(*d*) 7 East, 200.

(*e*) *Shepherd* v. *Gosnold*, Vaugh. 169. *R.* v. *Scott*, 3 T. R. 104. But in general evidence is not admissible to explain the meaning of a statute, as to show what is meant by the word *square* according to the technical usage of the trade. *The Attorney General* v. *The Plate Glass Co.*, 1 Ans. 39. Where a contract is for so many bushels of corn, statutory bushels must be intended. 1 Chit. R. 28.

(*f*) 6 T. R. 388. Lord Kenyon observed, that if there were any difference, it would be in favour of the admissibility in the case of a private deed, for the King's grants are not construed strongly against the grantor, as private deeds are.

evidence of usage was as much admissible to construe a deed made by the founder of a school, though a private person, as in the case of the King's charter.

Private deeds.

The doctrine of applying evidence of contemporaneous usage to the construction of ancient deeds, has, it appears, been applied to merely *private* as well as to *public* instruments (*g*); but it is obvious that the reasons for allowing it in the former case apply with much less force, inasmuch as the mere assent and acquiescence of a private person, who may have been ignorant of his rights, affords a presumption very inferior in weight to that which is to be derived from the long-established practice and usage of a public body. The application of this principle to the case of private instruments has, however, been denied in two instances (*h*) in equity, and it seems to be very doubtful whether such evidence would now be received in a court of law.

To explain mercantile contracts.

Where terms are used which are known and understood by a particular class of persons, in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of *applying* the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties in framing their contract had made use of a foreign language, which the Courts are not bound to understand. Such an instrument is not on that account void; it is certain and definite for all legal purposes, because it can be made so in evidence through the medium of an interpreter. Conformably with these principles, the Courts have long allowed mercantile instruments to be expounded according to the usage and custom of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters (*i*).

(*g*) In the case of *Cooke* v. *Booth*, (Cowp. 819,) the doctrine was extended to a subject of a nature merely private. A lease contained a covenant of renewal; the question was, whether by the terms of the covenant, each subsequent lease was to contain a similar covenant; and as there had been several successive renewals, with similar covenants, the Court held that the parties by their practice had put their own construction on the covenant, and were bound by it. Where the terms of an award are ambiguous in relation to a road, subsequent usage is admissible in explanation of its meaning. *Wadley* v. *Bayliss*, 5 Taunt. 752.

(*h*) 3 Ves. 298; 6 Ves. 237. In the case of *Iggulden* v. *May*, in error, 2 N. R. 449; Mansfield, C. J. in giving judgment, observed upon the case of *Cooke* v. *Booth*, "we think that was the first time that the acts of the parties to a deed were ever made use of in a court of law to assist the construction of that deed." S. C. 7 East, 237. In *Hughes* v. *Gordon*, 1 Bligh, 289, it was said that evidence to explain a deed was highly dangerous, except in cases of fraud or misrepresentation. See *Clifton* v. *Walmesley*, 5 T. R. 564. *Clinan* v. *Cooke*, 1 Sch. & Lef. 22. *Stammers* v. *Dixon*, 7 East, 200; *infra*, tit. WILLS.

(*i*) Witnesses may be called to show that a particular expression in a commercial contract is understood in the mercantile world in a different sense from its ordinary import. *Chaurand and another* v. *Angerstein*, Peake's C. 43. Or that a particular meaning was affixed to the word of indeterminate signification (privilege), in a previous conversation between the parties. *Birch and another* v. *Depeyster*, 4 Camp. C. 385; 1 Starkie's C. 210. And see *Iggulden* v. *May*, 7 East, 237; 3 Smith, 269; 9 Ves. 325; 2 N. R. 449, S. C. A bill of lading contains a memorandum, "to be discharged in 14 days," or pay five guineas a day demurrage; evidence of usage may be adduced to show that *working* days, and not *running* days, are meant. *Cochran* v. *Retbery*, 3 Esp. C. 121. Evidence of a communication to the insurer is admissible to define what otherwise is indefinite. *Urquhart* v. *Barnard*, 1 Taunt. 450. But evidence that "last" imports foreign, not English measure, is inadmissible. *Moller* v. *Living*, 4 Taunt. 102. Where an entry made by a clerk since deceased is ambiguous, a person conversant with the mode in the office in which the business was conducted, may be called to explain a particular item. *Hood* v. *Reeve*, 3 C. & P. 532. In trover for goods sent by the plaintiff to the defendant, a packer, and expressed in the receipt to have been received on account of the plaintiff for *M.*, the party to whom they had been sold; it was held, that evidence of the usage of trade was

To explain mercantile contracts.

Thus a general warranty in a policy of insurance to depart with convoy, may be proved, according to mercantile usage and understanding, to be satisfied by a joining of convoy at the nearest usual place of rendezvous (*k*).

So where upon the sale of a cargo, the vendor covenanted to pay all duties, *allowances*, &c. to be taken out of them, he was permitted to adduce proof of a custom, to show that such allowances were to be limited (*l*) to the price which he should receive.

Where it was stipulated in a charter-party that the captain should receive a stipulated sum in lieu of *privilege* and *primage*, and the question was, whether the terms of the contract excluded all right on the part of the captain to use the cabin for the carriage of goods on his own account, Gibbs, C. J. said, evidence may be received to show the sense in which the mercantile part of the nation use the term *privilege*, just as you would look into a dictionary to ascertain the meaning of a word; and it must be taken to have been used by the parties in its mercantile and established sense (*m*).

In the case of *Cutter* v. *Powell*, where a promissory note was given to a sailor, to be paid provided he served on board the ship as second mate during the voyage, and he died before the completion of the voyage, the Court, deciding upon the terms of the contract, held that his administrator was not entitled to recover *pro ratâ* for the time during which he served; but it appears from the language of the Court in that case, that if a custom could have been established that such notes were in general use, and that the commercial world would have acted upon them in a different sense, they would have decided differently (*n*).

It is to be observed, that it has been questioned by the highest authorities, whether the practice of construing mercantile documents by usage has not been carried too far.

In the case of *Anderson* v. *Pitcher* (*o*), Ld. Eldon observed, "It is now

admissible to explain the meaning of ambiguous terms in such receipt. *Bowman* v. *Horsey*, 2 Mo. & R. 85. And see the cases cited below. Also *Syers* v. *Bridge*, Doug. 509. *Uhde* v. *Walters*, 3 Camp. 16. *Edie* v. *East India Company*, 2 Burr. 1216; 1 Ves. 459; 2 B. & P. 16; 7 East, 237. A jury may properly judge of the meaning of mercantile phrases in the letters of merchants. *P. C. Lucas* v. *Groning*, 7 Taunt. 164.

(*k*) *Lethullier's Case*, 2 Salk. 443. See also *Cutter* v. *Powell*, 6 T. R. 320. *Noble* v. *Kennoway*, Doug. 492. In *Robertson* v. *French*, 4 East, 130, Lord Ellenborough observed, that the same rules which applied to all other instruments applied also to a policy of insurance, that is, to be construed according to its sense and meaning, as collected, in the first place, from the terms used in it, which are to be understood in their plain, ordinary and popular sense, unless they have generally in respect of the subject, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the word. See also Lord Eldon's observations on the subject, in *Anderson* v. *Pitcher*, 2 B. & P. 164; and Evans's Pothier, vol. 2, p. 214. *Salvador* v. *Hopkins*, 3 Burr. 1707. *Baker* v. *Paine*, 1 Ves. 459. *Ford* v. *Hopkins*, Salk. 283.

(*l*) *Baker* v. *Paine*, 1 Ves. 459. Ibid. 317. See 6 Ves. 336, n. *Ekins* v. *Maclish*, Amb. 186. *Ford* v. *Hopkins*, Salk. 283. *Henkle* v. *Royal Exchange Assurance Company*, 1 Ves. 318. *Thomas* v. *Fraser*, 3 Ves. jun. 399; 10 Ves. 227. And see 1 Atk. 545.

(*m*) *Birch* v. *Depeyster*, 1 Starkie's C. 210. And note, that in that case the same learned Judge admitted evidence of a conversation between the parties, to show in what sense they used the term. He said, he thought such evidence fell within the general current of mercantile understanding; since, if the term had been used in different trades in different ways, the conversation was evidence to show in what sense it was used on that occasion. So evidence has been admitted for the purpose of showing the understanding of mariners, in geographical matters; as to show that the Mauritius is considered to be an East India island. *Robertson* v. *Money*, R. & M. 75. See *Uhde* v. *Walters*, 3 Camp. 16.

(*n*) *Cutter* v. *Powell*, 6 T. R. 320.

(*o*) 2 B. & P. 164. The question in that case was as to the meaning of a war-

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too late to say that this warranty (in a policy of insurance) is not to be expounded with due regard to the usage of trade: perhaps it is to be lamented that in policies of insurance parties should not be left to express their own meaning by the terms of the instrument. This seems to have been the opinion of that great judge Lord Holt (*p*). It is true, indeed, that Lord Mansfield, who may be considered the establisher, if not the author, of great part of this law, expressed himself thus, 'whenever you render additional words necessary, and multiply them (*q*), you also multiply doubts and criticisms.' Whether, however, it be not true, that as much subtlety is raised by the application of usage to the construction of a contract, as by the introduction of additional words, might, if the matter were *res integra*, be reasonably questioned."

The legitimate object of extrinsic evidence in such cases, as consistent with general principles, seems to be to explain terms, (in order to their due application,) which are not intelligible to all who may understand the language, but which nevertheless have acquired, by virtue of habit, custom and usage, a known definite sense and meaning amongst a particular class of persons, which can be well ascertained by means of the extrinsic testimony of those who are conversant with the peculiar use of those terms. The witnesses for this purpose may be considered to be the sworn interpreters of the mercantile language in which the contract is written (*r*). Beyond this, however, the *principle* does not extend: merchants are not prohibited from annexing what weight and value they please to words and tokens of their own peculiar coinage, as may best suit their own purposes, but they ought not to be permitted to alter and corrupt the sterling language of the realm. If they use plain and ordinary terms and expressions, to which a natural unequivocal meaning belongs, which is intelligible to all, then, it seems, according to the great principles so frequently adverted to, that plain sense and meaning ought not to be altered by evidence of a mercantile understanding and usage to the contrary. It is clear, indeed, that if a contrary practice were to prevail, and be carried to its full extent, the effect would nearly be to annihilate special contracts in mercantile affairs, and to compel all persons, under all circumstances, to conform with the usages of trade; the written contract would become a dead letter; the question would not be, what is the actual contract, but what is the usage; and the very same terms would denote different contracts as often as mercantile fashions varied. In short, the *jus et norma*

ranty (contained in a policy) to depart with convoy; and it was held that it is not complied with unless sailing instructions be obtained before the ship leaves the place of rendezvous, if by due diligence they can be obtained. So in the case of a bill of lading, &c. evidence was admitted to show what was meant by "days." *Cochrane* v. *Retberg*, 3 Esp. C. 121.

(*p*) *Lethullier's Case*, Salk. 443.

(*q*) *Lilly* v. *Ewer*, Dougl. 74.

(*r*) Within this principle numerous cases have occurred, of which the following may be cited in addition to those already referred to. Parol evidence is admissible to show the meaning of the word *level* in a lease of coal mines (*Clayton* v. *Gregson*, 5 Ad. & Ell. 302; 4 N. & M. 602); of "mess pork of S. & Co.;" *Powell* v. *Horton*, 2 Bing. N. C. 668. To reconcile apparent variances in bought and sold notes by the testimony of brokers; *Bold* v. *Rayner*, 1 M. & W. 343. Where the captain of a ship had agreed to convey a boat for the plaintiff of stated dimensions, evidence was admitted of the practice to remove the decks of such boats when put on board. *Haynes* v. *Halliday*, 7 Bing. 587. And see *Hood* v. *Reeves*, 3 C. & P. 532. In *Chaurand* v. *Angerstein*, Peake's C. 43, where it had been represented to an insurer that the ship would sail from St. Domingo in October, he was permitted to show in his defence, that this was understood among merchants to mean between the 25th and the end of October. The admission of such evidence seems, however, to have been carried farther than either principle or convenience warrants. See below.

loquendi, in a legal sense, would become wholly dependent on the usages of trade (*s*). To explain mercantile contracts.

Where a policy of insurance (in the common form) expressed "that the insurance on the said ship shall continue until she is moored 24 hours, and on the goods till safely landed," the Court of King's Bench held that evidence of an usage, that the risk on the goods as well as the ship expired in 24 hours (*t*), was inadmissible.

Where the vendor of a quantity of bacon warranted it to be of a particular quality, it was held that the vendee could not give evidence of a custom in the trade, that the buyer was bound to reject the contract if he was dissatisfied with it at the time of examining the commodity (*u*), and Heath, J. who tried the cause, said that it would breed endless confusion in the contracts of mankind if custom could avail in such a case.

So where words have a *known legal meaning* which belongs to them, evidence is not admissible to show that the parties intended to use them in a different sense according to the custom of the country (*x*).

In many instances extrinsic evidence of custom and usage is admissible for the purpose of annexing incidents to the terms of a written instrument, concerning which the instrument is silent (*y*). The principle upon which such evidence is admissible, seems to be a reasonable presumption that the parties did not express the whole of their intention, but meant to be guided by custom as to such particulars as are generally known to be annexed by custom and usage to similar dealings. It is evident that in commercial affairs, and all the other usual and common transactions of life, it would be attended with great inconvenience that the well-known ordinary practice To annex customary incidents.

(*s*) See *Anderson* v. *Pitcher*, 2 B. & P. 168. *Parkinson* v. *Collier*, Parke on Ins. 314, *infra*. Parol evidence is inadmissible to explain the meaning of the words "more or less" in a mercantile contract. *Cross* v. *Eglin*, 2 B. & Ad. 106.

(*t*) *Parkinson* v. *Collier*, Park on Ins. 314. *Yeates* v. *Pym*, 2 Marsh. Rep. 141. 1 Holt's C. 95. The practice of construing mercantile instruments according to the custom of trade, was carried to a great length in the case of *Donaldson* v. *Forster* (Sittings after Mich. Term, 29 Geo. 3, Abbott's Law of Shipp. 213). There, by the terms of the charter-party, it was stipulated that the merchant should have the exclusive use of the ship outwards, and the exclusive privilege of the cabin, the master not being allowed to take any passengers. The defendants insisted, that under a charter-party so worded, it was the constant usage of trade to allow the master to take out a few articles for a private trade. Lord Kenyon admitted evidence to be given to prove this usage, observing, that although *primâ facie* the deed excluded this privilege, yet he thought the deed might be explained by uniform and constant usage, the usage being a tacit exception out of the deed. Notwithstanding this high authority, sanctioned as it has, in some measure, been by its adoption and insertion in the very learned work from which it is cited, some doubt may perhaps still be entertained whether the receiving such evidence be strictly warranted in principle. See Sir D. Evans's remarks in his edition of Pothier, vol. 2, p. 215.

(*u*) *Yeates* v. *Pim*, Holt's C. 95.

(*x*) *Supra*, 301; and see *Doe* v. *Benson*, 4 B. & A. 586.

(*y*) To what extent the silence of a mercantile contract on a particular point may be supplied by evidence of the general course and usage of trade, is a question which it would be difficult to answer with exactness and precision. Per Tindal, C. J. in *Whittaker* v. *Mason*, 2 Bing. N. C. 369. Where the stipulations in a lease as to the mode of cultivation applied only to the holding during the tenancy, but were wholly silent as to the terms of quitting; held that an affirmative covenant, that the wheat lands should be summer-fallowed, and an affirmative custom for the off-going tenant to have one proportion of the wheat for a way-going crop, if sown after a summer fallow, and another proportion if sown after turnips, were not so inconsistent as that the tenant might not be entitled to his share of wheat growing at the determination of the tenancy after a crop of turnips, the landlord having a right of action if the covenant had not been observed. *Holding* v. *Piggott*, 7 Bing. 465. If any condition in the lease is necessarily repugnant to or inconsistent with a custom, the latter is excluded.

To annex customary incidents.

and usage on the subject should not be tacitly annexed, by virtue of such a presumption, to the terms of a contract, and that the parties should either be deprived of the certainty and advantage to be derived from the known course of dealing, or be placed under the necessity of laboriously specifying in their contracts by what particular usages they meant to be bound.

It is unnecessary to allude to the numerous instances in which, upon the same principle, the law itself annexes its own terms to a contract. If a contract for the sale of goods be silent as to the time of delivery, the law annexes the term that they shall be delivered within a reasonable time. A bill of exchange is payable at a certain day; but the law allows three additional days of grace, concerning which the instrument is silent. The instance of a bill of exchange is also a strong one to show how far custom operates to annex terms not expressed in the instrument.

It would be superfluous to specify how many terms and conditions, which are not expressed on the face of a bill of exchange, are annexed to it by the custom of merchants, as necessary and inseparable incidents. The operation of this presumption is not confined to mercantile instruments.

It has been held that a tenant might avail himself of a local custom to take a way-going crop after the expiration of his term under a lease; for the custom did not alter or contradict the terms of the lease, but merely superadded a right consequential to the taking (*z*).

Upon the same principle, evidence was admitted to show that a heriot was due on the death of the tenant for life, although that duty was not expressed in the lease (*a*).

So it has been held that a custom for an away-going tenant to provide work and labour, tillage and sowing, and all materials for the same, in his away-going year, the landlord making him a reasonable compensation, is not excluded by an express written agreement between the landlord and tenant, which is consistent with such a custom (*b*).

The presumption necessarily ceases where it can be collected, from the terms of the instrument, that it was contrary to the intention of the contracting parties, in the particular instance, to be guided by the custom: as where the parties have actually expressed an intention different from the custom, for then, according to the general rule of law, *expressum facit cessare tacitum*; or even where a contrary intention may be inferred from the terms of the contract. Thus, where the lease specified certain payments to be made by the in-coming to the out-going tenant at the time of quitting, but specified no payment for foldage, it was held that this agreement excluded the operation of a custom for the in-coming tenant to pay to the out-going tenant an allowance for foldage (*c*). But a stipulation as to quitting does not exclude so much of a custom as is not inconsistent with such stipulation (*d*). Parol evidence was admitted to show, that by the custom

(*z*) *Wigglesworth* v. *Dallison*, Dougl. 201.

(*a*) Per cur. *White* v. *Sayer*, 211.

(*b*) *Senior* v. *Armitage*, Holt's C. 197. See *Dalby* v. *Hirst*, 1 B. & B. 224. An usage for a landlord to compensate the off-going tenant for tilling, fallowing and manuring arable and meadow land, according to good husbandry, and from which the tenant can receive no benefit, is reasonable, and is to be considered not as a custom but an usage, and need not be from time immemorial. See *Roxburgh, Duke of*, v. *Robertson*, 2 Bligh, 156.

(*c*) *Webb* v. *Plummer*, 2 B. & A. 746. *Roberts* v. *Barker*, 1 C. & M. 808. So evidence of an usage at the Navy-office to pay bills indorsed by an attorney in his own name, and negotiated by him under a power, cannot be received for the purpose of enlarging the terms of the power. *Hogg* v. *Snaith*, 1 Taunt. 347.

(*d*) Where a lease provided for the tenant's spreading more manure on the pre-

of the county the word "thousand," applied in a lease to rabbits, meant 1,200 (*e*).

To rebut a presumption.

It is a general rule, that oral and extrinsic evidence is admissible to rebut a presumption of law or equity. Here the evidence is not offered as a substitute for written evidence, but to remove an impediment which would otherwise have obstructed or altered its operation (*f*). Thus, it has been held that parol evidence is admissible to show that a legacy was not intended in satisfaction of a debt (*g*), or that the testator, although he gave the executor a legacy, intended that he should have the surplus (*h*), or to rebut the equity of an heir at law (*i*). So where the conusor of a fine dies before the uses are declared, the presumption that the fine was levied to the use of the conusor may be rebutted by evidence (*k*).

If a tenant for life pays off a charge on the estate *primâ facie*, he is entitled to that charge for his own benefit, with the qualification of having no interest during his life. If a tenant in tail or in fee-simple pays off a charge, that payment is *primâ facie* presumed to be made in favour of the estate; but the presumption may be rebutted by evidence, as by calling for an assignment, or by a declaration (*l*).

So oral evidence has been admitted by courts of equity to show that a portion advanced to a child subsequent to the making of a will, and of the same amount with the legacy, was not intended as an ademption of a legacy (*m*);

mises than the custom required, leaving the rest to be paid for by the landlord at the end of the term, and the custom was for the tenant to be paid last year's ploughing and sowing, and to leave the manure if the landlord would buy it, it was held that the tenant was still entitled to be paid for the last year's sowing and ploughing, according to the custom. *Hutton* v. *Warren*, 1 M. & W. 486. *Holding* v. *Pigott*, 7 Bing. 475.

(*e*) *Smith* v. *Wilson*, 3 B. & Ad. 728.

(*f*) 2 Atk. 69. 99; Amb. 126; 2 Vern. 252.

(*g*) *Cuthbert* v. *Peacock*, 2 Vern. 593. But see *Fowler* v. *Fowler*, 3 P. Wms. 353; where an allowance of pin-money being in arrear to the wife for two years, Talbot, C. would not admit evidence to show the intention of the testator that she should have a legacy of 500 *l.* in addition to the arrears.

(*h*) 2 Vern. 252. 648. 673. *Wingfield* v. *Atkinson*, 2 Ves. 673; 2 P. W. 158; 9 Mod. 9; 1 Str. 568. So where the wife was executrix, and real and personal property were left to her by her husband. *Lake* v. *Lake*, 1 Wils. 313; Amb. 126, per Buller, J.; Dougl. 40; 2 Atk. 69. Evidence is admissible to show that one *primâ facie* a trustee takes for his own benefit. *Langfield* d. *Banton* v. *Hodges*, Lofft. 230. *Doe* v. *Langton*, 2 B. & Ad. 680. The gift of a legacy in reversion to an executor does not necessarily exclude, but only raises a presumption against his taking the residue beneficially, and if there is no express declaration that he is to be a trustee, but only circumstances raising a presumption, parol evidence is admissible to rebut it. *Oldman* v. *Slater*, 3 Sim. 84. Where a specific bequest was given in the will to the executor for his care and trouble, held that it excluded him from taking the residue beneficially, and that parol evidence of the testator's declarations after the making of the will were inadmissible. *Whitaker* v. *Tatham*, 7 Bing. 628. And see *Foster* v. *Munt*, 1 Vern. 473; and *Gibbs* v. *Romney*, 2 V. & B. 294.

(*i*) *Mallabar* v. *Mallabar*, Cas. Temp. Talb. 79; 1 Powell, L. D. c. xii.; 2 Powell, L. D. 40.

(*k*) *Roe* v. *Popham*, Dougl. 24. *Lord Altham* v. *Lord Anglesea*, Gilb. Eq. R. 16.

(*l*) Per Lord Eldon, in *The Earl of Buckinghamshire* v. *Hobart*, 3 Swanst. 186. Where a tenant for life of a settled estate purchased incumbrances and had them assigned to a trustee, and purchased the remainder and had it conveyed subject to existing charges, and devised the estate subject to the charges so purchased, it was held that parol evidence was admissible to show that the charges were merged. *Astley* v. *Mills*, 1 Sim. 298.

(*m*) *Debeze* v. *Man*, 2 Bro. C. C. 165. *Coote* v. *Boyd*, 2 Bro. C. C. 521. Or, as it seems, to show that such advancement was intended as an ademption (*Rosewell* v. *Bennett*, 3 Atk. 77). But note, that the intention of the legacy was specified in the will; and the case was not decided on that ground. See also *Hooley* v. *Hutton*, 1 Ves. jun. 390. Where portions are provided by any means whatever, and the parent gives a provision by will for a portion, it is a satisfaction *primâ facie*, and unless there be circumstances to show that

To rebut a presumption.

and for this purpose, and to show the real intention, even oral declarations are admissible (*n*).

In the case even of a devise of lands, it has been held that the legal implication, as to the revocation of the will, founded upon the subsequent marriage of the testator, and birth of a child, may be rebutted by parol evidence (*o*). Lord Mansfield observed, "I am clear that this presumption, like all others, may be rebutted by every sort of evidence. There is a technical phrase for it in the case of executors (*p*); it is called rebutting an equity." And Mr. J. Buller said, that implied revocations must depend on the circumstances at the time of the testator's death.

But although such evidence be admissible to rebut a presumption arising from the operation of matter in *pais* as to the *intention* of the party to revoke, it is otherwise where the revocation is by act of law, where the law pronounces upon a presumption *juris et de jure* (*q*), that is, where the presumption of law is so violent that it does not admit circumstances to be set up to repel it (*r*). Thus, where a testator devised his lands to *B.*, and afterwards, upon his marriage, conveyed them by lease and re-lease to trustees, to other uses, with the usual limitations in marriage-settlements, the Court, on a trial at bar, refused to hear parol evidence to show that the devisor meant that his will should remain in force (*s*).

Again, parol evidence as to the state and circumstances of a testator are deemed to be admissible in order to give effect to a will, by explaining that which otherwise would have no operation. The legitimate limit to evidence of this description seems to be, that it is admissible to show *what the words*

it was not so intended. Per Lord Alvanley, *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. jun. 516. Per Lord Eldon, in *Pole* v. *Lord Somers*, 6 Ves. 325. The question there was as to *satisfaction*.

(*n*) *Ellison* v. *Cookson*, 1 Ves. jun. 100. *Clinton* v. *Hooper*, 1 Ves. jun. 173. But those made at the time of the will are the most important. *Trimmer* v. *Bayne*, 7 Ves. 508.

(*o*) *Brady* v. *Cubitt*, Dougl. 30. See the observations on this case in *Goodtitle* v. *Otway*, 2 H. B. 516. For the cases in which an alteration in circumstances amounts to an implied revocation of a will, see Bac. Ab. tit. *Wills and Testaments*, 363, 6th edit. *Brown* v. *Thomson*, 1 P. Wms. 304. *Lugg* v. *Lugg*, 1 Ld. Raym. 441. *Shepherd* v. *Shepherd*, Dougl. 38, n. —Sir D. Evans observes, that "the allowing a written instrument to derive a construction different from that which it would naturally import, in consequence, not of any relative character of the subject-matter, but of verbal declarations, cannot, on principle, be reconciled with the general tenor of our jurisprudence." It is impossible not to regret, in common with that learned writer, that in any branch of cases, particularly one so important as the present, the uncertainty and vagueness of oral testimony of the very weakest and loosest description should be in effect substituted for the certainty of a written document. The practice involves an inconsistency. If the extrinsic circumstances be so powerful as to create a stronger presumption as to the intention of the party, than that which arises from his own written exposition of that intention (which still remains uncancelled), how can that presumption be considered to be so weak as to be met and defeated by mere oral declarations? It seems to be inconsistent to consider such evidence to be more forcible than the written instrument, and yet weaker than oral evidence; and it is in effect to give to oral evidence a greater authority than the written evidence, to subject solemn and authentic written instruments to all the laxity and uncertainty of parol evidence, and to render titles to property, contrary to the policy of the law, hazardous and precarious. And now see the st. 7 W. 4, & 1 Vic. c. 26, and tit. WILLS.

(*p*) An executor is not excluded from proof of the testator's intention that he should take the surplus, by the circumstance of his taking a reversionary contingent interest. *Lynn* v. *Beaver*, 1 Turn. 63. Such evidence, however, is admissible only for the purpose of supporting the apparent effect of an instrument; it is inadmissible to show that a legacy in a second will was intended as an ademption of a legacy given by the former will. *Hurst* v. *Beach*, 5 Madd. 360.

(*q*) See tit. PRESUMPTION; and Heinecc. El. J. C., part 4, s. 124.

(*r*) See 2 H. B. 522.

(*s*) *Goodtitle* v. *Otway*, 2 H. B. 516.

themselves, as applied to their subject-matter, express; but not to show, independently of the expressions themselves, *what the testator intended to express*. To rebut a presumption.

For the purpose of determining the meaning of a testator's words, extrinsic evidence seems to be generally admissible (*t*). And it seems to be immaterial whether the necessity for resorting to extrinsic evidence be apparent on the face of the will, or is first raised by extrinsic circumstances (*u*).

It is, however, to be carefully remarked, that if, from evidence of the testator's circumstances, it appear that his words, strictly interpreted, are sensible and applicable, and there be nothing on the face of the will from which an intention to use the words in a different sense is apparent, the strict interpretation of the words must be adhered to, although they be capable of some secondary construction, and though the most conclusive evidence could be given to show that the testator used them in such secondary sense (*x*).

III. Having thus seen how far parol evidence is admissible to *contradict*, *vary*, or *wholly subvert*, a written instrument, as also, on the other hand, to *establish*, *explain*, and *support* written evidence, it remains, in the *third* place, to consider in what cases parol extrinsic evidence is admissible to prove a fact by virtue of its own weight and authority, notwithstanding the casual existence or use of collateral written evidence to prove or disprove the same fact. What has been already said supplies, indeed, a sufficient test; for it seems that, in general, the mere circumstance that a written instrument exists which *may* be made evidence of a particular transaction, does not exclude oral testimony either to prove or disprove the fact, unless that written instrument be by law constituted the *authentic* and *sole* medium of proving that fact (*y*). The importance of the subject, however, renders it desirable further to consider, 1st, In what instances written instruments are of an *exclusive* nature; 2dly, With respect to what *parties* and to what *facts*. Independent force and effect of parol evidence.

In the first place, written evidence has an exclusive operation in many instances, by virtue of peremptory legislative enactments (*z*). So it has in all cases of written contracts (*a*). Written instrument, when conclusive in its nature.

(*t*) Per Ld. Hardwicke, in *Goodinge* v. *Goodinge*, 1 Ves. 231. Per Ld. Thurlow, in *Jenecock* v. *Falkner*, 1 Bro. C. C. 295; and *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 471. Per Ld. Loughborough, in *Gaskell* v. *Winter*, 3 Ves. 540. Ld. Manners, in *Crane* v. *Odell*, 1 Ball. & B. 480. Sir T. Plumer, in *Beacheroft* v. *Beacheroft*, 1 Madd. 430; and *Colpoys* v. *Colpoys*, 1 Jac. 451. Per Ld. Eldon, in *Oakden* v. *Clifden*, Lin. Inn Hall, 1806. See also *Lane* v. *Lord Stanhope*, 6 T. R. 345. *Doe* d. *Le Chevalier* v. *Huthwaite*, 3 B. & A. 632. *Gibson* v. *Gell*, 2 B. & C. 680. *Poeock* v. *Bishop of Lincoln*, 3 B. & B. 27. *Alford* v. *Green*, 5 Madd. 95. *Goodright* v. *Downshire*, 2 B. & P. 608; 1 N. R. 344. *Wilder's Case*, 6 Rep. 16. See Powell on Dev. by Jarman, vol. i. p. 488.

(*u*) See the judgment given by Bayley, J. in *Smith* v. *Doe* d. *Jersey*, 2 B. & B. 553. *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 471. *Abbott* v. *Massie*, 3 Ves. 148. *Price* v. *Page*, 4 Ves. 680. *Colpoys* v. *Colpoys*, 1 Jac. 451.

(*x*) *Doe* d. *Oxenden* v. *Chichester*, 3 Taunt. 147; 4 Dow P. C. 65; *supra*, 771.

(*y*) See *Grey* v. *Smithies*, Burr. 2273, and *infra*. Still less does the existence of a deed or other written instrument exclude parol evidence as to a collateral transaction. *Fletcher* v. *Gillespie*, 3 Bing. 635. So in the case of a parol agreement to do repairs, in consideration that the plaintiff would become tenant to the defendant. *Seago* v. *Deane*, 4 Bing. 459. So where the parties to an indenture of charter-party afterwards agreed by parol for the use of the ship, *ad interim*. *White* v. *Parkins*, 12 East, 578. An *admission* of a fact is evidence of the fact against the party who makes it, although a written instrument be essential to the fact. *Slattery* v. *Pooley*, 6 M. & W. 664. *Doe* v. *Ross*, 7 M. & W. 102.

(*z*) *Supra*, tit. FRAUDS, STATUTE OF.

(*a*) *Supra*, tit. ASSUMPSIT.

Written instrument, when conclusive in its nature.

So also, in all cases where the acts of a court of justice are the subject of evidence. Courts of record speak by means of their records only; and even where the transactions of courts, which are not, technically speaking, of record, are to be proved, if such courts preserve written memorials of their proceedings, those memorials are the only authentic means of proof which the law recognizes (*b*). And it seems that, in general, where the law authorizes any person to make an inquiry of a judicial nature, and to register the proceedings, the written instrument (*c*) so constructed is the only legitimate medium to prove the result.

Thus, as has been seen, parol evidence cannot be received of the declaration of a prisoner taken before a magistrate under the statutes of Philip & Mary, where the examination has, as required by those statutes, been taken in writing (*d*).

So the official return of the sheriff to a writ of execution is usually conclusive as between the litigating parties, although not as between them and himself (*e*).

But in general, public and authorized documents, whether appointed by express authority of law, or recognized by the law as instruments of authority, if they be but collateral memorials of the fact, possess no exclusive authority as instruments of evidence. Thus, although the entry of a marriage in the parish register, made according to the Marriage Act, be evidence of the marriage, it does not exclude the parol evidence of any witness who can prove the fact of marriage. So, although public printed proclamations of government gazettes, public books, official returns, and other (*f*) documents of authority, are admissible in evidence to prove particular facts, they do not exclude parol evidence. The principle applies in general, as it seems, where the document contains a mere subsequent memorial and recognition of the fact.

Receipt.

A receipt for money, it has been held, is not conclusive evidence against the person who gives it, that he has actually received the money.

Thus, upon the failure of an annuity deed for want of a memorial, upon an action brought by the plaintiff against the two grantors, to recover the consideration paid, one of the defendants, who was a surety only, was permitted to show, notwithstanding his having signed a receipt for the money, jointly with the other defendant, the principal, that he had never in fact received the money (*g*).

Confession.

In the case of *Wilson* v. *Poulter*, which is very briefly reported (*h*), it is stated

(*b*) Vide Vol. I. tit. JUDGMENT. *Supra*, INSOLVENT, 562. In *Bledstyn* v. *Sedgwick*, Anst. 304, the Court refused to hear parol evidence of the condemnation of a ship in Carolina, a copy of the condemnation which had been given to the captain having been lost at sea.

(*c*) Or, in some instances, an examined copy of it. *Supra*, Vol. I. tit. JUDGMENT.

(*d*) *Supra*, 38. But parol evidence may be given of the same declarations made by the prisoner at other times; *supra*, 38; *infra*, 787.

(*e*) *Gyfford* v. *Woodgate*, 16 East, 296, vol. i.

(*f*) Vol. I. tit. WRITTEN EVIDENCE.

(*g*) *Stratton* v. *Restall & another*, 2 T. R. 366. And see *The Attorney-general* v. *Randall & others*, 2 Eq. C. Abr. 742, and cited 5 T. R. 369, and approved of by Buller, J.; where, although a receipt had been signed by three trustees, the Lord Chancellor decreed that the one only who had received the money should be answerable for it. But see *Rowntree* v. *Jacob*, 2 Taunt. 141; also, 1 Sid. 44; 1 Lev. 43; 1 Saund. 285; Lutw. 1173; Co. Litt. by Harg. and Butler, 373. *Latour* v. *Bland*, 2 Starkie's C. 382.

(*h*) Str. 794. In *Rowland* v. *Ashby*, 1 Ry. & M. 231, it was held that admissions made by a party on his examination before commissioners of bankrupts, and which were material though not contained in the written examination, might

merely that a defendant in trover was charged with his *confession* taken before commissioners of bankrupt, and that the Chief Justice refused to let the defendant explain it by parol evidence. It is not stated in what way the defendant proposed to explain the document; and it would not be safe to rely much on so very loose a report. Written instrument, when conclusive. Confession.

In the common case of a confession taken before a magistrate, on a charge of felony, the practice is for the prosecutor to prove by evidence that the written document produced is a faithful account of the prisoner's statement; upon principle, therefore, it scarcely admits of doubt that the prisoner is at liberty to meet such evidence by contrary testimony, and to show that the written instrument is inaccurate. The statutes which authorize the magistrate to take the examination of prisoners do not give them an exclusive force, and their admissibility and operation as evidence seem to stand upon the same footing with any other admissions at common law (*i*), which, in such instances, are usually inconclusive (*k*). And it seems that in general, where a document, such as a letter, not being matter of compact and agreement, is given in evidence as an admission by the adversary, the latter may adduce evidence to show that it originated in mistake, or to explain it by circumstances (*l*).

In an action brought by bankers to recover back money paid on a cheque purporting to be drawn by the defendant, but alleged to be a forgery, and which was the fact in issue, held, that minutes of the defendant's examination on a charge made against a party as having forged the cheque, were receivable, although he afterwards signed a regular deposition (*m*).

2dly. Next, with respect to the *parties*, and the particular *facts* which it recites.—The instrument offered in evidence, whether record, deed, or simple contract, is offered either as between the *same* parties, or where either one or both are *different*. Even where both parties are the same, it frequently happens that the instrument will not operate as an *estoppel* unless it be specially *pleaded* (*n*); and if it has not been pleaded, parol evidence of the fact is usually admissible in contradiction of the written instrument. As to what facts inconclusive inter parties.

In the next place, even where a record or deed exists, which is *conclusive* upon the *parties*, it is not always conclusive upon *all points*.

Thus, evidence is admissible to prove that a deed was executed, or a bill of exchange made, at a time different from that of the date (*o*), or that the party in whose name a contract for the sale of goods was made, was but the

be proved. So additional statements made by a prisoner before a magistrate, and not contained in the written examination, may be proved by parol. *Venafra* v. *Johnson*, 1 Mo. & R. 310. *Supra*, tit. ADMISSIONS. What a prisoner says before he may know the charge against him is admissible; interlineations and erasures in a confession are cured by the attestation; and it is no objection that it is said to be *signed*, where the party was a marksman; and a voluntary confession, taken before the conclusion of the evidence against the prisoner, may be given in evidence on the parol statement of the clerk, refreshing his memory by the paper. *R.* v. *Bell*, 5 C. & P. 162; questioning *R.* v. *Fagg*, 4 C. & P. 566.

(*i*) *Supra*, tit. ADMISSIONS.

(*k*) *Supra*, tit. ADMISSIONS.

(*l*) *Supra*, tit. ADMISSIONS, and see *Holsten* v. *Jumpson*, 4 Esp. C. 189; 1 T. R. 182.

(*m*) *Williams* v. *Woodward*, 4 C. & P. 346.

(*n*) *Supra*, Vol. I. tit. ESTOPPEL.

(*o*) The plaintiff may declare on a bond bearing date on one day, and prove a delivery on another day (*Goddard's Case*, 2 Rep. 4, b), or allege a deed to have been delivered on a day different from that on which it bears date. *Hall* v. *Cazenove*, East, 477. *Stone* v. *Bale*, 3 Lev. 348. A latitat alleged to have been issued on a particular day after term, may be proved to have been so issued, though tested of the preceding term. 1 Vent. 362.

Written evidence, as to what facts inconclusive inter parties.

agent of another(*p*). And even in the case of records, which are conclusive as far as regards their substance, averments and proofs may be received to contradict them as to time and place and many other particulars (*q*).

The reason is, that in the case of the record, the points of variance would not have been considered to be material at the trial, and therefore the evidence does not in effect contradict the record; and that in the case of deeds or other agreements it was not the intention of the contracting parties to bind themselves precisely as to such particulars, such instruments being, for the sake of convenience, frequently executed on days different from those on which they bear date, and commercial agreements being as frequently made on behalf of a principal in the name of an agent (*r*).

The parties to a written agreement are not, in general, precluded from proving facts consistent with the agreement, although not expressed in the agreement. Where the written agreement was, that Maxwell should purchase of Sharp 2,000 *l.* stock, it was held that the plaintiff Maxwell might give in evidence a parol agreement to buy 2,000 *l.* stock (which belonged to Sharp and Abbott, but stood in the name of Sharp) of Sharp and Abbott, the parol being consistent with the written agreement (*s*).

And as between the parties to a deed, or those who claim in privity, evidence is admissible to show the purpose and intention of executing the instrument, provided it be perfectly consistent with the legal operation of the instrument, and not inconsistent with its express terms.

Thus, in the case of *Milbourn* v. *Ewart & others* (*t*), where a man, in contemplation of marriage, executed a bond to his intended wife (the plaintiff), conditioned for the payment of money by the heirs or executors of the obligor to the plaintiff, at the expiration of twelve calendar months from and after the death of the obligor, and to an action on the bond against the heirs at law of the deceased husband, they pleaded the marriage, &c., and the plaintiff replied the fact that the bond was made in contemplation of a marriage between the defendant and the obligor, and with intent that, in case the marriage should take place, and the plaintiff should survive her husband, the plaintiff should have the benefit of the bond, it was held that those facts might well be averred, being perfectly consistent with the bond.

(*p*) *Wilson* v. *Hart*, 7 Taunt. 295. So a purchaser of land, having made the purchase in the name of another, may show that he the (purchaser) paid for it, in order to raise a resulting trust. Vern. 366. Where parol evidence was offered (to raise an equity) that a pension granted by the Crown absolutely was in trust for the plaintiff, which the defendant, by his answer, denied, the evidence was rejected by Lord Thurlow. *Fordyce* v. *Willis*, 3 Bro. C. P. 577. Parol evidence is admissible to show that land described in a deed as meadow was not meadow, for it is not the essence of the deed, but mere matter of description. *Skipwith* v. *Green*, Str. 610. Or that land described as containing 500 acres, does not contain so many. S. C. Bac. Ab. Pleas, I. 11. Where a deed contains a generality to be done, as to perform all agreements set down by *A.*, 1 Rol. 872, l. 5; to carry away all the marl in close *B.*, 1b.; to release all his right in *C.*, 1b.; 2 Cowp. 600; he is not estopped from denying such agreements, &c. Com. Dig. *Estoppel*, A. 2.

(*q*) See Starkie's Crim. Pleadings, 2d edit. 325, and *supra*, Vol. I. tit. JUDICIAL INSTRUMENTS.

(*r*) *Infra*, tit. PARTNERS; and tit. VENDOR and VENDEE.

(*s*) *Maxwell* v. *Sharp*, Say. 187. Where one partner deposited his own deeds under a written memorandum "as a security in the dealings which the party had with him," held that evidence to show that the dealings alluded to were partnership transactions, was admissible, and established the lien on payments made on behalf of the firm. *Chuck* v. *Freen*, 1 M. & M. 259; S. C. *contra*, 2 Glyn & J. 246.

(*t*) 5 T. R. 381.

Written evidence, when inconclusive, inter parties.

It has already been seen that, as between parties to a deed, evidence of a further consideration than that expressed in the deed is admissible where the evidence does not contradict the deed (*u*).

A party to support a deed may show a consideration by parol evidence, so as it be not inconsistent with the deed. A deed operating under the Statute of Uses, and not reciting any consideration, may be supported by evidence of a pecuniary consideration (*x*).

Except in cases where the Statute of Frauds requires a written agreement, parol evidence may be admissible, in conjunction with written, to prove the agreement. Thus, if an agreement be reduced in writing, parol evidence is admissible to show that the parties, without writing, afterwards varied the terms (*y*); for here the evidence is offered, not to vary the terms of an instrument which stands admitted as the real record of the intention of the parties, but is offered consistently with the existence of the instrument, and confessing that it does so exist, in order to avoid its effect by proof of a new agreement, adopting the old one, either wholly or in part, but annexing certain additional terms.

It has, indeed, already been seen, that previous or contemporary declarations are not admissible to vary the terms of a written agreement; where, however, the nature of the subject-matter does not require the agreement to be in writing, although a presumption arises, in the absence of proof to the contrary, that the parties expressed in writing the *whole* of their intention in respect of the subject-matter, and intended the written terms to operate as an agreement, yet that presumption may, it seems, be rebutted by express evidence that what was so written was intended as a mere memorandum of one part or branch only of a more general agreement, and was not intended to operate absolutely and unconditionally (*z*), or it may be shown that a parol contract was made independently, wholly collateral to and distinct from a written one made at the same time. In such cases, the parol evidence is used not to *vary the terms* of the written instrument, but to show either that it is *inoperative* as an entire and independent agreement, or that it is collateral and irrelevant.

Where a statute requires the agreement to be in writing, the case admits of a very different consideration; there the oral and written terms could

(*u*) *Supra*, 758.

(*x*) *Mildmay's Case*, 1 Co. 176. So a deed which recites a pecuniary consideration only, may be shown to have been founded on a consideration of marriage. *Villers* v. *Beaumont*, ib. Where premises were purchased at a sale in different lots by plaintiff and defendant, and in their deeds the premises were described only by reference to the then tenants; held, that a handbill exhibited at the sale was admissible, not as controlling, but explaining and applying the deed, and showing what was then in the tenants' occupation. *Murley* v. *M'Dermott*, 3 N. & P. 356.

(*y*) *Lord Milton* v. *Edworth*, 6 Bro. P. C. 587. *Cuff* v. *Penn*, 1 M. & S. 21. *Supra*, 761.

(*z*) See *Jeffery* v. *Walton*, 1 Starkie's C. 267. The action was in *assumpsit* for not taking proper care of a horse. A written memorandum was made upon hiring a horse, "six weeks, at two guineas—*W. W.*" (the hirer); Lord Ellenborough held that evidence was admissible to show that at the time of the hiring it was expressly stipulated, that as the horse was used to *shy*, the hirer, if he took him, should be liable to all accidents. In many instances, the terms reduced to writing may constitute but a small part of the real contract. Suppose *A.* to let a house by parol to *B.* for two years, and that at the time of the parol agreement a stipulation as to the furniture is made, for convenience of calculation, in writing, and that at the foot of the account is written, "*B.* to take the furniture at the above valuation," it would be difficult to contend that *B.* would be bound to buy the furniture, although *A.* refused to let him occupy the house, and that *B.* would be concluded by the written part of the engagement from showing the real condition annexed to it.

Written evidence, when inconclusive inter parties.

not, it should seem, be incorporated; and it might be very questionable, under the circumstances, whether the previously written agreement would be discharged and revoked by a subsequent oral agreement (*a*). It has been held that in cases which are within the scope of the Statute of Frauds, parol evidence is admissible to show a dispensation with the performance of part of the original contract, such as an agreed substitution of other days than those stated in the contract for the delivery of goods sold (*b*). But that it was otherwise where the terms of the written contract would be varied by the subsequent agreement (*c*). But it has since been held that where a written contract states a time and place for the delivery of goods, an alteration as to the time is not valid unless it be in writing (*d*).

It has already been seen that mere unsigned memorandums, made with a view to a subsequent agreement, need not be proved (*e*).

Operation of against strangers.

Next, where one of the contending parties was *not a party* to the record or other instrument.—It has been seen, that in some instances, where the proceeding is, as it is technically termed, *in rem*, the judgment or decree is final and conclusive upon all (*f*). Where, however, the record is admissible but not conclusive evidence, even parol evidence seems to be admissible to prove the fact in contradiction of the record.

Thus, upon an indictment against an accessory to a felony, although the record of the conviction of the principal be admissible evidence to prove the fact, yet, as it is not conclusive, the accessory is entitled to adduce any legal evidence in contradiction of the fact stated on the record (*g*).

Although there are many instances in which a deed or agreement between others is evidence for or against a stranger, or where such a deed or other agreement would be evidence in favour of a mere stranger, as to some extrinsic fact stated in the instrument *against a party*, yet it seems to be a

(*a*) An agreement to waive a contract for the purchase of lands is as much an agreement concerning lands as the original contract is, and must therefore, as it seems, be in writing. See Lord Hardwicke's observations in *Buckhouse* v. *Crosby*, Eq. C. Abr. 32, and in *Bell* v. *Howard*, 9 Mod. 332. In *Parteriche* v. *Powlet* (2 Atk. 384), Lord Hardwicke is reported to have said, that to add anything to an agreement in writing, by admitting parol evidence which would affect land, is not only contrary to the Statute of Frauds, but to the rule of common law before the statute was in being; yet, as mere parol agreements concerning land were operative before the statute, there seems to have been no reason why a written contract should not have been varied by a subsequent oral agreement when it related to lands, as well as in any other case. See *Clinan* v. *Cooke*, 1 Sch. & Lef. 35. Subsequently to the publication of the above remarks, it has been decided (*Marshall* v. *Lynn*, 6 M. & W. 109; *supra*, 491) that a contract required by the Statute of Frauds to be in writing, cannot be varied by oral assent.

(*b*) *Cuff* v. *Penn*, 1 M. & S. 21. See also the case of *Warren* v. *Stagg*, cited in *Littler* v. *Holland*, 3 T. R. 591; where Buller, J. held that an agreement to extend the time was not a waiver but a continuance of the original agreement. See also *Thrush* v. *Rooke*, 1 Esp. C. 53, cor. Lord Kenyon; where, in a written agreement, an appraisement on a given day was specified as a condition precedent, oral evidence of an enlargement by consent was admitted. Cor. Lord Kenyon. But see *Snowball* v. *Verain*, Bunb. 175.

(*c*) See Lord Ellenborough's observations in *Cuff* v. *Penn*, 1 M. & S. 26; where he says, "If this agreement had been varied by parol, I should have thought, on the authority of *Meres* v. *Ansell*, (3 Wils. 275), that there had been strong ground for the objection." But note, that *Meres* v. *Ansell*, was decided wholly, as far as the report intimates, upon the general principle of the inadmissibility of a *cotemporary* parol agreement to vary the terms of a written one. In *Cuff* v. *Penn* (and the same observation is applicable to *Meres* v. *Ansell*), and all other cases within the Statute of Frauds, the statute itself precludes any alteration of a written contract by a subsequent parol agreement.

(*d*) *Marshall* v. *Lynn*, 6 M. & W. 109.

(*e*) *Supra*, 57; and see *Ramsbottom* v. *Tunbridge*, 2 M. & S. 434; and *Same* v. *Mortley*, Ib. 445, and tit. STAMP.

(*f*) *Supra*, Vol. I. tit. JUDICIAL INSTRUMENTS; and vide *infra*, tit. SETTLEMENT.

(*g*) *Supra*, tit. ACCESSORY.

general rule, that in all these cases parol evidence of the fact would still be admissible; in other words, the instrument could never conclude the party by estoppel or otherwise.

Written evidence, operation of against strangers.

Thus, in the case of *The King* v. *Scammonden* (*h*), already cited, the inhabitants of a parish were permitted to show that 30*l.* was in fact paid as the consideration upon the sale of an estate, although the deed of conveyance between the parties specified 28*l.* as the consideration. Here the question was as to the value actually given for the estate; and although the agreement was *primâ facie* evidence as to the fact, and although the parties themselves might have been bound by their own representation of the transaction, it was not binding upon strangers, to the exclusion of the real fact.

In the case of *The King* v. *Laindon* (*i*), the question as to a settlement was, whether the parties intended to contract as master and servant, or as master and apprentice; the written agreement was as follows: "I, *J. M.* do hereby agree with *J. C.* to serve me three years, to learn the business of a carpenter, the first year to have 1*s.* 2*d.* per day, the second year to have 1*s.* 6*d.* per day;" &c. In addition to this, *J. C.* was admitted to prove, at the trial, that at the time of signing the agreement he agreed to give *J. M.* the sum of three guineas, as a premium to teach him the trade, and that he was not to be employed in any other work. The Court of King's Bench held that the evidence was admissible, being offered not to contradict a written agreement, but to ascertain an independent fact (*k*). It is, however, to be observed upon this case, that the question might have been very different indeed had it arisen as between the contracting parties; as if, for instance, a dispute had arisen between them as to the nature of the service which the master had a right to exact by virtue of the agreement. If in that case the servant had insisted on the co-existing parol agreement, to limit his service to carpenters' work, the objection would have operated strongly that this would have been to superadd terms by parol to those contained in the written instrument, or to explain the intention of the parties by parol evidence (*l*). But the question was between strangers to the contract; the point in issue was, the real intention of the parties when they committed certain terms to writing; the terms so written were admissible evidence, as tending to prove the fact, on the natural presumption, in the absence of all suspicion of fraud, that the parties would disclose their real intention; but this was not the *only* medium of proof, neither was it an *exclusive* one, for the private statement of the parties could not, on any principle, bind and estop strangers.

Where the action was brought against the heir and devisee, on a bond, and issue was taken on the fact, whether the defendant had sold the estate

(*h*) 3 T. R. 474. So in *R.* v. *Llangunner*, 2 B. & Ad. 616, the deed of apprenticeship stating the money to have been paid by *J. M.*, evidence was admitted to show that it was in part parish money. And see *R.* v. *Wickham*, 2 Ad. & Ell. 517, where it was held that a parish might show a settlement by renting a tenement in *A.*, although the lease stated it to be in *B.* Parish officers are not estopped from showing the true consideration for a conveyance, though the parties are. *R.* v. *Inhabitants of Cheadle*, 3 B. & Ad. 833; and see *R.* v. *Olney*, 1 M. & S. 387. See other cases where evidence has been admitted of a consideration different from that expressed in the deed. *Filmer* v. *Gott*, 7 Bro. P. C. 70. *Clarkson* v. *Hanway*, 2 P. Wms. 203; 1 Ves. 128; and *supra*, 548. 555.

(*i*) 8 T. R. 179. See also *R.* v. *Shinfield*, 14 East, 544.

(*k*) Per Lord Kenyon, C. J. and Lawrence, J.

(*l*) *Supra*, 548, *et seq.*

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for more than 168*l.*, a lease and release were produced in evidence, from which it appeared that the defendant had sold the estate for 210*l.*, but it was held that he was at liberty to prove that part of the estate so sold did not belong to the testator, but had been purchased by the defendant for the sum of 42*l.* in order to be sold to the vendee (*m*). Here the evidence was consistent with the terms of the deed; but even if it had not been so, it seems that it would still have been admissible as between those parties; for although, as between the defendant and the vendee, the defendant might have been estopped by his deed from making any averment against it, yet as between the plaintiff and defendant there was no mutuality, and consequently no estoppel, and therefore the defendant was not concluded, upon issue joined as to the amount for which the estate sold, from showing the real fact. It was held in the same case, that although the deed stated that the consideration was paid to the vendor, evidence was admissible to show that it was paid to a third person, with his privity.

A party to a deed may, in an action between others, contradict the deed by his testimony; thus, one who has jointly with another executed an assignment of a ship, as of their joint property, is competent to prove that he had no interest in it (*n*).

General rule as to the independent operation of parol evidence.

With the exceptions already adverted to, the general inference, as above stated, seems to be, that oral evidence may be used indifferently as original and independent evidence of a fact, either concurrently with or in opposition to written testimony (*o*); and that written evidence, however superior it may be, and frequently is in *effect* to mere oral evidence, does not in any case, of its own authority, unaided by an express rule of law, exclude such evidence.

In an action for bribery at an election, it was held that parol evidence was admissible to prove the delivery of the precept to the returning officer, although it appeared that the returning officer had indorsed upon the precept, with a view to prove it, the time of his having so received it, and that the indorsement had been attested by two witnesses (*p*).

(*m*) *Grore* v. *Weston*, Say. 209.

(*n*) 1 T. R. 301; *supra*, 10.

(*o*) An order for goods, describing their number and kind, is evidence for the plaintiff in an action against the defendant for not delivering the goods, although no time or price was mentioned; and the defendant's acceptance of the order, and the price agreed upon, may be proved by parol. *Ingram* v. *Lee*, 2 Camp. 521. Where the terms of adjustment with an underwriter were indorsed on the policy, and the money was paid, parol evidence was admitted of a previous agreement, that if the other underwriters should eventually pay a less sum, the surplus should be returned. *Russell* v. *Dunsley*, 6 Moore, 233. The fact that a receipt has been given, does not exclude parol evidence of payment by a witness who saw the money paid. *Rambert* v. *Cohen*, 2 Esp. C. 213, *cor.* Lord Ellenborough. An oral admission by a defendant is evidence of a debt, although at the same time a written admission was entered in a book, which cannot be read for want of a stamp. *Singleton* v. *Ballett*, 2 Tyr. 409; and see *Jacob* v. *Lindsay*, 1 East, 460; *Rambert* v. *Cohen*, 4 Esp. C. 213. *Mangham* v. *Hubbard*, 8 B. & C. 14. *Semble*, evidence is admissible that notes were issued by a corporation for a different purpose than that for which they were authorized to issue them. *Slark* v. *Highgate Archway Company*, 5 Taunt. 792.

(*p*) *Grey* v. *Smithies*, Burr. 2273. It appeared in the case of *Reason* and *Tranter*, Stra. 499, that the dying declaration of Mr. Lutterel, the deceased, had been taken down in writing by a witness, at the instance of two justices of the peace who were present; the witness had afterwards copied the writing thus made, and produced it at the trial; but the original was not produced. The Court held that the copy was not evidence. Upon this it may be observed, that although the copy was not evidence, the original being still in existence, and being better evidence than the copy, yet it seems that, in such a case, the mere fact that the witness reduced the declarations to writing at the time, would not exclude parol evidence of those declarations, the

An executory agreement, not under seal, may be discharged by a parol agreement (*q*). But it seems that a contract under the Statute of Frauds cannot be waived by a subsequent parol agreement (*r*).

To confirm or contradict unauthenticated written evidence.

Where letters are written in so dubious a manner as to be capable of different constructions, or be unintelligible, without the aid of extrinsic circumstances, their meaning becomes a question of fact for the jury, and parol evidence of such extrinsic facts is admissible; as in the case of libels, threatening letters, or a letter offered in evidence to prove acknowledgments to take a case out of the Statute of Limitations. But if they cannot be explained by extrinsic circumstances, then, like deeds or agreements, their construction is matter of law for the Court (*s*).

So an instrument in itself defective and inoperative may be confirmed and supplied by oral testimony, and operate in conjunction with it. Thus, where in the bishop's register a blank was left for the name of the patron, it was held that this might be supplied by oral testimony (*t*), for as the presentation itself might have been by parol, it might have been proved by the aid of the suppletory parol evidence, consequently there was no unwarranted substitution of oral for written evidence.

PARTICULARS, BILL OF.

By a general rule of all the courts of Trin. T., 1 W. 4, it is directed that with any declaration, if delivered, or with notice of declaration, if filed, containing counts in *indebitatus assumpsit*, or debt on simple contract, the plaintiff shall deliver full particulars of his demand under those counts, when such particulars can be comprised within three folios; and when the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios (*u*).

The particulars, when annexed to the record, are authentic without further proof (*x*); but they are not made part of the record and incorporated in the pleadings (*y*).

Object of.

The object of a bill of particulars is to give the defendant more specific and precise information as to the nature and extent of the demand made upon him by the plaintiff, than is announced by the declaration (*z*), in a

instrument not being an authentic one, authorized by the statute of Phil. & Mary. See *Sayer's Case*, 12 Vin. Ab. A. b. 23, pl. 7. In the same case other declarations of the deceased which had not been taken down in writing, made at other times, were received in evidence. See 2 Starkie's C. 208.

(*q*) *Ld. Milton* v. *Edworth*, 6 Brown. P. C. 587. *Secus*, after breach, *Willoughby* v. *Backhouse*, 2 B. & C. 824; B. N. P. 152. *Case* v. *Baker*, T. Raym. 450.

(*r*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 58.

(*s*) Per Buller, J., 1 T. R. 182.

(*t*) *Bishop of Meath* v. *Lord Belfield*, 1 Wils. 215.

(*u*) If the particulars exceed three folios, the defendant may obtain fresh particulars on payment of costs and taking short notice of trial. *James* v. *Child*, 2 Cr. & J. 252. If the plaintiff do not supply such particulars as the statute requires, he will not be allowed them in costs, if afterwards required and delivered.

(*x*) *Macarty* v. *Smith*, 8 Bing. 145; 1 M. & Scott, 227; 1 D. P. C. 227.

(*y*) *Booth* v. *Howard*, 5 Dow, P. C. 438.

(*z*) Wherever the form of pleading is so general as not necessarily to enable the defendant to prepare fully for his defence, as where a general form is given by a statute, such as 9 Ann, c. 14, or 25 Geo. 2, c. 36, it seems that the plaintiff would be required to furnish a bill of particulars. See Tidd's Practice, 7th edit. So where the action is on a bond conditioned to indemnify or to perform covenants. So in ejectment on a forfeiture of a lease (*Doe* d. *Birch* v. *Phillips*, 6 T. R. 597); or if the plaintiff declare generally in ejectment, and without sufficiently specifying the lands sought to be recovered (7 East, 332); so the plaintiff may call on the defendant in ejectment to

When sufficient.

mode unencumbered by the technical formalities of pleading. Hence, as will appear from the decisions on this head, referred to below, particulars are in general sufficient, provided they be not so materially erroneous (*a*) as probably to have led the defendant into error; but if, on the other hand, the particulars vary so materially from the evidence as to render it probable that the defendant has not been apprised of the real claim intended to be made by the plaintiff, the latter will be precluded from going into evidence of that part of his demand.

Objection to omission in, how taken.

In order to preclude the plaintiff from giving evidence of any item not included in the bill of particulars, the order for delivering the bill must be produced, and the delivery of the bill be proved (*b*). If a first bill of particulars has been delivered, under a Judge's order, and the plaintiff deliver a second without any order, he can give no evidence of any item which is not contained in the first particulars (*c*), for the latter will not supersede the former, neither will it confine the plaintiff in his evidence (*d*).

Defects in.

Where the particulars stated merely that the demand was on a promissory note, which for want of a stamp could not be given in evidence, it was held that the plaintiff could not go into evidence of the consideration for which the note was given (*e*).

If the particulars state the demand to be for goods sold and delivered to the defendant, no evidence can be given of goods sold and delivered by the defendant as agent for the plaintiff (*f*). Nor of a mere admission that the

specify for what he defends, where it is not ascertained in the consent-rule. But where the particulars are specified in the declaration, as in actions of special assumpsit, covenant, debt, or articles of agreement, or in actions for *torts* specified in the declaration, an order for particulars does not appear to be requisite. Tidd's Practice, 613, 7th edit.—In an action for *assumpsit* against the vendor for breach of contract in the sale of a house, with counts to recover the deposit, the plaintiff having in his first count alleged that the defendant, who was bound to make a good title, had delivered an insufficient abstract, the Court obliged the plaintiff to give a particular of all the objections to the abstract arising upon matters of fact (*Collett* v. *Thompson*, 3 B & P. 246). In ejectment brought on a forfeiture of a lease, the Court will compel the plaintiff to give a particular of the breaches on which he means to rely. *Doe* d. *Birch* v. *Phillips*, 6 T. R. 597.

(*a*) The particulars should contain an account of the items of demand, and state when, and in what manner, they arose; but it is sufficient to refer to a particular already delivered, without re-stating it (Peake's C. 172; Tidd's Pract. 614, 7th edit.) If the bill specify the transaction upon which the claim arises, it need not specify the technical description of the right resulting to the plaintiff from that transaction (*Brown* v. *Hodgson*, 4 Taunt. 189). It will be a contempt of court to deliver a particular as general as the declaration (*Brown* v. *Watts*, 1 Taunt. 353); but it is sufficient if it convey the requisite information, although it be inartificially drawn up (1 Camp. 69). It has been said, that where there has been an account current, and the party means to give credit, the particular ought to state those items meant to be allowed (per Lord Kenyon; *Mitchell* v. *Wright*, 1 Esp. C. 280.) And where an attorney, by his bill of particulars, claimed 200 *l.*, although, on allowing for payments, the balance was but 10 *l.*, the plaintiff was compelled to take the balance without costs (2 Camp. C. 410). But the practice does not conform with these cases (Tidd's Pract. 614 (*e*), 7th edit.) And in a late case, Holroyd, J. held, upon an application at chambers, that it was sufficient to state the items on the debtor side only (*Cooke* v. *Cooke*, MS.). And see *Miller* v. *Johnson*, 2 Esp. C. 602, where Eyre, C. J. observed that it was never the intention, in compelling a party to give a particular under a Judge's order, to make him furnish evidence against himself, and that such an use could not be made of it.

(*b*) Peake's C. 172; 2 B. & P. 243; 1 Esp. C. 195; 3 Esp. C. 168.

(*c*) *Brown* v. *Watts*, 1 Taunt. 353. *Short* v. *Edwards*, 1 Esp. C. 374. Where the plaintiff has made a mistake in delivering his particulars, he ought to amend, on a summons. 1 Taunt. 353.

(*d*) *Short* v. *Edwards*, 1 Esp. C. 374.

(*e*) *Wade* v. *Beasley*, 4 Esp. C. 7. The action was by the payee against the executor of the maker. But see *Brown* v. *Hodgson*, 4 Taunt. 189, and *supra*, 577, note (*d*).

(*f*) *Holland* v. *Hopkins*, 2 B. & P. 243.

defendant owed the particular sum (*g*). But in an action against an agent for not accounting for goods delivered to be sold, and for goods sold, particulars headed, "Defendant to plaintiff, 10 tierces of porter, 20*l*.," were held to be applicable to any of the counts (*h*). Defects in.

A mistake in the date, as to the demand upon a particular item, is not material where the date cannot mislead (*i*); as where the particular states the work for which the action is brought to have been done in one month, when in fact it was done in another month, and no work was done in the month so specified (*k*).

The plaintiff is not precluded from recovering a demand made in the particulars by his having omitted to include the item in a bill delivered before the action was brought (*l*); but the previous omission may, under the circumstances, afford a presumption against the claim.

A reference to an account delivered before the commencement of the action is a virtual compliance with the order for the delivery of a bill of particulars, and the plaintiff is bound by the account (*m*).

Where a party cannot have been misled by a mistake made in the particulars, the error is not in general material. Defect when immaterial.

Where the particulars, by mistake, specified a payment made by the plaintiff, on account of the defendant, to *A.*, and it turned out that it had been made to *B.*, the item having been erroneously placed under the name of *A.* instead of *B.*, it was held to be sufficient, unless the defendant would make affidavit that he had been misled by the particulars (*n*). So where the particulars, in an action of debt for rent, stated the premises to be at *A.* instead of *B.*, it was held to be no ground of nonsuit unless the defendant could prove that he held other premises at *A.* of the plaintiff (*o*).

So where the particulars specified the amount of a bill at 60*l.* instead of 63*l.*, and made a mistake in the day of the month in stating the date (*p*).

The plaintiff may recover interest, although the particular merely states a demand upon a promissory note (*q*). Effect of, by way of admission.

Where the plaintiff's particulars were for horses sold, and upon an account stated, and the defendant paid money into court sufficient to cover the latter demand, and the plaintiff failed on the former demand, it was held that he could not apply the money paid to the counts for horses sold, on which he had given no evidence; and he was nonsuited (*r*).

(*g*) *Buckton* v. *Smith*, 4 Ad. & Ell. 468, although the declaration contained a count on an account stated; and see *Holland* v. *Hopkins*, 2 B. & P. 243.

(*h*) *Hunter* v. *Welsh*, 1 Starkie's C. 224. And where a carrier had misdelivered goods which the defendant had misappropriated to his own use, the particulars "to seventeen firkins of butter, 50*l*." were held to be sufficient. *Brown* v. *Hodson*, 4 Taunt. 189. Disbursements are evidence under a particular for cash advanced. *Harrison* v. *Wood*, 8 Bing. 371.

(*i*) *Milwood* v. *Walter*, 2 Taunt. 224. *Harrison* v. *Wood*, 8 Bing. 371.

(*k*) 2 Taunt. 224.

(*l*) *Short* v. *Edwards*, 1 Esp. C. 374.

(*m*) *Hatchett* v. *Marshall*, Peake, 172. *Etches* v. *Fellowes*, Wightw. 78.

(*n*) *Day* v. *Bower*, 1 Camp. 69, n.

(*o*) *Davies* v. *Edwards*, 3 M. & S. 380. So where, in an action by the assignees of a bankrupt, the declaration stated the action to be for money had and received to the use of the bankrupt, but the particulars of demand stated it to be had and received to the use of the plaintiff, it was held that the variance was not material, the particulars having given substantial information of the nature of the claim. *Tucker* v. *Barrow*, 1 M. & M. 137.

(*p*) Per Abbott, J., Manning's Ind. 240. *Fleming* v. *Crisp*, 5 Dow. P. C. 454. Particulars for goods sold by the plaintiffs as *brewers* will not prevent their recovering as *spirit* dealers, the defendant not having been misled, *Lambirth* v. *Roff*, 8 Bing. 411.

(*q*) *Blake* v. *Lawrence*, 4 Esp. 147. So where the plaintiff confined his particulars to one count of his declaration.

(*r*) *Holland* v. *Hopkins*, 3 Esp. C. 168; 2 B. & P. 243.

Effect of, by way of admission.

Where in *assumpsit* the defendant pleaded non-joinder in abatement, and the particular contained items as due from the defendant and his partner, who was not sued, it was held that the particulars supported the plea, although part of the demand was due from the defendant solely (*s*).

The giving credit to the opposite party, where there has been an account current between them, is not an admission that the sum is due (*t*).

Particulars of set-off are for the benefit of the defendant, to enable him to know what to plead, as well as to restrain the plaintiff's proof of his claim in the declaration (*u*). An admission in the particular of a payment by the defendant is evidence for the latter to prove such payment, and the jury are not, in acting on such proof, bound to adopt the statements made in the particular by the plaintiff in his own favour (*v*); and such payment need not be pleaded (*w*).

The particulars of set-off are considered as incorporated with the notice of set-off, which is in the nature of a plea, and therefore a plaintiff cannot make use of a notice of set-off as evidence of the debt under the plea of *non assumpsit*; nor can he use a particular of set-off for that purpose, for it is incorporated with the notice (*x*).

Although the plaintiff be restricted in his own evidence by his particular, he may avail himself of any evidence adduced by the defendant to increase his demand (*y*).

The plaintiff brought an action against his partner, and confined himself by his particular to a balance due on a separate account; the defendant produced a subsequent account, stated by the plaintiff, in which the latter made himself a debtor on the separate account, but on the same paper stated also the general account, by which he made himself creditor to a greater amount than that claimed on the separate account: the Court said that the defendant had made a better case for the plaintiff than he was at liberty to have made for himself, and that the plaintiff was entitled to a verdict for the balance on the general account. Here the defendant himself proved the plaintiff's claim to the larger sum, by giving in evidence

(*s*) *Colson* v. *Selby*, 1 Esp. C. 452. And the Court of K. B. afterwards refused to set aside the nonsuit. *Qu.*

(*t*) *Miller* v. *Johnson*, 2 Esp. C. 602. Note, there the question was upon the particulars of set-off delivered by the defendants, and it was held that the admission of an item in the plaintiff's account did not render proof by the plaintiff unnecessary. See also 5 Taunt. 228; 1 Marsh. 33. S. C.

(*u*) See the observations of Parke, B. in *Kenyon* v. *Wakes*, 2 M. & W. 764; and see *Booth* v. *Howard*, 5 Dow, P. C. 438.

(*v*) *Kenyon* v. *Wakes*, 2 M. & W. 764; and see the observations of Parke, B., ib.

(*w*) Ib., and *Coates* v. *Stevens*, 2 C. M. & R. 118. Note, that in the case of *Kenyon* v. *Wakes*, the objection that without a plea of payment the defendant could use the particulars in reduction of damages only, and not in bar of the action, was not taken at the trial, and therefore the Court refused to set aside the verdict for the defendant. Parke, B., however, intimated his opinion that a plea of payment was unnecessary, and said, that had it not been for the case of *Ernest* v. *Brown*, 3 Bing. N. C. 374, he should have entertained no doubt on the question; and he disapproved of the distinction taken in *Ernest* v. *Brown*, between assumpsit and debt, in this respect. And see *Rymer* v. *Cooke*, M. & M. 86, n.; and now by the rule, Trin. Term, 1 Vict., where the plaintiff, to avoid the expense of a plea of payment, shall have given credit in the particulars for any sum admitted to have been paid to the plaintiff, it shall not be necessary to plead payment. The rule is not to apply where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance without giving credit for any particular sum. See tit. PAYMENT.

(*x*) *Harrington* v. *Macmorris*, 5 Taunt. 228; 1 Marsh, 33; *Supra*, Vol. I. tit. PLEADINGS.

(*y*) *Hurst* v. *Watkis*, 1 Camp. 68; and per Parke, B., 1 M. & W. 486.

the balance due on the general account, since the whole of the plaintiff's statement was in evidence.

Where a particular as to some counts (*e. g.* on bills of exchange) is unnecessary, it is sufficient if the particular specify the causes of action in the other counts (*z*).

Objection that a bill has not been delivered.

If the particulars of the defendant's set-off be not delivered within the time limited by the order (*a*), he will be precluded from giving evidence in support of his set-off; but the plaintiff cannot make an objection to such particulars at the trial, which might, if taken earlier, have been rectified by the defendant, or by the Court (*b*).

The objection on the score of variance between the proof and the particulars must be taken on the trial, after production and proof of the particulars (*c*).

PARTIES (*d*).

Grounds of incompetency.

THE rule which excludes a party from giving evidence in his own cause is not founded merely on the consideration of his interest; if it did, it would follow that a party might always be called by the adversary to give evidence *against* his own interest; the rule is partly, at least, founded on a principle of *policy* for the prevention of perjury (*e*).

In a recent case, a plaintiff was by consent of the defendant allowed to be examined upon oath as a witness in the cause, although he came to defeat the claim of a co-plaintiff (*f*).

It has been seen, that in general a voluntary admission made by a party to the cause is admissible evidence against him (*g*). This is true where the party making the admission is affected by it, in his own private and natural capacity; but in other cases the rule is frequently inapplicable.

Where a corporation has been a party, a corporator not disqualified on

(*z*) *Cooper* v. *Amos*, 2 C. & P. 267. *Day* v. *Davis*, 5 C. & P. 340.

(*a*) See the form, Tidd, App. c. 22, s.10. If the order direct the particulars to be delivered forthwith, without prescribing any specific time, and the particulars are delivered so late as to embarrass the party, he waives the objection by an acceptance of the particulars, and cannot urge it at the trial; the proper course is to object immediately, by application to the Court. See Holt's C. 552.

(*b*) *Lovelock* v. *Chiveley*, Holt's C. 552.

(*c*) The plaintiff recovered a greater sum than he claimed by his particulars, and upon discussion, the Court of K. B. approved of the principle on which he recovered, and judgment was entered accordingly, no objection having been made on the score of excess, either at the trial or upon the argument, the Court refused to reduce the judgment to the sum claimed by the particulars. *Bell* v. *Puller*, 2 Taunt. 285; 12 East, 496, n.

(*d*) As to the joinder of parties in an indictment, see Crim. Plead. 2d edit. 33; and *supra*, tit. ACCESSORIES. As to compelling a disclosure of the residence of plaintiffs in a suit, see *Worton* v. *Smith*, 6 Moore, 110. *Redford* v. *Birley*, MS.

(*e*) And yet either party may be put to his oath by a bill of discovery in equity, where he is quite as likely to commit perjury as if he were to be examined in a court of common law. It was formerly held (in equity) that though a plaintiff could not examine a co-defendant whom he had *unnecessarily* made a witness (*Gibson* v. *Allen*, 10 Mod. 19), yet one co-defendant might examine any other. Ch. Pr. 411; Gil. Eq. Rep. 98. Where a court of equity directs a party to be examined as a witness, the objection is merely reserved *quâ* competency as a party. *Rogers* v. *Whittingham*, 1 Swans. 39.

(*f*) *Norden* v. *Williamson*, 1 Taunt. 378; and *Fenn* d. *Pewtris* v. *Granger*, 3 Camp. 177. If, however, the general rule of exclusion be founded partly on the ground of policy, it seems to be clear in principle that the rule ought not to be infringed, even although a party be desirous of examining his adversary. The above case of *Norden* v. *Williamson* was so peculiarly circumstanced, that there could be no danger of perjury.

(*g*) *Supra*, tit. ADMISSIONS.

Grounds of incompetency.

the score of interest seems at all times to have been considered to be competent (*h*). And a declaration or admission by a corporator is not admissible in evidence against the corporation (*i*). But it has been held that the declaration of a rated parishioner is admissible, although it be exceedingly weak evidence in a case of settlement (*j*).

Who are parties. Inhabitants of parishes, hundreds, &c.

The inhabitants of contending parishes in settlement cases are considered *sub modo* as parties, and on this ground it has been held that an inhabitant of the adverse parish is not compellable to give evidence (*k*). Still inhabitants, if not rated, were always considered to be competent (*l*). And upon indictments against the inhabitants of counties for the non-repair of bridges, and of parishes for non-repair of highways, the inhabitants, although parties, seem to have been considered as competent witnesses, except so far as they were rendered incompetent by their interest (*m*). The statute, making inhabitants of hundreds (*n*) competent, notwithstanding their interest, would have been nugatory if the objection might still have been taken that they were parties.

The respondents' overseer, producing an ancient certificate by the appellant parish, may be examined as to the contents (*o*). So may a corporator, producing corporation documents.

Party to the record.

It has already been seen that a party to a transaction is, in general, competent, unless he be either a party to the record, or be disqualified by his interest (*p*). It still remains to be considered how far the being a party to the record will in itself operate as a disqualification. In the first place, whenever there are several defendants in *tort*, and after the whole of the evidence has been gone through on the part of the plaintiff, he may be acquitted, and examined as a witness for the others (*q*). But a plaintiff can in no case examine a co-defendant, although nothing be proved against him (*r*) on the trial.

(*h*) *Supra*, 340. The men of one county, city, hundred, town, corporation or parish, are evidence in relation to the rights, privileges, immunities and affairs of such town, city, &c., if they are not concerned in private interests in relation thereunto, nor advantaged by such rights and privileges as they assert by their attestation. Gilb. L. Ev. 128, 2d ed.; Vent. 351.

(*i*) *Mayor of London* v. *Long*, 1 Camp. 22.

(*j*) *R.* v. *Inhab. of Hardwicke*, 11 East, 579; see stat. 54 Geo. 3, c. 170; and see *R.* v. *Whitley, Lower*, 1 M. & S. 636; and Vol. I. tit. WITNESS. But see the observations there as to the stat. 54 Geo. 3, c. 170.

(*k*) Ib. But now see the stat. 54 Geo. 3, c. 170, s. 9; vide *supra*, Vol. I. tit. WITNESS.

(*l*) Ib.

(*m*) *Supra*, 530. Vol. I. tit. WITNESS —INHABITANT. I am not aware of any instance where exemption from examination has been claimed in such a case by an inhabitant, on the ground that he was a party.

(*n*) *Supra*, Vol. I. tit. WITNESS. And see the stat. 8 Geo. 2, c. 16, s. 15, which recites that hundredors are incompetent, by reason of interest.

(*o*) *R.* v. *Netherthong*, 2 M. & S. 337.

(*p*) *Supra*, Vol. I. tit. WITNESS.

(*q*) He ought to be acquitted at the end of the plaintiff's case, per Alderson, J.; and it was so held by all the Judges on consultation, and ruled accordingly by Alderson, J., in *Kendall* v. *Killshaw*, Lancaster Sp. Ass. 1834. For otherwise, per Alderson, J., the party against whom no evidence given would be entitled to cross-examine the witnesses for defendant. *Supra*, Vol. I. tit. WITNESS. So upon an indictment. *R.* v. *Bedder*, 1 Sid. 237. *R.* v. *The Mutineers of the Bounty*, 1 East, 313; and see *Dymoke's Case*, Sav. 34; Godb. 326; Vin. Ab. Ev. I. 5. I. 12; Tr. P. P. 334, 7th edit. But a bankrupt who has pleaded his bankruptcy, is not, on proof of the bankruptcy, a competent witness for a co-defendant. *Supra*, tit. BANKRUPT. *Qu.* whether, when an action is brought against a constable acting under a warrant, without joining the justice, the constable, on proof of the warrant, is not entitled immediately to his acquittal under the stat. 24 Geo. 2, c. 44, s. 6. Vide *supra*, tit. JUSTICES.

(*r*) B. N. P. 285; 2 Camp. 333, n. The general rule is, that a party to the record cannot be examined; per Le Blanc, J. Ibid.; and per Abbott, L. C. J., in *Blackett* v.

Party to the record.

A defendant upon the record, who is no party to the issue tried, may usually be examined as a witness, if he be not disqualified by interest. Thus a co-defendant, in an action of *tort*, who has suffered judgment to go by default, is competent to prove that a co-defendant is not chargeable (*s*). But he cannot be called to prove a co-defendant guilty (*t*). So a defendant in ejectment who has let judgment go by default is a competent witness for either a defendant (*u*) or plaintiff (*v*).

A co-defendant in *assumpsit*, who pleads his bankruptcy, is not a competent witness for a co-defendant who has pleaded *non assumpsit* (*w*). But where, in such a case, the plaintiff had entered a *nolle prosequi* as to the bankrupt, the latter was admitted as a witness for the other defendants (*x*).

Where upon an issue to try the validity of a will, a legatee appeared under a liberty "to attend the trial of such issue," it was held that his counsel might cross-examine witnesses, and suggest points of law, but had no right to address the jury or call witnesses (*y*).

Variance.

The effect of a variance as to parties between the record and the evidence is considered under the respective titles of *Assumpsit* (*z*), *Carriers* (*a*) *Case* (*b*), *Deed* (*c*), *Ejectment* (*d*), *Husband and Wife* (*e*), *Trespass*, *Trover*, *Variance*.

In *assumpsit*, the joinder of too many, either plaintiffs or defendants, or the non-joinder of plaintiffs, is a ground of nonsuit (*f*), but the non-joinder

Weir, 5 B. & C. 387. A plaintiff cannot call a co-defendant in *assumpsit* who has let judgment go by default. Ib. And it seems to be a general rule, that a plaintiff can in no case examine a co-defendant on the record; a rule founded, principally, on the ground of policy in preventing perjury, and a consideration of the hardship of calling on a party to charge himself. And this rule seems to be strictly observed as to plaintiffs, for the joining so many defendants is their own act, although, in many instances, it may be matter of necessity. The case of a defendant in ejectment who has let judgment go by default (*Doe* d. *Harrop* v. *Green*, 4 Esp. C. 198) is scarcely to be regarded as an exception; for there the proceeding is merely fictitious, and the name of the defendant does not appear upon the record. In the cases of *Mant* v. *Maiwaring*, 2 Moore, 9, and *Brown* v. *Brown*, 4 Taunt. 752, it was held that a co-defendant in *assumpsit*, who had let judgment go by default, was not a competent witness for the plaintiff, for by means of his own testimony he would obtain contribution from the defendant who had pleaded. Vide tit. WITNESS—INTEREST.

(*s*) *Ward* v. *Haydon & another*, 2 Esp. C. 552, cor. Lord Kenyon, 2 Camp. 334, n.; cor. Wood, B. Lancaster, 1809. Where three out of four defendants suffered judgment by default, it was held that one of them might be subpœnaed to produce a deed. *Colley* v. *Smith*, 4 Bing. N. C. 285; and 6 Dowl. 399.

(*t*) *Chapman* v. *Graves*, 2 Camp. 333, n. cor. Le Blanc, J. Lancaster, 1810. And see *Barnard* v. *Dawson*, 2 Camp. 333, n. cor. Lord Kenyon. But in the case of *Worall* v. *Jones*, 7 Bing. 395, it was held that where a party to the record had let judgment go by default, consented to be examined, and had no interest in the cause, it was competent to the plaintiff to examine him. See *R.* v. *Woburn*, 10 East, 395.

(*u*) Vide tit. WITNESS—INTEREST.

(*v*) *Doe* d. *Harrop* v. *Green*, 4 Esp. C. 198.

(*w*) *Raven* v. *Dunning & another*, 3 Esp. C. 25. See *Emmett* v. *Bradley*, 1 Moore, 332. *Emmett* v. *Butler*, 7 Taunt. 599. Peake's Ev. App. lxxxvii. And the Court would not in such a case permit a verdict to be recorded in favour of the bankrupt, for the purpose of enabling him to give evidence. *Currie* v. *Child & others*, 3 Camp. 283. Where one of several defendants sued as makers of a note, pleaded his bankruptcy and certificate, the Court permitted a verdict to be taken for him, and that he should be examined as a witness for the other defendants. *Bate* v. *Russell*, 1 M. & M. 333. S. P. *Afflalo* v. *Fourdrinier*, 6 Bing. 306.

(*x*) *M'Iver* v. *Humble*, 16 East, 171.

(*y*) *Wright* v. *Wright*, 4 C. & P. 389; and 7 Bing. 450, n.

(*z*) *Supra*, 59.

(*a*) *Supra*, 285.

(*b*) *Supra*, 298.

(*c*) *Supra*, 378.

(*d*) *Supra*, 430.

(*e*) *Supra*, 535.

(*f*) *Supra*, 59–100. Joint-tenants must also join in actions *ex contractu* (Co. Litt. 180, b.; Bac. Abr. tit. *Joint-tenants*, K. 1 B. & P. 73); and so must parceners in all actions relating to their estate (R. T. Hardw. 398, 9). Tenants in common may

Variance.

of other defendants must be pleaded in abatement (*g*). In actions of *tort*, on the other hand, although the joinder of too many plaintiffs be a ground of nonsuit (*h*), the non-joinder of plaintiffs must be pleaded in abatement (*i*); the joinder of too many defendants is not a ground of nonsuit, since some may be convicted and the rest acquitted (*k*); the same rule applies in penal actions (*l*); and the non-joinder of others as defendants in *personal* actions of *tort* (*m*) cannot be taken advantage of, even by plea in abatement. Where, however, the action is founded *immediately* upon a contract, and for a damage resulting from mere breach of contract, although in form it be an action of *tort*, the joinder of defendants, who did not contract, would, it seems, be a ground of nonsuit under the general issue (*n*); and in such case one of two joint contractors cannot maintain a separate action (*o*).

PARTNERS (*p*).

Identity of.

WHERE two or more unite in partnership, for carrying on a particular trade, or other purpose, they become in point of law so identified with each other (*q*), that the acts and admissions of any one, with reference to the common object, are the acts and declarations of all, and are binding upon all. The very constitution of this relationship furnishes a presumption that each individual partner is an authorized agent for the rest, but this presumption has no operation where a party who would rely upon it has received express notice to the contrary, or where the transaction between himself and the individual partner is a fraud upon the rest.

either join or sever in actions on contracts relating to their estate, although they must sever in avowry for rent. Bac. Ab. tit. *Joint-tenants*, and *Tenants in Common*, K.; 1 Lev. 109; Sir T. Raymond, 80.

(*g*) Ibid.

(*h*) *Supra*, 297.

(*i*) *Supra*, 297. Joint-tenants and parceners must join in personal as well as real actions for injuries affecting their real property, or the non-joinder may be pleaded in abatement (Bac. Abr. tit. *Joint-tenants*, K. 2 Vin. Ab. 59; Vin. Ab. tit. *Parceners*). Tenants in common *must sever* in real actions, except in *quare impedit*; but they *may join* in personal actions for a joint damage to the estate (Bac. Ab. *Joint-tenants*, K.; 5 T. R. 247; Cro. Jac. 231; 2 Bl. 1077; Yelv. 161), or each may sue separately (5 T. R. 248; 2 Bl. R. 1077). The non-joinder of a part-owner of a chattel must be pleaded in abatement, although the omission appear on the declaration in trover. *Addison* v. *Overend*, 6 T. R. 766. Lease to *A.* and *B.*; *A.* demises part to *D.* and gives receipts and a notice to quit in his own name. *A.* and *B.* (*semble*) cannot jointly maintain an action in the nature of waste. *Steele* v. *Western*, 7 Moore, 29.

(*k*) *Supra*, 285. 297.

(*l*) *Hardyman* v. *Whitaker & al.* 2 East, 573, n. and see *Barnard* v. *Gostling & al.* 2 East, 569.

(*m*) 1 Will. Saund. 291, a.

(*n*) *Weall* v. *King*, 12 East, 452. The plaintiff declared for a deceit alleged to have been practised by means of a warranty made by two defendants upon a joint sale to him, by both, of sheep, their joint property, and it was held that the plaintiff could not recover upon proof of a contract of sale and warranty by one only as of his separate property. See also *Max* v. *Roberts*, 2 N. R. 454; where, in an action on the case, upon the delivery of goods to several joint ship-owners, to be carried to *A.* for freight, and alleging a deviation, it was held, that if the plaintiff failed to prove them all to be owners, he could not recover against the rest. It is otherwise where *negligence* is the test of the action, although a contract exist relating to the business in which the negligence occurred. See *Gorett* v. *Radnidge*, 3 East, 62. *Supra*, 285.

(*o*) *Hill* v. *Tucker*, 1 Taunt. 7. Bail, jointly, employed an attorney to surrender the principal, and held that they could not maintain separate actions for neglecting to surrender the principal.

(*p*) See the Act for regulating the copartnership of bankers; 7 G. 4, c. 46. See as to joint-stock companies, 1 & 2 Vict. c. 96, continued and extended by 3 & 4 Vict. c. 111.

(*q*) Partners are at law joint-tenants, part-owners are tenants in common, and one cannot sell the share of another. Abbott's L. S. 68. See *Ouston* v. *Hebden*, 1 Wils. 101.

Identity.

The rules of evidence on this subject result from these general principles of law regarding partnerships, subject to this further consideration, that the acts, conduct and representations of parties, may be conclusive evidence of their partnership, in favour of strangers who are not cognizant of their private arrangements, but who must be guided by external indications, although as between themselves, they are not partners. The subject will be considered as it relates to—

1. Actions by several Partners, 801.
   - - - by one of several, 803.
2. Actions against several, 804.
   - - - proof in Defence, 809.
   - - - evidence of Dissolution, 811.
   - - - - - - of Notice, 812.
   - - - against one of several, 814.
3. By one partner against another, 815.
4. Competency, 817.

Actions by several.

First. Where several plaintiffs bring an action of *assumpsit*, unless they rely upon a contract expressly made with all, they must prove a joint interest, arising by implication, as by evidence that they are partners, and jointly interested in the subject-matter; for if a contract be made by the joint agent of all, or by one partner in behalf of all, they may sue jointly upon it, although their names have not been expressly mentioned (*r*). It must be proved that all who sue were partners at the time of the contract; one who has been subsequently admitted into the firm cannot join, although it were stipulated that he should have a share in past transactions (*s*).

Proof of partnership.

The evidence of partnership usually consists in the oral testimony of clerks, or other agents or persons who know that the alleged partners have actually carried on business in partnership; it is unnecessary, even in criminal cases, to produce any deed or other agreement by which the co-partnership has been constituted.

Where several sue as indorsees of a bill, indorsed in blank, it is unnecessary to give any proof of their partnership or joint interest (*t*).

(*r*) See tit. ASSUMPSIT, and VENDOR & VENDEE. In *Skinner* v. *Stocks*, 4 B. & A. 437, it was held that the action might be brought either in the name of the person with whom the contract was actually made, or in the names of the parties really interested. Where two brought an action as partners (with whom the defendant had frequently dealt), and at the trial it appeared that at the time of the contract a third person, who had formerly been a partner, and though he had withdrawn his name when the goods were supplied still continued to receive part of the profits, but was not a party to the action, Lord Kenyon refused to nonsuit the plaintiffs. But where the action was brought in the names of several, who had agreed that Ross (one of them) should carry on the business in his own name, it was held that the defendant was entitled to set off a debt to Ross for business done on Ross's own account; and Lord Kenyon observed that the plaintiffs had subjected themselves to this by holding out false colours to the world, and permitting Ross to appear as the sole owner. *Stacey & others* v. *Decy*, 1 Esp. C. 468. *Levick* v. *Shafto*, 2 Esp. C. 468. Where three firms agreed to purchase jointly certain goods, and the purchase was effected by one party and the broker knew him only, held that all might join in the action for breach of contract *Cothay* v. *Fennell*, 10 B. & C. 671. All part-owners are partners in respect of the concerns of a ship, and all ought to join in an action for freight. Abbott on Shipp. 82. And if any injury be done to a ship and a part-owner dies, the action survives. Ib. 81.

(*s*) *Wilsford* v. *Wood*, 1 Esp. C. 182. Where a guarantee is given to one person for the benefit of all, all may sue. *Garrett* v. *Handley*, 4 B. & C. 664.

(*t*) *Rordasnz* v. *Leach*, 1 Starkie's C. 446; and *supra*, 216.

Assignees of partners.

Where *A.* and *B.* being partners, their agent, after an act of bankruptcy by *A.* (*u*) but before an act of bankruptcy by *B.*, paid a sum of money on the joint account to *C.*, it was held that the assignees under a joint commission could not recover this money as had and received to the use of *A.* and *B.* before they became bankrupts, or as money received to their use, as assignees since the bankruptcy (*x*), even although *A.* knew of the bankruptcy of *B.*; for a solvent partner may dispose of the partnership effects in discharge of a partnership debt (*y*). So if *A.* in such case, after a secret act of bankruptcy by *B.*, dispose of the partnership effects for a valuable consideration, and afterwards commit an act of bankruptcy, the assignees of both under a joint commission cannot maintain trover against the *bonâ fide* vendee (*z*).

Where an Act authorized all suits on the part of the company to be commenced and prosecuted in the name of the chairman, held that it did not extend to authorize a suit to be commenced by the chairman against a member for an account of monies received by him for shares which he was employed to sell, but that it was necessary to make the other members parties to the suit (*a*).

Satisfaction to one, &c.

It is a good defence to show that one of several plaintiffs cannot recover although he may have been guilty of fraud against the rest. Thus *A.*, *B.* and *C.* cannot recover on a bill of exchange drawn by them, and accepted by the defendant, *A.* having (in fraud of his partners) engaged to provide for the acceptance when the bill should be due (*b*). A covenant by one partner not to sue is not a release of a partnership debt (*c*).

(*u*) The consequence of a dissolution of partnership between *A.* and *B.* by the bankruptcy of *B.* is that *A.* and the assignees of *B.* become tenants in common of each individual article; 15 Ves. 229. The right is not to an individual proportion of each specific article, but to an account; the property is to be made the most of and divided; per Lord Eldon, in *Crawshay* v. *Collins*, Ib. See *Fox* v. *Hanbury*, Cowper, 449. Where one of several partners (the plaintiffs) drew a bill which the defendant accepted on the condition that such partner would provide for it when due, held that as he having failed in performing the condition could not have sued the defendant, his partner being bound by his acts could not maintain a joint action, *Sparrow* v. *Chisman*, 9 B. & C. 241.

(*x*) *Smith* v. *Goddard*, 2 B. & P. 465.

(*y*) *Harvey* v. *Crickett*, B. R. Sittings at Serjeant's Inn before Mich. Term, 57 G. 3; Sel. N. P. 1060; *i. e.* to one who had no knowledge of the bankruptcy of the partner. If a creditor take the notes of a person after knowledge of the bankruptcy of one of several partners, though the rest are then solvent, he cannot set them off; per three Judges, K. B., Sittings before Mich. T. 1830; and see *Biggs* v. *Fellows*, 8 B. & C. 402.

(*z*) *Fox* v. *Hanbury*, Cowp. 449.

(*a*) *M'Mahon* v. *Upton*, 2 Sim. 473. And see *Long* v. *Young*, 369.

(*b*) *Richmond* v. *Heapy*, 1 Starkie's C. 102; where it was held by Lord Ellenborough that the parties could not sue out a commission of bankruptcy founded upon that debt (*Johnson* v. *Peck*, cor. Holroyd, J. Lancaster Summer Assizes, 1821). *Sparrow* v. *Chisman*, 9 B. & C. 241. *Jacaud* v. *French*, 12 East, 317. *Bolton* v. *Puller*, 1 B. & B. 539. So where *A.* being indebted to *B.* and *C.*, allowed the amount on the settlement of a private account between himself and *C.*, and the latter gave a receipt to *A.* for the amount, it was held that this was a good discharge (*Henderson* v. *Smith*, 2 Camp. 561). But where such a receipt was given after notice in the Gazette of the dissolution of partnership between *B.* and *C.* and that debts were to be paid to the former only, it was held to be fraudulent, and void. Ibid. and afterwards by the Court of K. B. *A.*, *B.* and *C.* being partners, and *A.* and *D.* being also partners, *A.* indorsed bills and paid money to *A.*, *B.* and *C.*, the property of *A.* and *D.*, in payment of a debt due from *A.* to *A.*, *B.* and *C.*, and afterwards indorsed the bills in the names of *A.*, *B.* and *C.* to a creditor of the firm; held, that though this was a fraud by *A.* on *D.*, yet that *A.* and *D.* could not recover against *B.* and *C.*; and that after the bankruptcy of *A.* and *D.* their assignees were not in a better situation. *Jones* v. *Yates*, 9 B. & C. 532.

(*c*) *Walmesly* v. *Cooper*, 3 P. & D. 149.

Where *A.* was a partner with *B.* in one firm, and also with *C.* in another, and the firm of *A.* and *B.* indorsed a bill to *A.* and *C.*, and *B.* received securities from the drawer, on an undertaking by *B.* that the bill should be taken up and liquidated by the house of *A.* and *B.*, it was held that *A.* being bound by the act of his partner, could not in conjunction with *C.*, maintain an action on the bill against the acceptors (*d*). So if one partner be precluded by the illegality of his act from recovering in the particular transaction, his partners, although innocent, cannot recover (*e*). Satisfaction to one, &c.

Thus if goods be sold and packed by a partner living in Guernsey, for the purpose of being smuggled into this country, the parties who live in England, although ignorant of the transaction, cannot, jointly with the other, maintain an action for the goods, for the act of one partner is the act of all (*f*).

But where a party colludes with one partner of a firm to enable him to defraud the other partners, the one partner may maintain a joint action with the rest in respect of such *tort* (*g*). A joint-stock company, the shares of which may be increased to an unlimited extent, and be assigned or disposed of by deed or will to any persons at the discretion of the holders, are fraudulent and illegal (*h*).

The non-joinder of a co-contractor as plaintiff, is, in general, a ground of nonsuit. Action by one of several.

A surviving partner cannot recover in *assumpsit* without naming his deceased partner in the declaration (*i*), for there is a variance. But where money is owing to two partners, and after the death of one it is paid to a third person, the survivor may maintain an action for money had and received to his own use (*k*).

On an execution against one of several partners, the purchaser of his interest in partnership property becomes tenant in common with the rest (*l*).

The party with whom the contract has been expressly made may alone

(*d*) *Jacaud* v. *French*, 12 East, 317.

(*e*) 3 T. R. 454.

(*f*) *Biggs* v. *Lawrence*, 3 T. R. 454. See *Clugas* v. *Penelnna*, 4 T. R. 466. *Waymell* v. *Read*, 5 T. R. 599.

(*g*) *Longman* v. *Pole*, 1 Mood. & M. C. 223.

(*h*) *Blundell* v. *Windsor*, 8 Sim. 601.

(*i*) *Jell* v. *Douglas*, 4 B. & A. 374. *Richards* v. *Heather*, 4 B. & A. 29. *Webber* v. *Tivill*, 2 Saund. by Serj. Will. 121, n. 1. *Israel* v. *Simmons*, 2 Starkie's C. 356. Where a partnership is determined by death, it survives in many cases as to the legal title, but not as to the beneficial interest. Per Ld. Eldon, C., in *Crawshay* v. *Collins*, 15 Ves. 227. If a partner die, the debts and effects survive, but the survivor is a trustee in equity, 1 Ves. 243. *Croft* v. *Pyke*, 3 P. W. 182. *Exparte* Ruffini, 6 Ves. 126. 1 Madd. ch. 76. "Hereby it is manifest, that survivor holdeth place generally, as well between joint tenants of goods and chattels in possession or in right as joint tenants of inheritance." 1 Ins. 182. See the diversities between a naked trust and one joined to an estate or interest. Ib. 181. And between authorities created by parties and those created by law for the sake of justice. Ib.

The law will take notice of the *Lex Mercatoria*, as that there is no survivorship. Per Powell, J. *Bellasis* v. *Hesler*, Lord Ray. 281. See *Jefferies* v. *Small*, 1 Ves. 217.

(*k*) *Smith* v. *Barrow*, 2 T. R. 476.

(*l*) *Chapman* v. *Coops*, 3 B. & P. 289. And the purchaser takes subject to the rights of the other partner. Per Lord Mansfield, *Fox* v. *Hanbury*, Cowp. 449. 1 Salk 392. *West* v. *Skipp*, cited Cowp. 449. Per Lord Hardwicke. If a creditor of one partner take out execution against the partnership effects he can only have the undivided share of his debtor, and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner. The transfer merely gives a right to an account, each partner having an interest not in the whole, but in the surplus. Per Lord Eldon, in *Dutton* v. *Morrison*, 17 Ves. 201. And see S. P. 5 Madd. Chancery, 76; 1 Wightw. 50. See *Tyler* v. *Duke of Leeds*, 2 Starkie's C. 218. The sheriff must sell the debtor's share and make the purchaser tenant in common. *Holmes* v. *Muntze*, 4 Ad. & Ell. 127.

Action by one of several.

sustain the action, although it turn out that another person, whose name was not mentioned, is secretly interested (*m*).

Where business has been carried on in the names of several, one of them may still support an action of *assumpsit*, provided he expressly prove that the others were not in fact partners (*n*); and a party in whose name the business has been carried on as a co-partner is competent to prove that in fact he was not a partner (*o*).

Against several.

Proof of partnership.

Secondly. In an action against several, upon a contract on which they are liable as partners, the proof of partnership usually consists in evidence that they have acted as partners in the particular (*p*) business. Less evidence is usually sufficient in this case than is requisite where partners sue as plaintiffs, for there they are cognizant of all the means by which the fact is capable of being proved; but where they are sued as defendants the plaintiff may not be able to ascertain the real connection between the parties; it is sufficient for him to show that they have acted as partners (*q*), and that by their

(*m*) *Lloyd* v. *Archbowle*, 2 Taunt. 324. *Maurman* v. *Gillet*, Ib. 325. And per Sir James Mansfield, Ibid.: "If you can find out a dormant partner you may make him pay, because he has had the benefit of your work; but a person with whom you have no privity of communication shall not sue you." But see *Skinner* v. *Stocks*, 4 B. & A. 437. *Supra*, *Leveck* v. *Shafto*, 2 Esp. C. 468. *Lucas* v. *De la Cour*, 1 M. & S. 249.

(*n*) The banking trade was carried on in the joint names of the father and son, and the accounts were headed in their joint names in the banking books; and it was held that the father could not maintain a separate action without proof that the son (although proved to be a minor) had no share in the business. *Teed* v. *Elworthy*, 14 East, 210. *Atkinson* v. *Laing*, 1 D. & R. 16. *Parsons* v. *Crosby*, 5 Esp. C. 199. *Leveck* v. *Shafto*, 2 Esp. C. 468.

Where the contract was originally entered into by *A.* for himself and partner, under the name of "H. and Sons," held that it was not necessary to join parties who were by a subsequent agreement to have a share in the contract. *Hovill* v. *Stephenson*, 4 C. & P. 469.

In an action for business done by the plaintiff, as an attorney, it being proved that his son's name was joined as a partner, in letters, and on the door of the office, but he swore that he was not in fact a partner; held that the plaintiff was not entitled to maintain the action alone if the son were believed, notwithstanding the evidence might be sufficient to render them jointly liable in an action for negligence. *Kell* v. *Nainby*, 10 B. & C. 20.

A father and son, being joint farmers, the son died, and the father carried on business for benefit of himself and next of kin. Held that the property was well laid in the father and son's next of kin. *R.* v. *Scott*, Russ. & Ry. C. C. 13; and *R.* v. *Gaby*, Ib. 178. *D.* and *C.* were partners, *C.* died intestate, leaving a widow; the widow acted as partner. Stolen property was held to be well laid in *D.* and *W.*

(*o*) *Glossop* v. *Colman*, 1 Starkie's C. 25.

(*p*) Partners in a particular concern are not liable in respect of transactions foreign to that concern unless they have held themselves out to others as partners in such transactions. See below, notes (*r*) and (*s*).

(*q*) Even although the partnership is by deed (*Alderson* v. *Clay*, 1 Starkie's C. 406). To make one liable as partner, there must either be an actual contract to share in profit and loss, or he must have permitted his credit to be pledged by the use of his name as a partner (*Hoare* v. *Dawes*, Doug. 371). An agreement to share profits alone raises a liability, in point of law, to losses with respect to creditors (*Hesketh* v. *Blanchard*, 4 East, 146. *Waugh* v. *Carver*, 2 H. B. 247). Where a debtor and creditor agree to be jointly concerned in an adventure abroad, which is to be purchased by the debtor, and the returns are to be paid to the creditor in satisfaction of the debt, both are liable as partners to vendors from whom the debtor in consequence purchases goods abroad. *Gouthwaite* v. *Duckworth*, 12 East, 421. And see *Waugh* v. *Carver*, 2 H. B. 235, and *Gardiner* v. *Childs*, 8 C. & P. 345. *A.* directs *B.*, a broker, to buy goods, and it is agreed that *B.* shall be interested therein one-third, acting in the business free of commission, and the concern is afterwards treated as a joint one; it was held that *B.* had power to pawn the goods, there being no ground for imputing fraud or collusion. *Reid* v. *Hollingshead*, 4 B. & C. 867.—The *communion of profit and loss* is the true test of partnership. An agreement by several to take aliquot parts of a commodity to be purchased by *A.*, where there is no agreement for a re-sale, does not make them partners (*Coope* v. *Eyre*, 1 H. B. 37). An agent whose wages are paid by a propor-

habit and course of dealing, conduct and declarations, they have induced those with whom they have dealt to consider them to be partners (*r*). Hence if a person has represented himself to be a partner, and has been trusted as such, he is bound by that representation, and it is no defence for him to show that he was not in fact a partner (*s*). One who lends his name to

Proof of partnership.

tion of the profits, is not a partner (*Meyer* v. *Sharpe*, 5 Taunt. 74). If *A.* be paid by a *portion* of the profits, he is as to third persons a partner; but if he be paid by a sum in *proportion* to the profits, it is otherwise. *Ex parte Hamper*, 17 Ves. 404. Per Lord Eldon, *Ex parte Rowlandson*, 1 Rose 91. *Grace* v. *Smith*, 2 Bl. 398. An agreement that *A.* shall make purchases for *B.*, and in lieu of brokerage, have *one-third of the profits* arising from sales, and bear a proportion of the losses, makes him a partner as to third persons. Per Holroyd, J., *Smith* v. *Watson*, 2 B. & C. 409. An agreement that *A.* for his labour shall share the profits made by *B.*'s vessel, constitutes them partners as to third persons; *secus*, of an agreement that he shall receive half the gross earnings. In the former case there is a communion of profit and loss; the latter is merely a mode of payment for labour. *Dry* v. *Boswell*, 1 Camp. 329. See *Wish* v. *Small*, Ib. 331. *Benjamin* v. *Porteous*, 2 H. Bl. 590. *Muir* v. *Glennie*, 4 M. & S. 240. *Cheap* v. *Cramond*, 4 B. & A. 663. *Wilkinson* v. *Frazier*, 4 Esp. C. 182. *R.* v. *Hartley*, Russ. & Ry. C. C. L. 139. Joint proprietors of a coach, each of whom provides horses for his own stage, but who share the gross proceeds, are not, it seems, jointly liable for goods supplied for the horses (*Barton* v. *Hanson*, 2 Taunt. 49); but *qu.* whether the particular agreement *inter se* was not known. Where *A.*, *B.*, *C.* and *D.* were partners in a coach concern, but *A.* provided coaches and horses at a certain allowance per mile, it was held that *A.* alone was liable for the repairs of the coach, to one who knew the agreement, although the names of all appeared on the coach. *Hiard* v. *Bigg and another*, per Holroyd, J., Winch. Sp. Ass. 1819, Mann. Ind. 220. But they are jointly liable to one who sends goods. Ibid. So for any damage done in the management of the coach. Ibid. And see *Waland* v. *Elkins*, 1 Starkie's C. 272, and *Green* v. *Beesley*, 2 Bing. N. C. 108. *A.* agreed to carry a mail from *M.* to *N.* at so much a mile, the money received for parcels to be equally divided, and losses borne equally; they were held to be partners. Ibid. Executors who continue the share of a deceased partner in trade, for the benefit of the deceased partner's infant child, are liable as partners. *Wightman* v. *Townroe*, 1 M. & S. 412. One of several joint proprietors of a ship, who assigns his interest to another, the register remaining joint as a collateral security, is liable for repairs. The amount or proportion of profit received is not material. *R.* v. *Dodd*, 9 East, 527.—It frequently happens that a partner in a firm may be considered a third person in transactions between the firm and a party with whom the firm deals (per Eyre, C. J., *Bolton* v. *Puller*, 1 B. & P. 546, 7). But in actions by the firm, the liability of any one partner as a defendant is a bar to the action. *Supra*, 241, and 802. The knowledge of participation in profits by one who seeks to charge the participator as a partner is not material. *Ex parte Gellar*, 1 Rose, 297. See *Vere* v. *Ashby*, 10 B. & C. 288.

(*r*) If it can be proved that the defendant has held himself out to be a partner, not "to the world," for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner, he is liable to the plaintiff on all transactions in which he engaged and gave credit to the defendant upon the faith of his being such partner. Per Parke, J., in *Dickenson* v. *Valpy*, 10 B. & C. 140. To prove the liability of *G.* as the partner of *S.*, evidence that a former partner with *S.* introduced *G.* to the witness as an in-coming partner, and that afterwards he (the witness) reported that *G.* and *S.* were partners, is admissible, although neither *G.* nor *S.* were present at the time when the witness so reported. *Shott* v. *Streatfield*, 1 Mo. & R. 8.

(*s*) As to the general principle, vide *supra*, 40. In an action against the defendant as a partner and shareholder in a joint-stock mining company, for goods supplied to the firm, it was held that it was necessary to prove either that she was in fact a partner, or that she had induced the plaintiff to suppose that she was a partner, and that it was insufficient to show by letters and conversations that the defendant had admitted herself to be a shareholder, or to show payment of money on account of shares. *Vici* v. *Lady Anson*, 7 B. & C. 409. Where, in an action by the indorsee of a bill of exchange drawn and accepted by order of the directors of a mining company, it was proved that the company had entered into a contract for the purchase of mines, taken a counting-house in London, engaged clerks, and also an agent to reside in the country, and had worked some of the mines, and that the defendant had applied to the secretary of the company for shares, some of which had been appropriated to him, and that he had paid an instalment of 15*l.* per share, attended the counting-house

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a firm, although he receives no part of the profits of the trade, is liable on

of the company, and there signed some deed, and afterwards attended a general meeting of the shareholders, the Court were inclined to think that there was not sufficient evidence to show that the defendant had either actually become a partner, or held himself out to the world as such, and that at all events it was necessary to prove that the directors had authority to bind the members by drawing and accepting bills of exchange, of which there was no sufficient evidence. *Dickinson* v. *Valpy*, 10 B. & C. 128. A prospectus was issued for a distillery company, with a capital of 600,000*l*., and 12,000 shares, and to be conducted pursuant to the terms of a deed to be drawn up; all persons who did not execute the deed within eighty days after it was ready, were to forfeit all interest in the concern. No more than 7,500 were ever allotted, only 2,300 persons paid the first deposit, only 1,106 the second, and only 65 signed the deed; and the directors, after the time for paying the second instalment had elapsed, advertised that persons who had omitted to pay had forfeited their interest in the concern. Held, that an application for shares, and payment of the first deposit, did not constitute a partner one who had not otherwise interfered in the concern, and that the insertion of his name by the secretary of the company in a book containing a list of the subscribers, was not a holding himself out as partner. *Fox* v. *Clifton & others*, 6 Bing. 776. Where, in contemplation of forming a company for distilling whiskey, the following prospectus was issued in May 1825: "The conditions upon which this establishment is formed, are, the concern will be divided into twenty shares of 100*l*. each, five of which to belong to *A. B*, the founder of the works, the other fifteen subscribers to pay in their subscriptions to Messrs. Moss & Co., bankers, Liverpool, in such proportions as may be called for: the concern to be under the management of a committee of three of the subscribers, to be chosen annually on the 10th of October; ten per cent. to be paid into the bank on or before the 1st of June next:" held, that this prospectus imported only that a company was to be formed, not that it was actually formed, and that a person who subscribed his name to this prospectus, and who was present at a meeting of subscribers when it was proposed to take certain premises for the purpose of carrying on the distillery, which were afterwards taken, and solicited others to become shareholders, but never paid his subscription, was not chargeable as a partner for goods supplied to the company. *Bourne* v. *Freeth*, 9 B. & C. 632. But in *Perring* v. *Hone*, 4 Bing. 28, where the plaintiff's name was entered in a book with those of several other subscribers to a projected joint-stock company, and he received scrip receipts, but sold them before the deed for the formation of the company was executed, and he was not a party to the deed, yet it was held that he was a partner, and that all who subscribed to the fund must be taken to have assented to the deed. In this case the Court seem to have considered that the plaintiff became a partner by being an original subscriber to the undertaking. And in *Lawler* v. *Kershaw*, 1 M. & M. 93, it was held by Lord Tenterden, C. J., at Nisi Prius, that a party paying a deposit on shares in a trading company, and afterwards signing a deed of partnership, was to be considered as a partner from the time of the deposit. Evidence that *A. B.* had contributed to the funds of a building society, and had been present at a meeting of the society, and was party to a resolution that certain houses should be built, was held to be sufficient to make him liable in an action for building those houses, without any proof that he had any actual interest in the houses, or in the land on which they were built. *Braithwaite* v. *Schofield*, 9 B. & C. 401. By the rules of the company, upon the transfer of shares, the party transferring ceased to be a proprietor from the time the transfer was registered, and the person purchasing was not to be deemed a proprietor until he executed the deed; upon a plea, in an action against the company, that the promises, if any, were made jointly with one of the plaintiffs, a co-proprietor; there being evidence by the letters of such party that he was a shareholder, although there was no actual proof of his having executed the deed (it having been done under a power of attorney not produced), and there having been no transfer of his shares, it was held he had not relieved himself from his liability as a partner. *Harrey* v. *Kay*, 9 B. & C. 356. An action was brought against two, for goods supplied to a mining company, originated in fraud, but of which the jury found the defendants to have been ignorant, they had never signed the partnership deed, and had transferred their scrip before the action brought, but both had attended a meeting of the company; it was held that they were liable. *Ellis* v. *Schmœck*, 5 Bing. 521. The defendants consented to become directors of a proposed company, for which an Act was intended to be obtained, and they paid instalments on the number of shares necessary to qualify them as directors, and attended meetings, and the contract with the defendant for certain works was by tender sent in to the directors, in consequence of an advertisement to receive proposals; held, that having held themselves out or allowed themselves to be represented to the public as directors, and done no act to divest themselves of

the engagements of the firm (*t*), to one who is ignorant of the real fact (*u*). By one as manager, &c.

In an action by one as manager of a district banking company, the return to the Stamp-office under the stat. 7 Geo. 4, c. 46, is not the only admissible evidence of his being one of the public officers; the fact may be proved *aliunde* (*x*).

Where bills drawn on *A.* and Co. are accepted by *B.* in the name of *A.* and Co., it is evidence against *B.* that he is a partner (*y*).

A party cannot be liable merely as a partner unless he was a partner at the time of the contract (*z*); and therefore although the acts and admissions of a party, made subsequently to a contract, may be used as evidence to show that he was a partner at the time of the contract, yet if it be clear that he was not then a partner, no subsequent admission will render him liable in point of law (*a*). Thus one who has been admitted into the firm is not responsible for goods previously sold and delivered, even although he acknowledge his liability, and accept a bill for the amount (*b*).

Although the declaration or admission of each individual member of a firm, that he is a partner, is evidence to charge himself, it is no evidence of the fact against any other party (*c*). Admissions.

An affidavit for the registry of a ship, made by *A.*, stating that *A.* and *B.* are the owners, is not evidence of the fact against *B.* (*d*).

Where two of three defendants in *assumpsit* were outlawed, it was held that a letter written by the third, who had pleaded *non assumpsit*, in which he admitted the partnership, was evidence of the fact (*e*).

An admission by *A.*, in the discussion of a particular transaction, that he is a partner with *B.*, is not evidence to bind him as a partner in any other matter unconnected with the particular transaction (*f*). But if *A.* publicly

that character, they were liable. *Doubleday* v. *Muskett*, 7 Bing. 110. And see *Nockells* v. *Crossby*, 3 B. & C. 814. *Cromford* v. *Lacy*, 3 Y. & J. 80. *Vere* v. *Ashby*, 10 B. & C. 288.

(*t*) *Guidon* v. *Robson*, 2 Camp. 302. The consent of the party is of course necessary. *Newsom* v. *Coles*, 2 Camp. 617; 2 H. Bl. 235. As by allowing his name to be exposed over a shop door, or to be used in invoices, bills of parcels, or advertisements. *Fox* v. *Clifton*, 6 Bing. 794; 4 M. & P. 714.

(*u*) *Alderson* v. *Pope*, 1 Camp. 404, n. See *Teed* v. *Elworthy*, 14 East, 214. And see *Kell* v. *Nainby*, 10 B. & C. 21. *De Berkom* v. *Smith*, 1 Esp. C. 29. *Ridgway* v. *Broadhurst*, 1 C. M. & R. 415.

(*x*) *Edwards* v. *Buchanan*, 3 B. & Ad. 878. It is sufficient in such case, if in the return the party be described as *A. B.* of, &c. esq., a public officer of the co-partnership. The right to sue is not defeated by the omission of the places of abode of one or more partners in the return. *Armitage* v. *Horner*, 3 B. & Ad. 793.

(*y*) *Spencer* v. *Billing*, 3 Camp. 312. And it was said that it may be shown that bills have been invariably accepted in this way, without producing them, per Lord Ellenborough, C. J.

(*z*) See the cases cited below, 810, note (*s*). There is no distinction between trading and mining companies; and where a party takes shares in a concern, on a prospectus holding out that a certain capital is to be raised for carrying it on, he will not be liable as a partner unless the terms of the prospectus be fulfilled, or it be shown that he knows and acquiesces in the directors carrying it on with a less capital; where the jury negatived such knowledge or acquiescence, and found the defendant not liable, the Court held the finding right. *Pitchford* v. *Davis*, 5 M. & W. 2.

(*a*) *Sarille* v. *Robertson*, 4 T. R. 720.

(*b*) Ibid. But he would be liable on the bill.

(*c*) Vide *supra*, 31.

(*d*) *Tinkler* v. *Walpole*, 14 East, 226. *M'Iver* v. *Humble*, 16 East, 169. *Flower* v. *Young*, 3 Camp. 240. *Smith* v. *Fuge*, 3 Camp. 456. *Ditchburn* v. *Spracklin*, 5 Esp. c. 31. An unsigned entry in the office for licensing stage-coaches, is not evidence that the persons named in the license are the owners (*Strother* v. *Willan*, 4 Camp. 24). The entry of a cart in the books of a tax-gatherer, as the joint property of *A.* and *B.*, is not evidence against them, without proof that they authorized the entry. *Weaver* v. *Prentice and another*, 1 Esp. C. 369.

(*e*) *Sangster* v. *Mazaredo*, 1 Starkie's C. 161.

(*f*) *De Berkom* v. *Smith*, 1 Esp. C. 29, cor. Lord Kenyon, C. J. Where two

Admissions, &c.

and generally represent himself to be a partner of *B.* it will be evidence to prove his liability as a partner on a contract unconnected with the real object of the partnership (*g*).

Where *A.* made an entry at the Excise-office of himself and *B.* as joint dealers in beer, according to the statute, it was held that this was not conclusive evidence of the partnership, in an action by a private person against *A.* (*h*); but with respect to the Crown the entry would have been conclusive against *A.* (*i*).

The record of an issue out of the Exchequer, to try the fact of the partnership of *A.* and *B.* has been admitted as evidence in an action against *A.* and *B.* to charge them as partners (*k*)

When the fact that several parties are partners has once been established, the act or declaration of the one relating to the subject-matter of the partnership is evidence against the rest: although the partner whose acts or declarations so given in evidence be no party to the suit (*l*), or although the admission be made after a dissolution of the co-partnership (*m*).

The principles upon which the admissibility of such evidence depends, and some of the decisions on the subject, have already been referred to (*n*).

defendants, who were sued as acceptors, were joint agents of a regiment, but not otherwise connected, and in the habit of accepting bills by a clerk, it was held to be no defence that the bill was accepted by one for his own benefit, and that this might have been known by inquiry of the clerk, if there were no proof of fraud, or of the holders being cognisant of the circumstances. *Sanderson* v. *Brookshank*, 4 C. & P. 286. In an action against several for breach of contract for building an engine, made by one in the name of *B.* & *Co.* he, being asked what other persons constituted the firm, endorsed the names of the other defendants, and one of them being asked whether the endorsement by *B.* was correct, answered that it was; and it appeared also that he was occasionally present at the factory, inquiring how the engine was going on, but it being proved in fact, that he had but a limited interest in the concern; it was held that it was a question for the jury whether his admission and acts were referable to such limited interest or not, and the jury having found that he was not a partner, the Court refused a new trial. *Ridgway* v. *Philip*, 1 C. M. & R. 415; 5 Tyr. 131.

(*g*) Ibid.

(*h*) *Ellis* v. *Watson and others*, 2 Starkie's C. 453.

(*i*) Ibid.

(*k*) *Whatley* v. *Menheim & Levy*, 2 Esp. C. 608. Lord Kenyon thought that it was conclusive evidence, but left the fact to the jury. The proceedings in the Exchequer suit would clearly be evidence against the party who alleged the partnership; such evidence would operate by way of admission. But *qu.* how far the record would be evidence of the fact as against the defendant, who denied the partnership; as to him, it should seem that the record would, in principle, have no more operation than it would have had in case he had contested the fact of partnership with a stranger. Vide *supra*, Vol. I. tit. JUDGMENT. See *Studdy* v. *Sanders*, 2 D. & R. 437.

(*l*) *Supra*, 30; and *Thwaites* v. *Richardson*, Peake's C. 16. *Whitcomb* v. *Whiting*, Doug. 652. Such an admission, in order to take the case out of the Statute of Limitations, ought to be clear and unequivocal. Per Lord Ellenborough, *Holme* v. *Green*, 1 Starkie's C. 488.

(*m*) *Wood* v. *Braddick*, 1 Taunt. 104.

(*n*) The question to what extent the acts of one partner are binding upon another, with reference to the subject-matter of the co-partnership, is one of law. One partner may bind another partner in trade by drawing or accepting bills of exchange; *supra*, 205; such an authority is inferred from the ordinary course of partnership dealings (*Rooth* v. *Janney*, 7 Price, 193), unless the latter give express *notice* that he will not be bound, or unless *coviu* be practised between the partner and the taker of the bill (Ibid). An acceptance by one partner in the name of the firm for his own debt, after a secret act of bankruptcy, is binding against the firm in favour of an innocent indorsee. *Lacy* v. *Woolcot*, 2 D. & R. 469. But a partner cannot, by drawing bills in his *own* name, and procuring them to be discounted, render a co-partner liable, although the produce was actually carried to the partnership account; *Emly* v. *Lye*, 15 East, 6; and although the discount was procured by an agent who had procured bills drawn by the firm to be discounted by the same banker. Ibid. *Secus*, where the firm trade in the name in which the bill is drawn. *South Carolina Bank* v. *Teague*, 9 B. & C. 427. And where *A.* and *B.* agreed to take a farm

Admissions, &c.

It is sufficient to prove that a co-defendant in *assumpsit* is a dormant partner with the rest (*o*); it is at the option of the plaintiff to join him as a defendant (*p*). But the liability of a dormant partner who withdraws, though recently, ceases in respect of future transactions, as regards those who were ignorant of the partnership (*q*).

Defence.

But it is not sufficient to show that one of the defendants became a part-

from *C.* and pay him for certain articles by bills at three months, and *C.* afterwards, without the knowledge of *A.*, took bills from *B.* payable at six and twelve months, accepted by himself in his own and *A.*'s names, it was held that as that was done without the assent of *A.*, *C.* would not recover on the bills. *Greenslade* v. *Dower*, 7 B. & C. 635. One partner has not authority to bind another by deed (*Harrison* v. *Jackson*, 7 T. R. 207), or by a guarantee of the debt of a third person (*Duncan* v. *Lowndes*, 3 Camp. 478). A part-owner of a ship has no authority to insure on account of the rest, although a partner has (*Hooper* v. *Lusby*, 4 Camp. 66). One partner in a contract with Government, has no authority to pledge goods consigned to him by another partner, for the purpose of performing the contract (*Smith* v. *Burridge*, 4 Taunt. 684). One partner possesses no general authority under a power of attorney granted to a co-partner. *Edminston* v. *Wright*, 1 Camp. 88. See *Warner* v. *Hargrave*, 2 Roll. R. 393; 2 Ch. C. 202. *Parker* v. *Kett*, 1 Salk. 95. The *implied* authority of one partner to bind another is generally limited to such facts as are in their nature essential to the general object of the partnership; as the borrowing of money for the defraying of the expenses of a partner in transacting the business of the house (*Rothwell* v. *Humphreys*, 1 Esp. C. 406), or the purchasing of goods, although one partner fraudulently converts them to his own use, unless the seller be privy to the fraud. (*Bond* v. *Gibson*, 1 Camp. 185). One of several partners may pledge the goods, if it be done without fraud or collusion on the part of the partner. *Reid* v. *Hollinshead*, 4 B. & C. 867. *Tupper* v. *Haythorn*, Gow. 135. *Ex parte Gillow*, Rose, 205. A partnership cannot acquire property by the fraud of one of the partners. *Reilly* v. *Wilson*, 1 R. & M. C. 178. The knowledge of one that a trader is solvent, affects all. One partner cannot bind another by submission to arbitration. *Adams* v. *Bankart*, 1 C. M. & R. 681. S. P. *Boyd* v. *Emerson*, 4 N. & M. 106; 2 Ad. & Ell. 184. Where one of three partners in two Scotch firms, all being partners in English firms, executed a trust-deed in favour of Scotch creditors; held not to be an act within the authority of a partner according to the English law, and that the general assignees of all who had become bankrupt could not homologate it. *Douglas* v. *Brown*, 1 Dow. & C. 71.

(*o*) *Swann* v. *Heald*, 7 East, 209. *Grellier* v. *Neald*, Peake's C. 146. And per Sir J. Mansfield, in *Lloyd* v. *Archbowle*, 2 Taunt. 324. A sleeping partner is liable, or he could receive usurious interest without risk. Per Lord Mansfield, in *Hoare* v. *Dawes*, Doug. 356. Where a partner by an acceptance pledges the partnership name, of whomsoever it may consist, and whether the partner be named or not, and whether known or secret partners, the partnership will be bound, unless the title of the party seeking to charge them can be impeached: but where the partnership acceptance was only in part pledged to satisfy the private debt of such partner, with the knowledge of the taker as to such part only being his separate debt; held, that the secret partner was liable as to so much as was not, to the knowledge of the taker, applied in fraud of the partnership. *Wintle* v. *Crowther*, 1 Cr. & J. 316, and 1 Tyrw. 216. Although a partner going abroad to establish a branch concern, exceeds his powers in respect of the extent of his dealings, indorsing bills for the purpose of such dealings in his own name, the firm in England subsequently sanctioning the transactions which were for the benefit of the firm, are bound as indorsees. *South Carolina Bank* v. *Case*, 8 B. & C. 427. *Ashley, Rowland & Shaw* being partners, but under an agreement that the name of *Shaw* should not appear, a bill was drawn, addressed to the firm of *Ashley & Co.*, and was accepted by *Rowland* in the name of *Ashley & Rowland*; no fraud being found, and a consideration having been given for the bill by the payee to the drawer, it was held that the action was maintainable, notwithstanding the variance between the names of those to whom the bill was addressed and those by which it was accepted. *Lloyd* v. *Ashley*, 2 B. & Ad. 23.

(*p*) *Lloyd* v. *Archbowle*, 2 Taunt. 324. *Ruppell* v. *Roberts*, 4 N. & M. 31. *Beckham* v. *Drake*, Exr. Mich. T. 1841, overruling *Beckham* v. *Knight*, 1 Scott, N. S. 675; 4 Bing. N. C. 243.

(*q*) *Carter* v. *Wholley*, 1 A. & Ad. 11. *Heath* v. *Sansom*, 4 B. & Ad. 172; and see *Keating* v. *Marsh*, 1 Mont. & Ayr. 570.

Defence.

ner after the time of the contract (*r*), or that he was by agreement afterwards permitted to share in the adventure (*s*).

As the authority of one partner to bind another is merely presumptive (*t*), the presumption may be rebutted by evidence that the partner gave express notice to the plaintiff that he would not be responsible for the acts of another. Thus if *A.*, being partner with *B.*, give notice to a creditor to deliver no goods to *B.* without *A.*'s concurrence, the creditor cannot recover for goods delivered to *B.* without proof that *A.* adopted the sale, or derived benefit from the goods (*u*).

Again, if one partner give notice that he will not be responsible for bills drawn in the name of the firm, he will not be liable to a party who takes such bills after the notice, even although the latter has given a valuable consideration for them (*x*).

Fraud.

The presumption may also be rebutted by proof of fraud or covin between a co-partner and another (*y*). As by evidence that the bill was given by two or three partners in payment of a debt due from the two previous to their partnership with the third (*z*).

(*r*) The defendant on the 24th June agreed that he was to be considered a partner with *A.* and *B.* from the 18th of May previously, but that his name should not appear, and he continued to be a partner until the 21st of September following. The plaintiffs, who before and after the agreement had been the bankers of the firm, discounted one bill for them on the 21st of May, and two others on the 13th July, and placed the amount to the partnership account, but were ignorant of the defendant being a partner until the winding up of the account; held that the defendant was not liable on the first, when he was not in fact a partner, nor his credit pledged, but that he was for the latter. *Vere* v. *Ashby*, 10 B. & C. 288. But where two parties agree to enter into partnership by a deed to be executed on a day stated, but which was in fact executed on a later day, it was held that one was bound by a contract entered into by the other during the interval between the two days. *Baily* v. *Lewis*, 1 M. & S. 155; 1 Scott, N. S. 143. Negotiations take place with a view to the defendant's taking an interest in a building speculation, and buildings are erected which are to be valued; the defendant afterwards expressly contracts to become a partner from the date; the partnership being prospective only, the defendant is liable only from the date. *Howell* v. *Brodie*, 6 Bing. N. C. 44.

(*s*) *Young* v. *Hunter*, 4 Taunt. 582. And see *Lloyd* v. *Archbowle*, 2 Taunt. 321; *Mawman* v. *Gillet*, 4 Taunt. 325; *supra*, 808.

(*t*) *Rooth* v. *Janney & Quin*, 7 Price, 193. *Note*, the action there was against the firm, on a bill accepted by Quin, who had let judgment go by default; the defence by the other defendant Janney was, that the plaintiff had received previous notice of the dissolution of partnership; and the Court of Exchequer held that an answer in equity by Quin, to a bill filed by Janney, was not admissible evidence against Janney, to show a continuance of the partnership; sed *qu.* et vide *Grant* v. *Jackson*, Peake's C. 268. *Wood* v. *Braddick*, 1 Taunt. 104.

(*u*) *Willis* v. *Dyson*, 1 Starkie's C. 164.

(*x*) *Lord Galway* v. *Matthew*, 10 East, 264. *Supra*, 205.

(*y*) *Supra*, 205.

(*z*) *Shirreff* v. *Wilks*, 1 East, 48. It has been said that the mere single circumstance that the bill has been given in discharge of the separate debt of one partner, is not in itself sufficient to raise a presumption of fraud, without some proof that it was without the assent of the rest. *Ridley* v. *Taylor*, 13 East, 175. There the bill was drawn for a larger amount than the particular debt, and it was known to the separate creditor that the indorsement was made by the hand of the partner so indebted to him, and direct evidence might have been given of fraud and covin, if any had existed.—In the case of *Arden* v. *Sharp & Gibson*, 2 Esp. C. 524, the plaintiff discounted a bill brought by Gilson, who desired that the business might be kept secret from his partner; and Lord Kenyon held that the action would not lie. And in *Wells* v. *Masterman*, 3 Esp. C. 171, Lord Kenyon said, that if a man have dealings with one partner only, and he draw a bill on the partnership on account of those dealings, he is guilty of fraud. Where *A.*, *B.* and *C.* carried on the cotton trade under the firm of *A.* and *B.* (*C.* not being known to the world as a partner), and *A.* and *B.* traded under the same firm as grocers, and a bill given to them in the cotton business was indorsed in the name of the firm common to both partnerships, and given in payment by *A.*

But where two firms carry on trade under the same name, one partner being common to both, the members of one firm will be liable on a bill drawn, accepted, or indorsed in the name common to both, although this has been done for the use and benefit of the other firm (*a*). Yet here the claim may, it should seem, be rebutted by evidence of fraud and covin between the partners in the firm for whose benefit the bill is actually used, and the taker. Defence. Fraud.

A partner having obtained a transfer of stock by a forged power of attorney in the name of a customer, the proceeds of which were paid into the partnership account, but afterwards appropriated by him, it was held, that as the other partners might have known the fact had they used due diligence, they were liable at law for money had and received to the use of the customer (*b*).

Where a partner of a firm called the N. and S. W. Coal Co. made a note in the name of the N. Coal Co., payable at a bank where the partnership had no account, it was held to be a question for the jury to say whether it was made with the authority of the firm (*c*).

Where the joint liability results not from a contract expressly made with all the defendants, but from the fact of their partnership, it is competent to the defendant to prove a *dissolution* (*d*) of the co-partnership previous to Dissolution.

and *B.* for goods received in the grocery business, it was held that *C.* was liable to pay the bill to the holders, although the indorsement was unknown to *C.* of whom the indorsee had no knowledge at the time of the indorsement. *Swann* v. *Heald*, 7 East, 209.—Where one partner clandestinely drew and accepted a bill in the name of the firm, partly to discharge a debt due from the partnership, and partly to discharge his own private debt, it was held that the payee could recover no more than the debt due from the firm, although money had been paid into court on the count on the bill. *Barber* v. *Backhouse*, Peake's C. 61. See also *Green* v. *Deakin*, 2 Starkie's C. 347.

(*a*) *Baker* v. *Charlton*, Peake's C. 80. *Swann* v. *Heald*, 7 East, 209, and *supra*, n. (*z*). Although one be but a dormant partner. *Ibid.* But where *S.* being indebted to a firm in which he was partner, gave a note in the name of another firm to which he also belonged, in discharge of his individual debt, the payees indorsed it over, and the indorsees sued the parties who appeared to be makers: held, that this note was made in fraud of *S.*'s partners in the second firm, and could not be enforced against them by the payees, and that at least under these circumstances of suspicion, the indorsee could not recover without proving that he took the note for value, though no notice had been given him to prove the consideration. *Heath* v. *Sansom*, 2 B. & Ad. 291.

(*b*) *Keating* v. *Marsh*, 1 Mont. & Ayr. 570.

(*c*) *Faith* v. *Richmond*, 3 P. & D. 187.

(*d*) The authority of one partner to bind another in respect of partnership property ceases on the dissolution of the partnership. The moment the partnership ceases, the partners become distinct persons; they are tenants in common of the partnership property undisposed of, from that period; and if they send any securities which did belong to the partnership into the world, after such dissolution, all must join in doing so. Per Ld. Kenyon, in *Abel* v. *Sutton*, 3 Esp. C. 110. Where, on the dissolution of partnership between *A.* and *B.*, the latter was entrusted with the settlement of the affairs, it was held that he could not indorse, in the name of the firm, a security, which was part of the joint effects (*Abel* v. *Sutton*, 3 Esp. C. 108, cor. Lord Kenyon. *Kilgour* v. *Finlayson*, 1 H. B. 155); and *qu.* whether *A.* would have been liable on the indorsement, although made during the partnership, if not negotiated until after the dissolution. See *Kilgour* v. *Finlayson*, 1 H. B. 155.—Where *A.*, a partner with *B* and *C.*, drew a blank bill in the name of the partnership firm, payable to their order, and delivered it to their clerk to be used according to exigency, and *A.* died, and *B.* and *C.* assumed a new firm, and the clerk, inserting a date previous to the death of *A.*, circulated the bill, it was held that *B.* and *C.* were liable to a *bonâ fide* holder, although they had received no value for the bill. *Usher* v. *Dauncey & others*, 4 Camp. 97; and the Court of K. B. refused a new trial.—One who allows his name to be used after a dissolution of partnership, is liable on a bill drawn in the name of the firm after the holder knew the dissolution. *Brown* v. *Leonard*, 2 Ch. 120. But a bill drawn after an actual dissolution, in the name of the firm, but dated previously to the dissolution, does not bind

Defence. Dissolution.

the contract; this, however, will not be in itself sufficient where the defendants have openly acted as partners, unless *notice* to the plaintiffs of the dissolution be also proved. It is sufficient if the plaintiff in the first instance prove a partnership at a time anterior to the contract; when that is once established, a continuance of the partnership is to be presumed, until a dissolution be proved, and proof of a dissolution will still be insufficient unless reasonable proof be given of notice of the fact to the plaintiff; for although the partnership may in fact have been dissolved, yet if the parties do not announce it, they by their silence induce strangers to trust to the joint credit of the firm as before.

Where a minute of an agreement between partners to dissolve the partnership, made in order to be advertised in the Gazette, and signed by the parties, and attested, is produced in evidence to prove the dissolution, an agreement stamp is necessary (*e*).

Notice.

Where express notice has been given of the dissolution of the partnership to those with whom the firm have had any dealings (a measure which in prudence ought never to be neglected), the notice must of course be proved in the usual way (*f*). Such notice may also be proved by means of an advertisement in the Gazette, or in a public newspaper; but a newspaper containing such a notice cannot be read in evidence without previous proof either that the plaintiff read an impression of the same paper, or at least that he was in the general habit of reading that paper (*g*). And notice in

a former partner if the holder had notice of the dissolution. *Wright* v. *Pulham*, 2 Ch. 120.—Where *A.*, *B.* and *C.*, being partners, ordered goods from abroad, and afterwards dissolved partnership, and assigned their property to trustees for the benefit of creditors, and *A.* and *B.* acted as agents to settle the affairs of the firm, and the goods arrived, and were delivered to *A.* and *B.*, in an action against *A.*, *B.* and *C.* for the freight, it was held that *C.* was not liable. *Pinder* v. *Wilks*, 1 Marsh. 248. Where, after dissolution of a partnership, the defendant accept a bill drawn by one only, it is no defence that by the deed of dissolution it was stipulated that the other partner should receive all debts due to the firm. *King* v. *Smith*, 4 C. & P. 108. After a partnership has been dissolved, one partner cannot bind the other to pay costs as between attorney and client; and a *cognovit*, signed by one in an action against both, was therefore set aside. *Rathbane* v. *Drakeford*, 6 Bing. 375. A partnership firm enter into a joint speculation with the plaintiff and another; the general dissolution of the partnership of the former does not put an end to the partnership in the joint speculation with the latter, nor relieve one partner from the acts of his co-partner in the joint speculation, after the general dissolution. *Ault* v. *Goodrich*, 4 Russ. 430.

Where a bill was drawn upon partners by the name of the *P. & M. Co.*, and accepted by procuration for the company, it appearing that one of the defendants, originally a partner, had withdrawn from the concern before the acceptance given; held, that the defendant not having represented himself to the plaintiff, nor ever appeared publicly as a partner, nor had the plaintiff ever dealt with him as such, no notice of his withdrawing himself was necessary. *Carter* v. *Whalley*, 1 B. & Ad. 11. A notice of dissolution, signed by a partner, is evidence against him of a legal dissolution, though the partnership be created by deed. *Doe* d. *Waithman* v. *Miles*, 1 Starkie's C. 181. Where the concern is entirely put an end to, and nothing left but to get in the debts and settle the credits, one partner cannot pledge the credit of the others; but where a retiring partner gave a general authority to the one who was to wind up the concern to do what he thought proper with the existing securities of the firm; held, that the latter might endorse bills in the partnership name, and it was not necessary that such authority should be by deed or writing. *Smith* v. *Winter*, 4 M. & W. 454.

(*e*) *May* v. *Smith*, 1 Esp. C. 283.

(*f*) *Supra*, tit. NOTICE. Where printed circular letters have been sent, or duplicates made out, it would be sufficient to produce and prove a duplicate original; but it might still be proper to give notice to produce the original. *Supra*, tit. NOTICE.

(*g*) *Jenkins* v. *Blizard & another*, 1 Starkie's C. 418.

Notice of dissolution.

the Gazette, if admissible at all, is very weak evidence, if it be not supported by some evidence to show that the plaintiff saw the Gazette (*h*).

There seems indeed to be little if any difference between a notice in the Gazette and a notice in any other newspaper, with respect to contracts of partnership, and other matters which are not of a public and official nature (*i*).

Proof of notice is still requisite, although the plaintiff had no dealings with the partners previous to the actual dissolution of partnership (*k*). But it seems that if notice be given to all the parties with whom the partners have dealt, and be also advertised in the Gazette, it will be presumptive evidence of notice against one who had no previous dealings with the firm (*l*).

Where notice of dissolution has been published in the Gazette, and has been given to the proper parties, the retiring partners are not liable on a contract subsequently made by one of the former firm, although he carries on business in the name of the former firm, unless it can be proved that they either interfered in the business subsequently to the dissolution, or authorized the use of their names (*m*), although the plaintiff was in fact ignorant of the dissolution.

The making an alteration in the description of the partners of a firm of bankers in their printed cheques, is notice to customers, who have used the new cheques (*n*).

Evidence of the general notoriety of the fact of dissolution is not sufficient where no express notice has been given, and no advertisement has been published in the Gazette (*o*).

An infant partner must, on attaining his age, having continued to be a partner up to that time, give notice, in order to relieve himself from future liability (*p*).

In the case of a mere secret or dormant partner, it is sufficient to prove an actual dissolution previous to the contract in question, for his liability depends upon the mere fact of partnership, and no credit has been given to him personally as a supposed member of the firm (*q*). But if it appeared that the acting partner had stated the existence of the partnership to one dealing with the firm, notice of the dissolution would be requisite (*r*).

Where it appeared that the plaintiff knew that the defendants intended to dissolve their partnership, and that they were actually carrying that intention into execution, it was held to be incumbent on the plaintiff, who

(*h*) *Godfrey* v. *Macauley*, Peake's C. 155 n. *Semble*, that notice in the Gazette is notice to all the world. *Wright* v. *Pulham*, 2 Ch. 120.

(*i*) *Infra*, note (*l*).

(*k*) *Parkin* v. *Carruthers*, 3 Esp. C. 248. There the retiring partner allowed his name to continue in the firm. *Graham* v. *Thompson*, Peake's C. 42. *Graham* v. *Hope*, Peake's C. 154.

(*l*) See *Newsome* v. *Coles and others*, 2 Camp. 617. *Godfrey* v. *Turnbull*, 1 Esp. C. 371; where an advertisement in the Gazette is said to have been considered to be presumptive evidence of notice. But see another report of the same case, entitled *Godfrey* v. *Macauley*, Peake's C. 155, n.; from which it seems that the jury were directed to consider the probability that the plaintiff had seen the Gazette.

(*m*) *Newsome* v. *Coles and others*, 2 Camp. 617, cor. Lord Ellenborough. For they were not bound to apply for an injunction.

(*n*) *Barfoot* v. *Goodall*, 3 Camp. 147.

(*o*) *Gorham* v. *Thompson*, Peake's C. 42.

(*p*) *Goode* v. *Harrison*, 5 B. & A. 147.

(*q*) *Evans* v. *Drummond*, 4 Esp. C. 89. *Newmarch* v. *Clay*, 14 East, 239.

(*r*) Ibid. Even, as is said, although the communication was made after the actual dissolution; but *qu.* as to the latter point; for by the dissolution the power of the acting partner to bind his former co-partner ceased.

Notice of dissolution.

relied upon a subsequent contract, to show that their intention had been abandoned (*s*).

Where a secret or dormant partner has retired from the firm, and goods have been supplied previous to the dissolution, and payments have been made by the parties who continue the business, subsequent to the dissolution, it is a question of evidence whether such payments are to be applied to the previous or to a subsequent debt (*t*).

An agreement by a creditor, after notice of dissolution, to transfer the account from the old to the new firm, will be evidence to show that he accepted the latter as his debtors, and will discharge a retiring partner (*u*).

Answer to notice of dissolution.

The plaintiff may rebut the proof of notice of dissolution by evidence of the subsequent conduct and declarations of the co-defendants, tending to induce the world to suppose that the partnership still subsisted; as by proof that they subsequently interfered in the management of the business, or allowed their names to be used, or in any way authorized the parties acting in the concern to make use of their names and credit (*x*).

Plea in abatement. Non-joinder.

A defendant cannot take advantage of the non-joinder of others as co-defendants (*y*), except by plea in abatement; upon issue joined on this plea the *onus probandi* usually lies upon the defendant (*z*). And the plaintiff in *indebitatus assumpsit* against a surviving partner, may recover a debt due from such survivor, though the declaration make no mention of the latter (*a*). It will not be sufficient to prove, upon issue taken on this plea, that he has a secret partner (*b*).

Where one of several partners promised individually to pay the debt,

(*s*) *Paterson* v. *Zachariah and another*, 1 Starkie's C. 71.

(*t*) *Newmarch* v. *Clay*, 14 East, 239. There goods had been furnished subsequently to the secret dissolution of the secret partnership, and bills which had been given, previous to the dissolution of the partnership, for goods previously sold, having been dishonoured, were given up to the continuing partners, they giving new bills which were sufficient to cover the debts incurred previous to the dissolution, although not sufficient to cover the goods subsequently furnished, and it was held that the transaction afforded evidence of an appropriation of the new bills to discharge the old debt.

(*u*) *Kirwan* v. *Kirwan*, 2 C. & M. 617. And see *Hart* v. *Alexander*, 2 M. & W. 484.

(*x*) See *Newsome* v. *Coles*, 2 Camp. 617.

(*y*) In what cases contracts are joint, and when several, is of course a question of law. A contract made by two partners to pay a certain sum of money to a third person, equally, out of their own private cash, is a *joint* contract. (*Byers* v. *Dobey*, 1 H. B. 236). A trader retiring from business lends money to his partner, and receives, by agreement, an annuity, to be paid for a specified number of years; this is not a continuance of the partnership (*Grace* v. *Smith*, 2 Bl. 298). The consignment of a bag of dollars to *A.*, with directions to pay over a specified number to *B.*, does not make them joint-tenants. *Jackson* v. *Anderson*, 4 Taunt. 24.

(*z*) Vide *supra*, p. 2. The practice upon the question, whether the plaintiff's or defendant's counsel shall begin, has not been uniform (see *Pasmore* v. *Bousfield*, 1 Starkie's C. 296. *Roby* v. *Howard*, 2 Starkie's C. 555). In such cases the question as to damages does not arise until the issue on the plea has been determined; and the more convenient course seems to be to try the issue first, the defendant's counsel beginning. This course was adopted by Bayley, J. at York Summer Assizes, 1821.

(*a*) *Richards* v. *Heather*, 1 B. & A. 29. A demand against a surviving partner as such may be joined with a demand due from him individually. *Golding* v. *Vaughan*, 2 Ch. C. T. M. 436. Where *A.* being partner with *B.*, took a warrant of attorney from *C.*, a creditor to *A.* and *B.*, in his own name, knowing that *C.* was insolvent, and after an act of bankruptcy committed by *C.*, the latter, at *A.*'s desire, sent goods to the warehouse of *A.* and *B.*, as a further security; and after the dissolution of partnership between *A.* and *B.*, *A.* received sums of money on account of the warrant of attorney; it was held that the assignees under a commission of bankruptcy against *C.* were entitled, after the death of *A.*, to recover the whole from *B.* *Biggs* v. *Fellows*, 8 B. & C. 402.

(*b*) *Supra*, p. 2, note (*h*).

without making any mention of his partners, it was held to be conclusive evidence that the debt was due from him individually (*c*).

Thirdly. Where the parties contest the question of partnership *inter se* (*d*), it seems that such evidence as would be sufficient to establish their partnership in a suit by a stranger, will raise a presumption of the fact of partnership *inter se* (*e*). Actions. *inter se.*

Although one partner cannot maintain an action against another, whilst the partnership accounts remain unliquidated (*f*), it is otherwise where the accounts have been settled and a balance struck, or even where one insulated transaction alone remains, or where the cause of action arises out of a transaction perfectly distinct from the general dealings (*g*), or where the liability to be sued is matter of contract (*h*).

But an action is not maintainable by one partner against another on a bill of exchange given in respect of an unascertained balance (*i*).

Parties engaged in a joint adventure in the whale-fishery, deposited the proceeds in a warehouse; the share of each was separated in bulk, and remained at the disposal of each by delivery orders, but subject to be retained until the ship's husband had been satisfied all expenses of the

(*c*) *Murray* v. *Somerville*, 2 Camp. 99, a. Vide *supra*, tit. ADMISSIONS.

(*d*) Vide *supra*, 804.

(*e*) Per Lord Ellenborough, *Peacock* v. *Peacock*, 2 Camp. 45. The father told the son, on his coming of age, that he should have a share in the business; the son acted as a partner for five or six years. Upon an issue out of Chancery to ascertain the son's share of the profits, it was not *presumed* that he was entitled to a moiety, but it was left by Lord Ellenborough to the jury to say to what proportion he was fairly entitled under the particular circumstances. Note, that Lord Eldon, C. was not satisfied with this decision. See 16 Ves. 56. If a partnership terminate by efflux of time, and the parties continue to trade without any new agreement, they are pronounced to go on upon the old footing. Per Lord Eldon, in *Crawshay* v. *Collins*, 15 Ves. 228. In an action to recover a subscription under the Thames Tunnel Act, it was held that those only were to be deemed subscribers who had signed the contract, so as to be liable for the amount of shares. *Thames Tunnel Co.* v. *Sheldon*, 6 B. & C. 341. As to liability to pay subscriptions, see *Norwich, &c. Navigation Co.* v. *Theobald*, 1 M. & M. 151. A partner cannot be permitted to place himself, in pursuit of his private advantage, in a situation which gives him a bias against the due discharge of the trust and confidence he owes to his co-partner; where one partner had purchased partnership stock, in exchange for his own separate shop-goods, held that his co-partner was entitled to share in the profit of such barter. *Burton* v. *Woolley*, 6 Mad. 367.

(*f*) The defendant, a shareholder and managing director of a company, receiving a commission, and also a *del credere* commission, drew bills on a purchaser of the company's goods for the amount, and indorsed them to the actuary of the company, who indorsed them to the plaintiff, also a shareholder, and who purchased goods for them, and was a creditor at the time, of the company, for an amount beyond the bills; it was held, that he could maintain no action against the defendant on the bills, nor could he on the money counts for the amount received by the defendant from the acceptor's estate, because having received it, not in his individual character, but as a member of the company, in each case the same consequence would follow; it would be a recovery by one contractor against another, and if he succeeded, give the defendant immediately a right to call on the plaintiff for contribution. *Teague* v. *Hubbard*, 8 B. & C. 345.

(*g*) See *Coffee* v. *Brian*, 3 Bing. 54, and the cases cited *supra*, 99. Where the plaintiff and defendant had been engaged as partners in particular purchases and sales of wool, and having had mutual dealings, stated an account, stating, amongst other items, "loss on wool," and having a balance against the defendant, which he signed and admitted to be due from him, held sufficient evidence of a promise to pay it, and that the plaintiff might sue for the amount of that item, and that a subsequent assent by him to take out the balance in meat, being merely matter of accommodation, did not preclude him. *Wray* v. *Milestone*, 5 M. & W. 21.

(*h*) One partner may sue another on a special agreement for a stipulated penalty. *Radenhurst* v. *Bates*, 3 Bing. 463. Part-owners of a ship may each sue on agreement with each other. *Owston* v. *Ogle*, 13 East, 538; Abbott on Shipp. 81.

(*i*) *Verley* v. *Saunders*, 2 Ch. 127; and an indorsee who takes the bill after it is due, cannot recover. *Ib.*

Actions. *inter se.*

adventure; it was held, first, that this was to be deemed not an absolute but a qualified appropriation; and that upon the general account between one of the partners and the ship's husband, such party being found to be indebted to the other part-owners, who were liable to pay the expenses incurred, the assignees of such partner could not maintain an action for the bankrupt's share until they had satisfied what was due from him to the partnership (*j*).

Where the plaintiff and defendant agreed to buy goods on their joint account, the defendant undertaking to furnish the plaintiff with half the amount in time for payment, and the plaintiff paid the whole, it was held that an action lay for the moiety, although an account was still to be taken between them as partners, on the subsequent disposal of the stock (*k*). So if one partner wrongfully carry money belonging to the other to the joint account, an action lies for money had and received (*l*). But where *A.*, *B.* and *C.* had been members of a trading company, and after its dissolution *B.* and *C.* being sued as members of the company, retained *A.*, who was an attorney, to defend them, it was held that as *A.* as a member of the company was jointly liable to contribute to the expense of the defence, he could not maintain an action for the costs (*m*). So an agent employed by a company of subscribers for an application to Parliament for an intended railway, being himself a subscriber, cannot maintain an action for his services, either against the body of subscribers or against the chairman (*n*).

Where *B.* ordered goods on his own credit to be shipped by *A.*, on an agreement between them that if any profit arose, *A.* should have half for his trouble, and goods were ordered, and afterwards paid for by *B.*, it was held that he might recover the amount of such payment from *A.*, who had not accounted to him for the profits, the contract not constituting a partnership *inter se*, but an agreement for compensation for trouble and credit (*o*).

Where an account is taken at the dissolution of a partnership, *assumpsit* will lie without proof of an express promise (*p*).

Notice by one partner that the partnership has been dissolved, is evidence against that partner that it has been dissolved by competent means, even by a deed, if a deed be essential (*q*); and in such case an ejectment lies, upon the demise of one co-partner, against another, for a house agreed to be

(*j*) *Holderness* v. *Shackels*, 8 B. & C. 612.

(*k*) *Venning* v. *Leckie*, 13 East, 7.

(*l*) *Smith* v. *Barrow*, 2 T. R. 476.

(*m*) *Milburn* v. *Codd*, 7 B. & C. 419. Damages having been recovered against one of several coach-owners who horsed a coach for different stages, in an action against one for contribution, the partnership still continuing, Lord Denman held, that it was an unliquidated account. *Pearson* v. *Skelton*, York Sp. Ass. 1836. One partner having paid a partnership debt by compulsion, cannot recover contribution. *Sudlow* v. *Hickson*, K. B. 1834, for he could not have recovered had the payment been voluntary.

(*n*) *Holmes* v. *Higgins*, 1 B. & C. 74. *A.* being a member and also the agent of a joint-stock company, drew a bill, accepted by a purchaser of goods from the company, and indorsed it to the secretary of the company, who again indorsed it to *B.*, another member, who purchased goods for the company, and was a creditor of the company to a larger amount than the bill; the acceptor having become insolvent, *A.* received 10*s.* by way of composition; held that *B.* could not sue *A.* on the bill, for it was drawn on behalf of the company, nor recover the sum received, because it was received by *A.* in his character of member of the company. *Teague* v. *Hubbard*, 8 B. & C. 345.

(*o*) *Hesketh* v. *Blanchard*, 4 East, 143.

(*p*) Per Gibbs, C. J., *Rackstraw* v. *Imber*, Holt's C. 368.

(*q*) *Doe* d. *Waithman* v. *Miles*, 1 Starkie's C. 181.

occupied jointly during the partnership, without proof of a notice to quit (*r*).

The ship's husband, being a part-owner, at the request of the defendant, also a part-owner, advanced his share of the outfit; he is entitled to sue for such advances for the separate share of such expenses; and the defendant having represented himself as owner of one-fourth, and dealt as such, is liable to the others in that proportion (*s*).

In an action for calls, after all the requisite forms of the Act had been complied with, against a party whose name had been inserted in the Act as an original proprietor, and who had subsequently acted as such, a misrecital in the Act that parties had signed a contract binding themselves and their heirs, which was not in legal effect true, the contract not being under seal, is no defence (*t*).

Where the Act establishing a joint-stock company, declared that a certain sum should be subscribed before any of the powers, &c. should be put in force, it was held that such sum being incomplete at the time of making the call, no action could be maintained for such call, and that it was not sufficient that the subscription list was complete before the action commenced (*u*).

Competency.

In general, a co-partner with the defendant in the subject of the action is incompetent to be a witness for the defendant, where a verdict for the plaintiff would diminish the joint property, or he would be liable to any part of the costs; even although the tendency of his evidence be to charge himself with the whole debt (*v*). But in order to raise this objection, it must be shown that he is a partner; it is not sufficient merely to *suggest* it (*x*). Thus, in an action for goods sold and delivered, a witness is competent to prove that the goods were supplied on his credit, and for his use, although it be *suggested* that he is a partner with the defendant (*y*).

In an action brought to charge *A.* as a partner in a trading company, a witness who, by other evidence than his own, appeared to be a shareholder in the company, was held to be competent to prove that *A.* was a partner (*z*).

A party is a competent witness for the plaintiff, although he has purchased from the plaintiff an interest in the contract on which the action is brought (*a*).

In an action against three directors for goods supplied to a company, the defence being that the defendant was a shareholder, a release by all the defendants to a witness (a shareholder) renders him competent (*b*).

(*r*) Ibid. By an agreement on a dissolution of partnership between the plaintiff and the defendant, the latter being considerably indebted on his private account to the plaintiff, it was agreed that the plaintiff should take two-and-half per cent. on his private debt for six months, and five per cent. afterwards; that the accounts should be wound up, and the debts received by the plaintiff, and the defendant's share go in liquidation of his private debt; and it was stipulated that the partnership might be dissolved upon certain notice, on the 1st day of any January, but in consequence of the arrangement, it was not expected to take place at the ensuing January; held, that there being no express stipulation for any suspension of the private right of action, nor for any definite period, the plaintiff was not precluded from suing for his separate debt. *Simpson* v. *Rackham*, 7 Bing. 617.

(*s*) *Helme* v. *Smith*, 7 Bing. 709.

(*t*) *Cromford Railway Company* v. *Lacey*, 3 Y. & J. 80.

(*u*) *Norwich and Lowestoff Navigation Company* v. *Theobald*, 1 M. & M. 151.

(*v*) See *Birt* v. *Hood*, 1 Esp. C. 20. *Young* v. *Bairner*, 1 Esp. C. 21.

(*x*) Ibid.

(*y*) *Birt* v. *Hood*, 1 Esp. C. 20.

(*z*) *Hall* v. *Curzon and others*, 9 B. & C. 646.

(*a*) *Supra*, tit. WITNESS.—INTEREST.

(*b*) *Betts* v. *Jones*, 9 C. & P. 199. But a release by one defendant only would not be sufficient. Ib.

Upon a plea in abatement in *assumpsit*, for goods sold and delivered, that the promises were made jointly with *E. F.*, the latter, it has been seen, is a competent witness for the plaintiff (*e*).

An examined copy of an answer in Chancery by two of the defendants, to a bill by a third defendant, is good evidence against the parties so answering (*d*).

A stipulation in a deed of a joint-stock company that shareholders should not be at liberty to inspect the books of the company, is no bar to the production of them in a suit by the shareholders against the company (*e*).

PAYMENT.

When to be pleaded.

Proof of payment of the debt was formerly evidence under the general issue in *assumpsit* (*f*), but must have been pleaded specially as a bar to an action on a debt by record or specialty. But now by the new rules of Hil. T. 4 W. 4, where payment is insisted on as a defence to the action, it must be pleaded in bar (*g*). And by one of the new rules of Trin. Term 1 Vict., it is directed that payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar. And by another of these additional rules, in any case in which the plaintiff, in order to avoid the expense of the plea of payment, shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money (*h*). This rule is not to be applicable where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums.

Onus probandi.

Upon issue taken on a plea of payment, the *onus* of proof lies on the defendant. The proof is either general, under the plea of *solvit post diem*, or special, under the plea of *solvit ad diem*.

It is a general principle that the party to be discharged is bound to do the act which is to discharge him (*i*). The obligor of a bond conditioned for the payment of money on a particular day, is bound to seek the obligee if he be in England, and on the set day to tender him the money (*k*). Consequently the burthen of proving such a discharge is, in general, incumbent on the party who seeks to be discharged.

(*e*) *Hudson* v. *Robinson*, 4 M. & S. 475; *supra*, tit. Abatement.

(*d*) *Studdy* v. *Sanders*, 2 D. & R. 347.

(*e*) *Hall* v. *Connell*, 3 Y. & Cr. 717 (in Equity).

(*f*) *Supra*, Assumpsit.

(*g*) Under these rules payment has been allowed in reduction of damages without any special plea of payment, &c. in an action of *assumpsit*. *Shirley* v. *Jacobs*, 4 Dowl. P. C. 136; 2 Bing. N. C. 88. Although in *debt* such evidence was held to be inadmissible without a plea of payment. *Cooper* v. *Morecroft*, 3 M. & W. 500. *Belbin* v. *Butt*, 2 M. & W. 522. But now see the additioual new rule of Trin. T. 1 Vict. The plea of payment is divisible, and operates *pro tanto* to the extent that payment is proved. *Cousins* v. *Paddon*, 2 C. M. & R. 547. *Probart* v. *Phillips*, 2 M. & W. 40.

(*h*) Under the former new rules a difference of opinion had obtained as to the effect of an admission in the plaintiff's particulars of the payment of a sum of money. On the one hand, the effect of such an admission has been held to be to restrain the plaintiff from going into that part of his demand which was covered by the payment; on the other, that the effect was merely an admission of payment operating as evidence, and that a plea of payment was requisite to make such evidence admissible. *Coates* v. *Stevens*, 2 C. M. & R. 119. *Ernest* v. *Brown*, 3 Bing. N. C. 674. *Nicholls* v. *Williams*, 2 M. & W. 758. *Kenyon* v. *Wakes*, 2 M. & W. 764.

(*i*) See Lord Ellenborough's observations in *Cranley* v. *Hillary*, 2 M. & S. 122.

(*k*) Litt. sec. 340; and per Dampier, J. 2 M. & S. 122.

Onus probandi.

Payment being pleaded generally to a declaration in *indebitatus assumpsit*, it lies on the defendant to prove payment to the extent of liability proved against him. Issue being taken on the plea of payment, to a declaration for work and labour, &c., although the defendant prove payment to an amount exceeding the aggregate of the sums stated in the declaration, the plaintiff may, without a new assignment, show works, &c. to a larger amount than is claimed, and recover the balance (*l*). *Assumpsit* for money lent, plea, payment, a new assignment and plea of payment, on which issue is joined: the plaintiff claimed a debt of 15*l.* in August 1833, and having proved a debt then due by the defendant, by the defendant's acknowledgment, and the defendant proving a payment to that amount in October 1833, it is incumbent on the plaintiff, in support of his new assignment, to prove a second debt (*m*).

The party must prove, 1st, a payment of the money, or its equivalent; 2dly, its application to the particular debt.

Direct evidence.

The proof of payment is either *direct*, or presumptive; in the former case payment has been made either to the plaintiff or to his agent.

Where a receipt has been given for the money, the receipt should be produced, and proof given of the handwriting of the party to whom the payment was made.

A receipt is merely *primâ facie* evidence of payment; it may be proved that it was obtained by fraud, or mistake (*n*).

A payment to one of several persons who (not being partners) have deposited money in a bank without the authority of the others, is not good as against them (*o*).

Of payment to an agent.

Where the payment has been made to an agent (*p*), an authority from the principal to the agent must be proved; the agent is a competent witness

(*l*) *Freeman* v. *Crofts*, 4 M. & W. 4. Per Alderson, B., it is like a plea of license in trespass; the defendant must prove a license for every trespass the plaintiff can prove; so on a plea of payment, you undertake to prove that whatever demand the plaintiff can establish, you have paid him.

(*m*) *Hall* v. *Middleton*, 4 Ad. & Ell. 107. The undersheriff having left it to the jury to say whether the 15*l.* said to have been lent in August had been so lent; the Court held, that the question was whether there had been two debts.

(*n*) *Stratton* v. *Rastall*, 2 T. R. 366; & *supra*; see *Rowntree* v. *Jacob*, 2 Taunt. 141; *infra*, tit. RECEIPT.

(*o*) *Innes* v. *Stephenson*, 1 Mo. & R. 145. *Stewart* v. *Lee*, M. & M. 158.

(*p*) Payment to another by the creditor's authority is a payment to himself, and may be so pleaded. *Taylor* v. *Beal*, Cro. Eliz. 222. *Goodland* v. *Blewith*, 1 Camp. 477. *Cootes* v. *Lewis*, Ib. 444. In general, if an agent be employed to receive money, and the debtor pays in money, he is discharged; but if the debtor does not pay in money, but settles the account by considering a debt due to him from the agent as paid, it is no discharge; per Abbott, C. J. in *Todd* v. *Reed*, 3 Starkie's C. 16. And therefore, where a broker adjusts a loss with the underwriter, and his name is struck out of the policy and adjustment, the broker becoming bankrupt within the month, the underwriter cannot set off against the assured the balance due to him from the broker at the time of adjusting the policy. Ib.; and see *Russell* v. *Bangley*, 4 B. & A. 395; *Jell* v. *Pratt*, 2 Starkie's C. 67. Where it had been agreed between two partners that a third person should collect and pay the debts, of which the defendant had notice, and promised to pay at a future time, but before that paid it to one of the partners; held, that such agreement amounting only to an authority to such agent to receive, and to make his receipt of the debt, if paid to him, a good discharge, it did not restrain the rights of the partners, and the payment to him therefore was good. *Porter* v. *Taylor*, 6 M. & S. 156. A traveller engaged in receiving orders, is not justified in receiving payment from a customer in other goods, but it will be for jury to say what acts of his employer amount to a subsequent ratification. *Howard* v. *Chapman*, 4 C. & P. 508. Where the defendant, as owner, was clearly liable to the plaintiff for necessaries, &c. supplied for his ship and crew, by the direction of the broker and agent, to whom the defendant entrusted the whole management, and the plaintiff, before the expiration of the credit, had applied to and received from the broker his acceptances for the amount, allowing discount, the latter having effects of the defendant's beyond the amount in his hands at the time; and the bills were sub-

Proof of agent's authority.

for that purpose (*q*). Whether such authority has been given to an agent to receive payment, or to receive it in a particular manner, are usually questions of fact for the jury (*r*). Such an authority may be implied from the relative situation of the principal and agent, the habit and course of dealing between the parties, or from some recognition by the principal of the authority of the agent subsequent to the payment (*s*).

Where a principal entrusts an agent with the sale of goods, as to sell them in a shop, or a horse at a fair, a presumption arises that he empowered that agent also to receive payment (*t*). So payment to a broker who sells for a principal not named, and who makes out the bought-and-sold notes to the buyer and seller, is a payment to the principal (*u*).

So, as has been seen, the authority of an agent to receive payment on bonds, bills, or other securities, is usually evidenced by the agent's possession of the instruments which are delivered up or cancelled upon payment (*x*).

Where the question is, whether the person who received money on a security was the agent of the owner for that purpose, it is not essential to call the agent himself (*y*); the possession of the security by a third person, and receiving payment for it, and giving a receipt for it in the name of the principal, afford strong presumptive evidence that he was employed as agent for that purpose (*z*).

Payment of the debt to the marshal or sheriff in whose custody the debtor is, is no satisfaction to the plaintiff (*a*).

sequently renewed, and the interest added: held, that upon the broker becoming bankrupt, and the bills remaining due, the defendant was not discharged by such bill transaction, having neither been misled nor prejudiced by it. *Robinson* v. *Read*, 9 B. & C. 449. The defendant sent a person to the plaintiff's countinghouse to pay the amount, with a letter, objecting to certain items, which was there paid, and the letter delivered to a party sitting in the inner part of the counting-house, and who gave a receipt for it; held, that although a stranger, and not authorized, nor in the employment of the plaintiff, that the defendant was discharged by such a payment to a person so appearing to be entrusted with the plaintiff's concerns. *Barrett* v. *Deere*, 1 M. & M. 200.

(*q*) *Supra*, Vol. I. tit. WITNESS.—And see tit. AGENT.

(*r*) *Supra*, tit. AGENT.

(*s*) *Supra*, tit. AGENT.

(*t*) 12 Mod. 230. A payment to a person found at the vendor's counting-house, and who appears to be entrusted with the conduct of the business, is a valid payment, although the person receiving the money had, in fact, no authority to receive it; for the debtor has a right to suppose that the trader has the control over his own premises, and that he will not suffer persons to come there and intermeddle with his business without authority. *Barrett* v. *Deere*, 1 M. & M. 200. *Wilmot* v. *Smith*, ib. 288. So where a debtor sent a servant to the house of the creditor to tender the amount of the debt, and the servant having been informed by a servant of the creditor at his house that his master was at home, delivered the money to that servant to be delivered to the creditor, and the creditor's servant went into his house, and returned with an answer that the master would not receive it; Lord Kenyon ruled that there was evidence of a tender for the consideration of the jury. *Anon.*, 1 Esp. C. 350.

(*u*) *Favene* v. *Bennett*, 11 East, 36. Vide *infra*, 821.

(*x*) *Supra*, 43.

(*y*) See *Owen* v. *Barrow*, 1 N. R. 101; where, in an action on the Statute of Usury, Chambre, J. said, "I should be sorry to have it laid down as a general rule that agency must be proved by the agent himself."

(*z*) *Owen* v. *Barrow*, 1 N. R. 101. The action was to recover penalties for usury in discounting a bill of exchange; in proof of the receipt of the money, it was proved that *B.*, in the name of the defendant, the owner of the bill, had commenced an action against the acceptor, and that he had received from him the amount of the bill and costs, on producing the bill, and that he had given a receipt in the name of the defendant; and this was held to be good *primâ facie* evidence, without producing the proceedings in the action.

(*a*) *Taylor* v. *Baker*, 2 Lev. 203. *Slackford* v. *Austen*, 14 East, 418; and per Holroyd, J. in *Crozer* v. *Pilling*, 4 B. & C. 32.

Where payment has been made to an attorney, proof should be given of his employment by the plaintiff (*b*). Proof of agent's authority.

Payment to a country attorney who is merely employed by the attorney of the principal to execute the writ, is insufficient (*c*); so is a payment which is made to an attorney on record, who has never been employed by the plaintiff (*d*); but payment to the attorney really employed by the plaintiff, although after he has been privately changed without leave of the Court, is a good payment (*e*).

Where payment has been made to a servant or other agent, in a cheque or bill, it is a question of fact whether the agent had authority to receive such a payment (*f*). And where the payment has been made according to the usual practice in similar cases, such an authority is, it seems, to be presumed (*g*). And in general, slight evidence of acquiescence on the part of the master will serve to show his assent to any particular mode of payment (*h*).

Payment by the debtor's attorney to a creditor will satisfy an averment of payment by the debtor, although the latter has not repaid the attorney, but has merely given his promissory note (*i*).

If the broker sell goods as his own, and the vendee has no notice to the contrary, a payment to the broker is good, although the mode varies from that which was agreed upon (*k*).

Though it be known that the party is but an agent, the payment will be good, if it be made according to the agreement (*l*), and without notice from the principal not to pay to the agent (*m*); and even where such notice has

(*b*) Payment to the attorney pending the action is good; *secus* as to a payment to his clerk, who shows no authority but his master's order to receive it. *Coore* v. *Callaway*, 1 Esp. C. 115.

(*c*) *Yates* v. *Freckleton*, Doug. 623; 1 T. R. 710.

(*d*) *Robson* v. *Eaton*, 1 T. R. 62.

(*e*) *Powel* v. *Little*, 1 Black. 85. So a plaintiff is bound by the act of the agent in town, in taking money out of court. *Griffith* v. *Williams*, 1 T. R. 610.

(*f*) *Supra*, 44. An agent employed to sell has no authority, as such agent, to receive payment. Per Littledale, J., *Mynn* v. *Jolliffe*, 1 Mo. & R. 326.

(*g*) Ibid. note (*s*).

(*h*) *Ward* v. *Evans*, Salk. 442; *supra*, 44.

(*i*) *Adams* v. *Dansey*, 6 Bing. 506.

(*k*) *Blackburn* v. *Scholes & another*, 2 Camp. 343. And see *De Leira* v. *Edwards*, 1 M. & S. 147. *Farens* v. *Bennett*, 11 East, 36, *infra*, n. (*l*). So also if the principals have allowed the agent to act as the principal in the sale of the goods (*Coates* v. *Lewis*, 1 Camp. 444. *Gardiner* v. *Davis*, 2 C. & P. 49). So where the principals allowed the broker to draw bills in his own name (*Townsend* v. *Inglis*, Holt's C. 278. *Farens* v. *Bennett*, 11 East, 36). So if the factor sell in his own name, the buyer may set off, as against the claim of the principal, the debt due to the factor (*George* v. *Claggett*, 7 T. R. 359; 2 Esp. C. 577). *Miller*, if the buyer be informed of the principal before the whole of the goods are delivered (*Moore* v. *Clementson*, 2 Camp. 22). Where a party sells in the character of an agent, although without disclosing the name of his principal, yet, if the disclosure be made before payment, the effect seems to be the same as if the name of the principal had been disclosed on the face of the contract. See Lord Ellenborough's, observations, 4 M. & S. 573.

(*l*) *Farens* v. *Bennett*, 11 East, 36. The goods were sold for a principal not named, on the terms of "payment in one month money," and the jury found that the meaning of the terms, in commercial understanding, was payment at any time within a month, and that the payment within the month to the brokers with whom the defendant had dealt, without the knowledge of the principal, was a good payment. But it is otherwise if the payment vary from the terms of the original contract. *Campbell* v. *Hassel & others*, 1 Starkie's C. 233; and evidence of an usage to substitute an equivalent mode of payment is inadmissible.

(*m*) But although the factor sell in his own name, and without disclosing the name of his principal, yet, if the principal give *notice* to the buyer to pay him, and not the factor, the buyer will not be discharged in afterwards paying the factor. (B. N. P. 130. *Houghton* v. *Matthews*, 3 B. & P. 485. See also *Powel* v. *Nelson*, 15 East, 65 n.)

To an agent.

been given, payment to a factor will still be good, if the principal, on the balance of account, be indebted to the factor, for he has a lien on the debt (*n*).

The effect of a bill or note in payment has already been considered (*o*).

Payment by bills is *primâ facie* evidence of payment; it lies on the plaintiff to show that they have been dishonoured (*p*).

If the master of a vessel is to get payment in the best mode he can, and has no power to get anything but a bill, he must take that; but if he could get paid in any other mode, he should do so, otherwise he will be bound by taking a bill (*q*).

Proof of payment by remittance, &c.

If a creditor desire his debtor to remit a bill or note by the post, it will be sufficient to prove that the debtor remitted the bill as directed, and if it

(*n*) *Drinkwater* v. *Goodwin*, Cowp. 251. Vide *ctium*, *Hudson* v. *Granger*, 5 B. & A. 27. The plaintiff sent goods to *A. B.*, his factor, to whom he was indebted in a larger amount; the factor sold the goods to the defendant, to whom he was indebted in a larger amount; the factor became bankrupt, and his assignees settled with the defendant, and it was held to be an answer to the plaintiff's demand. In the case of *Schrimshire* v. *Alderton*, (Str. 1182), the jury, contrary to the direction of the Court in point of law, found that a payment to a factor who sold under a *del credere* commission, after notice by the principal to the contrary, was a good payment (and see B. N. P. 130), on the ground that the factor, in such a case, was to be considered to be the real principal with whom the contract was made. The circumstance, however, of a *del credere* commission, which is no more in effect than an agreement by the factor to ensure the debt to his principal, cannot, it seems, at all affect the relative situation of the principal and the vendee. See *Morris* v. *Cleasby*, 1 M. & S. 576; 4 M. & S. 566. *Gurney* v. *Sharp*, 4 Taunt. 242. And see Lord Ellenborough's observations in *Cumming* v. *Forrester*, 1 M. & S. 499, and the judicious observations in Mr. Long's book on Sales, 243, and the authorities there cited.—As to payments made by a principal to a broker employed to buy for him, see above, p. 819; and see the case of *Powell* v. *Nelson*, 16 East, 65, cited by Lord Ellenborough. There the factor made purchases for his principal, who made payments on account; the vendor wrote to the factor for payment; the letter coming into the hands of the purchaser, he transmitted it to the factor, and afterwards paid him the remainder of the debt; and Lord Mansfield held that the principal was still liable to the vendor.

(*o*) *Supra*, BILL OF EXCHANGE, 264. *C.* guarantees the payment of *A.*'s debt to *B.* by instalments; *C.*, after the first instalment was due, remits bills to *B.* not due; *B.*, by keeping the bills, waives the objection. *Shipton* v. *Capon*, 5 B. & C. 378. In an agreement between the defendant with the plaintiff and other creditors for a composition of 15 *s.* in the pound, it was stipulated that certain bills which had been indorsed by the defendant and delivered to the plaintiff, should be considered as part payment. It was held that these were not to be considered as an absolute payment, and that the defendant was liable on one of them which was dishonoured at maturity. *Constable* v. *Andrew*, 1 C. & M. 293. Where a purchaser gives the seller an order on a third person, entitling him to receive cash, instead of which he *elects* to take a bill, the payment is good although the bill be dishonoured. *Vernon* v. *Bourerie*, 2 Show. 296; *Smith* v. *Ferrand*, 7 B. & C. 19. So if the purchaser give the seller an order for a good bill on London, the seller must take care that he gets a good bill. *Balson* v. *Reichard*, 1 Esp. C. 106. *Seens* if the order for payment be on the purchaser's *agent*, and the seller take a cheque which is dishonoured. *Everett* v. *Collins*, 7 B. & C. 24, 25; 2 Camp. 515. And where the freighter's foreign agent being furnished with funds to pay the freight, the master took a bill on a third person, it was held (by Gibbs, C. J.) that the freighter was not discharged. *Marsh* v. *Pedder*, 4 Camp. 257. A cheque to operate as payment must be unconditional in its terms. A cheque directing bankers to pay the plaintiff's balance account railing or bearer, was held to be no proof of payment. *Hough* v. *May*, 4 Ad. & Ell. 954. It was held to be no misdirection to leave it to the jury whether the plaintiff received the cheque as money. *Ib.* Judgment on a bill without satisfaction does not operate as payment, *supra*, 264 (*e*), although it was formerly held otherwise. See *Drake* v. *Mitchell*, 3 East, 251.

(*p*) *Hebden* v. *Hartsink*, 4 Esp. C. 46. *Stedman* v. *Gooch*, 1 Esp. C. 4. The giving a cheque is *primâ facie* evidence of payment where a debt is due, but it may be shown by circumstances that a loan was intended. *Boswell* v. *Smith*, 6 C. & P. 60.

(*q*) Per Bayley, J., *Strong* v. *Hart*, 6 B. & C. 161. See *Robinson* v. *Read*, 9 B. & C. 449; *Taylor* v. *Briggs*, M. & M. 28.

be lost the loss will fall upon the creditor (*r*). But in such case proof of a delivery of the letter, not at the post-office, or at a receiving-house, but to a bellman in the street, would not be a compliance with the creditor's directions, and the loss would fall on the debtor (*s*).

This authority seems, however, to have been overruled by a later decision (*t*).

In the absence of any direction by the creditor, it is said that the sending bills or notes by the post would be *primâ facie* evidence to show that they were received by him (*u*). It is clear that in such a case it would be competent to the creditor to show that he had never in fact received the bills, and that they had fallen into other hands.

A payment made by compulsion of law is always sufficient to protect the party who made it from a second demand (*x*).

Presumptive evidence.

In an action of covenant against the defendant, the drawer of certain bills, to pay to the plaintiff the amount of his acceptances of bills so drawn, the possession by the plaintiff of bills accepted by him, and drawn by the defendant, is *primâ facie* evidence that the plaintiff has paid them (*y*).

The mere production of a cheque drawn by the defendant on his banker, and payable to the plaintiff or *bearer*, is no evidence of payment to the plaintiff, without proof that he received the amount, or that it was in his possession; but proof that he indorsed his name upon it affords *primâ facie* evidence of payment to him (*z*).

The mere fact of the payment of money by *A.* to *B.* is presumptive evidence of the payment of an antecedent debt, and not of a loan (*a*). In an action on the bond of the testatrix, proof of a transfer of stock by the testatrix to a larger amount is evidence of payment (*b*).

Payment may be presumed from lapse of time. Under the Statute of Limitations, lapse of time may, it has been seen (*c*), be pleaded as a bar to the action. Still the statute operates but presumptively, and the presumption may be rebutted by evidence of an admission of the debt in writing, within the limit (*d*). And although the statute has not been pleaded, payment may be presumed by the jury, from lapse of time and other circumstances, which render the fact probable (*e*).

Satisfaction of a bond might, before the late statute (*f*), have been presumed from a lapse of twenty years, without any demand or acknowledgment of the debt within that space (*g*), or in a shorter time if circumstances rendered satisfaction probable (*h*). But a lapse of twenty years, before the

(*r*) *Warwick* v. *Noakes*, Peake's C. 67.

(*s*) *Hawkins* v. *Rutt*, Peake's C. 186.

(*t*) *Parke* v. *Alexander*, 3 Moore & Scott, 789.

(*u*) Peake's Ev. 289; where it is also observed, that where the creditor requires *a remittance* by the post, the sending bank notes uncut would not discharge the debtor, since the more usual and prudent course is to send them by halves.

(*x*) *Supra*, 443, note (*d*).

(*y*) *Gibbon* v. *Featherstonhaugh*, 1 Starkie's C. 225.

(*z*) *Egg* v. *Burnett*, 3 Esp. C. 196.

(*a*) *Welsh* v. *Seaborn*, 1 Starkie's C. 474; and see *Aubert* v. *Welsh*, 4 Taunt. 293.

(*b*) *Breton* v. *Cope*, Peake's C. 30.

(*c*) *Supra*, tit. LIMITATION.

(*d*) Ibid.

(*e*) *Cooper* v. *Turner*, 2 Starkie's C. 497.

(*f*) 3 & 4 W. 4, c. 42; *supra*, tit. LIMITATION.

(*g*) 1 T. R. 270. The surrender of a mortgage term is not to be presumed in less than twenty years. *Doe* v. *Calvert*, 5 Taunt. 170.

(*h*) Ibid. *Colsell* v. *Budd*, 1 Camp. 27; 3 P. Wms. 287. *Rex* v. *Stephens*, 1 Burr. 434; 3 Burr. 1936. *Forbes* v. *Wale*, 1 Bl. 532. Where the drawers of bills accepted by the defendant (who when due had paid the drawers not being the holders, but neglected to have them delivered up), had paid large sums to the plaintiffs, their bankers, the then holders, and they had not only entered the bills to their debit, but had treated them as paid; held, that

Presumptive evidence.

statute, was no legal bar, but merely afforded a presumption in fact for the jury (*i*).

The effect of an indorsement on a bond, of the receipt of interest, within twenty years, has already been considered (*k*).

In the usual course of business, a security, where the money is paid, is either delivered up to the debtor or destroyed; and therefore, where the fact of payment is otherwise doubtful, the possession of the entire instrument by the creditor affords a presumption that it is still unsatisfied (*l*).

A receipt for rent due at one time affords a presumption that the rent due at an earlier date has been paid.

Payment may also be presumed from the habit and course of dealing between the parties; as where the practice has been to pay wages, or for goods supplied, weekly, and a demand is made at a distant time (*m*).

Application of payment.

2dly. Where the payment is capable of different applications, proof is frequently necessary to show the application of the payment to a particular debt. The usual rule of law is, that the party who pays money has the power to apply it as he chooses, but that if he does not apply it, the party who received it may make the application (*n*). For these purposes, evi-

by the course of their own accounts they were precluded from saying the bills had not been satisfied. *Field* v. *Carr*, 5 Bing. 13; and 2 M. & P. 46.

(*i*) Ibid.

(*k*) *Supra*, tit. BOND. See also tit. RELEASE. *Washington* v. *Brymer*, Ibid. and Peake's Ev. Append. lxxiii. *Moreland* v. *Bennett*, Str. 652. See *Searle* v. *Lord Barrington*, Str. 825; Vol. I. 306. Such indorsements have been held to be inadmissible, unless proved to have been made at a time when it was against the interest of the party to make them. *Rose* v. *Bryant*, 2 Camp. 321; and see 9 Geo. 4, c. 14, s. 1; and even then the admissibility of such evidence is very questionable in principle. But in the case of *Parr* v. *Cotchett*, Dom. P. May 6, 1824, it was held, that where the indorsee of a promissory note had made indorsements of the half-yearly payments of interest, from the time of making the note until his death, which happened within six years of the date of the note, like indorsements by his executor, who died before the commencement of the action, were admissible in evidence in answer to the statute, although there was no extrinsic evidence to show the time when the indorsements were made, and although more than six years had elapsed between the death of the maker and of the executor. It is observable, that in this case, as well as that of *Searle* v. *Lord Barrington*, the party who made the entry was dead at the time of the trial. In the late case of *Glendow* v. *Atkins*, in the Exchequer, proof having been given, in an action on a bond, of payment of interest to a third person, an indorsement on the bond by the obligor, stating that the bond was to secure trust-money for that third person, was held admissible, there being a memorandum of the trust on the bond of even date with the bond, and attested by one of the two witnesses to the bond. Such evidence is now excluded by the express enactment of the stat. 9 Geo. 4, c. 14, s. 1.

(*l*) *Brembridge* v. *Osborn*, 1 Starkie's C. 374.

(*m*) *Lucas* v. *Norosilienski*, 1 Esp. C. 196. *Evans* v. *Birch*, 3 Camp. 10. The action was for the proceeds of milk daily sold to customers by the defendant as agent to the plaintiff; and evidence was given that the course of dealing was for the defendant to pay to the plaintiff every day the money which she had received, without any written voucher passing; and upon this evidence Lord Ellenborough held, that it was to be presumed that the defendant had in fact accounted, and that the *onus* of proving the contrary lay on the plaintiff.

(*n*) *Goddard* v. *Cox*, 2 Str. 1194. *Plomer* v. *Long*, 1 Starkie's C. 153. *Marryatts* v. *White*, 2 Starkie's C. 101. *Matthews* v. *Welwyn*, 4 Ves. 118; Cro. Eliz. 68. *Peters* v. *Anderson*, 5 Taunt. 596. *Hall* v. *Wood*, 14 East, 243, n. *Kirby* v. *Duke of Marlborough*, 2 M. & S. 18. *Bosanquet* v. *Wray*, 6 Taunt. 597. *Bodenham* v. *Purchas*, 2 B. & A. 39. *Smith* v. *Wigley*, 3 M. & S. 174. The party who pays the money ought to appropriate it at the time of payment; per Bayley, J., in *Mayfield* v. *Wadsley*, 3 B. & C. 363. But a creditor is not bound to make an immediate application. *Simson* v. *Ingham*, 2 B. & C. 65. And he is not bound by an entry in his book which he has not communicated. Ib.; and see *Cox* v. *Troy*, 5 B. & A. 474. And therefore a mere transfer in the books of a London banker to the credit of an old firm in the country, one of whose members is lately deceased, is not such an appropriation of subsequent receipts as to discharge the condition of a bond for the payment of all monies advanced to the late firm. *Simson* v. *Ingham*, 2 B. & C. 65. A.,

dence is admissible of what passed at the time of payment, or of letters enclosing bills or money, and directing their application. Application of payment.

In some instances, the law applies the payment, or the intention of the party paying the money is inferred from the circumstances of the particular case; as where a trader owes 100 *l.*, and after he has ceased to trade incurs a further debt, and then pays money on account, it will be set against the old debt (*o*).

A bond reciting that *A.* and *B.* were partners is conditioned for the payment of advances to them; this extends only to advances to the co-partnership; and remittances made subsequently to the death of one are, in the absence of any specific appropriation, to be applied in liquidation of the old balance (*p*). Where one of several partners who are in debt dies, the survivors continuing their dealings with a particular creditor, who joins the transactions of the old and new firm in one entire account, payments made from time to time by the survivors are to be applied to the old debts (*q*). So payments by a debtor from time to time to surviving partners upon a general account, including the whole debt, are to be applied, in the first place, to the old debt (*r*). In case of a continuing account, such as a banker's cash account, the ordinary appropriation is according to the order of time (*s*).

a solicitor, receives from a client a sum to be paid into Court on the client's account; *A.* pays the amount in a country bill into his bankers without any notice, being then indebted to them in the sum of 450 *l.*, for which they held securities, and as to which they kept an account distinct from the general account; *A.* dies; the bankers, after notice from the client, still keep the accounts separate, but ultimately deducting the 450 *l.* from the proceeds of the bill, pay the balance to *A.*'s executrix; it was held, that as there was no agreement to keep the account separate, and the bankers had no notice till after the amount was received of the purpose to which it was intended to be applied, the client was not entitled to recover the proceeds of the bill. *Grigg* v. *Cocks*, 4 Sim. 438. Several parties joined as sureties with the principal in a note to his bankers, who carried it to the account in his passbook, and charged him with interest on it yearly; upon a change of partners in the banking firm, and a balance struck between the old and new firms, it was held that the defendants appearing on the face of the note to be principals, and not having confined their liability to the then existing firm, that it continued, and that the action was properly brought in the names of the partners to whom it was given; and that being made payable on demand, there was no obligation in the bankers to appropriate any balance of the principal to the discharge of that note; and that there having been no appropriation by the debtor, the debt could not be considered as discharged. *Pease* v. *Hirst*, 10 B. & C. 122. In assumpsit for money had and received to the use of the plaintiffs, as assignees of *A.* & *Co.*, being the proceeds of a bill remitted by *A.* & *Co.* to the defendants, with orders to get it discounted, and apply the proceeds in a specific way, but before they became due *A.* & *Co.* became bankrupt, and required to have the bill returned, it not having been discounted, but the defendants received the amount when due; held, that the assignees were entitled to recover, and that the defendants could not set-off a debt due to them from the bankrupt. *Buchanan* v. *Findlay*, 9 B. & C. 739; and see *Key* v. *Flint*, 8 Taunt. 21.

(*o*) *Meggott* v. *Mills*, Ld. Raym. 286; Comb. 463; *Supra*, tit. BANKRUPTCY. *Dawe* v. *Holdsworth*, Peake's C. 64.

(*p*) *Simson* v. *Cooke*, 1 Bing. 452.

(*q*) Per Bayley, J., *Simson* v. *Ingham*, 2 B. & C. 72; and see *Clayton's Case*, 1 Merivale, 572. *Brook* v. *Enderby*, 2 B. & B. 71.

(*r*) *Bodenham* v. *Purchas*, 2 B. & A. 39. *Seeus*, where the old debt is not brought into the new account. *Simson* v. *Ingham*, 2 B. & C. 65. And where there are distinct demands by the whole firm, and by a partner, if the money paid be the money of the partners, the creditor cannot apply the payment to the debt of the individual partner. *Thompson* v. *Brown*, M. & M. 40.

(*s*) Where a continuing account is treated as one entire account by all parties, the rule of appropriation does not apply. In the case of a banking account, there is not room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried to account; presumably, it is the first sum paid in that is first drawn out; it is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of

Application of payment.

Where an old debt is due, and new debts are contracted, and payments are made from time to time, agreeing in amount with the new debts, a very strong inference arises that the payments were made in respect of the new debts (*t*), especially in favour of a surety for the new debts (*u*).

Where a creditor has a legal claim on bills of exchange, and also an equitable claim on a mortgage assigned by a third person, and a payment is made by the debtor generally, without prejudice to his claim on any securities, it is to be presumed that the payment is in discharge of the *legal* debt (*x*).

Where a secret partner had retired from the firm, and bills given in payment for goods previously supplied to the firm were dishonoured, and new bills were given by the partners who continued in the firm, on the dishonoured bills being delivered up; it was held that these were to be considered as applicable to the old debts, and not to new debts contracted since the dissolution (*y*).

Where a party placed in the hands of his banker the note of a third person, informing the banker that it was made for his accommodation, and afterwards paid in money generally, after which new credit was given by the banker, it was held that the banker could not recover from the maker more than the balance due on the note, after deducting the amount so paid in (*z*).

Where money is due from a debtor as executor, and other money is due on his own private account, and he makes a payment generally, it must be applied to the latter debt (*a*).

Where a broker sold goods of *A.* and also goods of *B.* to *C.*, and the latter made a payment generally on account, insufficient to discharge both debts, and then became insolvent, it was held that the money so received was to be applied in proportion to the debts (*b*).

Where a creditor has several demands, some of which cannot be enforced

setting the two items against each other; upon that principle all accounts are settled, and particularly cash accounts. *Clayton's Case*, 1 Merivale, 572. In general, where payments are made upon one entire account, they are considered as payments in discharge of the earlier items. Per Bayley, J. in *Bodenham* v. *Purchas*, 2 B. & A. 46. A general payment is applicable to a prior legal demand, not to a subsequent equitable one. *Goddard* v. *Hodges*, 1 C. & M. 33. Where a bond was given to secure advances to be made by partners, and one partner died, the account was continued, and the two accounts were blended together, subsequent payments being applied generally in reduction of the whole balance; it was held that the subsequent payments must be considered as payments in discharge of the former balance. *Bodenham* v. *Purchas*, 2 B. & A. 39; and see *Williams* v. *Rawlinson*, 3 Bing. 76.

(*t*) *Marryatts* v. *White*, 2 Starkie's C. 101.

(*u*) Ibid. per Lord Ellenborough. But it seems that the law will not apply a payment in favour of a surety, unless there be some circumstances to show that payments by the principal were intended to be made in discharge of the particular debt. *Plomer* v. *Long*, 1 Starkie's C. 153; and see *Kirby* v. *Duke of Marlborough*, 2 M. & S. 18; and *Williams* v. *Rawlinson*, 3 Bing. 71.

(*x*) *Birch* v. *Tebbutt*, 2 Starkie's C. 74.

(*y*) *Newmarch* v. *Clay*, 14 East, 239.

(*z*) Per Lord Kenyon, *Hammersley* v. *Knowlys*, 2 Esp. C. 665.

(*a*) *Goddard* v. *Cox*, 2 Str. 1194. But see *Steindale* v. *Hankinson*, 1 Simons, 393, where it was held, that where *B.* was indebted to the plaintiff on a balance of account for goods, and *B.*'s widow continued his trade after his decease, and continued to receive goods and make payments, and she was charged by the creditor with the debt, *B.*'s debt was discharged by the payments, and that the ultimate balance could not be proved against *B.*'s estate. It appeared that the plaintiff had adopted the administratrix as his debtor, by making her debtor to the balance, and that accounts had been rendered to her in which she was so debited.

(*b*) *Favene* v. *Bennett*, 11 East, 36.

because they are illegal, and money be paid generally, it will be applied to the legal demand (*c*). Application of payment.

A transfer of funds into the names of trustees, with an illegal intent to evade the legacy duty, without any communication made to such trustees, is not a binding appropriation (*d*).

In the case of mortgages, bonds, and other instruments, by which the party engages to pay money within a certain time, proof of payment on the last moment of the day will satisfy the allegation on issue taken on the plea of *solvit ad diem* (*e*). Solvit ad diem.

What will amount to payment under the circumstances of the particular case is a question of law (*f*).

(*c*) *Ribbans* v. *Crickett*, 1 B. & P. 264. *Wright* v. *Laing*, 3 B. & C. 166. But where one of the demands is for spirituous liquors, supplied in quantities not amounting to 20*s.* at a time, the receiver of the money may apply it to that demand; the stat. 24 G. 2, c. 40, operating merely to prevent the seller from maintaining the action. *Cruickshanks* v. *Rose*, 1 Mo. & R. 100. He may so apply it, although his particulars claim the whole demand, and he may make the appropriation at any time before trial. *Philpott* v. *Jones*, 2 Ad. & Ell. 41; 4 N. & M. 14; and see *Cruickshanks* v. *Rose*, 1 Mo. & R. 100.

(*d*) A party had directed his bankers to transfer certain funds to the accounts of certain persons, as trustees for his wife and others, for his son, with a view to evade the legacy duty, and the bankers accordingly did so, and placed the dividends accruing thereon to such accounts respectively; but such transfers were never communicated to the persons so named trustees, and the party had evinced an opinion that he had still a control over the funds; held, that they were not binding appropriations, being made with a fraudulent intent; and it being clear that the entire control had not been parted with, the funds were therefore on his death to be accounted for as part of his personal estate. *Gaskell* v. *Gaskell*, 3 Y. & J. 502; and see *Wharton* v. *Walker*, 4 B. & C. 163. See further, tit. Appropriation, *supra*.

(*e*) Per Lord Kenyon, in *Leftly* v. *Mills*, 4 T. R. 173, citing *Hudson* v. *Barton*, 1 Roll. R. 189. *Cabell* v. *Vaughan*, 1 Saund. 287; Moor, 122, pl. 166; Salk. 578.

(*f*) Payment in notes which turn out to be worthless is no payment in law. *Owenson* v. *Morse*, 7 T. R. 64. *Brown* v. *Kewley*, 2 B. & P. 518. *Tapley* v. *Martens*, 8 T. R. 451. *Bodenham* v. *Purchas*, 2 B. & A. 39. The giving a note of hand does not operate to alter the debt till payment; and therefore, although *A.* gave a note for rent in arrear to *B.*, and took a receipt for it, it was held that *B.* might still distrain for the rent. *Harris* v. *Shipway*, B. N. P. 182. *Secus*, if *A.* endorse a bill or note to *B* in payment of a debt, and *B.* neglect to demand payment from the drawer in time. *Ewer* v. *Clifton*, B. N. P. 182; Andr. 190. Where the agreement was for the sale of goods for ready money, and payment was made to the vendor's brother in a bill of exchange, accepted by the vendor, which when due had been dishonoured, and the bill, though objected to in the first instance, was taken and not returned, it was held, in the absence of fraud, to be a good payment as against the assignee of the vendor. *Mayer* v. *Nias*, 1 Bing. 311; *infra*, tit. Set-off. The taking of credit may be equivalent to payment. *A.* receives country bank notes in payment from *B.*, and by an agreement between *B.* and the country bank *A.* has credit for the amount; it is equivalent to a payment by the bank. *Gillard* v. *Wise*, 5 B. & C. 134. Or it may be by a transfer of a debt. If *A.* be indebted to *B.*, and *B.* to *C.* in the same amount, and by agreement *C.* takes *A.* for his debtor, this constitutes a loan from *C.* to *A.* and operates as a payment by *B.* to *C.* See *Wade* v. *Wilson*, 1 East, 195. *Surtees* v. *Hubbard*, 4 Esp. C. 203. The observations of Holroyd, J. in *Bodenham* v. *Purchas*, 2 B. & A. 47. *Browning* v. *Stollard*, 5 Taunt. 450. *Cecil* v. *Harris*, Cro. Eliz. 140; *supra*. *Secus*, where no new person agrees to become a debtor. *A.*, *B.* and C. being partners, *A.* retires from the firm; a transfer of a debt from *A.*, *B.* and *C.* to *D.* from the old to the new firm, with the assent of *D.*, does not discharge *A.* *David* v. *Ellice*, 5 B. & C. 196; and see *Lodge* v. *Dicas*, 3 B. & A. 611. *Newmarch* v. *Clay*, 14 East, 239. Where the defendants gave orders to their bankers to place a sum to the credit of the plaintiffs, so as to make the same as a bill of one month, and the bankers assented, but treated it as a payment to be made at a future day, and gave notice to the defendants accordingly, and became bankrupts before the day, it was held to be no payment. *Pedder* v. *Watt*, 2 Ch. C. T. M. 619. An execution against the person of the debtor operates as a legal satisfaction of the debt. *Cohen* v. *Cunningham*, 8 T. R. 123. *Burnaby's Case*, Str. 653. *Goddard* v. *Vanderheyden*, 3 Wils. 262. Payment to the obligee of a bond, after notice of assignment, is not sufficient to discharge the obligor (in equity). *Baldwin* v. *Billingsley*, 2 Vern. 539. *Ashcomb's*

Payment of money into court.

The payment of money into court was formerly proved by the production of the rule for paying it into court (*g*). It was proved either by the plaintiff or the defendant.

But now by the rule of Hil. T., 4 W. 4, such payment must in all cases be pleaded. The effect of paying money into court by way of admission seems to remain as it was before.

Effect of.

The effect of paying money into court, upon a special count, or generally when the declaration contains a special count, is an admission of the right to recover on that count, which supersedes the necessity of the usual proof of the making of the contract (*h*).

Case, 1 Ch. Ca. 232. An order by a creditor on his debtor to pay the amount to a third person, after being assented to by the debtor, is not revocable. *Hodgson* v. *Anderson*, 3 B. & C. 842. If *A.* owe *B.* 100 *l.*, and *B.* owe the same sum to *C.*, and the three meet, and it is agreed that *A.* shall pay *C.* the 100 *l.*, *B.*'s debt is extinguished, and *C.* may recover from *A.* Per Buller, J. in *Tatlock* v. *Harris*, 3 T. R. 174; and per Bayley, J., 3 B. & C. 855. So if *A.* engage to pay *C.* the amount due to *B.* when ascertained. *Crawfoot* v. *Gurney*, 9 Bing. 372. And *C.* may recover from *A.* notwithstanding the intermediate bankruptcy of *B.* Ib.; and see above, 79, 80. Payment of one entire rent to the clerk of seven trustees of a charity, coming to their title at different times, is *primâ facie* evidence of a joint title. *Doe* v. *Grant*, 12 East, 221. In general, money voluntarily paid under a knowledge of the facts cannot be recovered. *Supra*, tit. ASSUMPSIT. *Gower* v. *Popkin*, 2 Starkie's C. 85; 1 B. & A. 571. To a rector in lieu of tithes, when exempt from rate. *R.* v. *Boldero*, 4 B. & C. 467.

(*g*) *Israel* v. *Benjamin*, 3 Camp. 40; Tidd's Pr. 645, 7th edit.

(*h*) 4 T. R. 579. *Cox* v. *Parry*, 1 T. R. 464. *Elliott* v. *Callow*, 2 Salk. 597. *Guillod* v. *Nocke*, 1 Esp. C. 347. *Watkins* v. *Towers*, 2 T. R. 275; and see *Cox* v. *Brain*, 3 Taunt. 95. Payment of money into court admits everything which the plaintiff must have proved to recover it. P. C., 1 B. & C. 4. And such admission is conclusive, 1 C. M. & R. 207; which a payment before action brought is not, Ib.; to show that the plaintiff has a legal demand to the extent of the money brought in. *Blackburn* v. *Schoole*, 2 Camp. 341. It admits the right to sue in the particular capacity (*Tuson* v. *Batting*, 3 Esp. C. 192), and supersedes the usual proofs in the case of a bill of exchange. *Gutteridge* v. *Smith*, 2 H. Bl. 374. *Jenkins* v. *Tucker*, 1 H. B. 90. *Bennett* v. *Francis*, 2 B. & P. 550; 2 Camp. 357; Peake's C. 14. *Dyer* v. *Ashton*, 3 B. & C. 3; 2 D. R. 19. It admits the sufficiency of the stamp. *Israel* v. *Benjamin*, 3 Camp. 40. It conclusively admits the character in which the plaintiff sues. *Lipscombe* v. *Holmes*, 2 Camp. 441. As also that in which the defendant is sued. *Lucy* v. *Walrond*, 3 Bing. N. C. 841. It excludes (where the work was done under one contract) the defendant from objecting to the non-joinder of a co-plaintiff. *Walker* v. *Rawson*, 1 Mo. & R. 250. If all the defendants pay money into court, there being but one contract in fact, they are excluded from the defence that one of them was not a party. *Ravenscroft* v. *Wise*, 1 C. M. & R. 203. Where several breaches of covenant are assigned, payment on a single breach admits the deed. *Randall* v. *Lynch*, 2 Camp. 352. Payment into court generally, where no special contract is stated, admits no more than that the sum paid in is due; but where there is a special contract, the payment admits that contract. *Seaton* v. *Benedict*, 5 Bing. 31; and 2 M. & P. 67. 301. In an action on a security bearing interest; the defendant pays into court a sum sufficient to cover the principal, and interest up to the time of the action brought but not up to the time of paying money into court: the plaintiff is entitled to proceed in the action, and may recover damages for the remaining interest. *Kidd* v. *Walker*, 2 B. & Ad. 705. A sum of 4 *l.* is paid into court on the account stated; the plaintiff cannot recover a larger sum by showing that on an application to the defendant he admitted that something was due, insisting however on a cross-demand, with proof that a larger sum in fact was due; for the account stated is applicable to but one accounting. *Kennedy* v. *Withers*, 3 B. & Ad. 767. Payment of money into court admits the contract and breach of it as alleged, but asserts that no more was due than the sum paid in. Per Bayley, B., *Lechmere* v. *Fletcher* 3 Tyr. 455. On a general account, where it appears that there is one entire contract between the parties, the payment of money on the general count admits the contract. *Mayer* v. *Smith*, 4 B. & Ad. 673. *Secus* if there be no entire contract. Where money had been paid into court on a general *indebitatus* count, Parke, B. held that the plaintiffs, to recover a further sum on a further cause of action, were bound to prove the partnership of the plaintiffs. *Paley & others* v. *Barker*, York Lent Assizes, 1835. The

Thus a general payment admits the policy of insurance, alleged in a special count, and precludes the defendant from proving by evidence that the policy has been vacated by a material alteration (*i*). And in an action by a farmer of tithes under the statute, the payment admits the title, and reduces the question to the *quantum* of damages (*k*). Payment of money into court.

It has even been held that the admission by paying money into court will support the contract stated upon the declaration, although it appear upon the evidence, that if the admission had not been made the plaintiff must have been nonsuited (*l*); as where in an action of *assumpsit* for negligence in the carriage of goods, it appeared that according to the terms of the contract actually made, the plaintiff was not entitled to recover at all (*m*).

And such payment amounts to an admission of a contract for goods sold and delivered, with respect to goods of the plaintiff tortiously converted by the defendant to his own use (*n*). Admission, by paying money into court.

Although in the case of a special contract, the payment admits the contract, yet in the case of *indebitatus assumpsit*, where the demand is made up of several distinct items, the payment admits no more than that the sum paid in is due (*o*). And it seems that the liability as to the rest may be disturbed under this plea, although *non assumpsit* be not pleaded (*p*).

But in an action against a justice of the peace for an action done in his official capacity, the bringing money into court by virtue of a statute, does not, it is said, admit the right of action (*q*).

In an action against an infant for work and labour done for him, the payment of money into court does not exclude infancy as a defence, for to that amount he may have been liable for necessaries (*r*).

payment of money into court, in an action for use and occupation, precludes the defendant from questioning the plaintiff's title or alleging the non-joinder of another as co-plaintiff. *Dolby* v. *Iles*, 3 P. & D. 287. In an action on a guarantee, the plea admits an agreement signed according to the Statute of Frauds. *Middleton* v. *Brewer*, Peake's, C. 15. The plea admits the right to sue in the court in which the action was brought. *Miller* v. *Williams*, 5 Esp. C. 19. The performance of conditions precedent. *Harrison* v. *Douglas*, 3 Ad. & Ell. 396. The declaration stating a contract to pay a specified sum for particular articles, the payment of part of the money into court, by admitting the contract, admits the sum originally due, and the question is as to the remainder. *Cox* v. *Brain*, 3 Taunt. 95. Payment generally admits something to be due on each count. *Stoveld* v. *Brewer*, 2 B. & A. 116. But see *Stafford* v. *Clarke*, 2 Bing. 383. *Drake* v. *Lewin*, 4 Tyr. 730.

(*i*) *Andrews* v. *Palsgrave*, 9 East, 325; and *supra*, note (*h*).

(*k*) *Broadhurst* v. *Baldwin*, 4 Price, 58; and see *Cox* v. *Parry*, 1 T. R. 464.

(*l*) *Yate* v. *Willan*, 2 East, 128. *Pigott* v. *Dunn*, Ibid. Where goods had been sold by sample at a stipulated price, and the defendant in an action of *indebitatus assumpsit* for goods sold and delivered, paid money into court, it was held at *Nisi Prius* that he could not afterwards insist upon the inferiority of the goods, and that he ought to have returned them. 2 Starkie's C. 103; *sed qu.*

(*m*) *Yate* v. *Willan*, 2 East, 128; *infra*, 830, note (*x*). But in a subsequent case the court held that this case could not be supported to the full extent, and that the defendant might still avail himself of a stipulation by which the amount of damages was limited. When it appears that there is a material variance between the contract declared upon, and the real contract, the plaintiff, it seems, cannot recover; for although the defendant admits the contract stated, yet the plaintiff must show damages from the breach of that contract, which he cannot do where the damage has resulted from the breach of another and different contract. See *Mellish* v. *Allnutt*, 2 M. & S. 106; *infra*, 830.

(*n*) *Bennett* v. *Francis*, 2 B. & P. 550. *Qu.* whether, independently of this consideration, the plaintiff might not waive the *tort*, and recover as for goods sold and delivered. Vide *supra*, 83.

(*o*) *Meager* v. *Smith*, 4 B. & Ad. 673. *Seaton* v. *Benedict*, 5 Bing. 32.

(*p*) *Booth* v. *Howard*, 5 Dowl. 438.

(*q*) 13 East, 202, 3.

(*r*) *Hitchcock* v. *Tyson*, 2 Esp. C. 482; and see *Cox* v. *Parry*, *infra*.

Admission, by paying money into court.

Such payment operates merely as evidence of the defendant's admission of the contract, upon which a jury may act; and if they do not in a special verdict expressly find the contract, but merely the fact of the payment of money into court, it seems that the Court cannot make the inference (*s*).

Where the plaintiff had misled the defendant, and induced him to prepare to try a question of fraud, the Court would not permit him to insist upon the admission made by the payment of money into court, so as to exclude the defendant's evidence of fraud (*t*).

Such payment merely admits the contract and damages *pro tanto*, and the plaintiff will be nonsuited unless he prove that a greater sum is due (*u*). And where a limitation has been annexed to the real contract, the effect of which is, under certain circumstances, to preclude the plaintiff from recovering more than a specified sum, the defendant, although he has paid money into court generally, may prove the limitation, and show that the plaintiff is not entitled to recover more than has been paid into court.

In an action against a carrier, on a breach of an *assumpsit* to carry goods safely, 5*l.* having been paid into court generally, it was held that it was competent to the defendant to prove notice to the plaintiff that no more than 5*l.* would be accounted for, for any goods, unless entered as such, and paid for accordingly (*x*); for the notice did not alter the contract for safe carriage, but merely limited the amount of damages for breach of that contract.

In an action on a valued policy, the payment of money into court upon a count which states a total loss by capture, does not admit a total loss, and the plaintiff is bound to prove a damage exceeding the sum so paid in (*y*). And where the declaration was for the price of bark sold to the defendant, to be paid for at the average price, as ascertained on a day specified, it was held that the payment of money into court did not admit the average price to be as stated in the declaration (*z*).

Such payment into court does not preclude the defendant from objecting to the illegality of the contract, in order to bar the plaintiff from recovering more than has been paid into court (*a*). Neither is the defendant precluded from insisting that the loss complained of did not result from the breach of the particular contract (*b*).

Thus, where money is paid into court generally, on a declaration containing a special count on a policy, the defendant may dispute his further liability with respect to goods which were not loaded according to the terms of the policy (*c*). Such payment does not preclude the defendant from

(*s*) *Mellish* v. *Allnutt*, 2 M. & S. 106.

(*t*) *Muller* v. *Hartshorn*, 3 B. & P. 556. The declaration contained a special count on a policy of insurance, and the money counts, and money had been paid into court generally.

(*u*) 3 T. R. 657; 2 Salk. 597; 4 T. R. 10; 7 T. R. 372; 2 H. B. 374. *Rucker* v. *Palsgrave*, 1 Taunt. 419; *infra*, note (*f*).

(*x*) *Clarke* v. *Gray*, 6 East, 564. In the previous case of *Yate* v. *Willan* (2 East, 128), it was held, that in such an action, and payment of money into court, it was sufficient for the plaintiff to produce the rule, and prove the value of the goods, to entitle him to recover to the full amount; and that the defendant could not avail himself of a notice that he would not be responsible for more than 5*l.* unless, &c. But in the latter case of *Clarke* v. *Gray*, the Court intimated that the former case could not be supported to the full extent. See also *Cox* v. *Parry*, 1 T. R. 464.

(*y*) *Rucker* v. *Palsgrave*, 1 Taunt. 419; 1 Camp. 557. Payment of money into Court in an action on a promissory note payable by instalments, is an admission only to the extent paid, and does not exclude the Statute of Limitations as to a further sum payable on the same note. *Reid* v. *Dickens*, 5 B. & Ad. 499.

(*z*) *Stoveld* v. *Brewin*, 2 B. & A. 116. See also *Everth* v. *Bell*, 7 Taunt. 450; *Lechmere* v. *Fletcher*, 1 C. & M. 623.

(*a*) *Cox* v. *Parry*, 1 T. R. 464.

(*b*) 2 M. & S. 106.

(*c*) *Mellish* v. *Allnutt*, 2 M. & S. 106.

taking an objection to the recovering beyond that sum, although if money had not been paid into court, the objection would have been an answer to the whole demand (*d*).

Effect of paying money into court.

Where the payment into court is applicable indifferently to several grounds of claim alleged by the plaintiff, the plaintiff cannot apply the admission resulting from the payment of money into court generally, so as to make it evidence of any one particular ground of claim.

The plaintiff, on a declaration on a policy on fish, free from average, unless general, or the ship be stranded, averred that the ship was stranded, bulged, damaged and wrecked, and it was held that payment of money into court was not evidence of a total loss, and of a stranding; for the loss, consistently with the declaration, might have arisen from other means than by stranding (*e*).

If money be paid into court generally, and the plaintiff insists upon several claims, some of which are illegal, and others legal, the Court will apply the payment to the legal demand (*f*). And where money cannot be paid into court upon some of the counts, the payment will be applied to those upon which it might legally be made (*g*).

If as to part of the demand the plaintiff be entitled to recover, but not as to the rest, the payment will be attributed to the former, and will not entitle the plaintiff to recover in respect of the latter demand (*h*). Such payment does not take a case out of the Statute of Limitations (*i*).

The rule of Trinity Term, 1 W. 4, as to annexing the particulars of the plaintiff's demand to the declaration, does not make the payment of money into court to operate as an admission of such particulars (*k*).

Where the defendant has taken out a rule for the payment of money into court, but has not paid the taxed costs to the plaintiff, and the plaintiff proceeds in the action in order to recover the costs, it is sufficient for him to produce the rule of court and the master's *allocatur*, and this will entitle him to a verdict for nominal damages (*l*), unless the defendant prove that he has paid the costs under the rule, pursuant to the master's *allocatur*. And it is not necessary to such case for the plaintiff to prove a previous demand of costs, where they have been taxed, but the defendant has omitted to pay them (*m*).

Unless the plaintiff proves his claim to a larger sum than that which has been paid into court, he is liable upon the production of the rule to be nonsuited (*n*). But if the plaintiff, after taking the money out of court, take a verdict for the whole sum, without deducting the sum paid into court, the Court will set it aside, although no evidence be given of the rule (*o*). It has

(*d*) *Cox* v. *Parry*, 1 T. R. 464; where the action was on a policy which was void.

(*e*) *Everth* v. *Bell*, 7 Taunt. 450; 1 Moore, 158.

(*f*) *Ribbans* v. *Crickett*, 1 B. & P. 264. The late rules require illegality to be pleaded; but where such a defence is open, it seems that payment into court will be no waiver of the incapacity to sue. See *Wills* v. *Longridge*, 5 Ad. & Ell. 383.

(*g*) *Cotterell* v. *Apsey*, 6 Taunt. 322; 1 Marsh. 581.

(*h*) Where the action was for use and occupation by the bankrupt, and afterwards by his assignees (the defendants) at their special instance and request, and the defendants paid money into court, which on the evidence was sufficient to cover their own occupation, they had a verdict as to the rest. *Naish* v. *Tatlock*, 2 H. B. 319.

(*i*) *Long* v. *Greville*, 3 B. & C. 10. *Reid* v. *Dickons*, 5 B. & Ad. 499.

(*k*) *Booth* v. *Howard*, 5 Dowl. 438. *Meager* v. *Smith*, 4 B. & Ad. 673.

(*l*) *Horsburgh* v. *Orme*, K. B. Sitt. in H. T. 49 Geo. 3, 1 Camp. 558, in note.

(*m*) *Smith* v. *Smith*, 2 N. R. 473. *Smith* v. *Battersby*, 7 Price, 674.

(*n*) By the terms of the rule. See 3 T. R. 657; 2 Salk. 597; 4 T. R. 10; 7 T. R. 372; 2 H. B. 374.

(*o*) 2 Taunt. 267.

Effect of paying money into court.

been doubted whether the production of the rule by the defendant is to be considered as evidence given by him, so as to entitle the plaintiff's counsel to a reply; but by a rule of the Court of Common Pleas, it is not to be so considered (*p*).

Of taking money out of court.

The act of taking money out of court, and accepting it with costs in satisfaction, will not operate as conclusive evidence in a collateral action, to show that nothing more was due.

By the defendant.

In an action on the statute, for selling five chaldrons of coals, and delivering them short by sixteen bushels, the plaintiff proved, that in an action by the present defendant for the price of the five chaldrons, the plaintiff, then defendant, paid the amount into court, minus the value of the sixteen bushels, and that the then plaintiff took the money out, and had his costs; and this the plaintiff contended was conclusive to show the deficiency. But Lord Ellenborough held, that as the act of the attorney in taking the money was equivocal, he would admit evidence for the purpose of explaining the intention (*q*).

If money has been paid into court in a case where it could not regularly be paid in, the plaintiff should move to discharge the rule (*r*).

Money which has been paid into court cannot be recovered back, though it was paid wrongfully, for it is acknowledged on the record to be due (*s*).

Where, on a plea of payment, the defendant proved payment to the plaintiff's attorney, on his account, held that the attorney was a competent witness for the plaintiff to show that the defendant afterwards called upon him and got back the money (*t*).

PEDIGREE.

In proving *A.* to be the heir-at-law (*u*) of *B.*, in strict and formal detail (*v*), it is necessary to prove, 1st, their relationship through their common ancestor (*x*); and, 2dly, negative proof is requisite that no other descendant from the common ancestor impedes the descent to *A.* (*y*).

(*p*) 2 Taunt. 267.

(*q*) *Hildyard* v. *Blowers*, 5 Esp. C. 69, *cor.* Lord Ellenborough; the defendant had a verdict.

(*r*) *Griffiths* v. *Williams*, 1 T. R. 710.

(*s*) *Malcolm* v. *Fullarton*, 2 T. R. 645. And the Court will not order money paid in through mistake to be restored, unless it appear that some fraud or deceit has been practised upon the defendant. 2 B. & P. 392.

(*t*) *Bowers* v. *Evans*, 3 Cr. M. & R. 214.

(*u*) Vide *supra*, tit. HEIR. One born in America after the treaty of 1783, is an alien, and incapable of inheriting lands in England. *Doe* v. *Acklam*, 2 B. & C. 779.

(*v*) As to presumptive evidence, vide *infra*, 833.

(*x*) By the late stat. 3 & 4 W. 4, c. 106, several important alterations have been made relating to the descent of real property. By sec. 2, the descent shall always be traced from the purchaser, and the person last entitled to the land shall, for the purposes of the Act, be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner, the last person from whom the land shall be proved to have been inherited shall be considered to have been the purchaser, unless it shall be proved that he inherited the same.—By sec. 5, no brother or sister shall be considered to inherit immediately from his brother or sister; but every descent to a brother or sister shall be traced through the parent.—Sec. 6. Every lineal ancestor shall be capable of

(*y*) The person who claims as heir at law to the person last seised, must prove not only his relationship, but the failure of issue from the persons who intervene in the course of descent, by negative evidence (*Richards* v. *Richards*, B. R. 4 Geo. 2, Ford's MSS.). Where the plaintiff claimed as heir by descent, and proved the death of his elder brothers, but did not prove that they died without issue, it was held to be insufficient; but reputation of the negative, where such brothers had been absent from the family, would have been sufficient. *Doe* v. *Griffin*, 15 East, 293; *infra*, 604.

Proof of relationship.

1st. In order to prove the relationship of *A.* and *E.*, supposing *C.* to be the common ancestor, and *D.* and *E.* to be his son and grandson in the one line, and *B.* and *A.* to be his son and grandson in the other, the direct course would be to prove the marriage of *C.* and his wife, and that *B.* and *D.* were his legitimate children (*z*); and also the marriages of *B.* and *D.*, and that *A.* and *E.* were respectively the issue of those marriages (*a*).

2dly. Proof is requisite of the deaths of *E.* and *B.* (*b*), and also that *B.*, *C.*, *D.* and *E.* had no issue, which, according to the well-known rules which regulate descents, would take in preference to *A.*, or if they had, then to show the failure of such issue by negative evidence, or to prove that the issue, if any exists, which would otherwise take in preference to *A.*, is of the half-blood, &c. (*c*).

Presumptive evidence.

As in matters of pedigree it is impossible to prove the relationships of past generations by living witnesses, resort must usually be had to *traditionary declarations* made by those now dead who were likely to *know* the fact, and to declare the truth, or to evidence of *general reputation*.

Proof by declarations, &c.

Proof of the cohabitation of parties who publicly acknowledged each other in the characters of husband and wife, their treating and educating children as their legitimate offspring, according to their rank and station in life, and their acknowledging them to be such in the face of the world; or,

being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir, in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor; so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue.—Sec. 7. The male line is to be preferred. No female maternal ancestor shall be capable of inheriting, until all the male maternal ancestors and their descendants shall have failed.—Sec. 8. Where there shall be a failure of male paternal ancestors of the party from whom the descent is to be traced and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor or her descendants; and where there shall be a failure of male maternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor and her descendants.—By Sec. 11, the Act shall not extend to any descent before Jan. 1st, 1834.

(*z*) By direct proof, or by copies from the registers, with evidence of identity, or by reputation where direct proof, &c. cannot be had.

(*a*) By the testimony of members of the family, or of those conversant with it, or by reputation. See below, 833, 843.

(*b*) *Supra*, 364. Proof of letters of administration to the effects of *A. B.* is not sufficient evidence of the death of *A. B. Thompson* v. *Donaldson*, 3 Esp. C. 63; and per Park, J., Lanc. Sp. Ass. 1830. See *Moors* v. *Bernales*, 1 Russ. 307; *Pollhill* v. *Pollhill*, Hil. 1701, cited Bac. Ab. Evidence, F. In order to establish the determination of a life estate, hearsay evidence of the death of the *cestui que vie* is not, as in the case of pedigree, sufficient; nor is the register of a dissenting chapel, nor are inscriptions on the tombstones in the adjacent burial-ground, receivable. *Whittuck* v. *Waters*, 4 C. & P. 375. Where the brothers of an ancestor to whom the plaintiff claimed to be heir died a century ago, held that, in the absence of any evidence to the contrary, it might be presumed that they died without issue. *Doe* d. *Oldham* v. *Woolley*, 8 B. & C. 22; and 3 C. & P. 412.

(*c*) By the late stat. 3 & 4 W. 4, c. 106, s. 9, any person related to the person from whom the descent is to be traced by the half-blood shall be capable of being his heir, and the place in which any such relation by the half-blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female; so that the brother of the half-blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half-blood on the part of the mother shall inherit next after the mother.

Proof by declarations, &c.

on the other hand, the representation and treatment of a child as illegitimate; are all of them solemn and deliberate admissions relating to facts necessarily within the knowledge of the parties making them, accompanying and corresponding with their acts and conduct. Such representations are therefore admissible in evidence, on the broad and general elementary principle already adverted to (*d*).

They are not to be considered as mere wanton assertions, upon which no reliance can be placed; on the contrary, in the absence of any motive for committing a fraud upon society, it is in the highest degree improbable that the parties should have been guilty of practising a continued system of imposition upon the rest of the world, involving a conspiracy in its nature very difficult to be executed. So far, upon the strictest principles, the evidence is receivable, but the necessity of the case warrants a far greater latitude.

All those who knew the actual state of the family at a remote period may now be deceased, and very possibly no means of proof remain, except such as are derived from traditionary declarations of members of the family, or persons connected with it, now deceased, or from general reputation. The great difficulty of proving remote facts of this nature renders it necessary that the Courts should relax from the strictness which is required in the proof of modern facts, in the ordinary manner, by living witnesses (*e*).

Hence the traditionary declarations of deceased members of the family are in general admissible as evidence, after the deaths of those persons, as to the degrees of relationship of the different branches of the family, their intermarriages, the number of their children, and the times of their respective births (*f*).

Such declarations, made by persons who must have *known* the facts, and who laboured under *no temptation* to deceive, carry with them such a presumption of truth, as, coupled with the great difficulty of procuring more certain evidence, sanctions their reception.

Connexion of the declarant with the family.

To warrant the admission of declarations relating to pedigree, it is essential, 1st, that the parties who made the declaration be proved to be dead at the time of the trial, otherwise it is not the *best* evidence (*g*); 2dly, that the declarants were likely to know the facts. The tradition must therefore be derived from persons so connected with the family, that it is natural and likely, from their domestic habits and connexions, that they are speaking the truth, and that they could not be mistaken. Lord Eldon observed (*h*), that "declarations in a family, descriptions in wills, inscriptions upon monuments (*i*), in bibles (*k*) and registry-books, are all admitted upon the principle that they are the natural effusions of a party who *must know the truth*, and who speaks upon an occasion when the mind stands in an even position, without any temptation to exceed or fall short of the truth."

(*d*) *Supra*, Vol. I. tit. REPUTATION.

(*e*) See the observations of Le Blanc, J. in *Higham* v. *Ridgway*, 10 East, 120.

(*f*) See *Higham* v. *Ridgway*, 10 East, 120; the case of the *Berkeley Peerage*, 4 Camp. 404; and the Lord Chancellor's judgment in the case of *Vowles* v. *Young*, 13 Ves. 143.

(*g*) *Supra*, Part I. tit. REPUTATION. *Pendrel* v. *Pendrel*, 2 Str. 924; B. N. P. 113; 1 M. & S. 689. *Doe* v. *Ridgway*, 4 B. & A. 53; *supra*, 368.

(*h*) *Whitelocke* v. *Baker*, 13 Ves. 514.

(*i*) A copy of a mural inscription in a church, made at the time when, by repairing the church, it was effaced, in pencil, afterwards traced over with ink, was held to be admissible on a question of pedigree. *Slaney* v. *Wade*, 7 Sim. 595.

(*k*) Entries in a religious book treated by deceased owners as important family memorials, were held admissible, although it did not appear by whom they were made. *Hood* v. *Beauchamp*, 8 Sim. 26.

Connexion of the declarant with the family.

Proof by one of the family that a member of it went abroad many years ago, and was supposed to have died there, and that the witness never heard in the family that he had ever been married, was held in a late case to be good evidence of the death of that person (*l*).

Declarations by the deceased husband as to the legitimacy of the wife, are admissible after his death; for although he was not connected by blood, yet it is probable that he would be well acquainted with the fact, and possess better means of information than a remote relation would (*m*).

But declarations of mere strangers are inadmissible evidence as to pedigree (*n*); it has lately been held, that even the declarations of those who lived in intimacy with them, and who consequently possessed the means of judging, if not relations, are inadmissible (*o*).

Absence of suspicion.

3dly, The very foundation on which such declarations are admissible fails

(*l*) *Doe* v. *Griffin*, 15 East. 293. Proof by an elderly person that a particular individual went abroad to the West Indies many years ago, when he was a young man, and that, according to the repute of the family, he had afterwards died in the West Indies, and that the witness had never heard in the family of his having been married, is *primâ facie* evidence that that person died without issue (Ibid. and see *Doe* d. *George* v. *Jesson*, 6 East, 80). Proof that the husband went abroad, and had not been heard of seven years, was held to be sufficient evidence to entitle the widow to her dower (3 Bac. Ab. 369, 6th edit.). So evidence that a tenant for life of premises, born in 1759, had absented himself from his relations ever since 1804, given by a person who resided near the spot, but who was not a member of the family, was held to be good evidence to show that the tenant for life was dead in the year 1818, although no member of the family was called as a witness. *Doe* d. *Lloyd* v. *Deakin*, 4 B. & A. 433.

(*m*) *Vowles* v. *Young*, 13 Ves. 143. *Doe* d. *Northey* v. *Harvey*, 1 Ry. & M. 297.

(*n*) 3 T. R. 723. But where a trustee conveyed property to a party, entitled as a child of a particular marriage, by deed reciting that he was such child, held, that as an act done under a state of things which, if true, the trustee would have been compellable to do, and coming out of proper custody, the deed was admissible on a question of pedigree, although *res inter alios acta*, and was not the description of evidence to which the doctrine of *lis mota* was applicable; held, also, that where a testator bequeaths a legacy to a person designated as a "relation," it is to be presumed that he was a legitimate relation. *Slaney* v. *Wade*, 7 Sim. 595; and affirmed 1 Myl. & Cr. 338.

(*o*) See the observations of Buller, J. 7 T. R. 303; where he says, "I admit that the declarations of members of a family, and *perhaps* of others living in intimacy with them, are received in evidence as to pedigrees." See also Lord Kenyon's observations, Ib. And see B. N. P. 295; where, in the case of the *Duke of Athol* v. *Lord Ashburnham*, Mr. *Worthington*'s declarations were admitted in evidence. In *Weeks* v. *Sparke*, 1 M. & S. 679, Le Blanc, J. says, "In questions of pedigree, the evidence of what persons *connected* with the family may have been heard to say, is received as to the state of the family." And see *Higham* v. *Ridgway*, 10 East, 120. See also Lord Kenyon's observations in *R.* v. *Eriswell*, 3 T. R. 723. *Doe* d. *Lloyd* v. *Deakin*, 4 B. & A. 443; *supra*, note (*l*). But in the case of *Johnson* v. *Lawson*, 2 Bingh. 86, it was held that the declaration of servants and intimate friends of the family were not admissible in cases of pedigree. The declarations of an illegitimate child were held not within the rule as to members of the family of his reputed father, and have been rejected in a question of pedigree, as evidence of reputation. *Doe* v. *Barton*, 2 M. & R. 28. A declaration by a party that she heard her first husband say, that after his death the estate would go to *F.*, and after his death to his heir, under whom the lessor of the plaintiff claimed, is evidence to show the relation of *F.* to the family. *Doe* v. *Rudall*, 2 M. & P. 20. Where *A.* claims property as the heir at law of *B.*, the declarations of *C.* deceased, who is proved to be a member of the family of *A.*, are evidence to prove *B.* to be a member of the family of *C.* and *A.*, though there be no evidence to show that *C.* was in any manner recognized by *B.* as his relation. *Monckton* v. *The Attorney-General*, 2 R. & M. 156; by Brougham, Lord Chancellor; and the evidence was afterwards admitted by Littledale, J. On a question of legitimacy, the declarations of deceased persons supposed to have been married (who might themselves have been examined when living), are admissible to prove the fact of marriage. *R.* v. *Inhabitants of Barnsley*, 6 T. R. 330. The declarations of a deceased parent, though they are evidence of the time of a child's birth, are not evidence of the place. *R.* v. *Inhabitants of Erith*, 8 East, 539.

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where it is probable that the parties who made the declarations laboured under any temptation to misrepresent the facts (*p*); when that is the case, such evidence is inadmissible. Although the practice on the subject has not been uniform (*q*), it seems to be now settled by the cases of the *Banbury Peerage* (*r*) and *Berkeley Peerage* (*s*), that a declaration as to pedigree, if

(*p*) *Supra*, Vol. I. tit. TRADITIONARY DECLARATIONS. Lord Eldon's observations, *supra*, 834.

(*q*) In the case of *Goodright* v. *Moss*, (Cowp. 591), the Court held that an answer in Chancery, by the mother of the lessor of the plaintiff, to a bill filed by the committee of a lunatic, the person last seised, against the lessor of the plaintiff, and his mother, in which she stated the lessor of the plaintiff to be illegitimate, was evidence against the plaintiff; but this appears to have been so decided on the general principles relating to the admissibility of declarations in cases of pedigree; and the particular objection, as to the time of making the declaration, does not appear to have been urged. It is also to be observed, that it was unnecessary to decide upon this point, the defendant being clearly entitled to a new trial, on the ground that other evidence, viz. of declarations made by the father, had also been rejected, which clearly were admissible; such evidence, however, appears to have been received by Lord Camden, in the case of *Hayward* v. *Firmin*, Sitt. after Trin. T. 1766, cited by Lawrence, J. in the case of the *Berkeley Peerage*; and see *Nicholls* v. *Parker*, 14 East, 331, in note. On the other hand, Reynolds, C. B., in a case cited Vin. Abr. Ev. I. b. 21, as tried Dev. Spring Ass. 1731, rejected such evidence arising subsequently to the controversy.

(*r*) *Supra*, 196.

(*s*) In the case of the *Berkeley Peerage*, before a committee of privileges of the House of Lords (4 Camp. 401), in order to prove the legitimacy of the claimant of the peerage (which depended upon the validity of a marriage alleged to have been contracted by his parents in the year 1786), the claimant, who was born subsequently to that marriage, but previous to a marriage contracted between the parties in 1796, had in the year 1799, conjointly with two brothers, born also after the first, but previous to the second marriage, filed a bill in Chancery to perpetuate the evidence of their legitimacy, on the ground that they were entitled in remainder in tail to certain lands then held by the father for life. The children born after the second marriage were defendants, along with others entitled in remainder after them.

The Earl of Berkeley was one of the witnesses examined on interrogatories for the plaintiffs, and in his deposition swore positively to the plaintiff's legitimacy, and the validity of the first marriage. The counsel for the claimant proposed to read this deposition before the committee, as a declaration in a matter of pedigree.

The admissibility of this evidence being objected to, the following questions were submitted to the Judges by the House of Lords:—

1st. Upon the trial of an ejectment respecting Black Acre, between *A.* and *B.*, in which it was necessary for *A.* to prove that he was the legitimate son of *J. S.*, *A.* after proving by other evidence that *J. S.* was his reputed father, offered to give in evidence a deposition made by *J. S.* in a cause in Chancery, instituted by *A.* against *C. D.*, in order to perpetuate testimony to the alleged fact disputed by *C. D.*, that he was the legitimate son of *J. S.*, in which character he claimed an estate in White Acre, which was also claimed in remainder by *C. D.* *B.*, the defendant in the ejectment, did not claim Black Acre under either *A.* or *C. D.*, plaintiff and defendant in the chancery suit:

According to law, could the deposition of *J. S.* be received, upon the trial of such ejectment, against *B.*, as evidence of declarations of *J. S.* the alleged father, in matters of pedigree?

2ndly. Upon the trial of an ejectment respecting Long Acre, between *E.* and *F.*, in which it was necessary for *E.* to prove that he was the legitimate son of *W.*, the said *W.* being at that time dead, *E.* after proving by other evidence that *W.* was his father, offered to give in evidence an entry in a Bible, in which Bible *W.* had made such entry in his own handwriting, that *E.* was his eldest son born in lawful wedlock from *G.*, the wife of *W.*, on the 1st day of May 1778, and signed by *W.* himself:

Could such entry in such Bible be received to prove that *E.* is the legitimate son of *W.*, as evidence of the declaration of *W.*, in matter of pedigree?

3dly. Upon the trial of an ejectment respecting Little Acre, between *N.* and *P.*, in which it was necessary for *N.* to prove that he was the legitimate son of *T.*, the said *T.* being at that time dead, *N.* after proving by other evidence that *T.* was his reputed father, offered to give in evidence an entry in a Bible, in which Bible *T.* had made such entry in his own handwriting, that *N.* was his son born in lawful wedlock from *J.*, the wife of *T.*, on the 1st day of May 1778, and signed by *T.* himself; and it was proved in evidence on the said trial, that *T.* had declared "that he *T.* had made such entry for the express purpose of establishing the legitimacy, and the time of the

made *post litem motam*, that is after the commencement, not merely of the litigation, but of the controversy, is not admissible.

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birth of his eldest son *N.*, in case the same should be called in question in any case or in any cause whatsoever, by any person after the death of him, the said *T.*?"

Could such entry in such Bible be received, to prove that *N.* is the legitimate son of *T.*, as evidence of the declaration of *T.*, in matters of pedigree?

There being a difference of opinion upon the first question, the Judges delivered their opinions *seriatim*.

Bayley, J. held that the deposition was inadmissible, because it was made *post litem motam*, after a controversy raised upon this very point; because *J. S.*, the witness who made it, was brought forward to speak to the point, by a person who had a direct interest in establishing it; because the deposition is upon interrogatories formally put to *J. S.* by an interested party; and because *B.*, against whom it is proposed that the deposition should be read, had no opportunity of putting any questions on his own behalf. In general, when evidence is given *viva voce* in courts of justice, the witnesses speak to what they know, and each party has, in turn, an opportunity of putting such questions as he may think fit, for the purpose of drawing forth the whole truth, and of throwing every light upon the subject which the witness is capable of giving. Whoever has attended to the examination, the cross-examination, and the re-examination of witnesses, and has observed what a very different shape their story appears to take in each of these stages, will at once see how extremely dangerous it is to act on the *ex parte* statement of any witness, and still more of a witness brought forward under the influence of a party interested.

Wood, B. — The admission of hearsay evidence of the declarations of deceased persons in matters of pedigree, is an exception to the general law of evidence, and it has ever been received with a degree of jealousy, because the opposite party has had no opportunity of cross-examining the persons by whom the declarations are supposed to be made; but declarations to be receivable in evidence, as I have always understood, and as was said in the case of *Whitelocke* v. *Baker*, must have been the natural effusions of the mind of the party making them, and must have been on an occasion when his mind stood in an even position, without any temptation to exceed or fall short of the truth. Upon this principle it has been the general rule, as far as my experience and knowledge go, to reject hearsay evidence of the declarations of deceased persons, not only relative to matters of actual suit, but in dispute and controversy prior to the commencement of judicial proceedings.

Graham, B.—I have the misfortune to differ upon this question, not only with the two learned persons who have preceded, but, I am afraid, with the rest of my brethren who are to follow me; but the opinion I am about to offer is the conclusion to which my mind has come with perfect satisfaction. Under the circumstances of the case, I think there is no legal objection to receiving this deposition in evidence, not as a deposition —that I am not prepared to say—but as a declaration of the deponent. One ground on which I am induced to doubt the soundness of that rule which has been laid down by my learned brothers is, that I cannot find it stated in any book of law that ever fell within my reading. If there be a rule that the declaration of a deceased person upon a subject on which evidence of reputation may generally be received, is inadmissible when made subsequent to suit commenced, it is a rule with which, in my little experience, I have not become acquainted, and which is confined to the breasts of a few peculiarly conversant with the business of *Nisi Prius*. I must likewise observe that great uncertainty will arise in the application of the rule. We are told that it extends to all declarations after a suit is in contemplation. But how is it to be determined whether the parties did or did not contemplate a suit at any given moment of time? Then, if it should be clearly shown that the party making the declarations could not, by possibility, know that a suit was commenced or contemplated, surely the declarations are receivable; but if you exclude them when his knowledge of the *lis mota* is made to appear, what a field of inquiry is opened as often as evidence of reputation is tendered to a judge and jury! It seldom happens that an investigation of a pedigree takes place till an action is brought or resolved upon, and it will often be a great hardship to reject what was then said by a member of the family who dies before the trial. Suppose a man is privately married before the English ambassador at Paris, where no register is kept, and has a son; on his return to this country he is re-married, to satisfy the scruples of his wife, and afterwards has another son. In the progress of twenty or thirty years, when all the witnesses to the marriage, except the father, are dead, an estate is left to the eldest legitimate son, who enters into possession. The youngest son brings an ejectment to recover this. The father hears of such a proceeding with surprise and dismay, makes a solemn declaration of the legitimacy of the eldest son, and dies. I should require strong authority, and clear principle, for the rule which should exclude his dying declaration at the trial of the ejectment. You may have the natural and

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It is not necessary, in order to the exclusion of the evidence, to show that the *lis mota* was known to the person who made the declaration. After the voluntary effusions of the mind of the individual after a suit is commenced, although what he then says may be subject to more suspicion.

Lawrence, J.—I concur with the Judges who have stated their opinions against the admissibility of the evidence. From the necessity of the thing, the declarations of members of the family, in matters of pedigree, are generally admitted; but the administration of justice would be perverted if such declarations could be admitted which have not a presumption in their favour that they are consistent with truth. Where the relator had no interest to serve, and there is no ground for supposing that his mind stood otherwise than even upon the subject, (which may be fairly inferred before any dispute upon it has arisen,) we may reasonably suppose that he neither stops short nor goes beyond the limit of truth in his spontaneous declarations respecting his relations and the state of his family. The receiving of these declarations, therefore, though made without the sanction of an oath, and without any opportunity of cross-examination, may not be attended with such mischief as the rejection of such evidence, which, in matters of pedigree, would often be the rejection of all the evidence that could be offered. But mischievous indeed would be the consequence of receiving an *ex parte* statement of a deceased witness, although upon oath, procured by the party who would take advantage of it, and delivered under that bias which may naturally operate on the mind in the course of a controversy upon the subject. Notwithstanding what is said in *Goodright* v. *Moss*, I cannot think that Lord Mansfield would have held that declaration in matters of pedigree, made after the controversy had arisen, ought to be submitted to the jury. They stand precisely on the same footing as declarations on questions of rights of way, rights of common, and other matters depending upon usage; and although I cannot call to mind the ruling of any particular Judge upon the subject, yet I know that, according to my experience of the practice (an experience of nearly 40 years), wherever a witness has admitted that what he was going to state he had heard after the beginning of a controversy, his testimony has been uniformly rejected. If the danger of fabrication and falsehood be a reason for rejecting such evidence in cases of prescription, that will equally apply in cases of pedigree, where the stake is generally of much greater value. In looking for authorities upon the subject, I have found two cases of Nisi Prius, *Spadwell* v. ——, before Lord C. Baron Reynolds, at the Spring Assizes at Exeter in 1730, and *Hayward* v. *Firmin*, before Lord Camden, at the Sittings after Trin. Term, 1766. In the first of these, the declarations of an aunt, as to which of three brothers came first into the world, made after the dispute had arisen, were rejected; but such as she had made prior to the dispute were received. Therefore, in that case, the learned Judge took the distinction of before and after litigation commenced. *Hayward* v. *Firmin* was an issue to try the legitimacy of a child, and the declarations of the mother as to that fact were received in evidence, though made after the commencement of the suit. But it appears that the case determined by Lord C. Baron Reynolds was not at that time brought under the consideration of Ld. Camden. In *Goodright* v. *Moss*, the point whether declarations could be received which were made while the dispute was existing, was not adverted to; and in considering the authority of that decision, it must not be forgotten that Mr. Baron Eyre, who tried the cause, was of opinion that the answer was not admissible evidence. The authorities being thus balanced, I think the point must be considered as without any decision; and we must resort to principle, and the uniform practice which has obtained in matters of prescription. Hardships may arise in rejecting declarations made between the commencement of the suit, and the time of the trial; but such hardships are not confined to the case of pedigree. In other cases, if witnesses die before the trial of the cause, the party who relied upon their testimony must sustain the loss. For avoiding uncertainty in judicial proceedings, general rules must be laid down and adhered to, without regard to our feelings or our wishes on particular occasions. Besides, the hardship may generally be avoided by a bill to perpetuate testimony. In the supposed case of a marriage at Paris no difficulty need have arisen; for under a bill to perpetuate testimony the father might have been examined on behalf of the eldest son, and his deposition as to all the circumstances of the first marriage regularly read, against the younger son, on the trial of the ejectment. Although the exclusion of declarations made in the course of the controversy may prejudice some individuals, it is better to submit to this inconvenience than expose Courts of Justice to the frauds which would be practised upon them were a contrary rule to prevail. That this is not an imaginary apprehension will occur from what happened at the bar of your Lordships' house in the *Douglas* and *Anglesea* causes; in the first of which, fabricated letters were given in evidence before your Lordships, and in the second, false declarations. Notwithstanding the danger of incurring the penalties of the crime of perjury, there is scarcely an assize or sittings in which witnesses are not pro-

controversy has originated, all declarations are to be excluded, without regard to the knowledge of the witness; for if an inquiry were in each case

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duced who swear in direct contradiction the one to the other; and it may be feared that persons who have so little regard to truth may be induced to make false declarations, when they run no risk of punishment in this world, as no use can be made of their evidence till their death. We know that passion, prejudice, party, or even good-will, tempt many who preserve a fair character with the world, to deviate from the truth in the laxity of conversation. Can it be presumed that a man stands perfectly indifferent upon an existing dispute respecting his kindred? His declarations *post litem motam*, not merely upon the commencement of the law-suit, but after the dispute has arisen (that is the primary meaning of the word *lis*), are evidently more likely to mislead the jury, than to direct them to a right conclusion, and therefore ought not to be received in evidence.

Heath, J. and *Macdonald*, C. B. agreed with the majority.

Mansfield, C. J., after observing upon the latitude allowed by the practice of Scotland in the reception of hearsay evidence, observed, "But in England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds. To the general rule with us there are two exceptions; first, on the trial of rights of common, and other rights claimed by prescription; and secondly, on questions of pedigree. With respect to all these, the declarations of deceased persons who are supposed to have had a personal knowledge of the facts, and to have stood quite disinterested, are received in evidence. In cases of general rights which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what has passed in their own time, and to supply the deficiency, the law receives the declarations of persons who are dead; there, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like; a declaration with regard to a particular fact which would support or negative the right, is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on particular facts, such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood, and family transactions among the relations of the parties; therefore what is thus dropped in conversation upon such subjects, may be presumed to be true. But after a dispute has arisen, the presumption in favour of declarations fails; and to admit them would lead to the most dangerous consequences. Accordingly, I know no rule better established in practice than this, that such declarations shall be excluded. With respect to questions of prescription, I have known many instances in which the rule has been acted upon; I never heard the contrary contended, either by counsel or judge. I think the rule is equally applicable to questions of pedigree, and the violation of it here would be still more alarming. There is no difference between the declarations of a father and those of any other relative; and if the declarations of a father, after the suit has begun, be received, so must the declarations of all related to the parties, whatever their station in society, and whatever their private character. I do not feel that much mischief is likely to arise from such declarations being rejected.

"I have now only to notice the observation, that to exclude declarations, you must show that the *lis mota* was known to the person who made them. There is no such rule. The line of distinction is the origin of the controversy, and not the commencement of the suit; after the controversy has originated all declarations are to be excluded, whether it was or was not known to the witness. If an inquiry were to be instituted in each instance, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced. For these reasons I conceive that the deposition now offered in evidence is not admissible."

Lord *Eldon*, C., after referring to the case of the *Banbury Peerage*, said, "Upon the admissibility of such evidence, Judges have held different opinions; and it might appear remarkable that a declaration under no sanction was receivable, and a declaration upon oath was not. I therefore thought it material to ascertain from the highest authority what the law is upon the subject. Accordingly, in the *Banbury Case*, as the depositions under the bill to perpetuate testimony, contained many statements with regard to pedigree, a question was put to the Judges, whether, if they could not be received as depositions, they could be received as declarations. The Judges thought that, at all events, the depositions could not be received as declarations, unless the individuals whose declarations were supposed to be incorporated in the depositions were *aliunde* proved to be relations, and that there was no such evidence. I therefore thought it right that the question should be again put to the Judges in the present case, it being of great importance to the claimant and to the public. Your Lordships have heard the opinions which the

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to be instituted, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced (*t*). Such declarations however, though they tended to show that the person making them might, if they were true, derive an interest by proof of the fact, are still admissible, provided they were made *ante litem motam* (*u*).

learned Judges have delivered, and I have no difficulty in saying that I agree with that of the majority. In the case alluded to, decided in the Court of Chancery by myself (on which I ought to place less reliance than any other noble Lord), conscious of my liability to err, and prone to doubt (an infirmity which I cannot help), I delivered the sentiments which I believed to be according to law. I have heard nothing since which has convinced me I was wrong. I have attended most anxiously to the distinctions taken by Mr. Baron Graham; but on revolving the subject in my mind, I am forced to concur with the opinion so forcibly expressed by Mr. Justice Lawrence, that if the writing was not evidence as a deposition, it was not evidence at all. The suit in equity is commenced on the ground that, unless the testimony be so perpetuated that it may be used as a deposition, it must be entirely lost. Being embodied in deposition, are you to say that this same testimony is to be received as declaration, and read in evidence from the deposition? The previous existence of the dispute would be a sufficient ground to proceed upon. I have known no instance in which declarations *post litem motam* have been received. When it was proposed to read this deposition as a declaration, the Attorney-general flatly objected to it: he spoke quite right, as a western circuiteer, of what he had often heard laid down in the west, and never heard doubted. Lord Thurlow was most studious to contradict the case of *Goodright* v. *Moss*, and he had learned his doctrine in the same school; so had the Chief Justice of the Common Pleas, and I believe Mr. Justice Heath, the result of whose experience your Lordships have just heard. Therefore, although the authorities are at variance, principle and practice unite in rejecting the evidence. I introduced the Bible into the second and third questions, as the book in which such entries are usually made. If the entry be the ordinary act of a man in the ordinary course of life, without interest or particular motive, this, as the spontaneous effusion of his own mind, may be looked at without suspicion, and received without objection. Such is the contemporaneous entry in a family Bible, by a father, of the birth of a child."

On the second and third questions, *Mansfield*, C. J. delivered the unanimous opinion of the Judges.—Referring to the second, he said, "I cannot answer this question, without adding something to the answer beyond what is in the question, because it supposes that an entry written by a father in a Bible would be of more weight than the same written in any other book. Now I know no difference between a father writing any thing respecting his son in a Bible, and his writing it in any other book, or on any other piece of paper; and therefore the answer I would give is, that such a writing by a father in a Bible, or in any other book, or upon any other piece of paper, would be a declaration of that father in the understanding of the law, and like other declarations of the father, might be admitted in evidence. Were it to appear in your Lordships' Journals that the answer was given in the very words of the question, some persons might suppose that the admissibility of the entry depended upon its being written in a Bible, and therefore I submit that the answer should be, 'that such a writing in a Bible, or any other book, or on any other paper, would be admissible in evidence, as a declaration of the father, in a matter of pedigree.'

"The third question is the same in effect, with the addition that the father is proved to have declared that he had made such entry for the express purpose of establishing the legitimacy of his son, and the time of his birth, in case the same should be called in question after the father's death. The opinion of the Judges is, that the entry would be receivable in evidence, notwithstanding the professed view with which it was made. Its particularity would be a strong circumstance of suspicion; but still it would be receivable, whatever the credit might be to which it would be entitled. Of course, I should wish the same addition to be made to this as to the former answer, 'a Bible, or any other book, or any other piece of paper.'"

See also *R.* v. *Cotton*, 3 Camp. 444; and *supra*, Vol. I. p. 319; and the case 12 Vin. Ab. T. b. 91. See below, note (*b*).

(*t*) Case of the *Berkeley Peerage*, 4 Camp. 401; and Sir James Mansfield's observations, Ibid. 40; and *supra*, note (*s*).

(*u*) *Doe* d. *Tilman* v. *Tarver*, 1 Ry. & M. 141; where declarations were received which tended to show that the parties making them were entitled to a remainder on failure of the issue of the then possessor of the estate. So in a case of title to a peerage in the House of Lords, a widow was admitted to prove the declarations of her deceased husband, in support of her title, though her husband, if living, would have had the right which the declarations went to establish. Ib., per Tenterden, L. C. J.; and his Lordship added, that the precedent had since been acted on.

Declarations, to what facts limited.

There is a material difference between traditionary declarations in matters of pedigree, and those which relate to ancient rights, dependent on usage: in the latter case, the admissibility is confined to general declarations and reputation concerning the right, such as a right of common, right of passage, or the like (*x*); and it does not extend to declarations concerning particular facts, from which the right may be inferred, for those are not likely to be made matter of public notoriety and discussion, as general rights are. But in the case of pedigree it is otherwise, and particular declarations as to marriages, births, deaths, &c. are receivable, because from the nature of the case those are facts which are within the peculiar knowledge of the members of the family, and of those who are intimately connected with them (*y*).

The extent to which such declarations are evidence is defined by the reasons which warrant its admissibility; the principles apply generally to declarations concerning the *state* of the family, the members of which it consisted, the degrees in which they stand related, their births, marriages, and deaths, their ages, seniority, and their legitimacy (*z*). Thus, the declaration or entry of a father is evidence as to the time when his son was born, or of the fact that he was born previous to the marriage (*a*).

Where the question was, which of three sons, all born at a birth, was the eldest, the declaration of a female relation, that she was at the birth, and that she tied a string round the arm of the second son in order to distinguish him, was admitted as evidence (*b*). But in the case of *The King* v. *Erith* (*c*), it was held that the declaration of the deceased father, as to the *place* of the son's birth, was not admissible, since it was a simple fact involving only a question of locality; and it was observed by the Court,

(*x*) *Supra*, Part I. tit. REPUTATION.

(*y*) See the observations of Mansfield, C. J. in the case of the *Berkeley Peerage*, 4 Camp. 417, 18; & *supra*, note (*s*). In *Baker* v. *Whitelocke*, 13 Ves. 514, the Lord Chancellor observed, that there may be many circumstances forming part of a tradition which you would reject, taking the body of the tradition. It is not necessary that the fact declared should be cotemporary with the declaration. A mere declaration that his grandmother's maiden name was *M. N.*, is admissible. Per Brougham, C., in *Monkton* v. *Attorney-general*, 2 Russ. & M. 158.

(*z*) *Herbert* v. *Tuckal*, Sir T. Raym. 84. Upon a trial at bar, cited in *Roe* d. *Brune* v. *Rawlins*, 7 East, 290. See also *Higham* v. *Ridway*, 10 East, 109. See *Monkton* v. *Attorney-general*, 2 Russ. & M. 147. So it seems that monumental inscriptions, and declarations made by deceased relations, are evidence to prove the ages of the parties referred to. See *Kidney* v. *Cockburn*, 2 Russ. & M. 167. Tindal, C. J., had rejected such evidence, but Brougham, C., expressed a strong opinion in favour of its admissibility, and afterwards stated that Littledale and Park, Justices, concurred with him. In the course of the argument, the case of *Rider* v. *Malbone* was cited, in which Littledale, J., admitted evidence of an inscription on the tombstone, stating the age of the deceased, the age being material. An old tracing from an effaced monument is also admissible. *Shaney* v. *Wade*, 7 Sim. 595.

(*a*) *Goodright* v. *Moss*, Cowp. 591. Case of the *Berkeley Peerage*, 4 Camp. 401.

(*b*) A man had eight sons; the three last were all born at a birth. Question, on ejectment, which was the eldest? They were baptized by the names of Stephanus, Fortunatus, and Achaicus. Declarations of the father were proved that Achaicus was the youngest, and he took these names from St. Paul, in his epistles. The son of Fortunatus was lessor of the plaintiff; *è contra*, it was proved from the declarations of one *M. F.*, who was a relation, and at the birth, and upon the birth of the second child took a string and tied it round the arm, to know one from the other, &c. Objection was made that the declaration of this woman was not evidence, seeing it was since the death of the fifth son (the said Stephanus and all the other sons dying before him without issue), when there was a discourse about this matter; but what this woman said soon after the birth was allowed in evidence, when there was no prospect of a controversy. Per Reynolds, C. B., at Devon Lent Assizes, cited in Vin. Ab. Ev. T. b. 91. This, it seems, is the case cited by Lawrence, J., *supra*, 838.

(*c*) *R.* v. *Erith*, 8 East, 539.

Declarations, to what facts limited.

that the case did not fall within the principle of, and was not governed by, the rules applicable to cases of pedigree, and was to be proved as other facts are generally proved, according to the ordinary course of the common law.

A declaration by a party that she heard her first husband say that after his death the estate would go to *A.*, and afterwards to his heir, under whom the lessor of the plaintiff claimed, was held to be evidence to show the relationship of *A.* to the husband's family (*d*).

Written entries.

Written entries being written declarations, stand upon the same footing with oral ones, as to admissibility.

An entry by a father in a Bible, or in any other book, stating that *A. B.* was the eldest son born in lawful wedlock, by *M. N.* his wife, at a time specified, is evidence to prove the legitimacy of *A. B.* (*e*).

Written entries and inscriptions.

Upon the same principles, a pedigree hung up in a family mansion, inscriptions on rings (*f*) used by members of the family, inscriptions upon tombstones (*g*), and other matters of the like nature, are admissible to prove a pedigree, for they are all in their nature equivalent to declarations made by the family upon the subject (*h*). A bill in Chancery by a father, in which he states his pedigree, is also admissible for the same purpose (*i*).

So the recital in a family conveyance by a trustee is evidence of parentage (*j*).

So it has been held that a paper found with other papers relating to the private concerns of the party last seised of an estate, in a drawer, in his house, purporting to be the will of Richard, the grandfather of the person last seised, was evidence to show that the grandfather acknowledged a brother of the name of Thomas to be older than a brother of the name of William (*k*), although the will was found in a cancelled state, and although there was no evidence that it had ever been acted upon, or that it had ever been proved.

The probate of a will is not admissible to prove matters of pedigree; the will itself ought to be produced (*l*).

In the case of *Zouch* v. *Waters* (*m*), an old book from Lord Oxford's library, containing the pedigree of William Zouch, of Pilton, and *signed by him*, was admitted as evidence to show that the plaintiff was not descended from William Zouch, of Pilton.

A paper in the handwriting of a person deceased, purporting to give a genealogical account of his family, is admissible evidence to prove the truth of the relationship there stated, although it was never made public by the writer, although it be erroneous in several particulars, and profess to

(*d*) *Doe* v. *Rudall*, 2 M. & P. 20.

(*e*) Case of the *Berkeley Peerage*, 4 Camp. 401. *Supra*, 836. *Goodright* v. *Moss*, Cowp. 591; 4 Bl. Comm. C. 7.

(*f*) A ring worn publicly, stating the date of the death of the relation whose name is engraved upon it, is admissible. Per Brougham, L. C., in *Monckton* v. *Attorney-general*, 2 Russ. & M. 147.

(*g*) *Baxter* v. *Foster*, Vin. Ab. Ev. T. b. 87; Sty. 208.

(*h*) Cowp. 591; 12 Vin. Ab. Ev. T. b. 87; 13 Ves. jun. 148. 514; B. N. P. 233; 10 East, 120.

(*i*) *Taylor* v. *Cole*, 7 T. R. 8, n. *i.e.* where there is no controversy as to the pedigree. But in general a bill in equity, and depositions taken under it, are not evidence of the statements they contain as declarations concerning pedigree. See the case of the *Banbury Peerage*, Sel. N. P. 712; and Vol. I. tit. BILL IN EQUITY.

(*j*) *Slaney* v. *Wade*, 7 Sim. 595. See *Doe* v. *Pembroke*, 11 East, 504.

(*k*) *Doe* d. *Johnson* v. *Earl of Pembroke & another*, 11 East, 504.

(*l*) *Doe* v. *Ormerod*, 1 Mo. & R. 466.

(*m*) Guildford Lent Assiz. 5 Geo. 1; 12 Vin. Ab. T. b. 87, pl. 5.

be founded chiefly on hearsay (*n*); and although the object be to connect the family of the narrator with that of a party deceased, to whose property one of the family of the narrator lays claim (*o*). Written entries and inscriptions.

Public registers of authority are also admissible for the same purpose, being documents made under the authority of law (*p*). But the entry of the time of a child's birth, although contained in a public register, is not evidence as to the time of the birth (*q*), unless it can be proved that the entry was made by the direction of the father or mother; and then it seems to be receivable as a declaration made by one of them; for a clergyman has no authority to make an entry as to the time of the birth, and possesses no means for making any inquiry as to the fact (*r*).

It seems also that the herald's original visitation books are evidence for the same purpose, since it was their business to make out pedigrees (*s*). So are inquisitions *post mortem* (*t*).

With respect to general reputation, it is to be observed, that the public has an interest in the state of each of the individual families of which society is composed; the whole mass, from the highest to the lowest ranks, is bound together by the connecting ties of marriage and consanguinity. Society in general, therefore, has not only an interest in knowing, but possesses the means of knowing, from its connexion with each individual family, the state of that family, the members of which it consists, and their various degrees of kindred. The laws which exclude the marriages of parties within certain limits of consanguinity, and those also which regulate the descent of real and the distribution of personal property, according to known and settled rules, make it a matter of interest, as well as duty and necessity, that the various degrees of relationship, not only in each individual family, but also in those with which it is connected, should be ascertained and known. The public forms of solemnizing marriages, births, and burials, General reputation.

(*n*) *Monckton* v. *Attorney-general*, 2 Russ. & M. 147.

(*o*) Ibid.

(*p*) *Supra*, Vol. I. p. 243.

(*q*) So held in a case in the K. B. Mich. T. 2 Geo. 4, MS.

(*r*) *Goodright* v. *Moss*, Cowp. 591; 3 Bl. Comm. c. 7; B. N. P. 233; 10 East, 120. A public register does not prove the time of birth. Cowp. 591.

(*s*) *Steyner* v. *Burgesses of Droitwich*, Skinn. 623. But see the animadversions upon these documents in that case; and 12 Vin. Ab. Ev. T. b. 87. And note, that a charter of pedigree is not evidence, without showing the books and records whence it is deduced, although the heralds swear that the pedigree was deduced out of the records and ancient books in the office. *Earl of Thanet's Case*, 2 Jones, 224; and Vin. Ab. Ev. T. b. 87. And see *Zouch* v. *Waters*, Ib. In order to impeach the pedigree attempted to be established by the lessor of the plaintiff, the defendant having proved that Ann Brack was of the family of the lessor of the plaintiff, produced books from the Heralds' Office, containing an entry, purporting to be the affidavit of Ann Brack, stating the different members of her family. An officer from the Heralds' College stated that affidavits sent thither with a view to the making out a pedigree, were copied in the heralds' books, and that the originals were sometimes kept and sometimes returned, and that search had been unsuccessfully made for the original, the copy of which was contained in the book. Littledale, J., held that the copy was admissible evidence for the defendant, for the purpose of contradicting the pedigree set up by the lessor of the plaintiff; but held, that the pedigree in the Heralds' Office, compiled from it, was not admissible. *Doe* d. *Hungate* v. *Gascoigne*, York Spring Assizes, 1831.

(*t*) Inquisitions *post mortem*, whilst they were in use, frequently afforded great facilities for tracing descents (see 13 Ves jun. 143). These, under the feodal system, were taken before the justices in eyre, upon the death of a person of fortune, to inquire into the value of his estate, the tenure by which it was holden, and who, and of what age, his heir was, and thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the heirs thereon. These, at last, having been greatly abused, were abolished in the reign of Hen. 8, and the Court of Wards and Liveries erected in their stead. See 2 Bl. Comm. 69; 32 Hen. 8, c. 46; 4 Inst. 198.

General reputation.

tend also to the same end. Lastly, it may be remarked, that no fraud can usually be practised in affairs of this nature, which will not probably interfere with the rights of individuals connected with the family; and that the difficulty of practising such impositions successfully, and the vigilance with which they are likely to be watched, not alone by those whose interests are likely to be prejudiced by them (*u*), but by those who are actuated merely by a spirit of curiosity, so apt to be excited in such affairs, powerfully conspire to support the authority of this species of evidence.

Hence it is that not only particular and specific declarations as to the state of a family, made by those connected with it, are admissible with a view to pedigree, but so also is *general reputation*, as that *A.* was the father, or *B.* the husband of *C.* Such reputation or general opinion may be presumed to be the general result in the opinion of the public, founded upon actual knowledge and observation of the acts, conduct, and declarations of the family, tending to that conclusion (*x*).

It seems, however, that evidence of reputation must be of a general nature, such as that *A.* was generally reputed to be the son of *B.*, or the father of *C.*, although a much greater latitude is allowed to traditionary declarations; for although it is probable that the general facts of relationship would be matter of public notoriety and discussion, it is not to be presumed that the same would happen with respect to particular declarations or circumstances of a domestic nature; but that, on the contrary, the knowledge of the latter would be confined to a few who were either members of the family, or closely connected with it (*y*).

It has been doubted whether general evidence of heirship be sufficient to warrant the finding one person to be heir to another; or whether it be not necessary that the claimant should prove that he and the deceased were descended from some common ancestor, or at the least from two brothers or sisters (*z*).

Upon an ejectment, Thorn, the lessor of the plaintiff, gave slight evidence of a reputed relationship between himself and the person last seised, and of acknowledgments that the Thorns were his heirs at law, but made no deduction of pedigree, nor was able to state how the relation arose, or who was the common ancestor, or whether any ancestor of Thorn was a brother or sister to any ancestor of the deceased. The jury found for the plaintiff. Upon a motion for a new trial it appears that the Court did not agree upon the general question; but the Judges agreed in opinion that the evidence was too loose and insufficient to prove even general kindred (*a*). Upon

(*u*) Even the most abject poverty does not exempt the parties from rigorous observation; the omission of the marriage ceremony, or the unlawful repetition of it, seldom escapes the scrutinizing eye of the parish officer, who, with a view to parochial interests, prosecutes for bastardy, bigamy, &c. according to the exigency of the case.

(*x*) Le Blanc, J. observed (10 East, 120) that reputation was no other than the hearing of those who might be supposed to have been acquainted with the fact handed down from one to another.

(*y*) Vide *supra*, Vol. 1. tit. REPUTATION.

(*z*) 2 Bl. 1099.

(*a*) *Roe* d. *Thorn* v. *Lord*, 2 Bl. 1099. Note, the argument urged in favour of a strict deduction was, that if it were unnecessary, the estate might be carried, contrary to the rules of descent, to the *half-blood*, to the maternal instead of the paternal line, &c. It would surely be going a great length to admit a mere presumption in favour of so harsh a rule as that which excludes relations of the half-blood, to rebut a reasonable presumption, when once established by any means, that the claimant is the real heir; and the danger of preferring the maternal to the paternal line cannot arise where there is but one claimant, who, whether he claimed through the paternal or maternal line, would still be entitled in preference to a mere stranger. The

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showing cause against the rule for a new trial, the plaintiff's counsel cited the case of *Newton and the Corporation of Leicester* and *The Attorney-general*, as having been tried at Leicester about eight years before, where the lessor of the plaintiff obtained a verdict, although there was no deduction of pedigree, because it was proved that the deceased used to call him cousin.

Proof of death.

The *onus* of proving the death of a person once known to be living is incumbent on the party who asserts the death; for it is to be presumed that he still lives, till the contrary be proved (*b*). But it seems that the presumption of the continuance of life ceases at the end of seven years from the time when the party was last known to be living (*c*), in analogy to the Statute of Bigamy (*d*), and the statute concerning leases for lives (*e*).

Proof by an elderly person that a member of her family went to the West Indies many years ago, when he was a young man, and that according to the repute of the family he died there, and that she never heard of his being married, is *primâ facie* evidence that the party died without lawful issue (*f*).

Competency.

It is now perfectly settled that the parents are competent to prove or disprove their marriage (*g*), or to establish the legitimacy or illegitimacy of a child, by proof that it was born after or before marriage. A mother has been allowed to prove a clandestine marriage, in the Fleet, to the father of the child, previous to its birth (*h*); and the Dowager Countess of Anglesea was admitted in the House of Lords to prove her marriage with the Earl of Anglesea previous to the birth of their son, Lord Valentia, where the question was as to the legitimacy of the latter (*i*). So the evidence of parents is admissible to bastardize their own issue (*k*), by proof that they have never been married. But such evidence is open to great observation (*l*).

The wife is competent to prove acts of incontinency with others, because, as it is said, this is a matter peculiarly confined to her own knowledge; but it is fully settled that neither the wife nor the husband can prove the fact of non-access (*m*); a rule founded upon grounds of policy and of decency (*n*).

Declarations.

Where the parties, if living, would have been competent witnesses to negative the marriage, their declarations to that effect are evidence after their decease (*o*).

The declaration of the father is, after his death, admissible to prove that the son was born before the marriage (*p*).

Judges who held that strict deduction was necessary, founded their opinion on the doctrine relating to real actions, conceiving that the same deduction of descent which ought to be pleaded in real actions, ought to be given in evidence in ejectment, in order to make out a title by descent. *Quære.*

(*b*) Per Lord Ellenborough, in *Doe* v. *Jesson*, 6 East, 80. *Rowe* v. *Hasland*, 1 W. Bl. 404. And see *Doe* v. *Deakin*, 4 B. & A. 433; B. N. P. 233. 294-5. Cowp. 591.

(*c*) See tit. PRESUMPTION.

(*d*) 1 Jac. 1, c. 11, s. 2.

(*e*) 19 Car. 2, c. 6.

(*f*) *Doe* d. *Banning* v. *Griffin*, 15 East, 293.

(*g*) Cowp. 593.

(*h*) Per Lord Mansfield, Cowp. 593.

(*i*) Ap. 22d, 1771; and per Lord Mansfield, Cowp. 594.

(*k*) *R.* v. *Bramley*, 6 T. R. 330. *St. Peter's* v. *Swinford*, B. N. P. 112.

(*l*) Per Lord Kenyon, 6 T. R. 330.

(*m*) *R.* v. *Reading*, B. N. P. 112. *R.* v. *Kea*, 11 East, 131. *Rex* v. *Rook*, 1 Wils. 340.

(*n*) Per Lord Mansfield, Cowp. 594; and per Lord Ellenborough, 11 East, 133.

(*o*) *R.* v. *Bramley*, 6 T. R. 330; B. N. P. 112. *May* v. *May*, Ibid.

(*p*) *Goodright* v. *Moss*, Cowp. 591. *May* v. *May*, B. N. P. 112; where, upon an issue out of Chancery, the preamble of an act of parliament, reciting that the

Declarations.

But as the evidence of parents would not be received in their life-time to prove the bastardy of children born during marriage, by evidence of non-access, so neither are their declarations to that effect admissible after their death (*q*).

PENAL ACTION.

Particulars of proof.

In an action of debt to recover a penalty under a statute, issue being joined, on the usual plea of *nil debet*, it is necessary to prove (*r*),

1st. The affirmative of all the essential averments (*s*).

2dly. In *qui tam* actions, that the offence was committed within the county, &c.

3dly. That the action was commenced within time, &c.

Proof of averment.

It has been seen, that where a person is charged with a criminal omission, the proof of the negative lies upon the party who makes the charge (*t*); where, however, the action is founded on the doing an act without a legal qualification, the existence of which, if it exist at all, is peculiarly within the knowledge of the defendant, it seems to be incumbent on him, notwithstanding the rule, to prove his qualification (*u*).

Variance.

Where a contract is averred, a material variance will be as fatal as in an action of *assumpsit*. Where the plaintiff declared for a penalty for fraud in the measuring of coals purchased from the defendant by *A.* and *B.*, and it appeared in evidence that the purchase was made by *A.*, *B. and C.*, the variance was held to be fatal (*x*), although a separate delivery was made to *A.* and *B.* of their shares. The same was held where the plaintiff declared for a penalty for an illegal insurance of a particular lottery ticket for the sum of 42*l.*, and it turned out that this sum had been given for that and other tickets (*y*).

And the same proof must be given of a contract where the evidence of a contract is essential, as in an action on the contract. Thus, in an action against a master of a vessel for hiring a deserter from another ship, if the prior hiring was by contract in writing, it must be produced and proved, and cannot be proved by the parol evidence of the deserter (*z*).

A declaration alleged that the defendant advertised a proposal for a promise to give, &c. to any one who would procure *A. B.* a place under Government: the advertisement was, in fact, for a proposal to receive a promise. It was held that the words "for a promise" were surplusage: the words "under Government" were sufficient, though the language of the statute is "office in the gift of the Crown" (*a*).

plaintiff's father was not married, and to the truth of which he was proved to have been sworn, was given in evidence, yet, upon proof of a constant cohabitation, and his owning the mother upon all other occasions to be his wife, the plaintiff obtained a verdict.

(*q*) Cowp. 591.

(*r*) In an action for the penalty incurred by acting as a magistrate without being qualified, the defendant is not entitled to notice of action. *Wright* v. *Horton*, Holt's C. 458; cor. Wood, B. York, 1816.

(*s*) See Vol. I. 418.

(*t*) *Supra*, Vol. I. 418. 421.

(*u*) *Supra*, tit. GAME.

(*x*) *Parish*, q. t., v. *Burwood*, 5 Esp. C. 33. *Everett* v. *Tindall*, 5 Esp. C. 169. See *R.* v. *Goddard*, Leach, 617. *Partridge* v. *Coates*, R. & M. 153. *Fox* v. *Keeling*, 2 A. & E. 670.

(*y*) *Philips*, q. t., v. *Mendez da Costa*, 1 Esp. C. 59. *Secus*, if the declaration does not aver a particular premium, but a particular premium is proved to have been given. Ibid.

(*z*) *Martin* v. *Greenleaf*, 2 Esp. C. 729.

(*a*) *Clarke* v. *Harvey*, 1 Starkie's C. 92.

In debt for using a trade (*b*) without having served an apprenticeship, it was held that it need not be proved that the defendant used it for the whole of the time laid in the declaration, provided that it was alleged that he forfeited 40 *s.* for every month (*c*), and proved that he used the trade for a month together. Amount of penalties.

Where several lottery tickets are insured at the same time, one penalty only can be recovered (*d*); but it is otherwise where several tickets are insured at different times, although on the same day (*e*). But the plaintiff cannot recover more penalties than are included in the affidavit to hold to bail (*f*).

If the jury find a *general* verdict for one penalty (*g*), it is for the plaintiff to apply it; but, after applying it to one count, which turns out to be defective, he cannot afterwards apply it to another, although the evidence would have warranted a verdict on the latter (*h*). Penalty.

2dly. *Within the county.*—An offence against a penal statute must in general be alleged and proved to have been committed within the proper county (*i*). A variance in this respect is matter of defence upon the trial (*h*). Within the county, &c.

(*b*) The averment of the trade was held to be material. Averment of the trade of a sawyer is not proved by evidence of setting to work in the trade of a mast and block-maker. *Spencer* v. *Mann*, 5 Esp. C. 110. But *semble*, a misdescription of the master's trade would not be material, Ib. See *Beach* v. *Turner*, 4 Burr. 2449.

(*c*) *Powell*, q. t., v. *Farmer*, Peake's C. 57. Under the statute, 5 Eliz. c. 4, s. 31; this branch of the statute was repealed by the statute 54 G. 3, c. 96.

(*d*) *Holland* v. *Duffin*, Peake's C. 58. So under the stat. 29 C. 2, s. 7, which enacts that no tradesman, artificer, workman, labourer or other person, shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's Day, except works of necessity and charity, and except dressing of meat in families, or dressing and selling of meat at inns, cooks' shops, or victualling-houses, for such as cannot otherwise be provided, &c. on pain of forfeiting 5 *s.* &c.; it was held, that a baker who exercised his trade on a Sunday could not be convicted in more than one penalty in respect of the same Sunday, and that there could be no more than one offence on one and the same day. *Cripps* v. *Durden*, 2 Cowp. 640. So if an unqualified person kill several hares on the same day, he cannot, it is said, be convicted in so many different penalties, as the offence for which the statute gives the forfeiture is the keeping of dogs and engines, and not the killing the hare. *R.* v. *Matthews*, 10 Mod. 26. *Supra*, 500; and per Ld. Kenyon, in *Peshall* v. *Layton*, 2 T. R. 512; *Marriott* v. *Shaw*, Com. 274. Yet *qu.* whether every distinct instance of killing a hare be not a different using of a gun, &c. to destroy game? For the statute is in the disjunctive, *keep* or *use*. See *R.* v. *Gage*, 1 Str. 546; *R.* v. *King*, 1 Sess. C. 88. In the case of *Brooke* v. *Milliken*, 3 T. R. 509, it was held that several penalties might be incurred on the same day, on the 12 G. 2, c. 36, for *distinct acts of sale* of books reprinted in another country, which were originally printed and published here. If a man first shoot a hare, and afterwards, though on the same day, shoot a pheasant, it seems that the acts of using are as distinct as the acts of sale were in *Brooke* v. *Milliken*.

(*e*) See *Brooke* v. *Milliken*, 3 T. R. 509; and the preceding note.

(*f*) *Phillips* v. *Mendez da Costa*, 1 Esp. C. 34.

(*g*) One penalty may be recovered against several under the game laws. *Hardyman* v. *Whitaker*, 2 East, 572. *Secus*, in proceeding against two proctors for practising without certificates. *Barnard* v. *Gostling*, 1 N. R. 245.

(*h*) *Holloway* v. *Bennett*, 3 T. R. 448. *Hardy* v. *Cathcart*, 5 Taunt. 11. Penal information for *using* a private still, for which the party was liable to the penalty of 20*l.* under an ancient statute; the Court quashed a conviction in the sum of 200*l.*, which could only arise by inference from recent statutes, which impose the greater penalty for having in custody, &c. *R.* v. *Bond*, 1 B. & A. 390.

(*i*) By the stat. 31 Eliz. c. 5, s. 2, which enacts that the offence against any penal statute shall not be laid to be done in any other county than where it was in truth done. This statute extends to all actions by common informers upon a penal statute, whether made before or after that statute (B. N. P. 194. Com. Dig. *Action*, N. 10. 2 T. R. 238; 2 B. & P. 381. *Barber* v. *Tilson*, 3 M. & S. 429). The statute, how-

(*k*) 4 East, 385.

Contract.

Where a contract was made for the purchase of coals, without stating the specific quantity, it was held that the offence of selling coals of a different description from those contracted for, was committed in the county where the coals were delivered, the contract having been made in a different county (*l*). But the not justly measuring such coals being a local omission contrary to a local Act, is completed at the place where the coals are kept for sale, and where the bushel is required to be kept for the purpose of measuring (*m*).

The offence of driving a distress out of the hundred is not complete till the cattle have entered the second hundred; and if the latter hundred be situated in a different county, the defendant will be liable to be nonsuited if the *venue* be not laid there (*n*).

Where a draft was given for usurious interest in the county *A.*, and the money was actually received on the draft in the county *B.*, it was held that the offence was committed in the latter county (*o*).

An action for non-residence, although the offence consist in an omission, must be brought in the county where the living is situate (*p*).

In an action of debt for using a trade without having served an apprenticeship, it was held that proof was requisite that the defendant exercised the trade for one entire month (*q*) within the same county (*r*).

Although the *venue* be changed into another county for the purpose of trial, the cause of action must still be proved to have accrued in the county where the *venue* is laid (*s*).

Parish.

Where part of the penalty sued for is given by the statute to the poor of the particular parish where the offence was committed, evidence is also requisite to prove that the offence was committed in that parish according to the allegation in the information or declaration (*t*).

ever, contains some exceptions as to informations by the Attorney-general in the Exchequer, champerty, &c.—By the stat. 21 Jac. 1, c. 4, all informations, either by or on behalf of the King or any other, for any offence against any penal statute, shall be laid in the county where, &c. This statute, it has been held, does not apply to offences created by subsequent statutes, (3 M. & S. 438; B. N. P. 195; *Hickes's Case*, 1 Salk. 372, 3). But held to extend to an offence created by a statute which had expired before 21 J. 1, but continued by subsequent statutes, which give it effect from the time of first being passed. *Shipman* v. *Henbest*, 4 T. R. 109. And neither of these statutes extends to actions brought by the party grieved. Ibid. and B. N. P 195. By the latter statute, s. 3, the informer shall make oath that the offence was committed in the county where the suit was commenced. The venue of an information for being a tanner and shoemaker, under the stat. 24 G. 2, c. 19, need not be within the county. *Attorney-general* v. *Farris*, 3 Anst. 871. *Sed qu.*

(*l*) *Butterfield* v. *Windle*, 4 East, 385, under the stat. 3 Geo. 2, c. 26.

(*m*) Ibid.

(*n*) *Pope* v. *Davies*, 2 Camp. 266; and see *Platt* v. *Lokke*, Plow. 35. Sav. 58.

(*o*) *Searry* v. *Freeman*, 2 B. & P. 381. And see *Wade*, q. t., v. *Wilson*, 1 East, 195; where it was held, that if a premium be taken at the time of an usurious loan, receiving interest at the rate of 5 *l.* per cent., the offence is complete as soon as any interest is received. If an usurious contract be entered into by a deed executed in London, appointing the lender to be the receiver of the borrower's rents in Middlesex, with a pretended salary, and the lender receive the rents in Middlesex, but settle for the balance with the borrower in London, the *venue*, in an action on the statute, is well laid in London (*Scott*, q. t., v. *Brent*, 2 T. R. 238); and per Ashurst, it might be laid either in London or Middlesex (Ibid. 240). But P. C. K. B. Hil. T. 1825, the *venue* must be laid in the county where the money is received, and not where the contract is made. As to the *venue* in cases of *conspiracy*, *game*, *libel*, &c. see those titles respectively; as to the *venue* in cases of indictments, see Starkie's Crim. Pleadings, Ch. I.

(*p*) In the K. B. MS.

(*q*) *R.* v. *Barnett*, 3 Camp. 344. *Pearson* v. *Gowran*, 3 B. & C. 700.

(*r*) *Cunningham* v. *Watson*, 3 Camp. 249. This penal law is now repealed. *Supra*, 847, note (*b*).

(*s*) *Robinson* v. *Gurthwaite*, 9 East, 296. See the stat. 38 Geo. 3. c. 2, s. 1.

(*t*) See *R.* v. *Lookup*, 4 Burr. 2018. *Evans* v. *Steevens*, 4 T. R. 226. *R.* v.

Parish.

It is sufficient if the parish be described by its popular and well-known name, although that be not the name of its consecration (*u*); but where, in an action to recover penalties for non-residence, the parish was described to be *St. Ethelburg*, and it appeared, on the defendant's evidence, that the name was *St. Ethelburga*, the variance was held to be fatal (*x*).

Where the plaintiff had closed his case without proof of the local averment, he was held to be precluded from afterwards adducing such evidence (*y*).

Commencement.

3dly. *The commencement within time*, &c. (*z*).—The suing out a *latitat* was a commencement of the action (*a*).

The production of the writ shows that a *qui tam* action was commenced in time, although there be no evidence to connect the writ with the action (*b*), provided the declaration appear to have been filed in time (*c*); but the record of an issue in the Common Pleas did not prove the time of filing the declaration (*d*).

Priest, 6 T. R. 538; the statute gave a part of the penalty to the overseers of the poor where the offence was committed, and in the conviction it was adjudged to be paid to the overseers of the *township* of Ullesthorpe, the fact having been alleged at Ullesthorpe; and the Court were of opinion that the conviction was irregular. In *R.* v. *Wyatt*, (2 Ld. Raym. 1478), in a similar case, where the offence was laid to have been committed *apud* Villam de Mottram Andrews, the Court, after conviction, said that they would intend that the parish was co-extensive with the vill, and that if the vill was extra-parochial, the informer would have the whole.

(*u*) *Williams* v. *Burgess*, 3 Taunt. 127. And see *Kirtland* v. *Pounsett*, 1 Taunt. 570. *Burbidge* v. *Jakes*, 1 B. & P. 225. In an action of debt on the stat. 3 Hen. 8, c. 11, against Dr. Leigh, for practising physic in the parish of St. George's in the East, within seven miles of the City of London, it appeared from the consecration deed, that the name of the parish was St. George's, in the county of Middlesex; but Lee, C. J. held it to be well enough, for it was more generally known by the former than by the latter description. And see *Wilson*, q. t., v. *Van Mildert*, 2 B. & P. 394, where it was held that three united parishes might be described in pleading as one rectory.

(*x*) *Wilson* v. *Gilbert*, 2 B. & P. 281.

(*y*) *Torey* v. *Plomer*, Esp. on Pen. Stat. 142, cor. Ld. Ellenborough; but see below, 850, notes (*e*) and (*h*).

(*z*) By the stat. 31 Eliz. c. 5, s. 5, all actions, indictments, &c. brought for any forfeiture upon a penal statute, whereby the forfeiture is limited to the King only, shall be brought within two years, &c.; where the benefit is limited to the King and the informer (except where the action, &c. is brought on the Statute of Tillage), within *one* year; or on default, then by the King, within two years, &c. Upon the construction of this statute, and that of 7 Hen. 8, c. 3, where the penalty is given to a common informer alone, the action must be brought within one year (*Lookup* v. *Sir T. Frederick*, 4 Burr. 2018; B.N.P. 195, where the action was brought on the stat. 9 Ann. c. 14); and it extends to all actions upon penal statutes, whereby the forfeiture is limited to the King, or to the King and a common informer, whether made before or since the stat. 31 Eliz., 3 M. & S. 421. 434; 5 Taunt. 754; 9 East, 296; but it does not extend to actions brought by the party grieved. 1 Lord Ray. 78; Haw. b. 2, c. 26, sec. 47; Cro. Eliz. 645; Carth. 232; 3 Leon. 237; Show. 354; Tidd's Practice, 13, 14, seventh edition; Willes, 443 (*a*). It has, however, been doubted whether the statute applies where the whole of the penalty is given to the informer. *Culliford* v. *Blandford*, 4 Mod. 129; affir. *Chance* v. *Adams*, Ld. Ray. 78; cont. 4 Com. Dig. 410. *Frederick* v. *Lookup*, 4 Burr. 2018; B. N. P. 195. If a statute give a moiety to the informer and a moiety to the King, though an information after the year be void as to the informer, it is good as to the King. Haw. b. 2, c. 26, s. 46; 3 Wils. 250; Moor, 58; Savill, 6. The stat. 31 Eliz. c. 5, extends to offences of omission as well as commission. 5 M. & S. 427; 2 Chitty's Rep. 420; Chitty on the Statutes, 700. The limitations in the statute being incorporated in the stat. 12 Anne, apply to Scotland as well as England. *Surtees* v. *Allan*, 2 Dow. 254, and now see the late statute, *supra*, 656.

(*a*) *Hardyman* v. *Whittaker*, 2 East, 573. *Culliford* v. *Blandford*, Carth. 232, by two judges, Holt, C. J. *dissent*. For other observations and decisions, connected with this subject, vide *supra*, tit. JUSTICES—HUNDRED; and *infra*, tit. TIME.

(*b*) *Hutchinson* v. *Piper*, 4 Taunt. 555.

(*c*) 6 Taunt. 141; 1 Marsh. 497.

(*d*) In *Thistlewood* v. *Cracroft*, 6 Taunt. 141, 1 Marsh. 497, the writ was returnable Easter 1813, but had not been returned; the issue was of Hilary 1815, and the plaintiff produced rules for times to declare from Mich. 1813 to Trin. 1814; and it was held that this was not sufficient

Commencement.

The writ may be produced in order to show that the action has been commenced within time, after the objection has been taken (*e*).

In an action for penalties for using a trade without having served an apprenticeship, it was held that no penalty could be recovered which was completely incurred a year before the action brought; for each month's employment is a distinct offence (*f*).

Under the Uniformity of Process Act, the writ is the commencement of the action, and the record shows the day on which it was issued (*g*). The plaintiff's counsel having neglected in the first instance to prove the commencement of the suit, Lord Kenyon held that it might be proved in any stage of the cause (*h*).

The evidence as to the *corpus delicti* is referred to under the appropriate heads (*i*).

Defence.

The defendant may, under the general issue of *nil debet*, avail himself of any proviso, either in the principal statute, or any other which exempts him from the penalty, by evidence that he is, in point of fact, within the exemption (*k*). But the defendant cannot, under this issue, prove that the penalties have already been recovered by a stranger; for the fact ought to have been pleaded, in order to give the plaintiff an opportunity of replying that the recovery was fraudulent (*l*).

An offence against a penal statute cannot be punished after the repeal of the particular clause creating the offence, although the offence was committed previous to the repeal of the Act, unless the repealing statute contain some special exemption (*m*).

Competency.

An informer who is entitled to any part of the penalty is, it has been

evidence to show that the declaration had been filed in time.

(*e*) *Maugham* v. *Walker*, Peake's C. 263. Where the plaintiff, after he had closed his case in a penal action, and after an objection had been taken to the insufficiency of the evidence, offered further evidence in order to remove the objection, Lord Ellenborough said that he would receive it, if the omission arose from inadvertence on the part of the plaintiff's counsel, but not otherwise. *Alldred* v. *Halliwell*, 1 Starkie's C. 117.

(*f*) *Evans* v. *Hunter*, 2 Camp. 293.

(*g*) See tit. JUSTICES; HUNDRED; TIME.

(*h*) *Maugham* v. *Walker*, Peake's C. 163. But where the plaintiff had closed his case, having omitted to prove that the offence had been committed in the proper county, Lord Ellenborough excluded subsequent proof. *Tovey* v. *Palmer*, Esp. on Pen. Stat. 142; but *qu.*

(*i*) See GAME, USURY, &c. A penalty is inflicted by stat. 3 Geo. 2, c. 26, s. 13, on coal dealers who shall neglect to fill the sacks sent out from a measure prescribed by the Act. Proof that the coals, on being remeasured at the place of delivery, were short of the proper quantity, and the testimony of one who saw the coals delivered out of the barge into the cart, and who continued with them until remeasured, that he saw no bushel used, is sufficient proof of a neglect within the statute. *Warren* v. *Windle*, 3 East, 205. And even without such testimony, the former evidence is presumptive proof, in support of an averment in an action on the statute, that the coals had not been *justly* measured within the statute. Ibid. Where, in an action for unshipping foreign glass without paying duty, the master of a homeward-bound vessel coming up the Thames was proved to have hired and sent off a boat and men, accompanied by one of his own crew, to bring away certain boxes of foreign and British glass lying on the sands on the Essex coast, to be landed at Woolwich, which they find and bring as far as Gravesend, where the whole is seized by the custom-house officers; held to be sufficient for a jury, of a being concerned in unshipping foreign glass without payment of duty, and in unshipping British glass shipped for exportation, subjecting the master of the vessel to the penalties for both those offences, although the whole was one transaction. *Attorney-general* v. *Towns*, 6 Price, 198.

(*k*) B. N. P. 225; 2 Roll. Ab. 683. *R.* v. *Hall*, 1 T. R. 320. It was formerly held otherwise, where the exemption was contained in another Act, or where it contained matter of law. Gilb. L. Ev. 11.

(*l*) *Bredon* v. *Harman*, 2 Str. 701; *supra*, Vol. I. tit. JUDGMENT; and see the statute 4 H. 7, c. 20.

(*m*) *Miller's Case*, 1 Bl. 451.

seen, incompetent to give evidence (*n*); but in some instances such informers are made competent by the express provisions of particular statutes (*o*); and in some other instances also, informers have been held to be competent, by necessary inference from particular statutes, on the consideration that such statutes would otherwise be in a great measure nugatory (*p*). Competency.

PENALTY.

THE question whether a particular sum specified in a covenant or other agreement was intended as a penalty, or as liquidated damages, depends upon the *form* of the instrument, and the *intention* of the parties, as collected from the whole of the instrument. This is purely a question of law; but it is necessary to advert to it in order to ascertain whether the party must be prepared with evidence to prove the actual damage sustained from the breach of contract, or according to the contract, he is entitled to a specific sum on proof of *any* breach of the agreement. If the sum be mentioned simply under the denomination of a *penalty*, on an agreement not to do a specified thing, or to secure some advantage to an obligee, such as the use of a particular room (*q*), the *form* of the instrument imports it to be a mere penalty (*r*). Question on what it depends. Form of the instrument.

But although the terms of the instrument *primâ facie* import liquidated damages, they will not be considered as such if a contrary intention be ma-

(*n*) *Supra*, Vol. I. tit. WITNESS.—INFORMER.

(*o*) See the stat. 32 Geo. 3, c. 56, s. 7, which prohibits counterfeit certificates of the characters of servants. And see the Hackney-coach Act, 33 Geo. 3, c. 75, s. 17. See the statute 1 Geo. 4, c. 56, as to malicious trespasses. And see also as to parishioners, *supra*, Vol. I. tit. WITNESS.—INHABITANT.

(*p*) As in the case of the Bribery Act, 2 Geo. 2, c. 24. See *Heward* v. *Shipley*, 4 East, 182. *Bush* v. *Rawling*, Say. 289. *Mead* v. *Robinson*, Willes, 425. *Dover* v. *Maester*, 5 Esp. C. 92. So in a prosecution under the stat. 21 Geo. 3, c. 37, against exporting machinery (*R.* v. *Teasdale*, 3 Esp. C. 68). So under the stat. 23 Geo. 2, c. 13, s. 1, for seducing artificers to leave the kingdom, although the informer is entitled to half the penalty (*R.* v. *Johnson*, Willes, 425 n. (*c*). So on a prosecution for penalties under the stat. 9 Ann. c. 14, s. 5, the loser of money at play is competent to prove the fact. *R.* v. *Luckup*, Willes, 425 (*c*). Proof of exemption lies on defendant. *R.* v. *Neville*, 1 B. & Ad. 489. See also *Sutton* v. *Bishop*, 4 Burr. 2284. *Sibly* v. *Cuming*, 4 Burr. 2469; B. N. P. 225. *R.* v. *Pemberton*, 1 Bl. 250; 1 M. & M. 42. The new rules do not apply to such penal actions as are within the 4th sect. of the stat. 21 J. 1, c. 4. See *Lord Spencer* v. *Swannell*, 3 M. & W. 154; and *semble*, that the st. 21 J. 1, c. 4, applies to actions on statutes subsequent as well as prior to that Act. As to the limitation of actions for penalties by parties aggrieved, see the 2 & 3 Will. 4, c. 71, s. 3, & *supra*.

(*q*) *Smith* v. *Dickinson*, 3 B. & P. 630. *Sloman* v. *Walter*, 1 Brown's C. C. 418. Lord Hardwicke, in *Roy* v. *The Duke of Beaufort* (2 Atk. 190), held that a person who entered into a bond conditioned to pay 100 *l.* if he poached, must have paid the 100 *l.* for any breach. But see Lord Eldon's observations (2 B. & P. 352), where he says, with respect to the case of *Hardy* v. *Martin* (1 Brown's C. C. 418, in note), "I do not understand why one brandy merchant, who purchases the lease and goodwill of a shop from another, may not make it matter of agreement, that if the vendor trade in brandy within a certain distance he shall pay 600 *l.*, and why the party violating such an agreement should not be bound to pay the sum agreed; although, if such an agreement be entered into in the *form of a bond with a penalty*, it may perhaps make a difference." The stat. 8 & 9 Will. 3, c. 11, s. 8, seems to be imperative as to the assignment of breaches in all cases, except money-bonds, bail-bonds, replevin-bonds, &c. See Tidd's Prac. 604, 7th edit., and *supra*, 431.—But where one gave a counter security to pay an annuity, and a warrant of attorney as a collateral security, and it was agreed that in default of any one payment of the annuity, judgment should be entered up for the specific price of the annuity, it was held that execution might issue for the whole sum, without assigning breaches under the statute. *Howell* v. *Stratton*, 2 Smith, 66.

(*r*) Per Lord Eldon, 2 B. & P. 352.

Intention of the parties, as collected from the instrument.

nifested by the terms of the instrument. Thus, although the agreement concluded in this form, "Lastly, it is hereby agreed, that either party failing to perform their undertaking shall pay to the other 200*l.*;" although this appeared to be contract, and not penalty, the Court held that they were to look to the whole of the instrument (*s*).

Thus, if a smaller penalty be by the same instrument made payable upon the breach of part of the agreement, this rebuts the presumption that the parties intended the larger sum to be paid for the same breach (*t*).

And where the stipulated damages are to depend on a condition precedent, the party is not entitled to them by a mere breach of contract, unless the event has happened (*u*).

So it is if the deed or agreement contain a number of different covenants or stipulations, and a large sum be, at the end, covenanted or agreed to be paid for breach of performance; for then the object appears to be to secure the performance of the agreement in general, and it is not to be presumed that the parties intended that the whole should be paid for the breach of any one article (*x*).

To contract for stipulated damages.

Where the party binds himself to pay a specific sum as stipulated damages, or as a sum forfeited or due for non-performance of an agreement, such as not to continue in or to engage in a particular trade or business (*y*), or to

(*s*) Per Lord Eldon, in *Astley* v. *Weldon*, 2 B. & P. 346. The plaintiff in that case agreed to pay to the defendant so much per week for performance at his theatres, and to pay travelling expenses, &c.; the defendant agreed to perform the parts required by the plaintiff; to attend beyond the usual hours on emergencies, and at rehearsals, or to be subject to such fines as are established at the theatres; and notwithstanding the general conclusion, it was held, (in an action of *assumpsit*, stating several breaches in refusing to perform and attend, &c.), that the sum mentioned was a penalty, and not liquidated damages. Where by the original lease, the tenant covenanted not to sow during the last three years more than —— acres in one year with clover, or if he did so, to pay an additional rent of ——*l.* per acre, for every one above, &c., held that although the several terms penalty, compensation, and additional rent were used in the lease, yet that according to the present rule of the Court, it was not to be considered as a penalty in order to protect the defendant from answering, but as stipulated damages, or as additional rent, and therefore entitling the plaintiff to a discovery of the transaction. *Jones* v. *Green*, 3 Y. & J. 298. And see *Rolf* v. *Peterson*, 2 Bro. C. C. 436; and *Pultency* v. *Shelton*, 5 Ves. 260.

(*t*) *Astley* v. *Weldon*, 2 B. & P. 346; *supra*, note (*s*). *Fletcher* v. *Dyche*, 2 T. R. 32.

(*u*) *Staniforth* v. *Lyall*, 7 Bing. 269.

(*x*) 2 B. & P. 353. Where the sum which is to be a security for the performance of an agreement to do several acts, will, in case of a breach of the agreement, be sometimes too large and sometimes too small a compensation for the injury, the sum is to be considered as a penalty. *Davis* v. *Penton*, 6 B. & C. 216. Where an agreement containing various stipulations, of various degrees of importance, provided that in case either should fail to fulfil the agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other ——*l.* which was thereby declared to be liquidated and ascertained damages, held that not being limited to breaches which were of an uncertain nature and amount, it was to be considered as a penal sum only. *Kemble* v. *Farren*, 6 Bing. 141, and 3 M. & P. 425. So where a cognovit was given for 200*l.* in an action for damages for breaking up a road, and the defeazance stipulated minutely for his doing various acts in a limited time. *Charrington* v. *Laing*, 6 Bing. 242. But where upon an agreement between the plaintiff on the one part, and the defendant with others on the second part, for the execution of a lease, with the usual covenants, and for the performance each of the parties did bind himself in a penalty, to be recovered as liquidated damages; held, that on default, that sum was to be deemed a penalty, and not liquidated damages; and the declaration describing it as an agreement between the plaintiff and defendant, who had alone executed it, held, that the variance, whether fatal or not, was one which the Court, under 3 & 4 Will. 4, c. 42, s. 23, might amend, as it would not vary the substantial defence to the action. *Boys* v. *Ancell*, 5 Bing. N. C. 390.

(*y*) *Barton* v. *Glover*, 1 Holt's C. 43, cor. Gibbs, C. J. So in the case of a bond conditioned to pay 1,000*l.* in case the defendant renewed the business of a carrier

pay a higher rent, in case of non-residence, on an estate leased to him (*z*), or to pay a certain sum for every acre which he, being tenant, breaks up and converts into tillage (*a*), or to pay 1,000 *l.* to the plaintiff if the defendant marry any other woman (*b*); or to perform certain work in a time specified, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished (*c*), or to pay 500 *l.* if either party fail to perform his part of a contract (*d*); and in general, as it seems, where a party enters into a contract, bottomed on a good consideration, to pay a stipulated sum in case he violate the contract, that sum is to be considered as stipulated damages (*e*). Stipulated damages.

It has been said, that if the sum would be very enormous and excessive, considered as liquidated damages, it shall be taken to be a penalty, though agreed to be paid in the form of contract (*f*). But Lord Eldon, in the case of *Astley* v. *Weldon* (*g*), disapproved of this doctrine. He observed, that "nothing can be more obvious than that a person may set an extraordinary value on a particular piece of land or wood, on account of the amusement which it may afford him. In this country a man has a right to secure to himself a property in his amusements, and if he chooses to stipulate for 5 *l.* or 50 *l.* additional rent for every acre of furze broken, or for any given sum of money upon every load of wood cut and stubbed up, I see nothing irrational in such a contract; and it appears to me to be exceedingly difficult to apply the word *excessive* to the terms in which parties choose to contract with one another. There is, indeed, a class of cases in which Courts of Equity have rescinded contracts on the ground of their being unequal. It has

(*Baker* v. *Webb*, Manning's Index, 230). In the case of *Hardy* v. *Martin*, (1 Brown's C. C. 419, in note), the Court of Chancery restrained the plaintiff in such a case from taking out execution upon a penalty in the bond; but it does not appear that in that case the sum was mentioned in the *condition* of the bond. Vide *supra*, note (*q*); and see the observations of Lord Eldon on this case, 2 B. & P. 352.

(*z*) *Ponsonby* v. *Adams*, 6 Brown's P. C. 417.

(*a*) *Rolfe* v. *Peterson*, 6 Brown's P. C. 470. And where in such a case the jury found a verdict for the actual value, which was much less than the stipulated rent, the Court will not refuse a new trial on the ground that the verdict was consistent with justice. And Abbott, L. C. J., said, that if such an argument were to prevail, it would encourage juries in committing a breach of duty in finding verdicts contrary to law, and would enable them to set aside the contracts of mankind. As to cases where the Courts have sustained verdicts, though not warranted in fact or law, on account of their supposed consistency with justice, see *Smith* v. *Frampton*, 1 Ld. Ray. 62. *Fanwell* v. *Chaffey*, 1 Burr. 54. *Deerly* v. *Duchess of Mazarine*, 2 Salk. 646. *Cox* v. *Kitchen*, 1 B. & P. 338. A party is excused from a penalty in a lease where the forfeiture is occasioned by the act of God. Dyer, 53.

(*b*) *Lonce* v. *Peers*, 4 Burr. 2229.

(*c*) *Fletcher* v. *Dycke*, 2 T. R. 32.

(*d*) *Reilly* v. *Jones*, 1 Bingh. 302.

(*e*) See the above cases, and Lord Eldon's observations, 2 B. & P. 351. The rule laid down by Lord Somers in equity (Prec. in Chan. 487) was, that where a party might be put in as good plight as where the condition itself was literally performed, the Court would relieve, although the letter had not been performed, as by payment of money, &c.; but that where the condition was collateral, and no recompense or value could be put on the breach of it, there no relief could be had for breach of it. Lord Eldon (in the case of *Astley* v. *Weldon*, 2 B. & P. 352) regretted that this rule had not been adhered to.

(*f*) Said to have been stated in *Rolfe* v. *Peterson*, 6 Brown's P. C 470.

(*g*) 2 B. & P. 346; *supra*, note (*s*). On an agreement for the sale of a public house, the seller stipulated not to carry on the business of a publican under the penal sum of 500 *l.*, to be recoverable as and for liquidated damages; the jury having given a verdict for the whole sum, although no evidence was given of actual damages, the Court refused to disturb the verdict as excessive. *Crisdee* v. *Bolton*, 3 C. & P. 240. Best, L. C. J., not subscribing to the doctrine of *Randall* v. *Everest*, 2 C. & P. 577; 1 Mo. & M. 4, but inclining to hold that if it were doubtful, from the terms of the contract, whether the sum mentioned was intended to be a penalty or liquidated damages, that it should operate as a penalty only. Ib.

Stipulated damages.

been held, however, that mere inequality is not a ground of relief; the inequality must be so gross that a man would start at the bare mention of it."

As the plaintiff is not entitled to recover the whole penalty unless he prove damages to that extent, he may, on the other hand, recover *damages* in covenant or *assumpsit*, if he prove that he has sustained them, although they exceed the amount of the penalty (*h*).

PERJURY.

Particulars of proof.

On the trial of an indictment for perjury, the proofs relate to, 1st, the authority to administer the oath (*i*); 2dly, the occasion of administering the oath (*k*); 3dly, the taking of the oath (*l*); 4thly, the substance of the oath (*m*); 5thly, the materiality of the matter sworn (*n*); 6thly, the falsity of the matter so sworn (*o*); 7thly, the corrupt intention of the defendant (*p*).

Authority to administer the oath.

1st. Where the affidavit or answer has been sworn before a master in Chancery, surrogate, or commissioner, who has a general authority to take such affidavits, it is not necessary to prove his appointment; it is sufficient, according to the general presumption of law (*q*), to prove his having acted in that character (*r*). But where he derives his authority from a special commission issued to him for that particular purpose, it is necessary to prove the authority by the production and proof of the commission which created the special authority. And in the former case the legal presumption derived from a person's acting in a particular capacity, that he had competent authority so to act, may be rebutted by positive proof that the appointment was illegal (*s*).

Where the authority delegated is of a special nature, limited to particular circumstances, it is essential to prove their existence in order to show the authority to administer the oath. Thus, on an indictment against a bankrupt for perjury alleged to have been committed on his last examination before the commissioners, strict proof of the bankruptcy is necessary (*t*).

This proof is essential to show the authority of the commissioners; for if the defendant was not a bankrupt, there was no authority to administer an oath (*u*).

On the same principle, where the perjury was assigned upon evidence given at the trial of a cause at *Nisi Prius*, where the suit had previously

(*h*) *Harrison* v. *Wright*, 13 East, 343. *Winter* v. *Trimmer*, 1 Bl. 395. *Bird* v. *Randall*, Ibid. 373. *Cotterel* v. *Hook*, Doug. 93. Contra, *Wilbeam* v. *Ashton*, 1 Camp. C. 78.

(*i*) *Infra*, 854.

(*k*) *Infra*, 855.

(*l*) *Infra*, 856.

(*m*) *Infra*, 858.

(*n*) *Infra*, 859.

(*o*) Ibid.

(*p*) *Infra*, 860.

(*q*) *Supra*, tit. CHARACTER. A witness upon an arbitration under an order of Nisi Prius, directing the witnesses to be sworn before a commissioner duly authorized, being sworn before a commissioner empowered to take affidavits, cannot be indicted for perjury. *R.* v. *M. Hanks*, 3 C. & P. 419. An affidavit made in support of a bill for an injunction may be made the ground of an indictment for perjury therein, although it is not stated that any motion has been made for the injunction, nor has any in fact been made. *R.* v. *White*, 1 Mo. & M. 271.

(*r*) *R.* v. *Verelst*, 3 Camp. 432. *R.* v. *James*, Show. 397.

(*s*) *R.* v. *Verelst*, 3 Camp. 432; where evidence was given that the surrogate by whom the oath had been administered had been appointed contrary to the canon, which requires that no judicial act shall be speeded by any ecclesiastical Judge, unless in the presence of the registrar or his deputy.

(*t*) *R.* v. *Punshon*, 3 Camp. 96.

(*u*) Ibid.

Authority to administer the oath.

abated by the death of a co-plaintiff, for want of a suggestion of the death according to the statute (*x*), it was held that there was no jurisdiction, and consequently no perjury (*y*). The case seems to admit of a very different consideration where the perjury is assigned upon the deposition of a witness who comes to prove the bankruptcy; for there the commissioners have jurisdiction to inquire into the fact, although it should ultimately turn out that there was no bankruptcy (*z*).

2. The occasion of administering the oath.

2dly. If the perjury was committed on the trial of a cause at *Nisi Prius*, the record ought to be produced, in order to show that such a trial was had; the production of the *postea* will be sufficient for this purpose (*a*).

Where the oath was alleged to have been taken, and the matter sworn, by the defendant, before the honourable *E. W.*, one of the justices of assize, &c., and it appeared in evidence that the oath had in fact been taken before Willes, J. in a cause tried at the assizes, it was held to be sufficient, although another justice was mentioned in the indictment as a commissioner (*b*); and the *Nisi Prius* record alleged the trial to have been had before both.

Where the indictment alleged that the cause came on to be tried before Lloyd Lord Kenyon, &c., *William Jones* being associated, &c., and from the judgment-roll it appeared that *Roger Kenyon* was associated, &c., the variance was held to be fatal (*c*).

So where the indictment alleged the oath to have been taken at the assizes before justices assigned to take the said assizes, before *A. B.* one of the said justices, the said justices then having power, &c., and it appeared that the oath was taken before *A. B.*, sitting under the commission of oyer and terminer and general gaol delivery, the variance was held to be fatal (*d*).

Where an indictment for perjury on an excise information stated that the defendant gave the justices to be informed that *W. S.* "*being a brewer*," did neglect, &c., but the information produced did not contain the words "*being a brewer*;" held that as such an information could not have been supported, the variance was fatal (*e*).

Where perjury is assigned on an answer to a bill in equity, the bill must be proved in the usual way (*f*).

Where the indictment alleged a bill of discovery filed in the Exchequer (on the answer to which perjury was assigned) to have been filed on a day specified, viz. 1st of December 1807, and it appeared, on the production of the bill, to have been filed in the preceding Michaelmas Term, according to the practice of the Court where a bill is filed in the vacation, it was held that the variance was immaterial, the day not having been alleged as part of the document (*g*).

(*x*) 8 & 9 Will. 3, c. 11, s. 61.

(*y*) *R.* v. *Cohen*, 1 Starkie's C. 511.

(*z*) *Supra*, p. 190.

(*a*) *R.* v. *Iles*, Sitt. in London, Mich. 14 Geo. 2, cor. Lord Raymond, Hard. 118. B. N. P. 243. 1 Str. 162. 2 Haw. c. 46, s. 56. *R.* v. *Hammond Page*, 2 Esp. C. 649. Where the perjury was assigned on matters deposed to in reply to the evidence of a defendant in the original proceeding, who had been acquitted and examined, but the indictment did not state the acquittal, nor did it in fact appear; held that it was sufficient to show the fact that he was examined. *R.* v. *Browne*, 1 Mo. & M. 315.

(*b*) *R.* v. *Alford*, Leach, 179, 3d edit.

(*c*) *R.* v. *Eden*, 1 Esp. C. 97.

(*d*) *R.* v. *Lincoln*, 1 Russ. & Ry. C.C.L. 421.

(*e*) *R.* v. *Leech*, 2M. & Ry. 119.

(*f*) *R.* v. *Alford*, Leech, 179, 3d edit. Starkie's Crim. Pleadings, 2d edit. 115. *Supra*, Vol. I. tit. BILL IN EQUITY.

(*g*) *R.* v. *Hucks*, 1 Starkie's C. 521.

Variance.

And where the bill was alleged to have been filed by Francis Cavendish Aberdeen and others, and on the production of the bill it purported to have been filed by J. C. Aberdeen and others, the variance was held to be immaterial, evidence being given that Francis Cavendish Aberdeen and the other persons named did in fact file the bill, although it was objected that it ought to have been averred in the indictment that Francis Cavendish Aberdeen, &c. filed their bill by the names of J. C. Aberdeen, &c. (*h*); and although, after setting out the material parts of the bill, the words were added, "as *appears* by the said bill filed of record."

Matter sworn.

Where the perjury was assigned in answer to a bill alleged to have been filed in a particular term, and a copy produced was of a bill amended in a subsequent term by order of the Court, it was held to be no variance, the amended bill being part of the original bill (*i*).

Where on an indictment for perjury in an answer in Chancery as it originally stood, it having been subsequently amended, but the amendments did not relate to nor affect the parts on which the perjury was assigned; held that it was sufficient to produce the amended bill, and show by a clerk in the office what were the alterations (*k*).

Where an indictment for perjury alleged to have been committed in an affidavit in Chancery, alleged that the defendant did under his petition, and in and by his said petition, set forth that, &c. it was held that it was sufficient to prove the petition in substance and effect (*l*).

Where the indictment set out several matters sworn, and it appeared on evidence of the affidavits that the matters were not continuous, but were separated by intervening matters, it was held to be sufficient (*m*).

Taking the oath. Identity.

3dly. *The taking the oath.*—Where the perjury is assigned on an answer of the defendant in Chancery, the answer itself must be produced (*n*) from the proper office; and proof that the *jurat* is in the hand-writing of a master in Chancery, together with proof of the identity of the defendant, will be sufficient evidence of his taking the oath (*o*). But no return of commissioners, or of a master in Chancery, will suffice, without proof of the identity of the

(*h*) *R.* v. *Roper*, 1 Starkie's C. 518; and afterwards by the Court of K. B. Hil. Term, 1817. It was also objected in the same case, in arrest of judgment, that it was alleged that the defendant exhibited his answer in writing to the said bill of complaint, intitled, "The answer of Robert Roper, defendant, to the *bill of complaint of J. C. Aberdeen*," &c. and therefore that the answer could not be taken to be the answer to the bill of Francis Cavendish Aberdeen; and that the answer, being wrongly intitled, was to be considered as a mere nullity (*Beran* v. *Beran*, 3 T. R. 601); but the Court, after granting a rule to show cause, discharged the rule, being of opinion that the answer put in, although wrongly intitled, could not be considered to be a mere nullity. Where the indictment charged perjury before a select committee, and averred that the election was had by virtue of a certain precept of the high-sheriff, by him duly issued to the bailiff of the borough of New Malton, proof of a precept directed to the bailiff of the borough of Malton was held to be no variance, the precept having in fact issued to the bailiff of New Malton, for the averment was not used by way of description of the instrument (*R.* v. *Leefe*, 2 Camp. 139). The indictment also alleged that *A.* and *B.* were returned to serve as burgesses for the borough of New Malton, and it appearing by the indenture of return that they were returned as members for Malton, the variance was held to be fatal. Ibid.

(*i*) *R.* v. *Waller*, cor. Eyre and Fortescue, Js., Mich. 6 Geo. 1.

(*k*) *R.* v. *Laycock*, 4 C. & P. 326.

(*l*) *R.* v. *Dudman*, 4 B. & C. 850.

(*m*) *R.* v. *Callanan*, 6 B. & C. 102. Note, it does not appear that the sense was altered.

(*n*) B. N. P. 239. Bac. Ab. *Evidence*, 624.

(*o*) *R.* v. *Morris*, 2 Burr. 1189. 1 Leach, 50. *R.* v. *Benson*, 2 Camp. 508. 3 Mod. 116. B. N. P. 239. Ld. Ray. 951. 12 Mod. 511. Str. 545. 3 P. Wms. 196. The reason for requiring all answers in Chancery to be signed by the parties is to afford easier proof on indictments for perjury. 2 Burr. 1189.

defendant with the person so sworn (*p*); but proof of his signature to the answer will be sufficient (*q*). Proof of taking the oath.

The question of identity is one of fact for the consideration of the jury (*r*); but evidence of a conclusive nature is requisite in order to show that the defendant was the person who took the oath.

Where it is possible that all the evidence may be true, and yet it be possible, consistently with that evidence, that some other person actually took the oath, the evidence is insufficient (*s*). But circumstantial proof, if conclusive in its nature, is sufficient (*t*).

So it seems, that if a party produce an affidavit, purporting to have been made by him before commissioners in the country, and make use of it in a motion in the cause, it will be evidence against him that he made it (*u*). It is not necessary to prove that any use was made by the defendant of the affidavit which he has sworn (*x*).

The taking the oath must be proved as it is alleged; if it be averred that the defendant was sworn on the Holy Gospels, &c. and it turn out that he was sworn in some other manner, according to some particular custom, and not upon the Gospels, the variance would be fatal (*y*). Variance as to the oath.

It must appear that the oath was taken within the county where the indictment is tried. But a variance as to the place of taking will not be material; thus, if it be alleged to have been taken at Serjeants' Inn in London, it is sufficient to prove that it was taken in Cheapside (*z*). Upon an indict-

(*p*) *R.* v. *Morris*, 2 Burr. 1189; and *R.* v. *Brady*, Leach, 368. 3 Mod. 116. For some other person may have personated the defendant.

(*q*) *R.* v. *Morris*, Leach, 50. 3 Mod. 117. B. N. P. 239. 2 Burr. 1189.

(*r*) *Benson* v. *Olive*, Mich. 5 Geo. 2.

(*s*) *R.* v. *Brady*, Leach, 368. The indictment there was on the stat. 31 Geo. 2, c. 10, s. 24, for taking a false oath to obtain administration to a seaman, in order to receive his wages. The prisoner had obtained letters of administration to the effects of Michael Power, a seaman on board the Pallas, through Mr. Macintosh, a navy agent, representing himself to be Thomas Power. From the warrant and jurat it appeared that a man of the name of Thomas Power had taken the usual oath. The warrant was signed by the name of Thomas Power, and the *jurat* attested by Dr. Harris; but there was no evidence that the signature was in the handwriting of the prisoner, or direct evidence that he was the man who took the oath. It also appeared that some person had signed the bond by the name of Thomas Power; but there was no evidence that this person was the prisoner. The prisoner afterwards applied to a navy agent with a certificate, signed by the purser of the ship Pallas, and an order to receive some prize-money. The case was left to the jury by the Court, with an intimation that they ought to acquit, there being no positive and direct evidence of his having actually taken the oath, as is required in all cases of perjury, and as it was possible that the prisoner might have procured another to take the oath. The prisoner was acquitted.

(*t*) Upon an indictment for perjury, in falsely taking the freeholder's oath at an election of a knight of the shire, in the name of *J. W.*, it appeared that a person polled in the name of *J. W.*, on the second day of the election, and that the oath was administered to such person, who swore to his freehold and place of abode; also that there was no such person; also that the defendant did in fact vote on that day; that he had no freehold; and that he afterwards boasted that he had done the trick, and was not paid enough for his job, and was afraid that he should be pulled down for his bad vote. It did not appear that the defendant voted in his own name, or in any other name than *J. W.*, or that more than one false vote had been given on that day; and the evidence was held to be sufficient to warrant a conclusion of the jury that the defendant had voted in the name of *J. W.* *R.* v. *Price*, alias *Wright*, 6 East, 323.

(*u*) *R.* v. *James*, Show. 97.

(*x*) *R.* v. *Crossley*, 7 T. R. 315. *R.* v. *Hailey*, 1 Ry. & M. c. 94, and see Append. Vol. II. 624. But it is otherwise when the proceeding is under the stat. of Eliz. See Crim. Pleadings, 121. In *R.* v. *Taylor* (Skinn. 403), it was held that the bare making of the affidavit, without producing and using it, was not sufficient.

(*y*) *R.* v. *M'Arther*, Peake's C. 155. See *Rokeby* v. *Langston*, 12 Vin. Ab. T. b. 88. 2 Keb. 314.

(*z*) *R.* v. *Taylor*, Skinn. 403, cor. Holt, C. J.

Variance as to the oath.

ment in Middlesex, it may be shown that the oath was in fact taken in Middlesex, although the *jurat* state it to have been sworn in London (*a*).

Substance, and effect, &c.

4thly. It is necessary to prove (*b*), in the next place, that the defendant swore to the *substance and effect* as alleged in the indictment; and mere variances between the record and the evidence, in letters, or even in words, will not be material, if they agree in substance (*c*).

But it is necessary to prove in *substance and effect* the *whole* of that which the indictment alleges in substance and effect to have been sworn by the defendant, although the same count contains several distinct assignments of perjury (*d*); for the allegation that the defendant swore to the substance and effect of that which is set out, is an allegation that he swore to the whole of it, as much as an averment that the defendant published a libel *secundum tenorem* is an averment that he published the whole (*e*).

Matter sworn.

It has been said, that in the case of perjury assigned upon evidence upon the trial of a cause, the prosecutor must prove the whole of the defendant's testimony (*f*), unless the perjury be assigned upon a point which first arose upon the defendant's cross-examination, in which case it is sufficient to prove the whole of the cross-examination (*g*).

Notwithstanding the authority cited in support of these positions, considerable qualifications seem to be necessary. If the second position be correct, that it is sufficient to prove the evidence on cross-examination, if the point in question first arose then, upon the same principle, if the perjury was committed on the examination in chief, it would be sufficient to prove such part of the evidence upon that examination as related to the point in question. The object in requiring such evidence is to show that the assertions on which perjury is assigned have not been limited, qualified or explained by other parts of the defendant's evidence. It seems, therefore, that, at most, the rule amounts to this, that all the evidence given by the defendant, in reference to the particular fact on which perjury is assigned, ought to be proved. And the rule, even to this extent, appears to be a doubtful one; for when it has once been proved that particular facts, positively and deliberately sworn to by the defendant in any part of his evidence, were falsely sworn to, it seems, in principle, to be incumbent on him to prove, if he can, that in other parts of his testimony he explained or qualified that which he had so sworn (*h*).

In *Dame Carr's Case* (*i*), where the Court, on a trial at bar, held that an indictment could not be sustained upon an assignment of perjury assigned on the defendant's answer to a bill in Chancery, because the defendant had explained and limited her first answer by a supplementary one, it was so held, not on the ground that it was incumbent on the prosecutor to have

(*a*) *R.* v. *Emden*, 9 East, 437.

(*b*) The Court will not compel the production of depositions taken before a magistrate, in order to found a charge of perjury. *R.* v. *Justices of Bedford*, Chitty, 627. Burn's J. Append. *Examination*.

(*c*) See Starkie's Crim. Plead. 258, and the cases there collected; also *supra* tit. LIBEL, 459. *Infra*, tit. VARIANCE.

(*d*) *R.* v. *Lecfe*, 2 Camp. 134.

(*e*) See Lord Ellenborough's observations, 1 bid.

(*f*) *R.* v. *Jones*, cor. Lord Kenyon, Peake's C. 37.

(*g*) *R.* v. *Dowlin*, Peake's C. 170.

(*h*) On an indictment for speaking seditious words, it would be sufficient on the part of the prosecution to prove so much as satisfied the allegations on the record, although the defendant would on the other hand be entitled to give in evidence all that was said at the same time.

(*i*) 1 Sid. 418. It has since been held that proof of what the defendant swore, by a party present at the trial, but who did not take notes, and who does not profess to give the whole of what was sworn, is sufficient. *R.* v. *Munton*, 3 C. & P. 498.

proved the whole, but on the ground that the defendant was at liberty to explain her first answer by means of her second.

Averments and innuendos.

Where averments are introduced into the indictment, and also innuendos, with a view to give a peculiar sense and meaning to the expressions used by the defendant, and afterwards to assign the perjury accordingly, such averments and innuendos must be proved as alleged, for they constitute the substance and effect of the defendant's oath (*k*). But it is a general rule, that whenever an innuendo is superfluous, although it introduces new matter, it may be rejected as surplusage (*l*).

Materiality.

5thly. In order to show the *materiality* of the disposition or evidence of the defendant, it is essential, where the perjury is assigned in an answer to a bill in equity, to produce and prove the bill (*m*); or if the assignment is on an affidavit, to produce and prove the previous proceedings, such as the rule *nisi* of the Court, in answer to which the affidavit in question has been made (*n*).

If the assignment be on evidence on the trial of a cause, in addition to the production of the record, the previous evidence and state of the cause should be proved, or at least so much of it as shows that the matter sworn to was material. So also such prefatory circumstances and innuendos as are averred upon the face of the indictment for the same purpose, must be proved.

When the perjury is committed in an answer to a bill in equity, or in answer to affidavits on a rule to show cause, the materiality of the matter sworn to in such answer, and on which perjury is assigned, necessarily appears from the documents themselves; but where the perjury is assigned upon testimony given on the trial of a cause, evidence must be given in support of the averment of *materiality*. For this purpose it is not only necessary to show by the record what issues were joined between the parties, but also to prove so much of what occurred at the trial as shows the bearing and materiality of the defendant's evidence.

The false oath amounts to perjury if it has any tendency to prove or disprove the matter in issue, although but circumstantially (*o*).

Variance.

If a fact be alleged which is material, with reference to the knowledge of the defendant, it must be proved, and a variance from it will be fatal (*p*).

Falsity.

6thly. It is a general rule, that the testimony of a single witness is insufficient to warrant a conviction on a charge of perjury. This is an arbitrary and peremptory rule, founded upon the general apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against that of another (*q*).

(*k*) See Starkie's Crim. Pleadings, 118, 2d edit. An averment that an action is pending against the defendant is not proved by evidence of a notice of set-off received from the defendant's attorney in the action without producing the writ. *R.* v. *Stoveld*, 6 C. & P. 489.

(*l*) *R.* v. *Aylett*, 1 T. R. 69. *Roberts* v. *Cambden*, 9 East, 93; Starkie's Crim. Pleadings, 120. *Wilner* v. *Hold*, Cro. C. 489; Cro. J. 153; Starkie's Law of Libel, 339.

(*m*) *Supra*, Vol. I. tit. BILL IN EQUITY. *R.* v. *Alford*, Leach, 179, 3d edit. See further as to materiality, *R.* v. *Dunstan*, 1 Ry. & M. 109, and App. vol. 2, 626.

(*n*) Ibid.

(*o*) *R.* v. *Griebe*, 12 Mod. 142. As if he wilfully mis-state the colour of a man's coat, or speak to the credit of another witness. And see *R.* v. *Muscot*, 10 Mod. 195. And see *R.* v. *Gardiner*, 8 C. & P. 737.

(*p*) *R.* v. *Hucks*, 1 Starkie's C. 521. There the indictment alleged that at the time of effecting a policy of insurance, *purporting* to have been underwritten by *A. B.* and others, on the 13th, &c., the defendant well knew a particular fact; on the production of the policy, it purported to have been underwritten by *A. B.* on the 15*th*, &c. and the variance was held to be fatal.

(*q*) To convict a man of perjury, a probable and credible witness is not sufficient, but it must be a strong and clear evidence, and more numerous than the evidence given

Falsity.

Nevertheless, it very frequently happens, in particular cases, that the testimony of a single witness preponderates against the united testimony of many.

Upon the trial of a party for perjury, alleged to have been committed on a trial at the sessions, it is not sufficient to prove that he swore the contrary in his depositions before the magistrate; the jury are to consider whether there is such confirmatory evidence of the facts stated in the depositions as proves the evidence given at the sessions to be false (*r*).

If any one distinct assignment of perjury be proved, the defendant ought to be convicted (*s*).

Corrupt intent.

7thly. Evidence is essential, not merely to show that the defendant swore falsely in fact, but also, as far as circumstances tend to such, proof, to show that he did so corruptly, wilfully, and against his better knowledge. For it has been justly and humanely said, that a jury ought not to convict where it is probable that the fact was owing rather to the *weakness* than the *perverseness* of the party; as where it was occasioned by surprise or inadvertency, or by a mistake of the true state of the question (*t*).

Subornation.

On an indictment for subornation of perjury, it was held in *Reilly's Case* that the record of the conviction of Macdaniel, the person alleged to have been suborned, was not in itself sufficient evidence against the defendant to prove that Macdaniel had in fact committed perjury (*u*).

Defence.

The defendant, although perjury be assigned on his answer, affidavit, or deposition in writing, may prove that an explanation was afterwards given, qualifying or limiting the first answer.

Where perjury was assigned on the answer of the defendant, in which she swore that she had received no money, in her defence she proved a second answer, in which she stated that she had received no money before such a day: the Court, on a trial at bar, held that the second answer explained the first, and that perjury could not be assigned upon the first (*v*).

It is no objection to the competency of a witness that he has sworn to the same fact which he is called to prove (*w*); and if several be indicted for per-

for the defendant, for otherwise there is but oath against oath. Per Parker, L. C. J. *R.* v. *Muscot*, 10 Mod. 194. And *semble*, that the contradiction must be given by *two direct witnesses*, and that the negative supported by one direct witness and by circumstantial evidence would not be sufficient. It has been so held (*ut audivi*) by Lord Tenterden, C. J. See 2 Haw. c. 46, s. 10; 4 Bl. Comm. 150. But it is sufficient to prove the taking of the oath by means of one witness. Ibid.

(*r*) *R.* v. *Wheatland*, 8 C. & P. 238; and see *R.* v. *Harris*, 5 B. & A. 926.

(*s*) *R.* v. *Rhodes*, 2 Ld. Raym. 886, 7; 2 Bl. 790.

(*t*) 1 Haw. c. 69; 5 Mod. 350; *R.* v. *Melling*, 10 Mod. 295. As where a man swore that he had seen and read a deed, and on the trial it appeared that he had read the counterpart only. 11 Mod. 195.

(*u*) 1 Leach, 454; Russel, 1796. Macdaniel had been convicted of feloniously taking a false oath to obtain administration to the effects of a seaman, and the defendant was indicted for feloniously procuring Macdaniel to take the oath; the record of Macdaniel's conviction was produced and read; but it is stated that the Recorder obliged the counsel for the prosecution to go through the whole case to prove the guilt of Macdaniel. This authority seems, at first sight, to be inconsistent with that class of cases in which it has been held that, as against an accessory before the fact to a felony, the record of the conviction of the principal is evidence of the fact. If the prisoner, instead of being indicted as a principal in procuring, &c., had been indicted as an accessory before the fact, in procuring, &c., the record would clearly have been good *primâ facie* evidence of the guilt of the principal. It is, however, to be recollected, that this doctrine rests rather upon technical and artificial grounds, than on any clear and satisfactory principle of evidence.

(*v*) *R.* v. *Carr*, on a trial at bar; Sid. 418; 2 Keb. 576.

(*w*) *R.* v. *Pepys*, Peake's C. 138.

jury as to the same fact, each is a competent witness for the rest previous to his conviction (*x*). Defence.

It was formerly held, that a person prejudiced by the perjury was not a competent witness to prove it (*y*); the rule, it has been seen, is now exploded (*z*).

It is said to have been held, upon a trial for perjury, alleged to have been committed on a trial of an ejectment, that what a witness then swore who is since dead, is admissible in evidence (*a*); this however seems to be utterly inconsistent with the principles now established (*b*).

Where the chairman of a Court of Quarter Sessions was called to prove the statement on which perjury was assigned, the Court would not permit him to be examined (*c*).

It being material whether an annuity payable to the defendant or to *B.*, his trustee, had been paid, it was held that the clerk of *B.* might be asked what *B.* said about the money at the time he (the witness) received the money from *B.* to be paid in at his banker's, *B.* being an agent, and acting within the scope of his authority (*d*).

PEW (*e*).

See tit. PRESCRIPTION.—DISTURBANCE.

COURTS of Common Law do not recognize the right to a pew in a church otherwise than as an easement appurtenant to a messuage (*f*). Nature of the right.

(*x*) *Bath* v. *Montague*, cited Fortesc. 247; 2 Hale, 280. *R.* v. *Bray*, R. T. Hard. 358. *Supra*, Vol. I. tit. WITNESS.

(*y*) Ld. Raym. 396; Skinn. 327.

(*z*) *Supra*, Vol. I. tit. WITNESS. On an indictment against a bankrupt for perjury, alleged to have been committed in an affidavit to supersede the commission, the assignees and creditors are competent witnesses. *R.* v. *Keat*, 2 Moody, C. C. 24.

(*a*) *Taylor* v. *Brown*, Raym. 170, by two Justices, against the opinion of Kelynge, C. J.

(*b*) *Supra*, Vol. I. tit. WITNESS.

(*c*) *R.* v. *Gazard*, 8 C. & P. 595. The reason stated for this is, that the Court is a Court of Record.—*Qu.*

(*d*) *R.* v. *Hall*, 8 C. & P. 358.

(*e*) See Com. Dig. tit. *Esglise*; Burn's Ecclesiastical Law, tit. *Church*; and Tyrwhitt's edit. of Dr. Prideaux's Directions to Churchwardens, from which useful work the substance of the following notes has been taken.

(*f*) *Mainwaring* v. *Giles*, 5 B. & A. 356. *Byerly* v. *Windus*, 5 B. & C. 1. Disturbance of a pew not annexed to a house is only cognizable in the Spiritual Court. *Mainwaring* v. *Giles*, 5 B. & A. 356. For, per Holroyd, J., when a right is annexed to a house in the parish, an obstruction to that right is a detriment to the occupation of the house; and it is only on account of the pew being annexed to a house, that the temporal Court can take cognizance of intrusion into it. Proof of a possessory right to a pew, combined with actual possession, acquiesced in or not disputed by the churchwardens, will entitle the plaintiff to a sentence of monition to the defendant to refrain from disturbing the plaintiff in his possession, and probably to pay the costs of the suit. *Pettman* v. *Bridger*, 1 Phill. R. 316. See 3 Add. R. 7. But where after the expiration of a faculty attached to a house, and whilst the house was on sale, the churchwardens gave a written permission to the plaintiff, the auctioneer, to occupy the pew, but he was not regularly seated in it: held, that having no legal possessory title, he could not maintain a suit for perturbation by a parishioner who claimed to sit in it as a vacant pew. *Blake* v. *Usborne*, 3 Hagg. 726.

Where a pew in a chancel, claimed in right of a messuage, was shown to have been erected on the site of old open seats, in 1773, and no evidence was given of any faculty, or of search at the proper places; held, that the Judge rightly directed the jury, that the evidence of the former open state of the seats destroyed the prescription, and left it to them to say whether upon the evidence merely of long undisturbed possession any faculty existed; and a new trial was refused. *Morgan* v. *Curtis*, 3 M. & Ry. 389.

Proceedings may be at law for disturbance of a pew, *if appurtenant* to a house; and action on the case, not trespass, is the proper form of action. See *Devonshire's Case*, 36 Eliz. cited *Dauntree* v. *Dee*, Palmer, 46. For the plaintiff has not exclusive possession, the possession of the church being in the parson. *Stocks* v.

Proof of the right.

Such a right to a pew or seat (*g*), either in an aisle or in the body of the

Booth, 1 T. R. 430; 5 T. R. 296. Or rather he has no possession, but only a privilege to sit therein. Per Holroyd, J., *Harper* v. *Charlesworth*,, MS. K.B. Banc. Sittings after T. T. 1825; and per Lord Tenterden, in no case has a person a right to a pew analogous to the right which he has to his house or land; for trespass would lie for injury to the latter, but for intrusion into the former the remedy is undoubtedly by action on the case. That furnishes strong reason for thinking that the action is maintainable only on the ground of the pew being annexed to the house as an easement, because an action on the case is the proper form of remedy for the disturbance of the enjoyment of any easement annexed to land, as in the cases of a right of way or stream of water. *Mainwaring* v. *Giles*, 5 B. & A. 361.

By the general law, and of common right, the use of all the pews in the body of the parish church is the common property of the parish. See Gibs. 197. They are for the use in common of the parishioners, who are all entitled to be seated orderly and conveniently, so as best to provide for the accommodation of all. The disposal and distribution of seats rests with the churchwardens, but only as the officers, and subject to the control and correction of the ordinary. *Fuller* v. *Lane*, 2 Add. R. 425. *Kenrick* v. *Taylor*, 1 Wils. 326; per Lord Coke, Brownl. & Goldsb. R. 45, and *infra*. Neither the minister nor the vestry have any right whatever to interfere with the churchwardens in seating and arranging the parishioners. Per Sir J. Nicholl, 2 Add. R. 425; and see *Tattersall* v. *Knight*, 1 Phil. R. 233, 234. 323; 3 Phil. R. 515. In some places usage has vested the power of disposing of seats in churchwardens and vestry; and in others, in a particular number of the parishioners, exclusive of the ordinary. Gibs. 198; 2 Roll. R. 24; 2 Roll. Ab. 288; 1 Hagg. C. R. 203. But the bare fact that the ordinary has not acted, will not so vest the right, for no occasion for his intermeddling might have previously arisen. *Presgrave* v. *Churchwardens of Shrewsbury*, 1 Salk. 167. And a custom for churchwardens to place and displace persons in their pews is bad. 2 Roll. R. 24. Subject to faculties and prescriptive rights, it is the duty of churchwardens to look to the general accommodation of the parish, consulting as far as may be that of all its inhabitants; the latter have a claim on the ordinary to be seated according to their rank and degree. Year Book, 8 Hen. 7, 12, a.; Bro. Abr. tit. *Chattels*, p. 11; 2 Add. R. 425.

A seating by churchwardens does not give a permanent and exclusive right, like a faculty, but is liable to alterations as the circumstances of a parish may require. When church-room is abundant and population thin, persons of large property and large families may have large pews allotted to them, which may afterwards be taken away or diminished if their families become reduced in number, and from increase of population church-room becomes more wanted. Per Sir J. Nicholl, *Parham* v. *Templar*, 3 Add. R. 523.

Pews may be altered in trifling matters without a faculty, unless any prescriptive right is infringed, the church disfigured, the parishioners incommoded, or made liable to additional rates. Ibid. 527; 1 Hagg. C. R. 195.

A person in possession of a pew, whether under actual seating by or acquiescence of former churchwardens, is in fairness entitled to a preference; and *quære* whether a possessory title by allotment of former churchwardens can be altered by them alone, though it may be by the ordinary. 1 Hagg. C. R. 194, 195.

In like manner as by the general law there can be no permanent property in pews (*Hawkins* v. *Compeigne*, 3 Phil. R. 11), the occupancy of pews may from time to time be well detached from that of particular houses, as vacancies occur by deaths, leaving the parish, &c., so as best to provide for the general interest of the parishioners by preventing the growth of prescriptive rights to pews. 2 Add. R. 438. *Wyllie* v. *Mott*, 1 Hagg. R. Arches, 41. Yet if a house has always had a particular pew, it may be a fair ground for churchwardens as their own act to place the new proprietor there. Per Lord Stowell, *Turner* v. *Giraud*, 3 Phill. R. 533.

Pews cannot be sold or let, mediately or immediately, by the ordinary or churchwardens; nor will any custom or consideration legalize such a transaction. *Kensington* v. *Tryer*, *Stevens* v. *Woodhouse*, 1 Hagg. C. R. 318. *Walter* v. *Gunner*, Ib. 317, 318. Nor can even the owner of a house with a pew appurtenant let the pew to a person not a parishioner; "it is an

(*g*) As a seat in a church may be prescribed for, so may priority in a seat, and case or prohibition lies for disturbing it. *Carlton* v. *Hutton*, Noy, 78; Latch. 116; Palm. 424. The right to sit in a pew may be apportioned; and therefore, where by a faculty reciting "that *A*. had applied to have a pew appropriated to him in the parish church in respect of his said dwelling-house," a pew was granted to him and his family for ever, and the owners and occupiers of the said dwelling-house, and the dwelling-house was afterwards subdivided into two; held that the occupier of one of the two (constituting a very small part of the original messuage) had some right to the pew, and in virtue thereof might maintain an action against a wrong-doer. *Harris* v. *Drewe*, 2 B. & Ad. 164.

church, may be claimed by faculty or prescription (*h*); the proof is either direct by evidence of a faculty, or indirect, where it consists principally in showing long continued enjoyment of a pew, and repairs done, and other acts of ownership exercised, by the occupiers of the particular messuage in respect of which the right is claimed from which a faculty or prescriptive title may be inferred. Proof of the right.

A lord of a manor or owner of a messuage may prescribe for an aisle in a church (*i*), or he may claim the right by a faculty to hold the same in respect Presumptive evidence.

abuse which cannot be maintained, for use cannot be made of pews as of villas or other common property." Per Lord Stowell, 1 Hagg. C. R. 321, cited 5 B. & C. 20. See 2 Add. R. 427, 8. But if a house to which a pew is appurtenant is let, the tenant as a parishioner is clearly entitled to the pew. 2 Add. R. 428.

In *Dawtree* v. *Dee* (Palm. 46; 2 Roll. R. 140), it is said, if the pew itself which the party has put up be broken, trespass lies, by case cited; a position relied on by the Court of C. P. in *Spooner* v. *Brewster*, 3 Bing. R. 136, who there held trespass to be the remedy for the erasing an inscription on a tombstone, as an act distinct from its removal.

A bill will not lie to be quieted in possession of a pew, though plaintiff had a decree before the ordinary for it; for the Court cannot examine whether the bishop has done right, nor will his decree bind his successors. *Baker* v. *Child*, 2 Vern. 226.

See further on this subject, Dr. Prideaux's Directions to Churchwardens, edited by Mr. Tyrwhitt, in which the cases on the subject are collected.

(*h*) Title to a pew otherwise than by allotment or acquiescence of churchwardens or ordinary, is either by prescription as appurtenant to a house, in respect to the inhabitants thereof (Co. Lit. 121, a.) which supposes a lost faculty (1 T. R. 431), or a faculty from the ordinary. Ibid. 428. *Wyllie* v. *Mott*, 1 Hagg. Arches, 28. And the house need not be laid to be an ancient house. *Dawney* v. *Dee*, Cro. Jac. 606; Palm. R. 46, S. C. For it shall be intended that, at the consecration of the church, the patron or founder resigned the seats in the body of the church to the disposal of the ordinary; but such seats as are specially shown to be reserved by the patron on the foundation of a church, or by the original proprietors of a chapel, seem an exception. *Freem* v. *Dane*, Skinn. 34. *Lousley* v. *Hayward*, 1 Y. & J. 583. *Ripley* v. *Waterworth*, 7 Ves. jun. 428. And perhaps the incumbent's pew in the chancel. *Hall* v. *Ellis*, Noy's R. 133. There can be no gift of a pew without a faculty. 1 T. R. 432. 433; 5 T. R. 298. *Bryan* v. *Whistler*, 8 B. & C. 293. *Tattersall* v. *Knight*, 1 Phill. R. 237. But a faculty appurtenant to a messuage may be transferred with it. 1 T. R. 431; and see *Yard* v. *Ford*, 2 Saund. 175. And if a house to which a pew is appurtenant is (*qu.*) built, the tenant is entitled to the pew. 2 Add. R. 428. It seems there may be a faculty for exchanging a pew immemorially appurtenant to a house, for another. 1 T. R. 431. A seat in a church must be claimed as appurtenant to a house, in respect of inhabitancy of the house; it cannot be claimed in respect of land, though situate within the parish. *Pettman* v. *Bridger*, 1 Phill. 325; 3 Add. 6; Co. Litt. 121, a. b.; Wood's Ins. B. 1. c. 7. *Brabin and Tradum's Case*, Poph. 140; 2 Roll. Abr. 287. 289; Godolph. c. 12, s. 4. Faculties are usually granted for as long as the parties continue to be inhabitants of the parish; to which is sometimes added, "and occupiers of the messuages stated." 1 Add. R. 426; 1 Phill. 237. As a seat in a church may be prescribed for, so may priority in a seat, and case or prohibition lies for disturbing it. 1 Hagg. C. R. 212. *Carlton* v. *Hutton*, Noy, 78; Latch. 116, S. C.; Palm. 424; *Corven* v. *Pym*, 12 Coke, 105; 3 Inst. 302, S. C. reported by different names in Godb. 199, and Moor, 873. *Gibson* v. *Wright*, Noy's R. 104. 108. *Dawtree* v. *Dee*, Palm. R. 46; Cro. Jac. 604; 2 Roll. R. 639, S. C.; 2 Roll. Ab. 288, l. 10. *Boothby* v. *Bailey*, Hob. 69; Gibs. 197. *Shambrook* v. *Fettiplace*, 2 Mod. 283; 2 Add. R. 427.

(*i*) The aisles, lesser chancels, chapel and choirs occurring in ancient churches, are recognized in law as minor parts or adjuncts of them, differing in origin or properties from the nave or body. The site of an aisle may not originally have been the property of the church, but of the party who built the aisle; 1 Lev. 71; or may have been conveyed to him in fee, by the parson, patron or ordinary, before the restraining statutes of Elizabeth; 2 Roll. Abr. 288; 1 Inst. 44; unless it was part of the public chancel, which could at no time be alienated by the lay or clerical impropriator. *Clifford* v. *Wicks*, 1 B. & A. 498. An aisle, or a chapel adjoining a church, which has, time out of mind, belonged to a particular house, and been maintained and repaired by the owner thereof, is part of his freehold; nor can the ordinary dispose of or intermeddle with it, for the law presumes that it was built by his ancestors, or those whose estate he hath, and is thereupon particularly appropriated to their house. Gibs. 197; 1 Sid. 88; and per Lord Tenterden, 5 B. & A. 361. Thus the ordinary cannot order morning or

Presumptive evidence.

of his messuage within the parish, to hold the same to the use of himself and his family, and to bury their dead in such aisle, and to sit there for the hearing of divine service. So an inhabitant householder may prescribe in right of his messuage not only for a seat in the body of the church, or may make title to it by a faculty granted in respect of such messuage, but also for a seat in the chancel (*k*).

But it is contrary to ecclesiastical policy (in order to prevent the exclusion of inhabitant householders within the parish) that the right of a pew or seat should be enjoyed otherwise than in respect of the occupation of a messuage within the parish. And therefore a faculty cannot be granted for the enjoyment of a pew in respect of a messuage situate in another parish, although a man may prescribe in respect of a messuage situate in another parish: and for the same reason such a faculty cannot be granted to the owner of a messuage and his heirs (*l*).

evening prayer to be said in noblemen's chancels, but he may in the great chancel; Johns. 244; nor has he any power over seats in chapels annexed to the houses of noblemen, &c. 2 Roll. Ab. 288; and prohibition lies if he interfere. *Francis* v. *Ley*, Cro. Jac. 366. A seat in an aisle may be prescribed for by an inhabitant of another parish. Gibs. 198. 221. *Barrow* v. *Kean*, 1 Sid. 361; 2 Keb. 342, S. C.; for his ancestors may have built, and he bound to repair, the aisle. So a seat in an aisle may be claimed by an inhabitant as appurtenant to a house out of the parish. *Davis* v. *Wilts*, Forrest. 14. *Dawney* v. *Dee*, Cro. J. 604. Palmer's R. 46; 2 Roll. R. 139; S. C. observed on arguendo, 1 B. & A. 504. In actions on the case for disturbance resting on prescription for an aisle, it has been held that it need not be alleged or proved that the owners were accustomed to repair; for by common law the owners are not bound to repair aisles, and so need not show repair, or may have them for other reasons than repairing, as being founders or contributing to the building them. *Buxton* v. *Bateman*, 1 Keble, 370; T. Ray. 52; S. C. Gibs. 198. But this decision was after a verdict against a wrong-doer, and not against the ordinary. The rule was admitted to be otherwise in prohibition; S. C. 1 Keble, 370. It appears from the report of this case in 1 Sid. 88, that the claim was for a seat in a quire. A quire may belong to the claimant, and may be a place where his ancestors have sung requiems for their ancestors, Ibid.; and see Johns. Ecc. L. 243; 1 Burn's Eccl. Law, 8 ed. 363, a. Cancellus and Chorus are synonymous; for the body of the clergy sung, or at least rehearsed, the breviary in the (greater) chancel; Johns. 243. On the other hand, if an aisle be always repaired at the common charge of the parish, the constant sitting and burying there without using to repair, will not gain any peculiar property or pre-eminence therein, but the ordinary may from time *to time* appoint whom he pleases to sit there. Cro. Jac. 366.

(*k*) *Hall* v. *Ellis*, Noy's R. 123; 1 B. & A. 506. But the parson, whether appropriator or impropriator, as instituted rector of a parish, is entitled to the chief seat in the chancel, and this of common right in respect of his liability to repair it. Ib. So in some places, although the parson repairs the chancel, the vicar claims a prescriptive right of a seat for his family, and of giving leave to bury there, and a fee on such burial. Johns. 242. In London, the churchwardens repairing the chancel as well as the body of the church, equally dispose of the seats in both, subject to the authority of the ordinary. Gibs. 223, 224; 17 Vin. Ab. 491; Pl. 7.

(*l*) *Stocks* v. *Booth*, 1 T. R. 428. For his heirs may reside out of the parish. 1 Hagg. C. R. 321; 1 B. & A. 507; and the seat doth not belong to the person, but to the inhabitant while such. Gibs. 197. 221. *Brabin* v. *Tradum*, Poph. R. 140; 2 Roll. Abr. 287. *Langley* v. *Chute*, Sir T. Ray. 249; 1 T. R. 429. 432. Nor can a grant of a faculty to a non-parishioner to hold a pew or seat be supported. 2 Add. 427; 8 B. & C. 223; except by prescription. *Byerly* v. *Windus*, 5 B. & C. 21; 7 D. & R. 564, S. C. Thus in an action on the case for disturbance of a pew, it was held that a pew in the body of a church may be claimed as appurtenant to a house out of the parish, where the exercise of right was ancient, but its origin not shown, for the former owner of the house might have built or endowed the church, or some part of it, or the house, though not within the parish, according to its present bounds, might formerly have been within the ecclesiastical limits of the church *Lonsley* v. *Hayward*, Exch. 1 Y. & J. 583. But this, it may be observed, was an action against a wrong-doer, and not a claim against the ordinary; the separation of parishes must be for all purposes, and pews in aisles stand on broadly differing grounds. See 1 Phill. 328. Possession however is but presumptive evidence of the right, even as against a wrong-doer, although of 60 years' continuance, if a title by faculty or

For the same reason a pew appurtenant to a messuage cannot be severed by contract (*m*).

Proof of repairs.

The evidence in an action for the disturbance of a pew appurtenant to a messuage is different, where it is brought against a wrong-doer, from the evidence which is necessary when such an action is brought against the ordinary. As against a wrong-doer, proof of the undisturbed possession of the pew and of a messuage in the parish by the plaintiff, is sufficient (*n*) to warrant the inference of legal title. But in the second case, where the right is claimed against the ordinary, the plaintiff must, it is said, either prove the building of the pew, or that repairs, if any have been necessary, have

otherwise be negatived. *Stocks* v. *Booth*, 1 T. R. 428. *Davies* v. *Witts*, Forrest. 14. But undisputed possession, even for 36 years, where the pew is claimed as appurtenant to a messuage, was held good presumptive evidence of a faculty, though the church was rebuilt about 40 years before, and the churchwardens then seated the plaintiff in the pew, which had been previously open, for there are strong reasons against their act of giving possession as a new gift of the pew; viz. other persons' claim to it, and the want of a faculty; whereas the plaintiff claimed it by prescription, in right of his messuage, and probably got it in such right at the adjustment after rebuilding the church. *Rogers* v. *Brooks*, 1 T. R. 431, 432, note. So uninterrupted possession of a pew in the chancel of a church for 30 years, affords presumption of a prescriptive right to the pew, in an action against a wrong-doer. *Griffiths* v. *Matthews*, 5 T. R. 296; till rebutted by proof that prior to that time the pew had no existence, its site being occupied by an open seat occupied by several persons; and that it was not built at the expense of the then owner of the messuage to which it was claimed as appurtenant, but of another person. Ibid. Such presumption was also held to be rebutted (in a suit in the Ecclesiastical Court) by proof that the pew was built 100 years ago by the then occupier of the messuage, on a vacant space, by leave of the churchwardens. *Walter* v. *Gunner*, 1 Hagg. R. 314. 322. A decision in the Court of Delegates, respecting a pew, that it was not appurtenant to the messuage of *A.*, but that *B.* had no right to sit there, is not conclusive evidence against *A.*'s right, in an action against *B.* for disturbance, founded on *A.*'s possession for between 50 and 60 years since the pew had been built in right of a certain messuage. *Cross* v. *Salter*, 3 T. R. 639. In a similar action against a wrong-doer, an old entry in a vestry book, signed by the churchwardens, stating that the pew had been repaired by the owner of the messuage in respect of which the plaintiff claimed, *in consideration of his using it*, was admitted by Lord Ellenborough as evidence showing the reputation of the parish on the subject, and as an official act of the churchwardens within the scope of their authority. *Price* v. *Littlewood*, 3 Camp. 288.—The *best* evidence on which a faculty may be presumed against the ordinary, in either case, is, that the pew has been built and repaired time out of mind of living persons. The possession must be ancient, and going beyond memory; though the high legal memory does not apply to this subject. Per Lord Stowell, 1 Hagg. R. 322. The original building of a pew by the parish is strongly against such a presumption; nor is building and repairing conclusive evidence that a faculty was granted, for it may be explained by evidence of original permission by churchwardens to build it on a vacant space. Ibid. 1 Phill. 325; 2 Add. 422. Twenty years' adverse possession seems to bar the right to a pew. 1 Phill. 328.—If a man claiming title by prescription to an aisle, chancel, &c. as his freehold, or to a pew or seat in the body of the church, or in an aisle, &c. as appurtenant to a house in the parish, is disturbed therein by the parson, ordinary or churchwardens, by suit in spiritual court, he may have a prohibition, if he suggest as grounds for it, that he or those whose estate he hath, built, or time out of mind repaired, and therefore had the sole use of such aisle, or of such pew or suit; for the party has a right to a trial of the prescription in a temporal court. See 1 Burn's Ecc. Law, 8 edit. 366, 7. *Witcher* v. *Cheslam*, 1 Wils. 17. *Corven* v. *Pym*, 12 Rep. 105. *Jacob* v. *Dallon*, Ld. Ray. 755. *Boothby* v. *Bailey*, Hobart, 69. *Francis* v. *Lee*, Cro. Jac. 366. *Day* v. *Beddingfield*, Noy's R. 104. *Buxton* or *Butler* v. *Yateman*, 1 Sid. 89; 1 Lev. 71; Sir T. Ray. 52, S. C. *Crook* v. *Sampson*, 2 Keb. 92. *Brabin* v. *Tradam*, Poph. 140; 2 Roll. Ab. 287, 288.

(*m*) *Walter* v. *Gunner*, 1 Haggard, 314. And a covenant on the part of a tenant of a messuage, that he will not occupy it, in order that the lessor may let it severally, is illegal. Ib.

(*n*) *Ashley* v. *Freckleton*, 3 Lev. 73, cited 3 T. R. 640. *Bunton* v. *Bateman*, 1 Lev. 71; 1 Sid. 88. 201; 1 Keble, 370; Sir T. Ray. 52, S. C.

Proof of repairs.

been made at his expense; for the ordinary has *primâ facie* the disposal of the seats (*o*).

As the freehold in the body of the church is incumbent's, he may maintain his possession against any one who unlawfully erects a pew or seat there (*p*). And if a seat be illegally set up by a private person, and be pulled down, the materials belong to the minister, as having been affixed to his freehold (*q*).

POLICY OF INSURANCE.

Particulars of proof.

THE subject embraces, 1st, the effecting of the policy (*r*); 2dly, the interest in the ship or goods (*s*); 3dly, the inception of the risk, compliance with warranties, &c. (*t*); 4thly, the legality of the voyage, &c. (*u*); 5thly, the loss, adjustment, &c. (*x*); 6thly, the recovery of premium (*y*); 7thly, matters in defence of the action, fraud (*z*), breach of warranty (*a*), &c.; lastly, the competency of witnesses (*b*).

Policy, proof of.

1st. The Policy.—The policy must be produced properly stamped (*c*), and proved, either by evidence of the defendant's signature, or that of his agent; and in the latter case the authority of the agent must also be proved (*d*), either by the direct evidence of the agent, who is a competent witness for the purpose, or by proof of his hand-writing, and evidence that he is the general agent of the defendant for those purposes, or that he has been specially authorized in the particular instance. If a written authority has been given, it should be produced and proved (*e*). Proof of authority may also consist in showing that the defendant has, in other instances, recognized the authority of the agent to subscribe policies for him (*f*) by payment

(*o*) 3 Ins. 202. *Kenrick* v. *Taylor*, 1 Wils. R. 326. Per Lord Coke, Brownl. & Goldsb. 45. *Pettman* v. *Bridger*, 1 Phill. R. 316. 325. *Bradbury* v. *Burch*, Sir Thomas Jones, 3. *Fuller* v. *Lane*, 2 Add. R. 425. *Walter* v. *Gunner and another*, 1 Hagg. R. 322. And *semble*, repairs should be pleaded, and mere repairing for 30 or 40 years does not exclude the ordinary. 1 Hagg. R. 322. 1 Phill. R. 324. The lining and cushioning a pew is not a repair inconsistent with the property of the parishioners, who do not usually make such repairs. 1 Phill. R. 331. A man may relinquish his prescriptive title or faculty to a pew, by allowing the parish to repair or rebuild, unless there be a special agreement to the contrary. 1 Phil. R. 329.

(*p*) So a chapelwarden of a parochial chapelry, who enters the chapel and removes pews, is liable in trespass. *Jones* v. *Ellis*, 2 Y. & J. 265; and see 2 Roll. Ab. 337. *Gibson* v. *Wright*, Noy, 108; 10 H. 4. 9.

(*q*) Prideaux's Directions to Churchwardens, by Tyrwhitt, 126; Degge, pt. 1. c. 12; Bac. Ab. tit. *Churchwardens*, B. *Jarratt* v. *Steele*, 3 Phillm. 169, 170. 525.

(*r*) *Infra*, 866.

(*s*) *Infra*, 867.

(*t*) *Infra*, 873.

(*u*) *Infra*, 875.

(*x*) *Infra*, 876.

(*y*) *Infra*, 885.

(*z*) Ibid.

(*a*) *Infra*, 889.

(*b*) *Infra*, 893.

(*c*) See tit. STAMP.

(*d*) *Supra*, tit. AGENT. *Johnson* v. *Mason*, 1 Esp. C. 89. This proof, although essential if required, is in practice seldom called for. Where a policy has been effected by an agent of the plaintiff in the name of the plaintiff, the bringing the action is an adoption of the act of the agent. Per Abbott, L. C. J. *Roach* v. *Vaughan*, Guildhall sitt. after Trin. 1823. And see *Houghton* v. *Ewbank*, 4 Camp. 88. *Brocklebank* v. *Sugrue*, 5 C. & P. 21. *Courteen* v. *Towse*, 1 Camp. 43, *supra*, 42.

(*e*) *Supra*, 41. *Neale* v. *Irving*, 1 Esp. C. 61.

(*f*) *Supra*, 42. The authority to effect a policy may be presumed. A foreigner, after purchasing goods from *B.* at Bristol, directed his agent in London to effect an insurance, and *B.*, not knowing that he had done so, effected an insurance by instructions from his clerk, and it was held that the jury did right in presuming that the clerk had authority. *Barlow* v. *Leckie*, 4 Moore, 8. *Grant* v. *Hill*, 4 Taunt. 380. *Bell* v. *Jutting*, 1 Moore, 159.

of losses due upon such policies, or that he has admitted the making of the policy in the particular instance, as by paying money into court generally. Proof of subscription by an authorized agent will satisfy an allegation of signature by the defendant (*g*). Proof of the policy.

Where a material alteration has been made in a policy by consent of some of the underwriters, the plaintiff cannot recover against an underwriter who was ignorant of the alteration when it was made, although he afterwards assented to it (*h*).

Although, as has been seen, the technical terms of a policy may be interpreted according to their mercantile sense, yet the mere opinion of witnesses who have not had actual experience of the usage to that effect, is not admissible. Thus, where the terms were "at and from *L.* to *A.*, with liberty to cruize six weeks," it was held that witnesses who had never known a case so circumstanced could not be admitted to state their opinion that the clause warranted a cruizing of six weeks taken at intervals (*i*). Construction of the policy.

Proof of what passed at the time of effecting the policy is inadmissible (*k*).

And mercantile usage means the general usage of the whole trade in the place where the policy is effected, and not the particular usage of any more limited class of persons (*l*).

2dly. The plaintiff's *interest* in the subject-matter insured (*m*). Interest.

(*g*) *Nicholson* v. *Croft*, 2 Burr. 1188.

(*h*) *Campbell* v. *Christie*, 2 Starkie's C. 64. See the stat. 35 Geo. 3, c. 63, s. 13. A mere extension of the time of sailing does not render a new stamp necessary. (See *Kensington* v. *Inglis*, 8 East, 273. *Hubbard* v. *Jackson*, 4 Taunt. 169. *Ridsdale* v. *Sheddon*, 4 Camp. 107.) So a mistake may be rectified without a fresh stamp. (*Robinson* v. *Touray*, 1 M & S. 217. *Robinson* v. *Tobin*, 1 Starkie's C. 336.) But if the subject-matter of insurance be altered, a new stamp becomes requisite; as where an insurance on ship and goods is altered into an insurance on ship and outfit. (*Hill* v. *Patten*, 8 East, 373. *French* v. *Patten*, 9 East, 351; 1 Camp. 72.) Otherwise where the description only is altered, the subject-matter remaining the same (*Sawtell* v. *London*, 5 Taunt. 359; 1 Marsh, 99); where the insurance was altered by striking out the words "on ship," and inserting the words "on goods, as interest may appear," the assured having really no interest in the ship. Where a policy was executed in the printed form, without any specific subject of insurance being inserted in writing, and the subject-matter was afterwards added in writing, and subscribed by some of the underwriters only, it was held that the assured could not recover on the altered contract against the underwriters who had not signed the altered policy. *Langhorn* v. *Cologan*, 4 Taunt. 330. See Park on Insur. 7th edit. 46. *Forshaw* v. *Chabert*, 3 B. & B. 158.

(*i*) *Syers* v. *Bridge*, Doug. 509. *Supra*, tit. CUSTOM.—PAROL EVIDENCE. Lord Mansfield, in *Camden* v. *Cowley*, 1 W. Bl. 417, ruled, that insurance brokers and others might be examined as to the general understanding and opinion of persons conversant in the business, although they knew of no particular instance, in fact, on which such an opinion was founded.

(*k*) *Weston* v. *Eames*, 1 Taunt. 115.

(*l*) And therefore the usage amongst underwriters who frequent Lloyd's Coffee-house will not conclude persons who are not in the habit of resorting thither for the purpose of effecting insurances. *Gabay* v. *Lloyd*, 3 B. & C. 793. See *Palmer* v. *Blackburn*, 1 Bing. 63. *Supra*, tit. PAROL EVIDENCE.

(*m*) See the stat. 19 Geo. 2, c. 37, s. 1, which makes insurances on any *ships* belonging to his *Majesty*, or any of his *subjects*, or any goods laden or to be laden on board such ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer, void. The statute does not apply to foreign ships. *Thellusson* v. *Fletcher*, Doug. 301. *Nantes* v. *Thompson*, 2 East, 385. *Crauford* v. *Hunter*, 8 T. R. 13. Upon a policy for insurance of freight by the shipowner, it is immaterial whether he carries his own goods or those of another; the insurer of freight, to entitle himself to recover, must show, that but for the intervention of some of the perils insured against, some freight would have been earned by goods being actually shipped on board, or some contract for doing so. *Flint* v. *Flemyng*, 1 B. & Ad. 45. Goods sold to a bankrupt are stopped in transitu: the bankrupt, after such stoppage, has no property or insurable interest in the goods insured, and his assignees cannot support

Interest.

The same means of proving a title to a ship which existed previously to the passing of the Registry Acts still exist; the principal effect of those laws is to render further proof necessary in cases where the party relies on a title by transfer (*n*).

Ship.
Proof of interest.

The actual possession of a ship by the party in whom the interest is alleged to be, and acts of ownership by him, afford in this, as in other cases, presumptive evidence of title (*o*). Where the captain proved that he was appointed and employed by Robertson and Walker (in whom the interest was alleged to be), the proof was held to be sufficient, although it appeared upon cross-examination that the ownership was derived to those persons under a bill of sale, executed by the witness as the attorney of a former owner; and this evidence did not induce the necessity of documentary proof, their possession as owners being *primâ facie* evidence of ownership, and sufficient in the absence of contrary proof on the other side (*p*). And it was held that such further proof was not rendered necessary by the evidence of registers adduced on the part of the defendant, from which it appeared that the ship had been registered in the name of the witness as owner in the year 1799, which was previous to the time in question; also, that it had been registered in his name, as the owner, in the year 1802, which was subsequent to the time in question; these titles being perfectly consistent with a title in other persons in the mean time (*q*).

It is sometimes *necessary* to resort to the register, as where the party claims through a transfer under which he has not had actual possession; for then the bill of sale is a medium of proof essential to his title, and that will be of no effect unless the requisites of the Registry Acts have been complied with. It is a matter of prudence, although it may not be of strict necessity, to be prepared with such evidence wherever the possession has been of short duration, or is of an ambiguous character, and is likley to be encountered by contrary evidence.

Where title is claimed by transfer upon a sale, it is not only necessary to produce and prove the execution of the bill of sale, and also the possession of the vessel by the vendors in the usual way, but also to prove that the requisites of the Registry Acts (*r*) have been complied with.

the action against the underwriters. *Clay* v. *Harrison*, 10 B. & C. 99. Where the interest insured was described in the policy to be on bottomry, but it appeared from the terms of the bond that the money was payable within eight days after the arrival of the obligor in L., held that it was a fatal misdescription of the bond, the plaintiff's claim under it not depending on the risk of the voyage, but, according to the terms used, might be made whether the ship arrived or not. *Simonds* v. *Hodgson*, 6 Bing. 114; and 3 M. & P. 385. The word "interest," in the 14 Geo. 3, c. 48, s. 1, means pecuniary interest; held, therefore, that a policy effected by a father on the life of his son, not having any pecuniary interest in his life at the time of effecting it, was void. *Halford* v. *Kymer*, 10 B. & C. 724.

(*n*) *Infra*, note (*r*).

(*o*) Abbott's Law of Shipping, 72.

(*p*) *Robertson* v. *French*, 4 East, 130. And see *Thomas & others* v. *Foyle*, 5 Esp. C. 88. Abbott's L. S. 50, 5th edit.

(*q*) *Robertson* v. *French*, 4 East, 130. See Ld. Ellenborough's observations in the case of *Marsh* v. *Robinson*, 4 Esp. C. 99; in that case the plaintiff, having given such *primâ facie* evidence of ownership, the defendant proved that in 1792 the ship was registered in the name of *J. S.*, another person; and that it was registered in 1802 to the same person under a decree of the Court of Vice-Admiralty; and it was held that this evidence being consistent with the title of the plaintiff in the intermediate time, did not render further evidence of his title necessary. See also Abbott's L. S. 62, 5th edit. *Sutton* v. *Bush*, 2 Taunt. 302.

(*r*) By the stat. 4 G. 4, c. 41, all the former Registry Acts were repealed. By the 6 G. 4, c. 104, all the statutes relating to the customs, to the extent of 445 Acts and parts of Acts, were repealed; and the whole matter, including the registry of ships, comprised in 11 Acts, from c. 106 to c. 116, inclusive. By this Act, however, it was considered that the new Registry Act, 4 G. 4,

By the stat. 6 G. 4, c. 110, s. 43, every person shall, on reasonable request made to the collector of the customs, have inspection of all oaths and affidavits made by owners or proprietors, and of registers relative to any ship; and copies being proved to be true copies shall be receivable in any court of law.

Proof of interest in ship.—Registry Acts.

c. 41, was repealed; and a new Act, 6 G. 4, c. 110, was passed, which, with a few alterations, introduced by the stat. 7 G. 4, c. 48, 25, 26, 27, contains the present law. Abbott's L. S., 5th edit. 26, in which valuable work the important points of difference between the old and new provisions are pointed out, viz. that it is no longer necessary to recite the certificate of register in a *contract* for the sale of a ship; and that in a bill of sale, or other instrument intended to operate as a transfer of the property, it is sufficient to recite the principal contents of the certificate; and a provision is introduced with a view to prevent the effect of certain errors in the recital, sec. 36. That the indorsement is to be made by public officers, not by the party transferring, sec. 37. That a mortgagee or trustee for the payment of debts is not to be deemed an owner, sec. 45; nor his interest to be affected by the subsequent bankruptcy of the mortgagee or assignee, on the ground of reputed ownership, sec. 46. That the specific share of any part-owner, which is required to be one or more sixty-fourth parts, must be mentioned in the registry, except in the case of partners in trade, whose interest is to be considered as partnership property, sec. 32. That only 32 persons shall be entitled to be legal owners, or tenants in common, with a provision for the equitable title of minors, legatees, creditors, &c., with a provision also for joint-stock companies, sec. 33. That more extensive powers are given for a registry *de novo*.—By the stat. 6 Geo. 4, c. 110, s. 2, no vessel shall enjoy the privileges of a British ship until the owner shall have caused it to be registered, except as to certain vessels not exceeding thirty tons burthen, &c.—By sec. 3, the form of certificate of registry is provided; it is directed that an account of the shares of the owners shall be endorsed upon the certificate.—By sec. 31, when any ship shall, after registry, be sold, the same shall be transferred by bill of sale or other instrument in writing, containing a recital of the certificate of registry of such ship, or the principal contents, otherwise such transfer shall not be valid or effectual for any purpose whatsoever; provided that no bill of sale shall be void by reason of any error in such recital, or by the recital of any former certificate of registry, instead of the existing certificate, provided the identity of the ship be sufficiently proved thereby.—By sec. 37, no bill of sale shall be effectual until it shall have been produced to the comptroller or collector of the port where such vessel is registered, or to the comptroller or collector of such other port at which she is about to be registered *de novo*, or until such collector or comptroller shall have entered in the book of registry or intended registry, the name, residence and description of the vendor or mortgagor, or of each, if more than one, and the date of the bill of sale or other instrument, and the production of it; and if not to be registered *de novo*, the collector or comptroller of the port where such ship is registered, is required to indorse the said particulars of such bill of sale or other instrument, or the certificate of registry of the said ship, according to the form prescribed in the statute, and forthwith give notice to the commissioners of customs. And in case the collector or comptroller shall be directed so to do, and the bill of sale or other instrument shall be produced to him for that purpose, the said collector or comptroller is required to certify, by indorsement upon the said bill of sale or other instrument, that the particulars above recited have been so registered and indorsed. But such entry in the book of intended registry shall not be made until all the requisites of law for the immediate register of the ship or vessel in such book have been complied with, nor shall such entry be valid or certified on the bill of sale until the registry *de novo* of the ship or vessel shall have been duly made, and the certificate thereof granted; 6 G. 4, c. 110, s. 37, and 7 G. 4, c. 48, s. 26.—By sec. 3, after the particulars of the vessel to be transferred shall have been so entered in the book of registry, the said bill of sale or other instrument shall be valid and effectual to pass the property, against all except such purchasers and mortgagees who shall first procure the certificate to be indorsed as aforesaid.—By sec. 44, provision is made for registry *de novo* in certain cases where the instrument giving power to sell, or the bill of sale, cannot be produced, on security given to produce a legal power, or abide the claims of the absent owner.—Sec. 45 provides that in the case of a transfer by way of mortgage, the register shall state the fact, and the mortgagee shall not be deemed the owner except for the purpose of making the ship available as a security for the debt by way of sale, &c.—See also s. 46, as to the provisions in favour of a mortgagee, in case of the bankruptcy of owner.—A recital of the certificate of registry is not now necessary to the validity of an executory contract or transfer of property, as was required by the stat. 34 G. 3, c. 68, s. 14. Nor is an indorsement of such a contract on the certificate now required, as was held to be necessary under that statute. Abbott on Shipping, 5th edit. 50. *Mor-*

Proof of interest in ship.—Registry Acts.

The objects of the Registry Acts were aliene from those of evidence (*s*). A register is frequently essential to the communication of a title, and the want of it is in many instances conclusive to disprove a title, but in other respects the instrument is a mere private document, and it has no operation as evidence but that which it derives from the general principles of evidence. Proof of a registry of a ship in the name of one or more persons is no evidence for them to prove any interest in them (*t*), for it amounts to nothing more than their declarations (*u*).

In the case of *Pirie* v. *Anderson* (*x*), the register alone was produced, and was held to be insufficient to prove the ownership of the parties. It was not proved that the parties had made an affidavit for the purpose; but such further proof would not, as it seems, have varied the case, for the evidence would still have rested in the mere assertion (although upon oath) of the parties themselves. Neither is the register in itself evidence to charge a man as part-owner, without evidence that it was made by his authority, or that he afterwards assented to it and adopted it (*y*). But although a register be no evidence to *prove* a transfer by sale, it is frequently conclusive to *negative* a transfer by sale.

Where the interest was alleged to be in four, but two only were mentioned as owners in the register, it was held that the action could not be maintained, although in fact they were all partners in trade, and had paid jointly for the ship (*z*). Where the defendant, who was sued as part-owner, for repairs done to a ship, relied on a previous transfer of his share, and proved a bill of sale of that share to a third person, in which it appeared that the certificate was not truly recited, it was held that no interest passed, and that the defendant was still liable (*a*).

timer v. *Fleming*, 4 B. & C. 120. By the present Act, it is sufficient to recite in a bill of sale the principal contents of the certificate of registry, in order to prevent the inconvenience which resulted from mistakes in the recital. *Westerdell* v. *Dale*, 7 T. R. 306. But under the former Acts, a mistake apparent on the face of the instrument was held not to vitiate it. *Rolleston* v. *Smith*, 4 T. R. 461. Under the former Acts, questions frequently arose as to the time when a bill of sale should take effect, to the exclusion of intermediate acts and consequences. Abbott's L. S. 51. *Moss* v. *Charnock*, 2 East, 399. *Moss* v. *Mills*, 5 East, 144. *Heath* v. *Hubbard*, 4 East, 110. *Richardson* v. *Campbell*, 5 B. & A. 196. *Hodgson* v. *Brown*, 2 B. & A. 427. *Palmer* v. *Moxon*, 2 M. & S. 43. The indorsement is now to be made not by the party but by a public officer.

(*s*) The general object of the provisions thus briefly alluded to, was to restrict the commercial privileges formerly enjoyed by British owners of ships, wherever built, to British owners of ships built within the dominions of his Majesty.

(*t*) *Pirie* v. *Anderson*, 4 Taunt. 652. The affidavit on which the registry was made was not produced; the register purported to have been made on the oaths of the parties in whom the interest was alleged to be. On the objection being taken, evidence was adduced that *Cornfoot* was one of those persons, and being also master, had given instructions for preparing the bond in the names of those three persons.

(*u*) Ibid. And in *Flower* v. *Young*, 3 Camp. 240, the register was held to be no evidence for the defendant, in an action for stores supplied for the use of a ship, in order to prove a plea in abatement for the non-joinder of co-defendants, in order to show that those others were part-owners.

(*x*) 4 Taunt. 652.

(*y*) *Tinkler* v. *Walpole*, 14 East, 226. The defendant was charged as part-owner of the Walpole East Indiaman, for stores supplied to the ship. The plaintiffs proved the execution of a bill of sale to the defendant, by the assignees of a bankrupt, of a share of the ship, and a register, purporting to be made on the oath of a third person, that he and others, including the defendant, were the owners. See also *MacIver* v. *Humble*, 16 East, 169. Abbott's L. S., 65, 5th edit.

(*z*) *Camden* v. *Anderson*, 5 T. R. 709.

(*a*) *Westerdell* v. *Dale*, 7 T. R. 306. On the other hand, the evidence of a registry properly effected is conclusive. See *Dowson* v. *Leake*, 1 D. & R. 52., where it was held that a joint-owner of a ship, who had parted with his interest to the other joint-owner, but where the ship continued to be registered in their joint names as a collateral security, was liable for repairs, although he never interfered in the concerns

Where a ship was purchased in a foreign country, a copy of a bill of sale, issued by a public officer, authorized by law to authenticate the original, and to make copies, was admitted as evidence of the fact (*b*).

Interest in goods.

Where the interest is in goods, it may be proved by evidence of possession of the goods by the assured, or his agent, and by acts of dominion and ownership.

The ownership is also evidenced by bills of sale, bills of parcels, bills of lading, custom-house clearances, &c.; and such documentary evidence of this nature as can be procured ought to be produced in proof of the interest as alleged.

Where goods have been ordered by the assured, a delivery to an agent, or on board a ship, according to the directions of the latter, is a delivery to him (*c*).

The production of a bill of parcels from the seller abroad, with the receipt to it, and proof of his handwriting, has been held to be sufficient proof of the interest of the assured (*d*).

Where a cargo has been consigned to the assured, the production of the bill of lading (*e*), with the testimony of the master that he received the goods on board, is sufficient evidence of interest (*f*); but if the master be not called, it is necessary to prove that the goods specified in the bill of lading were received on board. Where the master is dead, the proof of his signature to a bill of lading, for the delivery of goods to the consignee is evidence of an insurable interest of the latter in the goods (*g*). Where in such a case the master, who had signed the bill, had made a memorandum upon it, that the contents of the boxes on board were unknown, it was held that the document did not prove an interest in the consignee (*h*). The nature of a bill of lading, and its legal operation in transferring property, has already been adverted to (*i*). If the bill direct a delivery to the consignee or his assigns, or to order or asssigns, and be indorsed specially to a third person by name, or be indorsed generally, and be delivered to a third person, the property passes to the indorser or holder (*k*). And where the delivery is to be made to a consignee by name, the property is conveyed by a *bonâ fide* indorsement and delivery of the bill of lading by that consignee, where it is intended so to operate, in the same manner as by a direct delivery of the goods themselves (*l*). So an indorsement of the bill of lading,

of the vessel. Owners are liable for such repairs as a prudent owner would deem to be necessary. *Webster* v. *Seekamp*, 4 B. & A. 352.

(*b*) *Woodward* v. *Larking*, 3 Esp. C. 286.

(*c*) *Supra*, tit. Bill of Lading.

(*d*) *Russel* v. *Bochm*, Str. 1127.

(*e*) Vide *supra*, tit. Bill of Lading. By the stat. 5 G. 4, c. 94, s. 2, any person entrusted with and in possession of any bill of lading, or warrant or order for the delivery of goods, shall be deemed and taken to be the true owner of the goods, or any deposit or pledge, provided there be no notice by the documents themselves, that the person intrusted as aforesaid was not the real owner. Bills of lading for goods carried coastwise require no stamp. (*Scotland* v. *Wilson*, 5 Taunt. 533). Vide *infra*, tit. Stamp.

(*f*) Per Ld. Kenyon, *M'Andrew* v. *Bell*, 1 Esp. C. 373.

(*g*) *Haddow* v. *Parry*, 3 Taunt. 305; *supra*, tit. Bill of Lading.

(*h*) *Haddow* v. *Parry*, 3 Taunt. 303.

(*i*) See Abbott's Law of Shipping, 392, where the nature and effect of these instruments is described. See also above, tit. Bill of Lading.

(*k*) *Supra*, tit. Bill of Lading. The property passes, by the indorsement and delivery of the bill of lading by the consignee, for a valuable consideration and without collusion, although the indorsee knew that the consignor had taken the consignee's acceptances, not yet due, in payment. *Cumming* v. *Brown*, 9 East, 506.

(*l*) Per Ld. Ellenborough in *Newsom* v. *Thornton*, 6 East, 41, as where a factor is entrusted to sell goods shipped by him,

Interest in goods.

and delivery of it by a factor entrusted to sell the goods, to a third person, to whom he has sold them, conveys the interest to the latter (*m*). Where the interest has vested by an indorsement and delivery of the bill of lading, the indorsement must be proved.

The shipment of particular goods on board the ship may be proved by the master or any other person acquainted with the fact of delivery.

A bill of lading, signed by a deceased master of a ship, is evidence to prove the shipment of the goods specified in the bill of lading, as well as the interest of the consignee (*n*). A copy of an official report of the cargo of a ship, made under legislative authority by an officer of the customs, in whose custody the original is lodged, is, it seems, evidence to prove the shipment of the goods which it specifies (*o*).

In an action on a policy on freight, the assured must shew that some freight would have been earned, either by proving goods to have been put on board, or some contract of freight (*p*).

Variance.

A variance in the proof of the interest from the averment will be fatal. It is material that a disclosure of the true interest meant to be covered by the policy should be made, not only in order to apprize the underwriter *whose case* he is to meet (*q*), but as a matter of public policy and convenience (*r*). Thus joint owners who have insured for their joint use, and on *their joint account*, cannot recover on a count in the policy, alleging the interest to be in one only (*s*).

But it is sufficient to show that the party was interested when the risk commenced, although he was not interested when the policy was effected (*t*).

Where a policy, in the usual form, alleged the interest to be in *Schroeder*, who was interested at the time, it was held to be sufficient to prove an adoption of the policy by *Schroeder*, by a letter by him to the plaintiff, who had effected the insurance, written after the loss (*u*).

which by the bill of lading are to be delivered to order, or to assigns, and the factor indorses the bill of lading and delivers it to a third person.

(*m*) 6 East, 41. *Wright* v. *Campbell*, 4 Burr. 2047. By the late stat. 6 Geo. 4, c. 94, s. 2, one entrusted with a bill of lading is competent to transfer the property to which it relates, either by way of sale or deposit, provided the party to whom it is conveyed have no knowledge, by the document or otherwise, that he is not the actual and *bonâ fide* holder. See *Fletcher* v. *Heath*, 7 B. & C. 517.

(*n*) *Haddow* v. *Parry*, 3 Taunt, 305. Vide *supra*, tit. BILL OF LADING.

(*o*) *Johnson* v. *Ward*, 6 Esp. C. 47, 8.

(*p*) *Flint* v. *Fleming*, 1 B. & Ad. 48.

(*q*) In this, as in other actions on contracts, it is essential that the names of the contracting parties should be disclosed by the declaration, in order to apprize the defendant whose case he is to meet, what admissions or declarations he may give in evidence, and in order that he may be enabled to object to a party's giving evidence as a witness against him, or sitting upon the jury. See 5 Taunt. 108.

(*r*) Per Lord Ellenborough, in giving judgment in *Bell* v. *Ansley*, 16 East, 141. And see the observations there made on the case of *Page* v. *Fry*, 2 B. & P. 240, where the objection was that *A.* and *B.* the purchasers of goods, admitted *C.* to a share in the concern; and the case was argued on the mere question, whether *A.* and *B.* were properly averred to be interested, without reference to the averment that the policy was made for their use and on their account. See the case of *Hiscox* v. *Barrett*, cor. Lee, C. J. Guildhall, Dec. 1747, cited 16 East, 142. See also *Cohen* v. *Hannam*, 5 Taunt. 101. *Caruthers* v. *Sheddon*, 6 Taunt. 14. *Perchard* v. *Whitmore*, 2 B. & P. 155, n.

(*s*) *Bell* v. *Ansley*, 16 East, 141.

(*t*) *Rhind* v. *Wilkinson*, 2 Taunt. 237; 6 Taunt. 465.

(*u*) *Hagedorn* v. *Oliverson*, 2 M. & S. 485. And see *Lucena* v. *Crawfurd*, 2 N. R. 269. *Routh* v. *Thompson*, 13 East, 274. And the stat. 28 Geo. 3, c. 56, which requires persons effecting insurances to insert in the policy the name either of the consignor or consignee, or of the person who shall receive, or of the person who shall give, the order for such insurance.

Inception of risk.

3dly. Where the insurance is on a particular voyage, it is necessary to prove an inception of the identical voyage (*x*). This may be done by the testimony of the master or other officer acquainted with the circumstances, or where the ship and crew have been lost, by means of written directions, or copies of them, transmitted to the master, by acts done by him, licenses, charter-parties, entries, clearances, convoy-bonds, &c. preparatory to the departure of the vessel, and which indicate her destination (*y*).

Intention. Issuable.

If a ship insured for one voyage sail upon another, the policy will be discharged, although the loss happen before the ship has reached the dividing point (*z*). An insurance was effected on a ship from Maryland to Cadiz. The ship was cleared for Falmouth, and a bond was given that all the enumerated goods should be landed in Britain, and all the other goods in the British dominions. An affidavit of the owner stated that the vessel was bound for Falmouth, the bills of lading were to Falmouth *and* a market. The place were the vessel was captured was in the course from Maryland to Cadiz and Falmouth. Lord Mansfield informed the jury, that if they were of opinion that the voyage intended was to Cadiz, they ought to find for the plaintiff, otherwise for the defendant. The jury found for the defendant, and the Court held that the verdict was well founded. It is otherwise where the ship sails on the intended voyage, and a deviation is *afterwards* intended, which is not carried into effect (*a*). And where the *termini* of the intended voyage are the same with those described in the policy, although an intermediate voyage is contemplated, the voyage is to be considered as the same until the deviation be actually commenced (*b*).

Where the insurance was on a ship at and from Portsmouth to Quebec, and the evidence was, that the ship was seen in Stokes Bay, going out with other ships for Spithead, and that she had not afterwards been heard of, it was held, that even if the loss had happened at Portsmouth, some evidence would have been necessary to show that she was at Portsmouth on the voyage insured, and that the loss having happened in the course of the voyage, evidence was necessary to show that she was in the course of the *insured* voyage (*c*); such an intention may be presumed from the particular destination specified in the charter-party (*d*), or from the convoy-bond executed at the Custom-house, on which the ship's destination is written, according to the usual course of office (*e*), although it does not appear that any official act has been done upon it (*f*), or from a license granted for the particular voyage (*g*).

(*x*) *Koster* v. *Innes*, Ry. & M. 336.

(*y*) See *Cohen* v. *Hinckly*, 2 Camp. 51. So proof of a convoy for a particular port, signed by the captain, with the other papers in evidence to the same point. Ib. So of a license for the port mentioned in the policy. *Marshall* v. *Parker*, 2 Camp. 69.

(*z*) *Wooldridge* v. *Boydell*, Doug. 16. See also *Marsden* v. *Reid*, 3 East, 572. In the latter case, Ld. Ellenborough is reported to have said, that the party who disputes the intention must show it by evidence; it seems, however, that in general the plaintiff is bound to show an inception of the voyage. Liberty to call at any of the Leeward Islands to discharge, exchange, or take on board all or any part of the cargo, without being deemed a deviation, does not warrant a calling there to obtain information as to the state of the market with reference to a new voyage. *Hammond* v. *Reid*, 4 B. & A. 72. See also *Solly* v. *Whitmore*, 5 B. & A. 45. *Rucker* v. *Allnutt*, 15 East, 278. *Langhorn* v. *Allnutt*, 4 Taunt. 511. *Warre* v. Miller, 4 B. & C. 538.

(*a*) *Foster* v. *Wilmer*, 2 Str. 1249. *Carter* v. *Royal Exchange Assurance Company*, cited Ibid.

(*b*) *Hare* v. *Travis*, 7 B. & C. 14. And see *Kewly* v. *Ryan*, 2 H. B. 343.

(*c*) *Cohen* v. *Hinekley*, 2 Camp. 51.

(*d*) Per Ld. Ellenborough, 2 Camp. 52. And see *Coster* v. *Innes*, 1 Ry. & M. 335.

(*e*) *Cohen* v. *Hinckley*, 2 Camp. 51.

(*f*) Ibid.

(*g*) *Marshall* v. *Parker*, 2 Camp. 69. And see *Twemlow* v. *Osmin*, 2 Camp. 85.

Inception of risk. Intention.

A policy on a ship at or from a place attaches during her stay and before she sails (*h*).

Where a deviation is justified on the ground of necessity, it must be shown that nothing more was done than the occasion required (*i*).

Sailing, &c.

A policy was effected on goods at and from Mogadore, &c., and the declaration averred that after the loading of the goods, the ship *set sail* on a day specified, with the goods on board, on her intended voyage, and that whilst the ship was in the course of her voyage, they were destroyed by perils of the seas. The truth was, that before the ship had received half her cargo on board, she was driven from her moorings by stress of weather, and lost, and the Court held that the averment was not proved; for the policy embracing losses *at Mogadore*, as well as those which might occur on the voyage, the two cases demanded very different consideration, and ought to be very differently alleged (*k*).

Warranty.

It is immaterial whether a warranty be written in the margin or in the body of the policy (*l*).

Where the ship is *warranted* to sail on a particular day, or before or after a particular day, the plaintiff must prove his compliance with the terms (*m*). In this, and in all other cases of warranty, the very object of the parties is to preclude all question whether the terms have been substantially complied with; they must be complied with *literally* (*n*). Where the policy was made on a ship, at and from Jamaica to London, warranted to sail on or before the 26th of July, and the declaration alleged that she would have sailed on that day if she had not been restrained by the orders and command of the governor of Jamaica, and detained beyond that day; it was held, that the warranty being absolute and express, must be complied with (*o*).

A sailing before the vessel has got her clearances, and is equipped for the voyage, is not within the warranty (*p*).

(*h*) *Palmer* v. *Marshall*, 8 Bing. 79. *Secus*, where the insurance is on *freight*, in which case the risk does not attach till the ship is at the place, in a condition to take in her cargo. *Williamson* v. *Innes*, Ib. 81 (*a*); 1 Mo. & R. 88.

(*i*) *Lavabre* v. *Walter*, Doug. 284. *Thompson* v. *Taylor*, 6 T. R. 483. *Horncastle* v. *Stuart*, 7 East, 400. *Bartlett* v. *Pentland*, 10 B. & C. 760.

(*k*) *Abitbol* v. *Bristow*, 6 Taunt. 464. Whilst the ship is on her voyage home, she must be fully rigged, victualled, manned and equipped, but whilst at Mogadore she need have no other men on board than such as are sufficient to prevent accidents.

(*l*) *Bean* v. *Stupart*, 1 Doug. 11. *De Hahn* v. *Hartley*, 1 T. R. 343. But a memorandum written on a separate piece of paper and inclosed in the policy, cannot be regarded as a warranty. *Pawson* v. *Barnevelt*, 1 Doug. 12. A warranty may be waived by a memorandum on the policy, without a new stamp. *Hubbard* v. *Jackson*, 4 Taunt. 174.

(*m*) See Park on Insurance, 483, *& sequent*, and the cases there cited. *Hore* v. *Whitmore*, Cowp. 784; 7 T. R. 710; 3 B. & P. 515. Upon a warranty to sail on or before a stated day, it was held to be intended that the ship should be on her voyage on that day, and therefore that the warranty was not complied with by the fact of her being ready to sail, and only prevented from stress of weather from unmooring. *Nelson* v. *Salvador*, 1 M. & M. C. 309.

(*n*) See the observations of Ld. Mansfield, C.J., and Ashurst and Buller, Js., in *De Hahn* v. *Hartley*, 1 T. R. 343; 2 Saund. 200, c. (*a*). *Pawson* v. *Watson*, Cowp. 785. And see *Weir* v. *Aberdeen*, 2 B. & A. 320.

(*o*) *Hore* v. *Whitmore*, Cowp. 784. A warranty to sail is satisfied by breaking ground and getting under weigh. *Moir* v. *Royal Exchange Assurance Company*, 3 M. & S. 461; 6 Taunt. 241. Unless the vessel be unmoored, the warranty to sail is not complied with. *Nelson* v. *Salvador*, M. & M. 309.

(*p*) *Ridsdale* v. *Newnham*, 3 M. & S. 456. Neither is a sailing without her crew on board, although the remainder are engaged and ready to sail. *Graham* v. *Barras*, 5 B. & Ad. 1011. See further, *Cochran* v. *Fisher*, 1 C. M. & R. 809. *Thelluson* v. *Ferguson*, 1 Doug. 361. *Bond* v. *Nutt*, Cowp. 601.

Where non-compliance with a warranty would have involved a breach of the law, performance was held to be presumable (*q*). Warranty.

The official letter of the commander of a convoy, or log book of a man of war, is admissible in evidence, to prove a compliance with a warranty in sailing with convoy (*r*). Official documents.

Evidence that the ship when she was free from danger carried a neutral flag, and that the captain addressed himself to the counsul of that nation in a foreign port, is *primâ facie* sufficient to prove that the vessel was neutral (*s*); and proof that at the time of capture the ship's papers were thrown overboard, is evidence to the contrary (*t*).

Where the declaration avers that the ship sailed after the making the policy, although it appear that in fact she sailed before, the variance will not be material (*u*).

4thly. Where a license is necessary (*v*) in order to legalize a voyage which would otherwise be illegal, such license should, if it be in existence, be produced and proved, and shown to apply to the voyage in question (*x*). And when a license is granted but upon condition, performance of the condition must be also proved (*y*). Legality. License.

(*q*) *Thornton* v. *Lane*, 4 Camp. 31.

(*r*) *Watson* v. *King*, 4 Camp. 275. *D'Israeli* v. *Jowett*, 1 Esp. C. 427.

(*s*) *Archangelo* v. *Thompson*, 2 Camp. 620. To prove the ship to be a Dane, the evidence was, that the captain, when at Trieste, addressed himself to the Danish consul there; that when he left that port he carried Danish colours, and that when he was brought into Venice he had still the same colours, with the French flag flying over them.

Best, Serjeant, contended that the acts of the captain were no evidence to show to what country the ship belonged. He might have various reasons for passing as a Dane, although he belonged to one of the belligerent powers. Therefore some documents should be produced, or some witness called, to prove that the warranty had been complied with.

Lord Ellenborough:—I think the acts of the captain are *primâ facie* evidence for the owner of the goods, to show to what nation the ship belonged. The circumstance of the ship carrying Danish colours when she was captured would have very little weight, as in the moment of danger any strange flag might be hoisted for the purpose of deception; but from the captain having carried Danish colours when he sailed securely from the port of Trieste, and having there addressed himself to the Danish consul, and conducted himself as the master of a Danish ship would have done, I conceive there is fair ground for the jury to infer that the ship really was Danish, according to the warranty.

(*t*) *Bernardo* v. *Motteux*, Doug. 575, per Buller, J.

(*u*) *Peppin* v. *Solomons*, 5 T. R. 496.

(*v*) At common law, a license to trade with an enemy could not be granted but under the great seal. See the stat. 48 G. 3, c. 126. By the st. 9 & 10 W. 3, s. 44, a monopoly in the East India trade is granted to the East India Company. And consequently, as a trading to that country in contravention of that Act is illegal, policies on ships engaged in such trading are void. *Camden* v. *Anderson*, 6 T. R. 723; 1 B. & P. 272. As it is illegal to trade to an enemy's country without the King's license, the law will not enforce a contract of assurance made in order to protect such a trade. *Potts* v. *Bell*, 8 T. R. 548. But the Crown, with a view to state policy and the advantage of the public, may license a trading with an enemy's country, which would otherwise be illegal, and such a trading being under the circumstances legal, it follows as a consequence that it may be protected, like any other legal interest, by a contract of assurance. *Uspariclia* v. *Noble*, 13 East, 332. Where the prohibition is founded merely on the law of a foreign state, the insurance will be valid, for one nation does not take notice of the revenue laws of another. *Planch* v. *Fletcher*, Doug. 250. An alien resident in an enemy's country, may enforce an insurance on goods to be delivered at a friendly or neutral port. *Bromley* v. *Hcseltine*, 1 Cowp. 75.

(*x*) *Barlow* v. *M'Intosh*, 12 East, 311.

(*y*) A condition that the merchant-exporter shall give security, is not satisfied by a security given by his vendee. *Camelo* v. *Brittan*, 1 B. & A. 184. A license by the Governor-general of India, for a "voyage from Calcutta in ballast to Canton, to take on board tea, and to deliver on shore at Calcutta, or on shore in and at any *intermediate* port or ports in the course of the said voyage;" held not to legalise a delivery at the Cape, for it is not an intermediate port within the meaning of the license nor intention of the company, nor in fact within the limits of the East India Company's charter, by which a license might

Legality. License.

Where the original is in existence, it ought to be produced, as being the best evidence. If it has been lost, after evidence of the loss, proof should be given of an examined copy of the order in the council-book, and of the license remaining in the secretary of state's office (*z*). Where a license granted under the king's sign manual has been lost, evidence should be given of an examined copy of it from the proper register (*a*).

Where a license, granted by the governor of a foreign colony, has been lost, parol evidence of its contents is admissible (*b*). Where a license to import certain specified articles had been burnt at the Custom-house, after proof that the Custom-house would not permit an entry to be made without an indorsement of the time of clearance upon it, in conformity with the order in council, it was presumed that such an indorsement had been made upon it (*c*). Where the insured vessel was warranted to carry a French license, it was held to be insufficient to show that the captain, before the ship sailed from Dantzic, received a document, purporting to be a French license, without showing that he received it from some person in authority under the French government; but proof that after the arrival of the vessel at Bordeaux she remained there a month after the inspection of the French license and other documents, by the officers of the French government, was held to afford *primâ facie* evidence that the document was genuine (*d*).

Where a license had been granted to *A.* and *B.* by name, for permitting vessels bearing any flag to import certain specified articles, it was held to be sufficient in proof to show that the license had been applied to the ship and voyage in question, without further connecting the plaintiff with *A.* and *B.* to whom the license had been granted (*e*).

Proof of loss.

5thly. Whether the *loss* proved satisfy the averment is of course a question for the Court. The proof must correspond in substance with the averments. An allegation that a ship was lost in the course of her voyage (*f*), is not supported by evidence that before her cargo was completed she was driven from her moorings by bad weather, and lost: for such an allegation, would tend to mislead an underwriter in making his inquiries as to the real state of the facts (*g*). But where it was averred that the ship sailed after the

have been granted. *Balston* v. *Bird*, 1 Knapp, 121.

(*z*) *Eyre* v. *Palsgrave*, 2 Camp. 605. *Rhind* v. *Wilkinson*, 2 Taunt. 237; that was under the stat. 48 Geo. 3, c. 126.

(*a*) *Rhind* v. *Wilkinson*, 2 Taunt. 237, as to licenses in time of war.

(*b*) *Kensington* v. *Inglis*, 8 East, 273.

(*c*) *Butler* v. *Allnutt*, 1 Starkie's C. 222.

(*d*) *Everth* v. *Tunno*, 1 Starkie's C. 508. On proof that goods which could not be exported without a license were entered for exportation at the Custom-house, it was presumed that a license had been obtained. See *Van Omeron* v. *Dowick*, 2 Camp. C. 44

(*e*) *Butler* v. *Allnutt*, 1 Starkie's C. 222. See *Robinson* v. *Morris*, 5 Taunt. 720.

(*f*) Policy on the ship until 24 hours after she had been moored in good safety at London, and upon the goods until the same were there discharged; the captain received orders to take her into the King's dock at Deptford, and on the 18th of February he arrived at the dock-gates, but was informed that no orders had been received to admit him, and that at all events the ship could not then be admitted on account of the ice in the river, &c.; she remained there at her moorings until the 25th, when the ice began to clear, and an order having been received for admitting her on the 21st, on the 27th she was cast off from her moorings, but by the breaking of a rope went on shore and was totally lost. Held that the place where she had laid could not be deemed her place of destination; and the jury having found that her remaining at her moorings from the 18th to the 27th arose from the state of the river, and no improper delay, the underwriters were liable for the loss. *Samuel* v. *R. Ex. Ass. Co.*, 8 B. & C. 119.

(*g*) *Abitbol* v. *Bristow*, 6 Taunt. 464.

Proof of loss.

making of the policy, when in fact she sailed before, the variance was held to be immaterial (*h*). It is a general rule that the loss must be a direct and immediate consequence of the peril insured against and averred upon the record, and not a remote consequence (*i*). Thus in the case of an insurance against the perils of the seas, every accident which happens by the violence of the wind or waves, by thunder and lightning, by driving against rocks, by the stranding of the ship, may be considered to be a loss within the meaning of the policy (*h*); but if a ship be driven by stress of weather on an enemy's coast, and be there captured, it is a loss by capture, and not by perils of the seas (*l*). To constitute a stranding (*m*), it is essential that the

(*h*) *Peppin* v. *Solomon*, 5 T. R. 496.

(*i*) 5 M. & S. 436, per Ld. Ellenborough. Park on Insurance, 97. 102. 262. An averment of seizure by enemies unknown is not supported by proof of a seizure by the government of the country, on the ground of illegal importation. *Matthie* v. *Potts*, 3 B. & P. 23. There are many subjects of insurance, such, for instance, as mercantile profits, which though they may by possibility be lost by other than the perils of the sea, yet if they be actually lost by such perils it is sufficient. *Truscott* v. *Christie*, 2 B. & B. 320: per Richardson, J. ib.; and per Lawrence, J., *Thompson* v. *Taylor*, 6 T. R. 483. A plaintiff may recover in respect of loss of passage-money, although at the time of the contract the alterations of the vessel for carrying the number of passengers had not been completed. *Truscott* v. *Christie*, 2 B. & B. 220. *Horncastle* v. *Stuart*, 7 East, 400.

(*k*) Park, 102. 1 Show. 323. Where a merchant ship was by mistake taken in tow by a British ship of war, and thereby exposed to a tempestuous sea, which injured goods on board her, it was held to be a loss by perils of the sea; but *semble*, it might have been alleged to be a loss by capture. *Hagedorn* v. *Whitmore*, 1 Starkie's C. 157. An underwriter is liable for a loss sustained *immediately* from the perils of the sea, but remotely from the negligence of the master and mariners. *Walker* v. *Maitland*, 5 B. & A. 171. And see *Busk* v. *Royal Exchange Assurance Company*, 2 B. & A. 73. So to a loss occasioned by one vessel running foul of another by misfortune, *Butler* v. *Fisher*, 3 Esp. C. 57; or by one ship being run down by another ship through gross negligence, *Smith* v. *Scott*, 4 Taunt. 126. So of a loss by the barratry of the master, *Heyman* v. *Parish*, 2 Camp. 149; so where the ship was stranded on a shoal within a few miles of the port of destination, and being unable to proceed, the goods were seized by the governor and confiscated, *Hahn* v. *Corbet*, 2 Bing. 205. And see *Bondrett* v. *Hentig*, Holt's C. 149. And see further *Fletcher* v. *Inglis*, 2 B. & A. 315; *Shore* v. *Bentall*, 7 B. & C. 798 (n.); *Phillips* v. *Headlam*, 2 B. & Ad. 380. Death of cattle by rolling of the ship is a loss by perils of the sea. *Lawrence* v. *Aberdein*, 5 B. & A. 107. If a ship be blown over on her side and be damaged whilst she is in the graving dock, the underwriter is liable, but it is not a loss by perils of the sea. *Phillips* v. *Barber*, 5 B. & A. 161. So the underwriter is liable in respect of loss in removing the goods from the ship to the place of landing, where it is done in the usual course of the voyage, although not mentioned in the policy. *Stewart* v. *Bell*, 5 B. & A. 238. The sale of part of a cargo for the purpose of making a refitment is not a loss by perils of the sea. *Powell* v. *Gudgeon*, 5 M. & S. 431. *Sarquy* v. *Hobson*, 2 B. & C. 7. See also *Mordy* v. *Jones*, 4 B. & C. 394; 4 Bing. 131. Where the ship was hoved on the beach to be capsized, and was bilged and damaged by the rising of the tide, it was held not to be a loss by perils of the seas. *Thompson* v. *Whitmore*, 3 Taunt. 227. Nor is the destruction of a ship by worms. *Rohl* v. *Parr*, 1 Esp. C. 445. Nor by one ship firing on another under a mistake that she is an enemy. *Cullen* v. *Butler*, 5 M. & S. 461. And see *De Vaux* v. *Salvador*, 4 Ad. & Ell. 420. In the case of the sale of a ship injured by the perils of the seas, it has been said that if the ship be so situated that she could not by any means which the captain could reasonably use be brought to retain the character of a ship, it is a total loss. See *Gardner* v. *Salvador*, 1 Mo. & M. 116. And see *Macburn* v. *Leckie*, Abbott on Shipp. 6. But the loss of a voyage will not make a constructive total loss: if the ship could have been brought to England, even in ballast, so as to have repaid the money expended in repairs, they ought to have been made by the captain. Per Lord Tenterden, in *Doyle* v. *Dallas*, 1 Mo. & R. 48; and he left it to the jury to say whether the captain exercised a sound judgment, as well for the benefit of the underwriters as for himself as owner, and did the best for all parties. And see *Sarquy* v. *Hobson*, 2 B. & C. 7; 4 Bing. 131, S. C.

(*l*) *Green* v. *Elmslie*, Peake's C. 212. And see *Hodgson* v. *Malcolm*, 2 N. R. 366.

(*m*) It is a stranding where the ship takes the ground, not in the course of navigation, but from some unforeseen accident. Per Bayley, J. in *Bishop* v. *Pentland*, 7 B. & C. 224. And see *Rayner* v.

Proof of loss.

ship striking upon a rock, &c. should have been stationary for some time (*n*). The taking ground to constitute a stranding, must have arisen from some unforeseen accident, and not in the ordinary course of navigation (*o*). But if the ship be fixed on a rock, even for a small space of time, as fifteen or twenty minutes, the stranding is complete, and the quantum of damage is not material (*p*). Proof that the ship was burnt in order to prevent her from falling into the hands of the enemy, is evidence of a loss by fire (*q*); so if it be proved that the ship was burnt by the negligence of the master and mariners (*r*). It is otherwise where goods take fire in consequence of having been put on board in an improper condition (*s*). An averment of loss by perils of the seas is not supported by proof that the vessel was sunk in consequence of being fired upon by another vessel under a mistake (*t*).

The stranding not of the ship itself but of a lighter conveying goods from the ship to the shore does not make the insurer liable (*u*).

Presumptive evidence.

Where a ship has sailed, and no intelligence has been received of her within a reasonable time afterwards, a presumption arises that she is lost (*x*). Where the insurance was on a voyage from North Carolina to London, with a warranty against captures and seizures, and the loss averred to be by sinking at sea, all the evidence was that she had sailed on her intended voyage, and had never since been heard of. Some witnesses proved that in such cases the presumption is that the ship has perished at sea, all other losses being usually heard of. It was insisted, for the defen-

Godmond, 5 B. & A. 225. *Carruthers* v. *Sydebotham*, 4 M. & S. 77. *Barrow* v. *Bell*, 4 B. & C. 736. *Wells* v. *Hopwood*, 2 B. & Ad. 21. Where the taking the ground is in the ordinary course of navigation, it is no stranding. See *Hearne* v. *Edmonds*, 1 B. & B. 388. Where on the ebbing of the tide a vessel took the ground in a tide harbour, in a place where it was intended she should lie, but in so doing struck against some hard substance, by which two holes were made in her bottom, it was held to be no stranding. *Kingsford* v. *Marshall*, 8 Bing. 458. Where there has been a stranding, the plaintiff is entitled to recover under the usual clause, free from average, &c. in respect of average losses, although the injury to the cargo does not result from the stranding. *Burnett* v. *Kensington*, 7 T. R. 210. *Harman* v. *Vaux*, 3 Camp. 429. Where the vessel arrived in a tide harbour, and was moored at high water alongside the quay; and in order to avoid grounding on a bank at low water, the stern being fastened to the quay, the head was hauled off by a rope carried to the opposite side of the harbour, and fastened; but by the wind blowing towards the bank causing a strain on the rope, her place was changed and she came to the ground, and received some damage; held (per Tenterden, L. C. J., and Littledale and Taunton, J. J., *contra* Parke, J.) to be a stranding. *Wells* v. *Hopwood*, 3 B. & Ad. 20. To bring the case within the stranding mentioned in the memorandum as to a partial loss, it must appear that the goods were on board at the time. Where goods putrified, and were sold before the *stranding*, it was held that this was not within the memorandum. *Roux* v. *Salvador*, 1 Bing. N. C. 526.

(*n*) *Baker* v. *Towry*, 1 Starkie's C. 436. *Macdougle* v. *Royal Exchange Assurance Company*, ibid. 130. Vide *etiam*, *Rayner* v. *Godmond*, 5 B. & A. 225. *Carruthers* v. *Sydebotham*, 4 M. & S. 77. *Hearne* v. *Edmunds*, 1 B. & B. 388.

(*o*) *Bishop* v. *Pentland*, 7 B. & C. 224. *Rayner* v. *Godmond*, 5 B. & A. 228. *Hearne* v. *Edmonds*, 1 B. & B. 388. *Carruthers* v. *Sydebotham*, 4 M. & S. 77.

(*p*) *Baker* v. *Towry*, 1 Starkie's C. 436. And see *Baring* v. *Huishall*, Mont. 240. *Barrow* v. *Bell*, 4 B. & C. 736. *Dobson* v. *Bolton*, Parke, 177. In *Houstman* v. *Thornton*, Holt's C. 242, a ship having sailed on a seven weeks' voyage, and not having been heard of for eight or nine months, was presumed to be lost.

(*q*) *Gordon* v. *Rimmington*, 1 Camp. 123.

(*r*) *Busk* v. *Royal Ex. Ass. Co.*, 2 B. & A. 72.

(*s*) *Boyd* v. *Dubois*, 3 Camp. 133.

(*t*) *Cullen* v. *Butler*, 1 Starkie's C. 138.

(*u*) *Hoffman* v. *Marshall*, 2 Bing. N. C. 383.

(*x*) Park, 105. *Tweedlow* v. *Oswin*, 2 Camp. C. 85. Although a report has prevailed that the ship has foundered, but that the crew were saved, it does not seem to be necessary that the mere owner (of goods at least) should have searched after the crew, especially where the vessel is foreign, and a considerable time has elapsed. *Koster* v. *Read*, 6 B. & C. 21. At all events, mere rumours are not entitled to any weight

dant, that as captures and seizures were excepted, it lay on the plaintiff to prove that the loss happened as averred; but Lee, C. J. said, that it would be unreasonable to expect certain evidence of such a loss, where all on board were presumed to be drowned, and the case was left to the jury, who found for the plaintiff (*y*). In such cases, it is proper to be provided with evidence of such collateral circumstances as tend to support the presumption, as, that other vessels which sailed at the same time did actually arrive (*z*), the usual length of the voyage, the difficulty of navigation, the prevalence of tempestuous weather, likely to occasion danger. Presumptive evidence.

The question of lost or not lost being one of fact, is of course for the consideration of the jury, no general rule having been laid down fixing any time after the sailing of the ship, at the expiration of which the assured is entitled to receive the amount of the loss from the underwriter (*a*); nor indeed would a very general rule be practicable, so much must depend upon the particular circumstances of each individual case (*b*). It seems that a shipping-entry at the Custom-house is evidence to show the time of the vessel's sailing (*c*).

A foreign sentence of condemnation (*d*) is not evidence to prove a capture, until a foundation has been laid for it by proof of a capture in fact; after such proof, the sentence is evidence to show the grounds of condemnation (*e*). The books at Lloyd's are not in themselves evidence of notice of the loss to the underwriter (*f*), where by the terms of the policy the loss is to be adjusted within a specified time after notice, but they supply such evidence of the fact of notice, as, coupled with other circumstances, may be sufficient to go to the jury (*g*). Loss. Capture.

Proof of a capture by collusion will sustain the allegation of a loss by capture, although it would also sustain an allegation of a loss by barratry (*h*). The plaintiff may recover in respect of a wrongful detention by a British ship of war (*i*). But an averment of loss by seizure in a hostile manner by enimies unknown is not supported by evidence of seizure, by order of a foreign government, as goods about to be illegally exported (*k*). Barratry.

Smuggling by the captain on his own account is evidence of barratry (*l*).

where it does not appear that intelligence has been received from persons capable of giving authentic information. *Koster* v. *Reed*, 6 B. & C. 21.

(*y*) *Green* v. *Brown*, Str. 1199. *Newby* v. *Read*, Sitt. after Mich. 3 Geo. 3, Bac. Ab. *Ev.* 661.

(*z*) *Newby* v. *Read*, Sittings after Mich. 3 Geo. 3; Park on Ins. 106.

(*a*) Park on Ins. 107.

(*b*) In Spain and France, however, rules have been laid down upon the subject. Park on Ins. 107.

(*c*) *Hughes* v. *Wilson*, 1 Starkie's C. 180.

(*d*) As to the proof of a foreign sentence, vide *supra*, Vol. I. tit. JUDGMENT.

(*e*) *Marshall* v. *Parker*, 2 Camp. 69.

(*f*) *Abel* v. *Potts*, 3 Esp. C. 242. It was said (Ib.) that they were evidence of the capture.

(*g*) Ibid; where, in addition, it was proved that the loss was publicly known; that the defendant was a *subscriber* to Lloyd's, and in the daily habit of examining the books, and the broker swore to his belief that the defendant had had notice.

(*h*) *Archangelo* v. *Thompson*, 2 Camp. 621.

(*i*) *Hagedorn* v. *Whitmore*, 1 Starkie's C. 159. And see *Robertson* v. *Ewer*, 1 T. R. 143; *Green* v. *Young*, 2 Ld. Ray. 840.

(*k*) *Matthie* v. *Potts*, 3 B. & P. 23. And where the policy is on the ship, loss from delay by detention in a foreign port, on process against the goods, cannot be recovered against an underwriter as a loss by caption and detention. *Bradford* v. *Levy*, 1 R. & M. 331.

(*l*) *Lockyer* v. *Offley*, 1 T. R. 252. But if through the gross negligence of the owner the mariners barratrously carry smuggled goods on board, the underwriters are not liable. *Pipon* v. *Cope*, 1 Camp. 434. Where prisoners of war rose and confined all the crew, and put them all on shore but one, who was heard on the deck in con-

Barratry.

Proof that the person who acted as master of the ship carried her out of her course for fraudulent purposes of his own, is *primâ facie* evidence of barratry, without negative proof that the person so acting as master was not the owner. It lies on the underwriter to prove, in his own discharge, that he was the owner (*m*).

But it must be proved that the captain acted against his better judgment, or fraudulently, for the act does not amount to barratry merely because it is against the interest of the owners, unless it be done with a criminal intent (*n*).

Loss, amount of.

Where the policy is an open one, it is incumbent on the plaintiff to prove the extent of his loss, and so he must in the case of a valued policy, where the loss is partial (*o*); but in the case of a valued policy, and total loss, proof of the extent of the loss is not necessary, for the very object of a valued policy is to supersede all disputes as to value. All that is necessary is to prove *some* interest, in order to show that the case is not within the st. 19 Geo. 2 (*p*).

In order to recover for a total instead of a partial loss, the plaintiff, when the property exists in specie, and there is a chance of its recovery, must prove his notice of abandonment to the defendant (*q*). Such notice will be insuffi-

versation with them, it was held to be evidence to go to a jury. *Hucks* v. *Thornton*, Holt's C. 40.

(*m*) *Ross* v. *Hunter*, 4 T. R. 33. Park on Ins. 154. Barratry may be committed by a general owner when the vessel is let to a freighter. *Vallejo* v. *Wheeler*, Cowp. 143. *Soares* v. *Thornton*, 1 Moore, 373.

(*n*) *Todd* v. *Ritchie*, 2 Starkie's C. 240. *Bottomley* v. *Borill*, 5 B. & C. 212. *Phyn* v. *Royal Ex. Ass. Co.*, 7 T. R. 508; and see *Everth* v. *Hannam*, 6 Taunt. 375.

(*o*) 2 Saunders, 201. Where in a valued policy the risk on the goods was to commence twenty-four hours after her arrival on the coast of Africa, where she was to load, and a total loss took place after a portion of the goods, not equal to the value put on the goods in the policy, had been put on board, it was held that the policy was open, and that the assured was entitled to recover only the estimated proportion of the value of the cargo put on board. *Beckman* v. *Carstairs*, 5 B. & Ad. 651.

(*p*) *Lewis* v. *Rucker*, 2 Burr. 1171. See also *Usher* v. *Noble*, 12 East, 646; *Forbes* v. *Aspinall*, 13 East, 326; *Marshall* v. *Parker*, 2 Camp. 69; *Shaw* v. *Felton*, 2 East, 109; *Feize* v. *Aguilar*, 3 Taunt. 507. If in such case the property were greatly overvalued, the policy would be void. *Haigh* v. *De la Cour*, 3 Camp. 319.

(*q*) *Thornley* v. *Hebron*, 2 B. & A. 513. *Tunno* v. *Edwards*, 12 East, 491. *Robertson* v. *Clarke*, 1 Bing. 448. *Cologan* v. *London Assurance Co.*, 5 M. & S. 447. *Marten* v. *Crokatt*, 14 East, 465. Park on Ins. 136. 228. An abandonment must be made before satisfaction can be demanded. Ibid. It must be total, not partial. Ibid. The insured may always elect not to abandon, but he cannot at his own option convert a partial into a total loss (2 Burr. 697); nor can he abandon unless, at one period or other of the voyage, there has been a total loss (*Cazalet* v. *St. Barbe*, 1 T. R. 187. *Farmaux* v. *Bradley*, Easter, 20 G. 1. Park on Ins. 257. *Da Costa* v. *Firth*, 4 Burr. 1966. *Anderson* v. *Wallis*, 2 M. & S. 240); that is, when the object of the insured is so far defeated by a peril in the policy that it is not worth his while to pursue it; or, if the salvage be very high, or amounting to one half (*semble*); or if further expense be necessary, and the insurer will not engage to pay that expense at all events, although it should exceed the value, or fail of success. 2 Burr. 1209; Park on Ins. 231. Where the expense of repairing would exceed her value when repaired, notice is unnecessary. *Cambridge* v. *Anderton*, 2 B. & C. 691. Where a vessel was placed in such danger by perils of the sea that the crew deserted her to save their lives, and a few days afterwards the vessel was found by fishermen, and towed into port, and the goods were so much injured that they would, if forwarded to the place of their destination, have been worth nothing, it was held that the owner was entitled to recover for a total loss. *Parry* v. *Aberdein*, 9 B. & C. 411. A mere loss of the adventure by retardation of the voyage, without loss of the thing insured, does not constitute total loss under a policy of insurance, by the aid and effect of an abandonment. *Naylor* v. *Taylor*, 9 B. & C. 718. *Doyle* v. *Dallas*, 1 Mood. & M. C. 46. And see *Bainbridge* v. *Neilson*, 10 East, 329; *Paterson* v. *Ritchie*, 4 M. & S. 393; and *Brotherston* v. *Barber*, 5 M. & S. 418. Where the ship in the utmost distress was deserted by the crew, but was afterwards found and

cient for the purpose of recovering a total instead of a partial loss, if it appear that the assured has not made his election, and given his notice of abandonment within a reasonable time after he has heard of the loss (*r*), or at the earliest opportunity after he has examined into the state of the cargo (*s*). Amount of loss.

Such notice must be positive and unconditional, and extend to the whole subject insured (*t*). It may be by parol, although, to prevent mistake, it had better be in writing (*u*). The acquiescence of the underwriter, for a considerable time after notice given, will be evidence of an acceptance of the notice (*x*).

One of several parties who have effected a joint insurance may give notice for all (*y*).

It is necessary to prove a total loss at some period of the voyage (*z*), or it must be shown, at least, that the object of the insured was so far defeated that it was not worth while to pursue it (*a*). A mere interruption of the adventure, short of its destruction, is not sufficient (*b*). Unless the underwriters have accepted notice of abandonment, the assured cannot recover as for a total loss, if it appear that, at the time of the action brought, the loss was but partial (*c*).

carried into a port, out of the course of her voyage, and detained there with her cargo many months for salvage, and the cargo (perishable goods) so much damaged as not to be worth sending to the place of destination if a ship could be found, and none was in fact found; the assured upon knowledge of the loss, and before intelligence of the subsequent facts arrived, abandoned; held, that it was to be deemed a total loss on the desertion of the crew, and not turned into a partial one by the subsequent events, which could be of no real benefit to the assured. *Parry* v. *Aberdein*, 9 B. & C. 411. And see *German* v. *Royal Ex. Ass. Co.*, 6 Taunt. 383; *Houldsworth* v. *Wise*, 7 B. & C. 794; *Anderson* v. *Wallis*, 2 M. & S. 240. In the case of *Roux* v. *Salvador*, 1 Bing. N. C. 539, where a cargo of hides having in consequence of a leak began to putrify, and were sold at an intermediate port for less than a fourth of their value, and it appeared that they could not have arrived at the end of their voyage *as hides*, it was held to be a constructive total loss, but that proof of abandonment was necessary. But in the Exchequer Chamber it was held (on error) that the assured were entitled to recover without an abandonment. If the jury find that the ship was so much damaged as not to be worth repairing, it is a total loss; the question whether the loss sustained was a partial or total loss is the same whether the policy be valued or open; the only difference is, that in the one case the assured must prove the value, in the other he need not. *Allen* v. *Sugrue*, 8 B. & C. 561. It appeared that the vessel was in a place where the repairs could have been done, and money obtained, although at an extravagant rate, and the captain sold the ship; upon the question of liability as for a total loss or not, held that it was properly left to the jury to say whether the expenditure was so great that no prudent man in the exercise of a sound judgment would hesitate as to the propriety of selling; if not, that then the captain was not compellable to incur it, and the sale by him was under a justifiable necessity. *Somes* v. *Sugrue*, 4 C. & P. 276.

(*r*) In order to put the underwriter in a situation to do all that is necessary for the preservation of the property, whether sold or unsold. *Mitchell* v. *Edie*, 1 T. R. 608. *Allwood* v. *Henckell*, Guildhall, after Mich. 1795; Park on Ins. 280.

(*s*) See *Read* v. *Bonham*, 3 B. & B. 147. *Barker* v. *Blakes*, 9 East, 283. *Aldridge* v. *Bell*, 1 Starkie's C. 498. In *Hunt* v. *Royal Ex. Ass.*, 5 M. & S. 47, five days was considered to be an unreasonable time. *Marten* v. *Crobatt*, 14 East, 465. *Gernon* v. *Royal Exchange Assurance*, 2 Marsh. 88. *Aldridge* v. *Bell*, 1 Starkie's C. 498. See *Reed* v. *Bonham*, 3 B. & B. 147. Sale of a ship at Calcutta, the captain arrived April 25th; the ship's papers arrived May 5th; and notice given on the 5th, without communication with the underwriters, was held to be sufficient.

(*t*) See *Parmeter* v. *Todhunter*, 1 Camp. C. 541. *Macmasters* v. *Shoolbred*, 1 Esp. C. 239.

(*u*) See the observations of Ld. Ellenborough in *Parmeter* v. *Todhunter*, 1 Camp. 541.

(*x*) *Hudson* v. *Harrison*, 3 B. & B. 97.

(*y*) *Hunt* v. *The Royal Exchange Assurance*, 5 M. & S. 47.

(*z*) *Cazalet* v. *St. Barbe*, 1 T. R. 187.

(*a*) *Hudson* v. *Harrison*, 3 B. & B. 97.

(*b*) *Hunt* v. *Royal Ex. Ass.*, 5 M. & S. 47. *Anderson* v. *Wallis*, 2 M. & S. 240.

(*c*) *Brotherston* v. *Barber*, 5 M. & S. 442. *Paterson* v. *Ritchie*, 4 M. & S. 393.

Amount of loss.

A payment into court of a per-centage on a valued policy, does not admit a total loss (*d*).

The plaintiff may recover for a partial, although he declare for a total, loss (*e*); but if he declare on a total loss by capture, and it appear that the ship was recaptured, he cannot recover the amount of the loss sustained by salvage, unless he prove the proceedings in the Admiralty Court under seal (*f*), for his claim depends upon the judgment of the Admiralty Court (*g*). But the amount of salvage may, it seems, be recovered, although it be not specifically alleged as a loss in the declaration (*h*).

If there be no evidence as to the amount of the loss, by which the jury can estimate the extent, the plaintiff will be entitled to nominal damages (*i*).

Adjustment.

An adjustment is proved by evidence of the signature of the underwriter, or his agent, with proof of the authority of the latter (*k*). It is, it seems, to be presumed, that an agent who has authority to subscribe a policy, has also authority to sign an adjustment of loss (*l*).

The legal operation and effect of an adjustment in evidence, seems, (although some contrariety of opinion has been expressed on the subject) (*m*), to depend upon settled and established principles. An adjustment is nothing more than a written admission of the amount of the loss as settled between the parties, and indorsed upon the policy, after which acknowledgment time is usually given (*n*) (which is sometimes stated in the indorsement accordingly) to the insurer to pay that amount. The effect there, as in other cases of admission, seems to be simply this, to relieve the plaintiff from proving his case in detail, and to enable him to recover the adjusted amount without further proof (*o*), according

MacIver v. *Henderson*, 4 M. & S. 576. *Bainbridge* v. *Neilson*, 10 East, 324. *Smith* v. *Robertson*, 2 Dow. 474. *Brown* v. *Smith*, 1 Dow. 349; 2 Burr. 2209. *Naylor* v. *Taylor*, 9 B. & C. 718.

(*d*) *Rucker* v. *Palsgrave*, 1 Taunt. 419.

(*e*) *Gardiner* v. *Croasdale*, 2 Burr. 904; B. N. P. 129.

(*f*) *Thellusson & others* v. *Sheddon*, 2 N. R. 228.

(*g*) The stat. 43 Geo. 3, c. 160, s. 40, directs, that in all cases of capture and recapture, the amount of salvage shall be ascertained in the Admiralty Court.

(*h*) *Cary* v. *King*, R. T. Hardw. 304; Park on Ins. 613.

(*i*) *Tanner* v. *Bennett*, 1 R. & M. 182. See as to estimating the amount of the loss on freight, *Palmer* v. *Blackburn*, 1 Bing. 62: on goods damaged by the sea, *Johnson* v. *Sheddon*, 2 East, 581: 4 Taunt. 511; 3 B. & P. 308; 12 East, 639; 1 Esp. C. 77: on ship, 1 R. & M. 78; 5 M. & S. 13; 2 T. R. 407.

(*k*) *Supra*, tit. POLICY, PROOF OF.

(*l*) Per Ld. Ellenborough in *Richardson* v. *Anderson*, 1 Camp. 43, n.

(*m*) Park on Ins. C. 6. An adjustment is not conclusive. *Steele* v. *Lacy*, 3 Taunt. 285.

(*n*) A month it seems is the time usually allowed. *Jell* v. *Pratt*, 2 Starkie's C. 67. An adjustment does not require a stamp. *Wilbe* v. *Simpson*, 2 Sel. N. P. 917.

(*o*) As it seems, on the *indebitatus* count, for unless there be some admission that the loss happened as averred in the special count, there would be a difficulty in applying the general admission to that count. See *Hogg* v. *Goldney*, Sittings after Trin. 1745, cor. Lee. L. C. J.; Beawes, Lex Merc. 310; Park on Ins. 193. *Rogers* v. *Naylor*, Sittings after Trin. 1790; Ibid. 194. *Christie* v. *Combe*, 2 Esp. C. 489. An adjustment is not binding in case of fraud. *Christian* v. *Coombe*, 2 Esp. C. 489; and does not bind unless there was a full disclosure of the circumstances of the case. *Shepherd* v. *Chewter*, 1 Camp. 274. The production of the policy with an adjustment indorsed on it, and the defendant's name struck through, is not conclusive evidence of the sum so adjusted having been paid by him. *Adams* v. *Sanders*, 1 M. & M. 373, and 1 C. & P. 25. The defendants, an Irish company transacting business in London by an agent, adjusted a loss with the broker of the assured (living at Plymouth) by setting off in account against it a debt due from the broker for premiums, and their names were then struck off the policy; the broker never paid the amount over to the assured, and subsequently became bankrupt: held that the plaintiff, having only authorised the broker to receive payment in money, and not being shown to be cognizant of any usage at Lloyd's as to the

to the general principles already announced (*p*), and the practice in analogous cases (*q*). Adjustment.

It appears that in the case of *De Garron* v. *Galbraith* (*r*), the plaintiff gave no other evidence than the adjustment, and that the witness who proved it swore that doubts, soon after they had signed it, arose in the minds of the underwriters, and they refused to pay; upon which Lord Kenyon held that the plaintiffs must go into other evidence, and in default of other evidence nonsuited them, and the Court of King's Bench afterwards refused to set aside the nonsuit. Notwithstanding this high authority, it is difficult to reconcile this case with general principles. Upon all the decisions, as well as upon principle, the adjustment was *primâ facie* evidence to establish the claim. It seems then to be difficult to say, upon what ground the existence of the subsequent doubts in the minds of the underwriters could be evidence at all against the plaintiff, and still more so, to say that such doubts, although communicated to the plaintiff, could do away the effect of a previous deliberate admission; if this were so, it would furnish a summary mode of getting rid of the most solemn admissions in all cases. The refusal to pay the amount was nothing more than what necessarily occurs whenever an action is brought after an adjustment. The *primâ facie* admission stood, as it seems, uncontradicted; and at all events, and even assuming that the subsequent doubts could in any way qualify that admission, the effect of it was rather a matter for the consideration of the jury, than a ground of nonsuit. The report, however, of this case is very short; and it may be collected from the statement made by the learned author of the work from which the case is cited (who was counsel in the cause) that the doubts were *communicated* (*s*) by the defendant to the plaintiff *immediately* after they had signed the adjustment. A mere subsequent communication, notifying the intention of the party, could not, it should seem, deprive the plaintiff of the benefit of his *primâ facie* evidence; its effect would rather be, as in the case of a bill of exchange, to estop him from saying that he had been taken by surprise, when evidence was offered by the defendant, notwithstanding the adjustment, to disprove his liability. If indeed the communication could be considered as a contemporaneous transaction, and part of the *res gestæ*, then, as the whole of the circumstances accompanying the adjustment must be taken together, the effect might be to show that the adjustment was not an absolute one, but subject to the removal of the doubts so expressed (*t*). Effect of an adjustment.

mode of adjusting losses, nor to have known or assented to the mode pursued by the broker in the particular transaction, the underwriters were not discharged. *Bartlett* v. *Pentland*, 10 B. & C. 760. So where the loss was settled, partly in setting off premiums due from the broker, and partly by payment of the residue in cash, the usage being proved to be so to make adjustment, held that the assured was not bound by a usage of which he was not shown to be cognizant, nor to have consented to it; but, that he could not recover as to the amount paid in money, which was within the general authority of the broker. *Scott* v. *Irving*, 1 B. & Ad. 605. Where the broker who effected the policy, and whilst the policy was in his hands, entered into an adjustment, which the defendant, the underwriter, signed, and his name was erased, held that the plaintiffs, having in no way recognized or adopted such adjustment, nor any custom established to bind them, were entitled to recover the amount of the loss from the underwriters. *Benson* v. *Maitland*, 1 Gow's C. 205.

(*p*) *Supra*, tit. ADMISSION.

(*q*) As in the case of a bill of exchange, *supra*, 237. So in cases of bankruptcy, 150.

(*r*) Sittings after Mich. Term, 1795. Park on Ins. 194.

(*s*) And see Ld. Kenyon's observations on refusing the rule for a new trial, *infra*, note (*u*).

(*t*) Especially as in such a case one *indicium* of the intent of the party to be bound,

Effect of an adjustment.

This view of the case seems however to be inconsistent with the observations made by Lord Kenyon on refusing the motion for a new trial (*u*).

In the case of *Hogg* v. *Goldney* (*x*), Lee, C. J. said, an adjustment on the policy, by which the defendant agreed to pay the adjusted amount a month after date, was to be considered as a note of hand, and that the plaintiff had no occasion to enter into proof of the loss (*y*).

It is clear, on the other hand, that an adjustment is but presumptive and *primâ facie* evidence, liable to be rebutted by proof on the part of the defendant, repelling the plaintiff's claim to recover (*z*). The signing the adjustment creates no new debt, even assuming time to have been given; for a promise to pay in consideration of forbearance to sue, where there is no legal right to sue, is a mere *nudum pactum* (*a*). It would also be contrary to the plainest principles of justice and sound policy, that a party should be estopped by a mere gratuitous promise from showing the real merits of the case (*b*). Consistently with these principles, it may be shown that no debt existed; or the presumption arising from the admission may be rebutted by proof that it was obtained by fraudulent practices. An underwriter, after admitting his liability, must indeed make a strong case; but an adjustment is a mere admission, without any consideration to support it, except the defendant's liability on the policy; and until he has paid the money he is at liberty to avail himself of any defence which the law or facts of the case will furnish (*c*). Thus, in the case of *Herbert* v. *Champion* (*d*), the defendant was admitted to prove in defence, that a letter from the captain to the insurer, containing intelligence as to the sailing of the ship, had not been communicated to the insurer previous to the insurance, although the defendant had read the letter previous to the adjustment. In the case of *Shepherd* v. *Chewter* (*e*) Lord Ellenborough informed the jury that the adjustment did not bind the defendant, unless there was a full disclosure of the circumstances of the case.

which exists in the case of a bill of exchange or other security, viz. the delivery of it to the plaintiff, would be wanting, for the policy would at all events be in the plaintiff's possession.

(*u*) He said, "I admit the adjustment to be evidence in the cause to a certain extent; but I thought at the trial, and still think, that where the same witness who proved the signature of the defendant to the adjustment, said that doubts, *soon after* the adjustment took place, arose in the minds of the underwriters as to the honesty of the transaction, and they called for further proof, the plaintiff should have produced other evidence; and that shutting the door against inquiry after an adjustment, would be putting a stop to candour and fair dealing amongst the underwriters."

(*x*) Beawes, Lex Merc. 310; Park on Ins. 193.

(*y*) See the remarks on the observations in Mr. Park's Law of Ins. 194, *& sequent.*

(*z*) *Steele* v. *Lacy*, 3 Taunt. 285; 6 Taunt. 519; *Rogers* v. *Maylor*, 1 Park on Ins. 194. *Reyner* v. *Hall*, 4 Taunt. 725. *Shepherd* v. *Chewter*, 1 Camp. 274.

(*a*) See *Barber* v. *Fox*, 2 Saund. 136. *Loyd* v. *Lee*, Str. 94. *Tooley* v. *Windham*, Cro. Eliz. 206; 3 B. & P. 249, note (*a*). *Rann* v. *Hughes*, 7 T. R. 350.

(*b*) See Ld. Kenyon's observations in *De Garron* v. *Galbraith*, Park on Ins. 194; *Supra*, note (*u*). See also the principles, *supra*, 882.

(*c*) Per Ld. Ellenborough in *Herbert* v. *Champion*, 1 Camp. 134.

(*d*) Ibid. Park on Ins. 196. The plaintiff in that case had a verdict, the jury deeming the letter to be immaterial.

(*e*) 1 Camp. 274. In that case the policy seems to have been discharged by the deviation of the ship; but evidence was offered on the part of the plaintiff, to prove the defendant's knowledge of that fact previously to the adjustment; and Lord Ellenborough left it as a question to the jury upon the evidence, whether in fact the defendant, when he adjusted, knew of the deviation. The jury found for the defendant; the question did not arise whether an adjustment, with knowledge that the policy had actually been discharged, would revive it. Upon the principles already adverted to, it seems to be clear that it would not.

An adjustment is admissible in evidence, though not stated in the declaration (*f*). Effect of an adjustment.

It is a general rule, founded upon principles of policy and convenience, that money paid with a knowledge of the facts cannot be recovered, although the party paid the money under a mistake as to his legal liability (*g*). But money paid even after an adjustment, and after the name of the underwriter has been struck off both the policy and the adjustment, may be recovered by the insurer, if it was paid under a mistake in fact (*h*), or on proof of fraud (*i*). Money paid by the insurer.

6thly. The usual acknowledgment in the policy of the receipt of the premium by the underwriter from the broker, is conclusive evidence of the fact in an action by the assured to recover the premium (*k*). The premium may be recovered where the insurance was effected under a reasonable expectation that a license would be procured to legalize the voyage, although no license has been in fact procured, and the voyage was in consequence illegal (*l*). To recover premium.

After an abandonment, and the payment as for a total loss, if there was in fact a total loss at the time of adjustment, although it afterwards turn out that the loss was but partial, the insurer cannot afterwards recover the money so paid, but he stands in the place of the insured as to any benefit to be derived from salvage (*m*).

7thly. By the new rules of Hil. T. 4 W. 4, it is directed that in the case of a policy of insurance, the plea of the general issue shall operate as a denial of the subscription to the alleged policy by the defendant, but not of the interest, &c., of the commencement of the risk, or of the alleged compliance with warranties. A subsequent rule requires that in actions of assumpsit all matters in confession and avoidance must be specially pleaded, and particularly specifies unseaworthiness, misrepresentation, concealment, deviation. The defendant may, on issue taken on a plea properly framed, adduce evidence to avoid the policy on the ground of fraud (*n*). The legal Defence. Fraud.

(*f*) *Rogers* v. *Maylor*, 1 Park on Ins. 194. *Sheriff* v. *Potts*, 5 Esp. C. 96.

(*g*) *Bilbie* v. *Lumley*, 2 East, 469; *supra*, 86.

(*h*) Ibid. And see Park on Ins. 197.

(*i*) Per Ld. Ellenborough in *Bilbie* v. *Lumley*, 2 East, 469.

(*k*) *Dalzell* v. *Mair*, 1 Camp. 532. Lord Ellenborough in that case observed, "If a man acknowledges that he has received a sum of money from the broker, and accredits him with his principal to that amount, he shall not afterwards, as between himself and the principal, be allowed to say that the broker never paid him. It is well known that there are running accounts kept between the insurance broker and the underwriter; and Ld. Kenyon held, that the former, before paying premiums to the latter, might maintain an action against the assured to recover the amount of them as for money paid." This doctrine rests, it seems, upon the peculiar situation of the parties in the case of an insurance through the medium of a broker, for otherwise a mere receipt is not conclusive evidence, as between the parties, of the payment of the money. *Supra*, tit. PAROL EVIDENCE, & *infra*, tit. RECEIPT. It seems, therefore, that the underwriter cannot maintain an action against the assured for premiums; but he may recover against the broker for premiums. Park on Ins. 39. *Edgar* v. *Fowler*, 3 East, 222.

(*l*) *Heutig* v. *Staniforth*, 1 Starkie's C. 254; 5 M. & S. 122. Where the assured upon a voyage clearly illegal has paid the premiums, and never gave any notice of an intention to rescind the contract, he cannot recover back the amount so paid. *Palyart* v. *Leckie*, 6 M. & S. 290. See further as to recovery of premium, *Colly* v. *Hunter*, 1 M. & M. 81. *Fishe* v. *Parkinson*, 4 Taunt. 640.

(*m*) *Dacosta* v. *Firth*, 4 Burr. 1966. Note, that in that case there was an agreement that the insurers should be content with salvage in such proportion as the sum insured bore to the whole interest.

(*n*) In all cases of insurance, the insurer is bound to communicate every material fact, although it may not fall within the general questions. Where the party whose life was insured was certified as being in good general bodily health, but the fact that his mental faculties had been affected

Fraud. Suppression of material facts.

presumption in favour of innocence in this, as well as in all other cases, renders full and satisfactory proof necessary (*o*). In contracts of this nature, where the highest degree of good faith is requisite, either the assertion of that which is false, or the concealment of that which is true, and which in the least degree affects the nature of the risk, will vitiate the contract (*p*). Where the contract is made through the medium of a broker, the rule is that the broker must communicate whatever is in the special knowledge of the assured, but he is not bound to communicate matters which are, as it were, in the middle between the assured and the underwriter; he is not bound to make a laborious disclosure of what is known to all (*q*). It is sufficient if the assured communicate all *facts* within their knowledge; they are not bound to state any opinion or conclusion founded upon those facts (*r*).

But the assured is bound to communicate information which he has received, although he does not know it to be true, and though it afterwards turn out to be false (*s*).

Some difference of opinion has been entertained upon the question, whether the judgment of persons conversant with the business of insuring is admissible to show that a knowledge of the facts not communicated would have enhanced the premium. Where the assured resided in Jersey, from which their ship sailed on the 6th, and rumours prevailed in Jersey from that day up to the 16th (when the letter directing the insurance was dated), that a capture had been made on the 7th, which rumours were not commu-

was not disclosed, it was held that the Judge had properly determined to leave it to the jury to say whether it was a material fact to be known. *Lindenau* v. *Desborough*, 8 B. & C. 586. Where the debtor had agreed to pay his debt by instalments in five years, held that his creditor had an insurable interest in his life during that period. *Ib.* The vessel being at Van Diemen's Land, and the owner resident at Sydney, he had written to his agent in London by another vessel sailing at the same time, and in order to give his ship every chance of arriving before he effected the insurance, directed his letter not to be delivered until 30 days after the arrival of the ship by which the letter was sent, and such letter communicated the fact of his having given such directions; the 30 days elapsed, and two other vessels also arrived in the meantime; held that such letter was material, and ought to have been communicated to the underwriter, and that the Judge properly received the evidence of persons as to the materiality of such letter. *Rickards* v. *Murdock*, 10 B. & C. 257. A misrepresentation as to the cargo, which is not stated in the policy, and is found by the jury to be immaterial to the risk, does not avoid the policy. *Flinn* v. *Headlam*, 9 B. & C. 693. S. C. *Flinn* v. *Tobin*, 1 M. & M. 367. Where one of the conditions of a life assurance required a reference to persons, "one to be the usual medical attendant of the party," it was held that a false reference to one who had been, but was not then the medical attendant, by the party whose life was to be insured, was a failure of compliance with the condition, and that it made no difference that the insurer was ignorant of the fraud, he having referred the agent of the office to the party, and adopted his representation. *Everett* v. *Desborough*, 5 Bing. 503. And see *Morrison* v. *Muspratt*, 4 Bing. 30. *Lindenau* v. *Desborough*, 8 B. & C. 586. *Maynard* v. *Rhodes*, 5 D. & R. 266.

(*o*) Park on Ins. 325. Fraud in this, as well as in all other cases, may be proved by means of circumstantial evidence; direct and positive proof is in such instances seldom attainable.

(*p*) See *Dacosta* v. *Scandrett*, 2 P. Wms. 170. *Seaman* v. *Fonnereau*, 2 Stra. 1183. *Beckthwaite* v. *Nalgrove*, cited 3 Taunt. 37. *Lynch* v. *Dunsford*, 14 East, 495. *Sawtell* v. *London*, 5 Taunt. 363. *Gladstone* v. *King*, 1 M. & S. 35. *Bufe* v. *Turner*, 2 Marsh. 49.

(*q*) Per Lord Ellenborough in *Vallance* v. *Dewar*, 1 Camp. 503. See *Kingston* v. *Knibbs*, 1 Camp. 508. *Syers* v. *Bridge*, Doug. 512. *Pelly* v. *Royal Exchange Assurance*, Burr. 341. *Hoskins* v. *Pickersgill*, Marsh. 727. *Sawtell* v. *London*, 5 Taunt. 383. *Gladstone* v. *King*, 1 M. & S. 35. *Bufe* v. *Turner*, 2 Marsh. 49. *Freeman* v. *Glover*, 6 Esp. C. 14. *Boyd* v. *Dubois*, 3 Camp. C. 133. It is not necessary to communicate circumstances stated in Lloyd's List. *Friere* v. *Woodhouse*, Holt's C. 372.

(*r*) *Bell* v. *Bell*, 2 Camp. 475.

(*s*) *Lynch* v. *Hamilton*, 3 Taunt. 37.

nicated to the underwriters, witnesses were allowed to prove, that if the facts had been communicated to them they would not have enhanced the risk (*t*). Gibbs, C. J., in summing up to the jury, observed, "It is the province of the jury, not of individual underwriters, to decide what facts ought to be communicated. It is not a question of science, on which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless. Such evidence leads to nothing satisfactory, and ought on that ground to be rejected (*u*)."

Fraud. Suppression of material facts.

In a later case (*v*), where the defence was that material information, as to the time when the ship sailed, had been withheld from the underwriter, and the letter upon which the insurance had been effected was given in evidence, Holroyd, J. held that a witness conversant in the subject of insurance might give his opinion as a matter of judgment, whether particular facts, if disclosed, would make a difference as to the amount of the premium. The premium had been considered as calculated upon an ordinary risk, and the question was not what the private opinion of the individual might be in the particular case, but what in his judgment the general opinion would be amongst those conversant in such matters.

Whenever the fixing the fair price and value upon a contract to insure is

(*t*) The question whether they would have engaged in the risk, appears clearly to have been objectionable. See *Berthon* v. *Loughman*, 2 Starkie's C. 258.

(*u*) *Durrell* v. *Bederly*, Holt's C. 283. And in *Campbell* v. *Richards*, 6 B. & Ad. 840, it was held that the evidence of underwriters and brokers was not admissible as to their opinion of the materiality of certain facts not communicated. In the case of *Boehm* v. *Carter*, Burr. 1905, the broker, on cross-examination by the defendant, said that he did not believe that the defendant would have meddled with the insurance if he had seen two letters, alluding to two letters which had been written by the party whose property had been insured in the plaintiff's name, in which he specified certain facts which ought, as was contended by the defendant, to have been communicated to the underwriter. Lord Mansfield, in discharging the rule which had been obtained for a new trial, said, "That as to the opinion of the broker, it was mere opinion, to which the jury ought not to pay the least regard; that it was not evidence; it was an opinion after the event, without the least foundation from any previous precedent or usage, and which, if rightly formed, could only be drawn from the same proceeding from which the Court and jury decided the cause." In this case it is observable that the evidence of the broker was mere opinion as to the probable conduct of the principal under circumstances which never happened, and was not given as the result of his judgment upon the value of the indemnity, as upon a matter of calculation and of science. Upon the general question, whether a witness may be asked whether, in his judgment, the risk would be increased, and consequently the value of the indemnity enhanced, by particular circumstances, it is to be observed, that the price and value must usually be a matter of calculation, depending upon the probability of loss, and calculated upon the average number of losses; and it is a combined matter of skill and experience to ascertain what circumstances ought to be taken into the account, for the purpose of estimating the probability of loss, and the value of an insurance, under particular circumstances, estimated upon an average. It is therefore difficult to say that the question of value, in such a case, is not one which *may* require the judgment of experienced and skilful persons.—In order to prove that the ship was not seaworthy when she sailed, ship-builders are competent to give their opinion on the facts detailed by others, (*Thornton* v. *Royal Exchange Assurance Co.*, Peake's C. 25; 1 Camp. 117); and yet the jury may frequently be better judges of the state and condition of the vessel than they would be of the real value of a policy. It is true, that a jury of merchants at Guildhall, skilful, intelligent, and acute and experienced as they are in such matters, would in all probability be as competent to form an opinion on such matters as the witnesses themselves; but it is to be recollected, that the question is as to the general admissibility of such evidence, and it may frequently happen that a jury is composed of persons very incompetent to form a correct judgment of their own in such matters.

(*v*) *Berton* v. *Loughman*, 2 Starkie's C. 258. But in an action for negligence in effecting a policy, it has been held that the opinion of underwriters is not admissible

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a matter of skill and judgment, acting according to certain general rules and principles of calculation, applied to the particular circumstances of each individual case, it seems to be matter of evidence to show whether the fact suppressed would have been noticed as a term in the particular calculation. It would not be difficult to propound instances in which the materiality of the fact withheld would be a question of pure science; in other instances, it is very possible that mere common sense, independent of any peculiar skill or experience, would be sufficient to comprehend that the disclosure was material, and its suppression fraudulent, although not to understand to what extent the risk was increased by that fact. In intermediate cases, it seems to be difficult in principle wholly to exclude the evidence, although its importance may vary exceedingly according to circumstances. It is observable, that in the two cases first cited (*x*), the evidence was in fact admitted, although strong remarks were made upon its operation.

The defendant (*y*) may prove also that the plaintiff or his agent misrepresented the facts, but it is sufficient if the plaintiff's representation was substantially true (*z*). Where the owner of goods made a *bonâ fide* statement as to the time of the ship's sailing, it was held that he was not concluded by it, although the ship did not sail till afterwards (*a*). A representation made to the underwriters at the time when their names are put down on the ship, will be binding on the assured, unless it be withdrawn before the conclusion of the contract (*b*).

The practice has obtained of admitting, in actions against an underwriter, evidence of representations made by the assured to the first underwriter, upon a presumption, as it seems, that the defendant acted upon the faith of the representation so made (*c*).

In the case of *Marsden* v. *Reid* (*d*), the Court intimated an opinion, that wherever a material fact had been represented to the first underwriter to induce him to subscribe the policy, it should be taken to have been made to all the rest, without the necessity of repeating it. The rule however seems to have been confined to such representations as have been made to the first underwriter (*e*); and notwithstanding the practice which has obtained, the soundness of the doctrine has been questioned, and if it be still

on the question, whether a fact concealed is or is not material to be communicated. *Campbell* v. *Richards*, 5 B. & Ad. 840; 2 N. & M. 542. But in an action for negligence in not procuring a policy of insurance to be altered, it was held that an insurance broker might, on inspection of the policy, the invoices, and a letter from the supercargo, describing the circumstances and situation of the ship, state what alterations a skilful broker would have made. *Chapman* v. *Walton*, 10 Bing. 57. And it is a question for the jury, whether any particular fact is material or not. *Westbury* v. *Aberdein*, 2 M. & W. 267.

(*x*) *Bochm* v. *Carter*, Burr. 1905. *Durrell* v. *Bederly*, Holt's C. 283.

(*y*) In an action on a life policy, a false representation, in answer to an oral question, was held to vitiate the policy, although the policy, by the articles of the insurance-office, was to be void in case of false answers given to certain written inquiries. *Wainwright* v. *Bland*, 1 M. & W. 32.

(*z*) *Pawson* v. *Watson*, Cowp. 785. Where the agent of a ship-owner in effecting a policy misrepresented the nature of the cargo which she was to carry; but this was not inserted in the policy, and it did not appear that the underwriter was induced by the misrepresentation to undertake the risk, and the jury found that the misrepresentation was not material; the Court held that the plaintiff was entitled to recover. *Flinn* v. *Headlam*, 9 B. & C. 693.

(*a*) *Bowden* v. *Vaughan*, 10 East, 415.

(*b*) See *Edwards* v. *Footner*, 1 Camp. 530. *Dawson* v. *Atty*, 7 East, 367.

(*c*) 3 East, 573. *Pawson* v. *Watson*, Cowp. 789. *Stackpole* v. *Simon*, Park, 648.

(*d*) 3 East, 573.

(*e*) Ibid.

allowed to prevail, it must, it seems, be taken with considerable qualification (*f*.)

Fraud. Suppression of material facts.

The contract is void if the goods have been fraudently over-valued with intent to defraud the insurers (*g*).

It has been seen that a deviation in respect of the voyage, the subject of insurance, will avoid the policy (*h*). So also will unreasonable and unjustifiable delay (*i*); the existence of which is for the consideration of the jury (*k*).

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The order in which the signatures appear, as subscribed to the policy, is evidence that the contracts were made with the underwriters in that order (*l*). The defendant is also at liberty, under the general issue, not only to negative, by evidence, the performance of such express conditions and warranties (*m*) as are precedent to the plaintiff's title to damages, the burthen of proving which, by *primâ facie* evidence at least, lies on the plaintiff; but he may also show that the plaintiff has not performed those conditions which the law implies. Thus he may show that the ship was not seaworthy at the time when she sailed (*n*). So the defendant may show that the ship was not furnished with proper documents, or with a crew competent, according to the circumstances of the voyage (*o*). The testimony of experienced and skilful persons is admissible for this purpose, although they form their judgment upon observations detailed by others (*p*). If the incompetency of the ship occurs at an early period of the voyage, a presumption naturally arises that the cause existed previously to the time of sailing (*q*).

The defendant even, as it seems (*r*), where there has been no express

(*f*) Upon this doctrine, Ld. Ellenborough, in the case of *Forrester* v. *Pigou*, 1 M. & S. 9, observed as follows: "Whenever the question comes distinctly before the Court, whether a communication to the first underwriter is virtually a notice to all, I shall not scruple to remark that that proposition is to be received with great qualification. It may depend upon the time and circumstances under which that communication was made; but on the mere naked unaccompanied fact of one name standing first upon the policy, I should not hold that a communication to him was virtually made to all the subsequent underwriters; but the question is of such magnitude, that if it should arise, I should direct it to be put upon the record, in order that it might be submitted to the consideration of all the Judges." See *Brine* v. *Featherstone*, 4 Taunt. 871.

(*g*) *Haigh* v. *De la Cour*, 3 Camp. 319.

(*h*) *Supra*, 873. But whether a deviation for the purpose of assisting a vessel in distress will avoid a policy has been doubted in the Court of Admiralty, and the American Courts have held that it does not. Case of the *Jane*, 3 Hagg. 345; 3 Keat's Comm. 16.

(*i*) *Mount* v. *Larkins*, 8 Bing. 169.

(*k*) *Palmer* v. *Marshall*, 8 B. 318. See *Palmer* v. *Fenning*, 9 Bing. 460.

(*l*) *Marsden* v. *Reid*, 3 East, 572; and it was there held, that a slip of paper made at the time when the different assurers subscribed the policy, and containing their names in the order in which they actually subscribed, was not admissible in evidence without a stamp, the evidence tending to show that the contract entered into was different from that which appeared on the face of the contract itself.

(*m*) As to the difference between an express warranty and a collateral representation, see Park on Insurance, 308. 478.

(*n*) *Annen* v. *Woodman*, 3 Taunt. 299. But *primâ facie* a ship is to be deemed to be seaworthy. *Parker* v. *Potts*, 3 Dow. 31.

(*o*) *Forshaw* v. *Chabert*, 3 B. & B. 158. *Clifford* v. *Hunter*, 2 R. & M. 104. *Douglas* v. *Scougall*, 4 Dow, 269. *Watt* v. *Moir*, 1 Dow, 32. *Bell* v. *Carstairs*, 14 East, 374. *Law* v. *Hollingsworth*, 7 T. R. 160. Where a sufficient crew has once been provided, negligence of the crew at the time of the loss, is no breach of the implied warranty. *Bushe* v. *Royal Ex. Ass. Co.*, 2 B. & A. 73.

(*p*) *Beckwith* v. *Sydebotham*, 1 Camp. 117.

(*q*) See *Watson* v. *Clark*, 1 Dow, 336. *Douglas* v. *Scougall*, 4 Dow, 269.

(*r*) *Christie* v. *Secretan*, 8 T. R. 192. *Law* v. *Hollingsworth*, 7 T. R. 160. *Furmer* v. *Legy*, ib. 186. *Bell* v. *Carstairs*,

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warranty to that effect, may show in defence that the *vessel* insured has not been furnished with proper documents, or navigated according to the laws of the country to which she belongs, and to which she sails.

It has been held at *Nisi Prius*, that a representation made by the broker at the time when the names of the underwriters are put down upon a slip, is binding upon the assured, unless it be qualified or withdrawn before the execution of the policy (*s*). But where a ship, at the time of subscribing the slip, was represented to be American, but at the time of subscribing the policy the *goods* were insured on board the ship Hermon, and she was not represented to be of any particular country or place, it was held, that although she was in fact an American, it was not necessary that she should be documented as such (*t*). Such a representation however cannot, it should seem, on general principles, be admissible, as adding terms to the written contract; and therefore, if available at all, must be so on the ground of fraud; and in that view of the case it seems to be immaterial whether the representation was made before or at the time of effecting the policy.

Evidence that at the time of the capture the ship's papers were thrown overboard, affords a presumption that the ship was not neutral (*u*).

Upon principles already adverted to (*x*), sentences of condemnation, not only in British, but in foreign Courts of Admiralty, are not merely admissible, but usually even conclusive evidence. Upon the points of adjudication, Lord Mansfield (in the case of *Bernardi* v. *Motteux*) (*y*), said, "All the

14 East, 374. But see the observations of Lawrence, J. 8 T. R. 197. And see *Dawson* v. *Atty*, 7 East, 367. As to a condemnation for carrying simulated papers, see *Horneyer* v. *Lushington*, 15 East, 46. *Oswell* v. *Vigne*, 15 East, 70. *Bell* v. *Bromfield*, 15 East, 364. *Steele* v. *Lacy*, 3 Taunt. 285. The ship left England with a competent crew, and part dying abroad, it became necessary, in order to obtain a sufficient crew for the voyage home, to take in foreigners, reducing the crew to less than three-fourths of British seamen; there was no consul at the place where the foreign crew were so taken in, and the ship was lost whilst proceeding to a British port; held, that upon the construction of s. 19, of the 6 Geo. 4, c. 109, the vessel might have been considered as duly navigated if, upon reaching her port, satisfactory proof were given before the collector or comptroller of customs of the matter of excuse; and that, upon such circumstances of excuse being satisfactorily proved before the jury at the trial, the assured were entitled to recover against the underwriters. *Stuart* v. *Powell*, 1 B. & Ad. 266.

The underwriters are liable for a loss on entering a port without a pilot, although the captain had been wrong in attempting to enter without a pilot; he being a person of competent skill, having used reasonable diligence to obtain a pilot, and having exercised his discretion *bonâ fide* under the circumstances. *Phillips* v. *Headlam*, 2 B. & Ad. 380. There is no implied warranty on the part of the owner of *goods* insured that the *ship* is properly documented. *Carruthers* v. *Gray*, 3 Camp. 142.

(*s*) *Edwards* v. *Footner*, 1 Camp. 530; Park on Ins. 531.

(*t*) *Dawson* v. *Atty*, 7 East, 367.

(*u*) Per Buller, J., in *Bernardi* v. *Motteux*, Doug. 575. But by a French arrêt, 26th July 1778, it is made a substantive ground of seizure.

(*x*) *Supra*, Vol. I.

(*y*) Doug. 575. In that case the doubt was, whether a condemnation in the French Court of Admiralty proceeded on the ground that the ship, which in the policy was warranted neutral, was enemy's property. Lord Mansfield, C. J., and Willes and Ashurst, Justices, were of opinion that the sentence was too ambiguous to warrant the conclusion. Lord Mansfield expressed a strong opinion that the procès verbal taken at the time of the capture, and on which the condemnation was founded, and to which the sentence referred, ought to be considered as part of the proceedings, and that the sentence ought not to have been read without it. Buller, J. was of opinion that the ground of condemnation appeared sufficient on the face of the sentence. See also *Hughes* v. *Cornelius*, 2 Show. 232. *Baring* v. *Claggett*, 3 B. & P. 201. *Baring* v. *Christie*, 5 East, 398. *Barzillay* v. *Lewis*, Park on Ins. 526.

world are parties to a sentence in a Court of Admiralty. Here there is a monition published at the Exchange, and in other countries at some place of general resort, and any person interested may come in and appeal at any time, if there has been no laches; if there has, the time of appeal is limited. But the sentence, as to that which is within it, is conclusive against all persons, unless reversed by a regular Court of Appeal; it cannot be controverted collaterally in a civil suit." Breach of warranty.

Such sentences are conclusive as to all matters upon which the Courts of Admiralty adjudicate, being within their jurisdiction (*z*). They are, however, conclusive on those points only on which they profess to decide.

Where the fact, which is the ground of condemnation, is specifically stated in the decretory part, the sentence is not conclusive as to other facts previously recited in the sentence (*a*).

Where no ground of condemnation is stated in the sentence, but the ship is condemned generally, the sentence is conclusive evidence to show that the ship was not neutral (*b*). But if special cause of condemnation be stated, and it be still doubtful whether it proceeded on the ground that the ship was the enemy's property, collateral evidence is admissible to show the real ground of condemnation (*c*).

If the ground of decision appear to be not the want of neutrality, but the infringement of a foreign ordinance, inconsistent with the law of nations, the sentence will not be sufficient to prove that the ship was not neutral (*d*).

The general result of the decisions upon this subject seems to be that the sentence of a foreign court is conclusive on that point which it professes to decide; if it be a general sentence of condemnation without assigning any reason, the Courts here will consider that it proceeded on the grounds of the ship being the property of an enemy; but if the sentence itself profess to be made on particular grounds, and they are set forth in the sentence, and appear not to warrant the condemnation, the sentence is not conclusive as to those facts (*e*).

A condemnation of a vessel by a Court of Vice-Admiralty abroad, for insufficiency, is evidence as to the mere fact of condemnation; but it was held by Lord Kenyon to be no evidence of the facts contained in it, the document being offered in order to prove that the vessel was not seaworthy at an antecedent time (*f*).

The defendant may also object by evidence, on the ground of the ille-

(*z*) *Geyer* v. *Aguilar*, 7 T. R. 681.

(*a*) *Christie* v. *Secretan*, 8 T. R. 192. And therefore, where the sentence of a French Court of Admiralty condemned the ship because she belonged to the enemies of the French Republic, having previously recited the want of proper documents, it was held that this was evidence of the former fact only. But if there had been a warranty that the ship was not enemy's property, the sentence would have been conclusive. Ibid.

(*b*) *Saloneci* v. *Woodmas*, Park on Ins. 528.

(*c*) See *Bernardi* v. *Motteux*, Doug. 575; and per Lord Mansfield, in *Saloneci* v. *Woodmas*, Park on Ins. 528.

(*d*) Park on Ins. 531. *Mayne* v. *Walter*, East. 22 Geo. 3, Park on Ins. 531. *Pollard* v. *Bell*, 8 T. R. 434. *Skiffkin* v. *Lee*, 2 N. R. 484.

(*e*) Per Le Blanc, J. in *Pollard* v. *Bell*, 8 T. R. 434; and see that case, and *Bird* v. *Appleton*, 8 T. R. 562. See also *Price* v. *Bell*, 1 East, 663. *Baring* v. *Royal Exchange Assurance Company*, 5 East, 99. *Kindersley* v. *Chace*, Park on Ins. 544. *Oddy* v. *Bovil*, 2 East, 473. *Lothian* v. *Henderson*, 3 B. & P. 499; 5 East, 155. *Fisher* v. *Ogle*, 1 Camp. 418; and the cases cited in Park on Ins. c. 18.

(*f*) *Wright* v. *Bernard*, Guildhall Sittings after Mich. 1798. Park on Ins. 610. Although the Court of Exchequer had directed that it should not be read in evidence.

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gality (*g*) of the voyage, trading, or adventure; and if a voyage be illegal in its commencement, it seems that an insurance on the latter part of it, which would not in itself have been illegal, is void (*h*). But it has been held to be no objection on this score that the contract was made in contravention of the revenue laws of a foreign country (*i*). And where the commencement is legal, and the question whether the prosecution of it was legal depends on the fact whether the captain had notice of an order of blockade, knowledge of such notice will not be presumed from a notification of the fact in the London Gazette, but must be proved as any other fact (*k*).

Where the defence in an action on a policy at fifteen guineas per cent., to return two on arrival, was, that upon the arrival of the ship the policy had been adjusted, and the two guineas per cent. demanded and paid, it was left to the jury to say whether the adventure was closed by a return of the premium, or the money was received with a reservation that the underwriter should still be liable upon the contingency which had happened (*l*).

The underwriter is still liable to the insured after a total loss and adjustment, although (within the month) whilst the policy remains in the hands of the broker the initials of the insurer are struck out of the adjustment, to indicate payment, and the broker debits the insurer with the loss (*m*).

A part-owner may recover against a broker who has insured a vessel in his name, and been paid by the underwriter as for a total loss, although it appear that others were also interested who had, previous to the bringing the action, given notice of their interest to the broker (*n*).

Where in the bye-laws of the office imposing the conditions, and cases in which policies should be void, there was no exception as to death by the hands of justice, it was held that a policy was not avoided by the insured having

(*g*) Where the ship sailed to a blockaded port before notification of the blockade had arrived, although she touched at a port of this country after publication in the Gazette, and when it might have arrived there; held, that such voyage was not illegal, and that actual knowledge was not to be presumed, but that, as a rule of insurance law, knowledge, like other matters, must be a question of fact for the jury. *Harratt* v. *Wise*, 9 B. & C. 712. Where a ship left England knowing of the blockade, it was held to be a question for the jury to say whether the ship ought not, on coming in sight of the blockading squadron, to have inquired whether it were such or not, and not have pursued her voyage without gaining that information. *Naylor* v. *Taylor*, 1 Mo. & M. C. 205. In an action by the underwriter against a broker, to recover premiums on certain policies upon an illegal adventure really intended by the assured, the words of the policy being large enough to cover such adventure; held, that although the subscription might have been innocently made by the underwriter, yet his demand being founded on an illegal consideration, he could not sustain it; and that the broker by the usage of the trade being accepted as the debtor, and substituted in the place of the assured, had in the action the same grounds of defence as the assured would have had if he had himself effected the policy, except in cases where the assured might have recovered back the premiums from the underwriter. *Jenkins* v. *Power*, 6 M. & S. 282. A bottomry bond made to two partners, lending partnership money for such purposes, is void under 6 Geo. 1, c. 18; and the defendant having effected an insurance thereon, may avail himself of the objection, notwithstanding he had under a consolidation rule agreed to admit the plaintiff's interest. *Everth* v. *Blackburn*, 6 M. & S. 152.

(*h*) *Wilson* v. *Marryatt*, 8 T. R. 31.

(*i*) 8 T. R. 197; see the observations of Lawrence. J., ibid.

(*k*) *Harratt* v. *Wise*, 9 B. & C. 712.

(*l*) The vessel had been seized by the Dutch Government, on which the plaintiff's agent, to obtain her liberation, entered into a bond to the attorney-general of the Dutch Government, to be in force in case the goods were confiscated; the ship and cargo were confiscated after the arrival of the vessel, and the bond put in force. The jury found for the defendant. *May* v. *Christie*, 1 Holt's C. 67.

(*m*) *Jell* v. *Pratt*, 2 Starkie's C. 67. See also *Todd* v. *Reed*, 4 B. & A. 210; 3 Starkie's C. 16. *Russell* v. *Bangley*, 4 B. & A. 395.

(*n*) *Roberts* v. *Ogilby*, 9 Price, 269.

suffered death for a felony: to avoid the obligation to pay, the act of a party insured, which produced the event, must have been done fraudulently, for the very purpose of producing the event (*o*).

Competency.

Lastly. One underwriter is a competent witness for another who has subscribed the same policy (*p*), unless he has entered into the consolidation rule, or has paid the loss, upon an agreement that the amount shall be repaid in case the plaintiff fails in the present cause (*q*). If he has paid the loss, a mere subsequent promise to repay him under that contingency will not, it seems, render him incompetent (*r*).

One who was jointly interested in the property at the time of effecting the policy, is not only incompetent on the score of interest, but he is so far to be considered a real party in the suit, although the action be brought in the name of the agent, that his declarations and admissions may be given in evidence by the defendant (*s*); and where his interest has accrued subsequently to the effecting of the policy by his becoming a partner in the goods, he is, it has been held, incompetent as a witness (*t*).

In this, as in other cases, a witness is incompetent to repel a charge of negligence or misconduct, for the consequences of which he himself would, if the verdict were given the other way, be personally liable (*u*). The master is not a competent witness for the defendant to disprove a charge of barratry (*x*), and the owner is not a competent witness for the plaintiff to prove the seaworthiness of the vessel (*y*).

Protest.

A protest made by the captain is not admissible as original evidence, but may be read for the purpose of contradicting his testimony (*z*). Where the plaintiff's agent showed the protest to the defendant, who read it, this, it was held, no more made the instrument admissible evidence for the plaintiff than a bill in equity would be, which the plaintiff had filed and the defendant had read (*a*).

Certificate.

The certificate of a British vice-consul abroad is not admissible to show that damaged goods were sold according to the law of the country, under his inspection, in order to prove the amount of the damage (*b*). Nor is the certificate of an agent at Lloyd's admissible for that purpose, although the defendant be a subscriber at Lloyd's (*c*).

POLYGAMY.

Proof of the first marriage.

On an indictment for this offence, it is necessary to prove the first and second marriages as alleged in the indictment (*d*), and that the husband or

(*o*) *Bolland* v. *Disney*, 3 Russ. 351.

(*p*) *Bent* v. *Baker*, 3 T. R. 27. *Akers* v. *Thornton*, 1 Esp. C. 414.

(*q*) *Forrester* v. *Pigou*, 1 M. & S. 14.

(*r*) Ibid.

(*s*) *De Symonds* v. *Sheddon*, 2 B. & P. 155.

(*t*) *Perchard* v. *Whitmore*, 2 B. & P. 155, in note.

(*u*) See the general principle, *supra*, Vol. I. tit. Witness, Interest of.

(*x*) *Bird* v. *Thomson*, 1 Esp. C. 339. For if the plaintiff recovered, the defendant might recover against the witness; per Lord Kenyon; see also *Taylor* v. *M'Vicar*, 6 Esp. C. 27. But the captain, though a part-owner, is competent to prove the original destination of the ship, where that is the only question. *De Symonds* v. *De la Cour*, 2 N. R. 374; or to prove the loss of the ship, 2 Moore, 503.

(*y*) *Rothero* v. *Elton*, Peake's C. 84; and see *Symonds* v. *De la Cour*, 2 N. R. 374. *Moorish* v. *Foote*, 2 Moore, 508.

(*z*) *Senat* v. *Porter*, 7 T. R. 158. *Christian* v. *Coombe*, 2 Esp. C. 489.

(*a*) *Senat* v. *Porter*, 7 T. R. 158; and *Christian* v. *Coombe*, 2 Esp. Ca. 489. *Supra*, tit. Parol Evidence.

(*b*) *Waldron* v. *Coombe*, 3 Taunt. 162.

(*c*) *Drake* v. *Marryatt*, 1 B. & C. 473.

(*d*) See Crim. Pleadings; and the stat. 9 G. 4, c. 31, s. 22. By the provisions of the latter statute, it is immaterial whether the second marriage shall have taken place in England or elsewhere.

Proof of the first marriage.

wife of the prisoner was alive at the time of the second marriage. With respect to the first marriage, it is sufficient to prove a marriage in fact to have been celebrated, either in this country, or abroad, according to the law of that country (*e*), although it be voidable, provided it be not absolutely void (*f*).

It has been said, that in the case of bigamy, as well as in an action for criminal conversation, it is essential to prove a *marriage in fact*, as distinguished from the acknowledgment and cohabitation of the parties (*g*). There is however some room for distinction between the two cases; the defendant in an action for criminal conversation cannot be affected by the acts and declarations of the plaintiff, and the fact of the plaintiff's marriage is not necessarily within the knowledge of the defendant, as that of the prisoner is in a case of bigamy (*h*); and it seems, that even in the former case, a deliberate and solemn admission by the defendant of the plaintiff's marriage, would be evidence against him (*i*). In Truman's case (*k*), the cohabitation of the prisoner with Mary Russel was proved, and it was also proved that he had admitted that he had married her in Scotland; and it was proved that he had showed a paper, which he said was a certificate of his marriage, and which was shown to be a writing which purported to be a proceeding before a Court in Scotland against the prisoner and Mary Russel, for having married in a clandestine and unorderly manner, upon which they had appeared, and acknowledged that they were married at the time mentioned in the complaint, and were fined 100 marks. The prisoner was convicted, and all the Judges (Perryn, Baron, and Buller, J. being absent) held the conviction to be proper. Some of the Judges observed, that the case did not rest upon cohabitation and acknowledgment, since the defendant had backed his assertion by the production of a copy of a proceeding against him for having improperly contracted his first marriage. Some thought that the acknowledgment alone would have been sufficient, and that the paper was merely confirmatory of such acknowledgment; and one of them took a distinction between an action for criminal conversation and an indictment for this offence. It is not easy to say on what principle a direct and deliberate admission by the prisoner of his marriage should not be evidence against him of the fact in this case, as well as in any other. Assertions which have been made with a particular view during cohabitation, would indeed of themselves be entitled to very little credit; but a distinct and solemn admission, made after the prisoner has been charged with the offence, and when he knew its probable consequences, seems to be entitled to a very different consideration (*l*). In general, a prisoner would not be concluded by any admission, where it appeared that the first marriage was void in point of law (*m*).

Admission.

(*e*) East's P. C. 465. 469; 1 Hale, 692, 693; 1 Haw. C. 43, s. 7; Kel. 79, 80; 1 Sid. 171; 3 Ins. 88.

(*f*) 3 Ins. 88.

(*g*) In *Morris* v. *Miller*, 4 Burr. 2059.

(*h*) See the observations in *Truman's Case*, East's P. C. 470.

(*i*) See tit. ADMISSIONS. In *Norwood's Case*, East's P. C. 470, confession and cohabitation, &c. were admitted as evidence to prove the relation of husband and wife in a case of petit treason.

(*k*) East's P. C. 471.

(*l*) I have known a prisoner to be convicted of bigamy upon proof of his deliberate admission of both marriages, in the presence of his first wife, before a magistrate.

(*m*) In a case before Le Blanc, J. at York, the prisoner had confessed the first marriage; but it appeared that the marriage was void for the want of the consent of the guardian of the woman, and the prisoner was acquitted.

The evidence in proof of a marriage in fact has already been considered (*n*). Where one of the parties was a minor at the time of a marriage by license, proof of the consent of the parent, guardian, &c. according to the Marriage Act, was required to be proved (*o*). Proof of the first marriage.

Where the indictment stated the second marriage to have been with *E. C.* "widow," which she never had been, nor had ever so represented herself, it was held to be a fatal variance (*p*).

It is sufficient, as regards the second marriage, to prove a marriage *de facto*; an objection to the validity applies only to the first marriage (*q*). Proof of the second marriage.

Next it must be *proved* that the first wife was alive at the time of the second marriage.

The mere presumption as to the continuance of life has been held to be insufficient without some positive proof of the fact, although seven years have not expired (*r*).

The prisoner, in defence, may show that the first marriage was actually void, but it is no defence to show that it was *voidable* only (*s*). Consequently, being indicted for marrying *A.* whilst *B.* a former wife was living, he may show that he married *C.* before he married *B.*, and that *C.* was living when he married *B.*, for then the marriage with *B.* was void; and in such case, if *C.* was dead when he married *A.*, he was not guilty of bigamy in marrying her (*t*). Evidence in defence.

The defendant may also bring himself within the exceptions of the statute 9 Geo. 4, c. 31, s. 22, which exclude the case of a person marrying a second time whose husband or wife shall have been absent and not known to be living for seven years (*u*); or who shall have been divorced from the first marriage, or whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction: and the Act does not extend to a second marriage contracted out of England by any other than a subject of His Majesty.

(*n*) *Supra*, tit. MARRIAGE. If the marriage be proved by a person present, it is unnecessary to prove registration, license, or banns; *R.* v. *Allison*, Russ. & Ry. C. C. L. 109; and the assumption of a fictitious name on second marriage will not prevent a conviction, ib.; and the prisoner was concluded by his written description of the name of the second wife, in his note directing the publication of the banns. *R.* v. *Edwards*, Russ. & Ry. C. C. L. 283. Where the prisoner after contracting marriage in England, married a Catholic in Ireland before a Catholic priest there, to whom he declared himself to be a Catholic, held that he could not set up as a defence his protestation afterwards; and that evidence of what so took place before the priest, part of the ceremony being in English, and part in Latin, after which the priest having respectively asked each if they would take the other as man and wife, and on their answer in the affirmative he pronounced them married, was sufficient in proof of the second marriage. *Reg.* v. *Orgill*, 9 C. & P. 80.

(*o*) *Supra*, tit. MARRIAGE. In the case of *The King* v. *Bridgewater*, cor. Le Blanc, J. York Assizes 1801, such evidence not having been given, the prisoner, after conviction, was discharged on his recognizance to appear to receive judgment at the next assizes; and the Judges, without determining upon the point, agreed, it is said, that he should not be brought up for judgment. The point was afterwards expressly decided in *Butler's Case*, Old B. 1803; and Le Blanc, J. afterwards directed the acquittal of a prisoner at York on the same ground. Where the registry of the first marriage stated it to have been by license, and the prisoner proved that he was an infant at the time, and that his parents had never been in England, it was held that the jury ought to acquit. *R.* v. *James*, Russ. & Ry. C. C. L. 17. *R.* v. *Morton*, ib. in note.

(*p*) *R.* v. *Deeley*, 4 C. & P. 579.

(*q*) *R.* v. *Allison*, Russ. & Ry. 109; *R.* v. *Penson*, 5 C. & P. 412.

(*r*) *R.* v. *Twyning*, 2 B. & A. 386.

(*s*) 3 Ins. 88.

(*t*) *Lady Madison's Case*, 1 Hale, 693.

(*u*) This provision differs from that of the (repealed) stat. 1 J. 1, c. 11, under which such notice was immaterial. See East's P. C. 466; 1 Hale, 693; 3 Ins. 88; 4 Comm. 164.

Defence.

The 3d section of the statute 1 J. 1, c. 11, provided, that nothing in the Act should extend to any person or persons that at the time of such marriage were *divorced* by *any* sentence had in the Ecclesiastical Court, or to any person or persons where the former marriage had been by sentence in the Ecclesiastical Court declared to be void and of no effect.

The former of these exceptions was held to extend to a divorce *à mensâ et thoro*; for although in Porter's case this point was much doubted (*x*), it was fully established by other authorities (*y*). A second marriage, pending an appeal against a divorce *a vinculo matrimonii*, was also held to be within the exception, although the appeal suspends and *may* repeal the sentence. In the celebrated case of the Duchess of Kingston (*z*), it was held, that a sentence in a jactitation suit, although unappealed from, was not conclusive evidence of the invalidity of the former marriage, since the decision on the invalidity of the marriage was merely collateral; and further, that the effect of it might be avoided by proof that it had been obtained by fraud and collusion.

It was also provided by sect. 3 (of the stat. 1 J. 1, c. 11), that the Act should not extend to "any person or persons for or by reason of any former marriage had or made within the age of consent."

The age of consent on the part of the man is fourteen, and of the woman twelve, and the case was held to be within the provision if *either* party were within the age of consent, since the power of dissent must be reciprocal (*a*). If both were above those ages at the time of marriage, although under the age of 21, the second marriage was felony; so if they had agreed to the marriage after either of them had attained the age of consent, by which the marriage was completed (*b*).

Competency.

The first, that is, the true wife, cannot be a witness against her husband, nor *vice versâ*, but the second may be admitted to prove the second marriage after the first has been established (*c*).

POSSESSION.

Proof of possession, when necessary.

THE actual possession of property is in many instances absolutely essential to a title to real or personal property, and in all cases, especially where it is of long continuance, is regarded as strong evidence of right.

Effect of.

To constitute a complete title to lands, the union of actual possession with the right of possession, and right of property, the *juris et seisinæ conjunctio* is essential (*d*). In the case of a feoffment at common law (*e*), and of a *donatio mortis causâ* (*f*), and in many instances by the provisions of particular statutes, such as the statute concerning bankrupts (*g*), and the Stat. of Frauds (*h*), actual delivery and possession are absolutely essential to confer a title (*i*).

(*x*) Cro. Car. 461.

(*y*) Hale, 699; 3 Ins. 89; 1 Haw. c. 43, s. 5; 4 Bl. Comm. 164. *Middleton's Case*, Kel. 27; East's P. C. 467.

(*z*) 11 St. Tr. 262; and see *Martin Lolly's Case*, *supra*, 706.

(*a*) 1 Hale, 17. 694; 1 Haw. c. 43, s. 6; East's P. C. 468.

(*b*) 1 Hale, 694; 4 Bl. Comm. 165; East's P. C. 468.

(*c*) *Ann Cheney's Case*, East's P. C. 469, Old B. May 1730. Sergeant Foster's MS. *R.* v. *Gregg*, T. Ray. 1.

(*d*) 2 Comm. 199; *Fleta*, l. 3, c. 15, s. 5. Seisin *primâ facie* imports occupation. *Stott* v. *Stott*, 16 East, 343.

(*e*) 2 Comm. 514.

(*f*) 2 Comm. 44. *Irons* v. *Smallpiece*, 2 B. & A. 551.

(*g*) *Supra*, tit. BANKRUPT.

(*h*) *Supra*. tit. FRAUDS, STATUTE OF.

(*i*) As to the necessity of an actual delivery of a chattel to confer a title, see TROVER; VENDOR AND PURCHASER. Livery of seisin is not rendered void by the fact of a child having remained on the pre-

Possession, how proved.

One man may have the actual possession of lands, whilst the right of possession resides in another, and the actual right of property, or *jus merum*, in a third person (*k*). But the mere naked possession of lands is *primâ facie* evidence of right against a mere stranger, who can show no colour of title.

Thus the mere prior occupancy of land, however recent, gives a good title to the occupier, whereon he may maintain trespass against all the world, except such as can prove an older and better title in themselves (*l*).

A possession of twenty years' duration by a defendant, is a bar to an ejectment, and of thirty years, is a bar to a possessory action by the owner (*m*).

But the nature of such possession is the proper subject of evidence. For the mere corporeal possession by the defendant is not inconsistent with a legal possession by the owner; consequently, the owner may show that the defendant occupied merely by his permission, as his agent, or his tenant.

On the other hand, it is competent to the defendant to prove, by opposite evidence, that his possession was adverse, and in spite of the owner, although he was not in the actual occupation of the premises; or to show that the party actually in possession took and retained that possession for him, as his tenant (*n*) or agent (*o*).

The proof of a lease, and of the receipt of rent (*p*), or even the proof of the receipt of rent (*q*) from one who is in actual possession of land, is evidence of possession by the party who receives it, for the possession of the lessee is that of the lessor (*r*).

Where a party is in actual possession, and has a right to the possession under a legal title, which is not adverse, but claims the possession under another title which is adverse, the possession will not in law be deemed adverse (*s*).

Seisin in fact.

In a writ of right (*t*), or of aiel, mortdauncestor, &c. (*u*), or of assise (*x*),

mises, not being placed there to represent a party having title, although such child was a descendant of that party. *Doe* v. *Sophia Taylor*, 5 B. & A. 575.

(*k*) A disseisor who enters upon the lands of another by force, and turns him out of possession, has mere possession; should the owner acquiesce for twenty years, the owner would lose his right of entry, and his remedy by ejectment, although the right of possession and of property would still reside in him; but after a lapse of twenty years the right of possession would vest in the original disseisor, and the owner would retain the mere right of property; and after an acquiescence of sixty years, the right of property in the former owner would wholly fail.

(*l*) *Catteris* v. *Cowper*, 4 Taunt. 547. Even in the case of a writ of right. *Jayne* v. *Price*, 8 Taunt. 326.

(*m*) For less than twenty years is not evidence of livery of seisin. *Doe* v. *Marquis of Cleveland*, 9 B. & C. 864. As to the effect of twenty years' possession, see *Dean* v. *Barnard*, Camp. 595 and tit. EJECTMENT and LIMITATIONS. An adverse possession of twenty years against trustees for raising portions, is evidence that the right of the trustees has been released and satisfied. *Doe* v. *Martyn*, 8 B. & C. 497.

(*n*) If an heir demises for years, or at will, the entry of the lessee gives an actual seisin to the lessor. Com. Dig. *Seisin*, A. 2; *Assise*, B. 4.

(*o*) Multoque magis liberi et servi in potestate nostrâ constituti possessionem nostro nomine adprehendre possint. L. 1, s. 3. 5. L. 4. Proof of an oral authority to the agent is sufficient. Watkins on Descents, 72.

(*p*) 3 Woodes, 333. *Harper* v. *Brook*, Bac. Ab. *Ev.* 660.

(*q*) *Denn* v. *Barnard*, Cowp. 595. *Smith* v. *Parkhurst*, And. 326.

(*r*) For other observations on this subject, vide *supra*, 399.

(*s*) *Doe* d. *Milner* v. *Brightwen*, 10 East, 583; *supra*, 399.

(*t*) 4 Co. 9. a. But the heir in a writ of right may allege a seisin in his ancestor. These writs are now abolished by the statute.

(*u*) Com. Dig. *Seisin*, A. 2.

(*x*) Ibid.

Seisin in fact.

it is necessary to prove a seisin in fact, within the time limited by the statute (*y*), as by proof of an actual entry, or of the receipt of the rents or profits (*z*), or of a recovery and execution (*a*).

And in order to render the heir at law of hereditaments which descend to him the stock of descent, so as to make the estate descendible to his own right heirs, it is requisite that he should be actually seised or possessed; for *non jus sed seisina facit stipitem* (*b*). But if on the death of the ancestor the possession was vacant, then the heir is in law presumed to be in possession: he has a *seisin in law*, which is sufficient to entitle his widow to dower, although he never had actual possession (*c*). This, however, is but a presumption, which, where the heir marries after the death of the ancestor, is liable to be rebutted by proof of actual possession by another (*d*). But where lands descend to an heiress, a seisin in fact must be proved, in order to entitle the husband, as tenant by the curtesy; and it is not sufficient that the heiress has a presumptive seisin, or seisin in law, unrebutted by any other seisin (*e*), except in particular instances, where, from the nature of the case, actual seisin was not attainable (*f*).

Entry.

In order to constitute actual seisin, proof of an entry into part (*g*), in the name of the whole, is sufficient; as where one, having half entered at the window, was forcibly dragged out (*h*). But the entry, if made on part, must be made in the name of the whole (*i*). And it is necessary that all persons having a lawful estate and possession in the thing whereof livery is made, should be removed (*k*). And proof of mere entry is insufficient, unless it appear that it was done with *intent* to take possession, as manifested by an express declaration made at the time (*l*), or by some unequivocal overt act (*m*).

Evidence of entry.

(*y*) 32 H. 8, c. 2. A seisin in law is sufficient for an avowry upon a distress. 4 Co. 10. a. Com. Dig. *Seisin*, B.

(*z*) Com. Dig. *Seisin*, A. 2.

(*a*) Com. Dig. *Seisin*, A. 2.

(*b*) 2 Bl. Com. c. 20; *Fleta*, l. 6, c. 2, Watkins on Descents, 58, and the authorities there cited. If, therefore, the heir die before entry or other actual seisin, or possession obtained, the brother of the half blood will succeed to the inheritance, in exclusion of the sister of the whole blood. But now see the late statute, and tit. PEDIGREE.

(*c*) Co. Litt. 31. a. 266. b.; F. N. B. 149. Watkins on Descents, 38. 49. So to render the lands assets, though they were in the actual possession of a tenant from year to year. *Bushby* v. *Dixon*, 3 B. & C. 298.

(*d*) Co. Litt. 277. a.; Perk. s. 367; Watkins on Descents, 51. But where the heir is married at the time of the death, the widow is dowable, notwithstanding an abatement, upon the notion of law, that some interval, however short, must intervene between the death of the ancestor and the entry of the abator, during which the possession was vacant, and the heir had a seisin in law. Co. Litt. 185. b. 298. a.; Plowd. 258; 1 Co. 76. b. 174. b.; Watkins on Descents, 50.

(*e*) Co. Litt. 29. a. & n. (3) 40. a.; 2 Comm. 127, c. 8; 1 Co. 97. b.

(*f*) Co. Litt. 39. a.; Com. Dig. *Seisin*, A. 1; Co. Litt. 29. a. As in the case of a rent, advowson, &c. where the wife dies before the rent becomes payable or the advowson void. Ibid. and Perk. s. 468; F. N. B. 149.

(*g*) So according to the civil law, "(consequitur) sufficere qualemcunque adprehensionem vel ingressum in rem immobilem adeoque nec opus esse ut quis omnes glebas, circumambulet." L. 3. 1. L. 48. L. 2.

(*h*) Et pur ceo q'il ne purra entrer per le huis, il entra per le fenestre; et quant l'un moitiè de son corps fuit deins la meason, et l'autre dehors, il fut treit hors, per q'il port assise et fuit agardé que le plaintif recovera, 8 ass. pl. 25. f. 17. b. Bro. Seisin, 20. 23. Entre Cong. 57 & 61.

(*i*) 1 Will. Saund. 319; 6 Mod. 44.

(*k*) Shepherd's Touchst. 213. *Doe* v. *Taylor*, 5 B. & Ad. 575. But good, although a child be there, the descendant of a party having title, unless placed there to represent that party.

(*l*) Co. Litt. 245. b. *Clerk* v. *Rowell*, 1 Mod. 10. *Ford* v. *Lord Grey*, 6 Mod. 44. Plowd. Comm. 92, 93.

(*m*) Watkins on Descents, 47. (d); Robinson's Law of Inheritance, c. 4, p. 33, note (*i*).

Evidence of entry.

It is not sufficient that the disseisee entered upon the invitation of the disseisor to dine with him, or see his cellar, or such other purpose aliene from (*n*) the assertion of right.

It seems that any act of dominion exercised by the heir over the inheritance, as by repairing houses, fences, &c. or by receiving rent, will amount to an actual entry (*o*).

By an agent.

So proof of an entry by an agent is sufficient, whether he be specially appointed for the purpose, or be so considered in point of law; as of the entry or possession of the guardian or lord of the infant heir (*p*), or of any other person, on the infant's estate (*q*), or of the ancestor's lessee for years, tenant by *elegit*, statute merchant, or statute staple, or of the lessee of the owner (*r*).

The entry of a coparcener, joint-tenant, or tenant in common, is the entry of all the rest, where it is for their advantage (*s*).

The possession of the lessee for years of the ancestor is the actual possession of the heir, so as to constitute a *possessio fratris* (*t*). But where the lands are let on a freehold lease there is no actual seisin, unless the heir acquire an actual seisin after the expiration of the lease (*u*).

In many instances the owner has an election whether he will consider the party in possession a disseisor, or by his own permission; as where a tenant at will, or by sufferance, makes a lease (*x*) or a lessee attorns, or merely pays rent to a stranger without coercion (*y*). So if a man enter, claiming as guardian where he has no right to be so (*z*).

Incorporeal hereditaments.

In order to constitute a seisin of incorporeal hereditaments in the heir, so as to make him the stock of descent, it is essential that he should actually receive the rents, or present to the advowson, unless it be appurtenant to a manor of which he has had actual seisin (*a*).

Where seisin of an inheritance has once been shown, a continuance will be presumed till the contrary be proved (*b*).

Proof of title to real property shows a seisin in law, and is *primâ facie* evidence of possession in fact (*c*). The proof of title to personal property is

(*n*) Watkins on Descents, 47. (d); Robinson's Law of Inheritance, c. 4, p. 33, note (*i*).

(*o*) Watkins on Descents, 76. Robinson's Law of Inheritance, 33, note (*i*), c. 4.

(*p*) 1 Com. Dig. *Assise*, B. 4. Dyer, 291. *Newman* v. *Newman*, 3 Wils. 516; Watkins on Descents, 64 (f), and the cases there cited; and *Doe* d. *Hirst* v. *Hirst*, York Spring Ass. 1820, cor. Bayley, J.

(*q*) An infant may consider any entry made by another on the estate, as made for his use. F. N. B. 118. b.; Co. Litt. 189. a.; *Morgan* v. *Morgan*, 1 Atk. 489. *Dormer* v. *Fortescue*, 3 Atk. 140, per Ld. Kenyon. *Doe* v. *Keene*, 7 T. R. 390. *Ex parte Grace*, 1 B. & P. 376; and such entry will constitute a *possessio fratris*. Where a posthumous son was born in one of four houses belonging to his father, and his mother received rents for the three others, and the son died when five weeks old, it was held to be a *possessio fratris*, which excluded the sister of the half blood. *Goodtitle* d. *Newman* v. *Newman*, 3 Wils. 516.

(*r*) B. N. P. 104; 1 Com. Dig. *Assise*, B. 4; 1 Wils. 176.

(*s*) Gil. Ten. 29; Co. Litt. 242. 373. b.; Hob. 120; and will constitute a *possessio fratris* in one who did not enter, to the exclusion of the half blood. Hob. 128; Dyer, 128, pl. 58; Moore, 868.

(*t*) Co. Litt. 15. a.; ib. 243. a.; and the rule is the same as to copyholds of inheritance, 4 Rep. 21; Moore, 125, pl. 272. And see *Bushby* v. *Dixon*, 3 B. & C. 298; *supra*.

(*u*) *Doe* v. *Keene*, 7 T. R. 390.

(*x*) 1 Roll. 661. l. 25; Cro. Car. 302; Com. Dig. *Seisin*, F. 3.

(*y*) 1 Roll. 661. l. 45; Com. Dig. *Seisin*, F. 3.

(*z*) 1 Roll. 661. l. 20; Com. Dig. *Seisin*, F. 3; and see other instances there collected.

(*a*) Co. Litt. 15. b.; F. N. B. 36; Watk. Law of Desc. 77.

(*b*) See *Cockman* v. *Farrer*, Sir T. Jones, 182; Plowd. 193. a. 431. a.

(*c*) *Supra*, 405.

evidence of possession; for the law annexes the possession to the right to personal property (*d*).

Possession, effect of, as presumptive evidence.

The effect of possession, as affording presumptive evidence of right, is very powerful. As against a mere stranger, the simple occupation of property, whether real or personal, however recent, is evidence of a right, and will enable the possessor to maintain trespass or trover (*e*); and even where the right is otherwise doubtful, ought to turn the scale (*f*), according to the maxims of the Roman law, in *pari causâ possessor potior haberi debet* (*g*), and *pro rei possessore in dubio est pronuntiandum* (*h*).

The long-continued and peaceable possession of an easement, or interest in the lands of another, affords, as has been seen, presumptive evidence of right, which must prevail, unless such enjoyment can be rebutted and explained; and finally, such an enjoyment of lands, where it has been long continued, will at last, by the positive authority of law, ripen into an absolute and indefeasible right, which will prevail against the original proprietor himself. He, according to the notion of the civil law at least, may justly be regarded as having abandoned that property, and thrown it again, as it were, into its original and natural state (*i*), so that a title to it may again be acquired by occupancy (*k*).

Where possession has accompanied a deed of feoffment, livery, in fact, is to be presumed. But it is otherwise where possession has not accompanied the deed (*l*). But this is a mere presumption in fact, of which the jury are to judge; and the Court cannot infer a lawful conveyance by feoffment unless the jury find the livery (*m*).

Proof of possession, and of the receipt of rent for twenty years, is evidence of an estate in fee to go to a jury, although the title, as far as it could be developed, appeared to be a long term for years; for it might have been a term to attend the inheritance (*n*).

POST-MARK. *See* tit. LIBEL.

THE post-mark on a letter may be proved, where the fact is material, by any person who knows it to be genuine; it is not necessary to call the post-master, or clerk from the post-office (*o*).

(*d*) *Infra*, tit. TROVER.

(*e*) As where he finds a jewel; *Armory* v. *Delamirie*, Str. 505. See tit. TROVER.

(*f*) See *Bremridge* v. *Osborn*, 1 Starkie's C. 374. Where the question was, whether a piece of cloth had been returned by the defendant to the plaintiff, the possession of a note by the defendant, in which the plaintiff requested him to return the cloth by the bearer, was considered to afford *primâ facie* evidence that the cloth had been returned. *Shepherd* v. *Currie*, 1 Starkie's C. 454. An agent's authority to receive payment is usually evidenced by his possession of the securities, *supra*, 43. The possession of a negotiable instrument is *primâ facie* evidence of ownership. *King* v. *Milsom*, 2 Camp. 5.

(*g*) L. 2. s. 9. Ff. uti poss.

(*h*) L. 125; L. 128; Ff. de r. i. Cogi possessorem ab eo qui expetit titulum suæ possessionis dicere incivile est. L. 11.

(*i*) Id quod nullius est, ratione naturali, occupanti conceditur. Ff. 4. b. s. 3; see 2 Com. 258.

(*k*) Quum enim quæ nullius sunt cedant occupanti, et res pro derelictis habitæ pro rebus nullius habeantur, nihil sanè æquius est, quam id quod quis bonâ fide et justo titulo tempore longo possedit, et ab altero non est vindicatum, possidenti adquiri. Heineccius, El. J. C. pars 6, s. 208; Gro. de Jure Belli atque Pacis, p. II. 4.

(*l*) Roll. Rep. 192. 227; Tri. per Pais, 209; Cro. J. 463; Bl. Comm. 6, 7; Bac. Abr. *Ev.* 648.

(*m*) Roll. Rep. 132; Tri. per Pais, 339.

(*n*) *Denn* v. *Barnard*, Cowp. 595.

(*o*) *Abby* v. *Lill*, 2 Bing. 599. And see *Arehangelo* v. *Thompson*, 2 Camp. 620. *Kemp* v. *Lowen*, 1 Camp. 178; 5 Bing. 299. *Hitchen* v. *Best*, 1 B. & B. 299. Where the postmaster was offered in a criminal case as evidence to show

POWER (*p*).

General principle.

Proof of execution.

It is a general principle of law, that whenever a power is given to particular persons to do a written act in a particular manner, or under certain particular circumstances, whether it be to parish officers or magistrates, as to grant certificates, under which, if duly executed, other persons, especially public officers, are bound to act, or to grant warrants, or make orders, that their authority must appear on the instrument itself. It must thereby appear that they are the persons authorized, and that the certificate, warrant, or order, was made in the manner and under the circumstances required. Otherwise the certificate, warrant, or order, is not obligatory, but void (*q*).

Hence, where the question was, whether a certificate signed by two churchwardens and one overseer, but bearing only two seals, was a legal and valid certificate under the stat. 8 & 9 W. 3, c. 30 (*r*), the Court held that the certificate had not been properly executed (*s*). Lord Ellenborough, in giving judgment, observed, "in considering how far the cases of deeds are applicable to the present, it is to be recollected, that, in those cases, the parties alone, under whose authority the deeds were executed, are bound by them; but the present is the case of the execution of a power, which binds and operates upon other persons at their peril, and subjects them to indictments as for crimes, in case of their disobedience to the power, if it be duly executed."

that the prisoner had put the letter into the post-office at a particular place, Lord Ellenborough rejected the evidence. *R.* v. *Watson*, 1 Camp. 215. See above, 622.

(*p*) It is a general rule that an appointee under a power, takes under the instrument creating the power, and not under that by which it is executed. *R.* v. *Lord of Manor of Oundle*, 1 Ad. & Ell. 283. Power of appointment when satisfied by a devise. *Davies* v. *Williams*, 1 Ad. & Ell. 588. A power of appointment in *A.* on surrender of copyhold to such uses as *A.* shall appoint, and until such to use of *A.* in fee is well executed by *A.*, although never admitted. The copyholder continues tenant until some one is admitted under his surrender. *R.* v. *Lord of Manor of Oundle*, 1 Ad. & Ell. 283. And see *R.* v. *Lord of Manor of Hendon*, 2 T. R. 484. An affirmative power expressed does not narrow an incident power. Com. Dig. *Franchise*, F. 20. Lands are appointed under a power to *A.* to the use of *B.*, the legal estate vests in *A.* *Doe* v. *Heddon*, 4 M. & Ry. 118. Appointments illusory or nominal are rendered valid by 1 W. 4, c. 46. Where a deed of appointment appears formally executed, revoking a former one, which is not found and declared by the existing one null and inoperative, the Court will not allow the existing deed to be affected by mere conjecture as to its not pursuing duly the power of revocation reserved in the former. *Hougham* v. *Sandys*, 2 Sim. 137. When a lease is made under a power to let at the ancient and accustomed rent, all the circumstances connected with that rent are admissible in evidence. The different leases may be referred to, in order to see what is the usual and accustomed rent. *Doe* v. *Wilson*, 5 B. & A. 363. And see *Smith* v. *Doe*, 2 B. & B. 504. And a lease under such a power is not void, though it reserve a forehand rent, if such be the usual and accustomed rent. Ib. *Secus*, if the power require the "best and most approved yearly rent to be reserved." *Doe* v. *Gifford*, ib. 371.

(*q*) Per Ld. Ellenborough, *R.* v. *Austrey*, K. B. East, T. 1817.

(*r*) Which requires certificates to be under the hands and seals of the churchwardens and overseers, or the major part of them, or under the hands and seals of the overseers, where there are no churchwardens.

(*s*) *R.* v. *Austrey*, K. B. East. Term, 1817; Phillips on Ev. 469. The certificate was duly attested, and allowed by two magistrates, and purported to be the certificate of *A. B.* and *C. D.* churchwardens, and of *E. F.* overseer. One seal was opposite the first two names, and the other seal opposite to the last; no trace of any other seal appeared on the instrument, which was thirty years old. It must appear on the face of an order made by a justice that he had jurisdiction to make it, or it will be void. *R.* v. *Hulcot*, 6 T. R. 587. But such an order may be bad in part, and good for the residue. *R.* v. *Fox*, 6 T. R. 148.

Proof of execution.

Where a special authority is given to magistrates and others by statute, their acts are null and void unless they proceed in the manner and under the restrictions which the statute imposes. And therefore where a notice is required previous to the allowance of indentures by a magistrate, if he allow the indentures without such notice, the allowance is void (*t*).

With regard to the execution of powers created by private authority (*u*), it is a settled rule of law, that all the circumstances required by the creators of the power, however unessential and otherwise unimportant they may be, must be observed, and cannot but be satisfied by a strict and literal performance (*x*).

Thus, in the case of *Thaire* v. *Thaire* (*y*), where there was a submission to arbitration, "so that the award be delivered under their hands and seals," it was made a question, whether an award sealed, but not signed, was a good award; the point reserved being, whether the sealing, which was virtually a signing, was sufficient; or, whether the words of the submission should be intended, as in common parlance, an actual writing of their hands. The Judges of the Common Pleas were at first divided upon that point. It was finally determined, however, by the whole Court, that a virtual signing would not do, but that there ought to be an actual signing under their hands.

It has been solemnly decided, in several cases, that a power, to be executed by signing and sealing, to be attested by witnesses, is not well executed unless the attestation shall express that the signing, as well as the sealing, were witnessed. Thus, in the case of *Doe* d. *Mansfield* v. *Peach* (*z*), where the power was to be executed "by any deed or writing under the *hands and seals* of the parties, to be by them duly executed in the presence of, and *attested* by, two or more witnesses," and the attestation was only of the *sealing and delivery*, the Court of King's Bench held that the attestation was insufficient. The same point was decided by a majority of the Judges of the Common Pleas, in the case of *Wright* v. *Wakeford* (*a*).

Upon the same principle it was held, that a power, to be executed by any appointment, in the nature of a will, to be *signed and published* in the presence of, and attested by, two or more credible witnesses, was not well executed by an attestation which noticed the *signing only*, and not the publication (*b*).

And such a defect in an attestation cannot be remedied by a new attesta-

(*t*) *R.* v. *Newark-upon-Trent*, 3 B. & C. 59. Although the Act also provided that no settlement should be gained unless the indentures should be allowed.

(*u*) In what case a power delegated to *three* conjunctim & divisim may be executed by *two*, see Co. Litt. 52. b. note (2) and (3), by Butler and Hargrave. In what cases a majority of churchwardens and overseers have power to lead the parish. *R.* v. *Beeston*, 3 T. R. 592; 2 Nolan, 196, n. Burn's J., tit. *Churchwardens*.

(*x*) Per Ld. Ellenborough, in *R.* v. *Austrey*, K. B East. Term, 1817. See Sugden on Powers.

(*y*) Palm. 109, cited by Ld. Ellenborough, in *R.* v. *Austrey*.

(*z*) 2 M. & S. 576.

(*a*) 4 Taunt. 214—Mansfield, C. J. dissentiente. In consequence of the decisions in these two cases, the stat. 54 G. 3, c. 168, enacted, "that every deed or other instrument, already made with the intention to exercise any power, &c. shall, if duly signed and executed, and in other respects duly attested, be from the date thereof, and so as to establish derivative titles, if any, of the same validity and effect, and provable in like manner, as if a memorandum of attestation of signature, or being under hand, had been subscribed by the witness, and the attestation expressing the fact of sealing and delivering, without expressing the fact of signing, or any other form of attestation, shall not exclude the proof, or the presumption, of signature." This Act is merely retrospective.

(*b*) *Moodie* v. *Reid*, 7 Taunt. 355.

tion, indorsed upon the instrument after the death of one of the parties. For such an attestation cannot give to the act of the parties an operation after their death which it never had during their lives (*c*). Proof of execution.

And where the attestation in such a case is defective, the defect cannot be supplied by evidence that the witnesses did in fact attest the signing, as well as the sealing (*d*).

Where, however, the terms creating the power do not require an attestation of the signing and sealing by the witnesses, but merely that the instrument shall be signed, sealed, &c. *in their presence*, it seems that proof, in fact, that they did witness the requisite particulars, signing as well as sealing, is sufficient, although the attestation applies to the sealing and delivery only (*e*).

PRESCRIPTION, GRANT, &c.

As the ownership of property is a mere arbitrary and artificial relation, it follows, that the evidence to prove that relation must also be of an artificial character, and that it does not admit of proof through the natural medium of the senses. Nature of evidence to prove a title.

The most direct indications of property consist in the evidence of those forms and ceremonies of investiture and written instruments which the law has appointed for the transferring the right of property, and authenticating and commemorating such transfers.

For such purposes, the ancient mode of alienation, by open and formal livery, before witnesses, and the more modern conveyance by deeds, solemnly authenticated, were devised and appointed. These are the most direct proofs which the nature of the case admits of. But these alone are inadequate to the purposes of proof and the security of property. The living witnesses of such transfers perish in the ordinary course of nature; and the most durable memorials which human ingenuity can devise are liable to decay, and to casual loss and destruction, as well as wilful spoliation. In order, therefore, to supply the place of these, the most direct and authentic testimonies, recourse must be had, as in other cases, to indirect and circumstantial evidence, for the purpose of proof. Of those circumstances which afford presumptive evidence of property, whether real or personal, continued possession is, beyond all comparison, the strongest in its nature and operation. In the infancy of society, mere occupation would usually confer an actual title, and in some instances, even to this day, such a title prevails (*f*); and, by a slight extension of the principle, an owner who has long acquiesced in the adverse enjoyment of property by another, may be considered to have abandoned it, and the occupant to be entitled to it by reason of his occupancy. Grounds for presuming a title.

(*c*) P. C. in *Doe* d. *Mansfield* v. *Peach*, 2 M. & S. 576; *Wright* v. *Wakeford*, 4 Taunt. 214; *Wright* v. *Barlow*, 3 M. & S. 512. S. P.

(*d*) *Doe* d. *Hotchkiss* v. *Pearce*, 6 Taunt. 402; 2 Marsh. 102.

(*e*) Thus, where the deed, which created the power, directed merely that it should be executed by any writing, to be signed and sealed in the presence of two witnesses, without directing that they should attest such execution; and the deed, in pursuance of the power, was expressed to be executed in the presence of the witnesses, but the attestation applied to the sealing and delivery only: the Chancellor was of opinion that it might be properly left to the jury to presume that the deed was signed, as it professed to be, in the presence of the witnesses who attested the sealing and delivery. *M'Queen* v. *Farquhar*, 11 Ves. 467; 17 Ves. 458.

(*f*) 2 Bl. Comm.; *supra*, tit. POSSESSION.

Grounds for presuming a title from enjoyment.

So forcible is the presumption derived from long-continued possession, and so conducive is it to the peace and quiet of society to protect such a possession, that in many instances it is absolutely conclusive of the right to the subject-matter, by virtue of positive arbitrary rules and statutory enactments; and in numerous other cases possession affords presumptive evidence of title (*g*). Rules of this nature, whether conclusive, or of inferior force, are founded, 1st. On the principle of law, which will not presume any man's act to be illegal, and will therefore attribute such continued use and enjoyment to a legal, rather than an illegal origin, and will ascribe long-continued possession, which cannot otherwise be accounted for, to a legal title. 2dly. Upon a reasonable and very forcible presumption, that the acquiescence in such enjoyment for a long period, by those whose interest it was to interrupt it, arose from the knowledge and consciousness, on their part, that the enjoyment was rightful, and could not be disturbed. And also on a consideration of the hardship which would accrue to parties, if, after long possession, and when time had robbed them of the means of proof, their titles were to be subjected to rigorous examination. Were this to be permitted, length of possession, instead of strengthening, would weaken every man's title to his estate. 3dly. Upon a principle of public policy and convenience, which operates to the preservation of the public peace, and the quieting of men's possessions (*h*), and can work no prejudice, except to those who are guilty of negligence in the conduct of their affairs (*i*).

(*g*) The maxim of law is "ex diuturnitate temporis omnia præsumuntur solemniter esse acta." Co. Litt. 6. Hence, if in the case of a feoffment the witnesses be dead, quiet possession for a length of time will make a strong or violent presumption, which stands for proof. Ibid. Mod. 117; Lev. 25; Palm. 427. In *Eldridge* v. *Knott*, Cowp. 215, Lord Mansfield observes, that "there are many cases not within the Statute of Limitations, where, from a principle of quieting possession, the Court has thought a jury should presume any thing to support a length of possession." Lord Coke says, "that an Act of Parliament may be presumed, even in the case of the Crown, which is not bound by the statutes of limitation." A grant may be presumed from great length of possession; it was so done in *The Mayor of Hull* v. *Horner*, Cowp. 102. Not that in such cases the Court really thinks that a grant has been made, because it is not probable that a grant should have existed without its being upon record, but they presume the fact for the purpose and from a principle of quieting possession." Presumptions do not always proceed on a belief that the fact has taken place: grants are frequently presumed for the purpose and on the principle of quieting the possession. *Hilary* v. *Walker*, 12 Ves. 252; and see Lord Hardwicke's observations in *Lyddall* v. *Weston*, 2 Atk. 19. Title was made from the Black Prince, which could have been out of him but by Act of Parliament; and because possession had gone accordingly, the Court presumed an Act. Skinn. 78. But although a record may be presumed from long-continued enjoyment, so as to defeat an ancient documentary title, yet such a title must (it seems) prevail in a case of merely conflicting evidence. Per Abbott, L. C. J. in *Cuthbert* v. *Cooper*, Sitt. after Trin. T. 1825.

(*h*) See Lord Mansfield's observations in *Eldridge* v. *Knott*, Cowp. 215, & *supra*, note (*g*). The presuming a deed from long usage is a modern invention of the Judges, for the furtherance of justice and the sake of peace, where there has been a long exercise of an adverse right. For instance, it cannot be supposed that a man would suffer his neighbour to obstruct the light of his windows and render his house uncomfortable, or to use a way over his meadow with carts and carriages, for twenty years, unless some agreement had been made between the parties to that effect, of which usage is the evidence. P. C. *Knight* v. *Halsey*, 2 B. & P. 206. And thought it be a general rule that no length of time will sanction a public nuisance (*Weld* v. *Hornby*, 7 East, 195), yet presumptions may be made even as to the extinguishment of a public right, in favour of long enjoyment by the public of some other right. Where a public road had existed for a great length of time across a channel once navigable, it was held that in support of the case it might be presumed that the public right had been extinguished either by an Act of Parliament and writ of *ad quod damnum*, by the act of the commissioners, or by natural causes. *R.* v. *Montague*, 4 B. & C. 598.

(*i*) According to the Roman law, Ea (usucapio vel longi temporis præscriptio

Grounds for presuming a title from enjoyment.

In considering the nature and effect of circumstantial evidence in questions of title, the order which belongs to presumptive evidence in general, naturally presents itself. Accordingly, it will be proper to consider, 1st. In what cases long-continued and peaceable possession is *conclusive* as to the right. 2dly. In what instances the law, although it does not conclusively infer a right, nevertheless gives to the evidence a mere *technical* force and operation, beyond its natural force and operation, as estimated by a jury. 3dly. In what cases the law raises no technical presumption, but the jury are left to make their own inference, according to the *natural* weight of the evidence.

Presumption, when conclusive.

The inference of title from adverse undisturbed enjoyment is *conclusive*, 1st. In cases of *prescription*. 2dly. In the different instances which fall within the Statutes of Limitation.

Prescription. Time and usage.

To every prescription *time* (*k*) and *usage* are inseparable incidents (*l*). With respect to time, it must have existed from time whereof the memory of man is not to the contrary, which is to be understood not merely of living memory, but of memory by the means of records or other written memorials (*m*). And therefore where there is any proof of the original or commencement of anything, it cannot be claimed by prescription (*n*); unless, indeed, the commencement were before the reign of Richard the First, for then it is considered to have existed immemorially, on an equitable construction of the stat. 2d of Westminster, which limited that time for a writ of right (*o*).

Hence, proof of an ancient grant of the right or liberty, without date, does not necessarily destroy the prescription; for it may have existed before the time of legal memory; and even supposing the grant to have been executed since, this may have been done for the purpose of confirming a prescriptive right (*p*).

Consideration.

A prescription is good, if it can be supposed to have had a legal commencement (*q*). And therefore, in such case, it is unnecessary, in order to

nocet iis qui in inquirendâ re suâ fuere negligentiores. Pand. L. 41, tit. 3; Heinecc. E. J. C. pars 6, s. 212. Such a prescription was not allowed to operate against those who from infirmity, &c., were not chargeable with negligence and laches in acquiescing in the possession of the property by another, "Ut agere non valenti non currat præscriptio." L. 1, s. 2.

(*k*) The Roman law was much more artificial than the law of England in its rules relating to the nature and effect of the continued possession of property. A prescription was either, 1st. Usucapio vel longi temporis præscriptio; or, 2d. Præscriptio longissimi temporis. Pand. lib. xli. tit. 3.—To constitute the first, a continued possession of three years, in the case of moveables, and in the case of immoveables, of ten years, *inter præsentes*, and of twenty years, *inter absentes*, was requisite. It was also essential that the possession should be *bonâ fide* "ut ignoret possessor rem esse alienam potiusque existimet eum a quo causam habet tanquam dominum jus alienandi habuisse." L. 109. Ff. de v. s. Where the possession was *malâ fide*, a *præscriptio longissimi temporis, i. e.* of thirty years, was necessary to confer a title. L. 8. s. 1, de prax. xxx. Et quidem triginta annorum præscriptione opus est si res usucapi nequeunt ob auctoris malam fidem. Heinec. El. J. C. pars 6, sec. 223. In other instances, a prescription of forty years, and in some of one hundred years; in others, of time immemorial, "cujus in contrarium non extat memoria," was essential to confer a title. L. 2, s. 1. 7; L. 23, s. 2; Heinec. El. J. C. p. 6, s. 225.

(*l*) Co. Litt. 113.

(*m*) Co. Litt. 115. a.

(*n*) Ibid. Hence, although the Pope's bull be evidence under a special prescription to be discharged of tithes, it is no evidence under a general prescription, because it shows the commencement of the custom. Palm. 38. B. N. P. 248.

(*o*) 2 Roll. 269, l. 10. 45.

(*p*) 2 Bl. 989.

(*q*) 1 T. R. 667. Hence a *custom* differs from a *prescription*; for a custom is good if it be *not unreasonable*.

Prescription. Consideration.

the establishment of a prescription by evidence, to prove a consideration, to support the right or obligation.

But in order to support a prescription against public right, a consideration must be proved; as where toll-thorough, that is, a toll for passing over the public highway, is claimed (*r*). But toll-traverse, that is, toll for passing through the private lands of the owner, may be claimed without alleging or proving any consideration.

And where the plaintiff claimed toll-thorough, and showed that the soil and the tolls before the time of legal memory belonged to the same owner, although they had been severed since, it was held, that it was to be presumed that the right of passage had been granted to the public in consideration of the toll (*s*).

Usage.

If repeated *usage* within the time of memory cannot be proved, the prescription fails (*t*); as, if it appear that a town was incorporated before the time of Richard the First, but that the franchise was never afterwards used (*u*).

And by non-use of a fair, market, or other franchise, for the use of others, the franchise will be forfeited (*x*).

So a chasm or interruption in the usage within time of memory will destroy the prescription. But a tortious interruption will not destroy it (*y*); neither will a discontinuance by the lease of a terre-tenant (*z*).

A prescription is also destroyed by proof of unity of possession (*a*).

Presumptive evidence.

Although prescriptive enjoyment of a right, when established, be conclusive as to title, yet the evidence to prove a prescription must, from the nature of the claim, usually be *presumptive*. So difficult is it to establish the continuance of an usage through many centuries past by the aid even of written memorials. In order to raise such a presumption, evidence should be given, such as the case affords, of the usage and exercise of the right, as far as living memory can go, by witnesses who have had actual knowledge of the fact. When this source has been exhausted, recourse must be had in the case, both of public and private prescriptions, to ancient documentary evidence. But here it may be observed, that continued usage and exercise of a right, carried no farther back than even living memory can go, will frequently afford *primâ facie* evidence whereon

(*r*) *Mayor and Burgesses of Nottingham* v. *Lambert*, Willes, 111. See *Richards* v. *Bennett*, 1 B. & C. 223. *Colton* v. *Smith*, 1 Cowp. 47. *Crispe* v. *Belwood*, 3 Lev. 424. Com. Dig. tit. *Toll-thorough* (*c*); where it was held, that a prescription to take toll for passing on an ancient navigable river, through the plaintiff's manor, was bad. And see *Truman* v. *Walgham*, 2 Wills. 206. Where a corporation claiming tolls were shown to have repaired only a single road and bridge; held, that the consideration for toll-*thorough* failed, and the claim could not be supported; but that if the King were at the time entitled to the soil of the town and to toll-*traverse*, a grant by King John, by charter to the corporation, "of the town with its appurtenances," was sufficient to include such toll. *Brett* v. *Beales*, 1 M. & M. 426.

Where the Crown granted a fair or market, with an express grant of toll; held, that the grantees were entitled to demand a reasonable toll, although none was specified in the charter. *Stamford Corp.* v. *Pawlett*, 1 J. & Cr. 57.

(*s*) *Lord Pelhom* v. *Pickersgill*, 1 T. R. 660.

(*t*) Co. Litt. 113, b.

(*u*) 2 Roll. 268. l. 52. Legal memory was from the first day of the reign of Rich. 1st. 1 Inst. 170.

(*x*) Manw. 81. Com. Dig. *Liberty*, C. 1. *Secus*, in the case of a free warren.

(*y*) 2 Inst. 653.

(*z*) 2 Inst. 654; Com. Dig. tit. *Prescription*.

(*a*) 3 Taunt. 4; Com. Dig. tit. *Suspension*, G.; *infra*, 1068.

a prescription may be presumed, which will prevail, if not rebutted by some evidence to the contrary (*b*). Prescription.

Ancient deeds, and other instruments relating to the exercise of the right, and derived from the proper custody, are also admissible in proof of a prescription. They may be considered to be in the nature of solemn declarations, accompanying acts which, it has been seen, are always admissible on general principles, as part of the *res gestæ*; and although it cannot be proved that any act of enjoyment was immediately consequent upon ancient deeds, yet when such deeds are found in the natural and legitimate repository where they might be expected to be found, on the supposition that they had been *acted upon*, a fair presumption arises that such has been the case. It would be too much to presume that an ancestor had forged the deeds in order to enable some remote descendant to commit a fraud, especially as such evidence, if it stand alone, unsupported by proof of the actual enjoyment of the right in modern times, is of no avail. Ancient deeds.

When the enjoyment has been established, as far as living memory can go, then ancient instruments, connected with the exercise of the right by their contents, and deriving authority from the place in which they are found, are in the nature of solemn declarations, which, although they do not *actually* accompany the enjoyment proved, are yet as proximate to it as the nature of the case will permit.

It has already been stated that doubts have been entertained on the question, whether reputation and traditionary declarations be admissible to prove a private, as they are to prove a public, prescription; and the practice on this point has not been uniform (*c*).

(*b*) Thus the uninterrupted possession of a pew in a church for thirty years is presumptive evidence, against a wrong-doer, of a title by prescription. *Griffith* v. *Matthews*, 5 T. R. 296; but see *Stocks* v. *Booth*, 1 T. R. 428. In *Rex* v. *Jolliffe*, 2 B. & C. 54, it was held that an usage in a court-leet, for but twenty years, as to the nomination of persons to be summoned on a jury, was evidence of an immemorial custom. Small rents had been paid without any variation for a long period to the lord; held that it afforded no evidence of the title to the land, the presumption being that they were quit-rents. *Doe* d. *Whittick* v. *Johnson*, 1 Gow's C. 173. On a claim, by custom, of the second-best fish out of every boat landed in S. Cove, whether a capstan and rope, maintained by the plaintiff and his ancestors in an artificial harbour, were used or not, held that the keeping of a capstan for such a purpose was a sufficient consideration for a reasonable duty, and that the custom was valid; but a party admitting himself to be a fisherman frequenting the Cove, was held to have been properly rejected as a witness; the judgments in causes between other parties being admissible in evidence to prove or disprove such customs. *Lord Falmouth* v. *George*, 5 Bing. 286; and 2 M. & P. 457 Under a covenant for perpetual renewal, in a lease by a corporation, dated so far back as 1710, at a yearly rent of 4 *l.* and fine of 5 *s.*, the Court would not presume, from the application of the yearly rent since 1769 to the purchasing coats for four poor men, that the lands were held in trust for a charity, and decreed a renewal. *Gozna* v. *Grantham Corp.*, 3 Russ, 261. As to an extinguishment by a change or alteration in the subject-matter, see 4 Co. 87, 88.

(*c*) Vide *supra*, Vol. I. tit. REPUTATION. In *Morewood* v. *Wood*, 14 East, 327, upon a motion for a new trial, the question was, whether such evidence was admissible to prove a prescriptive right, annexed to a particular estate, of digging stone upon the waste of the lord of a manor; the Court were divided upon the point; Kenyon, C. J. and Ashurst being of opinion against the evidence; Buller and Grose, Justices, for it. In *Blacket* v. *Lowes*, 2 M. & S. 494, where one question was, whether evidence of reputation was admissible to show the right of customary tenants to cut down wood on the plaintiff's estate, Ld. Ellenborough said, that reputation was out of the question; but a new trial was in that case granted, on the ground, that evidence of an old agreement between a former lord of the manor and his customary tenants, by which the former agreed to set out yearly sufficient wood for repairing their houses, and the latter agreed not to cut down wood, &c had been rejected. In *Barnes* v. *Mawson*, 1 M.

Prescription. Reputation, &c.

It seems, however, to be very doubtful, whether such evidence, in the case of a merely private prescription, would now be deemed admissible. At all events, assuming such evidence to be admissible, it is obviously very weak in its nature, and entitled to less credit than is due to similar evidence in the case of a public prescription: for there, the subject being a matter of public and general interest, it is probable that the existence and nature of the right would be matter of public experience, notoriety, and discussion, a presumption which cannot be fairly made where the right is of a merely private nature.

It is also to be remembered, that such evidence is of no avail unless it be supported by proof of acts of enjoyment of the right of privilege (*d*). And

& S. 77, it was held, that the lord of a manor might show that there was a known distinction in the manor between old and new land, and might prove the right of the lord to take the coals under freehold parcels of the new lands, as well by acts of enjoyment as by *reputation*. In *Doe* v. *Thomas*, 14 East, 323, evidence of reputation was held to be inadmissible to prove that lands devised by *A.* to the defendant in ejectment had formerly belonged to *I. S.* the father of *A. B.*, under whose will, made upwards of fifty years before, the plaintiff claimed, although the reputation was coupled with corroborative evidence. In *Clothier* v. *Chapman*, 14 East, 331, n., evidence of reputation, that a particular waste was parcel of a particular farm, was rejected at *Nisi Prius*. In *Powell* v. *Ireland*, Peake's L. E. 14, Chambre, J. admitted evidence of general reputation as to the boundaries of a town, but rejected it when offered to prove that houses once stood where there were then none. See *Chatfield* v. *Fryer*, 1 Price, 253. In *Davies* v. *Lewis*, 2 Ch. C. T. M. 535, hearsay evidence was admitted on the question, whether the *locus in quo* was parcel of a sheep-walk. In *Reed* v. *Jackson*, 1 East, 357, Ld. Kenyon said, that reputation was evidence with respect to public rights claimed, but not with respect to private rights. In *R.* v. *Eriswell*, 3 T. R. 723, Ld. Kenyon denied that reputation, with respect to prove a particular fact, *i. e.* the presentation to a benefice, was admissible. In *Withnall* v. *Gartham*, 1 Esp. C. 324, where the question was as to the mode of electing a schoolmaster, by the vicar and churchwardens of Skipton, Ld. Kenyon held, that tradition, as to the usage, was admissible, the distinction being between public and private rights. On the other hand, in B. N. P. 295, it is stated generally, and without qualification, that in questions of prescription it is allowable to give hearsay evidence; and that therefore, where the issue was on a right of way over the plaintiff's land, the defendants were admitted to give evidence of a conversation between persons, not interested, then dead, wherein the right of way was acknowledged. In *Webb* v. *Potts*, Noy, 44, the Court held, that such evidence was admissible to prove a modus for a particular farm. *Morewood* v. *Wood*, 14 East, 327, in the note, *supra*, 665. Buller and Grose, Justices, were of opinion that such evidence was admissible. See also the observations made by the Judges in the case of *R.* v. *Eriswell*, 3 T. R. 709, where Grose, Justice, observed generally, that reputation was evidence to prove prescriptive rights, although persons permitted to give evidence of what they have heard from dead persons concerning the reputation of the right, are not permitted to state facts of the exercise of the right, which the deceased persons said they had seen. In *Price* v. *Littlewood*, 3 Camp. 288, in an action for the disturbance of the plaintiff's pew, claimed in right of a messuage, an old entry in the vestry-book, signed by the churchwardens, stating that the church had been new leaded and repaired at the expense of the parish, with the exception of the two galleries, which had been repaired at the costs and charges of *A.* and *B.*, (under one of whom the plaintiff claimed,) in consideration of their using the galleries; Ld. Ellenborough held that this was admissible, as it showed the reputation of the parish on the right; but *note*, that he added also, as a reason, that it was made by the churchwardens, upon a point within their official authority. In the case of the *Bishop of Meath* v. *Lord Belfield*, B. N. P. 295; 1 Wils. 215; after the plaintiff, in a *quare impedit*, had given in evidence an entry in the register of the diocese of the institution of one *K.*, a blank being left in the register for the name of the patron, he adduced parol evidence of a general reputation in the country, that he had been presented by one under whom the plaintiff claimed; and it was held, upon a bill of exceptions tendered, that such evidence was admissible, on the ground that the presentation might be by parol, and that what commenced by parol might be transmitted to posterity by parol.

(*d*) *Supra*, Vol. I. tit. REPUTATION. If a right of turbary be attached to a house, or of common to a mill, and the owner pull down the house or mill, the right *primâ facie* ceases. But if he show an intent to build another house or another mill, the

Prescription.

also, that reputation or traditionary declarations, to be admissible, must be general as to the existence of the right, and that reputation or tradition as to particular facts are inadmissible (*e*).

Reputation, &c.

In the late case of *Weekes* v. *Sparke* (*f*), where the question raised by the pleadings was, whether the plaintiff in trespass had a right to abridge a right of common, by using the land for tillage, the Court held, that evidence of reputation in support of this right was admissible, because the right claimed was an abridgment of the general right over the waste, and affected a great number of occupiers within the district.

Variance.

If the party fail in proving part of the prescription as alleged, he fails altogether. For a prescription, being in its nature entire, cannot be divided into parts, so as to be supported in part, and in part rejected (*g*).

If a party prescribe generally for common for commonable cattle, the plea is not supported by evidence of a right of common for some particular species of commonable cattle only (*h*).

A prescription for common appendant to three hundred acres in four towns, is not proved by evidence of a right of common appendant to two hundred acres in two towns (*i*). And if a right of common be claimed in certain land, evidence that the right has been released in part of the land will defeat the prescription so laid (*k*).

But proof of a more ample right than that claimed is no variance. A plea prescribing a right of common for sheep will be supported by proof of a right of common for sheep and cows (*l*).

So it is no variance, although it appear that to the enjoyment of the right a condition is annexed, in the nature of a consideration for such enjoyment.

A prescriptive right of common for copyholders was alleged, and the right was found; but it was also found that the copyholders used to pay to the lord a hen and five eggs yearly; it was held that the prescriptive right was sufficiently alleged, although the annual payment was not stated (*m*). And where a prescriptive right of common appurtenant was claimed for so

right continues. *Moore* v. *Rawson*, 3 B. & C. 332; *infra*, tit. WINDOW. There seems, however, to be a very material distinction between those cases where the right is founded on a grant, real or presumed, as in the case of a right of way or right of common on the lands of another, and those where it arises from mere occupancy, as the right to light or air. In the former case, it should seem that as the right is not acquired but by twenty years' use, it ought not to be lost but by disuse for the same period. In the case above cited, the question was, whether the right to have a window unobstructed had been lost by the owner's taking down the building seventeen years before, and erecting a blank wall in its place, adjoining the ground of the defendant, who, three years before the action, had erected a building near the blank wall of the plaintiff, who then opened a window in the same place where the ancient window had been. See the observations of Littledale, J. in that case; and *Lethbridge* v. *Winter*, 1 Camp. 263.

(*e*) 5 T. R. 29. 32; *supra*, Vol. I.

(*f*) 1 M. & S. 691.

(*g*) *Morewood* v. *Wood*, 4 T. R. 159.

(*h*) *Pring* v. *Henley*, B. N. P. 59, 60. *Rotheram* v. *Green*, Cro. Eliz. 593; 1 Camp. 309. 315.

(*i*) B. N. P. 60; Hob. 109; Cro. Eliz. 531.

(*k*) *Rotherham* v. *Green*, Cro. Eliz. 593.

(*l*) *Bushwood* v. *Pond*, Cro. Eliz. 722. *Bailiffs of Tewkesbury* v. *Bicknell*, 1 Taunt. 142.

(*m*) *Gray* v. *Fleteher*, B. N. P. 29; Cro. Eliz. 563; 5 Co. 78, b. But see *Lovelace* v. *Reynolds*, Cro. Eliz. 593, where an issue was taken on a plea prescribing for a right of common generally, and the jury found that the party had the right, paying 1 *d.* for it; it was held that the plea was not supported, the prescription being entire. There the payment was part of the custom. Upon a trial, Newcastle Summ. Assizes, 1827, Bayley, J. left it to the jury, whether the payment of 1 *d.* for horngeld was a condition precedent or subsequent to the enjoyment of the right, being of opinion that if it were the former it ought to be alleged.

Prescription. Variance.

many sheep, every year, and at all times of the year, and the right was proved; but it also appeared that the tenant of an adjoining farm was entitled to have the sheep folded on his lands whenever they were fed on the common; it was held that the prescription was well proved: that the words *at all times* must be understood with reference to the usual custom of folding sheep, which seldom, if ever, remained on the common in the night-time, but were folded; and that the folding of the sheep at night was not to be regarded as part of one entire prescription for common of pasture, but rather as a consideration subsequent to the enjoyment of the right (*n*).

The precise quantity of the estate to which the prescriptive right is claimed as appurtenant, is not material. Thus, a prescription for common appendant to a house and twenty acres is sufficient, although it appear that the right is appurtenant to a house and but eighteen acres (*o*).

Where the question in a replevin suit was as to the liability of the plaintiff to repair the banks of a river, a finding by the jury that all occupiers have used to repair, was held to be immaterial, for possibly the occupiers were but particular tenants, who could not bind the inheritance (*p*).

A justification in trespass, under a custom for the tenants of a particular copyhold tenement, parcel of a manor, stated in the plea, to cut turf, &c. to be used on the tenement, is not supported by evidence of a general usage of that nature pervading the whole manor (*q*).

By the new rules of Hilary Term, 4 W. 4, where the defendant pleads a right of way or of common, or other similar right, the plea shall be taken distributively (*r*).

Defence.

In answer to evidence tending to prove a title by prescription, the defendant may adduce proof of a commencement within time of memory. As by showing that a pew, claimed by prescription, began to exist within the time of legal memory (*s*). But a grant within the time of memory does not necessarily destroy the prescriptive claim, for it may have been intended merely in confirmation (*t*). Or the defendant may show that the right has been extinguished by unity of possession (*u*).

So he may show that the usage has not been continued (*x*). Or that the thing to which the presumption was attached no longer exists (*y*). But it is not sufficient to show a mere circumstantial variation in that to which the prescription is annexed. As where a man prescribes for a watercourse to a fulling-mill, and he converts it into a grist-mill (*z*); or a corporation takes a new name (*a*); or that a public road, which existed by prescription, but which could be used only when the tide was out, may, in consequence of alterations made in the adjacent river by virtue of an act of parliament, be used at all times (*b*).

(*n*) *Brook* v. *Willet*, 2 H. B. 221.

(*o*) B. N. P. 60; Cro. Eliz. 531; 1 Ford. 204.

(*p*) *Rooke's Case*, 5 Co. 100.

(*q*) *Wilson* v. *Page*, 4 Esp. C. 71.

(*r*) See tit. RULES.

(*s*) *Griffith* v. *Matthews*, 5 T. R. 296.

(*t*) 2 Bl. 989.

(*u*) 3 Taunt. 24, and *infra*, tit. WAY. B. N. P. 74, where it is laid down, that a right of way may be extinguished by unity of possession, unless it be a necessary one, and then it shall not; but a right of watercourse does not seem to be extinguished by unity of possession in any case. Latch. 103; Poph. 166; Com. Dig. *Suspension*, G. If a man has a franchise by prescription, and the king grants him a charter, he cannot afterwards claim it by prescription. Com. Dig. *Prescription*, G.

(*x*) *Supra*, 906.

(*y*) 4 Co. 48; Com. Dig. *Prescription*, G.

(*z*) 4 Co. 87; Com. Dig. Ibid.

(*a*) Ibid.

(*b*) *R.* v. *Tippett*, 3 B. & A. 193.

Statutory bar.

Upon the principle of policy in quieting men's possessions and preventing litigation, the enactments of the several statutes of limitation are founded (*c*). Thus, by the stat. 32 H. 8, c. 2, seisin in a writ of right must be within sixty years; writs of mortdauncestor, and actions possessory on the possession of the plaintiff's ancestors, must be brought within fifty years; writs for manors, lands, &c. on the plaintiff's own seisin, must be brought within thirty years; and no person shall make any avowry or cognizance for any writ, suit or service, or allege seisin of any writ, suit or service, above fifty years before the making such avowry or cognizance (*d*). By the stat. 21 J. 1, c. 16, writs of formedon must be sued within twenty years next after the title or cause of action first accrued; and by the same statute, no one shall enter upon any lands, tenements or hereditaments, but within twenty years next after his title accrued (*e*).

The Statute of Fines (*f*) affords another instance to the same effect.

It has been seen, that by the late statute real and mixed actions, except for dower, of *quære impedit*, and ejectment, are abolished (*g*).

Technical force and operation.

Secondly, where the law makes no conclusive inference, but nevertheless gives to the evidence a *technical* efficacy beyond its simple and natural force and operation (*h*).

Grant of incorporeal right.

Under this head are to be classed the presumptions of legal title, by grant or otherwise, to incorporeal rights in the lands of others, founded on the adverse possession and enjoyment of such rights for the space of twenty years.

The presumption of right in such cases is not conclusive; in other words, it is not an inference of *mere law*, to be made by the Courts, yet it is an inference which the Courts advise juries to make whenever the presumption stands unrebutted by contrary evidence. Such evidence in theory is mere presumptive evidence; in practice and effect it is a bar. The grounds of such presumptions have been already adverted to (*i*).

The precise period of twenty years seems to have been adopted in analogy to the enactment of the Statute of Limitations, which makes an adverse enjoyment of twenty years a bar to an action of ejectment (*k*); for as an adverse possession of that duration will give a possessory title to the land itself, it seems to be also reasonable that it should afford a presumption of right to a minor interest arising out of the land (*l*).

(*c*) Vide *supra*, tit. EJECTMENT.—LIMITATIONS.—POSSESSION.

(*d*) See *Eldridge* v. *Knott*, Cowp. 214; *infra*.

(*e*) As to the interference of a court of equity after twenty years, see *Ld. Cholmondeley* v. *Clinton*, 1 J. & W. 190.

(*f*) 4 H. 7, c. 24.

(*g*) *Supra*, 656.

(*h*) Subsequently to the writing the observations under this head, a great change has been made in this branch of the law by the stat. 2 & 3 W. 4, c. 71. As this statute does not exclude a party from any plea which was available before, but attains the same end by less objectionable means, it has been thought to be advisable to retain them, subjoining to them the provisions of the statute, with the decisions upon it which have since occurred.

(*i*) *Supra*, 904.

(*k*) See *Holcroft* v. *Heel*, B. & P. 460; 2 Saund. 175, a. *Doe* v. *Calvert*, 5 Taunt. 170; *supra*, 399. The use of the banks of a river for more than twenty years by fishermen, who have occasionally sloped and levelled them, is evidence of a grant by the owner of the soil. *Gray* v. *Bond*, 2 B. & B. 667.

(*l*) *Supra*, 395. 743; and see *Campbell* v. *Wilson*, 3 East, 294. *Reed* v. *Brookman*, 3 T. R. 151. Notwithstanding the admission of these presumptions, which appear now to be established and necessary rules of law, this branch of jurisprudence cannot but be considered as imperfect and inartificial, more especially if it be contrasted with the laboured distinctions of the Roman law upon the same subject. The presumption being one of law, arising out of the fact of continued and adverse possession unrebutted, ought, as a rule of

Grant. Presumption.

Thus, an enjoyment of lights (*m*); of a right of way over the land of another (*n*); of a stream of water flowing through the property of another (*o*); of a market in the neighbourhood of another market belonging to a grantee under the Crown (*p*), affords *primâ facie* evidence of a legal right, by grant or otherwise, which, if unrebutted by opposite evidence, ought to prevail.

Upon the same principles, the uninterrupted possession of a pew in a church for the space of twenty years, affords presumptive evidence of a legal title by prescription, or by a faculty, against a wrong-doer (*q*).

This, however, it is to be remembered, is but a rule or presumption of evidence, according to which twenty years seem to constitute the *minimum* of continued adverse enjoyment, from which *alone*, unconfirmed by any other circumstances, a legal title ought to be presumed against a title which would otherwise prevail. The presumption may be founded on a shorter period of enjoyment, if it be supported by confirmatory evidence; a longer period may be insufficient, if collateral circumstances tend to rebut the presumption (*r*).

Livery may be presumed from a deed of feoffment, followed by possession for forty years (*s*).

How rebutted.

The very ground of the presumption in such cases is the difficulty of accounting for the possession and enjoyment, without presuming a grant or other lawful conveyance. Hence, notwithstanding a continuance of possession far exceeding twenty years, if the original possession can be accounted for consistently with a title existing in another, it will be competent to the latter to rebut the presumption arising from the continuance of the possession (*t*).

law, to be applied whenever the facts to which it is applicable arise; and yet, unless the jury strain their consciences so far as to find a grant, in the actual existence of which the Court itself may not believe (see Ld. Mansfield's observations, *supra*, 904), the rule of law is inapplicable. In other words, the rule is useless, unless the jury, upon the recommendation of the Court, find a fact, which, in all human probability, never existed, and which is perfectly unconnected with the real merits of the case. Surely so heavy a tax upon the consciences and good sense of juries, which they are called on to incur for the sake of administering substantial justice, ought to be removed by the assistance of the legislature. And now see above, note (*h*).

(*m*) *Darwin* v. *Upton*, 26 G. 3; 2 W. Saund. 175, c.; *supra*, 538. *Lewis* v. *Price*, 2 W. Saund. 175, a. *Dougal* v. *Wilson*, 2 W. Saund. 175, b.

(*n*) *Keymer* v. *Summers*, B. N. P. 74. It has been seen, that an enjoyment of a right of way by the public, far short of twenty years, is sufficient to afford a presumption of a dedication to the public. *Supra*, tit. HIGHWAY.

(*o*) Vin. Ab. *Ev.* Q. a. pl. 8.

(*p*) *Holcroft* v. *Heel*, 1 B. & P. 400, where the enjoyment for twenty-three years seems to have been considered to be an absolute bar. It seems, however, to be now settled that the enjoyment operates as presumptive evidence only. See Lord Mansfield's observations on *The Mayor of Kingston-upon-Hull* v. *Horner*, Cowp. 102. *Darwin* v. *Upton*, 2 W. Saund. 175. c.

(*q*) So held by Willes, J., as stated by him in *Darwin* v. *Upton*, 2 W. Saund. 175, c. But if the right be claimed by prescription, as appurtenant to an ancient messuage, the claim will be rebutted by proof that the pew began to exist within time of legal memory. *Griffith* v. *Matthews*, 5 T. R. 296. There the right was claimed as appurtenant to an ancient messuage; an enjoyment of thirty years was proved; but as it appeared that previous to that time it was an open seat, it was held that the declaration was not supported by the evidence. Vide *supra*, tit. PEW.

(*r*) Per Ld. Ellenborough, C. J. in *Bealy* v. *Shaw*, 6 East, 214. *Darwin* v. *Upton*, 2 W. Saund. 175, b.; Mich. 26 G. 3, where the Court of K. B. held that length of time was presumptive evidence only.

(*s*) Per Lord Coke, in *Isaac* v. *Clarke*, 2 Buls. 306; 1 Roll. 132; Vin. Ab. A. a.

(*t*) These and many of the following observations having been written previously to the late statutes of Prescription and Limitation, must be taken as subject to the positive provisions of those Acts.

Grant Presumption.

Where user is proved, and it is not shown that there ever was a time when the user did not exist, the jury are bound to find a prescription, and cannot find a lost grant since the time of legal memory, unless an actual grant be proved, or circumstances be proved which afford probable ground for presuming that a grant was in fact made at the time laid (*u*).

As the presumption of title is made in analogy to the Statute of Limitations, 21 J. 1, c. 16, which takes away the right of entry after an adverse possession of twenty years, it seems that any evidence which would under that statute show that the possession of the land was not adverse, so as to bar the entry of the lessor, would also be admissible to show that the enjoyment of the right was not adverse (*x*).

Thus the presumption of a grant of an incorporeal right, affecting the lands of another, may be rebutted by proof that the exercise and enjoyment of the owner was acquiesced in, not by the owner of the inheritance, but by one who possessed a temporary interest only, such as a tenant for life, or years, whose negligence and laches cannot be allowed to prejudice the owner of the inheritance (*y*). Or by proof that, although the enjoyment was with the acquiescence of the owner of the inheritance, it was not *adverse*, but was with the leave and license of the owner of the soil, or was exercised under a mutual mistake (*z*).

The technical presumption necessarily assumes that it was practicable to transfer the right by means of a grant or other conveyance; hence, the presumption does not operate, where such a grant could not, from the nature of the case, have been made. Such a presumption cannot, therefore, be made against an incumbent of a living, although the right has been enjoyed

(*u*) *Blewett* v. *Tregoning*, 5 N. & M. 300. S. C. 3 Ad. & Ell. 554. *Qu.* Whether a custom can co-exist with a prescriptive right? Ib.

(*x*) *Supra*, tit. EJECTMENT. But now see the stat. 2 & 3 Will. 4, c. 71.

(*y*) Thus, where *A.* being tenant for life, with power to make a jointure, which he afterwards executed, gave license to *B.*, in 1747, to erect a weir on *A.*'s soil, for the purpose of watering *B.*'s meadows, and then *A.* died, and the jointress entered, and continued seised down to 1799, when an action being brought against the tenant of *A.*'s farm for diverting the water of the river, the Court of K. B. held that the uninterrupted possession of the weir for so many years, with the acquiescence of the particular tenants for life, did not affect him who had the inheritance in reversion. *Bradbury* v. *Grinsell*, Mich. 41 Geo. 3; 2 W. Saund. 175, d. And in *Daniel* v. *North*, 11 East, 370, it was held that an enjoyment of lights for more than twenty years, during the occupation of the opposite premises by a tenant, did not preclude his landlord, who was ignorant of the fact, from disputing the right to the enjoyment of such lights. See also *Wood* v. *Veal*, 5 B. & A. 454. *Cross* v. *Lewis*, 2 B. & C. 686.

(*z*) See *Campbell* v. *Wilson*, 3 East, 294. In that case, the road in question had been used by the defendant for more than twenty years, an award had been made about twenty-six before the action, the operation of which was to extinguish all the ways then existing, except particular ways, not including the one in question. Chambre, J. observed to the jury, that it was probable that the defendant's enjoyment of the way over the plaintiff's mossdale, after the award, originated in mistake; but that if they were satisfied that the enjoyment was adverse, and that it had continued for more than twenty years and upwards before the action, it was a sufficient ground for presuming a grant. The jury found for the defendant; and upon motion for a new trial, it was objected, as a misdirection, that the jury had been told that they ought to presume a grant, although they were of opinion that the user originated *in mistake*. The rule, however, was discharged, on the ground, it seems, that the real question had been substantially left to the jury, there being no evidence to refer the use of the way to the award. Although right of common has been exercised for far more than twenty years, yet if, from the nature and circumstances of the enjoyment, it does not appear to have been generally known to all those interested in opposing the right, it is a question for the jury whether the enjoyment is to be referred to a right, or to encroachment. *Dawson* v. *Duke of Norfolk*, 1 Price, 247.

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for twenty years through the laches of his predecessor, for the latter was incapable of making the grant (*a*).

Where, by a statute, it is essential to a conveyance that it should be made by bargain and sale, enrolled in Chancery, it will not, it seems, be presumed, even after long-continued enjoyment, that such a deed was enrolled, unless some foundation be laid for making such a presumption; as by proof that the rolls have been searched, and a chasm found corresponding with the date of the supposed conveyance (*b*).

Where possession or usage has been of long duration, although it neither furnishes an absolute bar, nor operates virtually as such, in analogy to the statutes of Limitations, yet such evidence is so far regarded and recognized by the Courts, that a practical efficacy is given to it, not wholly derived from its own natural weight, as estimated by a jury, but partly from considerations of policy and convenience (*c*).

(*a*) *Barker* v. *Richardson*, 4 B. & A. 579.

(*b*) *Doe* v. *Waterton*, 3 B. & A. 149. The premises, which were copyhold, had been surrendered to the use of trustees, in trust for the poor of a town, and the trustees had been admitted under the surrender in 1743, and remained in possession till 1819. See also *Wright* v. *Smythies*, 10 East, 409. But see *R.* v. *Buckby*, 7 East, 45.

(*c*) Proof of long-continued possession does not in any case, except by the peremptory direction of a statute of limitations, operate as a bar, but merely as evidence of a legal commencement. In such cases, evidence of possession is of great weight; but there is no positive rule which says, that possession for one or two centuries, or any time *within memory*, shall be a sufficient ground for presuming a charter. In the case of a supposed bye-law, usage is evidence to support it, without the production of the original written law, or the loss of it. In all such cases, the presumption in favour of rights, of which the parties have been in long and peaceable possession, is founded upon principles of sound policy and convenience. Per Ld. Mansfield, 1 Cowp. 110. In *Read* v. *Brookman*, 3 T. R. 159, Buller, J. said, "For these last two hundred years it has been considered as clear law, that grants, letters patent, and records, may be presumed from length of time. It was so laid down in Lord Coke's time, 12 Rep. 5, as undoubted law at that time, and in modern times has been adopted to its fullest extent." See 1 T. R. 399. n.—Where the mayor and aldermen of a corporation had for near a century acted as the trustees of a school, and received the rents and profits, it was held, that a *charter* might be presumed. *Barwick* v. *Thomson*, 7 T. R. 488.—Where long possession has accompanied a recovery, a surrender by the tenant for life will be presumed. 2 Saund. 42. 7. In *Biddulph* v. *Ather*, 2 Wils. 23, proof that the owners of an estate had enjoyed wrecks for the space of ninety-two years, was held to be strong evidence of right. In *Hasselden* v. *Bradney*, 3 G. 3, C. B., cited by Buller, J., 3 T. R. 159, it was held, that a jury might find a recovery on presumption; and see *Bridges* v. *Duke of Chandos*, 2 Burr. 1065; *sinfra*, tit. RECOVERY. The production of an original lease for a long term, and possession for seventy years, is evidence of an assignment. *Earl* v. *Baxter*, 2 Bl. 1288. So possession of land for twenty years, and evidence of a deed, purporting to assign an old term of two thousand years, is evidence of an original grant of that term. *Denn* v. *Barnard*, 2 Cowp. 595. In *Roe* d. *Johnson* v. *Ireland*, 11 East, 279, where a surrender had been made to churchwardens, and their successors, in the year 1636, without naming any rent; but in 1649 the Parliamentary Survey charged them with 6*d.* rent, under the head of Freehold Rents; and there was no evidence of any different rent having been paid since that time; and receipts had been given for it as for a freehold rent, by the stewards of the manor; it was held to be evidence on which the jury might presume an enfranchisement, even against the Crown, although the manor had continued out in lease from before 1636 to 1804, although an old tablet of parochial benefactions, suspended in the church, noticed the surrender, but made no mention of any enfranchisement; and Ld. Ellenborough said, "that he would presume anything capable of being presumed, in order to support so long an enjoyment; and that, as Lord Kenyon had said, on a similar occasion, he would presume not only one, but a hundred grants, if they were necessary. See also *Lady Stafford* v. *Luellin*, Skinn. 77. *King* v. *Carpenter*, 2 Show. 48. A grant of property of the Duchy of Lancaster is subject to the same incidents as other Crown grants; a grant therefore of such property whilst out on lease, not recited in the grant, is void, notwithstanding an user

Grant. Presumption.

It seems, however, to be generally true, that whenever the original possession on the part of the holder can be accounted for by the party who claims through an antecedent legal title, and there is no precise point of time at which a clearly adverse possession commenced, however long the subsequent possession may have been, it is a mere question of fact for the jury, under all the circumstances of the case, whether a conveyance has actually been made to the party so in possession (*d*).

Grant from the Crown.

Although no one can prescribe against the Crown, the maxim being *nullum tempus occurrit regi*, yet after long-continued enjoyment, a grant from the Crown may be presumed. After long-continued exercise of a right of advowson by the prior of Stonely, it was held, that a grant was to be presumed (*e*); for that all should be presumed to have been solemnly done, which could make the ancient appropriation good, although the original grant could not be found.

Where the question was as to the right of advowson of a curacy under a deanery, formerly belonging to the collegiate church of Chester-le-street, but which came into the hands of the Crown at the dissolution, and remained there till 16 Jac. 1, when the deanery was granted away by the Crown, with all advowsons, donations, &c. and no nomination or presentation by the Crown was proved since that time; but those claiming under the grant had enjoyed the nomination or appointment. The jury found, under the direction of Ld. Mansfield, a grant of the advowson by the Crown, subsequent to the grant of the deanery (*f*).

Where it was proved that the corporation of Kingston-upon-Hull had (in 1774) been in possession and receipt of toll-dues on goods imported into the port of Hull, for the space of three hundred and thirty years, it was left to the jury to presume a grant by the Crown of those duties, between the date

under the grant from 1631 to 1760, as the King must be taken to have been deceived when he granted that which he could not give according to the terms of the grant. *Alcock* v. *Cooke*, 5 Bing. 340. Although the King may hold lands, &c. as an inferior lord, he holds also as King. Ib. See further, *Chad* v. *Tilsed*, 2 B. & B. 403.

(*d*) See *Doe* d. *Fenwick* v. *Read*, 5 B. & A. 232; *infra*, 923, note (*f*).

(*e*) *Bedle* v. *Beard*, 12 Co. 5. The church was appurtenant to the manor of *Kimbolton*, which manor, *cum pertinentibus*, was granted by Edward the First to Humphrey de Bohun, in tail general. The latter granted it to the prior of Stonely and his successors, who held it till the dissolution of the monastery, 27 Hen. 8. The manor had descended to Edward duke of Buckingham, and upon his attainder king Henry the Eighth granted the manor, with all advowsons, to Wingfield, and afterwards sold the rectory as impropriate in fee; and the plaintiff claimed by mesne conveyance from the vendee. The defendant obtained a presentation from queen Elizabeth by lapse, pretending that the church was not lawfully appropriate to the priory, on the ground that the rectory did not pass to Humphrey de Bohun, under the description of *manerium cum pertinentibus*; and that at all events the grant by him, being tenant in tail only, enured but for his own life. But the Court held, that although the advowson did not pass by the grant of the king, under the words *cum pertinentibus*, yet that it should be intended, in respect of the ancient and continued possession, that there was a lawful grant by the king to the said Humphrey; for that all should be presumed to have been solemnly done which might make the ancient appropriation good, although the grant could not be shown. And it was also said, that ancient possession would injure instead of strengthening a title, if, after a succession of ages, and the decease of the parties, objections should prevail which might have been answered in the lifetime of the parties, and which, if well founded, would have been sooner made. See the observations of Lord Mansfield on the above case, Cowp. 109, 110; and in *Eldridge* v. *Knott*, Cowp. 215.

(*f*) *Powel* v. *Milbank*, 12 G. 3, B. R.; 1 T. R. 399, in the note. The curacy appeared to be a benefice with cure of souls, and the plaintiff not having been licensed, it was held that he could not maintain an action for money had and received against an intruder.

Grant from the Crown.

of the charter, 5 Rich. 2d (1382), and the year 1441, when the enjoyment commenced, and the jury found the grant (*g*).

In a case in the Duchy Court, between the *King* and Mr. *Brown*, it was held, by Ld. Mansfield, that possession and enjoyment for one hundred years operated as evidence against the Crown for right in the defendant, if the claim could have a legal commencement (*h*).

Legal presumptions.

The law will, in many instances, found a presumption in fact as to a legal title, upon other grounds than long-continued enjoyment.

The presumption of law is *omnia rite esse acta*; and upon this principle, wherever trustees are bound to convey an estate to the beneficial owner, it is to be presumed, for the sake of investing one who has the lawful possession, with the legal title, that they have done their duty (*i*).

In the case of *Lade* v. *Halford* (*k*), Lord Mansfield said, that he and several of the Judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term outstanding in his own trustee, or a satisfied term to be set up by a mortgagor against a mortgagee, but direct the jury to presume it to be surrendered (*l*). So a surrender of a satisfied term is to be presumed in favour of the owner of the inheritance, where it is his interest that the term should be considered as surrendered (*m*).

Where there was a grant of a stewardship of a manor in 1821, and it appeared that a term had been created in 1712 to attend the inheritance, that upon a sale in 1793 the conveyance contained a declaration that all who held outstanding terms should hold them in trust to attend the inheritance, it was held that it was properly left to the jury to presume a surrender of the term in support of the grant (*n*).

And a surrender may be presumed from the acts and dealings of the owner, when they are inconsistent with the supposition that there has been no surrender, and there is no reason to apprehend that none has been made (*o*).

(*g*) *The Mayor of Kingston-upon-Hull* v. *Horner*, 1 Cowp. 102.

(*h*) Cited by Ld. Mansfield, 1 Cowp. 110. See also *Roe* d. *Johnson* v. *Ireland*, 11 East, 280; *supra*, 915; Skinn. 78; Vin. Abr. *Ev.* Q. a. 2.

(*i*) See Ld. Ellenborough's observations in *Keene* v. *Dearden*, 8 East, 263. See also Lord Kenyon's observations in *Doe* v. *Staple*, 2 T. R. 696. *Doe* v. *Sybourn*, 7 T. R. 2.

(*k*) B. N. P. 110, cited in *Doe* d. *Bristow* v. *Pegge*, 1 T. R. 758, in note.

(*l*) Lord Kenyon, in the case of *Doe* v. *Staple*, 2 T. R. 684, and *Doe* v. *Sybourn*, 7 T. R. 2, expressed his approbation of Lord Mansfield's doctrine. In *England* d. *Sybourn* v. *Slade*, 4 T. R. 682, a father having devised lands to trustees, in trust to convey them to his son in fee, on his attaining the age of twenty-one; it was left to the jury to presume that this had been done, although twenty years had not elapsed. See the next note.

(*m*) *Doe* d. *Burdett* v. *Wright*, 2 B. & A. 710. Where a term of one thousand years was created by deed in 1717, and in 1735 was assigned for the purpose of securing an annuity to *A.*, and after that to attend the inheritance: *A.* having died in 1741, and the estate having remained undisturbed in the hands of the owner of the inheritance and her devisee from 1735 to 1813, without any notice having been in the meantime taken of the term, except that in 1801 the devisor, in whose possession the deeds creating and assigning it were found, covenanted to produce those deeds when called for; it was held that the jury were warranted, in an ejectment brought for the premises by the heir at law, to presume a surrender of the term. In *Doe* d. *Bristow* v. *Pegge*, 25 G. 3, B. R., 1 T. R. 758, in the note, Lord Mansfield said, "I found this point settled before I came into this court, that the Court never suffers a mortgagor to set up the title of a third person against his mortgagee; for he made the mortgage, and it does not lie in his mouth to say so, though such third person might have a right to recover the possession. Nor shall a tenant, who has paid rent, and acted as such, ever set up a superior title of a third person against his lessor, in bar of an ejectment brought by him."

(*n*) *Bartlett* v. *Downes*, 3 B. & C. 616.

(*o*) Lord Tenterden, in *Doe* v. *Hilder*,

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But this is not a direct and immediate inference to be made by the Courts, but by a jury; and although the Court will, under certain circumstances, direct a jury to presume an outstanding term to have been surrendered by the trustee, yet, if such a presumption be not made by the jury, it cannot be made by the Court (*p*).

But a surrender of an outstanding term is not to be presumed where the purpose for which the term was created remains unsatisfied. Thus, an unsatisfied term, raised for the purpose of securing an annuity, cannot during the life of the annuitant be presumed to have been surrendered (*q*).

2 B. & A. 782, observes, "So where acts are done or omitted by the owner of the inheritance, and persons dealing with him as to the land, which ought not reasonably to be done or omitted, if the term existed in the hands of the trustee, and there does not appear to be anything that should prevent a surrender from being made, the act or omission may be most reasonably accounted for by supposing a surrender of the term, and therefore a surrender may be presumed." See further as to the doctrine of presuming a surrender, *Doe* v. *Putland*, Sugden's V. & P. 438. *Aspinal* v. *Kempson*, ib. 433.

(*p*) See Lord Kenyon's observations in *Goodtitle* d. *Jones* v. *Jones*, 7 T. R. 47; Mich. 1796. In that case, it was stated in the verdict that an old term created in the preceding century had been assigned from time to time, and was in existence in the year 1780.

(*q*) *Doe* d. *Hodsden* v. *Staple*, 2 T. R. 684. In 1772 a term of 1,000 years was created by deed, for the purpose of securing a sum of 5,000 *l.*; and in 1787 the principal and interest having been paid, the residue of the term was assigned in trust for the devisees of the person who created the term. In 1789 the premises were conveyed to a purchaser by deed, and the residue of the term was assigned in trust for the purchaser, her heirs and assignees, or as she should appoint, and in the meantime to attend the inheritance. The purchaser entered into possession of the premises, and continued so possessed till her death. In 1808 she executed a marriage-settlement, reserving to herself a power of appointment by deed or will, and after the marriage, she, in December 1813, devised all her real estate; neither in the marriage-settlement nor in the will was any mention made of the term of 1,000 years; she and her husband having both died, it was held, on ejectment brought by her heir at law, that there were no premises from which a surrender of the term could be presumed. *Doe* v. *Plowman*, 2 B. & Ad. 573. In the above case it was admitted by counsel in argument, that it was not usual in practice to notice such terms in a marriage-settlement, and therefore the Court held, that there was no ground for presuming a surrender. Lord Tenterden, in the same case, called in question the decisions in *Doe* v. *Wright*, 2 B. & A. 710; and *Doe* v. *Hilder*, 2 B. & A. 782. Those decisions have also been questioned in *Doe* v. *Putland*, Sugden on Vendors and Purchasers, 440; by Richards, C. B., and Graham, B., in *Dearden* v. *Lord Byron*, ib. 444; by Richards, C. B., in the *Marquis of Townsend* v. *Bishop of Norwich*, Ib. 443, and *Hayes* v. *Baily*, Ib. 444; *Aspinal* v. *Kempton*, Ib. 446, by Lord Eldon, C., who in the latter case observed upon the case of *Doe* v. *Hilder*, 2 B. & A. 782: "I have no hesitation in declaring that I could not have directed a jury to presume a surrender of the term in that case; and for the safety of the titles to the landed estates in this country, I think it right to declare that I do not concur in the doctrine laid down in that case." See Sugden on Vendors and Purchasers, 8th edit., from 440 to 446; Matthews on The Doctrine of Presumption and Presumptive Evidence, 226 to 259. It is to be remarked, that in the above case of *Doe* v. *Plowman*, the claim of the heir at law was allowed to be defeated by the term outstanding in his own trustee. See further, *Evans* v. *Bicknell*, 6 Ves. 184; *Hillay* v. *Wather*, 12 Ves. 251; *Shannon* v. *Broadstreet*, 1 Sch. & Lefroy, 70; *Lee* v. *Wallwyn*, 9 Ves. 31; 1 Madd. 412. Twenty years' adverse possession against trustees for raising portions is evidence that the right of the trustees has been released and satisfied. *Doe* v. *Martyn*, 8 B. & C. 497. The presumption of a surrender of a term can only be made where a title has been shown by the party who calls for the presumption, good in substance but wanting in some collateral matter necessary to complete it in point of form, and the possession has been consistent with the existence of the fact required to be presumed; where therefore the party calling for it to be made stood only upon the naked possession, and proved neither title thereto nor conveyance, nor how he acquired it, and the only ground for presuming a mortgage term to have ceased or been surrendered was, that proceedings in equity had been commenced for raising monies by sale of the mortgaged estates, to which the mortgagee was a party, but there was no proof of the particular estate having been sold, or the mortgage-money paid

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So, although as against a mortgagor who seeks to defeat the title of his mortgagee, a surrender of an outstanding term will be presumed, yet that presumption will not be made in favour of a prior mortagee against a subsequent mortgagee, in possession of the title deeds, without notice of the prior incumbrance (*r*).

And the law will not, in any case, raise such a presumption on a supposed breach of trust on the part of the trustees. Thus, where an estate was conveyed to trustees, in trust, to sell and to invest the money arising from the sale in the purchase of lands, to be settled to certain specified uses, but till the sale to permit *A.* to remain in possession, and to receive the rents and profits, *A.* having remained in possession for more than twenty years, it was held, on an ejectment brought by the trustees, that the possession of *A.* was not an adverse possession as against the trustees, and that no reconveyance by the trustees to *A.* could be presumed (*s*). And the jury will not be directed to presume the surrender of a term to attend the inheritance against the interest of the owner. Thus, where an old mortgage-term of one thousand years was created in 1727, was recognized in a marriage settlement of the owner of the inheritance in 1751, by which a sum was appropriated to its discharge, and no farther notice was taken of it till 1802, when a mortgage-deed, to which the owner of the inheritance and the representatives of the termors were parties, assigned it, as a security, it was held that a surrender could not be presumed (*t*).

Finally, it seems that an artificial presumption of this nature is not to be made gratuitously, merely because a term is satisfied, unless it be to answer some purpose of justice (*u*). It is to be remembered, that the presumptions here spoken of are the mere artificial creatures of law, depending entirely on considerations of legal policy and convenience; they are pure legal rules; the jury being, for this purpose, mere passive instruments in the hands of the Court. Such presumptions differ, therefore, *toto cœlo*, from conclusions drawn by a jury, when they determine according to the natural tendency and weight of the evidence; a distinction of importance, inasmuch as considerations of policy and convenience, which are the very source, and origin, and support of artificial presumptions, have no application to conclusions as to actual matter of fact. It is obvious, that wherever a jury is required to find, not according to their actual conviction of the truth, but in conformity with any considerations of policy, their finding resolves itself into a mere rule or presumption of law.

It has been intimated, that the doctrine of legal presumptions ought not to be extended (*x*). This, however, is a matter of purely legal consideration. The practice of requiring juries, in any case, to be mere passive

off, the Court held, that no presumption could be made. *Doe* d. *Hammond* v. *Cooke*, 6 Bing. 174, and 3 M. & P. 411. Where the wife was in possession of the premises for three months before her marriage, and she and her husband continued afterwards in possession for forty years, held, that the jury might assume the husband's possession to be in her right, and referable to her prior seisin, and sufficient to rebut the presumption of a prior title in the wife's father, who with his son and heir had always lived near, and had never disturbed the husband and wife in the occupation. *Doe* d. *Carr* v. *Bellyard*, 3 M. & Ry. 111.

(*r*) *Goodtitle* d. *Norris* v. *Morgan*, 1 T. R. 755.

(*s*) *Keene* v. *Dearden*, 8 East, 248.

(*t*) *Doe* d. *Graham* v. *Scott*, 11 East, 478, and *supra*, 916 (*m*).

(*u*) See Lord Eldon's observations in *Evans* v. *Bicknell*, 6 Ves. 184; and of Lord Ellenborough, C. J., in *Doe* d. *Graham* v. *Scott*, 11 East, 478.

(*x*) See Lord Eldon's observations in 6 Ves. 184; 10 Ves. 259; and of Abbott, C. J., 5 B. & A. 216.

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instruments in finding facts upon their oaths, in the existence of which the Court itself did not believe (*y*), although now established, is of singular origin. The effect is, indirectly, to establish an artificial presumption, which, for want either of inclination or authority, could not be established and applied directly. It seems to be very difficult to say, why such presumptions should not at once have been established as mere presumptions of law, to be applied to the facts by the Courts, without the aid of a jury. That course would certainly have been more simple, and any objection, as to the want of authority, would apply with equal if not superior force to the establishing such presumptions indirectly through the medium of a jury.

Subsequently to the writing the preceding observations, the stat. 2 & 3 Will. 4, c. 71, has been passed (*z*), which is intituled, "An Act for shortening the term of Prescription in certain cases," and which enacts, s. 1, that no claim which may be lawfully made at the common law by custom, prescription, or grant, to any right of common, or other profit or benefit to be taken and enjoyed from or upon any land of the king, or any land parcel of the duchy of Lancaster, or of the duchy of Cornwall, or of any ecclesiastical or lay person or body corporate, except such matters and things as are herein specially provided for, and except tithes, rents, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption, for the full period of thirty years, be defeated or destroyed by showing only that such right profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of 60 years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Sect. 2. That no claim which may be lawfully made at the common law, by custom, prescription, or grant (*a*), to any way or other easement, or to

(*y*) See Lord Mansfield's observations in *Eldridge* v. *Knott*, 1 Cowp. 214.

(*z*) The principle of this Act, and the alterations intended to be effected by it, are very clearly and succinctly stated by Mr. Baron Parke in the very able judgment delivered by him in the case of *Bright* v. *Walker*, 1 C. M. & R. 217; he there observes, "For a series of years prior to the passing of this Act Judges had been in the habit of, for the furtherance of justice and the sake of peace, to leave it to juries to presume a grant from a long exercise of an incorporeal right, adopting the period of 20 years, by analogy to the stat. of Limitations. Such presumptions did not always proceed on a belief that the thing presumed had actually taken place, but, as is properly said by Mr. Starkie, in his Treatise on Evidence, Vol. ii., p. 669, 'a technical efficacy was given to the existence of possession beyond its simple and natural force and operation;' and though in theory it was presumptive evidence, in practice and effect it was a bar. And that author observes, that so heavy a tax on the consciences and good sense of juries, which they were called on to incur for the sake of administering substantial justice, ought to be removed by the Legislature." The Act in question is intended to accomplish this object, by shortening, in effect, the period of prescription, and making that possession a bar or title in itself, which was so before only by the intervention of the jury.

(*a*) By the common law the presumption of a grant could not be made where no power to make such a grant existed; neither could it be presumed against a reversioner where the land during the enjoyment was in the occupation of a lessee; see above. A corresponding construction has been given to the statute in the case of *Bright* v. *Walker*, 1 C. M. & R. 219.

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any watercourse, or the use of any water to be enjoyed or derived upon, over or from any land or water of our said lord the king, his heirs or successors, or being parcel of the duchy of Lancaster, or of the duchy of Cornwall, or being the property of any ecclesiastical or lay person or body corporate, when such way or other matter as herein last before mentioned

In that case a way had been used adversely for 20 years over land in possession of a lessee, who held under a lease for lives granted by the Bishop of Worcester, and it was held that this user gave no right as against the Bishop, and did not affect the see. It was likewise held that no right was gained as against the Bishop's lessee. The grounds of this decision are fully explained by Parke, B. in delivering the judgment of the Court, and are a valuable commentary on the statute. "If the enjoyment," he says, "takes place with the acquiescence or by the laches of one who is tenant for life only, the question is, what is its effect, according to the true meaning of the stat. 3 W. 4? Will it be good to give a right against the see, and those claiming under it, by a new lease, or only against the termor and his assigns during the continuance of the term, or will it be altogether invalid? In the first place, it is quite clear that no right is gained against the Bishop; whatever construction is put on the 7th section, it admits of no doubt under the 8th. It is quite certain that an enjoyment of 40 years instead of 20, under the circumstances of this case, would have given no title against the Bishop, as he might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period as against the Bishop, it certainly must from the shorter. Therefore there is no doubt but that this possession of 20 years gives no title as against the Bishop, and cannot affect the right of the see. The important question is, whether this enjoyment, as it cannot give a title against all persons having estates in the *locus in quo*, gives a title against the lessee, and defendants claiming under him, or not at all. We have had considerable difficulty in coming to a conclusion on this point, but upon the fullest consideration we think that no title at all is gained by an user which does not give a valid title against all and permanently affect the see. Before the statute this possession would indeed have been evidence to support a plea or claim by non-existing grant from the termor in the *locus in quo* to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence, and in practice the usual course was to state a grant by an owner in fee to an owner in fee; but since the statute such a qualified right we think is not given by an enjoyment for 20 years; for in the first place, the statute is for shortening the time of prescription, and if the periods mentioned in it are to be deemed new time of prescription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the land in fee. And in the next place, the statute nowhere contains any intimation that there may be different classes of rights, qualified and absolute, valid as to some persons and invalid as to others. From hence we are led to conclude that an enjoyment of 20 years, if it give not a good title against all, gives no title at all; and as it is clear that this enjoyment whilst the land was held by a tenant for life cannot affect the reversion in the Bishop now, and is therefore not good against every one, it is not good as against any one, and therefore not against the defendant. This view of the case derives confirmation from the 7th section, which, it is to be observed, excludes in express terms the time that the person (who is capable of resisting the claim to the way) is tenant for life, and unless the context makes it necessary for us, in order to avoid some manifest incongruity or absurdity, to put a different construction, we ought to construe the words in their ordinary sense. This construction does not appear to us to be at variance with any other part of the act, nor to lead to any absurdity. During the period of a tenancy for life, the evidence of an easement will not affect the fee. In order to do that there must be that period of enjoyment against an owner of the fee. The conclusion therefore to which we have arrived is, that the statute gives no right from the enjoyment that has taken place; and as section 6 forbids a presumption in favour of a claim to be drawn from a less period of enjoyment than that prescribed by the statute, and as more than 20 years is required in this case to give a right, the jury could not have been directed to presume a grant by one of the termors to the other by the proof of possession alone. Of course nothing that has been said by the Court, and certainly nothing in the statute, will prevent the operation of an actual grant by one lessee to the other, proved by the deed itself, or upon proof of its loss by secondary evidence, nor prevent the jury from taking the possession into consideration, with other circumstances, as evidence of a grant, which they may still find to have been made if they are satisfied that it was made in point of fact." 1 C. M. & R. 221.

shall have been actually enjoyed (*b*) by any other person claiming right thereto, without interruption (*c*) for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as hereinbefore last mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. Presumption of law.

Sect. 3. That when the access and use of light to and for the use of any

(*b*) See the case of *Bright* v. *Walker*, 1 C. M. & R. 219, and the very learned judgment which elucidates as well the grounds of the statute as the effect to be given to its provisions. Mr. Baron Parke observes, "that in order to establish a right of way, and bring the case within the statute, it must be proved that the claimant has enjoyed it for the full period of 20 years, and that he has done so as of right, for that is the form in which, by the 5th section, such a claim must be pleaded, and the like evidence would have been required before the statute to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly, and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done, if he shall have occasionally asked the permission of the occupier of the land, no title would be acquired, because it was not enjoyed as of right; for the same reason it would not, if there had been unity of possession during all or part of the time, for then the claimant would not have enjoyed as of right the easement, but the soil itself. So it must have been enjoyed without interruption. Again, such claim may be defeated in any other way by which the same is now liable to be defeated, that is, by the same means by which a similar claim arising by custom, prescription, or grant would now be defeasible, and therefore it may be answered by proof of a grant or of a license, written or parol, for a limited period, comprising the whole or a part of the 20 years, or of the absence or ignorance of the parties interested in opposing the claim and their agents during the whole time that it was exercised. The enjoyment meant by the statute is an open notorious one, without particular leave, by one who claims without danger of being treated as a trespasser; whether this right claimed be strictly legal, as by permission, adverse user, or by deed, or, although not strictly legal, yet lawful to the extent of excusing a trespass, as by consent in writing not under seal in case of a plea of 40 years, or by written or parol consent in case of a plea of 20 years." A license in writing, covering the whole period of 40 years, must be pleaded; so must a license by parol, covering the whole period of 20 years. *Tickle* v. *Brown*, 4 A. & E. 370.

(*c*) Under a plea that the defendants had for 20 years and as of right and without interruption used a right of way, the defendants must show an uninterrupted rightful enjoyment for 20 years. If they had enjoyed it for one week and not for the next, and so on alternately, the plea would not be proved. Per Parke, B. *Monmouth Can. Co.* v. *Harford*, 1 C. M. & R. 631. It was therefore held that when permission to use the way had been asked for and given, the occupiers of closes who claimed the way did not enjoy it uninterruptedly. Every time that the occupiers ask for leave, they admit that the former license has expired, and that the continuance of the enjoyment is broken. *Monmouth Canal Co.* v. *Harford*, 1 C. M. & R. 631. In the previous case of *Payne* v. *Shedden*, 1 Mo. & R. 383, it was held that the enjoyment of a right of way for 10 years, coupled with an enjoyment under an agreement for another 10 years, was a sufficient enjoyment under the statute, for the agreement to suspend the enjoyment of the right did not extinguish nor was it inconsistent with the right. *Payne* v. *Shedden*, 1 Mo. & R. 383. So if for one way another had been substituted by consent of the parties for an indefinite time. Per Patteson, J., Ibid. See *Hall* v. *Swift*, 4 Bing. N. C. 381. The statute requires a continuous enjoyment for 20 years of the easement *as such*, and it is unnecessary to reply an unity of possession. *Oxley* v. *Gardiner*, 4 M. & W. 496. So an agreement or license within the period pleaded is evidence on a traverse of the enjoyment, for it breaks the continuity and disproves the plea. See *Bensley* v. *Clarke*, 2 Bing. N. C. 75. *Tickle* v. *Brown*, 4 Ad. & Ell. 370.

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dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary thereto notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Sect. 4. That each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption within the meaning of the statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

Sect. 5. Provides that in all actions on the case, and other pleadings where the plaintiff may allege his right generally, such general allegation shall still be deemed to be sufficient; and if the same shall be denied, all the matters mentioned and provided in the Act shall be admissible in evidence to sustain or rebut such allegation: that in all pleadings to actions in trespass it shall be sufficient to allege the enjoyment thereof as of right (*d*), by the occupier of the tenement in respect whereof the same is claimed, without claiming in the name or right of the owner of the fee; and if the other party intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter thereinbefore mentioned, or on any cause or matter of fact or law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged, and not received in evidence on any general traverse or denial of such allegation (*e*).

Sect. 7. The time of incapacity through infancy, &c. is to be excluded in the computation of the periods mentioned, except when the right or claim is declared to be absolute and indefeasible.

Sect. 8. Where any land or water upon or over which any way or watercourse shall have been enjoyed, has been or shall be held by virtue of any term, for life, or years exceeding three years, the time of enjoyment during the term shall be excluded in the period of computation of forty years, in case the claim be resisted within three years next after the end or other sooner determination of the term, by any person entitled to any reversion expectant on the determination thereof.

Circumstantial evidence.

Thirdly. Where the law raises no artificial presumption, but the jury are left to make their own inference, according to the natural weight of the evidence.

(*d*) The plea (to trespass for impounding cattle) of an immemorial right to profit à prendre in *B.* and his ancestors, commencing before time of legal memory, is not supported by proof of a grant to an ancestor of the defendant in 1755; and is not aided by the stat. 2 & 3 W. 4, c. 71. If sec. 5 applies to such rights, the enjoyment should be pleaded for one of the periods there stated. *Welcome* v. *Upton*, 7 Dowl. 475. A plea of prescriptive sole and several right of pasturage in a close is good, and parties are equally entitled to hold the right from another, whether they claim under him by deed or by descent. *Welcome* v. *Upton*, 6 M. & W. 536. It was held also that recitals in a deed-poll by the person then in possession (an ancestor of the present owner), and relating to such pasturage, were admissible as evidence of pedigree; and that leases, &c. made by the grantor were admissible as evidence of the seisin of the grantor, and of the enjoyment of those claiming under him. Ibid.

(*e*) See *Tickle* v. *Brown*, 4 A. & E. 370. *Supra*, 921.

Where there is conflicting evidence as to enjoyment, it is a question for the jury to whom the right belongs; but if, in a case of conflicting evidence as to enjoyment and possession, a documentary title be proved on the one side, it must no doubt prevail. Where documentary evidence of title on the one hand is opposed to strong and long-continued evidence of enjoyment on the other, even a record may under the particular circumstances be presumed (*e*). Circumstantial evidence.

Although the enjoyment be of too short a duration to constitute either an absolute bar against one who claims under a legal title, or even to furnish any technical presumption in fact, in favour of the right, it seems, that in all cases a jury may find a grant, conveyance, or release, on such cogent and legal though circumstantial evidence as is sufficient to convince their minds that a grant or other conveyance, essential to the transfer, according to the nature of the property, has been actually executed (*f*).

(*e*) Vide *supra*, 914.

(*f*) See the observations of Lord Ellenborough in *Beaty* v. *Shaw*, 6 East, 214; *Reeves* v. *Brymer*, 6 Ves. 516, and *Washington* v. *Brymer*, Peake's L. Ev. xxv, and *infra*, tit. RELEASE. From which it appears, that, where a court of equity cannot infer a release from circumstantial evidence, yet, that it is competent to a jury to find one upon precisely the same evidence. And in *Eden* v. *Smith*, 5 Ves. 341, a letter written by the obligee of a bond, to the mother of the obligor, in which he stated, that he had released the sum for which the bond was given, was held to be sufficient evidence of a release in equity, and the Lord Chancellor (Eldon) said, that if a release had been pleaded at law, the letter would have been evidence of it. In *Eldridge* v. *Knott*, Cowp. 214, it was held, that although the release of a quit-rent could not be presumed in law from mere nonpayment for a less term than the period fixed by the Statute of Limitations (fifty years), yet that a release might have been inferred from such nonpayment, accompanied with other circumstances which rendered it probable. And see tit. PAYMENT. See also the case of *Doe* d. *Fenwick* v. *Reed*, 5 B. & A. 232; in which case, although Abbott, C. J., expressed an opinion, that the presumption of grants and conveyances had been carried too far, it was considered to be properly a mere question for the jury, whether a conveyance in fact had actually been made. Indeed, the practice, which has prevailed from the earliest time of sanctioning the finding by a jury of a title from long-continued possession, admits the principle, for such evidence is purely circumstantial, and may frequently be weaker than circumstantial evidence of a different description. In the Trials per Pais, 179, it is laid down, "the jury may find deeds or matter of record, if they will, though not showed in evidence." Finch, 400. See also *supra*, 670. *Stone* v. *Grabham*, 1 Roll. R. 3, pl. 5. Wood, B., in *Mead* v. *Norbury*, 2 Price, 351, said, "Lord Keeper Henley, in *Fanshawe* v. *Rotheram*, 3 Gwill. 1179, says, 'I would not be understood as if a Judge would in all cases expect the production of the very deed or grant of exemption, but the best evidence the nature of the case will admit of;' and this is certainly the true rule of law;" and see Lord Loughborough's observations, 5 Ves. 186, Part iv. tit. *Tithes*. In equity, a surrender of a copyhold never made may be presumed from lapse of time. *Knight* v. *Adamson*, 2 Freem. 106. A grant is presumable in equity, in case of encroachment of rent, after a lapse of twenty years, 2 Vent. 516. So a reconveyance may be presumed; 12 Ves. 261. If it would be the duty of a Judge to give a clear direction to the jury in favour of a fact, it seems to be a rule in equity that the case is to be considered to be without reasonable doubt; but if a Judge would be bound to leave it to a jury to pronounce on the effect of the evidence, it is to be considered in equity as too doubtful to conclude a purchaser. *Emery* v. *Grocock*, 6 Mad. 54. A surrender of a copyhold was presumed where a devisee of the copyhold had been admitted, and there had subsequently been two surrenders and admittances. *Wilson* v. *Allen*, 1 J. & W. 620. The tenant in tail having the reversion in fee, dependent on the estate tail, in 1779 executed a deed of feoffment to his brother, and died, leaving a son, who continued in possession for forty years, until he let the lands to one of the lessors of the plaintiff, who held them for six years, and the feoffee never entered into possession, but in 1789 the son suffered a recovery, and the deed of feoffment was found amongst his deeds; it was held, that the jury were exonerated in presuming a reconveyance after the feoffment. *Tenny* v. *Jones*, 10 Bing. 75. But a surrender will not be presumed in favour of a reversioner from a perception of profits by him for eighteen years, which must have been known to many individuals if it had really taken place. *Day* v. *Williams*, 2 Cr. & J. 460.

Presumption in fact.

The nature of the evidence, tending indirectly to prove a title, is too plain to require comment; it is, in such cases, obviously of the highest importance to account for the non-production of the supposed deed, either on the ground of probable loss or destruction, or of fraud or spoliation, on the part of the adversary.

Where the duration of enjoyment does not constitute an absolute bar, but furnishes a mere *primâ facie* presumption of legal title, all the circumstances incident to the particular case are admissible, in order either to confirm or rebut such a presumption. And where the presumption is met by evidence tending to explain such enjoyment, consistently with the legal existence of the adverse claim, it is for the jury to decide upon the conflicting evidence as a pure question of fact. Thus, where the original possession by the party who has long continued in possession is accounted for consistently with the continuance of a legal title in one who claims by virtue of a title antecedent to such possession, it becomes a mere question of fact, for the decision of the jury, whether, under all the circumstances of the case, a conveyance has actually been made; or the continuance of the possession is to be attributed to laches and want of care on the part of the claimant (*g*).

It has been doubted whether the doctrine of presumption, as to the execution of deeds of conveyance, has not been carried to too great a length (*h*). The reasons, however, which have been urged on the subject are properly applicable to *legal* and *artificial* presumptions only, that is, to such as are made by the Courts, either directly, or indirectly by means of a jury, and not to such conclusions in fact as are made by a jury upon a full conviction of the truth of the fact, by the natural force of the evidence. To the weight

(*g*) *Doe* d. *Fenwick* v. *Reed*, 5 B. & A. 232. Rooke having obtained judgment against Charlton, was, by agreement, in the year 1747, put into possession till the debt should be satisfied. In 1753 Rooke assigned the remainder of the debt and his right of possession to Reed, another creditor, under whom the defendant claimed. Reed and his family had continued in possession ever since. In 1801 a chancery suit had been commenced by the heir at law of the former owner, to recover possession, and in 1820 the Vice-Chancellor directed the action to be brought, prohibiting the defendant from insisting that the debt due to Reed had been paid twenty years ago, or still remained unpaid. The title deeds (which extended to other estates also) remained in the hands of the Charlton family; the lands being copyhold, the name of Rooke had remained upon the manor books till within a few years. Moduses had been paid by the steward of the Charlton family to the then rector of Simonburn in 1779, for some of the estates (amongst others) in question. Edward Charlton died in 1767, leaving a widow, and a son under age; the son, William Charlton, married in 1778, and died in 1797, leaving a son, an infant. Bayley, J., informed the jury that the real question for them to consider was, whether they believed that a conveyance had actually taken place, observing, that the loss of a deed of conveyance was less likely to take place, than of a grant of a right of way; and that during the marriages of Edward and of William Charlton, no conveyance could have been made without levying a fine, which being of record, might have been produced if it had existed. The jury found for the lessor of the plaintiff. The Court refused a rule *nisi* for a new trial, which was moved for on the ground of misdirection. It was observed by the Court, that the original enjoyment was consistent with the fact of there being no conveyance, and that it was a question of fact for the jury to say, whether the continuance in possession, though longer than was warranted by the original condition, was to be attributed to the want of care and attention on the part of the Charlton family, or to the fact of there having been a conveyance of the estate. That in cases of rights of way, the original enjoyment cannot be accounted for unless a grant has been made; and hence such grants after long-continued enjoyment are to be presumed; but that in the present case the original enjoyment had been accounted for.

(*h*) See the observations in *Doe* d. *Fenwick* v. *Reed*, 5 B. & A. 232. See also Lord Eldon's observations in *Evans* v. *Bicknell*, 6 Ves. 174.

and importance of circumstantial evidence to prove the actual execution of a conveyance, whose existence cannot be directly proved, there is no limit short of that which necessarily produces actual conviction; and there seems to be no rule of law which excludes such evidence from the consideration of a jury; if there were, it would be a singular and anomalous one, which shut out evidence of a nature and description which is admissible in every other case, however important the consequences, even upon trials for murder and treason. Juries are bound to decide according to the actual truth of the fact; they are to do this, it has been seen, even in cases where a party, and even the Court, would be bound by an estoppel (*i*); it would therefore be absurd and inconsistent to say that a jury was not to be allowed to find according to the real fact, where they were satisfied that an actual conveyance had been executed. In an action of ejectment, for instance, how could they find a verdict for *A.*, when they were satisfied from the evidence that he had assigned, released, or otherwise conveyed his right to *B.*? The *dicta* and *decisions* to be found on the subject, as well as legal analogies and natural reason, tend to the conclusion that the jury are, in this case, as in all others, to find, according to their conscientious conviction, the truth of the fact. Mere *artificial* presumptions ought, no doubt, for reasons which will be adverted to (*h*), to be confined within due limits: where such a presumption operates, the inference is an arbitrary one, drawn from a few facts, and is by no means necessarily true, but usually rests on grounds of legal policy and convenience. But to a jury, who are in possession of all the circumstances of the case, and are, at the peril of their oaths, to decide according to the real truth as collected from all the evidence, a far greater latitude may reasonably be given (*l*): they, from the very extensive nature of the trust committed to them, are limited in the discharge of that duty by no boundaries, except those of truth and actual fact, which they are always bound to find, according to their conscientious conviction and persuasion, derived from the evidence, without regarding consequences, and unfettered by extraneous considerations of policy and convenience. If this be so, it follows, that however impolitic and inconvenient it may be to extend the limits of artificial presumptions, such objections have no weight, or rather, are wholly inapplicable to conclusions drawn by a jury from legal evidence, although circumstantial in its nature, tending to the proof of the facts so inferred. It can never be contended, that they are in no instance to be allowed to infer the execution of a deed from circumstantial evidence; such evidence frequently acts with an almost irresistible degree of force, such as no rational mind can withstand. But if this be once admitted, the principle must extend to all cases where there is legal evidence tending to the proof. No intermediate limits can, consistently with principle, be interposed; it is the peculiar province of the jury to estimate the weight and effect of evidence.

Presumption in fact.

Reasons of policy and convenience are the very foundation upon which all artificial presumptions are built, and the utility and propriety of such presumptions, and the extent to which they ought to prevail, whether as conclusive on the subject-matter, or merely till proof be adduced to the contrary, are mere matters of legal consideration. But from these, the conclu-

(*i*) Vol. I. tit ESTOPPEL.

(*h*) See tit. PRESUMPTION. See also *Isaac* v. *Clarke*, 1 Roll. R. 132, pl. 9; Vin. Ab. *Ev.* Q. a.

(*l*) A jury, it has been seen, may draw a conclusion from circumstantial evidence, where even a court of equity cannot. *Reeves* v. *Brymer*, 6 Ves. 516; *supra*, 923, note (*f*).

Presumptive evidence.

sions of the fact, drawn by a jury from circumstantial evidence, differ most widely and essentially in this as well as other respects, inasmuch as jurors are bound by their oath to decide according to the real truth, without regard to consequences; and it is clear, upon principle, that their functions can never be properly limited by any considerations of mere policy and convenience (*m*), whatever may be the legal effect of the facts when found.

(*m*) These observations have been introduced, in order that objections to the doctrine of mere artificial or legal presumptions may not be applied to conclusions made by a jury from circumstantial evidence. In the case of *Doe* d. *Putland* v. *Hilder*, 2 B. & A. 782, the title of the lessor of the plaintiff was founded on a judgment, recovered in the year 1808, against Richard Newman, for 8,000*l.* and a writ of elegit and inquisition thereon in 1818. On the part of the defendant it appeared, that in 1762 the premises had been mortgaged for a term of one thousand years by Naylor, and that in 1799 the mortgage was discharged, and the term assigned to William Denman, in trust for John Newman, a purchaser of the premises to attend the inheritance. In 1814, Richard Newman, to whom the premises had descended from the purchaser, executed a marriage settlement, and in 1816 conveyed the premises to Sarah Newman his mother, as a security for 1,162*l.*, which was due from him to her. But no assignment of the term or delivery of the deeds took place on either occasion. Mrs. Newman died in 1817, and in 1819 an assignment was made by the administrator of the trustee of the term in 1799, to a trustee, in trust for the devisees of Mrs. Newman. The jury, under the direction of the learned Judge who tried the cause, presumed a surrender of the term, and the Court of K. B. afterwards refused to disturb the verdict, on the ground, as it appears, that the *circumstantial evidence* warranted such a finding in fact. Upon this case, Mr. Sugden (in his letter to Charles Butler, esq. on the doctrine of presuming a surrender of terms, assigned to attend the inheritance (1819) has very forcibly urged, that in such a case the possession of the *cestui que* trust being consistent with the existence of the term in the trustee, no presumption, as from an adverse and continued possession, ever arises. This argument seems fully to prove, that a surrender, in such a case, is not to be presumed from mere lapse of time. But it is to be observed, that the Court, in refusing a new trial, did not refuse it upon that ground, but relied principally on the force of the circumstantial evidence to prove a surrender in fact. The subsequent arguments (so well urged by Mr. Sugden) are founded principally upon considerations of policy and convenience, which although they may be entitled to the greatest consideration, where the question is, whether a *legal* presumption ought to be established in such cases, are inapplicable, where the conclusion is one of actual fact to be drawn by a jury. The very mention of the proposition is absurd, that a jury, who are bound by their oath to pronounce according to the evidence, should decide contrary to their solemn conviction, on any collateral suggestion of convenience; as, for instance, because a purchaser is a *favourite*, either in a court of law or equity. If it be admitted that in the case of *Doe* v. *Hilder* no legal presumption of a surrender resulted from lapse of time, still, in such a case, where there is circumstantial evidence derived from the ordinary course of practice, as well as from the *res gestæ* of the individual case, it is a question of fact for the jury, whether such an assignment has been actually executed or not. If, in such a case, it appeared that any uniform course of dealing and practice prevailed as to such transactions, it would afford a strong ground for the jury to find, in point of *fact*, in the absence of any reason for supposing the contrary, that such ordinary course and practice had been adopted and followed in the particular instance; but this, it is obvious, is mere *matter of evidence* to be found and acted upon, not by the Court, but by the jury. In the late case of *Doe* d. *Fenwick* v. *Reed*, which has already been adverted to, the great distinction between a legal presumption founded upon mere length of possession, and on a finding by the jury that a conveyance had actually been made, was acted upon by the Court; and it was held, that no legal presumption of a conveyance could be properly founded upon a long-continued possession, the origin of which had been accounted for; but that it had been properly left to the jury to say, whether, under all the circumstances of the case, a conveyance had actually been executed or not. The plaintiff on going abroad, agreed with the defendant's testator to sell an instrument at a stated price, which was acknowledged as taken in part payment for another instrument to be made for him on his return. After a lapse of 20 years and the death of the party, he returned and brought his action on the contract; the defendant having pleaded performance, and the acceptance of an instrument in satisfaction, it is for the jury to say whether they find the contract alleged in the plea or not, and (upon a second trial) no evidence being offered to prove the plea, and the jury having found

PRESUMPTIONS.

Presumptive evidence.

EVIDENCE, as has been seen, is either *direct*, where the witnesses testify as to facts, of which they have had actual knowledge; or it is indirect, circumstantial, or presumptive (*n*), where the fact is not proved by direct evidence, but is inferred or deduced from one or more other facts, which are directly proved or admitted.

According to this definition, circumstantial or presumptive evidence includes all evidence which is not positive and direct, without regard to its nature, intensity, and degree; whether the fact in issue be a necessary consequence from the circumstances proved, or whether, on the other hand, their tendency to establish the fact may be rebutted by proof to the contrary; whether the inference be made by virtue of some previously known and ascertained connection between the disputed fact and those which are proved, or be a mere deduction of reason, exercised upon the special circumstances of the case, either with or without the aid of connections pointed out by experience.

Presumptions, kinds of.

A presumption may be defined to be an inference as to the existence of one fact, from the existence of some other fact, founded upon a previous experience of their connection. To constitute such a presumption, a previous experience of the connection between the known and inferred facts is essential, of such a nature, that as soon as the existence of the one is established, admitted, or assumed, the inference as to the existence of the other immediately arises, independently of any reasoning upon the subject. It also follows from the above definition, that the inference may be either *certain*, or not certain, but merely *probable*, and therefore capable of being rebutted by proof to the contrary (*o*).

Artificial.

Presumptions thus defined are either *legal and artificial*, or *natural*. They are artificial, or presumptions of law, whenever they derive from the law any technical or artificial operation and effect, beyond their mere natural tendency to produce belief, and operate uniformly, without applying the process of reasoning on which they are founded to the circumstances of the particular case. They are, on the other hand, *natural* where they act merely by virtue of their own natural efficacy. For instance, whenever a particular presumption arises from the lapse of a defined space of time, it is always in its nature artificial; for the evidence, when left to its own natural

for the plaintiff, the Court refused a rule in arrest of judgment. *Siboni* v. *Kirkman*, 1 M. & W. 418.

(*n*) The term *presumptive* has been used in this sense by English lawyers in contradistinction to positive and direct evidence, and consequently as including all evidence whatsoever arising from circumstances, whether conclusive or inconclusive in its nature. See Co. Litt. 6; Staundf. 179; Com. 367; 4 Comm. 353; 2 Haw. c. 45, s. 10; 1 St. Tr. 181. Lord Coke, when he speaks of violent, probable, and light presumptions (Co. Litt. 6), evidently means, not presumptions in their strict technical sense, but presumptive or circumstantial evidence.

(*o*) According to some writers, the term *presumption* is not strictly applicable where the inference is a necessary one, and absolutely conclusive, as where it is founded on the certain and invariable course of nature. See Evans's Pothier. If any practical advantage could be derived from this distinction, in thus limiting the meaning of the term, it would be proper so to use it, and to apply the more general term *inference* to all, whether conclusive or inconclusive. Such a distinction appears however to be an unnecessary one; and it may be well doubted whether the distinction itself be founded on sound principles. The Roman lawyers used the term in the more extensive sense. Their *præsumptio juris et de jure* was *conclusive*. L. 3. L. 9. Ff. lib. 22, tit. 2. Heinecc. El. J. C. part 4, s. 122, 3.

Presumptions, kinds of.

efficacy, is not confined within arbitrary and artificial boundaries. Thus, at the expiration of twenty years, without payment of interest on a bond (*o*), or other acknowledgment of its existence, satisfaction is to be presumed; but if a single day less than twenty years has elapsed, the presumption of satisfaction from mere lapse of time does not arise. This is obviously an artificial and arbitrary distinction. No man's mind is so constituted that the mere lapse of the single day which completes the twenty years would absolutely generate in it a conviction or belief that the debt had been satisfied. But again; satisfaction may be inferred from the lapse of a shorter period, if it be rendered probable by other circumstances; for instance, from the lapse of nineteen years; here the lapse of time is to be taken into the account by the jury, in estimating the probability, whether under all the circumstances, the debt has not been satisfied. Here, however, the lapse of time possesses no *artificial* or arbitrary operation, but is left to its mere *natural* tendency, to convince the minds of the jury that the debt has been satisfied (*p*).

(*o*) This was written before the late statute.

(*p*) As artificial or legal presumptions are founded partly upon principles of policy and utility, independently of the real existence of the fact inferred, and consequently, as such presumptions must occasionally, at least, be made contrary to the real truth; it follows, that these presumptions cannot, consistently with just principles, be established, unless either the real fact be immaterial, as where the presumption is made merely for the purpose of annexing a legal consequence to the fact on which the presumption is founded; or where the fact to be presumed being material, but its investigation difficult and remote, a general rule of presumption can be established of practical convenience, and consistent with justice, although it may occasionally operate contrary to the truth. In the first place, presumptions are frequently made for the mere purpose of annexing a legal incident to a particular predicament of fact. If the fact *B.*, to which a particular legal consequence is annexed, be absolutely or conditionally presumed from the existence of the fact *A.*, it is obvious that the effect is to annex to the fact *A.* the legal consequence which belongs to *B.* The making such presumptions, and thus annexing legal consequences, is an indirect mode of legislation; and in estimating the legal value of such a presumption, it is plain that the intermediate or presumed fact may be left out of the account; the question is, whether a legal consequence be well connected with a particular predicament in fact; in other words, whether a rule of law be wisely constituted. Thus, if from the adverse possession of an incorporeal interest in the lands of another, unanswered, a grant is to be presumed, the effect is to annex ownership as an incident to such adverse possession unanswered; for the supposed grant is mere fiction, or legal machinery, and the only question is, whether the legal consequences really incident to a valid grant are well annexed to such a state of facts.—Again, in trover, a conversion of the plaintiff's property is to be inferred by a jury, from the fact of a demand by the owner, and refusal on the part of the defendant who is in possession of it, such refusal being unexplained. Here, the predicament on which the presumption is built renders the fact presumed in reality immaterial, where the defendant wilfully withholds the plaintiff's property; it is of no importance to the real justice of the case, as between the parties, to what use the defendant may have applied the property, whether he has consumed the goods, or allowed them to perish in the course of nature. The effect in such cases is merely to annex to one fact a legal incident annexed by law to another fact, to which the former is in all respects equivalent. Such presumptions are also well founded in principle where the investigation of a fact is difficult and precarious, and where a general rule of practical utility can be established, without occasioning positive injustice in individual instances. Within this principle, all statutes of limitation, and the presumptions made in analogy to them, are founded. All these, either absolutely, or provided there be no proof to the contrary, substitute the lapse of some definite period of time for proof of the fact. The difficulty of proving a debt constantly increases with lapse of time, and may at last become impossible; whilst on the other hand, the probability that he who makes no claim of payment or possession has a right to make it, continually diminishes. Convenience, therefore, requires that at some period or other the presumption should be made, either absolutely or otherwise, against the antiquated claim. And as such a rule or presumption must be general in its operation, a precise and definite period must of course be appointed for its opera-

Artificial or legal presumptions are also of two kinds, immediate and mediate. Immediate, are those which are made by the law itself, directly, Presumptions, kinds of.

tion. The great advantages of this in point of policy and convenience are of the most obvious nature. The operation of such a rule, whether it be absolute, or be but a *primâ facie* presumption, being purely artificial in its nature, may be, it is true, contrary to the fact; but of this, a party who knew the rule, and who suffers therefore merely from his own laches, has no just ground for complaint. So by the stat. 1 Jac. 1, c. 11, s. 2, 19 C. 2, c. 6, a person who has been abroad for the space of seven years, and has not been heard of within that time, is, at the expiration of it, presumed to be dead; a rule of convenience, on account of the difficulty of proving the death of a person under such circumstances, and attended with no positive injustice in any individual case, the presumption operating only in the absence of proof to the contrary. On the same principle were founded the decisions of the Roman law in those nice cases which sometimes happen, where it is impossible, with any approach to certainty, to decide which of two persons, who died very nearly at the same time, survived the other. Cum bello pater cum filio periisset, materque filii quasi postea mortui bona vindicaret, agnati vero patris quasi filius antea perisset, Divus Hadrianus credidit, patrem prius esse mortuum. L. 9. s. 1. ff. de reb. dub. And again, Mulier naufragio cum anniculo filio periit quia verisimile videbatur, ante matrem infantem perisse, virum partem dotis retinere placuit. L. 26. ff. de pac. dot. Where the father and son were hanged in the same cart, and the question was, whether the wife of the son was entitled to dower, the jury found upon the evidence that the son survived the father; for it appeared that he struggled the longest. A question of the same nature occurred when General Stanwix and his daughter were lost in the same ship; cited in *R.* v. *Dr. Kay*, 1 Bl. R. 640. And see Cro. Eliz. 503; 2 Comm. 132. *Wright* v. *Netherwood*, 2 Salk. 593, note by Evans. *Taylor* v. *Diplock*, 2 Phillimore, 261. Where a husband and his wife perished in the same wreck, the Court held that it could not presume that he survived, but that there must be some evidence that he did so to entitle his representative to take administration to property vested in the wife. *Satterthwaite* v. *Powell*, 1 Curt. 705. In such cases a general rule is preferable to laborious investigation in each individual case, where the result must always be subject to doubt and uncertainty. It has been said, that the presumption of the law is better than that of man (Esprit des Loix, l. 29, c. 16). A position much too large, if it be not limited to general rules of the nature above alluded to. For artificial presumptions, although beneficial, as general and practical rules, are usually very uncertain and precarious instruments for the investigation of truth in particular instances; they are, therefore, unfit to be employed where any application of the law, contrary to the real fact, would be attended with positive injustice, as in criminal cases. Where facts are not necessarily connected, the connecting them by means of artificial presumption leads to error in fact. Where facts are necessarily or usually connected, technical presumptions are unnecessary; the common sense and experience of mankind will lead them to the proper conclusions, giving to such natural presumptions such weight as experience warrants, confirmed as they are on the one hand, or impeached on the other, by the whole context of circumstances belonging to the case. It is also to be observed that presumptions which tend to the actual investigation of such facts as are usually the subject of litigation in courts of justice, are of a very general nature, and seldom, if ever, conclusive. Thus presumptions, and strong ones, are constantly founded on a knowledge of mankind; a man's motives are inferred from his acts, and his conduct from the motives by which he was known to be influenced; it is presumed, that a rational agent intended that consequence which his acts naturally tended to accomplish; that he consults his own interests; that if he pays or acknowledges a debt, it is really due; that if he admits himself to be guilty of a crime, the admission is true; that he does not commit a crime, or do any other act which tends to his prejudice, without a motive. Presumptions of this nature, in almost every case of circumstantial evidence, afford a light which may be considered to be absolutely essential to the discovery of truth; but then they operate simply by their own intrinsic efficacy, as ascertained by experience, and never so conclusively as to form the basis of an artificial rule which is to operate invariably. All presumptions are founded in experience; but so infinitely are the transactions of mankind complicated and varied, that such an experience of the necessary or even ordinary connection between particular facts as will serve for the basis of a *primâ facie* presumption, still less of a conclusive inference, is unattainable, even in the most simple instances. So far is experience from warranting such presumptions, that it evinces their inefficacy by showing that a general presumption would frequently be a fallacious one. There is no subject for presumption of more ordinary occurrence than is afforded by the prisoner's recent possession of stolen goods, on prosecutions for larciny; no facts, per-

Presumptions, kinds of.

and without the aid of a jury. Mediate presumptions are those which cannot be made but by the aid of a jury. Thus the law itself presumes that a bond, or other specialty, was made upon a good consideration; but the law cannot presume, from the lapse of twenty years, without any payment of interest on a bond, or acknowledgment of its existence, that it has been satisfied; the presumption is to be left to a jury. Presumptions may therefore be divided (*q*) into three classes: 1st. Legal presumptions made by the law itself, or presumptions of *mere law*. 2dly. *Legal* presumptions to be made by a jury, or presumptions of *law and fact*. 3dly. Mere *natural* presumptions, or presumptions of *mere fact*.

Of mere law.

First. Presumptions of *mere law*, then, are artificial presumptions, made by the law itself, without the aid of a jury. These, again, are either, 1st. Absolute and conclusive, which correspond with the *præsumptiones juris et de jure* of the Roman law: Or, 2dly. Like the *præsumptiones juris* of the Roman law, may be rebutted by evidence to the contrary. Thus, the presumption of law, that a bond or other specialty was executed upon a good consideration, cannot be rebutted by evidence (*r*); but, although the law also presumes, or intends, that a bill of exchange was accepted on a good consideration, that presumption may be rebutted by proof to the contrary.

Artificial presumptions, made by the law itself, are not in general used as

haps, are more closely and usually combined, in legal experience, than is the fact of such recent possession of the property by the prisoner, with the fact that he stole it; yet this connection, although usual, is by no means necessary, as experience proves; no artificial presumption can therefore be founded on such a connection; the law, it is true, recognizes it, and the Judge usually comments upon its nature and force; but no *artificial* weight or importance is annexed to it, and the juries do not convict unless they are fully satisfied and convinced of the actual guilt of the prisoner. Artificial presumptions, therefore, can never be safely established as a means of proof in a criminal case. To convict an innocent man is an act of positive injustice, which, according to one of the best and most humane principles of our law, cannot be expiated by the conviction of an hundred criminals, who might otherwise have escaped. 4 Comm. 352; 2 Hale, 289. From such presumptions the common law is justly most abhorrent; and happily our statute-book has not been disgraced by many violations of the humane principles of the common law in this respect. The abominable and sanguinary enactment of the statute of James the First (21 Jac. 1, c. 27), which made the concealment of a bastard child by the mother, evidence that she murdered it, no longer exists. But it is impossible, without a feeling of indignation, to recollect that such a statute did exist as the law of this country for nearly two centuries; the natural effect of which was to leave a court and jury no other alternative than either to violate their oaths, or to execute one for murder whom in their consciences they believed to be innocent. The enactment of the statute 45 Geo. 3, c. 89, s. 6, which makes the having a forged Bank note in possession, knowing it to be forged, without lawful excuse, felony, but which provides also that proof of the excuse shall lie upon the person accused, is a law, which, whatever may be said for it on the score of necessity, is contrary to the humane spirit and just principles of the common law, and is liable to the objections which have been above adverted to, inasmuch as it raises an artificial presumption of guilt, which may or may not consist with the real truth, and consequently in its technical and peremptory operation tends to convict the innocent as well as the guilty.

(*q*) So according to the Roman law, "Præsumptio conjectura est ducta ab eo quod ut plurimum fit. Ea vel a *Lege* inducitur vel a *Judice*. Quæ ab ipsa lege induciur vel ita comparata est ut probationem contrarii haud admittat vel ut eadem possit elidi. Priorem doctores presumptionem juris adpellant. Quæ a judice inducitur conjectura præsumptio hominis adpellari solet et semper admittit probationem contrarii quamvis si alicujus momenti sit probandi onere relevet." Heineccius El. J.C., p. 4, s. 122, 3. Ff. Lib. 22, tit. 3.

(*r*) *Lonce* v. *Peers*, 4 Burr. 2225; *i. e.* so long as the deed remains unimpeached; a bond or other specialty may be directly impeached, on the ground of fraud; and then the consideration may become the subject of inquiry; but whilst the legal existence of the deed stands admitted, the presumption of a good consideration is peremptory and absolute. After a verdict for the plaintiff, the Court will presume all things necessary to support the declaration. P.C. *Sweetapple* v. *Jesse*, 5 B. & Ad. 27.

rules of evidence for the purpose of ascertaining doubted facts, but are, in effect, mere arbitrary rules of law, which, according to the policy of the law, operate in some instances conclusively, and which, in other instances again, where a peremptory and absolute operation would be attended with inconvenience, may be answered and rebutted. The connection between mere natural facts cannot be known but from actual observation and experience; but purely artificial relations, such as legal incidents and consequences, the mere creatures of positive law, may be indissolubly tied and connected together by the rules of law. A law, or rule of law, consists in nothing more than the connecting of certain consequences with particular defined predicaments of fact. When, therefore, the law presumes or infers any fact to which a legal consequence is annexed, from any defined predicament of facts, the law in effect indirectly annexes to that predicament the legal consequence which belongs to the presumed fact (*s*). Presumptions of law.

Again; in many instances presumptions of law are but *primâ facie* inferences or *intendments*, made by the Courts, liable to be rebutted by proof to the contrary. Thus the law will intend, or imply, that the heir at law of an ancestor, who died seised of an estate, was in possession (*t*); or where a fine has been levied, will imply that it has been levied with proclamations (*u*). Or that the examination of a prisoner, under a charge of felony, has been taken in writing (*x*), until the contrary of these facts be proved. Presumptions of this nature may be rebutted not only by evidence to the contrary, but also by contrary presumptions or intendments of law. Thus on an indictment for the non-repair of a road, the presumption that an award in relief of the defendants was duly made according to the directions of an inclosure act, may be rebutted by proof of repairs subsequently done to the road by the defendants (*y*). But the presumption in favour of innocence is, it has been held, too strong to be overcome by an artificial intendment of law (*z*).

Secondly, Presumptions of *law and fact*.—These are also artificial presumptions which are recognized and warranted by the law as the proper inferences to be made by juries under particular circumstances. These also are founded partly upon principles of policy and convenience, and frequently in analogy to express rules of law; and for this purpose a technical force and efficacy is given to the evidence which warrants such presumptions, beyond its mere natural tendency to convince the mind. Two incidents are essential to presumptions of this class: 1st, The inference cannot be made by the Court, but ought to be made by the jury. 2dly, The inference is never conclusive. Of law and fact.

Presumptions, therefore, of this kind are very closely allied to those artificial presumptions which are made by the law itself, but which are in their nature inconclusive, that is, to the *præsumptiones juris* of the Roman law (*a*). They are of a class intermediate between mere *artificial* presump-

(*s*) *Supra*, 928, note (*p*).

(*t*) Watkins on Descents, ch. 1, p. 38.

(*u*) 3 Co. 86, b.; Watkins on Descents. But if the intendment be rebutted, proclamations must be proved, in order to bar a stranger. B. N. P. 229. The acceptance of rent from a third person is not a ground for presuming a surrender. *Copeland* v. *Watts and another, executors of Gubbins*, 1 Starkie's C. 95. The non-production of books upon notice, merely entitles the opposite parties to give secondary evidence. It does not authorise the jury to speculate upon the probable contents. *Cooper and another* v. *Gibbons*, 3 Camp. C. 364.

(*x*) *Supra*, tit. ADMISSIONS.

(*y*) *R.* v. *Inhabitants of Haslingfield*, 2 M. & S. 558.

(*z*) *R.* v. *Tucyning*, 2 B. & A. 386; *infra*, 686.

(*a*) *Supra*, 930, note (*q*).

Presumptions of law and fact.

tions made by the law itself, and mere *natural* presumptions, which are to be made exclusively by a jury. They may, therefore, not improperly be called mixed presumptions, or presumptions of *law and fact*, partaking of the nature of mere *legal* presumptions, in this respect, that they are artificial, and of the nature of mere *natural* presumptions, inasmuch as they must be made, not by the Court, but by a jury. The principle and origin of this class of presumptions are usually not remote; they are for the most part instruments in the hands of the Courts, by which positive statutes, or rules of law, are extended by analogy to cases which do not fall within their express legal operation, or by means of which effect is given to rules of evident policy and convenience, which cannot be applied directly (*b*). Thus a jury is required, or at least advised, by a Court, to infer a grant of an incorporeal hereditament after an adverse enjoyment for the space of twenty years unanswered. This is done in analogy to the Statute of Limitations, 21 Jac. 1, for as an adverse possession of twenty years is sufficient to confer a title to the possession of the land itself, *à fortiori*, it ought to confer a right to an interest arising out of the land; but the Statute of Limitations does not extend to this case, and therefore the benefit and convenience of such a limitation is obtained indirectly, by thus raising an artificial presumption (*c*). Presumptions of this nature, which depend merely on acquiescence for a specific and definite period of time, of arbitrary appointment, are most obviously artificial; their operation may depend on the lapse of a few hours, more or less (*d*).

So in the case of trover; an unqualified refusal to deliver up the goods on demand made by the owner, does not fall within any definition of a conversion; but inasmuch as the detention is attended with all the evils of a conversion to the owner, the law makes it, in its effects and consequences, equivalent to a conversion, by directing or advising the jury to infer a conversion from the facts of demand and refusal.

Natural presumptions.

Thirdly, Natural presumptions, or presumptions of *mere fact*.—These depend upon their own natural force and efficacy in generating belief or conviction in the mind, as derived from those connections which are pointed out by experience (*e*); they are wholly independent of any artificial legal relations and connections, and differ from presumptions of mere law in this essential respect, that those depend upon, or rather are, a branch of the particular system of jurisprudence to which they belong; but mere natural presumptions are derived wholly by means of the common experience of mankind, from the course of nature, and the ordinary habits of society. Such presumptions are therefore wholly independent of the system of laws to be applied to the facts when established; they remain the same in their nature and operation, whether the law of England, or the code of Justinian, is to decide upon the legal effect and quality of the facts when found.

Many presumptions of this class are recognized by the law, and therefore, in one sense, may be termed legal presumptions, which still, unless some degree of technical force and weight be given them beyond their

(*b*) For instances of the latter description, vide *supra*, note (*p*).

(*c*) The presumption that a bond has been satisfied after the expiration of twenty years from the time when interest has been paid, or other acknowledgment made of its existence, is built on the same principle. Vide *supra*, 270. 823. And see *Seurle* v. *Lord Burrington*, 2 Str. 826; 2 Ld. Raym. 1370. *Turner* v. *Crisp*, 2 Str. 827. *Moreland* v. *Bennett*, Str. 652. *Washington* v. *Brymer*, Peake's L. E. 29.

(*d*) See the observations, *supra*, 927.

(*e*) These no doubt form the basis of numerous legal presumptions. It is to be presumed that a party will adopt acts done for his benefit. *Bayly* v. *Culverwell*, 8 B. & C. 448.

mere natural operation, are properly to be ranked in this class. The recent possession of stolen goods, on a trial for larciny, is recognized by the law as affording a presumption of guilt; and therefore, in one sense, is a presumption of law, but it is still, in effect, a mere natural presumption; for although the circumstance may weigh greatly with a jury, it is to operate solely by its own natural force, for a jury are not to convict on this or on any other charge, unless they be actually convinced in their consciences of the truth of the fact. Such a presumption is therefore essentially different from the legal presumptions in fact lately adverted to, where the jury are to infer that a bond has or has not been satisfied, as a few days or even hours, more or less, have elapsed, when the twenty years are expiring. Natural presumptions.

Although it be the peculiar province of a jury to deal with presumptions of this description, and to make such inferences as their experience warrants, yet in some instances, where particular facts are inseparably connected according to the usual course and order of nature, and the interposition of a jury would be nugatory, the Courts themselves will draw the inference. Thus on a question of bastardy, where the child has been born within a few weeks after the access of the husband, the bastardy of the child will be inferred without the aid of a jury (*f*).

Presumptions of this nature are, as has already been observed, co-extensive with the experience of mankind; there is in fact no relation whatsoever, whether natural or artificial, subject to human observation, which may not be proved, where such proof is material, in a court of justice, by the testimony of those who have had experience of that relation.

A mere *presumption*, in the proper and technical sense of the word, is much more limited in its nature than presumptive or circumstantial evidence in general. A presumption, strictly speaking, results from a previously known and ascertained connexion between the presumed fact and the fact from which the inference is made, without the intervention of any act of reason in the individual instance; on the other hand, circumstantial evidence, that is, indirect evidence to prove a fact, may depend wholly on a process of reasoning applied to the facts of the particular case, although the mind may never have experienced such a combination before. The instance put by Lord Coke (*g*), of what he terms a violent presumption, is, in reality, a case of indirect or circumstantial evidence, but not properly presumption in the strict sense of the word, because the inference results from an act of reason, exercised upon the facts, and not upon any known and ascertained relations. The instance which he gives of a violent presumption is this: "where a man is found suddenly dead in a room, and another is found running out of that room with a bloody sword in his hand." It is plain that in such a case conviction is wrought by an exercise of the reason upon the circumstances, (however small the effort,) by which the mind, upon the slightest reflection, excludes all guilty agents but one; the excluding force and nature of the circumstances generate conviction by negativing, to the satisfaction of the mind, the agency of any, but one, individual. It is evident that a witness who had never seen such a transaction before would as readily come to the proper conclusion as one who had actually had experience of similar facts; and consequently that reason, and not any previous experience of similar associations, supplies the inference.

(*f*) *R.* v. *Luffe*, 8 East, 193.

(*g*) Co. Litt. 6.

Natural presumptions.

In practice, however, it rarely happens that some natural presumption, properly so called, does not co-operate with the exercise of reason on the particular circumstances to produce conviction. And on the other hand, those transactions which are the subject of judicial inquiry, and indeed all human dealings, present such an infinite variety of circumstances, that experience alone, however essential and important as undoubtedly it is, in supplying inferences which *tend* to the general conclusion, can rarely simply and alone, without the aid of sound reason and discretion, exercised upon all the circumstances, warrant a conclusion. It follows, that further remarks on mere natural presumptions belong properly to the head of *circumstantial evidence* (*h*).

It seems to be a general rule, that wherever there is evidence on which a jury has founded a presumption according to the justice of the case, the Courts will not grant a new trial (*i*). In an action on a promissory note, given to the plaintiff by the defendant, in consideration of the plaintiff's marrying his daughter; the defence was that the marriage was not a legal one, the plaintiff having married the daughter when he was under age, and without the consent of his parents or guardian. It also appeared, that when the plaintiff came of age, the wife was lying on her death-bed, and that she died in three weeks afterwards. The jury nevertheless presumed a subsequent legal marriage, and the Court afterwards refused to set aside the verdict. Many of the presumptions which are recognized by the law are noticed under the particular subject of evidence to which they belong (*k*); it may, however, be proper to advert to some of the most general.

Of innocence.

The law of England, as well as the civil law, presumes against fraud, "odiosa et inhonesta non sunt in lege præsumenda, et in facto quod in se habet et bonum, et malum, magis de bono, quam de malo, præsumendum est" (*l*). Thus the law always presumes in favour of innocence, as that a man's character is good until the contrary appear, or that he is innocent of an offence imputed to him till his guilt be proved. Where a woman married again within the space of twelve months after her husband had left the country, the presumption of innocence was held to preponderate over the usual presumption of the continuance of life (*m*).

(*h*) See Vol. I.

(*i*) *Wilkinson* v. *Payne*, 4 T. R. 468. Lord Kenyon, in that case, said the rule was carried so far that he remembered an instance of it bordering on the ridiculous; where, in an action on the game laws, it was suggested that the gun with which the defendant fired was not charged with shot, but that the bird might have died in consequence of fright; and the jury having found for the defendant, the Court refused to grant a new trial. See also *Standen* v. *Standen*, cited 4 T. R. 469; where a marriage was presumed, although there was strong evidence to show that there had not been time enough for a publication of banns three times. It may, however, be very questionable whether such decisions are not only contrary to sound policy, but even positively mischievous. Do they not afford temptation to juries, in hard cases, to trifle with the sacred obligation of an oath? See Vol. I. tit. NEW TRIAL.

(*k*) See tit. INTENTION.—PRESCRIPTION.—CUSTOM.

(*l*) 10 Co. 56. The law always presumes against the commission of crime; and therefore where a woman twelve months after her first husband was last heard of, married a second husband, and had children by him; held, on appeal, that the sessions did right in presuming, *primâ facie*, that the first husband was dead at the time of the second marriage, and that it was incumbent on the party objecting to the second marriage to give some proof that the first husband was then alive. *R.* v. *Js. Gloucestershire*, 2 B. & A. 386.

(*m*) *R.* v. *Twyning*, 2 B. & A. 386. And see *Williams* v. *The East India Company*, 3 East, 192; and *R.* v. *Hawkins*, 10 East, 211, where the jury having found that a candidate for a corporate office at the time of election declared that he had taken the sacrament within the year, and the allegation not having been negatived by the verdict, the Court held that it was

Presumptions.

And in general, where a person is required to do an act, the omission to do which would be criminal, his performance of that act will be intended until the contrary be shown (*n*). And, therefore, where a plaintiff alleged in his declaration that the defendants, who were the charterers of his ship, had put on board a very dangerous and combustible commodity (in consequence of which a loss happened), without giving due notice to the captain or other person employed in the navigation of the vessel, it was held to be incumbent on the plaintiff to prove his averment (*o*). But when an act, which in its nature is criminal, has once been proved, the law frequently infers malice, and requires exculpatory proof from the party. Thus in case of homicide, after proof that the prisoner killed the deceased, the law will presume malice, until the prisoner justify or extenuate the act (*p*). So if a man hold a market near to the legal market of another, and on the same day, the former will be intended to be a nuisance (*q*).

Omnia rite esse acta.

It is also a maxim of law, in principle nearly allied to the former, that "omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium." Thus it will be presumed that a man who has acted in a public office or situation, was duly appointed (*r*).

Upon proof of title, every thing which is collateral to the title will be intended without proof; for although the law requires exactness in the

to be presumed that he had so received the sacrament. In *Powell* v. *Milburn*, 3 Wils. 355; 2 Bl. 851; upon the trial of an action for money had and received, in order to try the plaintiff's right to a donative, it was held that it was unnecessary for him to prove at the trial, although called upon to do so, that he had subscribed the articles of the church, in the presence of the ordinary, or publicly read the same, or that he had subscribed the declaration of uniformity contained in the stat. 13 & 14 Charles 2, c. 4. And the case of *Monke* v. *Butler*, 1 Roll. R. 83, was cited as a strong one. Monke sued for tithes; the defendant pleaded that the plaintiff had not read the articles according to the statute, and the Court constrained the defendant to prove the negative; and Coke said, that if such a matter should come before him in evidence, he would presume, until the contrary should be proved, that the plaintiff had read the articles. And in Clayton's Rep. Pleas of Assize. fol. 48, 1636, where the plaintiff sued for tithes under the statute Edw. 6, it was held that the plaintiff should not be put to prove admission, institution and induction; and that if it was otherwise, the defendant might prove it. And in ejectment by a rector or vicar, it is not necessary to prove that he was in orders, for, according to Lord Holt, having established his temporal title, his religious or political title was to be presumed (*Dr. Hasker's Case*, Comb. 202). Upon an information against Lord Halifax for not delivering up the rolls of the auditor of the Court of Exchequer, the Court put the plaintiff on proof of the negative, for a person shall be presumed to execute his office till the contrary appears (B. N. P. 298; Vin. Ab. tit. *Evidence*). And in *R.* v. *Coombs*, Comb. 57. the defendant having sworn an affirmative for which an information was filed against him, the Court directed that the prosecutor should first give probable evidence of the negative, and that the defendant should afterwards prove the affirmative if he could.

(*n*) 3 East, 192; and per Lord Ellenborough, *R.* v. *Inhabitants of Haslingfield*, 2 M. & S. 558.

(*o*) *Williams* v. *The East India Company*, 3 East, 192.

(*p*) Fost. 256; *supra*, 712. So the maxim of law is, *qui semel est malus, semper præsumitur esse malus in eodem genere.* Cro. Car. 387.

(*q*) 2 Will. Saund. 175; F. N. B. 184; 11 H. 4, 5.

(*r*) *Supra*, note (*m*). *R.* v. *Verelst*, 3 Camp. 432. Where in an action by an attorney for costs incurred in the year 1824 in a suit in the Common Pleas, the defendant proved that the plaintiff had not taken out any certificate in the year 1814 or the four following years, and that he had been admitted an attorney of the King's Bench in the year 1792, but had not since been readmitted an attorney of that Court, but there was no proof that he had not been re-admitted an attorney in the Court of Common Pleas, it was held that the plaintiff's acting as an attorney afforded *primâ facie* evidence that he was then an attorney of the Court of C. P., and that it lay on the defendant to show that he was not an attorney of that Court when the business was done. *Pearce* v. *Whale*, 5 B. & C. 38. See *Bevan* v. *Williams*, 3 T. R. 635; *supra*, 24. 309.

Presumption of omnia rite esse acta.

derivation of a title, yet when that has once been proved, all collateral circumstances will be presumed in favour of right (*s*).

If therefore a man declare upon a grant or feoffment, attornment will be intended (*t*); even although a deed be essential to such collateral matter *ex institutione hominis*, for this is but the private act of the parties, and is not allowed to control the judgment of the law, which intends all collateral matters (*u*). But it is otherwise, although the matter be but collateral, if a deed be essential to such collateral matter *ex institutione legis* (*x*).

So where one who suffered a recovery, had power to do it, it will be presumed that it was done with all the legal requisites (*y*). So it is always inferred that the records of a court of justice have been correctly made (*z*), that Judges and juries do nothing maliciously (*a*), and that the decisions of a Court of competent jurisdiction are well founded (*b*). The Court will not presume any fact to vitiate an order of removal (*c*). Upon the same principle, the Courts, after verdict, will presume that facts, without proof of which the verdict could not have been found, were proved, although they were not alleged (*d*); where an order of bastardy purports to have been made on the evidence of the mother, who is a married woman, and on *other* evidence, the Court, in support of the order, will intend that the other evidence was legal evidence (*e*). So it will be presumed, till the contrary be shown, that a child born in wedlock is legitimate, for the maxim of law is, "Pater est quam nuptiæ demonstrant" (*f*); that the signatures in parish registers are those of the person whose duty it is to sign them (*g*); that a rate is equally made (*h*). So on a return to a mandamus, which on the face of it is certain, the Court will not intend facts inconsistent with it, but will intend in favour of the return and not against it (*i*). So that an estate was sold as directed by a statute (*k*).

But notwithstanding the general presumption, omnia rite esse acta, positive proof may still be necessary if any counter presumption be raised by the circumstances. Thus where the inhabitants of Haslingfield, in defence of an indictment against them for not repairing a highway, gave in evidence an award by commissioners under an inclosure Act, made sixteen or seventeen years ago, by which they awarded that the highway was not within the parish, but it appeared that the defendants had repaired it ever since, it

(*s*) 6 Co. 38. 2. A compensation awarded by a jury for land taken for the purpose of highway, is presumed to include a compensation for the burthen of holding up the fences. Per Grose, J., *R.* v. *Llandillo*, 2 T. R. 232.

(*t*) Ibid. and Cro. Eliz. 401.

(*u*) 6 Co. 38; Bac. Ab. *Ev.* 639.

(*x*) Ibid.

(*y*) 2 Saund. 42, (7); *infra*, tit. RECOVERY.

(*z*) *Read* v. *Jackson*, 1 East, 355.

(*a*) Per Eyre, B. 1 T. R. 503.

(*b*) *Supra*, Vol. I. tit. JUDGMENT. Res judicata pro veritate accipitur, L. 207, ff. de reg. jur. A parish certificate, of the date 1748, was signed only by two churchwardens and two overseers, it appearing from entries in visitation books long before and long after, down to the present time, that four churchwardens had always been regularly chosen, although in 12 instances, between 1683 and 1829, less than four had been sworn in; the visitation books for 1747 were lost; and the session having refused to *presume* a new and valid appointment of two only for the year of the date of the certificate, the Court confirmed their decision. *R.* v. *Upton Gray*, 10 B. & C. 807.

(*c*) *R.* v. *Stockton*, 5 B. & Ad. 546.

(*d*) *Spiers* v. *Parker*, 1 T. R. 141. *R.* v. *Twyning*, 2 B. & A. 386.

(*e*) *R.* v. *Dedall*, Andr. 8.

(*f*) *Supra*, tit. BASTARDY.

(*g*) *Taylor* v. *Cooke*, 8 Price, 653.

(*h*) See tit. RATE.

(*i*) Per Buller, Doug. 159. See further as to presumptions in favour of legality, *Van Omeron* v. *Dowick*, 1 Camp. 44.

(*k*) *Doe* v. *Evans*, 1 Cr. & M. 450.

Presumptions.

was held that the usage raised a presumption that proper notices had not been given according to the Act (*l*).

From time.

Some of the most important presumptions, founded on lapse of time and length of enjoyment, have already been considered (*m*). Where the existence of a particular subject-matter or relation has once been proved, its *continuance* is presumed till proof be given to the contrary, or till a different presumption be afforded by the very nature of the subject-matter (*n*). Thus it is to be presumed, within certain limits, that a person once proved to have existed still exists (*o*). This presumption, it has been seen, ceases at the expiration of seven years from the time when the person was last known to be living (*p*). So where two or more have been proved to be partners, it is to be presumed that the partnership afterwards subsists, unless the contrary be shown (*q*). Upon an indictment for a libel against Lord St. Vincent, as first lord of the admiralty, after proof of his appointment by patent *previous* to the publishing of the libel, it was held to be evidence that he was so at the time of publication, and that proof of the determination of the appointment lay on the defendant (*r*).

Continuance.

Where a party holds over after the determination of a lease, an agreement is presumed, to hold on the same terms, so far as they are applicable (*s*).

Conduct.

Most important presumptions are derivable from the conduct of parties, as well in civil as criminal proceedings. If circumstances induce a strong suspicion of guilt, and where the accused might, if he were innocent, explain those circumstances consistently with his own innocence, and yet does not offer such explanation, a strong natural presumption arises that he is guilty. And in general, where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a forcible inference against him.

Presumptions from a man's conduct operate, as has been seen, in the nature of admissions; for, as against himself, it is to be presumed that a man's actions and representations correspond with the truth (*t*). These are in all cases evidence of the fact; and where the party has induced another to act on the faith of such representations, and where he cannot show the contrary, without being guilty of a breach of good faith and common honesty, such representations are usually not barely evidence of the fact, but are absolutely conclusive (*u*).

Common experience.

Numerous and most important presumptions are founded merely on the common and ordinary experience of mankind; as that a man will not pay a debt which is not due (*x*); or acknowledge the existence of a debt to which he is not liable. That every man contemplates and intends the natural consequence of his act (*y*).

(*l*) *R.* v. *Inhabitants of Haslingfield*, 2 M. & S. 558.

(*m*) *Supra*, tit. PRESCRIPTION.

(*n*) See Lord Ellenborough's observations in *Doe* v. *Palmer*, 16 East, 55.

(*o*) 2 Roll. Rep. 461.

(*p*) *Supra*, 365; and see the stat. 19 C. 2, c. 6, as to lessees for lives, and the stat. 6 Anne, c. 18.

(*q*) *Supra*, tit. PARTNERS.

(*r*) *R.* v. *Budd*, 5 Esp. C. 230. *R.* v. *Tanner*, 1 Esp. C. 304.

(*s*) *Digby* v. *Atkinson*, 4 Camp. 475. *Doe* v. *Ward*, 1 H. B. 97. *Roberts* v. *Hayward*, 3 C. & P. 432.

(*t*) *Supra*, tit. ADMISSIONS.

(*u*) *Supra*, 31. If *A.* rent lands of *B.*, the incumbent of a living, and pay him rent, he cannot show, in defence of an action for use and occupation, that the presentation was simoniacal. *Cooke* v. *Loxley*, 5 T. R. 4.

(*x*) "Presumptionem pro eo esse qui accepit, nemo dubitat, qui enim solvit nunquam ita resupinus est ut facile suas pecunias jactet et indebitas effundat." L. 25, ff. de probat.

(*y*) *Supra*, tit. INTENTION.—MALICE.

Presumption Course of dealing.

Many again are derived from the course and habit of dealing in a particular trade or business; as that the parties intended to contract according to the usual course of dealing (*z*).

It would, however, be a vain endeavour to attempt to specify the numerous presumptions with which the knowledge of a jury, conversant in the common affairs and course of dealing in society, necessarily supplies them; it is obvious that such presumptions are co-extensive with the common experience and observation of mankind (*a*).

PRINCIPLE.

When the Court have discovered a principle, they will apply it, notwithstanding a previous misapplication (*b*).

PRIVILEGE OF COPYRIGHT, &c. (*c*).

Proof of interest.

The proofs in an action for an injury by pirating the book or invention of the plaintiff depend of course upon the issues joined (*d*); from the nature

(*z*) *Supra*, tit. CUSTOM.

(*a*) For other observations connected with the subject, see Vol. I. and Ind. tit. PRESUMPTION. Although the owner is liable to the master for money actually laid out for the benefit of the ship, yet he is not liable to a stranger for money advanced, unless it be expressly advanced for that purpose. *Thacker* v. *Moates*, 2 2 M. & M. 79. The declarations of a shop man are not evidence against his employer, unless made in the course of his employer's business. *Garth* v. *Howard*, 8 Bing. 451. But in an action for freight by the master, the declarations of the owner were admitted as evidence for the defendant. *Smith* v. *Lyon*, 3 Campb. 465; Ellenborough, C. J. 1813.

(*b*) Per Lord Eldon, C. J., in *Browning* v. *Wright*, 2 B. & P. 24; and see 7 T. R. 148.

(*c*) As to the copyright of books and music, see the stat. 8 Ann. c. 19; 41 G. 3, c. 107; 54 G. 3, c. 156:—12 G. 2, c. 36, as to the importation of books reprinted abroad, composed or written or printed in Great Britain:—41 G. 3, c. 107, s. 7, as to the copyright in books in the English and Scotch universities. The statutes 8 Ann. c. 19, and 54 G. 3, c. 107, relate only to works published in this kingdom; if an author publish abroad, and does not use due diligence in publishing here, another may publish. *Clementi* v. *Walker*, 2 B. & C. 861; 4 D. & R. 607. A single sheet or page of music is a *book* within the meaning of the Acts. *Clementi* v. *Golding*, 11 East, 244. *White* v. *Geroch*, 2 B. & A. 298. *Storace* v. *Longman*, 2 Camp. 27. So of the words of a song applied to an old tune. *Hime* v. *Dale*, 2 Camp. 29; 11 East, 244. But there can be no copyright in a work of an illegal or immoral tendency. *Stockdale* v. *Onwhyn*, 5 B. & C. 173; 2 Swan. 413. *Hime* v. *Dale*, 2 Camp. 29; 11 East, 244; 7 Ves. 1. The first publisher may sue a stranger, though he has improperly obtained a copy of the work in the first instance. *Cary* v. *Kearsley*, 4 Esp. C. 168. A party may acquire a copyright in additions to another work. *Cary* v. *Longman*, 3 Esp. C. 273. By stat. 8 Ann. c. 19, s. 11, if the author be living at the expiration of 14 years, his copyright shall extend to another 14 years. It seems that an assignment during the first 14, would carry the contingent interest; see 2 Starkie's C. 285; 7 T. R. 625. By the stat. 54 G. 3, c. 156, s. 4, the right is extended to 28 years from the time of publishing, and for term of life, if the author be living at the end of 28 years. See *Brooke* v. *Clarke*, 1 B. & A. 396. The words of the Act are prospective, and do not revest a right where 28 years had previously expired. Ib. See further, 2 Bl. Comm. 407; 4 Burr. 2408. Chitty on the Stat. tit. *Copyright*, *Infra*, note (*l*). The Acts protecting prints do not apply to such as are executed abroad, though published here. *Page* v. *Townsend*, 5 Sim. 395. But the assignee of the copyright of a foreign musical composition is protected, and so is a foreigner residing and publishing in this country. *D'Almaine* v. *Boosey*, 1 Young, 288. As to publication of lectures, see 5 & 6 W. 4, c. 65. See as to amendments of the patent, 5 & 6 W. 4, c. 83.

(*d*) See tit. CASE. RULES. In an action for infringing the plaintiff's patent for certain improvements in a carriage, the defendant having pleaded, 1st, the general issue; 2dly, that the improvements were not new; 3dly, that the plaintiff was not the first inventor; it was held that it could not be objected on these pleas, that the patent was illegal as a monopoly, and that it was sufficient to maintain the action to show an imitation by the defendant of part only of the plaintiff's improvements. *Gillett* v. *Wilby*, 9 C. & P. 334. It was also held that the

of the case, these usually throw it on the plaintiff to prove his interest, as author, inventor, or assignee of the book, &c., in respect of which the injury is alleged. Proof of interest.

In an action for pirating a book, under the st. 54 G. 3, c. 156, it is not necessary to show that the plaintiff had previously printed the work; and he does not lose his copyright by having sold the manuscript before it was printed (*e*).

In an action for infringing a patent (*f*), containing a proviso that the Patent. Specification.

plaintiff was entitled to the Judge's certificate, under the st. 5 & 6 W. 4, c. 83, s. 3. Ib. In case for infringing a patent, plea, *inter alia*, that the improvements, or some of them, were in use long before, held, that under 5 & 6 W. 4, c. 83, s. 4, it was intended that the defendant should give an honest statement of the objections on which he meant to rely, and that he must state with precision what they are; and where they were as general as the plea, a rule absolute was granted for further and better particulars. *Fisher* v. *Dewick*, 4 Bing. N. C. 706; 6 Sc. 587; and 6 Dowl. 739.

(*e*) *White* v. *Geroch*, 2 B. & A. 298.

(*f*) The consideration which a patentee gives for his monopoly, is the benefit which the public are to derive from his invention after his patent is expired; which benefit is secured to them by a specification. *Turner* v. *Winter*, 1 T. R. 602. A specification must be given in clear and unequivocal terms. If there be any unnecessary ambiguity in the specification, so that a man of science could not produce the thing intended without trying experiments, or anything which tends to mislead the public, as if he makes the articles with cheaper materials than those which he has enumerated, although the latter will answer equally well, the patent is void. *Turner* v. *Winter*, 1 T. R. 602. No merely philosophical or abstract principle can answer to the words of the st. 21 J. 1, c. 3, or be the subject of a patent. *Rex* v. *Wheeler*, 2 B. & A. 345. Patent for "a new or improved method of drying and preparing malt." In the specification it was stated, that the invention consisted in exposing malt previously made to a very high degree of heat, but it did not describe any new machine invented for that purpose, nor the state, whether moist or dry, in which the malt was originally to be taken, for the purpose of being subjected to the process; nor the utmost degree of heat which might be safely used, nor the length of time to be employed, nor the exact criterion by which it might be known when the process was accomplished. Held, that the patent was void, inasmuch as, 1st, the specification was not sufficiently precise; and as, 2dly, the patent appeared to be for a different thing from that mentioned in the specification. Held, also, that as the word malt was here not to be taken in its usual sense, viz. of an article used in the brewing only, but in the colouring of beer, it was necessary to have stated in the patent the purpose to which the prepared malt was to be applied, and to have said, that it was obtained for a new method of drying and preparing malt to be used in the colouring of beer. *Rex* v. *Wheeler*, 2 B. & A. 345. A patent is void, if the specification omit an ingredient used by the inventor for expediting the process. *Wood and others* v. *Zimmer and others*, Holt, 58; Gibbs, C. J. 1815. Or if the article has been publicly sold by the inventor before he obtained his patent. Ibid. The patent must not be more extensive than the invention. If, therefore, the invention consist in an addition or improvement only, and the patent be for the whole machine or manufacture, it is void. *Rex* v. *Else*, 11 East, 109, n. If a patent is obtained for making several things by one process, and the process fails in producing any one, the patent is void. The consideration of the patentee's exclusive right was the producing the several things specified, and the whole of them; and a part of that consideration has failed, and with it his right. *Turner* v. *Winter*, 1 T. R. 602. Where the representation of the party, stated in a former patent, was of a machine for making paper of certain width and length, and from the evidence it appeared that the party was not possessed of any machine capable of making it of the width stated, though at a later period he had invented such a method as applied to the machine would effect it, and which was properly set forth in the subsequent grant; held that the objection to the first grant was fatal. *Bloxam* v. *Elsee*, 6 B. & C. 169. Where a patent is obtained for an *improvement*, a specification not distinguishing what is new from what is old, is bad. *Macfarlane* v. *Price*, 1 Starkie's C. 199. Ellenborough, C. J. 1816. But see *Harmer* v. *Playne*, 11 East, 101. *Boville* v. *Moore*, 2 Marshall, 211. A patent "for an improved method of lighting cities towns, and villages," is *too general*, where, from the specification, it appears that the invention consists merely in the improvement of an old street lamp. *Lord Cochrane* v. *Smethurst*, 1 Starkie's C. 208. Le Blanc, J. 1815. And al-

Piracy of patent.

specification must be enrolled within an appointed time, the fact must be proved accordingly. A proviso that a specification shall be enrolled within one calendar month next *after* the date, which is the 10th May, is satisfied by an enrolment on the 10th of June (*g*).

Where a witness was called to prove a machine not new, a drawing of one the witness had before constructed was put into his hand and objected to; held, that he might look at it, and be asked if he had such a recollection of the machine made by him, as to say it was a correct drawing of it (*h*).

Print.

In an action under the st. 17 G. 3, c. 47, for pirating a print, it is sufficient to produce a print struck from the original plate, without producing the plate itself (*i*).

Assignment.

An allegation that the plaintiff is the true and legal proprietor, is satisfied by evidence of an assignment from the original owner (*k*). But as an assignment of a copyright must be in writing, it is not sufficient for the plaintiff, in an action under the stat. 8 Anne, c. 19, to prove a parol agreement between himself and the author, according to which the plaintiff is to enjoy the exclusive publication in England (*l*). But a declaration by the plaintiff that he has parted with all his copyright, is evidence, as against him, that he has parted with it by legal and competent means (*m*). But the mere

though an inventor introduce a new, or extend an old principle, yet if his specification be limited to the old principle, the patent is void. *R.* v. *Cutler*, 1 Starkie's C. 354. Ellenborough, C. J. If a patent be taken out for new machinery, and also for improved machinery, and the latter be not new, the whole is void. *Kay* v. *Marshall*, 5 Bing. N. C. 492. Where a patent is granted for improvements in a machine, for which a former patent had been granted, and whereof a specification had been enrolled, "so as a specification particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed, should be enrolled;" a general specification describing the whole machine is sufficient. *Harmer* v. *Playne*, 11 East, 101. A patent was granted to *A. B.* for a new invented method of using an old engine in a more beneficial manner than was before known. The specification stated, that the method consisted of certain principles, and described the method of applying those principles to the purposes of the invention; and an act of parliament reciting the patent to have been for the making and vending certain engines by him invented, extended to *A. B.* for a longer term than fourteen years the privilege of making, constructing and selling the said engines: held, that the invention was the subject of a patent, and that the patentee's right under the patent and act of parliament was valid. *Hornblower* v. *Boulton*, 8 T. R. 95. In *Boulton* v. *Bull*, 2 H. B. 463, the Court were divided upon the point. See Lofft, 395. Where a person obtains a patent for a machine consisting of an entirely new combination of parts, though all the parts may have been used separately in former machines, the specification is correct in setting out the whole as the invention of the patentee. But if a combination of a certain number of those parts has previously existed up to a certain point, in former machines, the patentee merely adding other combinations, the specification should only state such improvements, though the effect produced be different throughout. *Bovill* v. *Moore*, 2 Marshall, 211.

(*g*) *Watson* v. *Pears*, 2 Camp. 294. And see *Thomas* v. *Topham*, Dyer, 218; Moore, 40. *Clayton's Case*, 2 Co. 1, b.

(*h*) *R.* v. *Hadden*, 2 C. & P. 184.

(*i*) *Thomson* v. *Symonds*, 5 T. R. 41.

(*k*) Ibid. and see *Sayer* v. *Dicey*, 3 Wils. 60. The stat. 17 Geo. 3, c. 57, is confined to prints struck off from engravings printed from other engravings, and does not extend to prints wrongfully struck off by the engraver from the original owner's plate. *Murray* v. *Heath*, 1 B. & Ad. 805.

(*l*) *Power* v. *Walker*, 4 Camp. 8; and 3 M. & S. 7. *Clementi* v. *Walker*, 2 B. & C. 866. *Qu.* whether two witnesses are necessary. Chitty on Stat. tit. *Copyright*. Evidence that the plaintiff acquiesced in a publication by the defendant six years ago, does not prove a transfer. *Latour* v. *Bland*, 2 Starkie's C. 382. But *qu.* whether an admission of an assignment would be sufficient. Ibid. and see *Moore* v. *Walker*, 4 Camp. 9. If one assigns in writing a copyright sold to him by the author, an original assignment will be presumed till the contrary be shown. *Morris* v. *Kelly*, 4 J. & W. 481. See further *Cumberland* v. *Plumber*, 1 Ad. & Ell. 580; and st. 3 & 4 W. 4, c. 15.

(*m*) *Moore* v. *Walker*, 4 Camp. 9, n.

fact, that for many years before the action the defendant had published the work with the knowledge and acquiescence of the plaintiff, is merely evidence that the defendant had at that time authority to publish, but is no evidence of an actual transfer by the plaintiff to the defendant (*n*). Assignment.

A party who publishes a book or print with trifling variations (*o*), in order to evade the penalties of piracy, is liable to the author (*p*). Otherwise where the work, by the publication of which the right of the author is alleged to have been invaded, is in substance a new work, although use may have been made of the original, or even part of it incorporated in the new work (*q*). It is no piracy of an engraving to take another from the original picture (*r*). Variance.

An action on the case, or bill for an injunction, may be maintained without proof of any entry at Stationers'-hall; but such an entry is essential in order to support an action for a penalty (*s*). Two or more penalties may be recovered in respect of distinct sales of copies on the same day (*t*).

In an action under the stat. 8 G. 2, c. 13, s. 1, to recover a penalty for pirating an engraving, it must appear that the date and name of the author were engraved, in order to entitle him to a penalty (*u*). Piracy of engraving.

The grant of an exclusive license to use a patent amounts to no more than a common license, and will not invalidate the patent, although vested in twelve persons, and although the district included in the license be co-extensive with that of the patent (*x*).

QUARE IMPEDIT.

In the proceeding by Quare Impedit (*y*), issue is usually taken on a

(*n*) *Latour* v. *Bland*, 2 Starkie's C. 382. It was also held, that proof that the plaintiff had ten years ago given a receipt to the defendant for a sum of money, as the consideration for the transfer of the copyright, was not evidence of a transfer; *sed quere*.

(*o*) The publishing of the airs of an opera under the form of quadrille airs, is piracy. *D'Almaine* v. *Boosey*, 1 Young, 288.

(*p*) *West* v. *Francis*, 5 B. & A. 737; in an action for pirating a print. For in common parlance, there may be a copy of a print, notwithstanding minute variations from the original.

(*q*) It is lawful to incorporate in a new work, part of an original work, provided it be not made a pretext for stealing the original. *Cary* v. *Kearsley*, 4 Esp. C. 168. *Roworth* v. *Wilkes*, 1 Camp. 94. *Secus*, if so much be copied as to supply a substitute for the original work. Ibid. It is said that a fair and *bonâ fide* abridgment is not an infringement of the copyright. Lofft, 775; 1 Bro. 451; 2 Atk. 141; 4 Esp. C. 168; Chitty on the Stat. tit. *Copyright*; 1 East, 361. So the performance of a dramatic work on the stage, is not a publication within the statute. *Colman* v. *Wathen*, 5 T. R. 245. *Murray* v. *Elliston*, 5 B. & A. 657. And where unwritten lectures in surgery were delivered, it was held that they might be published, as the plaintiff was not the author of any *book*. *Abernethy's Case*. *Secus*, in the case of a manuscript play performed on the public stage. *Macklin* v. *Richardson*, Ambl. 694. *Morris* v. *Kelly*, 1 J. & W. 481; 2 Camp. 27; 5 B. & A. 660.

(*r*) *De Berenger* v. *Wheble*, 2 Starkie's C. 548. *Secus*, if the second be a servile imitation of the first engraving. *Trusler* v. *Murray*, 1 East, 363, n.

(*s*) See the stat. 8 Ann., c. 19, s. 2. As to an injunction in Chancery for the protection of a copyright, see 1 Madd. Ch. 149.

(*t*) *Brooke* . *Milliken*, 3 T. R. 509. Under the stat. which prohibits the selling of books printed here, and reprinted abroad (12 Geo. 2, c. 36; 41 Geo. 3, c. 107; 54 Geo. 3, c. 156), it is immaterial whether the author's copyright is extinct or not, the statute having been passed for the purpose of encouraging printing in this country. Chitty on the Stat. tit. *Copyright*; 2 Bl. Comm. by Christian, 417.

(*u*) *Sayer* v. *Dicey*, 3 Wils. 60. *Thompson* v. *Symonds*, 5 T. R. 41. *Secus*, as it seems, in action on the case. Per Ld. Hardwicke, *Blackwall* v. *Harper*, 2 Atk. 92. And see *Roworth* v. *Wilkes*, 1 Camp. 94. *Beckford* v. *Hood*, 7 T. R. 620. *Macmurdo* v. *Smith*, 7 T. R. 691.

(*x*) *Prothero* v. *May*, 5 M. & W. 675.

(*y*) By the common law, there were three writs for the church itself; viz. Right of Advowson, Quare Impedit, and Assize of Darrein Presentment. 2 Inst. 357. The writ of *quare impedit* lies by him who, being in possession of an advowson, is dis-

traverse of some fact essential to the plaintiff's title, as alleged in the declaration (*z*).

Title. Where the title is put in issue, the plaintiff must prove at least one presentation by himself, or those from whom he derives his title, and the institution and induction of the clerk so presented.

If it be probable that the defendant means to give evidence to show a title in himself, it becomes a matter of prudence to prove the exercise of the right of presentation in as many instances as possible.

Presentation. Where the presentation has been made in writing, the document should be produced and proved; but as a presentation by parol is sufficient in law, such presentation may be proved by parol (*a*).

Where a blank was left in the bishop's register-book of presentations for the name of the patron, it was held that the omission might be supplied by parol (*b*).

The letters of institution should also be produced and proved. Where they have been lost, the bishop's register is evidence (*c*).

Induction. The *induction* under the bishop's mandate may be proved by any witness who was present at the time.

Perpetual curacy. *Primâ facie*, the right of nominating a curate is in the vicar; or if there be no vicar, but a mere perpetual curate, then in the lay rector (*d*).

turbed in his presentation. 2 Inst. 356; Com. Dig. *Quare Impedit*, D. If the right of nomination be in *A.*, and that of presentation in *B.*, *quare impedit* lies by *A.* for disturbing his right, either against *B.* before presentation, or against the incumbent after. *R.* v. *The Marquis of Stafford*, 3 T. R. 646. A defendant obtaining judgment on demurrer in *quare impedit*, is not entitled to costs. *Thrale* v. *Bishop of London*, 1 H. B. 530.

(*z*) In *quare impedit* there is no general issue. *Read* v. *Brookman*, 3 T. R. 158. *Windsor* v. *Bishop of Carlisle*, 3 Bing. 404. An allegation that the right to appoint a curate is in the plaintiffs as owners of messuages, &c. charged annually with the repairs of the chapel, is not sustained by proof that such repairs are paid out of the poor's rates. *Shepherd* v. *Bishop of Chester*, 6 Bing. 435. In *quare impedit*, under a parcener entitled to present to a (fourth) turn, it is sufficient to show the seisin in and presentation by the party under whom the plaintiff claims, and it is not necessary to show that the presentations on other turns were made by persons having right to make them; the party is not supposed to have knowledge of their title. The declaration showing that particular persons presented on particular turns, the Court will not presume that such presentations were by usurpation; but if they were so, it is for the defendant to prove the usurpation. A conveyance was made in 1762 of a fourth part of the advowson, the turn of presentation not being to take effect until after the death of the then incumbent, and of the two next prior turns; held that the consideration of such conveyance being of "20*s.*, and of services performed, and of other good and valuable causes and considerations," was not to be deemed a voluntary conveyance on the face of it, and fraudulent in law, the jury having negatived fraud in fact. *Gully* v. *The Bishop of Exeter*, 10 B. & C. 584, affirming the judgment in C. P. The plaintiffs in error claiming the right of presentation to the vicarage of *K.*, in order to show a seisin in the party under whom they claimed, read an entry from the visitation book of the diocese, from which it appeared that *H. C.* "admissus fuit ad inserviendum curæ animarum," in the church of *K.*, by the then bishop, and from a long list of other entries *curates* were found always to be admitted only, whilst *vicars* were described as "admitted and *instituted*;" held, that the Judges (at bar) before whom the cause was tried, did wrong in taking the construction of the entry out of the hands of the jury, and that their direction to the jury, "that such entry as to the admission of *H. C.* was in legal construction to be taken to mean that *H. C.* had been admitted and instituted to the vicarage of *K.* on a presentation by some other person to the bishop, and that the only question for the jury was, by whom was the presentation made," was improper, and that the Court of Error had properly directed a *venire de novo*. *Cooke* v. *Elphin, Bishop of*, 1 Dow. & C. 247.

(*a*) *Bishop of Meath* v. *Lord Belfield*, 1 Wils. 215; *supra*, tit. PAROL EVIDENCE.

(*b*) Ibid.

(*c*) As to the form and effect of institution, see Burn's Ecc. Law, tit. *Benefice*, V.

(*d*) *Duke of Portland's Case*, 1 Hagg. C. C. C. 157. Where a chapel of ease has been erected within time of legal memory,

An allegation of a custom in parishioners to elect a curate, is not supported by proof of such a custom in parishioners paying church-rates (*e*). And no ecclesiastical custom, which though ancient is not immemorial, will deprive a rector of his common-law right to appoint his curate (*f*). Perpetual curacy.

If the defendant plead only the general issue, *i. e.* that he did not disturb, &c. the title does not come in question; the plaintiff either has judgment, or proceeds for damages for the disturbance: in that case he must prove the presentation, the bishop's refusal, and the institution or presentation of the other clerk (*g*). Ne disturba.

Where issue is taken upon the avoidance, the fact of avoidance is alone material; and a variance as to the manner of the avoidance is unimportant. Avoidance.

Proof of an avoidance by taking another living without a dispensation (*h*), or by privation, is sufficient, although an avoidance by death be alleged (*i*).

the incumbent of the parish church, in the absence of a special agreement to the contrary, to which the parson, patron and ordinary are parties, is entitled to the nomination of the minister. *Farnworth* v. *The Bishop of Chester*, 4 B. & C. 555. Ancient appropriations were either *pleno et utroque jure*, or *pleno jure tam in spiritualibus quam in temporalibus*, or *pleno jure in temporalibus*, where temporal interests only were conveyed. The stat. 15 Rich. 2, c. 6, and 4 Hen. 4, c. 12, required that vicarages should be regularly endowed; vicarages then became vicarages with cure of souls, and the monks held in *proprietatem* as a lay fee. Gibs. Co. 1719. *Mallett* v. *Trigg*, 1 Vern. 42. Still after this, the monks (according to Sir Wm. Scott, 1 Hagg. Cas. Consist. C. 165) were too cunning for the law, and obtained appropriations annexed to their tables, as before, under the plea of poverty. Thus *unionces ad mensam* were always presumed in law to be *in utroque jure*; there was a perpetual plenarty, and the canon *de supplendâ negligentiâ*, which gives the right of presentation on lapse, did not apply to such appropriations. The monks became as it were *immortal* incumbents, having the cure of souls remaining in them, and the minister a mere stipendiary. From this root sprung the peculiar kind of appropriation without a vicarage endowed, and this is the origin of stipendiary tenures, in which the impropriator is bound to provide divine service. Since that time, the statutes of Dissolution enact that benefices of every description should be held as they had been held by the dissolved religious houses; a grantee who had obtained what was before held *ad mensam pleno et utroque jure*, would have the complete incumbency as *intitulatus* and beneficiary. If such an impropriator took orders, he might perform the duties himself without institution, only taking the oaths imposed by the later statutes, and it could only be the circumstance of his not being in orders which would prevent him from exercising his ecclesiastical rights in full form as the monks did before; but it was not so in ordinary impropriations, because the vicar holds by something extrinsic of the impropriator. In the presumption of the canon law, the monks were held to be impropriators in the ordinary and common way; and this presumption is more strongly fortified in the law of England by the Statute of Impropriations. The presumptions of law are, that a benefice, though impropriate, is not impropriated *pleno et utroque jure*; and if so, that there is an endowed minister to whom the *cura animarum* belongs. It is true, that where a parson claims tithes as vicar, he must show his endowment to show of what he is endowed, but in him the cure of souls entirely resides; but it is clear that one who claims as lay rector does not show the cure of souls to be in him, and the presumption of law is against him. See the able judgment of Sir Wm. Scott, in the case of the *Duke of Portland* v. *Bingham* (1 Hagg. Cas. C. C. 157), in which it was held, on the above grounds, that a license to preach in a chapel within the parish of St. Mary-le-bone could not be impeached by the lay rector of the parish in a civil suit.

(*e*) *Arnold* v. *Bishop of Bath and Wells*, 5 Bing. 316.

(*f*) Ibid.

(*g*) See Peake's Ev. 438, 5th edit.

(*h*) By the stat. 21 Hen. 8, c. 13, s. 9, if any person having one benefice with cure of souls, of the yearly value of 8*l*., accept and take any other with cure of souls, and be instituted and inducted in possession of the same, the first benefice shall be adjudged void. If the benefice be under 8*l*, a year, the first is void by the canon law. Burn's Ecc. Law, tit. *Avoidance*. And the patron may take notice and present. But no lapse will occur without notice, until six months after induction, and that only in cases within the statute. Hob. 166; B. N. P. 125. For the lapse is incurred in respect of *negligence*. See Burn's Ecclesiastical Law, tit. *Avoidance*.

(*i*) Dyer, 377, b.; Co. Litt. 182, a.

Avoidance.

Where the avoidance arises from the acceptance of another living, proof of the clerk's subscription to the articles, after his appointment to the second benefice, is essential to the proof of avoidance; mere evidence of institution and induction to the second benefice, without more, is insufficient. Such subscription may, nevertheless, it seems, be presumed from circumstances, such as his having officiated as parson of the second benefice. The first living will still be void, although, after subscribing to the articles on his appointment, the party neglect to read them within two months after his induction.

Where proof was given that a presentation was made by a patron *in extremis*, in order to show that it was simoniacal, it was held that it was not necessary to show that the *presentee* knew the fact (*k*). It has since been held that such a presentation is not simoniacal (*l*).

Curacies augmented by Queen Anne's bounty are by the stat. 36 Geo. 3, c. 83, s. 3, to be considered as benefices presentative, so that the license thereto shall operate in the same manner as an institution to such benefices, and shall render voidable other livings in like manner as institution to such benefices. Where, therefore, it is insisted that a living has been avoided by the acceptance of such a curacy, proof must be given that the curacy has been augmented (*m*).

Dispensation.

Where proof of a dispensation is necessary, the retainer, as chaplain, must be proved by the production of the document, and by the testimony of the subscribing witness, as in ordinary cases; and it seems that a copy of it, entered in the Court of Faculties, is not in itself sufficient (*n*).

Avoidance.

In a case of an avoidance by deprivation or resignation, the ordinary, in proof of his title by lapse, must prove notice of the fact to the patron; but in case of an avoidance by death, no notice is necessary (*o*). The computation is by calendar, not lunar, months; and the day the church became void is to be taken into the account (*p*).

Qualification of presentee.

The bishop is the sole judge of the fitness of the party presented, and may in his discretion reject him if he be illiterate. And if the right of nominating be in *A.*, and the right of presentation be in *B.*, the latter may exercise the same discretion that a bishop may do (*q*). But if the presentee be rejected on the score of immorality, the fact is to be tried by a jury (*r*).

Inquiry by jury.

If the jury find for the plaintiff, they are to inquire (*s*), 1st. Whether the

(*k*) *Fox* v. *Bishop of Chester*, 2 B. & C. 635. As to the effect of *simoniacal presentation* in collateral proceedings, see *Cooke* v. *Loxley*, 5 T. R. 4. The grant of the next presentation of a living *void*, or of an advowson during avoidance, is void, not because it is chose in action, but because contrary to sound policy, as encouraging simony. Per Ld. Mansfield and Wilmot, J., *Wolferston's Case*, 3 Burr. 1512.

(*l*) In the same case in Dom. Pro.

(*m*) As to proof of augmentation, see *Doe* d. *Graham* v. *Scott*, 11 East, 478; and *supra*, 136.

(*n*) Litt. R. 1; Peake's Law Ev. 439, 5th edit.

(*o*) By 13 Eliz. c. 12; B. N. P. 124; 2 Cowp. 869; Keilw. 49, b.

(*p*) 2 Inst. 311; B. N. P. 125.

(*q*) *The King* against *The Marquis of Stafford*, 3 T. R. 646.

(*r*) Ibid.

(*s*) By the stat. Westm. 2, c. 5, if six months pass by the disturbance of any, so that the bishop do confer to the church, and the very patron loseth his presentation for that time, damages shall be awarded to two years value of the church; and if six months be not passed, but the presentation be deraigned within the said time, then damages shall be awarded to the half-year's value of the church. An usurpation cannot be avoided but by a writ brought *infra tempus semestre*, and no damages are recoverable when the church remains void. B. N. P. 123; Peake's Ev. 440, 5th edit. where it is observed, that these are seldom matters of dispute in the

church be full; and, 2dly. If so, upon whose presentation; for if upon the defendant's presentation, the clerk is removable. 3dly. How long it has been void. 4thly. The yearly value of the living, to enable them to assess damages according to the statute of Westminster 2, c. 5 (*t*). Inquiry by jury.

If the defendant's clerk has been refused admission, he must be prepared with evidence, not only to controvert the plaintiff's, by showing that the former presentation was an usurpation on his right, but must also be prepared with such evidence to support his own title as was necessary on the part of the plaintiff, for in this case both are actors (*u*). Defendant's evidence.

Where a bishop has omitted to present a living lapsed to him, a party who may present, if the bishop omit to present, is not a competent witness for one who claims in right of that party (*x*).

QUO WARRANTO.

THE evidence necessary upon the trial of a *quo warranto* information must of course depend upon the particular issues joined (*y*). Evidence on information.

It has already been seen that court-rolls of a manor and corporation books are *sub modo* to be regarded as public books, of which the Court will in some instances grant an inspection (*z*). A corporator is entitled to an inspection, although the corporation is not a party to the dispute (*a*). So as to court-rolls at the instance of a tenant of the manor, who has been refused inspection by the lord (*b*). But where the application is made at the suit of a corporator, it seems that the rule for inspection will be confined to entries touching the matter in question (*c*). The Court will not, in the case of an *action*, grant a rule for inspection before issue joined (*d*); but it is otherwise, as it seems, in the case of a *quo warranto* (*e*). Court-rolls.

suit, but that, unless they be admitted, the plaintiff ought to be prepared with evidence to ascertain them.

(*t*) B. N. P. 123.

(*u*) Hob. 163.

(*x*) *Gully* v. *Bishop of Exeter*, 5 Bing. 171.

(*y*) Not guilty, and *non usurpavit*, are from the very nature of the charge, bad pleas; the defendant must either justify or disclaim. B. N. B. 211.

(*z*) But not in the case of a stranger, *supra*, 413. *Hodges* v. *Atkins*, 1 Str. 307; 3 Wils. 38. *Mayor of Southampton* v. *Greaves*, 8 T. R. 590, by which the cases of the *Mayor of Lynn* v. *Denton*, 1 T. R. 689; *Corporation of Barnstaple*, v. *Lathey*, 3 T. R. 303; *Mayor of London* v. *Mayor of Lynn*, 1 H. B. 211; were expressly overruled. Where an application was made by one not a corporator, pending an action brought against him for tolls by the corporation, it was refused, although the application was confined to all books, papers, writings, &c. touching the matter in question. *Hodges* v. *Atkins*, 3 Wils. 38. And where an information was moved for to show by what authority the defendant claimed to hold a court leet within the borough of Wigan, the corporation being the prosecutors, the Court discharged the rule for inspection, saying that one private person would have as good a right to inspect the deeds and evidences of another. *R.* v. *Bridgman*, 2 Str. 1203. *Mayor of Exeter* v. *Coleman*, Barnes, 238. And see *Harrison* v. *Williams*, 3 B. & C. 162. *Brewers' Company* v. *Benson*, Barnes, 236. By the stat. 32 G. 3, c. 58, any officer of a corporation having the custody of or power over the records shall upon demand made by any person being an officer or member of such corporation, permit an inspection of the books and papers wherein the admission or swearing in of the freemen, burgesses, or other members or officers shall be entered, and shall give copies or minutes of the admission, or entry of the swearing in, under a penalty of 100 *l.* This extends only to the books and papers in which the *admission* or *swearing in* is entered, and not to orders for such admission or swearing in. *Davies* v. *Humphries*, 3 M. & S. 223.

(*a*) *Supra*, 568. *R.* v. *Fraternity of Hostmen in Newcastle*, 2 Str. 1223. Tancred on Q. W. 336.

(*b*) *R.* v. *Lucas*, 10 East, 235.

(*c*) *R.* v. *Babb*, 3 T. R. 579. Tancred on Q. W. 339.

(*d*) *Supra*, 416.

(*e*) See Mr. Tancred's observations, Tancred on Q. W. 344. *R.* v. *Hollister*, C. T. H. 245. *R.* v. *Justices of Surrey*, Say. 165.

Proof of the franchise.

Evidence to prove the existence of a particular franchise is either direct or presumptive. *Direct*, consists in the production of the letters patent, or charter (*f*) by which it is created, from the proper place of deposit (*g*): the fact also admits of proof, and is constantly proved, in the absence of direct evidence, by evidence of prescription (*h*), or of constant usage, from which a title by prescription or grant may be presumed.

It has been seen that proof of an ancient grant, without date, does not necessarily destroy a right claimed by prescription; for the grant may have been before the time of legal memory, or in confirmation of a prior grant (*i*).

User.

In the next place, a legal title to a franchise may be presumed from user, although it be clear that the title is not prescriptive; for notwithstanding the maxim *nullum tempus occurrit Regi*, a grant from the Crown may be presumed from long-continued enjoyment (*k*), even against the Crown, as to a claim of right: still less would such an objection operate against the presumption of the grant of a franchise from the Crown, where the grant was not inconsistent with the rights of the Crown, but rather showed a beneficial exercise of the royal authority for the benefit of the subject.

The corporation-books are the proper records of the transactions of the body, for the purpose of proving the election, swearing in, admission, disfranchisement and restoration of particular members of the body (*l*).

Custom. Variance.

In this, as in other cases, proof of a larger custom than that alleged will not be fatal as a variance: thus, where a custom was alleged that the eldest son of a freeman, born within the port of Hastings, should be admitted a freeman of the town, and it appeared that not only the eldest, but that all sons so born were entitled, it was held to be an immaterial variance (*m*).

Where the plea alleged that a court-leet was holden immemorially, part

(*f*) Where the corporation was composed of a mayor, four jurats, and two bailiffs, and by the charter upon any vacancy it should be lawful for the mayor and other the surviving and remaining jurats and bailiffs, "or the greater part of them," of whom the mayor was to be one, to elect one of the burgesses or inhabitants, held that as, in the cases of the deaths of one bailiff or of two jurats, the ordinary rule of construction requiring a majority of each integral part to be present would lead to an absurdity, if not impossibility, the Court would give it a consistent and uniform construction by holding that an election might well be made by a majority of the entire number of the mayor, jurats, and bailiffs. *R.* v. *Greet*, 8 B. & C. 363. Where a charter temp. Eliz. gave powers to elect to vacant offices one or more of the "burgesses and inhabitants," held that only persons filling both those characters were eligible; held also, that a usage subsequent to the charter, to elect burgesses not being inhabitants, being repugnant to the charter, could not, after the acceptance of the charter, be supported by antecedent usage: and the charter having, after a surrender, been restored by an instrument granting to the corporation that they should enjoy all franchises, &c. which they had previously enjoyed by virtue or pretence of any charter, or by any other lawful manner, right or title; held that such instrument only restored such rights as had been lawfully exercised, and consistently with that charter. *R.* v. *Salway*, 9 B. & C. 424.

(*g*) Vide Index, tit. PATENT.—RECORD. And see an excellent Treatise on the subject of Quo Warranto Informations, by Mr. Tancred.

(*h*) See tit. PRESCRIPTION.

(*i*) *Supra*, tit. PRESCRIPTION. *Addington* v. *Clode*, 2 W. Bl. 989.

(*k*) *Supra*, tit. PRESCRIPTION. *Bedle's Case*, 12 Co. Rep. 5. *R.* v. *Carpenter*, 2 Show. 48. *Biddulph* v. *Ather*, 2 Wils. 23. In that case proof of usage on the part of a plaintiff, in taking wreck in right of a manor for the space of 92 years without interruption, was held to be stronger evidence of right than was supplied by evidence of two records in eyre, 7 E. 1, and a judgment in trespass, 7 E. 3, showing the right to be in the lords of the barony of Brambre. And *qu.* by some of the Judges, whether such evidence was admissible at all.

(*l*) *Symmers* v. *Regem*, Cowp. 489; Tancred on Q. W. 355.

(*m*) *Case of Henry Moore*, 17 How. St. Tr. 914; and see tit. VARIANCE, and *Bailiff, &c. of Tewkesbury* v. *Bricknell*, 1 Taunt. 142.

in the morning and part in the evening, and that the custom had been to elect the mayor at the morning court, and that he had been accustomed to be sworn in at the evening court by the steward or his deputy, issue having been taken on the mode of election, and also on the mayor being duly sworn, it appeared at the trial that it had been also the custom for the leet jury to present in writing the candidates who had most votes at the morning court, but that they had no control over the poll, it was held that this was a merely ministerial act on their part, and that it needed not to be alleged as part of the custom (*n*). Custom. Variance.

If a bye-law be pleaded and issue taken thereon, proof that from the time of the supposed bye-law the usage at elections has been according to such supposed law, affords presumptive evidence that there was such a law, although it cannot be produced (*o*). Whether a corporation has accepted a new charter or not, is usually matter of evidence; proof of their having acted under it is evidence of acceptance (*p*). Proof of bye-law. Acceptance of charter.

In the case of the King against the Vice-chancellor of the University of Cambridge (*q*), it was observed by Lord Mansfield, in giving judgment, that there was a vast deal of difference between a new charter granted to a new corporation, who must take it as it is given, and a new charter given to a corporation already in being, and acting either under a former charter or under prescriptive usage; the latter, or corporation already existing, are not obliged to accept the new charter *in toto*, they may act partly under it, and partly under their old charter or prescription; and the extent to which

(*n*) *R.* v. *Rowland*, 3 B. & A. 130.

(*o*) When the election of mayor, aldermen, &c. is by charter given to the commonalty, or burgesses at large, the corporation may, to avoid popular confusion, make a bye-law to retsrain the power of election to a select number; and though there be no such bye-law to be found, yet constant usage will be proof that there was such a one, and the Court will intend it. Therefore, it is in daily practice to plead such supposed bye-law to an information as made at a particular time, and then, upon issue joined thereon, to support it by proving that the elections have been, from about that time, agreeable to such supposed bye-law. B. N. P. 211. 4 Co. 78; and per Lord Mansfield, Cowp. 110. But no bye-law can limit the class out of which such officers are by charter to be chosen; B. N. P. 211; *R.* v. *Phillips*, 1749; for that would be prejudicial to the corporation. But in case of a corporation by charter, no usage, how long soever, can support an election made otherwise than according to the terms of the charter. And therefore where a special verdict found that the defendant's election was according to very long usage, but did not find expressly that *there was a bye-law* for the purpose, judgment was given against the defendant. But Lord Hardwicke observed, that it possibly might be otherwise in the case of a corporation by prescription. *R.* v. *Tomlyn*, C. T. Hard. 316. Sixty years usage has been considered sufficient evidence for presuming the existence of a bye-law. *Perkins* v. *Master, &c. of Company of Cutlers*, 2 Sel. N. P. tit. *Quo Warranto*. Tanered on Q. W. 364. A corporation has power to make bye-laws by the whole body, although power be given by charter to a select body. *R.* v. *Westwood*, 4 B. & C. 781. As to the presumption of a bye-law, *R.* v. *Atwood*, 4 B. & Ad. 481.

(*p*) B. N. P. 212. Comb. 316. In the case of *The King* v. *Amery*, 1 T. R. 367, Lord Mansfield observed, "the great question is as to the acceptance of the charter of Car. 2, but that cannot involve in it much difficulty. We know the obloquy that charters granted at that time lie under: as my Lord Hardwicke said, they have never received any countenance in Westminster Hall; and he would never give any opinion in support of them, unless the strongest evidence was laid before the Court of their having been accepted and uniformly acted under; therefore there is no ground in this case for a trial at bar." And see *R.* v. *Larwood*, Salk. 167, where Holt, C. J. held, that although the corporation of Norwich might have used a charter of King Car. 2, either as a new grant, or confirmation of their former charter (for the King could not resume an interest which he had already granted), yet that having made their elections according to the new charter, it was evidence of their consent to accept it as a grant.

(*q*) 3 Burr. 1647. See the observations of Lord Mansfield, C. J. and of Wilmot, J. in *R.* v. *Amery*, 1 T. R. 367.

Acceptance of charter.

an old corporation has accepted the terms of a new charter is to be decided by practice and usage (*r*).

But in the case of *The King* v. *Westwood* (*s*) it was held that a charter cannot be partially accepted; for a grantee from the Crown must take the whole of the entire grant, or reject it altogether.

Evidence to impeach the title.

Where issue is taken upon the fact, whether *A. B.* was mayor at the time of the defendant's election, the question, whether he was mayor or not *de jure*, is put in issue, and evidence is admissible to show that he was not mayor *de jure*, although he was mayor *de facto* (*t*). But the contrary had been ruled in a former case, where the mayor having died long before his title was impeached, it was held that proof of his being mayor *de facto* was conclusive evidence as to the right (*u*).

Although it be held, in general, that the person elected must take upon himself to support the right and title of his electors, as in the election of aldermen of the city, coroners, members of parliament, &c. (*x*), yet for the sake, as it seems, of convenience, a distinction has been made in cases where the right of election depends upon corporate franchises. It has been said to be a general rule, founded on principles of justice and convenience, that upon a *quo warranto* against particular members, the prosecutor cannot go into evidence to impeach the titles of other corporators *de facto*, being electors.

Competency.

It has been said that one who is not a party to the record is a competent witness, although he has acted under the authority of the custom which he comes to prove, and has, if the custom does not exist, acted illegally; Lord Hardwicke, in giving judgment in the case of *The King* v. *Bray* (*y*),

(*r*) 3 Burr. 1647.

(*s*) 4 B. & C. 781.

(*t*) *R.* v. *W. Smith*, 5 M. & S. 271. And see *R.* v. *Lisle*, 2 Str. 1090; Andr. 163. In order to constitute a man an officer *de facto*, there must be at least the form of an election, although that, upon legal objections, may afterwards fall to the ground; a mere acting upon usurpation is not sufficient. Ib.; and see *R.* v. *Malden*, 4 Burr. 2135. 2140, and *Foot* v. *Prowse*, Str. 625. *R.* v. *Hebden*, 2 Str. 1109; Andr. 388. *R.* v. *Grimes*, 5 Burr. 2591. *R.* v. *Smart*, 4 Burr. 2241. *R.* v. *Harding*, cited in *R.* v. *Kynaston*, Cas. Temp. Hardw. 150. The issue on *debito modo electus* puts in issue the law as well as the fact. 4 T. R. On the issue whether the presiding officer on defendant's election was mayor, the title *de jure* as well as *de facto* is put in issue. *R.* v. *Smith*, 5 M. & S. 271; Tancred, 194. And see *Bird* v. *Dale*, 7 Taunt. 560.

(*u*) *R.* v. *Spearing*, Winch. Sp. Ass. cor. Blackstone, J. 1771, 1 T. R. 4, in the note. The only material issue was, that the Duke of Bolton was not mayor of Winchester, for he was not an inhabitant at the time he was chosen, nor for some time before, and so not eligible. Blackstone, J. would not suffer the parties to go into evidence at that distance of time after the death of the Duke of Bolton, to prove him not an inhabitant, but merely whether he was mayor or not, which the book showed; that is, he would not suffer the title of the person to be impeached after the death of the person from whom it was derived. As he had in fact been mayor, it should be taken that he was regularly so.

(*x*) *Symmer et al.* v. *The King*, in error, Cowp. 489. The issue was on the replication, that the defendants were not elected in manner and form aforesaid; and upon the trial, the Judge (in Ireland) refused to admit evidence offered by the defendants, to show that fifteen persons, who had been elected, and who had acted as corporators for a number of years, were not inhabitants, &c. and had not resided for one whole year before their respective elections; and (as is said) such titles cannot be impeached collaterally, even although notice be given of the intention to do so. Ib.; see *Strode* v. *Palmer*, Lilly's Ent. 248. *Tufton* v. *Nevison*, 2 Lord. Raym. 1034; but Lord Ellenborough, C. J., in *R.* v. *Smith*, 5 M. & S. 271, observed, that the language of Lord Hardwicke in *Symmer* v. *Regem*, was very strong, and that if the case then before the Court had turned upon it, he should have desired further time for consideration.

(*y*) *R.* v. *Gray*, Sel. N. P. 1087, and by the name of *R.* v. *Bray*, C. T. H. 358. An information was brought against the defendant to show by what authority he claimed to be mayor of Tintagel. The question was, as to the existence of an

observed, that it was every day's experience, that persons who have formerly executed offices in a corporation are produced to prove what they did when they were in office, and what has been usually done in their time, although in all such cases these officers have been liable to be punished by information for their unlawful acts, the Statute of Limitations not extending to informations *quo warranto*, and yet such witnesses have been always allowed as the best evidence. In the same case Lord Hardwicke seemed to consider that such testimony was also admissible on the ground of *necessity*; he observes, "Wherever any unlawful act is done in a corporate assembly, the whole assembly is liable to be punished by informations; and yet the persons who were present at such assemblies are always allowed to be good witnesses, and if they were not allowed there would be no evidence as to such acts at all" (*z*). Competency.

A judgment of ouster against one corporator is, as has already been seen, evidence against another who claims his title through the former (*a*). In

alleged custom, that at a court leet within the town the old mayor elected one elisor, and the town-clerk another; and in case the town-clerk refused it, or was absent, then the mayor chose both elisors, which elisors nominated the jury who were to elect the mayor for the subsequent year. There were also informations against James Hoskins for exercising the office of elisor, and another against Pascho Hoskins for exercising the powers of a juror in that corporation. Upon the trial of the information against the mayor, an issue having been taken on the validity of the custom, James Hoskins and Pascho Hoskins were called to prove the custom, but their testimony was rejected on the ground that they were called to support a custom which they were concerned in interest to maintain. A new trial was afterwards granted, on the ground that these witnesses had been improperly rejected. Lord Hardwicke, in delivering the judgment of the Court, stated, that as to the objection that James Pascho derived his own authority from the custom, the answer was, that his authority was ended; his claim was not that of an office or franchise, but a bare authority, for he was only an elisor chosen by the corporation for the purpose of returning a jury to choose a mayor, and that is not an office, but an authority constituted for a particular purpose; and that as to the second objection, which was the most material one, that he was liable to be punished for a wrong exercise of his power, the objection went rather to credit than competency; and his lordship said, that he did not know of any case in which it had been held that a man was an incompetent witness because he was possibly liable to be punished in an information in nature of a *quo warranto*, for a past act, the lawfulness of which he may probably support by the testimony he is about to give in another action to which he not a party. See in general as to competency, WITNESS—INTEREST—CORPORATION.

(*z*) It may be doubted whether the reasons alleged in support of this decision be strictly sufficient to warrant it in principle, without resorting to the plea of necessity. His lordship referred to the case in Roll. Ab. 685, pl. 3; 2 Hale, 280; where three defendants, in three several actions for perjury in the same suit in Chancery, were held to be competent witnesses for each other. But there the verdict for one would be no evidence in favour of another, whereas the very gist of the objection in the principal case is, that the record would be evidence for the witness himself to protect him from punishment. It is difficult to distinguish the case in principle from that of indictments against a principal and accessory in case of felony. The accessory would not be a competent witness for the former, inasmuch as the record of conviction would be evidence against himself, and a record of acquittal would conclusively discharge him. The case cited by his lordship (*Champion* v. *Atkinson*, 3 Keb. 90; *supra*, Vol. I. tit. WITNESS), where the steward of a manor was held to be a competent witness to prove a custom to pay a fine on the death of the lord, although the establishment of the action might render a re-admission necessary, and so entitle him to a fee, seems to have proceeded on the ground that the nature of the interest was but contingent.

(*a*) *Supra*, Vol. I. tit. JUDGMENT. *R.* v. *Hebden*, 2 Str. 1109; Sel. N. P. 1089; where, on a *quo warranto* to try the defendant's right to be a bailiff of Scarborough, in setting out his right he showed his own election under Batty and Armstrong, two former bailiffs, alleging, that at the time of his election they were bailiffs. One of the issues was taken on the allegation that they were bailiffs. The *onus* of proof lying on the defendant, he gave general evidence to prove their title; and on the other hand the prosecutor gave evidence of the custom of the borough

Competency.

such a case, however, the effect of the judgment may be repelled by proof of fraud or neglect (*b*).

Six years are not a bar under the 32 G. 3, c. 58, to an objection to the title to a former office, when the want of title is impeached on election to a second office (*c*).

Corporation books.

Corporation books being of a public nature, copies of them are admissible in evidence (*d*); consequently the Court will not enforce the production of the original books, unless an inspection be necessary, on the ground of an erasure, new entry, or other circumstance which renders an inspection of the original necessary (*e*). Vide *supra*, tit. INSPECTION.

RAPE.

By the stat. 9 G. 4, c. 31, s. 18, carnal knowledge shall be *deemed* complete, on proof of penetration only (*f*).

Age of witness.

It was formerly held, that a child under the age of seven years (*g*) could not be examined as a witness; but this rude and inartificial rule of measuring capacity by years was overruled in the case of *Brazier* (*h*), where it was unanimously held by all the Judges, that a child of *any* age, if she were capable of distinguishing between good and evil, might be examined on *oath* (*i*). Lord Hale has observed, with respect to the proof of this offence (and his observations have been very frequently repeated to juries in after times) (*k*): "It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, be he never so innocent." Again, he observes (*l*), "The party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far she is to be believed, must be left to the jury, and is more or less credible, according to the circumstances of the fact that concur in that testimony. For instance, if the witness be of good fame; if she presently discovered the offence, and made pursuit after the offender; showed circumstances and signs of the injury (*m*), whereof many are of that nature that only women are the most proper inspectors. If the place wherein the

Confirmatory evidence.

of electing bailiffs, and produced a record whereby judgment of ouster was given against Batty and Armstrong. This evidence was admitted, notwithstanding the objection taken that this was *res inter alios acta*; and upon a motion for a new trial, after a verdict for the Crown, the Court held that the evidence had been properly admitted; for the defendant (it was said) makes title under, and takes upon himself to justify, their election, and therefore ought to be bound by what has been transacted by them.

(*b*) Ib. and *R.* v. *Grimes*, 5 Burr. 2598. *R.* v. *Mayor of York*, 5 T. R. 72.

(*c*) 2 M. & S. 71.

(*d*) B. N. P. 210. *R.* v. *Babb*, 3 T. R. 579.

(*e*) Ibid.

(*f*) *R.* v. *Jennings*, 4 C. & P. 249. But see *R.* v. *Russell*, 2 Mood. & M. C. 122. A boy under the age of fourteen cannot be convicted of a rape, except as a principal in the second degree, the law presuming him incapable of completing the offence; he cannot therefore be guilty of an assault with that intent. *R.* v. *Eldershaw*, 3 C. & P. 399.

(*g*) Stra. 700; Hale's P. C. 634, 5.

(*h*) 1 Leach, 237; East's P. C. 443; and see *Powell's Case*, ib.

(*i*) *Supra*, tit. INFANT. *R.* v. *Powell*, Leach's C. C. L. 128. *R.* v. *Brazier*, Leach's C. C. L. 237; East's P. C. 443.

(*k*) 1 Hale, 635.

(*l*) Ibid. 633.

(*m*) Fresh discovery and pursuit, in the case of an appeal, were not only evidence to support it, but essential to it. Thus, Bract. lib. 3, cap. 28, f. 147, a., "Cum igitur virgo corrupta fuerit, et oppressa statim cum factum recens fuerit, cum clamore et hutesio debet accurrere ad villas vicinas, et ibi injuriam sibi illatam, probis hominibus ostendere sanguinem, et vestes suas sanguine tinctas, et vestium scissuras."

fact was done were remote from people, inhabitants, or passengers; if the offender fled for it: these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself." Confirmatory evidence.

"But on the other side, if she concealed the injury for any considerable time after she had an opportunity to complain; if the place where the fact was supposed to be committed were near to inhabitants, or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption that her testimony is false and feigned."

The fact that the prosecutrix made complaint recently after the commission of the alleged crime, seems to be considered as admissible generally (*n*). It is a test applicable to the accuracy as well as the veracity of the witness; and therefore it seems that her account of the transaction, if communicated recently, is admissible (*o*).

In principle, such evidence is not in general admissible until the testimony of the witness has been in some degree impeached, by an attempt to show that the statement is a fabrication. But in a case of this nature, after *primâ facie* evidence has been given of the perpetration of the crime, the defence usually rests upon some impeachment of either the honesty or the accuracy of the witness, and in either case the evidence seems to be admissible on the strictest principles.

If the prosecutrix be an infant of tender years, the *whole* of her account recently given seems to be admissible, for it is of the highest importance to ascertain the *accuracy* of her recollection (*p*). The state and appearance of the prosecutrix, marks of violence upon her person, and the torn and disordered state of her dress recently after the transaction, at the time of complaint, are material circumstances, which are always admissible in evidence (*q*).

Several (women as well as men) may be convicted as principals in the second degree, in an offence of this nature (*r*).

The wife is a competent witness against her husband, where he has assisted another to commit the offence (*s*). Competency, wife.

It is no defence that the prosecutrix consented through fear (*t*), or that she was a common prostitute (*u*), or that she assented after the fact (*x*); or that she was taken at first with her own consent, if she was afterwards forced against her will (*y*). The notion that her conception is evidence of consent has long been exploded. Defence.

The character of the prosecutrix for chastity may be impeached by general evidence (*z*); even although the defendant has not attempted to impeach Character.

(*n*) 1 Hale, 633. *Brazier's Case*, East's P. C. 445; Leach's C. C. L.

(*o*) *Brazier's Case*, East's P. C. 445.

(*p*) See *Brazier's Case*, East's P. C. 443. In the case of *R.* v. *Clarke*, 2 Starkie's C. 241, upon an indictment for an attempt to commit a rape upon an adult, Holroyd, J. held, that the *particulars* of the complaint made by the prosecutrix recently after the injury were not admissible in evidence. *Qu.*

(*q*) See *R.* v. *Clarke*, 2 Starkie's C. 241.

(*r*) 1 Hale, 628, 9; 1 Haw. c. 41, s. 6; 4 Bl. Com. 212; East's P. C. 446.

(*s*) *Lord Castlehaven's Case*, 1 Hale, 629; 12 Mod. 340. *Lord Audley's Case*, Hutt. 116; 1 St. Tr. 387; 1 Str. 633.

(*t*) Dalt. 105. 607; Haw. c. 411.

(*u*) 1 Haw. c. 41; Bract. 147, 8.

(*x*) Ibid.

(*y*) East's P. C. 444; Cro. Car. 485.

(*z*) Phillips on Ev. vol. 1. p. 176. She may be asked, whether since the alleged offence she has not on, &c. walked with

Character. the prosecutrix's character for chastity on cross-examination (*a*). But evidence of particular facts for this purpose is inadmissible (*b*). Nor can the prosecutrix be asked whether she has not had connexion with another man, or with a person named. The prisoner may, however, show that the prosecutrix has been previously criminally connected with himself (*c*).

Where the general character of the prosecutrix for honesty has been impeached by cross-examination, as to particular facts, evidence of subsequent good conduct is admissible on the part of the prosecution (*d*).

Upon a trial for an unnatural crime, an admission by the prisoner that he had committed such an offence at another time and with another person, and of his inclination for such practices, is not admissible in evidence against him (*e*).

RATE (*f*).

Notice. On an appeal against a poor's rate, the appellant must, in the first place, prove his notice of appeal in writing, signed by the appellant, or his attorney on his behalf, to have been delivered to or left at the places of abode of the churchwardens, or any two of them, which must specify the particular causes or grounds of appeal: and no other cause or ground of appeal than such as are stated, can (without consent of the overseers, and of any other person interested therein) be examined or inquired into by the Court (*g*);

common prostitutes, and in a certain public place, to look out for men.

(*a*) *R.* v. *Clarke*, 2 Starkie's C. 241. *Supra*, note (*p*).

(*b*) *R.* v. *Hodgson*, Phillips on Ev. 176; 1 Ross. & Ry. C. C. L. 211.

Ib. *R.* v. *Aspinall*, cor. Hullock, B. Spr. Assizes, 1827.

R. v. *Clarke*, 2 Starkie's C. 241. The prosecutrix, on an indictment for an assault with intent, &c., admitted that she had several years ago been sent to the house of correction on a charge of stealing money from her master. She stated that she had since been in the Refuge for the Destitute, and had remained there two years, and had, on going away, received a reward for good behaviour; and the superintendent of the establishment was admitted on the part of the Crown to prove the good conduct of the prosecutrix whilst in that asylum, and the practice of giving rewards.

(*c*) Phillips on Ev. 143; 1 Burn's J. 393, 25th edit.

(*f*) A retrospective rate is bad. *Curtis* v. *Kent Waterworks Co.*, 7 B. & C. 214. A poor's rate ought to be founded on the principle of fair annual value of property to let. *R.* v. *Company of Proprietors of Liverpool Exchange*, 1 A. & E. 465.

(*g*) By the stat. 41 Geo. 3, c. 23, sect. 4 and 5. The justices cannot hear an appeal against a rate, under the stat. 41 Geo. 3, c. 23, on the ground that a party has been omitted who ought to be rated, unless notice of appeal has been served on that party. *R.* v. *Brooke*, 9 B. & C. 915. It ought to appear on the face of the rate in respect of what property the assessment is made on each individual charged in the rate, and the omission would be a sufficient ground for quashing the rate. But where the notice of appeal did not state such as one of the grounds of appeal, it was held that the court of quarter sessions had no jurisdiction to quash the rate for the defect, though apparent on the face of it. *R.* v. *Bromyard*, 8 B. & C. 240; and 2 M. & Ry. 280. The construction of the appeal clause in 55 Geo. 3, c. 51, s. 14, is that the parish, township or place must be aggrieved: where the ground stated in the notice was, that particular individuals in one township were rated higher than other individuals were in another parish, it was held to be insufficient. The Act not having required any grounds of appeal to be specified, it is the duty of the justices, if they think the respondents have been misled by the terms of the notice given, to adjourn the appeal. *R.* v. *Westmorland, Justices of*, 10 B. & C. 226. The intention of the Legislature (13 Geo. 2, c. 18, and 55 Geo. 3, c. 51) being clearly to include every place having a jurisdiction of its own, and not contributing to any county rate, nor subject to the commission of the peace of any county; held that Berwick-upon-Tweed was within the effect of those statutes, and that a rate, in the nature of a county rate, might be made and levied by the sessions there. *R.* v. *Berwick Justices*, 8 B. & C. 327.

several appellants may give joint notices (*h*), and one appeal against several rates is sufficient (*i*). Notice.

Notice of appeal must also be given to the persons alleged to be rated or omitted, or over-rated or under-rated (*k*). But where one of the grounds was, that the appellant was rated in a higher proportion than all the other inhabitants, &c. it was held to be unnecessary to give notice to all (*l*).

If upon the trial of an appeal against a poor's rate, the appellant object merely to the quantum of the rate, he ought to begin; but if the objection be that he has no rateable property within the place, the respondents are first to prove the affirmative (*m*). Where both questions are put in issue, and in all cases where it lies on the respondents to prove any affirmative, by analogy to trials at *Nisi Prius*, the respondents, it seems, ought to begin, and go into their whole case (*n*). Where the question is upon the *quantum* of the rate, it is incumbent on the respondents to show probable ground for the amount at which they charge the party in the rate. It is not sufficient to show that he is liable to be rated for something, and leave him to pare down the amount as well as he can (*o*). The bare possession of personal property is evidence from which the justices may draw the conclusion that the possessor should be rated (*p*); but if the justices do not find that it is productive, the Court of King's Bench cannot make the inference (*q*). Onus probandi.

Rateability depends either upon inhabitancy or occupancy; the word inhabitant, as used in the statute of Eliz., means a *resident* within the parish (*r*).

As to competency, vide *supra*, INTEREST—INHABITANT. As to the production of rate-books, vide Vol. I. tit. PUBLIC BOOKS (*s*).

In an action of trespass for executing a warrant of distress under a poor's rate, it is not competent to the plaintiff to object to the validity of the rate itself, for that is matter of appeal (*t*). Nor to the form of the warrant, for the defect will not make the defendant a trespasser *ab initio* (*u*). But it is open to inquiry, whether the plaintiff occupied the lands rated, even after an appeal decided against him; and the question whether the overseers had power to make a rate for the whole district over which the rate extends, may be tried in an action against the justices who granted the warrant (*x*). Trespass for execution of distress-warrant.

(*h*) *R.* v. *Justices of Sussex*, 15 East, 206. *R.* v. *White*, 4 T. R. 771.

(*i*) *R.* v. *Justices of Suffolk*, 1 B. & A. 640.

(*k*) 4 Geo. 3, c. 23, sect. 6.

(*l*) *R.* v. *Justices of Suffolk*, 1 B. & A. 640.

(*m*) *R.* v. *Newbury*, 4 T. R. 475; and see *R.* v. *Topham*, 12 East, 546.

(*n*) *Supra*, Vol. I. tit. ONUS PROBANDI.

(*o*) Per Ld. Ellenborough, *R.* v. *Topham*, 12 East, 546.

(*p*) *R.* v. *Dursley*, 6 T. R. 53.

(*q*) Ibid.

(*r*) *R.* v. *Nicholson*, 12 East, 330. *Williams* v. *Jones*, 12 East, 346; and per Lord Ellenborough, *R.* v. *Bishop of Rochester and others*, 12 East, 353.

(*s*) See the stat. 17 Geo. 2, c. 38, s. 14, as to books of rates, and their production. By the stat. 17 Geo. 2, c. 3, s. 2, the churchwardens and overseers shall permit any inhabitant to inspect such rate, at all seasonable times, paying 1 *s.*, and shall give copies on demand, being paid 6 *d.* for every twenty-four names, under a penalty of 20 *l.* payable to the party grieved. As to books of overseers' accounts, see the stat. 14 Geo. 2, c. 38, sect. 1; inspection and copies of them, ibid.

(*t*) *Hutchins* v. *Chambers*, 1 Burr. 579. And in an action for a gaol rate, it was held to be no objection that the property was not sufficiently described, that being properly a ground of appeal. *Curtis* v. *Co. of Kent Waterworks*, 7 B. & C. 314. But the objection there applied to a mere inequality in the rate, not to a radical defect in the rate itself. *R.* v. *Newcomb*, 4 T. R. 368, per Lord Kenyon.

(*u*) Ib. And see *Durrant* v. *Boys*, 6 T. R. 580. So if the distress be partly for lands which plaintiff does not occupy. *Governors, &c. of Poor of Bristol* v. *Wait*, 1 A. & E. 261. See *Marshall* v. *Pitman*, 9 Bing. 595.

(*x*) *Lane* v. *Cobham*, 7 East, 1. *Hilton*

RATIHABITIO.

An entry by a stranger for a condition broken is sufficient, if assented to before the day of the demise in the declaration in ejectment (*y*).

The principle does not affirm a stoppage of goods *in transitu* by a mere volunteer (*z*).

RECEIPT (*a*).

Effect of.

It has been seen that a receipt acknowledging the payment of money, although it be strong, is not conclusive evidence of the fact (*b*). If a man give a receipt for the last rent, the former is presumed to be paid, because he is supposed first to receive and take in the debts which are of the longest standing (*c*); "especially (says C. B. Gilbert) if the receipt be in full of all demands, then it is plain there were no debts standing out; and if this be under hand and seal, the presumption is so strong that the law admits of no proof to the contrary."

An acknowledgment by deed of the receipt of money is conclusive evidence of the receipt as between the parties (*d*).

It has even been held that a receipt in full of all demands, although not under seal, is conclusive, in the absence of *mistake*, although it has been given by the debtor to the creditor for the purpose of defrauding third persons (*e*).

v. *Parish*, Cro. Car. 22. *Harper* v. *Carr*, 7 T. R. 270. *Milward* v. *Caffin*, 2 W. Bl. 1330.

(*y*) *Fitchett* v. *Adams*, Str. 1128.

(*z*) *Siffkin* v. *Wing*, 6 East, 371. *Right* v. *Cuthell*, 5 East, 491. And see *Bailey* v. *Culverwell*, 8 B. & C. 441. And further as to the application of the maxim, see *R.* v. *Bulcock*, 1 M. & S. 370; and *supra*, 417.

(*a*) A party who pays money may tender a stamped receipt, and the party to whom the money is payable must fill it up and pay the amount of the stamp, under a penalty of 10*l.*; 43 Geo. 3, c. 26, s. 6. The obligor of a single bond is not bound to pay without an acquittance. Bro. tit. *Faits*, pl. 8; Fortescue, 145. One of several assignees of a bankrupt has power to receive payment of a debt to the estate, and to give a valid receipt. *Smith* v. *Jameson*, 1 Esp. C. 114. *Carr* v. *Read*, 1 Atk. 695. *Secus*, if the others have expressly dissented.

(*b*) *Supra*, 786.

(*c*) Gilb. L. Ev. 142.

(*d*) *Baker* v. *Dewey*, 1 B. & C. 704. *Rowntree* v. *Jacob*, 2 Taunt. 141. But it will not be conclusive where the recitals show that the money was not paid. *Lampon* v. *Corke*, 5 B. & A. 607. So a receipt endorsed on the deed is not conclusive. *Stratton* v. *Rastall*, 2 T. R. 366. *Lampon* v. *Corke*, 5 B. & A. 611.

(*e*) *Almer* v. *George*, 1 Camp. 392; where the defendant, in an action for goods sold and delivered, gave in evidence an account stated between the parties, for the balance found to be due, which was declared to be in full of all demands. To meet this defence, it was proposed to prove that before the receipt, the plaintiff had assigned the whole of his effects for the benefit of his creditors, of which the defendant had notice, that no money passed, and that the whole was a collusion between the parties to defraud the creditors; but Lord Ellenborough held that the receipt was a bar between the parties, and intimated, that if a motion had been made in term time to the equitable jurisdiction of the Court, to prevent the defendant from setting up such a defence, the Court might, perhaps, have interfered. That the plaintiff might have released the action; and that it was impossible to admit evidence of his attempting to defraud others and to recognize the transfer of choses in action, without confounding all legal distinctions. Notwithstanding these reasons, derived from so great an authority, the question not having met with any solemn decision in Bank, may yet be open to consideration. A receipt not under seal does not operate as an estoppel, but is like a parol declaration, mere *evidence* of the fact of payment; and it is for the jury to estimate its *effect*. An acquittal under seal of rent due on a later day, is a bar to all recovery for rent due on a former day; but if not sealed, contrary proof shall be admitted. B. N. P. 56. If then a receipt, or parol declaration, be offered as mere evidence of a fact, are not the circumstances under which it was given equally evidence as part of the

yet it seems to be clear, that a mere receipt not under seal cannot operate as an estoppel, but is mere evidence of the fact to be submitted to a jury, and Effect of.

transaction, as explanatory of its real nature, and as showing what reliance ought to be placed upon it? Although the evidence of fraud be not admissible merely for the purpose of establishing the right of a third party to a chose in action, yet why is it not admissible to show a legal title subsisting in the plaintiff? for that is the tendency of the evidence; in which respect, such a receipt differs essentially from a release of the debt under seal, which would operate as an estoppel, or a security under seal, which might operate as an extinguishment; whereas a mere receipt operates as evidence only. *Non constat* but that the plaintiff himself, although a wrong-doer in being a party to such collusion, may be willing to retrace his steps, and recover for the benefit of his creditors, for whom he is a trustee; and it is difficult to say why he should be estopped from so doing by any act which would not amount to a legal estoppel. In so doing he does not seek to take advantage of his own wrong, but having done wrong endeavours to repair his fault. Where indeed a release has been given in such a case by the debtor, the Courts have, upon application in Bank, set it aside; (see *Legh* v. *Legh*, 1 B. & P. 447, and *supra*, 28, note (*a*);) but it would be almost impossible to say *à priori* with what *evidence* the defendant may come prepared at the trial, which may have been fabricated collusively between himself and the nominal plaintiff; and therefore it would be difficult to make any application to the Court in Bank, which would effectually restrain him, short of enjoining him from setting up any subsequent discharge of the debt by way of defence, which might in effect be to prejudge the whole case. As the Court does undoubtedly possess what has been termed an equitable jurisdiction in such cases (so termed, not because it does not properly belong to a court of law, as distinguished from a court of equity, but because it is founded, as all rules of law are, or ought to be, on just and equitable principles), there seems to be no reason why that jurisdiction should not be exercised, according to the exigency of circumstances, in Bank, when the application can properly be made there, or upon the trial, where a fraud is sought to be effected under the colour and pretext of mere evidence of the fact, provided it can be done without violating any rule of law. It is by no means true that the Court will not regard mere equitable relations with a view to the real fact, and for the purposes of justice. This is very frequently done in the action for money had and received. But in the principal case there seems to be no necessity for regarding mere equitable relations in order to let in the evidence of fraud; the simple question is, whether the plaintiff is not to be permitted to answer and explain that which is mere evidence, by showing that the transaction taken altogether has no tendency to prove the fact, but is bottomed in fraud. The receipt not amounting to a release or extinguishment of the debt, it still subsists in law, and if it subsist in law, may be recovered at law, and for that purpose it should seem that all evidence is admissible which tends to show that the debt still subsists. It would be a solecism to say that the debt under the circumstances still subsists, but that the plaintiff cannot be permitted to show that it still subsists by evidence. If indeed the plaintiff could not recover but through the medium of a fraud, the maxim would apply *in pari delicto potior est conditio defendentis*; but the plaintiff seeks but to recover a debt *bonâ fide* due to him, and the defendant endeavours to protect himself by means of his own fraud. This case seems to be directly opposed in principle to that of *Cockshott* v. *Bennett*, 2 T. R. 763 (and see *Smith* v. *Bromley*, Doug. 671. 2d ed.), where a promissory note given by the defendant to the plaintiff, in discharge of part of a debt justly due, was held to be void, because the collateral effect was to defraud other creditors of the defendants, who had been induced to enter along with the plaintiff into a composition-deed; and the plaintiff, in fraud of the other creditors, had refused to execute the deed unless the remainder of his debt was secured by giving the promissory note in question. If a promissory note given as a security for a debt really due can be impeached by evidence of fraud, in respect of third persons, it is difficult to say upon what principle such evidence is not equally admissible in order to impeach a fraudulent receipt. The Courts, in the cases adverted to, proceed upon the broad principle that a security is void if given in fraud of third persons, and shall not be available even as between the parties themselves. The same principle seems to apply in the fullest extent in the case of *Alner* v. *George*. See *Bristow* v. *Eastman*, 1 Esp. C. 172. In the case of *Skaife* v. *Jackson*, 3 B. & C. 421, where the action was brought by two co-trustees, and the defendant produced a receipt given by one of them, it was held that it was competent to show that the receipt was fraudulently given, and that the money was not in fact paid. In *Benson* v. *Bennett*, C. P. sittings after Mich. 49 G. 3, 1 Camp. 394, n. it was held that a receipt in full obtained by fraud was a nullity. And see *Walker* v. *Consett*, Forrest, 157. A bill is drawn by *A.* on *B.*, and indorsed to *C.* two years

Effect of.

capable of being rebutted by the other circumstances of the case (*f*). In the late case of *Lampon* v. *Corke* (*g*), in an action for goods sold and delivered, and on the money counts, the defendant gave in evidence a deed executed by the plaintiff, which recited that the plaintiff had given possession of certain premises and growing crops, taken in execution by the plaintiff as a judgment-creditor against a third person, and that the defendant had agreed to pay the plaintiff the sum of 40*l.* for such possession; and also stated, that in pursuance of such agreement, and in consideration of the sum of 40*l.* being now so paid to the plaintiff as hereinbefore is mentioned, and also in consideration of the sum of 10*s.* a-piece paid to the plaintiff and the judgment-debtor, the plaintiff did generally release the defendant; (there was also indorsed on the deed a receipt by the plaintiff for the sum of 40*l.*): it was clearly proved, and admitted, that the sum of 40*l.* had not been actually paid. And it was held, that upon the construction of the deed itself it did not operate as a release; and that as the receipt upon the deed was not under seal, it would not operate as an estoppel, but only as evidence, and then, as it was admitted that no money had in fact been paid, it became of no importance.

A receipt in full, given with a full knowledge of all the circumstances, and in the absence of fraud (*h*), seems to be conclusive (*i*).

If a man by his receipt acknowledges that he has received money from an agent on account of his principal, and thereby accredits the agent with the principal to that amount, such receipt is, it seems, conclusive as to payment by the agent (*k*). Thus the usual acknowledgment in a policy of insurance of the receipt of premium from the assured is conclusive of the fact as between the underwriters and the assured (*l*), although not as between the underwriter and the broker. A receipt on the back of a bill of exchange is *primâ facie* evidence of payment by the acceptor (*m*). The giving a receipt does not exclude parol evidence of payment (*n*).

RECITAL.

A RECITAL in a writ of supersedeas, of a former commission of bankrupt, is evidence that such prior commission (*o*) issued on the day stated.

after it has become due; *D.* pays the balance due on the bill to *C.* the holder, and *C.* indorses the bill and writes a receipt upon it in general terms; the receipt is not conclusive evidence that the bill has been satisfied, and parol evidence is admissible to explain it. *Graves* v. *Key*, 3 B. & Ad. 313.

(*f*) See the observations of Holroyd, J. in *Lampon* v. *Corke*, 5 B. & A. 611.

(*g*) 5 B. & A. 606.

(*h*) *Benson* v. *Bennett*, 1 Camp. 394, n.

(*i*) *Bristow* v. *Eastman*, 1 Esp. C. 172. And see *Branston* v. *Robins*, 4 Bing. 11. *Foy* v. *Bell*, 3 Taunt. 493. Any agent employed to receive money, and to render accounts of money received, having rendered an account of money received, cannot recover back money paid under his own misstatement. *Shaw* v. *Picton*, 4 B. & C. 729. *Skyring* v. *Greenwood*, *Ib.* 281, 704 (*r*). *Secus* where fraud has been practised by the assured to induce the broker to give credit to him. *Foy* v. *Bell*, 3 Taunt. 493.

(*k*) See *Dalzell* v. *Mair*, 1 Camp. 532. In an action by the assured against the underwriter for a return of premium, the policy having been effected by a broker, and confessing payment of the premium in the usual form, it appeared that no money had, in fact, been paid, but that the plaintiff, being the holder of a dishonoured bill, accepted by the broker, proposed, in satisfaction of the bill, that the broker should get policies underwritten for him, and the broker having a running account with the underwriter, the policy was effected in consequence; Lord Ellenborough, C. J. held that the defendant was bound by the receipt in the policy.

(*l*) Ibid.

(*m*) Peake, 25.

(*n*) *Rambert* v. *Cohen*, 4 Esp. C. 214.

(*o*) *Gervis* v. *Grand Western Canal Company*, 5 M. & S. 76.

So a recital in a deed of a former deed is evidence of such former deed, against a party to the latter (*p*). The execution of a deed by the defendant is evidence of the conveyance to him of the real property specified as his in the deed (*q*).

In such instances the evidence operates as an admission by the party of the fact recited. But where a plaintiff in trespass produces a warrant, in order to connect the act of the bailiff with the defendant, the warrant is not evidence of the writ which it recites; for it is necessary that he should produce it to show the defendant's agency, and this affords no inference that he admits the existence of the recited writ (*r*).

An indorsement on the feoffment, purporting to have been made by the attorney employed to deliver seisin, that he had done so in the presence of *A.*, is not evidence of the fact, although the deed is produced by the plaintiff at the desire of the defendant, unless the plaintiff claims under it (*s*).

RECOGNIZANCE. *See* 7 Geo. 4, c. 64, s. 31.

RECOMMENDATION.

When construed to be mandatory (*t*).

RECORD.

Proof of.

The mode of proving a record by mere production, or by copy, has already been considered (*u*); where the record is pleaded it must be tried on the issue of *nul tiel* record, and then it should be proved by the production of the record itself, or of its tenor *sub pede sigilli* (*x*). But when issue is joined on the fact, the record may be given in evidence in support of the fact, or it may be proved by means of a sworn copy (*y*). In such case the whole should be proved, or at least so much as is material to the question (*z*). A document purporting to be a record of the conviction of a prisoner of felony, without any caption, is inadmissible, being imperfect as a record, inasmuch as the indictment does not appear to have been found by persons of competent jurisdiction (*a*). It has been seen that the record of a verdict is not evidence to prove the facts which it finds, unless the judgment be also proved, or the decree founded upon it where the trial was on an issue out of Chancery (*b*). By the stat. 3 & 4 Ed. 6, c. 4, and 13 Eliz. c. 6, patentees, and all claiming under them, may make title by showing the exemplification or *constat* of the roll; and these statutes extend to all the king's patents which concern land privilege, or any thing else granted to a subject or corporation (*c*). The nature of the proof, where a record has been lost, has already been considered (*d*).

(*p*) Willes, 9; and *supra*, tit. Admission.

(*q*) *Laycock* v. *Ambler*, sittings after T. T. 1825. As to recitals in writs, see 282, 284.

(*r*) *Infra*, tit. Trespass.

(*s*) *Doe* v. *Marquis of Cleveland*, 9 B. & C. 864.

(*t*) *Kirkback* v. *Hudson*, 7 Price, 712. 2 Powel on Devises, 24.

(*u*) *Supra*, Vol. I. tit. Record.

(*x*) Sty. 22; Sid. 142; Bac. Ab. Ev. F.; *supra*, Vol. I. tit. Judgment.

(*y*) Ibid.

(*z*) Trials per Pais, 166. 3 In. 173. 1 Mod. 117. Bac. Ab. Ev. F. 10 Co. 92, b. Com. Dig. Ev. A. 4.

(*a*) *Cooke* v. *Maxwell*, 2 Starkie's C. 183.

(*b*) Vol. I. tit. Judgment.

(*c*) 5 Co. 53. Co. Litt. 225, b.

(*d*) *Supra*, Vol. I. tit. Judgment.

Proof of.

The effect of a record of a verdict and judgment, either as mere evidence of a fact, or to establish the legal consequences of the judgment (*e*), or as operating between private parties (*f*), either by way of estoppel (*g*), or as evidence of a disputed fact (*h*), or in criminal cases (*i*), or where the judgment operates *in rem* (*k*), have already been considered.

How impeached.

The mode of impeaching a judgment, decree, or sentence, has also been considered (*l*). It is further to be observed, that no collateral proof is admissible to impeach the authenticity and accuracy of a record. Thus evidence is inadmissible to show that the finding of the jury was mistakenly indorsed on the *postea* (*m*); but an officer may be examined as to the state and condition, although not as to the matter of a record (*n*). A judgment, though erroneous, is binding, until it be reversed. Thus an execution on an erroneous judgment is valid, until reversal (*o*). An accessory cannot take advantage of error in the judgment against the principal (*p*). And an erroneous judgment against the husband for treason, is, whilst unreversed, sufficient to deprive the wife of her dower (*q*). Where, in an action of trespass for an injury to the person, the record of an acquittal of the defendant is produced, for the purpose of showing that the civil action has merged in the felony, evidence is admissible to show that the acquittal was obtained by collusion (*r*).

Effect of, in evidence.

It has been seen, that in an action for diverting water from the plaintiff's mill, a previous verdict for the defendant, in an action by the same plaintiff, for the disturbance of the same right, was held to be admissible, but not conclusive evidence (*s*). In principle it is exceedingly difficult to conceive *in what degree* such evidence tends to rebut evidence adduced to prove the right, or how it ought to be estimated by a jury, where the second action relates to a later period of time than the former; the verdict for the defendant shows indeed, strongly, if not conclusively, that the plaintiff was not entitled to *damages* in the former action. But the plea in the former action being general, it does not at all appear, neither, as it seems, can it be shown by evidence, upon what ground the former verdict proceeded. It is consistent with the former verdict that the plaintiff fully established his right, but that he failed in proving a disturbance by the defendant, or that the latter proved satisfaction, or a release, which was held to be a bar to the action; how then can the verdict be evidence to disprove the right, when it is perfectly consistent with the existence of the right (*t*)! And even assuming that the former verdict was founded on evidence as to the right, it is exceedingly difficult to say what degree of weight in the scale of evidence is to be attributed by the jury to the

(*e*) Vol. I. tit. JUDGMENT.
(*f*) Ibid.
(*g*) Ibid.
(*h*) Ibid.
(*i*) Ibid.
(*k*) Ibid.
(*l*) Ibid.
(*m*) *Reed* v. *Jackson*, 1 East, 355.
(*n*) *Leighton* v. *Leighton*, Str. 210.
(*o*) 1 Ld. Raym. 546. *Holmes* v. *Walsh*, 7 T. R. 465.
(*p*) 1 Hale, 625. *R.* v. *Baldwin*, 3 Camp. 265.
(*q*) Per Lawrence, J. *Holmes* v. *Walsh*, 7 T. R. 465.
(*r*) *Crosby* v. *Leng*, 12 East, 412.
(*s*) *Vooght* v. *Winch*, 2 B. & A. 662, *supra*, Vol. I. and see *Outram* v. *Morewood*, 3 East, 346, and *Strutt* v. *Bovingdon and others*, 5 Esp. C. 56.
(*t*) For similar reasons, an acquittal upon an indictment for the non-repair of a highway, under the plea of not guilty, is not, as it seems, evidence to repel the obligation to repair upon the trial of a second indictment. *R.* v. *St. Pancras*, Peake's C. 219, *supra*, Vol. I. But a former conviction is conclusive as to the liability, unless fraud be shown, *ib.*

Effect of, in evidence.

opinion of a former jury, without the means of knowing the reasons which led them to that decision, or how far they are to distrust their own opinion, formed upon grounds which they do know, in order to embrace the opinion of strangers, formed upon grounds which they do not know, and of which, by the rules of evidence, they cannot be informed. A previous verdict for the plaintiff is not liable to the former of these objections, inasmuch as it necessarily involves the proof of the plaintiff's right (*u*); still such a verdict, offered as evidence under the plea of the general issue, would not be conclusive (*x*).

In the case of *Bredon* v. *Harman* (*y*), it was held that in a *qui tam* action, evidence of a recovery of the same penalty, by another plaintiff, was not admissible to defeat the action on the issue of *nil debet*; for had he pleaded it, the plaintiff might have replied that it was a recovery by fraud to defeat the prosecutor, which he would not be prepared to prove under that issue; in this case, it is to be observed, the recovery was by a third person, to which the plaintiff in the second action was not privy, and therefore that he ought to be apprised of the intended defence by means of a special plea.

Where, however, the plaintiff has already recovered damages in trespass or trover for a conversion of his goods, the record will, it seems, be a bar to an action of trover, for converting the same goods under the general issue, for the effect of the former recovery was to vest the property in the defendant (*z*). And in an action of assumpsit or debt, it seems that a former

(*u*) According to the report of the case of *Vooght* v. *Winch*, the Court announced an opinion that the defendant might have availed himself of the former verdict, by pleading it as an estoppel; but as that was not the question in the case, but at most an *obiter dictum*, it may not be improper respectfully to suggest a doubt whether the former verdict could have operated as an estoppel to the second action, by which damages were claimed down to a later period than in the former action; for the most that the former verdict and judgment proved was, that the plaintiff was not entitled to damages in respect of any supposed injury committed previously to the former action; it could not, as it seems, be conclusive as to any subsequent claim, unless it were conclusive as to the plaintiff's *right* to the water, and it could not be conclusive as to the *right*, inasmuch as no issue was joined upon the right, and the verdict might have turned upon a matter collateral to the right. In the case of *Sir Frederick Evelyn* v. *Haynes*, cited in *Outram* v. *Morewood*, 3 East, 395, upon a second action for obstructing a watercourse, and not guilty pleaded, Ld. Mansfield held that a former verdict for the plaintiff, when given in evidence, was not considered by the law as conclusive as to his right; and Lord Ellenborough adds, it could only be conclusive upon the right, if it could have been used, and were actually used, in pleading by way of estoppel, which it could not be in that case; first, because no issue was taken in the first action, upon any precise point, which is necessary to constitute an estoppel thereupon in the second action; and secondly, it was not even pleaded by way of estoppel in the second action, but only offered as evidence under the general issue.

(*x*) *Sir F. Evelyn* v. *Haynes*, cited 3 East, *supra*, note (*u*).

(*y*) Str. 701; and in the case of *Vooght* v. *Winch*, 2 B. & A. 662, *supra*, Vol. I. tit. JUDGMENT, the case of *Bird* v. *Randall*, 3 Burr. 1345, where it was held, that a recovery by the plaintiff against a covenant servant for leaving his service, was a bar, under the general issue, in an action against a defendant, for seducing that servant from the plaintiff's service, was denied.

(*z*) *Adams* v. *Broughton*, 2 Str. 1078; Kel. 58. b. Andr. 18. In *Smith* v. *Gibson*, Rep. T. H. 319, Ld. Hardwicke observed, "there are several cases where a recovery in one action shall be a bar to another action of the same nature, but that is where the recovery is a satisfaction for the very thing demanded by the second action. In an action of trover the plaintiff recovers damages for the thing, and it is as a sale of the thing to the defendant which vests the property in him, and therefore it is a bar to an action of trespass for the same thing." See also *Martens* v. *Adcock*, 4 Esp. C. 251; *infra*, VENDOR & PURCHASER. And see Com. Dig. *Action*, K. 4. A recovery in trespass may be a bar in trover, but a verdict for the defendant in trespass is no bar to an action of trover. Lofft on Evidence, 533. See *Vernon* v. *Hanson*, 2 T. R. 287. *A.* recovers against *B.* for

Effect of, in evidence.

verdict or judgment for the same cause of action is not only admissible, but frequently conclusive evidence, although it be not pleaded. In *Burrows* v. *Jemino* (*a*), King, Lord Chancellor, said, that upon a trial at law on a bill of exchange accepted by the defendant, he would permit the defendant to prove at the trial that the acceptance had been vacated by the sentence of a court of competent jurisdiction in the country where it was made; and his lordship cited a case which came before him in the Mayor's Court, when he was Recorder of London, where a mariner having sued for wages, and there being a sentence against the plaintiff in the Admiralty Court, in an action for the same wages, he doubted whether he could allow the defendant to give the sentence of the Admiralty Court in evidence upon *non-assumpsit*; and that he asked the opinion of Holt, C. J. who said, that whatever *defeated* the promise might be given in evidence on *non-assumpsit*. In the case of *Kitchen and others* v. *Campbell* (*b*), in an action for money had and received by the defendant, upon the sale of certain goods, to the use of the plaintiffs, as the assignees of a bankrupt, it was held, that a verdict for the defendant, in an action of trover brought by the same plaintiffs, as such assignees, to recover in respect of the same goods, was a bar to the action. In the case of *Lawrence* v. *Reynolds* (*c*), which was an action on the case against an under-sheriff, for not executing a bill of sale to a trustee for the plaintiffs, of certain goods seized by him under a *fieri facias*, at the suit of the plaintiffs, it was held that a rule of Court, giving specific relief to the plaintiffs, by ordering a former bill of sale to be cancelled, and the present bill of sale to be executed, was a bar to the action under the plea of not guilty, on the broad ground that a man should not be permitted to pursue a second recompense (*d*).

So it has been held that under the plea of *non-assumpsit*, a garnishee, against whom a recovery and execution have been had in the Mayor's Court, in foreign attachment, after the issuing a summons to the defendant below, and *nihil* and *non-inventus* returned, may protect himself by giving the proceedings in evidence on an action to recover the same debt (*e*), and that it was not necessary for him to prove the debt of the plaintiff below, who attached the money in his hands. Even an award made by an arbitrator, to whom the parties have referred the question in dispute, is final under the plea of the general issue to an action of *assumpsit* (*f*).

As an award made by the referee of the parties is conclusive evidence under the general issue, the record of a verdict and judgment must, it seems, in principle, be equally operative: and, in general, from the establishment of the rule, that a release, accord and satisfaction, or the merger of a simple contract debt in a higher security, is evidence in bar under the general issue in an action on the simple contract (*g*), it seems also to follow in principle that a judgment for the recovery of the same debt, or a judgment for

goods sold, the verdict is evidence for *C.* in an action by *A.* against *C.* in respect of the same goods. *Macbrain* v. *Fortune*, 3 Camp. 317. And see *Robinson* v. *Hudson*, 4 M. & S. 475.

(*a*) 2 Str. 732.

(*b*) 3 Wils. 304. S. C. 2 Bl. 827.

(*c*) Cowp. 403.

(*d*) Note, that part of the rule was, that all further proceedings should be stayed. It was also held that an action ought to have been brought against the high sheriff.

(*e*) *Macdaniel and another* v. *Hughes*, 3 East, 367; and see 1 Will. Saund. 167, a, and the cases there cited.

(*f*) *Price* v. *Hollis*, 1 M. & S. 105.

(*g*) Com. Dig. tit. *Pleader*, 2 G. 12, per Holt, C. J.; 5 Ann. 2 W. 46; Cro. Eliz. 201; 5 Mod. 314; Cro. Jac. 33; Cro. Car. 415; B. N. P. 182. A right of action on a bond is merged in a judgment, and the obligee can have no new action whilst the judgment remains. *Higgen's Case*, 6 Co. 43.

the defendant, for the same cause of action, are equally admissible; such evidence would no more take a plaintiff by surprise, than evidence of a release would, for he is equally privy to both, and a judgment of a court of competent jurisdiction shows that the debt does not exist. Effect of, in evidence.

It has lately been held accordingly. In the case of *Stafford* v. *Clarke*, the Court held, that under the plea of *non-assumpsit*, the defendant might give, in evidence, a judgment in trover between the same parties for the amount of the two bills sought to be recovered in the latter action (*h*).

If a plaintiff, having several causes of action, offer evidence on the trial, and fails for want of proof in respect of one or more of such causes of action, he cannot afterwards bring another action in respect of those causes of action in which he has failed (*i*). The right to sue on a promissory note is entire, and a recovery a bar, though the note was given (but not expressed to be) for securing payments accruing due from time to time. So if a cognovit and receipt be given in a first action, though no judgment be entered up (*k*).

RECOVERY (*l*).

Recovery. Presumptive evidence of surrender of estate for life.

In general, where the party suffering a recovery had power to suffer it, it is to be presumed that all things were regularly done till the contrary appear (*m*). In such case it is sufficient to produce and prove an examined copy of the recovery (*n*). But where the party suffering the recovery had no title in himself, being but a remainder-man, or reversioner; or if there be evidence to show that there was at the time of the recovery an estate for life in another, then a surrender by the tenant for life, in order to make a tenant to the præcipe, ought to be proved (*o*), either directly, by proof of actual seisin, or of the deeds by which he is made a freehold tenant, or by presumptive evidence.

Where the freeholder is a trustee for the tenant in tail himself, acting under his power and direction, such a presumption (*p*) arises.

So the presumption may be founded on the acquiescence of those who were interested in disputing the validity of the recovery, and who have had opportunity to dispute it (*q*).

Where a recovery has been suffered by a tenant in tail during the existence of the estate for life, and possession has long gone according to the recovery, a surrender of the life-estate is to be presumed (*r*). This presumption cannot however be made where the title is disputed recently after the

(*h*) 2 Bing. 377; 1 Saund. 87. Chitty on Pleading, vol. 2, p. 438.

(*i*) Per Best, C. J. 2 Bing. 282.

(*k*) *Siddal* v. *Rawcliffe*, 3 Tyr. 441.

(*l*) By the stat. 3 & 4 Will. 4, no recovery shall be suffered after 31st December 1833.

(*m*) 2 Burr. 1065. But if the deeds be produced, and it appear that there was in fact no good tenant to the præcipe, the presumption is destroyed. *Earl of Suffolk's Case*, East, 1747; 2 Burr. 1073. See the case of *Lincoln College*, 3 Co. 58. *Keen* v. *The Earl of Effingham*, 2 Str. 1267, where the question was (20 Geo. 2) as to the validity of two recoveries suffered in 1714 and 1721, when the Court held, that, although after such a lapse of time proper tenants to the præcipe would be presumed where no deed appeared, yet these being insufficient, they could not presume that there were others which were good. *Sed quære.*

(*n*) 2 Cro. 455; Lutw. 1549; 1 Mod. 117.

(*o*) 5 Mod. 211. And see below note (*e*).

(*p*) Per Lord Mansfield, 2 Burr. 1073.

(*q*) Ibid.

(*r*) *Bridges* v. *Duke of Chandos*, 2 Burr. 1065; Bac. Abr. Ev. F.

Presumption of surrender of life estate.

death of the person who was entitled to hold, without the aid of the recovery (*s*). If there be tenant for life, with remainder in fee, and he in remainder suffer a recovery, with a single voucher, if the recovery have been ancient, and there has been constant enjoyment under the recovery, the Court will presume a surrender by the tenant, so as to make a lawful tenant to the præcipe (*t*).

But the length of time on which such a presumption is founded is to be reckoned, not from the date of the recovery, but from the period when possession began to go according to the recovery (*u*). If, therefore, after the recovery suffered by a tenant in tail, the tenant for life remain in possession for more than thirty years afterwards, the length of time does not begin to run until the death of the tenant for life (*x*).

And it seems, therefore, that no presumption can be made from mere length of time after the recovery suffered, unless there be some circumstance of enjoyment, and acquiescence under the recovery, or other evidence to show that a recovery has in fact been suffered; for otherwise there is no ground to build a presumption upon. For instance, if an eldest son, who has a remainder in tail, should privately suffer a recovery, and his father should live many years afterward, there would be no pretence for presuming a surrender of the father's life-estate (*y*). But although a possession by a tenant in tail, after the death of the tenant for life, may be ascribed to the tenancy in tail, as well as to a recovery previously suffered, yet after a long possession by the tenant in tail the presumption ought, it seems, to be made; for it is probable, from the *acquiescence* of the tenant in tail under his former recovery, that he knew that it was not defective (*z*).

In the case of *Warren* d. *Webb* v. *Grenville* (*a*), where a recovery had been suffered by a son who was tenant in tail forty years before, the estate for life being then in the widow, the Court expressly held that a surrender was to be presumed from mere lapse of time, without taking into consideration the circumstantial evidence, tending strongly to prove that a surrender had in fact been made, *viz.* the proof of the debt-book of a deceased attorney, in which he charged 32*l.* for suffering the recovery, two articles of which were for drawing and ingrossing a surrender by the mother, and in which the bill was acknowledged to have been paid. From this declaration of the Judges, therefore, it should seem as if mere lapse of time, even during the life of the tenant for life, would warrant the presumption. This, however, is qualified and limited by Lord Mansfield's account of the case in *Bridges* v. *The Duke of Chandos* (*b*); from which it appears that the report of *Webb* v. *Grenville*, in Strange, is defective, in not stating the important fact, that the *jointress* (the tenant for life) had been *dead a vast number of years*, a circumstance which reconciles the declaration of the Court in *Webb* v. *Grenville*, as applied to that case, with the doctrine expounded in *Bridges* v. *The Duke of Chandos* (*c*).

(*s*) *Bridges* v. *Duke of Chandos*, 2 Burr. 1065; Bac. Abr. Ev. F.

(*t*) *Anon.* Vent. 257. S. C. reported differently, by the name of *Green* v. *Froud*, 3 Keb. 310, 311; and by the name of *Green* v. *Proud*, 1 Mod. 117.

(*u*) 2 Burr. 1065.

(*x*) *Bridges* v. *Duke of Chandos*, 2 Burr. 1065.

(*y*) Per Lord Mansfield, 2 Burr. 1076.

(*z*) Ibid.

(*a*) 2 Stra. 1129.

(*b*) 2 Burr. 1065.

(*c*) In the case of *Dame Griffin* v. *Stanhope*, (Cro. J. 455,) the Court intended the recovery to be good; but it appears that possession had gone along with the recovery. In 2 Lutw. 1549, at the end of the case of *Leigh* v. *Leigh*, it is laid down, that in every common recovery

By the stat. 14 Geo. 2, c. 20, it is enacted, that all common recoveries suffered, or to be suffered, without any surrender of the leases for life, shall be valid, provided that it shall not extend to make any recovery valid, unless the person entitled to the first estate for life, or other greater estate, (in case there be no such estate for life in being), next after the expiration of such lease, have or shall convey, or join in conveying, an estate for life, at least, to the tenant to the præcipe. Statute 14 Geo. 2, c. 20, s. 1 & 2.

By sect. 4, in favour of purchasers, where, by neglect, recoveries have not been entered of record, it is enacted, "That where a person shall have purchased any estate for a valuable consideration, whereof a recovery was necessary to complete the title, he, and those claiming under him, having been in possession, may, at the end of twenty years from the time of such purchase, produce in evidence the deed, &c. making a tenant to the writ of entry, &c. for suffering a common recovery, and declaring the uses, &c.; and such deeds (the execution being *duly* proved) shall be deemed good evidence for the purchaser, &c. that such recovery was duly suffered, and perfected according to the purport of such deed, &c. in case no record can be found, or the same should be found not to be regularly entered; provided the person making such deeds, &c. had a sufficient estate and power to make a tenant to such writ."

And by the 5th sect. of the same Act, it is enacted, "That after twenty years from the time of suffering, all common recoveries shall be deemed good and valid to all intents and purposes, if it appear upon the face of such recovery that there was a tenant to the writ; and if the person joining in such recovery had a sufficient estate, and power to suffer the same, notwithstanding the deed or deeds for making the tenant to such writ should be lost, or not appear."

This Act applies to those cases only where the party who suffered the recovery had a sufficient estate to enable him to do so, and does not alter the rules of evidence as to recoveries suffered by tenants in tail, during the existence of the estates for life. Where, therefore, the party suffering the recovery had no power to suffer it, but only an estate-tail, or remainder expectant on the death of the tenant for life, it is essential to prove, either directly, by proof of the necessary deeds, or by presumptive evidence, that there was a good tenant to the præcipe (*e*).

it shall be intended that there was a good tenant to the præcipe, till the contrary appear; this, however, it seems, was but the reporter's own speculation, and not an adjudication of the Court.

(*e*) 5 Mod. 211. Sixty years ago, lands were limited to trustees to pay debts, remainder to *A.* in tail, remainder to *B.* in tail. *A.* had possession, and, in consideration of 800*l.* marriage portion, made a settlement, and a common recovery was suffered, wherein Moore was tenant to the præcipe, who vouched *A.*, who vouched the common vouchee. After the death of *A.* without issue, the remainder-man brought ejectment, and a deed to make a tenant to the præcipe, and payment of the debts was presumed from length of possession by *A.* and payment of the 800*l.* 12 Vin. Ab. Q. Where tenant in tail of an estate subject to a long term, in order to suffer a recovery and bar the entail, by deed granted, bargained and sold unto *L.* & *B.* the said land and premises, and the reversion, &c. to hold to *L.* & *B.* to the use of *L.* to the intent that he might become a perfect tenant of the freehold, in order to suffer such recovery, and which was declared to enure to the only proper use of the tenant in tail, his heirs, &c. for ever; and the deed was, after the return of the writ of seisin, duly enrolled as a bargain and sale within 27 Hen. 8; held that *L.* thereby became solely seised of the premises, so as to be a good tenant of the freehold for suffering the recovery. *Haggerston* v. *Hanbury*, 5 B. & C. 101. Where *A.*, a party levying a fine of Hil. 1821, having in the following April distrained for half a year's rent of the premises, due at Lady-day 1821, and other actions being then pending to try the title of the party, and another as heir-at-law, the rents were paid into a banker's to abide

Statute 14 Geo. 2, c. 20, s. 1 & 2.

It has been seen that a fine is proved by the production of the chirograph (*f*). It will be presumed that a fine has been levied with proclamations, till the contrary be shown (*g*). But to prove that a fine has been levied with proclamations, it is necessary to produce and prove a copy, examined with the roll: the chirograph is insufficient for the purpose; for the chirographer is not authorized to make out copies of the proclamations (*h*).

In order to render a fine available, a seisin of the estate by the party who levied it is essential (*i*); but proof of possession, or of the receipt of rent, is *primâ facie* evidence of seisin (*k*).

RECTOR, &c.

Dilapidations.

THE plaintiff, in an action against a preceding incumbent for dilapidations (*l*), must, under the proper issue, prove his own title to the church, as in an action of ejectment (*m*). Also, that the defendant, or the party whom he represents, was possessed of the living. Evidence, by way of admission, as by proof of his having acted as such, by taking tithes, or other profits of the living, will suffice for this purpose. Lastly, he must prove the state of dilapidation in which the premises were left, and the amount required to put them into a proper state of repair.

It seems to be no answer on the part of the defendant, nor even to be evidence in reduction of damages, that the premises were in a dilapidated state when he or his testator took possession (*n*).

Non-residence.

In an action to recover penalties for non-residence (*o*), the plaintiff must

the event, which being determined in his favour, were ultimately paid over to his representatives, held, that never having actually received any rent, he was not to be deemed to have been seised at the time of his levying the fine, which consequently did not operate as a bar by the ejectment in which the lessor claimed to be heir. *Doe* d. *Lidgbird* v. *Lawson*, 8 B. & C. 606. And see *Lord Townsend* v. *Ashe*, 3 Atk. 336; 5 Cruise Dig. tit. 35, c. 5, s. 34, p. 121. Ejectment by a tenant in tail, evidence of receipt of rents for thirty years during the life of the last tenant in tail, and for seven years afterwards the ancestor had had seisin, held that there was no such presumption of a fine or recovery by the last tenant in tail as called on the plaintiff to rebut it. *Doe* v. *Pike*, 3 B. & A. 738.

(*f*) *Supra*, tit. FINE.

(*g*) *Supra*, 931 (*u*).

(*h*) B. N. P. 129; *supra*, Vol. I. tit. PUBLIC DOCUMENTS.—COPIES.

(*i*) Where a fine was levied by tenant in tail in remainder during the life of the tenant for life, it was held that the remainder-man in fee was not bound by the fine and non-claim. *Doe* v. *Harris*, 5 M. & S. 326; and see *Doe* v. *Perkins*, 3 M. & S. 271; *supra*, tit. FINE. *Doe* v. *Lidgbird*, 8 B. & C. 606.

(*k*) *Doe* v. *Williams*, Cowp. 622. *Supra*, 567.

(*l*) In an action against the executor of a deceased rector for dilapidations, the incumbent is bound to maintain the parsonage (assumed to be of a size suitable to the benefice) and the chancel, and to keep them in good and substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement, but he is not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to preserve exposed timbers) and whitewashing and papering belong, and by this rule the damages should be estimated. *Wise* v. *Metcalfe*, 10 B. & C. 299. *Vacation* under the stat. 28 Hen. 8, c. 11, s. 3, means vacation *de facto*. One who has recovered in *quare impedit* against an incumbent *de jure* only, in consequence of presentation to a second benefice, cannot recover the profits either from the time of his being presented or of suing out the *quare impedit*. *Halton* v. *Cove*, 1 B. & Ad. 538.

(*m*) See tit. EJECTMENT.—PRESUMPTION.—QUARE IMPEDIT.—TITHES.

(*n*) See 3 Burn's Eccles. Law, 184.

(*o*) By the st. 57 G. 3, c. 99, every spiritual person holding any benefice, who shall, without such license or exemption as is specified in the Act, wilfully absent himself for any period exceeding three months together, or to be accounted at several times in any one year (and for the

first prove the obligation to reside, by evidence of the holding of the *benefice* by the defendant. The formal and strict proof of presentation, institution, and induction, is unnecessary; it is sufficient to prove that the defendant has acted as incumbent, as by receiving tithes or other profits of the living in that character (*p*). Non-residence.

Secondly, he must prove the fact of absence; and for this purpose, if there be a parsonage-house within the parish, residence in another house will subject the defendant to the penalties (*q*) for non-residence, unless he *has a licence from the bishop*, or is entitled to exemption under the stat. 57 G. 3, c. 99, s. 5, 15 (*r*).

Lastly, the annual value of the living. The statute 57 Geo. 3, c. 99, s. 44, provides, that the Court in which the action is pending shall, upon application made for the purpose, require the bishop of the diocese to certify in writing under his hand to the Court, and the party named in the rule, the reputed annual value of the living; and that such certificate shall, in all future proceedings in the action, be received as evidence of the annual value, without prejudice to the admissibility or effect of any other evidence on the subject. Value.

A variance in the description of the parish is fatal; as, where the parish was styled *St. Ethelburg*, but the real name was *Ethelburga* (*s*). Variance.

The defendant may prove, in defence, under the general issue, that he is within one of the exemptions specified in the statute; but he cannot insist on any other ground of excuse, such as ill-health, without the bishop's license, which cannot be granted but on evidence laid before the bishop, and when granted, will be evidence in bar of the action (*t*).

If he rely on an exemption from his appointment as chaplain, he must prove the appointment by the proof of the original document (*u*); and he must also prove the delivery of a notification of such appointment to the bishop. For this purpose, the original notification from the bishop's registry ought, it seems, to be produced (*v*).

One presented by the king may maintain ejectment for the rectory against one who has been presented in consideration of a simoniacal resignation bond (*x*). Ejectment for a Rectory.

purposes of the Act, s. 38, the year is to be deemed to commence on the 1st of January, and to end on the 31st of December, both inclusive; and, s. 39, a month is to be deemed a calendar month, except when a month or months is or are to be made up of different periods, in which case thirty days shall be deemed a month), and make his residence and abiding at any other place or places, except at some other benefice donative, perpetual curacy, or parochial chapelry, of which he may be possessed, shall, when such absence shall exceed such period as aforesaid, and not exceed six months, forfeit one third of the annual value (deducting all outgoings, except any stipend paid to any curate); and when such absence shall exceed six months, and not exceed eight months, one half of such annual value; and when such absence shall exceed eight months, two-thirds of such annual value; and when it shall have been for the whole year, three-fourths of such annual value. The whole of such penalties are given to the informer.

(*p*) *Supra*, 934 (*m*); and tit. TITHES.

(*q*) *Canning* v. *Newman*, 2 Brownl. 54.

(*r*) By sec. 6, if there be no house belonging to the benefice, a residence within the limits of the parish is sufficient; and see sec. 9.

(*s*) *Wilson* v. *Gilbert*, 2 B. & P. 281.

(*t*) Such a license, if pleaded, will, by the 45th sect. of the stat., entitle the defendant to double costs.

(*u*) *Supra*, 944.

(*v*) See Peake's L. E. 456. Notice left at house of Bishop's Dep. Reg. not sufficient. *Vaux* v. *Vollamy*, 4 B. & Ad. 525.

(*x*) *Doe* v. *Fletcher*, 8 B. & C. 25.

REFUSAL.

Where a condition was inserted in a composition deed, that it should become void in case the creditors *refused* to execute the deed, it was held that the mere omission to execute was not a refusal (*y*).

RELATION.

Lord Coke, in the case of *Rutter* v. *Baker*, says, "relation shall never be strained to the prejudice of a third party." See 3 Tyr. 803. The title of the assignee of an insolvent's real estate does not relate to a time antecedent to the conveyance (*z*).

RELEASE.

Proof of.

A release (*a*), if produced, must of course be proved in the ordinary way; but it may be established by circumstantial evidence (*b*).

(*y*) *Holmes* v. *Love*, 3 B. & C. 242.

(*z*) *Doe* v. *Telling*, 2 East, 257. *Supra*, tit. Insolvent.—Bankrupt.—Ratihabitio, &c. As to the relation of an attornment to the grant, see Lord Mansfield's judgment in *Moss* v. *Gallimore*, Doug. 249. Of livery of seisin to the feoffment, ib. In case of bankruptcy, see tit. Bankruptcy.

(*a*) General words in a release are to be taken most strongly against the releasor. P. C. *Thorpe* v. *Thorpe*, 1 Ld. Raym. 235; 2 Roll. Ab. 409, A. 1. But where there is a particular recital in a deed, and general words follow, the general words shall be qualified by the special ones. Ibid. and 2 Saund. 403; 3 Keb. 45. 59. *Lord Arlington* v. *Merrick*, 1 And. 64; 2 Cro. 623. *Butcher* v. *Butcher*, 1 N. R. 113. *Payler* v. *Homersham*, 4 M. & S. 423. *Simmons* v. *Johnson*, 3 B. & Ad. 175. A release given by the indorsee of a promissory note to the payee, will not extinguish the claim of the indorsee against the maker. *Carstairs* v. *Rolleston*, 5 Taunt. 551. A release, in the usual form, of all manner and causes of action, &c. extends to all inchoate causes of action then existing, and will, therefore, preclude the releasor, being the acceptor of a bill for the accommodation of the releasee, from suing the releasee for the amount afterwards recovered against the releasor by the holder. *Cartwright & others* v. *Williams*, 2 Starkie's C. 343. *Scott* v. *Lifford*, 1 Camp. C. 246. In cases of fraud, the Court will set aside a release given by a nominal plaintiff. *Hickey* v. *Burt*, 7 Taunt. 48. *Legh* v. *Legh*, 1 Bos. & Pull. 447; or by a co-plaintiff. *Jones* v. *Herbert*, 7 Taunt. 421. A release by one of several churchwardens is bad. Cro. J. 284; Burn's Ecc. L. tit. *Churchwardens*. A covenant not to sue for a debt operates as a release. Cro. Eliz. 352; 1 Roll. 939. Com. Dig. tit. *Release*, A. 1. A release to one of two joint trespassers, is in law a release to both. *Cooke* v. *Jenour*, Holt, 66. It is as good a satisfaction in law as a satisfaction in deed. Ib. In all cases where a release is to one who is not merely a wrongdoer, it is a release to his companion. Co. Litt. 276; Com. Dig. Release, B. 4. But a covenant not to sue one of two obligors does not operate as a release. *Dean* v. *Newhall*, 8 T. R. 171. *Supra*, 348. The *principle* of a composition-deed is that all the parties are supposed to stand in the same situation; where the words of release are general as to all the parties signing it, a party cannot, by splitting his debt compound for a part, and by reserving himself as to the residue, obtain a greater proportion of his entire debt than other creditors (*diss.* Gazelee, J.) *Britten* v. *Hughes*, 5 Bing. 460. The appointment of a debtor to be executor releases, because he cannot sue himself. Went. Off. Ex. ch. 2. p. 73.; Williams, Ex. 812. In what cases a legacy to debtor discharges, see 2 Roper on Leg. 61. 3d ed. *Woodburn* v. *Woodburn*, 4 B. C. C. 226. *Jeffs* v. *Wood*, 2 P. W. 132. Williams on Ex. 810.

(*b*) *Washington & others* (executors) v. *Brymer*, Sitt. at Guildhall after Hil. 42 G. 3. Peake's L. E. Appendix. The action was debt on bond, dated 27th Sept. 1766, for 800 *l.* conditioned for payment of 400 *l.* and interest, on the 27th Sept. 1767. Pleas, *non est factum*, *solvit ad diem*, *solvit post diem*, a release, and a discharge under an Insolvent Act on 28th May 1778. To rebut the presumption of payment, the plaintiffs produced an affidavit made by the defendant on the 1st July 1800, before a master in chancery, to whom it had been referred to take an account of the testator's personal estate; wherein he stated, that the testator, Michael Foster, having three daughters, to each of whom he said

A release under seal operated as a bar in *assumpsit* under the general issue (*c*), and was conclusive, although not pleaded, as it might have been, by way of estoppel (*d*). Operation of.

It seems, however, to be clear, that the plaintiff was entitled to impeach such release by evidence of any matter which might have been replied in avoidance of the release, had it been pleaded. For the plaintiff could not, by the defendant's omission to plead the release, be placed in a worse situation than if it had been pleaded (*e*). Under the new rules a release must now be pleaded in cases to which those rules are applicable (*f*). How impeached.

he intended to give a portion of 1,000*l*; the defendant in the years 1764 married one of them, and received a portion of 500*l*., with an assurance that he intended to give him 500*l*. more at his death. That he (the defendant) being in want of money in 1766, applied to the testator to assist him, who then lent him 400*l*. on the bond in question; and being about six years afterwards again in distressed circumstances, he again applied to the testator to assist him, who refused, saying, that *he had already had his share of his estate; that he might do as he pleased with what he had, as he should never call on him for it.* The affidavit then added, that the deponent conceived that the testator had cancelled the bond, and that he had never been applied to for payment by him. The testator died in 1791. It was contended, that the circumstances afforded strong evidence of a release; and that where a man promised to forgive his debtor, it must be presumed that he intended to do it by legal and competent means; and as that could only be by a release under seal, it was to be presumed that a release had been executed. The case being left to the jury, they found for the defendant. And see 6 Ves. 516; *et supra*, tit. PAYMENT.

(*c*) Where it was under seal. *Lampon* v. *Corke*, 5 B. & A. 606. *Jacob* v. *Rowntree*, 2 Taunt. 164; *infra*, note (*e*). The release in a composition deed can only operate upon whatever debt is then due to the party; it was held, therefore, that it does not affect bills then outstanding and dishonoured in other hands; held also, that an offer of a composition dispensed with proof of notice of dishonour. *Margetson* v. *Aitkin*, 3 C. & P. 338. A deed recited that it had been agreed that — *l*., part of the purchase-money, should be paid to a mortgagee, and the residue to the vendor, and the acknowledgment of the consideration was "of the payment of the said sum of — *l*. to the mortgagee at or before the sealing, &c., the receipt whereof the mortgagee acknowledged, &c.;" but as to the residue, the language was, "in consideration of the said residue paid to the vendor, as before mentioned, the receipt whereof, as also the payment of the mortgage-money, making in the whole — *l*., the vendor thereby acknowledged, and from the same and every part thereof acquitted, &c.;" a receipt was also indorsed for the full sum; the Court (*dissentiente* Vaughan, B.), upon the authority of *Lampon* v. *Corke* (5 B. & A. 606), held that the vendor was not estopped from showing that part of the consideration-money was unpaid, the words of acknowledgment of the consideration paid to the vendor, "as before mentioned," referring only to the agreement to pay, and not to an actual payment. *Buttrell* v. *Summers*, 2 Y. & J. 407. Where it appeared in an action by an attorney for the costs of defending in another suit the defendant's son, that the plaintiff had prepared a release for the defendant, upon calling him as a witness, in case his competency should be objected to; held, that the plaintiff, having imposed on the Court, ought not to be allowed to profit by it, and should be deemed to be in the same situation as if the release had been actually given by the defendant. *Williams* v. *Goodwin*, 11 Moore, 342. *Semble*, that in an action of *tort* against a minor, for the negligence of his agent, the guardian cannot release the latter. *Fraser* v. *Marsh*, 2 Starkie's C. 41. A release by a party after his bankruptcy does not discharge the releasee, although the latter was ignorant of the trader's insolvency, and the release was executed more than two months before the suing out of the commission. *Mellor* v. *Pyne*, 3 Bing. 285. A party seeking to avoid a composition deed, on the ground of a refusal by a creditor to execute, must prove an actual refusal. *Holmes* v. *Lace*, 3 B. & C. 242. See further *Kesterton* v. *Solway*, 2 Chitty, 541. A release extinguishes the debt. *Baker* v. *Dewey*, 1 B. & C. 704.

(*d*) *Lampon* v. *Corke*, 5 B. & A. 606.

(*e*) *Supra*, Vol. I. In the case of *Rowntree* v. *Jacob*, 2 Taunt. 141, the plaintiff, in an action for money had and received, proved the receipt of 103*l*. as prize-money by the defendant, who was a prize agent, on the plaintiff's account. The defendant proved in answer a deed of assignment of the whole of the plaintiff's pay,

(*f*) See tit. RULES.

How impeached

In a case where a fraudulent release is set up in answer to a just debt, it would, it seems, be both inconvenient and unnecessary to prevent the plaintiff from defeating the instrument by proof of fraud, merely because the party might possibly obtain a remedy in equity (*g*), and when it is very possible that a court of equity might, the party guilty of fraud denying it upon his oath, again send the plaintiff to law to have his case tried by a jury. The party may, by recourse to a court of equity, obtain an answer from his adversary on oath, an advantage which he could not obtain at law; but if he chooses to waive that advantage, there seems to be no reason in law or equity why he should not at once impeach the deed for fraud by evidence upon the trial.

A deed of feoffment is evidence of a release, if it be without livery (*h*).

&c., purporting to have been made to the defendant, in consideration of 1000*l.* to bond paid at or before the delivery thereof, and a receipt in the plaintiff's handwriting was indorsed on the back. There was also evidence that the plaintiff had acknowledged the receipt of *bail* from the defendant. On the other hand, it was proved, that no money passed at the time, and that no vouchers or receipts had been kept, and that the plaintiff was an extravagant and thoughtless man. The plaintiff's counsel relied upon the whole of the circumstances to show that the matter relied on by the defendant was a gross fraud. But the jury, relying on the plaintiff's execution of the deed, and signature to the receipt, found for the defendant. A motion being afterwards made for a new trial, and a rule *nisi* granted, the Court ultimately discharged the rule, Heath, J. observing, that where a man by deed acknowledges himself to be satisfied, it is a good bar, without receiving anything. Mansfield, C. J. entertained doubts upon the subject, but stated, that as his brethren were of opinion that a verdict against the evidence of the deed and receipt could not be supported, the rule must be discharged. In the marginal note affixed to this report, it is stated, that "If there has been an imposition in obtaining a deed, the relief must be in equity." This position, whether true or not, does not seem to be warranted by the case. The question of fraud seems one that cannot be collected from the report to have been left to the jury, but they, relying on the receipt as well as the deed, by their verdict negatived the imputed fraud. The circumstances were probably too slight to warrant any jury in finding fraud against the evidence of the deed itself and the *plaintiff's signature* to the receipt, and the mere fact that the money was not actually paid at the time, was too slender a foundation for presuming fraud. The decision seems, indeed, from the language of the report, to have been founded upon the insufficiency of the evidence in the particular case to establish fraud, and not upon the broad position that such an instrument could not be defeated at law by full and satisfactory proof of its having been obtained by fraudulent practices. On the contrary, it appears, that matters of fraud are in general cognizable by courts of law. 3 Bl. W. Blackstone, in his Comm. vol. 3, p. 441, after observing that it had been said, that fraud, accident, and trust, are proper and peculiar objects of a court of equity, observes, "but every kind of fraud is equally cognizable in a court of law, and some frauds are cognizable only there, as fraud in obtaining a devise of lands, which is always sent out of the equity courts to be there determined." And it has been decided in the House of Lords that a will of a real estate cannot be set aside in a court of equity for fraud or imposition, but must first be tried at law on *devisavit vel non*, being matter *proper for a jury to inquire into*. Bac. Ab. tit. *Fraud*, D. and the cases there cited. In *Bright* v. *Eynon*, 1 Burr. 390, Lord Mansfield says, that courts of equity and courts of law have a concurrent jurisdiction to suppress and relieve against fraud, but the interposition of the former is often necessary to give more complete redress, and Lord Loughborough, C. in the case of *Bates* v. *Graves*, 2 Ves. J. 288, says, "Where the Court of Chancery has decreed a deed to be set aside for fraud and imposition, I must suppose that it would be equally set aside at law, upon pleading it. For courts of law relieve by making void the instrument obtained by fraud." Wood's Inst. 201. In the case of *Cockshott* v. *Bennett*, 2 T. R. 763, Ashurst, J. says, "If this security be fraudulent, a court of law may avoid it, as well as a court of equity." See also Lord Kenyon's observations to the same case, 1 T. R. 641. In *White* v. *Hussey*, Prec. in Chan. 64, 65, it was said, that where a fraud can be clearly established, courts of law are competent to exercise a concurrent jurisdiction. See further *Cowper* v. *Lord Cowper*, 2 P. W. 720.

(*g*) A release solemnly and deliberately executed by competent parties will not be set aside in equity, except upon clear actual proof of fraud and imposition. *Hatfield* v. *Hatch*, 3 Swanst. 111.

(*h*) 1 Vin. Ab. 7 & 15. *Bullard* v. *Sidwell*, 3 Bayley, 42.

REPLEVIN (*a*).

If issue be joined on the right of property (*b*), the plaintiff must prove either a general or special property in the goods or cattle at the time of the taking (*c*). A mere possessory right is insufficient (*cc*) Right of property.

Issue being taken on the right of property, the plaintiff is entitled to begin (*d*)

Where the taking is admitted, and the affirmative of every issue lies on the defendant, as where he pleads *liberum tenementum* only, his counsel are entitled to begin and to reply (*e*). Onus probandi

On issue taken on the plea of *non cepit*, it is incumbent on the plaintiff to prove the taking or having of the cattle or goods (*p*), or part of them, in the Non cepit.

(*a*) A sheriff at common law could replevy by writ only By the stat of Marlborough he might replevy by plaint out of court; and the hundred court, which is derived out of the county, cannot do it by prescription *Hallet v Best*, Lord Raym 940 Replevin is not an action within the stat 24 G 2, c 44 *Fletcher v Wilkins*, 6 East, 209 It is the proper form of proceeding to recover possession of a specific chattel *Dore v Wilkinson*, 2 Blackie's C 980 Neither the removal of a distress from the premises, nor an appraisement of the distress, takes away the right to replevy *Jacob v King*, 6 Taunt 151 And see 1 Chit 106; *Griffiths v Stephens*, ib. Replevin does not lie on a distress where the conviction before justices of the peace is conclusive *R v Monkhouse*, 1 Mr 1101 B N P 82 Co Litt 145 It seems that goods taken under a warrant of distress on a decree of the Court of Bevers, are not replevisable on another distress, by the sheriff or his deputy Lord Kenyon expressed great doubt as to the opinion in Cullis that a replevin did not lie But, however this be, if actually replevied, and the replevin removed into the K B, the Court will not interfere in a summary way, but leave the plaintiff to his plea *Pritchard v Stephens*, 8 T R 522 Where the question was, whether the owner could replevy goods seized under a warrant of distress by Commissioners of Bevers, the Court declined to interfere *Pritchard v Stephens*, 8 T R 522 And see *Harrell v Wink*, 2 Moore, 117 According to Gilbert, C B 161 Replev 101), the distinction is between an action from a superior and one from an inferior court But see *R v Monkhouse*, 2 Mr 1101, and Willes, 642, note (*a*) Where the defendants seized goods by virtue of a magistrate's warrant, under the Stat of Labourers, 20 G 2, c 20, which the plaintiff replevied, and removed the plaint by *re fa lo* into the Court of C P, the Court held on demurrer that the plaintiff could not plead that the servant did not take oath, &c *Wilson v Walker*, 1 B & B 51 Richardson, J said it was clear that the action would not lie, and cited Bac Ab 5th edit vol II, p 58, *Replevin*, Bradshaw's case, where it is laid down that where distress and sale are given by Act of Parliament, replevin does not lie *Sems*, where overseers take a man not in occupation *Millward v Caffin*, 2 H 1111 The superior court interferes by punishing the sheriff as for a contempt of court 2 Mr 1104 A man may distrain for rent cause and avow for another Bac Ab *Replevin* (K 1 Com D 70 Carth, 41; *infra*, 66 The reverse 31 Ed I, Avowry, 312, 34 Co 20 Bac *Governors of Poor of Bristol v Waite*, 1 A & E 204

(*b*) The defendant may claim property in himself or some other, for he has a right of possession against all but the right owner at the time of replevying Bac Repl pl 31

(*c*) Bac Repl pl 19 20 *Templeman v Case*, 10 Mod 26 Persons who have a joint interest in cattle or goods may join, 3 H 1 111, 1 Dust 145, b But where the interest is several, there should be several replevins; Bac Ab Repl pl 12 If the goods of a feme sole be taken, and she marries, the husband alone may sue, or they may join *Bern v Maltaire*, Cro T H 140 But if the goods be taken after marriage, they ought not to join, but after verdict, it will be presumed that they were jointly possessed before Ibid I executors may maintain replevin for goods of the testator, taken in his lifetime Bac Repl pl 58

(*cc*) 10 Mod 26

(*d*) *Colston v Hiscotts*, 1 M & R 301 The plea is divisible, and the defendant may prove property in part of the goods Com Dig Pleader, 3 K 12

(*e*) *Halford v Cooke*, Oxford Summ Ass 1814, Peake's L Ev 6

(*p*) A barge attached by a rope to a wharf may be distrained for rent of the wharf, and the premises attached to it *Buccard v Capel*, 1 Ring 137 This case was reversed on error brought in the Exchequer Chamber Plea to an avowry for taking cattle as a distress for rent, that the cattle were not levant and couchant on the close in which, &c, held bad on demurrer, it being sufficient, on such an

Non cepit. *place* (*q*) specified in the declaration. But it is not essential to prove that the cattle or goods were taken in that place originally (*r*), or that the goods were the property of the plaintiff (*s*). It is sufficient, under this issue, or on issue joined on a traverse of the taking in the place specified in the declaration, to prove a detention of them by the defendant in that place; for it is a continuance of the original wrong (*t*). But the plaintiff would fail, unless he showed either an original taking of the goods, or a subsequent possession and detention of them there (*u*).

The defendant under this issue, which merely denies the taking, cannot dispute the ownership.

Non tenuit. Upon issue taken on a plea of *non tenuit modo et formâ*, or of *non demisit*, &c. in bar of an avowry for rent (*x*) in arrear, the defendant must prove the

avowry, to state merely that the cattle were on the lands, and the owner, if he wishes to avail himself of an exception, must bring himself within it; the avowry, also stating that the tenant held the close in which, &c., *amongst other lands*, and the plea only stating that the cattle were not levant, &c., on the close in which, &c., held insufficient, as that might be true, and yet they might on other of the lands demised. *Jones* v. *Powell*, 5 B. & C. 647; and 8 D. & R. 416; and see *Kempe* v. *Crews*, 1 Lord Raym. 167. Replevin does not lie in respect of a caption in foreign parts, for it may have been justifiable by the custom of the place. Gil. Repl. 164. It is a caption in any county into which property taken. Gil. Repl. 165.

(*q*) The place is material, and traversable. *Weston* v. *Carter*, 1 Sid. 10. Where the plaintiff brought replevin for goods seized under a warrant of distress for an assessment under the stat. 13 G. 3, c. 78, s. 47, on the ground that the premises, in respect of which he was assessed, were situated in another township, the Court refused to set aside the proceedings. *Fenton* v. *Boyle*, 2 N. R. 399.

(*r*) *Walton* v. *Kersop*, 2 Wils. 354; *Maltravers* v. *Fossett*, 2 Wils. 295; B.N.P. 54; 2 B. & P. 480.

(*s*) But the defendant cannot have a return of the goods under that plea. 1 Will. Saund. 347 (1). In analogy to the practice in trespass, *quare clausum fregit*, it is sufficient to put the locality of the taking in issue. If issue be joined on the property, the defendant may show, in mitigation, that the plaintiff has the goods. B. N. P. 59; Godb. 98.

(*t*) *Walton* v. *Kersop*, 2 Wils. 254.

(*u*) *Johnson* v. *Wolyer*, 1 Str. 507; B. N. P. 54. *Abercrombie* v. *Parkhurst*, 2 B. & P. 481; 1 Will. Saund. 347 (1).

(*x*) Rent, in general, is something given by the lessee to the lessor for the use of his land. Bac. Ab. tit. *Rent*. It is therefore payable so long as the engagement continues, and until an eviction. And a lessee is liable on his express covenant, although the engagement has ceased, from the premises having been burnt down. *Belfour* v. *Weston*, 1 T. R. 310. *Monke* v. *Cowper*, Ld. Ray. 1477. *Rent-service* is where the tenant holds land of his landlord by fealty and rent, or by any service and certain rent. Litt. sec. 213; Co. Litt. 142. And fealty is a common-law incident to rent-service. Co. Litt. 142. And so is distress. Bac. Ab. *Rent*, K. Or the landlord may have his remedy by an assize. By action of debt at common-law, on a rent reserved on a lease for years. And by st. 8 Ann, c. 14, s. 4, against a tenant for life. Or by action for use and occupation, where the demise is not by deed. 11 G. 2, c. 14.

The landlord cannot distrain for rent, corn sold under a *fi. fa.* on which sale the landlord was paid his year's rent. *Peacock* v. *Purvis*, 2 B. & B. 362. This is a necessary consequence of allowing such crops to be seized. Such crops as are *fructus industriales*, and would go to the executor, have always been considered as seizable; hence it is (per Richardson, J.) that so little appears on the subject in the books; but where the law authorizes a seizure, it authorizes all which would make a seizure available. The st. 11 G. 2 only enabled landlords to distrain crops like other goods; but other goods must be taken as subject to prior rights which have attached them, and here a prior right had attached inconsistent with the landlord's distress. The landlord cannot distrain unless there be an actual demise at a fixed rent. *Dunk* v. *Hunter*, 5 B. & A. 322; *Hamerton* v. *Stead*, 3 B. & C. 478; and see tit. USE AND OCCUPATION. Where, in replevin, it appeared that the lessee was also agent for the lessor, and had paid for him the interest due upon the premises, which were mortgaged for twenty-five years, with his knowledge and acquiescence, the interest being equal to the rent; held, that it was equivalent to a payment as rent, and available upon the plea of *riens en arriere*. *Dyer* v. *Bowley*, 2 Bing. 94. If there be separate demises of two parcels, there cannot be a joint distress. *Rogers* v. *Bickmire*, Str. 1040. A *rent-charge* is a rent granted by deed with a clause of distress. See Bac. Ab. tit. *Rent*. If tenant in fee make a feoffment, or a tenant for life or

holding, as alleged in the plea(*y*); and a variance as to the amount of

Non tenuit.

years grant all his estate, he cannot reserve a rent without deed. 2 Roll. 448; Litt. s. 215; Com. Dig. *Rent*, B. It must be reserved out of manurable lands and tenements on which the lessor may distrain. Co. Litt. 47. a. *Buzzard* v. *Capel*, 8 B. & C. 141. It is an entire charge and against common right, but is divisible among several coparceners and tenants, and subject to several distresses. Co. Litt. 146 b. A replevin for a distress for a *rent-charge* is within the st. 11 G. 2, c. 19, s. 23, as to taking a bond for the effectual prosecution of the suit; but is not within the 22d sect. as to the general avowry for a distress. *Short* v. *Hubbard*, 2 Bing. 349. *Bulpit* v. *Clarke*, 1 N. R. 56; see also as to rent under a Canal Act, *Leominster Canal Co.* v. *Cowell*, 1 B. & P. 213; Willes, 429; *Heriot Custom*. 2 Wils. 28. A *rent-seek* is a rent granted without a power of distress. The stat. 4 G. 2, c. 28, s. 5, gives a power of distress for rent-seck, rent of assize, and chief rents, as in case of rent reserved on a lease. And at common law an assize lay after seisin, as by the payment of a penny. Litt. sec. 236; and see the st 11 G. 2, c. 19, as to the form of avowry. As to the right of distress by executors, husbands and tenants, *pur autre vie*, see the st. 32 Hen. 8, s. 37, and 8 Ann. c. 14; 11 G. 2, c. 19. As to the apportionment, suspension, and extinguishment of rents, see Bac. Ab. tit. *Rent*, (M.)

(*y*) Proof of an agreement for a lease is insufficient. *Dunk* v. *Hunter*, 5 B. & A. 322. *Hayward* v. *Haswell*, 6 Ad. & Ell. 265. *Secus*, where a person entering under an agreement for a lease, either pays rent (*Knight* v. *Bennett*, 3 Bing 361), or promises to do so, or admits rent to be due. *Regnart* v. *Porter*, 7 Bing. 451. *Cox* v. *Bent*, 5 Bing. 185. So a tenant holding over after notice to quit is not liable to a distress. *Jenner* v. *Clegg*, 1 M. & R. 213. Cor. Parke & Bolland, B. Where the rent was payable quarterly, or half-quarterly, if required, it was held that the landlord having received the rent quarterly for twelve months, could not, without notice, distrain for a half-quarter. *Nullam* v. *Arden*, 10 Bing. 299. Where by the terms of an agreement to take a lease at a certain rent, but without any words of demise, the landlord undertook to complete certain erections which he never did, and no rent was ever paid for four years, and on being demanded, the tenant said he was ready to pay what was due when the erections were completed, and an allowance made him for the expense of his own erections according to the agreement; held, that there being no promise of payment of any certain rent, but only a conditional agreement to pay something, to be ascertained in reference to the agreement, there was no sufficient right shown to a rent certain to entitle the landlord to distrain. *Regnart* v. *Porter*, 7 Bing. 451. Where the avowry was for rent due from the plaintiff as tenant of premises at a yearly rent of 100 *l.*, but it appeared that the defendant was entitled to two-thirds only as tenant in common with a party who had omitted to execute the conveyance to him; held that such avowry was not supported. Although the landlord, since the statute, may avow generally, he must allege truly, and prove his title to the rent as alleged. *Philpott* v. *Dobbinson*, 6 Bing. 104; and 3 M. & P. 320. Where the plaintiff had entered under an agreement with the defendant for a lease, and in an account of dealings between them there was an item for rent, the amount of which had been discussed and altered, it was held to constitute an acknowledgment of a tenancy from year to year, under which the landlord was authorised to distrain. *Cox* v. *Bent*, 5 Bing. 185; and 2 M. & P. 281. And see *Knight* v. *Bennett*, 2 Bing. 361. The avowant, whilst holding for a term of years, underlet part to the plaintiff from year to year; and upon the expiration of his own term, agreed with his landlord to hold on from month to month; held, that in the absence of any new agreement between the plaintiff and the avowant, the former tenancy between them continued. *Peirse* v. *Sharr*, 2 M. & Ry. 418. The defendant, after bringing ejectment against the plaintiff, cannot afterwards raise the relation of landlord and tenant, and distrain; and it makes no difference that the ejectment was directed against the claim of a third person who came in and defended, the plaintiff being suffered to remain in possession, the judgment against the casual ejector would be conclusive against the tenant. *Briders* v. *Smith*, 5 Bing. 411. By an instrument not under seal, *A.* agreed to let to *B.* on lease the rectory of *L.*, and the tithes arising from the lands in the parish of *L.*, and also a messuage used as a homestead for collecting the tithes, at the yearly rent of 200*l.* *A.* cannot distrain for rent in arrear; the agreement not being under seal, did not operate as a demise of the tithes, and no distinct rent was reserved for the homestead. *Gardiner* v. *Williamson*, 2 B. & Ad. 336. The landlord, having a term in the premises, which will expire on the 11th November, lets the premises orally to the plaintiff, to hold till the 11th November, paying 40 *l.* rent immediately; the agreement amounts to a lease, of which parol evidence may be given, without any assignment made in writing; but being a demise of the whole interest, the defendant cannot distrain. *Preece* v. *Correy*, 5 Bing. 24; and 2 M. & P. 57. And see *Poulteney* v. *Holmes*, 1 Stra. 405. *Smith*

Non tenuit.

annual rent will be fatal (*z*); so as to the days when the rent becomes due (*a*.) But a variance as to the quantum of rent due will not be material, provided the terms of the holding be proved as laid.

Where the defendant made cognizance for rent for two years and a quarter, ending on a day specified, it was held to be sufficient to prove that he was entitled to rent for two years ending on that day (*b*). Where the declaration was for taking cows in four closes, and the avowry stated the holding at a certain yearly rent, and the evidence was that the four closes, and also two others, were held at that rent, it was held to be no variance (*c*).

The defendant avowed for the yearly rent of 26 *l.* payable half-yearly, by equal payments, every second Tuesday in November, and every second Tuesday in May, and because the sum of 26 *l.* of the said rent for one year, ending on the 14th day of November, being the second Tuesday in November, was in arrear, &c. It appeared that the rent-days were the second Tuesday in November and the second Tuesday in March, and that the plaintiff had said so; it was also proved that the plaintiff entered on the land at Candlemas, and the house, &c. on May-day, and the variance was held to be fatal (*d*).

Where the defendant avowed that the plaintiff held four closes at a specified rent, proof that he held those and two others at that rent, was held to be no variance, every part of the land being liable to that rent (*e*). An avowry for rent payable at *Martinmas*, means *New* Martinmas (*f*). The defendant under an avowry for a double rent under the st. 11 G. 2, c. 19, s. 18, cannot recover the single rent (*g*).

A verdict for a defendant, who made cognizance as the bailiff of *A. B.*, is conclusive, as to the tenancy, in an action between the same plaintiff and the landlord (*h*).

Coparceners must join in an avowry for rent in arrear (*i*).

v. *Maplebank*, 1 T. R. 445. But a tenant from year to year, underletting from year to year, has a sufficient reversion to entitle him to distrain. *Curtis* v. *Wheeler*, 1 M. & M. 495. Where a party entitled to a lease for lives, with perpetual right of renewal, assigned his whole interest, reserving a rent, with power of distress; it was held, that there being no reversion, he could not avow under 25 Geo. 2, c. 13 (Irish Act corresponding to 11 Geo. 2, c. 19); those statutes being confined to cases where there is a reversion or interest vested in the lessor, on the expiration of the lease. *Pluck* v. *Digges*, 1 Dow & C. 180. Where the issue is as to the amount of rent which is found, but the jury find a different holding, the defendant may amend under the st. 3 & 4 W. 4, c. 42, s. 24. *Regnart* v. *Porter*, 7 Bing. 451.

(*z*) *Cossey* v. *Diggons*, 2 B. & A. 546. The allegation was, that the plaintiff held under the yearly rent of 72 *l.* The evidence was, that he held under the rent of 72 *l.* 9 *s.*, and the variance was held to be fatal. The plaintiff having also pleaded *riens* in arrear, it was held that the jury ought to be discharged from giving any verdict on that issue, but that if any were given, it ought to be found for the plaintiff. See *Brown* v. *Sayer*, 4 Taunt. 320. So if the defendant avow for the whole, being entitled only to two-thirds of the rent. *Philpott* v. *Dobbinson*, 6 Bing. 104.

(*a*) Avowry for rent payable at two periods, the plaintiff may allege that he holds by rent payable at one *absque hoc*, &c. 9 Co. 34. Bac. Ab. tit. *Replevin* (K). In *Hill* v. *Ellard*, Lev. 141, where the plaintiff, in lieu of an avowry for taking one cow damage-feasant, pleaded a prescription for four cows and a half, which was found for him, the Court, on motion in arrest of judgment, held that it was sufficient to prove the prescription for so much as covered the alleged trespass.

(*b*) *Forty* v. *Imber*, 6 East, 434.

(*c*) *Hargreave* v. *Sherwin*, 6 B. & C. 34.

(*d*) *Collum* v. *Butler*, Lanc. Summ. Ass. 1829, cor. Bayley & Hullock, Js.

(*e*) *Hargreave* v. *Sherwin*, 6 B. & C. 34.

(*f*) *Smith* v. *Walton*, 8 Bing. 235.

(*g*) *Johnstone* v. *Huddlestone*, 4 B. & C. 938.

(*h*) *Hancock* v. *Welsh*, 1 Starkie's C. 347.

(*i*) Ld. Raym. 64.

A joint-tenant may distrain for the whole rent, but he ought to avow for part only in his own right, and make cognizance, as bailiff, to the rest (*k*). Non tenuit.

Tenants in common must sever in an avowry for rent (*l*); but one cannot avow alone for taking cattle damage-feasant, without making cognizance, as bailiff, of the rest (*m*).

The general principle already adverted to (*n*) precludes the plaintiff from disputing his landlord's title under this plea, even although the landlord has obtained possession by fraud (*o*), whilst he continues in possession under the avowant who first let him into possession (*p*); neither can he dispute the title of the assignee of the landlord to demise the land (*q*); but he may rebut the presumption derived from the mere fact of his having paid rent to one from whom he did not derive his original possession, by proof that the rent was so paid, through ignorance, to one who had in reality no title (*r*); and although he cannot dispute his landlord's title to demise, he may show

(*k*) 12 Mod. 96; Bac. Ab. tit. *Joint-tenant*, K.; 5 Mod. 75. 151; Thomps. Ent. 264; 3 Salk, 207. So for Distress, Damage feasant. Ibid.

(*l*) Co. Litt. 188. b; 5 T. R. 249.

(*m*) 1 Roll. Ab. 228. Sir W. Jones, 283. Thel. Dig. 27. 5 T. R. 249. *Culley* v. *Spearman*, 2 H. B. 286.

(*n*) *Supra*, 424. The stat. 11 G. 2, c. 19, s. 22, permitting the landlord to avow generally, without setting forth the demise or his title, the plaintiff can neither plead *nihil habuit in tenementis*, nor give such matter in evidence under the plea of *non tenuit*, or *non demisit*. *Syllivan* v. *Stradling*, 2 Wils. 208.

(*o*) *Parry* v. *House*, Holt's C. 489. See also *Syllivan* v. *Stradling*, 2 Wils. 208. *Parker* v. *Manning*, 7 T. R. 539; B. N. P. 139. *Palmer* v. *Ekins*, Ld. Ray. 1552. *Morgan* v. *Ambrose*, Peake's L. E. 242; 11 Ves. 344; Say. R. 13. So where the party under whom the plaintiff claims has submitted to a distress by the defendant, *Cooper* v. *Bland*, 1 Bing. N. C. 45. So in an action for use and occupation, the defendant who has paid rent to the plaintiff cannot be permitted to show that his presentation to the living was simoniacal. *Cooke* v. *Loxley*, 5 T. R. 4. *Brooke* v. *Watts*, 6 Taunt. 333. So he cannot show that the plaintiff has demised the premises to a third person whose interest is not expired. *Phipps* v. *Sculthorpe*, 1 B. & A. 50 (in an action for use and occupation); or that he had mortgaged them previous to the lease to the defendant. *Alchorne* v. *Gomme*, 2 Bing. 54, in replevin. See also *Balls* v. *Westwood*, 2 Camp. 11; from which it should seem, that in an action for use and occupation, it is no defence to show that the landlord's title has expired, unless he has formally renounced his landlord's title and commenced a fresh holding under another person. See further *Clarke* v. *Waterton*, 2 Mo. & R. 87.

(*p*) See *Rogers* v. *Pitcher*, 6 Taunt. 209; and see the following notes.

(*q*) *Rennie* v. *Robinson*, 1 Bing. 147. Where the plaintiff had taken a lease from a party, though a mere receiver, held that under the plea of *non tenuit*, he could not insist upon his want of beneficial interest to demise; *Dancer* v. *Hastings*, 4 Bing. 2. Or that his landlord, by whom he was let into possession, acquired the property by a fraudulent and void assignment. *Parry* v. *House*, Holt, 48; Dallas, J. And *nil habuit in tenementis* would be a bad plea, *supra*, note (*n*).

(*r*) *Rogers* v. *Pitcher*, 6 Taunt. 209. The plaintiff held under *A. B.*, and afterwards paid rent to the defendant, to whom a moiety of the estate had been delivered under a writ of *elegit* against *A. B.*, and the plaintiff was permitted to show that, previous to the defendant's judgment, *A. B.* had conveyed the premises to a creditor, in satisfaction of a debt which entitled the latter to distrain; and see *Phillips* v. *Pearce*, 5 B. & C. 433. And a plaintiff in replevin is not estopped by an attornment made by him after an ejectment brought seven years before the commencement of the replevin-suit, during which no rent had been demanded, from proving a feoffment to himself from the person under whom the avowants claim. *Gravenor* v. *Woodhouse*, 1 Bing. 38; see tit. EJECTMENT; see *Rogers* v. *Pitcher*, 6 Taunt. 202. *Doe* v. *Ramsbottom*, 3 M. & S. 516. *England* v. *Slade*, 4 T. R. 682; *supra*, EJECTMENT. And a lessee is not estopped by payment of rent to a lessor after his title had expired, and after notice to the lessee of an adverse claim, unless the lessee had full notice of the nature of the adverse claim, or the manner in which the lessor's title expired. *Fenner* v. *Duplock*, 2 Bing. 10; and see *Gregory* v. *Doidge*, 3 Bing. 474. *Doe* v. *Edwards*, 5 B. & Ad. 1065. The observations of Buller, J. in *Williams* v. *Bartholomew*, 1 B. & P. 326. So he may show that a payment or acknowledgment was made under the influence of a fraudulent misrepresentation. *Doe* v. *Brown*, 7 Ad. & Ell. 447.

Non tenuit.

the landlord's title has expired subsequently to the lease, and that he has been compelled to pay rent to another (*s*); for otherwise he would be obliged to pay the rent twice over.

Proof that the plaintiff was let into possession of land under an agreement for a lease before the lease was executed, is not evidence of a demise during the first year of such possession (*t*). A payment to a mortgagee on a mortgage affecting the premises, with the avowant's consent, is evidence under this plea (*u*).

The plaintiff under this plea may also prove an eviction by a third person, and an attornment to him (*x*).

Riens in arrear.

Upon issue taken on the plea in bar to an avowry for rent, that no rent is in arrear, the demise is admitted as alleged in the avowry (*y*); and it is incumbent on the plaintiff to prove that it has been satisfied. And the defendant will be entitled to a verdict if it appear that rent is in arrear to a less amount than is alleged (*z*), although a specific sum be alleged to be in arrear (*a*); for the substance of the issue is, whether any rent be in arrear.

The plaintiff cannot, it has been said, under this issue, prove payment to one who claims by a superior title, under a threat of distress (*b*). This, however, seems to be doubtful, for if the payment be good, there is no rent in arrear (*c*).

The right to distrain is not taken away by a mere conditional promise to the tenant, who has not performed the condition (*d*).

There is a distinction between an avowry in replevin and a justification in trespass; in replevin the avowant is an actor, and must make out a good title in all respects (*e*).

Where issue was joined upon *non tenuit*, and also upon the plea of *riens* in arrear, it was held, that the first issue being found for the plaintiff, the second became immaterial; and that the proper course was to discharge the jury from giving a verdict, but that if any verdict was entered, it must be for the plaintiff (*f*).

(*s*) *Doe* d. *England* v. *Slade*, 4 T. R. 682, and per Best, L. C. J. in *Fenner* v. *Duplock*, 2 Bing. 10. Where land belonged to a parish, and the churchwardens let the land to the plaintiff, it was held that the defendant, in action for use and occupation, was not estopped from denying the plaintiff's title from the churchwardens. *Phillips* v. *Pearce*, 5 B. & C. 433.

(*t*) *Hegan* v. *Johnson*, 2 Taunt. 148. See above.

(*u*) *Dyer* v. *Bewley*, 2 Bing. 94.

(*x*) *Hoperaft* v. *Keys*, 9 Bing. 613. In the case of an eviction by the landlord himself, *qu.* whether the eviction ought not to be pleaded.

(*y*) *Hill* v. *Wright*, 2 Esp. C. 669. *Cooper* v. *Eggington*, 8 C. & P. 748.

(*z*) *Harrison* v. *Barnby*, 5 T. R. 246; 2 B. & A. 249.

(*a*) *Cobb* v. *Bryan*, 3 B. & P. 348.

(*b*) *Taylor* v. *Zamira*, 6 Taunt. 524. The plaintiff cannot claim in his plea a deduction for land-tax, unless the sum distrained for was due at time of such payment. *Stubbs* v. *Parsons*, 3 B. & A. 516. The payment is still to be regarded as compulsory although the ground-landlord has allowed the occupier time to pay. *Carter* v. *Carter*, 5 Bing. 406.

(*c*) Where the plea showed that the plaintiff had paid the rent to the defendant's mortgagee, it was held to be good as a plea of payment, and did not amount to a plea of *nil habuit in tenementis*. *Johnson* v. *Jones*, 10 Ad. & Ell. 809; 1 P. & D. 651.

(*d*) Trespass for distraining goods, plea alleging the plaintiff to be under-tenant to *B.* the defendant's tenant, and that the defendant had promised that so long as he paid the rent which should become due to the defendant's tenant, he, the defendant, would not trouble him or his property, and averring that he had paid the rent up to a certain period, and had tendered the residue, but did not allege that the defendant had any notice of the tender; held that it was a mere conditional promise by the defendant, and not having been performed, he was not to be deprived of his remedy by distress by any proceeding of which he had no notice. *Welsh* v. *Rose*, 6 Bing. 638.

(*e*) B. N. P. 55.

(*f*) *Cossey* v. *Diggons*, 2 B. & A. 546.

Traverse that the defendant is bailiff.

If the plaintiff traverse the fact, as alleged in the cognizance, that the defendant is bailiff to the party under whose authority he distrained, evidence of a subsequent ratification and approval of the act will be sufficient, although there was no prior command given (*g*).

Amount of rent and value of distress.

In the case of an avowry for rent in arrear, the avowant ought to be prepared with proof, not only of the amount of the rent, but also of the value of the distress; for the stat. 17 C. 2, c. 7, enacts, that if the plaintiff be nonsuit after cognizance or avowry, and issue joined, or if the verdict be given against the plaintiff, the jurors impannelled to try the issue shall inquire of the sum in arrear, and the value of the goods or cattle distrained, and that the avowant, or he that makes cognizance, shall have judgment for such arrears, or so much as the goods or cattle distrained amount to. An omission to find the value of the distress cannot be supplied by a writ of inquiry (*h*).

Damage-feasant.

The proof of a prescriptive right of common, where issue is taken on such a plea, when pleaded in bar of an avowry, for taking cattle, damage-feasant, is considered in another place (*i*). In general, evidence of a more limited right than that alleged will be insufficient (*k*). But evidence of a more ample right will support the plea (*l*). Thus, if the plaintiff prescribe for a right of common for sheep, his replication will be supported by evidence of a right of common for cows as well as for sheep (*m*).

Where the lord has distrained, and issue is taken on the levancy and couchancy of cattle, proof that part only were levant and couchant will not support the issue for the plaintiff (*n*).

A plea of tender of a specific sum admitted to be due for rent, is not proved by evidence of the tender of a less sum, though no more be due (*o*). A tender may be either to the landlord or to the bailiff who makes the distress (*p*). But, in general, a tender to a bailiff (*q*), with proof that he is agent to the landlord, is not sufficient (*r*).

Tender of amends.

Where issue is taken on a plea of tender of amends to the person entitled

As the costs are now divisible, a verdict ought to be found on each, except by consent.

(*g*) *Trevilian* v. *Pine*, 11 Mod. 112; Vin. Ab. tit. *Bailiff*, D.

(*h*) *Sheape* v. *Culpepper*, 1 W. Saund. 195, b. 1 Lev. 255; Ca. T. H. 297; 2 Bl. 763. *Rees* v. *Morgan*, 3 T. R. 349. But the avowant, &c. would still be at liberty to take his judgment as at common law, for the statute does not extinguish the common-law right. 3 T. R. 349. *Baker* v. *Lade*, Carth. 254. And where the plaintiff in replevin is nonsuit, the defendant is not bound to have his damages assessed under the statute, or take the earliest opportunity to prosecute his writ *de retorno habendo*. And he may distrain the same goods for rent subsequently accrued, previous to suing out the writ *de retorno habendo*, without waving his action against the sureties on the bond. 1 Taunt. 218.

(*i*) The evidence, where such an avowry or cognizance is pleaded, depends, of course, on the plea and issue taken, such as of a freehold or other title to the *locus in quo*, defect of fences, &c.; the evidence relating to which is considered under the appropriate heads. See TRESPASS; LIBERUM TENEMENTUM, &c.

(*k*) *Supra*, tit. PRESCRIPTION.—COMMON. And see *Pring* v. *Henley*, B. N. P. 59. *Rotheram* v. *Green*, Cro. Eliz. 593; B. N. P. 60.

(*l*) *Supra*, tit. PRESCRIPTION.

(*m*) *Bushwood* v. *Pond*, Cro. Eliz. 722. *Bailiffs of Tewkesbury* v. *Brickwood*, 1 Taunt. 142.

(*n*) *Sloper* v. *Allen*, 2 Roll. Ab. 706; B. N. P. 299; *supra*, 319.

(*o*) *John* v. *Jenkins*, 1 C. M. 227. A tender before distress makes the taking, and after distress, before impounding, the detention unlawful. *Evans* v. *Elliott*, 5 A. & E. 142. See *Carpenter's Case*, 8 Rep. 146, b.

(*p*) *Smith* v. *Goodwin*, 4 B. & Ad. 413.

(*q*) *Pilkington's Case*, 5 Rep. 76; 1 Brownl. 173. So a tender to one deputed by the bailiff is bad. *Pinner* v. *Grevill*, 6 Esp. C. 95.

(*r*) As where the bailiff is the landlord's usual receiver. *Browne* v. *Powell*, 4 Bing. 230.

Tender of amends.

to receive them, it seems, that evidence of a tender to the bailiff making the distress, the principal being present, is insufficient. But if a distress be made by a bailiff, in the absence of the principal, and the bailiff be proved to be his usual receiver, a tender to the latter seems to be equivalent to a tender to the principal (*s*)

Where the cattle were distrained, damage-feasant, in a private pound, and the distrainor admitted that they were about to be sent to a public pound, it was held, that a tender of amends, whilst they were in the private pound, was not too late (*t*).

Fraudulent removal.

In replevin upon goods distrained off the premises, under 11 Geo. 2, c. 1, as on a fraudulent removal, it must be shown that there was not a sufficient distress left on the premises; the justification fails unless it be established that the defendant is without remedy except by action (*u*).

The defendant must establish that the goods were removed fraudulently, and with the view to elude a distress; where the proof was, only that some goods had been removed from the premises openly, and the jury negatived that any rent was due, the Court refused a new trial on payment of costs. The Court, in a doubtful case, would not by the result of another trial subject the plaintiff to double costs, and revive the liability of the sureties, especially as the landlord might still have recourse to an action for use and occupation if rent were really due (*x*).

Competency.

Competency.—Where the avowry alleged that the plaintiff and *J. B.* were joint-tenants under a lease, and *J. B.* was rejected as a witness for the plaintiff, on the *voir dire* without examination, for the purpose of explaining his situation, a new trial was granted (*y*).

The declarations of the party under whom the defendant in replevin makes cognizance are not admissible against the defendant, for the party may be called as a witness (*z*).

Where the landlord, after distraining on the under-tenant, avows in the name of the tenant, the latter is not a competent witness for the landlord (*a*).

But in a later case, where the defendant having made cognizance first, under a demise by *A.* to *B.*, and secondly, under a demise from *B.* to the plaintiff, abandoned the second cognizance, it was held that he might call *B.* as a witness (*b*).

(*s*) Gilb. on Replevin, 89. But see *Pilkington* v. *Hastings*, 5 Co. 70. Tender to a mere servant who makes the distress is insufficient. Ib. And *Browne* v. *Powell*, 4 Bing. 230. But where there was evidence of a wife having before acted as the agent of her husband, as to the impounding of the same cattle, it was held that she was a sufficient agent for the purpose of making a tender to her. *Browne* v. *Powell*, 4 Bing. 230; 1 Will. Saund. 347, d. (n). A joint-tenant, co-parcener, or co-heir in gavelkind, has authority to distrain as bailiff to his co-tenant, without proof of express command. *Leigh* v. *Shepherd*; *Robinson* v. *Hoffman*, 4 Bing. 562. So he may appoint a bailiff for all. Ib. But *qu.* whether he can so distrain against the will of the others. *Robinson* v. *Hoffman*, 4 Bing. 565. A tenant in common is not entitled to receive a co-tenant's share of the rent after notice not to pay it to him. *Harrison* v. *Barnby*, 5 T. R. 246. An appointment of a bailiff by a corporation need not be under seal. *Smith* v. *Birmingham Gas Company*, 1 A. & E. 526; *supra*, tit. AGENT.—CORPORATION.

(*t*) *Browne* v. *Powell*, 4 Bing. 230.

(*u*) *Parry* v. *Duncan*, 1 Mood. & M. C. 533.

(*x*) *Parry* v. *Duncan*, 7 Bing. 243; and 5 M. & P. 19.

(*y*) *Bunter* v. *Warre*, 1 B. & C. 689. And in *Tremlett* v. *Sharland*, Exeter Sp. Ass. 1837. Roscoe on Ev. 474. On issue taken on the joint tenure of the plaintiff and his father, Gurney, B. admitted the father to disprove it.

(*z*) *Hart* v. *Horne*, 2 Camp. 92.

(*a*) *Upton* v. *Curtis*, 1 Bing. 210.

(*b*) *King* v. *Baker*, 2 Ad. & Ell. 338. The abandoning the issue was held to be

Replevin Bond.

Replevin Bond (*c*).—Declaration against a surety plea, that the plaintiff in replevin did prosecute his suit, and that it is still depending, issue being taken on a traverse of the prosecution, upon evidence, that after the removal of the cause into the court above, the landlord and tenant entered into an agreement to stay proceedings, the surety was held to be liable (*d*).

Where a defendant made cognizance under a trustee, and also under the party beneficially interested, it was held, that the trustee could not be called to support the title (*e*).

Where one of the sureties in a replevin bond was a mutual witness for the plaintiff, the Court allowed another to be substituted, on his being approved of by the prothonotary, and giving notice to the defendant's attorney to appear before him, to sanction such approval, as, in case the surety so substituted should turn out to be insufficient, the defendant would be deprived of his remedy against the sheriff (*f*). A record in replevin between the tenant and the bailiff of the landlord, where the issue was found for the bailiff, on the plea of *non tenuit*, to an avowry for rent, is evidence in an action of assumpsit brought by the landlord to recover the rent which was accruing at the time of the distress (*g*).

REPUDIATION.

See *Doe* v. *Smyth*, 6 B. & C. 112. *Supra*, tit. COPYHOLD, 241. And *Townson* v. *Tickell*, 3 B. & A. 31.

REVERSION.

Case for an injury to the reversion.

IN an action on the case for an injury to the plaintiff's reversion, it is essential to prove, 1st, The plaintiff's interest in the reversion; 2dly, The damage complained of.

In the first place, the plaintiff ought to prove his reversionary interest (*h*); and where the present interest of the tenant and the reversionary interest of the plaintiff depend on a written instrument, it ought to be produced and proved (*i*).

equivalent to consenting that a verdict should be found against him. Ib. The accuracy of the report of *Upton* v. *Curtis* was questioned by Lord Denman in the same case. And see 4 M. & Ry. 640. *Qu.* whether the stat. 3 & 4 W. 4, c. 42, s. 26, applies to cases where the witness is *quasi* a party, his bailiff making cognizance. See 2 Ad. & Ell. 338.

(*c*) The assignee of a replevin bond may sue in another court than that in which the re. fa. lo. is returnable. *Wilson* v. *Hartley*, 7 Dowl. 461.

(*d*) *Hodlett* v. *Mount Stephen*, 2 D. & R. 343.

(*e*) Per Chambers, J. in *Golding* v. *Nias*, 5 Esp. C. 272, *qu.* sec. *Johnson* v. *Mason*, 1 Esp. C. 89.

(*f*) *Bailey* v. *Bailey*, 1 Bing. 92. 7 Moore, 439.

(*g*) *Hancock* v. *Welsh & Cooper*, 1 Starkie's C. 347. And Ld. Ellenborough, C. J. held it to be conclusive evidence.

(*h*) In case by a reversioner for an injury to the reversion, by pulling down certain parts of a building, upon the question whether the plaintiff's reversionary interest was sufficiently established by mere parol evidence of the occupier holding the premises as tenant to the plaintiff, without producing the written agreement under which he held, the Court was equally divided. Gaselee and Park, J. J. being of the affirmative opinion; L. C. J. Best, and Burrough, J. of the negative. *Strother* v. *Barr*, 5 Bing. 136; and 2 M. & P. 207. In an action brought by a trustee against a party for an injury to the reversion, held, that having the legal estate, the action was properly brought in his name, although the cestui que trust appeared to have demised the premises and received the rent. *Vallance* v. *Savage*, 7 Bing. 595.

(*i*) *Cotterill* v. *Hobby*, 4 B. & C. 465. It appeared in that case that the plaintiff had demised the land to a tenant by a written instrument not produced, and held that the plaintiff could not recover on the count for an injury to his reversion, but that he was entitled to nominal damages

Although the declaration allege that the tenancy still subsists at the time of the action brought, it is sufficient to prove that it subsisted at the time of the injury committed (*k*).

Proof of tenancy.

Where the declaration alleged the premises to be in possession of certain tenants of the plaintiff, it was held that the allegation was not satisfied by proof that they were parish paupers, who occupied by the mere leave of the plaintiff (*l*).

But a mortgagor of the premises is tenant to the mortgagee, and may be so described (*m*).

The evidence of damage is usually the same as in an action of trespass to the land, or for a nuisance (*n*). The action lies against a tenant for inclosing and cultivating waste land included in the demise (*o*).

The tenant is a competent witness for the plaintiff (*p*).

The reversioner cannot maintain an action against a stranger for a mere trespass, although it be done under a claim of right, unless it be of a permanent nature (*q*). He may recover against his tenant, where anything is done to destroy the evidence of title (*r*).

Where there is a doubt whether an injury has in fact been done to a reversionary right, as by a tenant's opening a new door in a dwelling-house let to him, the question seems to be one of fact for the consideration of the jury;

on a count in trover in respect of some branches taken away, the value of which was not proved. But in *Strother* v. *Barr*, 5 Bing. 136, the Court of C. P. were divided on the question whether in such a case the occupation by the tenant might not be proved by oral evidence. No doubt the mere fact of *occupation* may be so proved, but in such an action it is necessary to shew a reversionary interest; that is, it is necessary to shew not merely an occupation, but an occupation as tenant, of which the writing is the proper evidence. Vide *infra*, tit. SETTLEMENT.

(*k*) *Vowles* v. *Miller*, 3 Taunt. 137.

(*l*) *Austen* v. *Goble*, 1 Camp. 320.

(*m*) *Partridge* v. *Bere*, 5 B. & A. 604.

(*n*) *Supra*, tit. NUISANCE. Case by a reversioner of a house in Cheapside against the owner of the adjoining house, for pulling it down without shoring up the plaintiff's house, in consequence whereof it was impaired, and in part fell down. Held, first, that upon this declaration the plaintiff could not recover, on the ground of the defendant's not having given notice that he was about to pull down his house, that not being alleged as a cause of the injury; secondly, that as the plaintiff had not alleged any right to have his house supported by the defendants, he was bound to protect himself by shoring, and could not complain that the defendant had neglected to do it. *Peyton & others* v. *The Mayor and Commonalty of London, as Governors of St. Thomas's Hospital*, 9 B. & C. 725. The reversioner is entitled to sustain a second action for the injury to his reversion, by continuing an obstruction, &c. upon an issue of its being "the same identical grievance" the continuance of the injury for a subsequent period negatives that issue. *Shadwell* v. *Hutchinson*, 4 C. & P. 333. A reversioner may maintain an action for a nuisance, though it produces no present injury to the premises, if it be an injury to the right. *Shadwell* v. *Hutchinson*, 1 M. & M. 350. As where the defendant obstructs a window by raising a skylight. Ib. Where the lessee opened a door from the premises demised into the street, and in an action by the landlord for injury to his reversionary interest, the jury found that no injury was thereby occasioned to the buildings, the Court held that it ought to have been also left to the jury to say if any injury had been done to the plaintiff's reversionary rights, as destroying the evidence of title, as in that case the action was maintainable by him, and granted a new trial. *Young* v. *Spencer*, 10 B. & C. 145. The removal of part of the soil by a highway surveyor is an injury to the reversioner, although the land be the better for the removal. *Ashton* v. *Seal*, 9 Bing. 1.

(*o*) *Queen's College, Oxford*, v. *Hallett*, 14 East, 489.

(*p*) *Doddington* v. *Hudson*, 1 Bing. 257.

(*q*) *Baxter* v. *Taylor*, 4 B. & Ad. 72; 1 N. & M. 11. As where the stranger claims a right of way, but the act is not injurious to the reversion. Ib. *Secus*, where the injury is of a permanent nature. *Biddlesford* v. *Onslow*, 3 Lev. 109. As by placing a spout from the eaves of the defendant's house overhanging the premises. *Tucker* v. *Newman*, 3 P. & D. 14.

(*r*) *Young* v. *Spencer*, 10 B. & C. 152.

for such an alteration by the lessee is not necessarily injurious to the reversion (*s*).

A reversion after an estate for years is assets in possession (*t*). A reversion after an estate-tail is not assets (*u*). But a reversion after an estate for life ought to be pleaded by the heir (*x*). When assets.

Where a plaintiff, in an action against the heir, on the obligation of the ancestor, relies on the descent of a reversion, it should be shown, either that the obligor was the first taker, or that he exercised acts of ownership over his reversionary interest (*y*).

The grantor of a reversion, who seeks to recover in respect of a forfeiture, must prove a cause of forfeiture subsequent to the grant. Forfeiture.

It is a general rule, that the grantee of a reversion cannot take advantage of a forfeiture prior to the grant; for neither a right of entry, nor a right of action, can ever be transferred (*z*). If a tenant, whether for life or years, levy a fine, and the reversioner does not enter, but grants his reversion, the grantee cannot enter, or maintain ejectment (*a*). So if a copyholder make a feoffment, and the lord alienes, neither the grantor nor grantee can take advantage of the forfeiture (*b*).

REWARD.

In an action for a reward offered to any one who should give information whereby the property taken on a robbery might be traced on conviction of the parties, he who first gives such information, although it be not communicated immediately to the party robbed, but to a party authorized to receive it and act in the apprehension, *e. g.* a constable, is entitled (*c*).

RULES OF COURT.

By an Order of Hilary Term, 4 W. 4, after reciting the stat. 3 & 4 W. 4, c. 42, s. 1, which enables the Judges of the superior Courts of Common Law to make certain regulations as to proceedings in actions at law, provided Rules of Court.

(*s*) *Young* v. *Spencer*, 10 B. & C. 145.

(*t*) *Bulkely* v. *Nightingale*, 1 Str. 665. And a variance as to the county where the lands lie is immaterial. B. N. P. 178. 6 Co. 47. See tit. Heir. See also 2 Will. Saund. 7, note 4. Co. Litt. 209, a. Com. Dig. *Pleader*, 2 E. 2.

(*u*) *Mildmay's case*, 6 Co. a.

(*x*) Dyer, 373, b. Carth, 129. *Mildmay's case*, 6 Co. 42, a.

(*y*) For there can be no mesne seisin of a remainder or reversion expectant upon an estate of freehold, so as to make a *possessio fratris*, while such remainder or reversion continues in a regular course of descent. But as such remainder or reversion may be sold, devised, or charged, by the person entitled to it, the descent of it may be changed by the exertion of certain acts of ownership, as by granting it over for term of life, or in tail; for the exertion of such acts of ownership is equivalent to the actual seisin of an estate which is capable of being reduced into possession by entry. For as an actual entry is not practicable in the case of such reversion or remainder, the alienation of them for a certain estate is sufficient to turn the descent, such grants being (before the statutes 4 & 5 Ann, c. 16) always attended with attornment, the notoriety of them, and the consequent alteration of the tenant, were deemed equal to the actual entry on a descent, or livery of seisin on a gift or sale of an estate in possession; such attornment being originally *coram paribus*, and in later days sufficiently attested. And for this reason, a reversion could not be granted over to take effect *in futuro*, any more than an estate in possession. And this principle, that a remainder or reversion on a freehold will admit of no mesne seisin, while it continues in a course of descent, and such acts of ownership have not been exerted, presents a solution of the question, whether a remainder or reversion on a freehold shall be subject to the debts of the mesne-remainder man or reversioner.—Watkins on Descents. *Supra*, tit. Heir.

(*z*) Co. Copyholder, sec. 60.

(*a*) *Fenn* d. *Matthews* v. *Smart*, 12 East, 444.

(*b*) Co. Copyholder, s. 60.

(*c*) *Lancaster* v. *Walsh*, 4 M. & W. 16.

Rules of Court.

that no such rule or order should have the effect of depriving any person of the power of pleading the general issue, and of giving the special matter in evidence, in any case wherein he then was or thereafter should be entitled to do so, by virtue of any Act of Parliament then or thereafter to be in force, the following Rules and Regulations were made:

First, General Rules and Regulations.

1. Every pleading, as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date, and every declaration and other pleading shall also be entered on the record made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a Judge.

2. No entry of continuances by way of imparlance, *curia advisare vult, vicecomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained.

Provided that such regulation shall not alter or affect any existing rules of practice as to the times of proceeding in the cause.

Provided also, that in all cases in which a plea *puis darrein continuance*, is now by law pleadable in *Banc* or at *Nisi Prius*, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be.

Provided also, that no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the Court or a Judge shall otherwise order.

3. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day.

Provided that it shall be competent for the Court or a Judge to order a judgment to be entered *nunc pro tunc*.

4. No entry shall be made on record of any warrants of attorney to sue or defend.

5. And whereas by the mode of pleading hereinafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore, and by the said Act of the 3 & 4 W. 4, c. 42, s. 23, the powers of amendment at the trial, in cases of variance, in particulars not material to the merits of the case, are greatly enlarged.

Several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each; nor shall several pleas, or avowries, or cognizances, be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.

Therefore, counts founded on one and the same principal matter of complaint, but varied in statement, description or circumstances only, are not to be allowed.

Ex. gr.—Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.

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So counts for not giving, or delivering, or accepting a bill of exchange, in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed.

So counts for not accepting and paying for goods sold, and for the price of the same goods, as goods bargained and sold, are not to be allowed.

But counts upon a bill of exchange, or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint, for the debt and the security are different contracts; and such counts are to be allowed.

Two counts upon the same policy of insurance are not to be allowed.

But a count upon a policy of insurance and a count for money had and received, to recover back the premium, upon a contract implied by law, are to be allowed.

Two counts on the same charter-party are not to be allowed.

But a count for freight upon a charter-party, and for freight *pro rata itineris*, upon a contract implied by law are to be allowed.

Counts upon a demise, and for use and occupation of the same land, for the same time, are not to be allowed.

In actions of tort for misfeasance several counts for the same injury, varying the description of it, are not to be allowed.

In the like actions for nonfeasance, several counts founded on varied statements of the same duty are not to be allowed.

Several counts in trespass, for acts committed at the same time and place, are not to be allowed.

Where several debts are alleged, in *indebitatus assumpsit*, to be due in respect of several matters; *ex. gr.* for wages, work and labour, as a hired servant, work and labour generally, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count, within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts.

Provided that a count for money due on an account stated may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

The rule which forbids the use of several counts, is not to be considered as precluding the plaintiff from alleging more breaches than one of the same contract, in the same count.

Pleas, avowries, and cognizances, founded on one and the same principal matter, but varied in statement, description, or circumstances only (and pleas in bar, in *replevin*, are within the rule), are not to be allowed.

Pleas of *solvit ad diem*, and of *solvit post diem*, are both pleas of payment, varied in the circumstance of time only, and are not to be allowed.

But pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed.

Pleas of an agreement to accept the security of *A. B.* in discharge of the plaintiff's demand, and of an agreement to accept the security of *C. D.* for the like purpose, are also distinct and to be allowed.

But pleas of an agreement to accept the security of a third person in

Rules of Court.

discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time, in consideration of the same security, are not distinct; for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed.

In trespass *quare clausum fregit*, pleas of soil and freehold of the defendant in the *locus in quo*, and of the defendant's right to an easement there; pleas of right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct and are to be allowed.

But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed.

So pleas of a right of way over the *locus in quo*, varying the *termini* or the purposes, are not to be allowed.

Avowries for distress for rent, and for distress for damage feasant, are to be allowed.

But avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are not to be allowed.

The examples, in this and other places specified, are given as some instances only of the application of the rules to which they relate; but the principles contained in the rules are not to be considered as restricted by the examples specified.

6. Where more than one count, plea, avowry, or cognizance shall have been used, in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a Judge, suggesting that two or more of the counts, pleas, avowries, or cognizances are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognizances introduced in violation of the rule be struck out at the cost of the party pleading: whereupon the Judge shall order accordingly, unless he shall be satisfied, upon cause shown, that some distinct subject-matter of complaint is *bonâ fide* intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognizances, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognizances mentioned in such application which shall be allowed.

7. Upon the trial, where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance, which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence, as well as those of the pleadings; and, further, in all cases in which an application to a Judge has been made under the preceding rule, and any count, plea, avowry, or cognizance allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was *bonâ fide* intended to be established at the trial in respect of each count so allowed, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, if the Court or Judge, before whom the trial is had, shall be of opinion that no such distinct subject-matter of complaint was *bonâ fide*

intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any count, plea, avowry, or cognizance with respect to which the Judge shall so certify. Rules of Court.

8. The name of a county shall, in all cases, be stated in the margin of a declaration, and shall be taken to be the *venue* intended by the plaintiff; and no *venue* shall be stated in the body of the declaration, or in any subsequent pleading.

Provided that, in cases where local description is now required, such local description shall be given.

9. In a plea, or subsequent pleading, intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment; nor shall it be necessary, in any replication or subsequent pleading, intended to be pleaded in maintenance of the whole action, to use any allegation of "*precludi non*," or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in maintenance of the whole action. Provided that nothing herein contained shall extend to cases where an *estoppel* is pleaded.

10. No formal defence shall be required in a plea, and it shall commence as follows:—"The said defendant, by , his attorney, 'or in person,' &c.] says that."

11. It shall not be necessary to state, in a second or other plea or avowry, that it is pleaded by leave of the Court, or according to the form of the statute, or to that effect.

12. No protestation shall hereafter be made in any pleading; but either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made.

13. All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country.

Provided that this regulation shall not preclude the opposite party from pleading over to the inducement, when the traverse is immaterial.

14. The form of a demurrer shall be as follows:—"The said defendant, by , his attorney [or, 'in person,' &c., or 'plaintiff,'] says, that the declaration [or, 'plea,' &c.] is not sufficient in law," shewing the special cause of demurrer, if any.

The form of a joinder in demurrer shall be as follows:—"The said plaintiff [or, 'defendant,'] says, that the declaration [or, 'plea,' &c.] is sufficient in law."

15. The entry of proceedings on the record for trial, or on the judgment roll (according to the nature of the case), shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record, and no fees shall be payable in respect of any prior entry made, or supposed to be made, on any roll or record whatever.

16. No fees shall be charged in respect of more than one issue by any of the officers of the Court, or of any Judge at the assizes or any other officer, in any action of assumpsit, or in any action of debt on simple contract, or in any action on the case.

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17. This rule is repealed; *see R. G. T. T.* 1 *Vict. post.* 987.

18. No rule or Judge's order to pay money into Court shall be necessary, except under the 3 & 4 W. 4, c. 42, s. 21, but the money shall be paid to the proper officer of each Court, who shall give a receipt for the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff on demand.

19. This rule is repealed; *see R. G. T. T.* 1 *Vict. post.* 987.

20. In all cases under the 3 & 4 W. 4, c. 42, s. 10, in which, after a plea in abatement of the non-joinder of another person, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, the commencement of the declaration shall be in the following form:—

"(*Venue*) *A. B.*, by *E. F.*, his attorney [or, 'in his own proper person,' &c.], complains of *C. D.* and *G. H.*, who have been summoned to answer the said *A. B.*, and which the said *C. D.* has heretofore pleaded in abatement the non-joinder of the said *G. H.*," &c. [the same form to be used, *mutatis mutandis*, in cases of arrest or detainer.]

21. In all actions by and against assignees of a bankrupt or insolvent or executors or administrators, or persons authorized by Act of Parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied.

PLEADINGS IN PARTICULAR ACTIONS.

I. *Assumpsit.*

1. In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

Eg. gr.—In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk of the loss, or of the alleged compliance with warranties.

In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

In an action of *indebitatus assumpsit* for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

2. In all actions upon bills of exchange and promissory notes, the plea of *non assumpsit* shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *ex. gr.* the drawing or making,

or indorsing, or accepting or presenting, or notice of dishonour of the bill or note (*d*). Rules of Court.

3. In every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void, or voidable in point of law, on the ground of fraud (*e*) or otherwise, shall be specially pleaded. *Ex. gr.* Infancy—coverture—release—payment—performance—illegality of consideration (*f*), either by statute or common law—drawing, indorsing, accepting, &c. bills or notes by way of accommodation—set-off—mutual credit—unseaworthiness—misrepresentation—concealment—deviation—and various other defences, must be pleaded.

4. In actions on policies of assurance the interest of the assured may be averred thus:—"That *A.*, *B.*, *C.*, and *D.*, or some or one of them, were or was interested," &c.; and it may also be averred, that the insurance was made for the use and benefit, and on the account of the person or persons so interested.

II. *In Covenant and Debt.*

1. In debt on specialty or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only; and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

2. The plea of *nil debet* shall not be allowed in any action.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that "he never was indebted in manner and form as in the declaration alleged;" and such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit:* and all matters in confession and avoidance shall be pleaded specially, as above directed in actions of *assumpsit*.

4. In other actions of debt in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specially some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

III. *Detinue.*

The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea.

IV. *In Case.*

1. In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no

(*d*) In an action on a bill, held that admitting the acceptance and indorsement did not entitle the defendant to begin. *Pontifex* v. *Jolly*, 9 C. & P. 302.

(*e*) In an action for breach of contract, plea that it was obtained by fraud and covin, the defendant was held to be entitled to begin. *Steinkeller* v. *Newton*, 9 C. & P. 313.

(*f*) In assumpsit on a cheque by the holder against the drawer, pleas, 1st, that it was given to a third party for losses a gaming and notice to the plaintiff before he received the cheque, and 2dly, that the plaintiff gave no value for it, and issues on the notice and value given, held that the plaintiff was entitled to begin. *Bingham* v. *Stanley*, 9 C. & P. 374.

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other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. *Ex. gr.*—In an action on the case for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and, in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods. In an action of slander of the plaintiff, in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession or trade; but it will not operate as a denial of the fact of the plaintiff's holding the office, or being of the profession or trade alleged. In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment or preliminary proceedings. In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

2. All matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit.

V. *In Trespass.*

1. In actions of trespass *quare clausum fregit*, the close or place in which, &c. must be designated in the declaration by name or abuttals, or other description; in failure whereof the defendant may demur.

2. In actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which if intended to be denied, must be traversed specially.

3. In actions of trespass *de bonis asportatis*, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

4. Where in an action of trespass *quare clausum fregit*, the defendant pleads a right of way with carriages and cattle, and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle or on foot only shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified.

5. And where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of common of pasture for divers kinds of cattle—*ex. gr.* horses, sheep, oxen, and cows,—and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found, and for the plaintiff in respect of the trespasses which shall not be so justified.

6. And *in all actions* in which such right of way or common as aforesaid, or other similar right is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively. Rules of Court.

Provided, nevertheless, that nothing contained in the fifth, sixth, or seventh of the above-mentioned general rules and regulations, or in any of the above-mentioned rules or regulations relating to pleading in particular actions, shall apply to any case in which the declaration shall bear date before the first day of *Easter* term next.

The further recital order and general rules were made in Trin. Term, 1 Victoria.

Whereas it is expedient that certain rules and regulations made in Hilary Term, in the fourth year of his late Majesty King William the Fourth, pursuant to the statute of the 3 and 4 W. 4, c. 42, s. 1, should be amended, and some further regulations made pursuant to the same statute;

It is further ordered, that from and after the first day of Michaelmas term next inclusive, unless parliament shall in the mean time otherwise enact, the following rules and regulations, made pursuant to the said statute shall be in force:—

1st. It is ordered that the 17th and 19th of the General Rules and Regulations made pursuant to the statute 3 and 4 W. 4, c. 42, s. 1, be repealed, and that in the place thereof the two following amended rules be substituted; *viz.*—

FOR THE SEVENTEENTH RULE.

Payment of Money into Court.] When money is paid into Court, such payment shall be pleaded in all cases, and as near as may be in the following form, *mutatis mutandis*:—

Form of Plea.] The day of The defendant *C. D.* by his attorney (or in person, &c.), says (*or*, in case it be pleaded as to part only, *add*, "as to £ , being part of the sum in the declaration," or " count mentioned," or "as to the residue of the sum of £ ") that the plaintiff ought not further to maintain his action, because the defendant now brings into Court the sum of £ ready to be paid to the plaintiff: And the defendant further says, that the plaintiff has not sustained damages (or, in actions of debt, "that he never was indebted to the plaintiff") to a greater amount than the said sum of, &c., in respect of the cause of action in the declaration mentioned, (or, "in the introductory part of this plea mentioned,") and this he is ready to verify: wherefore he prays judgment if the plaintiff ought further to maintain his action thereof.

Writs, A. B.

FOR THE NINETEENTH RULE.

As to proceedings by the plaintiff after payment of money into Court.] The plaintiff, after delivery of a plea of payment of money into Court, shall be at liberty to reply to the same by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty in that case to tax his costs of suit, and in case of nonpayment thereof within forty eight-hours to sign judgment for his costs of suit so taxed; or the plaintiff may reply, "that he has sustained damages (or that the defendant was and is indebted to him, as the case may be) to a greater amount than the said sum;" and, in the event

Rules of Court.

of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

General Issue by statute.] It is further ordered, that in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of any act of parliament, he shall insert in the margin of the plea the words "by statute," otherwise such plea shall be taken not to have been pleaded by virtue of any Act of Parliament; and such memorandum shall be inserted in the margin of the issue, and of the Nisi Prius record.

Payments credited in particulars of demand need not be pleaded.] In any case in which the plaintiff (in order to avoid the expense of a plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money.

Rule not to apply to a claim of a balance.] But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums.

Payment in reduction of damages or debt not to be allowed.] Payment shall not, in any case, be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar.

Proof of a rule of Court.

The production of a rule of court made in a particular cause is usually sufficient, without further authentication; for it is an original, whether it be a rule of the same or of a different court (*g*).

It has been seen, that the production by the defendant of a rule to pay money into court, did not, according to the practice of the Court of Common Pleas, at least, give the plaintiff's counsel a right to reply (*h*). The production of a rule of court for committing a defendant convicted of a misdemeanor to a gaol, to be imprisoned for a term, according to his sentence, is evidence to prove an allegation that he has received judgment of imprisonment for that term (*i*). Where the Court for relief of Insolvent Debtors had issued amongst their officers printed rules and orders of the Court, for their guidance, held that one of the printed copies was admissible to show the duties of those officers, although the original rule was kept under the seal of the Court, and there was no proof of the copy having been examined with the original (*j*). What took place in court previous to a rule being made is inadmissible; the Court can only look to the rule itself (*k*).

SEDUCTION.

Proof of service.

In an action (*l*) for debauching the plaintiff's daughter and servant (*m*),

(*g*) *Selby* v. *Harris*, Ld. Raym. 745, per Treby, J. If at a trial at Nisi Prius a rule of the Court of K. B. or C. P. be produced, under the hand of the proper officer, there is no need to prove it to be a true copy, for it is an original.

(*h*) 2 Taunt. 267, *supra*, 603.

(*i*) *Carlile* v. *Parkins*, cor. Abbott, C. J. Westminster Sitt. after Mich. T. 1822.

(*j*) *Dance* v. *Robson*, 1 M. & M. 294.

(*k*) *Edwards* v. *Cooper*, 3 C. & P. 277.

(*l*) The action is usually laid in case; but where the offence has been accompanied with an *illegal* entry into the father's or master's house, it may be laid by way of aggravation in trespass *quare clausum fregit*. *Bennett* v. *Alcott*, 2 T. R. 167. *Woodward* v. *Walton*, 2 N. R. 476. *Mackfadzen* v. *Olivant*, 6 East, 387. And a count may be joined for assaulting the daughter. 2 N. R. 476. An action for assauling the plaintiff's daughter *vi et armis*, and debauching her *per quod servitium amisit* is an action of trespass. *Woodward* v. *Walton*, 2 N. R. 476. And

per quod servitium amisit, it is necessary to prove, 1st, That the daughter resided with the plaintiff, and that she performed *some* acts of service for him (*n*). But services of the most trifling nature are sufficient for the purpose; the relation of master and servant being, in such cases, little more than matter of fiction, made use of to support the action. And therefore it is unnecessary to prove any contract of service (*o*). And it has been held to be sufficient to prove a *right* to the service. Where a daughter lives with her father as part of his family, and subject to his control and command, no proof of service is necessary (*p*). And where the child is a minor, and capable of service, service may be presumed (*q*). And the action is maintainable, although the daughter be of age, if she reside with her father (*r*), or although she be a married woman, separated from her husband and living as servant to her father (*s*). Proof of service.

But although the daughter be a minor, yet if she reside in another person's family, at the time of the seduction, without an intention to return to her father, the latter cannot maintain the action, although she actually returns to him whilst under age, in consequence of the seduction, and is maintained by him (*t*). Otherwise, if she be merely absent with his consent, and with the intention of returning, even although she be of age (*u*); or if it be proved that the defendant engaged her as a servant, and induced her to live in his house as his servant, with intent to seduce her (*x*).

If the daughter has a fixed residence in another family, the person with whom she resides may maintain the action (*y*). And the jury, in such a case, are not limited in their verdict to the mere damage arising from the loss of service (*z*).

The daughter is a competent witness to prove the seduction (*a*); and although it is not absolutely essential to call her as a witness, the omission to do so would be open to great observation (*b*). Seduction.

the dictum of Buller, J. in *Bennett* v. *Alcott*, 2 T. R. 167, is not well founded.

(*m*) A master may maintain the action although he be no relation to the party seduced. *Fores* v. *Wilson*, Peake, 55.

(*n*) The mere relation of parent and child is insufficient, without some proof of loss of service. Where the plaintiff's infant son was injured by the negligent driving of the defendant, and loss of service was alleged, it was held that *some* evidence of such loss was necessary. *Hall* v. *Hollander*, 4 B & C. 660. It is sufficient to show the daughter to have been under the control of the father, without proof of acts of service. *Maunder* v. *Venn*, 1 M. & M. 323. It is insufficient merely to show expense incurred in consequence of the confinement. *Satterthwaite* v. *Durst*, 5 East, 47, n. *Hall* v. *Hollander*, 4 B. & C. 662. *Postlethwaite* v. *Parkes*, 3 Burr. 1878. Proof of the milking of cows. *Bennett* v. *Alcott*, 2 T. R. 167. Even the making of tea has been deemed to be an act of service. *Carr* v. *Clarke*, 2 Chitty, 261. *Mann* v. *Barrett*, 6 Esp. C. 42. In the case of *Joseph* v. *Carendar*, cor. Ld. Denman, Winton Summ. Ass. 1834, (cited Roscoe on Ev. 483,) the action was held to be maintainable, although the plaintiff, on discovering the pregnancy of his daughter, had turned her out of his house, and she had not been confined when the action was commenced.

(*o*) *Bennett* v. *Alcott*, 2 T. R. 166. And see *Woodward* v. *Walton*, 2 N. R. 476. *Jones* v. *Brown*, Peake's C. 233. The action is maintainable, although the condition of the plaintiff excludes all proof of menial service. Per Ld. Kenyon, *Fores* v. *Wilson*, Peake, 55.

(*p*) *Maunder* v. *Venn*, M. & M. 324. See *R.* v. *Chillesford*, 4 B. & C. 102.

(*q*) *Harris* v. *Butler*, 2 M. & W. 242, per Parke, B.

(*r*) *Booth* v. *Charlton*, 5 East, 47. n. *Tullidge* v. *Wade*, 3 Wils. 18.

(*s*) *Harper* v. *Luffkin*, 7 B & C. 387.

(*t*) *Dean* v. *Peel*, 5 East, 45. *Carr* v. *Clarke*, 2 Chitty, 260. *Blagmire* v. *Haley*, 6 M. & W. 55. *Harris* v. *Butler*, 2 M. & W. 539.

(*u*) *Johnson* v. *MacAdam*, 5 East, 47, n.; 2 M. & W. 542.

(*x*) *Speight* v. *Oliviera*, 2 Starkie's C. 493.

(*y*) *Irwin* v. *Dearman*, 11 East, 24. *Dean* v. *Peel*, 5 East, 45. *Edmonson* v. *Machel*, 2 T. R. 4.

(*z*) *Irwin* v. *Dearman*, 11 East, 24.

(*a*) *Cock* v. *Wortham*, 2 Str. 1054.

(*b*) See *Farmer* v. *Joseph*, Holt's C. 451.

Damage.

The plaintiff should be prepared to prove the amount of the expenses to which he has been put, in supporting the daughter, and supplying her with the necessary medical attendance. It is not essential to show that an apothecary's bill has been actually paid, the plaintiff being liable to the payment. But it seems that, in such a case, he would not be entitled to recover for a physician's fees, unless they have been actually paid, for he is not legally liable to pay them (*c*).

The jury, in a case of this nature, are not confined in their estimate of damages to the mere amount of the damage from loss of service, and the expenses consequent upon the seduction, but may award a compensation for the loss which the father has sustained in being deprived of the comfort and society of his child (*d*), the injury he sustains as the parent of other children whose morals may be corrupted by her bad example (*e*), and for the dishonour and disgrace cast upon the plaintiff and his family by such an injury (*f*). The plaintiff should be ready to prove, in aggravation of damages, the state and situation of his family at the time (*g*), the conduct and demeanour of the defendant, and the terms upon which he was allowed to visit the family, as that he professed to visit the family as the daughter's suitor (*h*); and was received on that footing.

It seems, though the contrary has been asserted (*i*), that evidence to show that the defendant prevailed by means of a promise of marriage is admissible (*k*), for this is properly evidence of the extent of the injury, and of the means used to perpetrate it, which, in all cases where the jury are to assess the damages, seem to be material for their consideration. But no evidence of the daughter's general character for chastity is admissible until her character has been impugned on the other side (*l*).

(*c*) *Dixon* v. *Bell*, 1 Starkie's C. 287.

(*d*) See the observations of Ld. Eldon in *Bedford* v. *M'Kowl*, 3 Esp. C. 120. And see *Tullidge* v *Wade*, 3 Wils. 19.

(*e*) Lord Ellenborough, in the case of *Irwin* v. *Dearman*, 11 East, 24, observes, that although it is difficult to reconcile with principle the giving of greater damages on a ground different from that of the loss of service, which is the legal foundation of the action, yet that the practice had become inveterate and could not be shaken. Sel. N. P. 1042. Anxiety and distress of mind may be taken into the account in awarding damages. *Andrews* v. *Askey*, 8 C. & P. 7.

(*f*) *Southernwood* v. *Ramsden*, Sel. N. P. 1042. And see *Chambers* v. *Irwin*, 2 Sel. N. P. 1042.

(*g*) The plaintiff, it is said, may give evidence of the general good conduct of his family, and of the number of his other children, in aggravation of damages. *Bedford* v. *Mackoul*, 3 Esp. C. 119.

(*h*) *Elliott* v. *Nicklin*, 5 Price, 641.

(*i*) *Dodd* v. *Norris*, 3 Camp. 519. Peake's L. Ev. 355.

(*k*) See *Elliott* v. *Nicklin*, 5 Price, 641, and the observations of Garrow, B., who said the distinction is, where the actual promise of marriage is not relied on as a prominent part of the case, but is merely collateral to the main object of the action, as to vindicate the character of the young woman when assailed by the defence set up. In *Watson* v. *Bayless*, London Sitt. after Easter, 1823, Park, J. admitted such evidence, saying that otherwise it might appear to the jury that the servant was a mere wanton. In that case she was not the daughter of the plaintiff. So in *Margatroyd* v. *Margatroyd*, York Summer Assizes, 1828, and in a similar case, cor. Bayley, J., Lancaster Summer Assizes, 1830; and see *Tullidge* v. *Wade*, 3 Wils. 18, where evidence of the promise was admitted. See also *Capron* v. *Balmond*, Ex. Sp. Ass. 1831, (cited in Roscoe on Ev. 484,) where Park, J. not only allowed proof of a promise, but also evidence that the defendant had persuaded the daughter to take measures to destroy her offspring, and had spoken to her about hiring a nurse, and other arrangements in contemplation of marriage; these facts being all immediately connected with the fact complained of.

(*l*) *Bamfield* v. *Massey*, 1 Camp. 460. And it has been said, that an attempt to impugn her character on cross-examination is insufficient. *Dodd* v. *Norris*, 3 Camp. 519. So an attempt to prove a single act of unchastity before her acquaintance with the defendant is, it has been said, insufficient to warrant general evidence. In the case of *Bamfield* v. *Massey*, the daughter having been cross-examined as to circumstances of extreme levity of conduct, Lord Ellenborough held that the plaintiff was

Defence.

In an action on the *case* for seduction, the plea of not guilty has been held to put in issue the *service* as well as the seduction (*m*). The daughter cannot be contradicted as to statements with respect to intercourse with others, as to which she has not been cross-examined (*n*).

The defendant may, in mitigation of damages, adduce any evidence which tends to show that the consequence has, in part, resulted from the improper, negligent, and imprudent conduct of the plaintiff himself.

Where a father permitted one whom he knew to be a married man to visit his daughter as a suitor, upon an alleged probability of a divorce, or of the death of the wife, Ld. Kenyon went so far as to hold that an action for seduction could not be maintained (*o*). The defendant may also give evidence as to the loose conduct and the bad character of the daughter (*p*). But if she be asked whether, before her acquaintance with the plaintiff, she had not been connected with other men, she is not bound to answer the question (*q*). Other remarks belonging to this head have been made in another place (*r*).

Seduction of a servant.

To support an action for seducing or harbouring an apprentice or hired servant, the plaintiff must prove the contract (*s*) of apprenticeship or service; the soliciting the apprentice or servant to leave the service; with a knowledge of the fact (*t*), that he was at the time the apprentice or servant of the plaintiff; or that the defendant harboured the party after notice of the contract, and a request to deliver him up; and also the loss of service (*u*).

An action lies for enticing a journeyman paid by the piece (*x*), but it does not lie for procuring a servant to leave the service at the end of the term for which he is engaged (*y*).

Proof that the defendant, being a captain on the recruiting service, asked the plaintiff's servant whether he would enlist, and gave him money, is sufficient evidence of enticement (*z*).

And proof of an indenture of service, by an infant negro slave, in the West Indies, by which the latter covenanted to serve for a term of years, entitles the master to recover from the seducer (*a*).

The plaintiff, in an action for seducing his servants, may recover damages,

not at liberty to call witnesses to character, there being an opportunity for explanation on re-examination; but in a later case, where the cross-examination of the party seduced tended to show that she had conducted herself immodestly towards the defendant before the seduction, and kept improper company, the plaintiff was allowed (without objection) to prove the general good character and modest deportment of the daughter, and the general respectability of the family. *Bate* v. *Hill*, 1 C. & P. 100.

(*m*) *Holloway* v. *Abell*, 7 C. & P. 528. But see tit. CASE and RULES.

(*n*) *Andrews* v. *Askey*, 8 C. & P. 7. But she was allowed to be recalled, for the purpose of being so cross-examined. Ibid.

(*o*) *Reddie* v. *Schoolt*, Peake's C. 240.

(*p*) *Dodd* v. *Norris*, 3 Camp. 519.

(*q*) Ib. But see above, note (*n*).

(*r*) *Supra*, tit. CHARACTER.

(*s*) But the defendant cannot avail himself of any defect in the contract. *Keane* v. *Boycott*, 2 H. B. 511.

(*t*) Peake's C. 55; 3 Comm. 142. See Willes, 577. *Eades* v. *Vandeput*, 5 East, 39. In an action by the master against a captain of a ship of war, to recover damages for the service of his apprentice, it was held that the statement of the apprentice to the defendant that he was an apprentice was sufficient evidence of knowledge, and that the defendant was bound to inquire.

(*u*) Burr. 1352; 3 Comm. 142.

(*x*) *Hart* v. *Aldridge*, Cowp. 54. Note that a piece was left unfinished.

(*y*) *Powell* v. *Gordon*, 2 Esp. C. 735; Bac. Ab. tit. *Master & Servant*, O. *Semble*, if a journeyman takes in the work of different persons, he is not the servant of each. Per Lord Mansfield, Cowp. 56, *sed* vide *supra*.

(*z*) *Keane* v. *Boycott*, 2 H. B. 511.

(*a*) Ibid.

Seduction of servant.

not merely for the loss of service, as calculated on the time for which they were engaged to serve, but on the whole consequential damage (*b*).

SEQUESTRATION.

A SEQUESTRATION in Scotland, under the stat. 54 Geo. 3, c. 137, discharges a debt contracted in England by a trader residing in Scotland (*c*).

A writ of sequestration takes effect from the time of its being read in the parish church (*d*).

SESSIONS, PETTY.

See the Act for regulating the Division of Counties, 9 Geo. 4, c. 43.

SET-OFF.

Notice.

NOTICE of set-off having been given under the statute (*e*), the defendant.

(*b*) *Guntor* v. *Astor*, 4 Moore, 12; where the servants were hired to work by the piece, and the jury having given 1,600 *l.* damages, the Court refused a new trial.

(*c*) *Sidaway* v. *Hay*, 3 B. & C. 12.

(*d*) *Doe* v. *Block*, 3 Camp. 477. See Burn's Ecc. Law, vol. 3, p. 340, 8th ed., and the authorities there cited.

(*e*) By the stat. 2 G. 2, c. 22, s. 13, where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require; so as at the time of pleading the general issue (*), where any such debt of the plaintiff, his testator, or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and on what account it became due, or otherwise such matter shall not be allowed in evidence under such issue. Where there is any other plea than the general issue on the record, the statute does not permit a defendant to avail himself of a set-off, unless pleaded. *Webber* v. *Venn*, 1 Ry. & M. 413.

Where the defendant means to insist that the sum sought to be recovered was intended in satisfaction of a debt due to him from the plaintiff, or in satisfaction of a claim which he had on the plaintiff, a notice, or plea of set-off, is unnecessary; the circumstances are admissible in evidence under the general issue. *Dale* v. *Sollett*, 4 Burr. 2. 33. Where the plaintiff sues in *indebitatus assumpsit*, this still seems to be the case notwithstanding the said rules. And so it is where the assignees of a bankrupt sue; for by the stat. 5 G. 2, c. 32, s. 28, they cannot recover more than the balance due to the bankrupt. And see the statute 46 G. 3, c. 101, and now the late statute 6 G. 4, c. 16.

A debt to be available by way of set-off must be due at the time when the action was commenced. *Evans* v. *Prosser*, 3 T. R. 186. *Rogerson* v. *Ludbrooke*, 1 Bing. 93. Freight not due by reason of the non-completion of a voyage, and sums to which a party is liable, but which he has not paid, cannot be set-off. *Leman* v. *Gordon*, 8 C. & P. 392. And see *Deudy* v. *Powell*, 3 M. & W. 442.

Where the arbitrator found for the plaintiff, in an action of trespass, 40 *s.* damages, and for the defendant, in an action for goods sold, a verdict for 102 *l.* which he directed to be paid on a future day; held that the latter could not set off that sum against the plaintiff's taxed costs, the time not having expired when his own demand became payable. *Young* v. *Gye*, 10 Moore, 198.

There *can be no set-off* to an avowry for rent. *Sapsford* v. *Fletcher*, 4 T. R. 512. Nor, as it seems, to an action of *assumpsit*, for not accepting a bill of exchange at two months' date, according to the contract upon a sale of goods; the action having been brought before the expiration of the two months. *Hutchinson* v. *Reed*, 3 Camp. 329. Nor to an action for breaches of covenant. *Warn* v. *Bickford*, 7 Price, 550. Nor to an action for not accepting accommodation bills, whereby the plaintiff was obliged to pay the amount, and interest and

(*) The plea of *non est factum* is not a general issue for this purpose. *Oldershaw* v. *Thompson*, 1 Starkie's C. 311; 5 M. & S. 164.

to entitle himself to enter upon evidence of the set-off, was bound to prove his notice according to the statute. Notice.

expenses. *Hardcastle* v. *Netherwood*, 5 B. & A. 93. *Auber* v. *Lewis*, 1 Mann. Index, 251. But it seems that the defendant might have pleaded a set-off to that part of the count which charged him with the acceptances paid by the plaintiff. Ib. Where the plaintiff in an action for not accounting, with a count for money had and received, proved a balance due which might have been proved under either count, on *non-assumpsit* pleaded with a set-off to the general count, it was held that the plaintiff might avail himself of his set-off; per Gibbs, C. J. *Birch* v. *Depeyster*, 4 Camp. 387.

Unliquidated damages cannot be set off. *Freeman* v. *Hyatt*, 1 Bla. 394. *Dowsland* v. *Thomson*, 2 Bla. 910. *Howlett* v. *Strickland*, Cowp. 56. *Weigall* v. *Waters*, 6 T. R. 488. *Gillett* v. *Maxeman*, 1 Taunt. 137.

A. guarantees to *B.* goods sold by him to *C.*, who becomes bankrupt. *A.* admits the amount of goods supplied, yet *B.* cannot set off the amount against *A.* *Crawford* v. *Stirling*, 4 Esp. C. 207; *secus*, if the *damage* to *B.* be adjusted between *A.* and *B.* Ib., and see *Morley* v. *Inglis*, 4 Bing. N. C. 85.

In an action by a servant for wages, the master cannot set off the value of goods lost by the negligence of the plaintiff, although he has admitted his liability. *Le Loir* v. *Bristow*, 4 Camp. 134.

But where it was part of the original agreement, that the servant should pay, out of his master's wages, for all goods lost by his negligence, the value may be deducted under the general issue.

And a custom in trade to set off the amount of damages done to goods dyed is a good defence under the general issue. *Bamford* v. *Harris*, 1 Starkie's C. 343.

Money agreed to be paid on breach of a condition of an agreement, as liquidated damages, may be set off. *Fletcher* v. *Dyche*, 2 T. R. 32. But uncertain damages, resulting from breach of covenant, cannot. *Weigall* v. *Waters*, 6 T. R. 488.

A manufacturer, who refuses to deliver goods ordered till the price be paid, or security given, may set off the amount as goods bargained and sold. *Dunmore* v. *Taylor*, Peake's C. 41.

The debt set off must be due from the plaintiff *in the character* in which he sues, to the defendant *in the character* in which he is sued. *Staniforth* v. *Fellows*, 1 Marsh. 184.

An *attorney* cannot set off his bill for business done in court, unless he has previously delivered a bill signed. *Balman* v. *Birkett*, 1 Esp. C. 449. But it is not necessary that a month should intervene between the delivery of the bill and the trial. Ibid.

A., *B.* and *C.* having delivered bills to *D.* for a specific purpose, the assignees, under a commission of *bankrupt* against *A.* and *B.*, bring an action against *D.* for the proceeds; *D.* cannot set off a debt due from *A.*, *B.* and *C.* *Staniforth* v. *Fellows*, 1 Marsh. 184.

A judgment is pleadable by way of set-off, although a writ of error be pending. *Reynold* v. *Beerling*, cited 3 T. R. 188. And see 2 H. B. 372.

As to set-off in actions brought by assignees of a *bankrupt*, vide *supra*, 177.

B., a creditor of *A.*, after his (*A.*'s) bankruptcy, but before his certificate, buys goods of him; he cannot, to an action brought by *A.* after his certificate, set off the debt, for it was bound by the certificate. *Hayler* v. *Sherwood*, 2 N. & M. 401. In an action by a trustee to recover a debt due to the *cestui que trust*, the defendant cannot set off a debt due to him from the latter. *Tucker* v. *Tucker*, 1 N. & M. 477.

Where the defendant had sustained a loss by means of *A.* *B.*, which was fixed at 1,900*l.*, and *A.* *B.* engaged that he would, for the space of four years, recommend certain parcels of cotton to the defendant, which he should purchase by notes at three months date, and engaged, at the expiration of four years, to pay him that sum if the profits did not amount to so much, and *A.* *B.* became bankrupt, it was held that such sum could not be set off against the assignees. *Haucock* v. *Entwisle*, 3 T. R. 435

A., before his bankruptcy, deposits a bill with *B.* to raise money, and *B.* advances money to *A.* on the credit of the bill. *B.* has not a lien on the bill for the general account, but only for so much as he has advanced on the particular bill. *Key* v. *Flint*, 1 Moore, 451.

Where *A.* purchased of *B.* two parcels of goods at different times, and to be paid for at different times, and when the first became due, *A.* lodged in *B.*'s hands a bill of exchange for a larger amount than the first parcel, *B.* engaging to return the overplus when the bill should be paid, and *B.* received the amount of the bill, and then *A.* became a bankrupt, it was held, that in an action by *A.*'s assignees for the surplus of the bill, *B.* might retain it to satisfy the demand of *B.* for the second parcel of goods. *Atkinson* v. *Elliott*, 7 T. R. 378.

Where a creditor of the bankrupt purchases goods from the bankrupt after an act of bankruptcy, but more than two months before the commission, he is entitled (since the 46 Geo. 3, c. 101, s. 3)

Notice. By the rules of Hil. Term, 4 W. 4, a set-off must be pleaded (*d*).

A set-off being pleaded, the plaintiff need not prove the whole of his debt to set off the debt due to him in an action by the assignees for the value of the goods. *Southcood* v. *Taylor*, 1 B. & A. 471.

Goods are pledged to secure a debt, part of which is paid before act of bankruptcy; after an act of bankruptcy fresh advances are made; this is not a case of mutual credit within the statute of 5 Geo. 2, c. 30, s. 28. The statute is confined to demands on such credits only as will in their nature terminate in a debt. *Rose* v. *Hart*, 2 Moore, 547; 8 Taunt. 499.

A guaranty against contingent damages is not within the statute. *Sampson* v. *Burton*, 2 B. & B. 89.

Where the *executors* of an underwriter sue a broker for premiums, the defendant cannot set off returns of premium which became due after the testator's death. *Houston* v. *Robertson*, 4 Camp. 342.

Where *A.* being appointed by *B.* to receive his rents, after the death of *B.* received money due to him in his lifetime, it was held, that *A.* could not set off against the executrix of *B.*, who brought an action for this debt in her own name, a debt due to him from the testator; for the testator himself never had any cause of action against the defendant. B. N. P. 180. *Shipman* v. *Thompson*, C. B. 11 Geo. 3. Willes, 103. So it is where the plaintiff declares as *executor*, the cause of action having arisen after the death of the testator. *Kilvington* v. *Stevenson*, Selw. N. P. 145.

A debt due to a man *in right of his wife* cannot be set off in an action against him on his own bond. B. N. P. 179. *Paynter* v. *Walker*, East, 4 Geo. 3. *Cooke* v. *Dixon*, B. R. 1735.

A debt due from the wife *dum sola*, cannot be set off in an action brought by the husband alone. *Wood* v. *Akers*, 2 Esp. C. 594; unless the husband has made himself individually liable. Ibid.

So, where the husband sues alone on a promissory note given to the wife. *Burrough* v. *Moss*, 10 B. & C. 558.

A defendant sued for his own debt, may set off a debt due to him as surviving *partner*. *Slipper* v. *Stidstone*, 5 Tr. 493. *French* v. *Andrade*, 6 Tr. 582; and see *Smith* v. *Barrow*, 2 T. R. 478.

In an action brought by an ostensible and dormant partner, the defendant may set off a debt due from the ostensible partner alone. *Hay & another* v. *Dicey*, 2 Esp. C. 469, n. cor. Kenyon, C. J.; and vide tit. PARTNER; and *France* v. *White*, 6 Bing. N. C. 33.

A. and *B.* indorse a note to *B.* given them by *C.*; in an action by *B.* (who carries on trade separately) as indorsee against *C.*, the latter may set off a debt due from *A.* and *B.* *Puller & others* v. *Roe & others*, Peake's C. 197, cor. Kenyon, C. J. See *Exparte Harrow*, 12 Ves. 346. *Exparte Stephens*, 11 Ves. 27. *Exparte Twogood*, ib. 517; and *Fair* v. *M'Iver*, 16 East, 130.

The different situations in which the buyer and seller, and their factor or broker, are placed in relation to each other, afford frequent discussions as to the right of set-off, especially where the bankruptcy of one of the parties has intervened. The great principle upon which many of these cases turn, is this, that where the name of the principal is disclosed, the principal vendor and vendee are the creditor and

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(*d*) *Braham* v. *Partridge*, 1 M. & W. 395. *Dendy* v. *Powell*, 3 M. & W. 442; see tit. RULES. In an action for the balance of an account, 36*l.* 2*s.* 4*d*, the defendant pleaded *inter alia* a set-off and payment into court of 5*s.*, which was taken out of court, and the jury gave a verdict for 35*l.* 17*s.* 4*d.*, which, with the 5*s.*, made up the amount claimed by the plaintiff's particulars of demand, but they found also that the defendant had paid a sum of 29*l.* 17*s.* 3*d.*, and had a set-off to the amount of 16*l.* 10*s.* 7*d.*, it was held that the pleas being severally pleaded to the whole, not covering the whole demand established in evidence, the defendant was not entitled to have the verdict entered for him. *Kilner* v. *Bailey*, 5 Mees. & W. 382, & 7 Dowl. 803. Where the nature of the employment, transaction or dealing constitutes an account, consisting of receipts, payments, debts and credits; the *balance* only is the debt. See *Green* v. *Farmer*, 4 Burr. 2221. Where *A.* took possession of a house on the 2d of June, and on a sum of money becoming due on the 24th for ground-rent paid it, he was held to be entitled to deduct the payment in an action for mesne profits. *Doe* v. *Hare*, 2 C. & M. 145.

A party not being bound to plead a set-off to an action brought by assignees of a bankrupt, may plead tender as to part, and give in evidence the set-off as to the residue. *Wells* v. *Croft*, 4 C. & P. 332.

Where a set-off is pleaded, a plaintiff can only avail himself of the statute of Limitations by replying to it specially. *Chapple* v. *Durston*, 1 B. & C. 1.

See as to set-off on a bond, *Penny* v. *Foy*, 8 B. & C. 11.

Upon an agreement to deliver a specific quantity of bark, part only is delivered, which is not returned; the value of this may be set off. *Shipton* v. *Casson*, 5 B. & C. 378. The provisions of the stat. 9 G. 4, c. 14, s. 4, and of the stat. 21 J. 1, c. 16, are applicable to any debt by simple contract, alleged by way of set-off.

in the first instance, but only the balance; and on the defendant's proving a set-off, may then prove other parts of his account to cover it (*e*). Where the plaintiff proved a claim on a special count *in assumpsit*, to a larger amount than the balance claimed, the declaration containing a count on an account stated, and the defendant having pleaded part-payment and a set-off, the plaintiff took a verdict for the balance, with an indorsement on the *postea* that the two other sums were allowed to the defendant (*f*). Notice.

Where the parties had expressly agreed that a particular question should be tried between them, the Court refused to allow the defendant an advantage of a set-off which it was the intention of both he should not have (*g*).

Whether the set-off be pleaded, or notice be given, the defendant must prove his demand as if he were plaintiff.

The proof of the set-off must, of course, correspond with the plea or notice of set-off. Nearly the same degree of certainty in the notice and proof seems to be necessary, as if the defendant had brought his action for the subject-matter of the set-off (*h*). Under the set-off for money paid to the Variance.

debtor, although the agent in selling acted under a *del credere* commission.

If a *factor* under a *del credere* commission, sell goods as his own, and the buyer *know nothing* of the principal, the buyer may set off any demand which he may have on the factor against a demand for the goods made by the principal. *George* v. *Claggett*, 7 T. R. 359. *Rabone* v. *Williams*, 7 T. R. 360, n. *Carr* v. *Hinchcliff*, 4 B. & C. 547. An auctioneer permits goods, sold by him, to be taken away by the purchaser, after an intimation of the purchaser's claim against the principal; the purchaser may set off his claim in an action brought by the auctioneer; *secus*, if the goods had been sold in his own name, or if he had had a lien upon them. *Jarris* v. *Chapple*, 2 Chitt. 57. But a *broker*, in selling goods without disclosing the name of his principal, acts beyond the scope of his authority, and the buyer cannot set off the debt from the broker. *Baring* v. *Corrie*, 2 B. & A. 137.

Where a *broker* sold goods to *Smith & Co.* on a commission *del credere*, from *Mesurier*, and re-sold the goods by direction of *Smith & Co.*, and afterwards disclosed the name of his principal to *Smith & Co.*, and after the expiration of the credit to *Smith & Co.* paid the proceeds to *Mesurier*, it was held that the broker could not in an action by the assignees of *Smith & Co.*, who became bankrupts, set off the payment to *Mesurier*. *Morris* v. *Cleasby*, 4 M. & S. 566. For the defendant having sold to *Smith & Co.*, as broker, and having disclosed the name of his principal to *Smith & Co.* before the relative rights and situation of the parties were altered, it was the same thing as if the disclosure had taken place at the time of the sale. Ib. And see *Gurney* v. *Sharpe*, 4 Taunt. 242. *Cumming* v. *Forrester*, 1 M. & S. 495. *Koster* v. *Eason*, 2 M. & S. 112. *Moore* v. *Clementson*, 2 Camp. 22. *Warner* v. *M'Kay*, 1 M. & W. 591. The case of *Grove* v. *Dubois*, 1 T. R. 112, is distinguishable from that of *Morris* v. *Cleasby* in this respect, that, in the latter, the name of the principal was disclosed before any transaction on which the defendant's claim was founded took place. See also *Morris* v. *Cleasby*, 1 M. & S. 576; where, under the same circumstances as in *Morris* v. *Cleasby*, 4 M. & S. 566, except that it was doubtful whether the defendant had disclosed the name of his principal before or after the payment to *Mesurier*, the Court granted a new trial, in order to ascertain the fact. But if the factor has a lien upon the goods, the vendee cannot set off a debt due to him from the principal, although the name of the principal be disclosed at the time of sale. *Atkyns* v. *Amber*, 2 Esp. C. 493.

By the stat. 8 G. 2, c. 24, mutual debts may be set off against each other, notwithstanding such debts are of a different nature, unless where either of the debts shall accrue by reason of a penalty contained in any bond or specialty; and in all such cases the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side; and in case the plaintiff shall recover, judgment shall be entered for no more than is justly due, after setting one debt against the other. In an action on a bond, the defendant in his plea of set-off must show what is really due on the bond, and the averment is traversable. *Symmonds* v. *Knox*, 3 T. R. 65. *Grimwood* v. *Barritt*, 6 T. R. 460.

(*e*) *Williams* v. *Davies*, 1 C. & M. 464.

(*f*) *Bult* v. *Burke*, 7 C. & P. 806.

(*g*) *Gould* v. *Oliver*, 6 Sc. 648.

(*h*) B. N. P. 179. Where it is said, that under a notice of set-off for use and occupation, the defendant cannot set off rent reserved by indenture of lease. *Fowler* v. *Jones*, Sitt. at West. Hil. 8 G. 2.

Variance.

plaintiff's use, the defendant may prove that he has paid bills of exchange and promissory notes for the plaintiff at his request (*i*). And under a set-off for money had and received to the use of the defendant, the payment of bills by the defendant to the plaintiff is presumptive evidence to prove the set-off, without actual proof that the amount has been received by the plaintiff (*j*).

Against assignees of a bankrupt.

Where the defendant sets off, against the assignees of a bankrupt, notes payable to the bearer, issued by the bankrupt, and bearing date before the bankruptcy, he must prove further that the notes came into his hands before the bankruptcy (*k*); but it was held, that if the notes had been made payable to the defendant himself, the date would have been reasonable evidence of their having come to his hands at the time of the date (*l*).

Proof that notes to the amount of the set-off came into the hands of the defendant three or four weeks before the bankruptcy, was held to be evidence for the consideration of the jury, to show that those were the notes produced in support of the set-off (*m*).

Where the defendant, in such a case, sets off the bankrupt's acceptances given in exchange for his own, he must prove either that the obligation on himself to pay the bills, in respect of which the acceptances were given, subsisted before the bankruptcy, or that there was a mutual credit created in the origin of the bills (*n*).

Answer to set-off.

It may be shown by the assignees, in answer to a claim of set-off on a bill of exchange, that it was indorsed by a third person to the defendants, as a mode of covering the amount of a bill: for the defendants do not hold such bill in their own right, but, in effect, for the indorser (*o*).

Stat. of Limitations.

Where the set-off is not pleaded, the plaintiff may insist on the Statute of Limitations at the trial; for he had no opportunity of pleading it.

It seems to have been considered, that where a set-off is pleaded, the plaintiff, in order to avail himself of the statute, must reply it specially (*p*). This, if it be law, imposes a great hardship on the plaintiff; for as he cannot reply more than one matter, he is placed in a worse situation than the defendant, who can plead the statute, and also insist upon other defences. It seems to be highly unreasonable that, in one and the same action, the defendant should be indulged in making several distinct answers to the plaintiff's claim, and yet that the plaintiff, in his answer to a counter-claim on the part of the defendant, should be confined to one answer. At all events, where the debt attempted to be set off is of long standing, the jury may presume satisfaction from lapse of time and other circumstances (*q*).

(*i*) *Fletcher* v. *Lee*, cor. Ld. Ellenborough, C. J. Sitt. after Mich. Term, 1817.

(*j*) *Hebden* v. *Hartsink*, 4 Esp. 46. It has been said, that under a set-off for money had and received, the defendant, who seeks to recover for an over-payment, will not be allowed to take the plaintiff by surprise, by giving it in evidence under this set-off. *Hampton* v. *Jarratt*, 2 Esp. 560, cor. Eyre, C. J.; *sed quære*; for the plaintiff might have had a bill of particulars.

(*k*) *Dickson* v. *Evans*, 6 T. R. 57.

(*l*) Ibid.

(*m*) *Moore* v. *Wright*, 2 Marsh. 209.

(*n*) *Ouchterlony* v. *Easterby*, 4 Taunt. 888.

(*o*) *Fair* v. *M'Iver*, 16 East, 130.

(*p*) B. N. P. 180, where it is said, that if a debt barred by the statute be pleaded, the plaintiff *may* reply the statute. If it be given in evidence on notice, it may be objected to at the trial. *Remington* v. *Stevens*, Stra. 1271. S. P. And see 1 Starkie's C. 343. The plaintiff may plead that he has been taken in execution on the judgment attempted to be set-off. *Taylor* v. *Waters*, 5 M. & S. 103.

(*q*) *Cooper* v. *Turner*, 2 Starkie's C. 497.

Stat. of Limitations.

It has, however, been decided that the plaintiff must reply the statute, if he mean to insist upon it (*r*).

The plaintiff cannot, after receiving the defendant's particulars of set-off, and keeping them, object at the trial that they were not delivered within the time directed by the Judge's order; he ought, it seems, to apply to the Court (*s*).

An allegation of an agreement to set off a specific joint debt against specific separate debts previously accrued, is proved by evidence of an agreement prior to the debts accruing, to set off all joint debts that should thereafter arise against all separate debts that should thereafter arise (*t*).

In *assumpsit* for goods sold and delivered, it is no answer to the defendant's plea, or proof of set-off after notice, that it was agreed that the goods should be paid for in ready money (*u*); or, that the defendant brought an action to recover the same debt before the plaintiff's cause of action accrued (*x*); or, that the defendant has, at the same sittings, recovered a verdict for his debt (*y*); or, that the plaintiff being indebted to the defendant, the defendant borrowed money under an express promise to repay it (*z*).

Effect of.

The plaintiff cannot use a notice of set-off as evidence of the debt, under the issue of *non-assumpsit*, for the notice is in the nature of a plea, and one plea cannot be used as evidence to prove a fact denied in another plea (*a*); neither can a particular of set-off be used for this purpose, for it is incorporated with the plea (*b*).

An item of admission in a set-off does not supersede the necessity of proof of that item by the plaintiff (*c*).

If the set-off exceed the original demand, an action lies for the surplus (*d*).

A defendant is not, in any case, bound to set off his cross-demand, although the action be brought to recover the balance of an account (*e*). But if he does not set it off, and makes default at the trial, the plaintiff may, it seems, either take a verdict for the whole sum, subject to a reduction in case the defendant will enter into a rule to bring no action for the set-off, or for the balance, with a special indorsement on the *postea*. And this indorsement will, it seems, be a ground for staying the proceedings, if a cross-action be brought (*f*).

Where a verdict was given against the plea of set-off, and the defendant afterwards brought an action for such cause of action; it was held, that he was estopped from suing for the same demand. And a plea stating the former action, and that the second action was for recovery of the iden-

(*r*) *Chapple* v. *Durston*, 1 C. & J. 1. A replication of the stat. to a plea of a promissory note indorsed by the administrator of the payee to the defendant, admits the making and indorsement of the note. *Gale* v. *Capron*, 1 Ad. and Ell. 102.

(*s*) *Lovelock* v. *Cherely*, Holt's C. 552.

(*t*) *Kinnerley* v. *Hossack*, 2 Taunt. 170.

(*u*) *Eland* v. *Kerr*, 1 East, 375. *Cornforth* v. *Rivett*, 2 M. & S. 510. But in estimating the plaintiff's damages, the jury it seems should take into consideration the loss sustained from non-payment in ready-money. Ibid. Note that payment was made to the vendor's brother in a dishonoured bill of the former, which was taken in payment, and not returned; it was held, on action brought by the assignees of the vendor, that in the absence of any evidence of fraud, it was to be taken as a good payment.

(*x*) *Knibbs* v. *Hall*, Peake's C. 210.

(*y*) *Baskerville* v. *Brown*, Tr. 1 G. 3, K. B. Sitt.; B. N. P. 180. *Evans* v. *Prosser*, 3 T. R. 186.

(*z*) *Lechmere* v. *Hawkins*, 2 Esp. C. 626. *Taylor* v. *Okey*, 13 Ves. 180. *Eland* v. *Carr*, 1 East, 375

(*a*) *Harrington* v. *Macmorris*, 5 Taunt. 282.

(*b*) Ibid.

(*c*) *Miller* v. *Johnson*, 2 Esp. C. 602.

(*d*) *Hennel* v. *Fairlam*, 3 Esp. C. 104.

(*e*) *Laing* v. *Chatham*, 1 Camp. 252; 1 Chitty, 178, n.

(*f*) Ibid.

tical claim specified in that set-off, is not answered by a replication that no evidence was offered to substantiate the plea of set-off (*g*).

SETTLEMENT.

Birth and derivative settlements.

Proof that a party was born in a particular parish is *primâ facie* evidence of a settlement there (*h*). But it has been held, that the declarations of deceased parents are not evidence as to the place of birth (*i*). And proof that the father, grandfather, or any other male ancestor of the pauper, was settled in the parish, is *primâ facie* evidence of the settlement of the pauper there—the settlement being transmitted from father to son until a new settlement is gained.

If the settlement of the father cannot be ascertained, proof of that of the mother will also be *primâ facie* evidence of that of the pauper: for if the father had no settlement, a child would take that of his mother (*k*).

If a derivative settlement be relied on, the relationship must of course be proved in the usual manner (*l*).

Presumptive evidence of marriage, by proof of cohabitation, reputation, &c. is sufficient (*m*).

It has been said that the fact that the pauper, when he was four years of age, was within the parish of *A.*, is no evidence of a settlement there, though no evidence be given to show a settlement elsewhere (*n*).

A bastard can gain no settlement by parentage (*o*).

Hiring and service.

The evidence to prove a hiring and service is either, 1st, Direct; or, 2dly, Indirect. 1st. Where there has been any contract (*p*) between the parties, whether written or oral, capable of proof, it must be proved; what passed at the time of hiring is the best evidence to prove the nature of the contract; and resort ought not to be had to presumptive evidence where direct evidence of this nature is attainable. If the terms of the contract be proved, and the effect of that contract be doubtful, the question is a pure question of law (*q*), which if it involve real difficulty, may properly be re-

(*g*) *Eastmure* v. *Laws*, 5 Bing. N. C. 444; and 7 Dowling, (P. C.) 431.

(*h*) *R.* v. *Heaton Norris*, 6 T. R. 653. *R.* v. *Whixley*, 2 Const, 14. The fact of a pauper remembering himself when four years of age in the parish of *A.*, is no evidence that he was born there. *R.* v. *Trowbridge Inh.*, 7 B. & C. 252.

Where the pauper, a bastard, was born in *Z.* during a wrongful removal of the mother from *S.*; held, that the latter was clearly in law its place of settlement, and the Court would not draw any presumption from a 40 years' relief by the mother's parish, where the child had followed her during nurture, and afterwards continued, the court of sessions not having so done. *R.* v. *Great Salkeld*, 6 M. & S. 408.

(*i*) 8 East, 530; B. N. P. 294.

(*k*) *Cripplegate* v. *St. Saviour's*, 4 Burn. 210, 23d edit.; 2 Bott. 13.

(*l*) See tit. Pedigree.—Bastardy.

(*m*) *R.* v. *Cliviger*, 2 T. R. 263. *R.* v. *Stockland*, Nolan's P. L. 217, 1st edit.

(*n*) *R.* v. *Inhabitants of Trowbridge*, 7 B. & C. 252. Note, that the appeal was against an order of removal to that parish, and the justices at sessions quashed the order; but *qu.* whether, though they were not bound to act upon that evidence, they might not have acted on it. Ld. Holt, in *Duke of Banbury* v. *Broughton*, Comb. 364, held that, where a child is first known to be, that parish must provide for it till it find another.

(*o*) *R.* v. *Marthsham*, 10 B. & C. 77.

(*p*) To constitute a contract, the party hired must be *sui juris*; and therefore a local militia man, liable to be called out, cannot make an absolute contract for a year. *R.* v. *Taunton St. James*, 9 B. & C. 831. A stipulation that the party hired shall comply with the regulations of the factory in which he is to be employed, which regulations are occasionally varied, is not an exception. *R.* v. *St. John, Devizes*, 9 B. & C. 896. *Secus*, where the engagement is to work during specified hours, with liberty to make over-work. *R.* v. *Birmingham*, 9 B. & C. 925.

(*q*) If there be anything in the contract to show that the hiring was intended to be for a year, a reservation of weekly wages cannot control that hiring; but if the

served for the consideration of the Court above. If it expressly appear that the hiring was a general one, without any stipulation as to time, the law will infer a yearly hiring, unless something appear to raise a presumption to the contrary (*r*). And it has been held by the Court of King's Bench, that the circumstance that the servant quitted before the end of the current year, is not sufficient to rebut the presumption of a yearly hiring from an indefinite hiring (*s*). Neither will the apprehension and understanding of the pauper on the subject make any difference (*t*). Evidence of conversations and subsequent dealings between the master and servant, on the subject of the contract, cotemporary with the service, is admissible, in order to control the presumption (*u*). But although, as a mere presumption of law, the Court above will infer a yearly from an indefinite hiring, yet, where there are any circumstances in the case which tend to a contrary conclusion, it is the duty of the Court below either to find or to negative the fact of a Hiring.

payment of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be only a weekly hiring. Per Buller, J. *R.* v. *Newton Toney*, 2 T. R. 453; 2 Bott. 223. *R.* v. *Odiham*, 2 T. R. 622. *R.* v. *Pucklechurch*, 5 East, 382. The presumption of a weekly hiring is rebutted by evidence of a stipulation for a month's notice to quit. *R.* v. *Hampreston*, 5 T. R. 205. A hiring for a year, determinable within the year by matter subsequent, is nevertheless a good hiring for a year within the statute; and service under it for a less period than a year, may be connected with previous service under a hiring for a less period than a year. *R.* v. *Farleigh Wallop*, 1 B. & Ad. 336. Upon an agreement by the pauper to work in a factory for four years, and "in all things to observe and obey all the rules and regulations of the master, as well with regard to the hours of attendance and of work, as the mode and particulars of working;" after executing which she was told by the foreman that she must observe the working hours, and if certain work was not done must work twelve hours a day; held, that what passed between the pauper and the foreman was inadmissible to explain the agreement, and that the stipulation in the contract to obey the rules, &c., amounted to no more than a contract to obey the orders of the master, and was no exception to the agreement. *R.* v. *St. John, Devizes*, 9 B. & C. 896. Where the hiring of the pauper was at first by the week, and continued for eight months, after which the nature of the employment and mode of payment varied, and the pauper continued to serve for several years, held, that whether there was a general hiring, or an express hiring for a year, was a question entirely for the sessions, and the case was therefore sent back. *R.* v. *Road*, 1 B. & Ad. 362. So where on a hiring in the terms "let him stop what time he would, he, the master, would give him satisfaction, if not in money, in clothes," and the sessions found, as a fact, that there was no general hiring, the Court refused to disturb the finding, it being a question of fact to be decided by them. *R.* v. *Rosliston*, 8 B. & C. 668. So where the pauper was told he might stay a fortnight, until another came, but who was not engaged, and the pauper stayed for three years and a quarter, and then hired himself at another place without consulting his master, who afterwards, on being told of his going, only said "that if it was his mind to go he believed he must," and the sessions found that there was an implied hiring for a year, the Court refused to disturb the decision. *R.* v. *St. Martin, Leicester*, 8 B. & C. 674. And see *R.* v. *Pendleton*, 15 East, 449. *Sicus*, where there are no premises whatever to warrant the finding of the sessions; as where the hiring was "at so much per week, and a month's wages or a month's warning;" it being manifestly intended that the service should continue for a longer period than a week, and therefore a hiring unlimited in duration, from which the law implies a hiring for a year, the Court held, that there were no premises to warrant the sessions in deciding that there was not a yearly hiring, and quashed the order. *R.* v. *St. Andrews, Pershore*, 8 B. & C. 679.

(*r*) *R.* v. *Wincanton*, 2 Burr. S. C. 299; 4 Burn. 276. 23d edit. *R.* v. *Berwick St. John*, Burr. S. C. 502; Burn's J. 276. *R.* v. *Worfield*, 5 T. R. 506; 1 Inst. 426. *R.* v. *Bath Easton*, Burr. S. C. 823. *R.* v. *Macclesfield*, 3 T. R. 76. But the sessions ought to draw the conclusion; *infra*, 1001, note (*k*).

(*s*) *R.* v. *Worfield*, 5 T. R. 506.

(*t*) *King's Norton* v. *Camden*, 2 Str. 1139. *R.* v. *Seaton and Beer*, Cald. 440; 4 Burn. 279. *R.* v. *Astley*, ibid. *R.* v. *Wincaunton*, 4 Burn. 276; Burr. S. C. 299.

(*u*) *R.* v. *Dedham*, Burr. S. C. 653. *R.* v. *St. Matthew's, Ipswich*, 3 T. R. 449. D. of Buller, J. in *R.* v. *Seaton and Beer*, 4 Burn. 279.

Hiring.

yearly hiring (*v*). And in such case the Court will not disturb the finding of the sessions. The contract of hiring being lost, the pauper may be asked whether it was not founded in part upon her agreeing to cohabit with her master; as it is necessary to ascertain the nature of the contract, whether void in part or in *toto* (*x*).

If a father make a contract for his son, and the son adopt it by serving under it, it is the contract of the son, by his ratification of the contract so made (*y*).

Where it is doubtful whether the parties intended a contract of hiring and service, or a contract of apprenticeship, parol evidence, as has been seen, is admissible to show the real intention, although a written contract has been entered into (*z*).

Fraud.

And, in general, evidence of fraud is admissible in opposition to the express and colourable terms of the contract, as to show that the parties really contracted for a year's service, although, in order to prevent a settlement, they also colourably contracted for a shorter period. But there is no fraud in contracting for a period less than a year, although in order to prevent a settlement (*a*).

Fraud exists in those cases only where the parties actually contract for a year or more, but ostensibly contract for a shorter period, so as to secure the benefit of a contract for a year, or of longer duration, with intent to evade the legal consequences of their act (*b*). The same observation is applicable where less than the true consideration is expressed in a deed as the purchase-money to be paid for an estate (*c*).

Hiring, presumptive evidence of.

If direct evidence as to the terms of the actual contract cannot be procured, they may be presumed from the acts and conduct of the parties. Thus, in general, a hiring for a year may be inferred from a service for a year (*d*), especially if the presumption be confirmed by the conduct of the parties in relation to that service. And it seems that all acts, and even declarations, made by the parties, contemporary with the service and connected with it, and explanatory of the terms on which they contracted, would be evidence for this purpose (*e*); but that mere naked assertions, made subsequently to the service, and unconnected with it, would be inadmissible. The presumption of a yearly hiring from a service for a year, is one of law and fact (*f*): that is, the court of quarter sessions ought to draw the conclusion from such evidence standing uncontradicted. But if the Court below does not find a yearly hiring from such evidence, the Court above cannot infer one (*g*). And, in general, where the evidence of a on-

(*v*) See Ld. Kenyon's observations in the preceding case.

(*x*) *R.* v. *Northwingfield*, 1 B. &. Ad. 912.

(*y*) *R.* v. *Burbach*, 1 M. & S. 370.

(*z*) *Supra*, tit. PAROL EVIDENCE. A contract to teach a servant does not necessarily exclude a contract of hiring and service. *R.* v. *Burbach*, 1 M. & S. 370. Provided the relation of master and servant otherwise existed. *Secus*, where the contract is merely to teach for a year. *R.* v. *Kidwelly*, 2 B. & C. 750. Where the inference is to be made from the contract itself, the Court will collect the intention of the parties from the whole tenor of the instrument. *R.* v. *Tipton*, 9 B. & C. 888.

(*a*) *R.* v. *Haughton*, 1 Str. 83.

(*b*) *R.* v. *Mursley*, 1 T. R. 694.

(*c*) *Supra*, 791.

(*d*) *R.* v. *Lyth*, 5 T. R. 327. *R.* v. *Hales*, 5 T. R. 668. *Saint James's in Poole* v. *Holy Trinity in Wareham*, Cald. 141. *R.* v. *Hampreston* 5 T. R. 205.

(*e*) *Wincanton* v. *Crediton*, B. S. C. 299. *Wandsworth* v. *Putney*, 2 Bott. 194; *supra*, 999 (*u*).

(*f*) See tit. PRESUMPTION.

(*g*) Per Ld. Kenyon, *R.* v. *Lyth*, 5 T. R. 327. *R.* v. *Hales*, 5 T. R. 668.

tract is merely presumptive, the Court below must draw the inference, either finding or negativing a contract for a year (*h*). Hiring, presumptive evidence of.

The justices below may infer a hiring for a year, from continuance of service, although the original contract was for less than a year (*i*).

So if there be evidence tending to prove a dispensation with the service, the justices below ought to find whether, in fact, there was a dispensation or not; and if they find a dispensation, and there be evidence tending to prove it, the Court above will not interfere (*k*), although the Court above would have formed a different opinion upon the facts stated.

The fact that the master paid the whole year's wages at the end of the year, is *primâ facie* evidence that the party served for the year (*l*). Service.

To prove a settlement under an apprenticeship, the deed of apprenticeship must, of course, be proved in the usual way (*m*), properly stamped (*n*). But it is sufficient to prove that it was executed by the apprentice, without proving the execution by the master (*o*). In the case of a parish apprentice, as well as in any other (*p*), where the pauper was bound as a *parish* apprentice, and the deed was executed by all but the apprentice, who served five months under the indentures, it was held to be a sufficient assent on the part of the apprentice (*q*). Apprenticeship.

By the stat. 43 Eliz. c. 2, s. 5, parish apprentices are to be bound by the greater part of the churchwardens and overseers. Where one of the two overseers was also sole churchwarden, and the indentures were executed by the two overseers, the binding was held to be insufficient (*r*). But by the stat. 51 G. 3, c. 80, such indentures which have been or shall be executed and signed by two persons only, acting or purporting to act in the capacity of churchwardens as well as of overseers, shall be valid. It was held, under this statute, that where there were three officers in the parish, one of whom acted as churchwarden as well as overseer, a binding by that person, and one of the others who acted as overseer, was sufficient (*s*).

(*h*) *R.* v. *Inhabitants of Seacroft*, 2 M. & S. 472. *R.* v. *Inhabitants of Tyrley*, 4 B. & A. 624. See tit. LAW AND FACT, Vol. I.

(*i*) *R.* v. *Long Whatton*, 5 T. R. 447; where the original agreement was for service from March to Michaelmas, but the service continued for three years. See also *R.* v. *Hales*, 5 T. R. 668. But see *R.* v. *Ardington*, 2 A. & E. 260, where the Court quashed the order of sessions, the Court below having implied a yearly hiring from premises which did not warrant the conclusion. But note that the evidence negatived the conclusion of a yearly hiring being on same terms as before, *i. e.* for a gross sum for a term less than a year.

(*k*) *R.* v. *Inhabitants of Tyrley*, 4 B. & A. 624. Where the hiring was from the 13th of May 1819 to the 13th of May 1820, the latter year being leap-year, and a service till the 12th of May 1820, *viz.* 365 days, it was held by the sessions to be insufficient, and per Ld. Tenterden, "whether there was a dissolution or dispensation was for the sessions to decide. I should not be disposed to interfere with their judgment if I thought it wrong, which I do not." Note, the statute 24 G. 2, c. 23, s. 2, enacts that leap-year shall consist of 366 days. But where the inference is one of mere law, arising upon the facts stated, the Court above is not bound by the conclusion drawn by the justices at sessions. *R.* v. *Whittlebury*, 6 T. R. 464.

(*l*) *Milwich* v. *Creyton*, Burr. S. C. 433.

(*m*) *Supra*, Vol. I. tit. DEED. A binding by deed is sufficient, though it be not indented. 31 G. 3, c. 11.

(*n*) *Infra*, tit. STAMP.

(*o*) *R.* v. *St. Peter's on the Hill*, 14 G. 2; 2 Bott. 367. *R.* v. *Ribchester*, 2 M. & S. 135. But in general the apprentice, though an infant, must be a party. *R.* v. *Cromford*, 8 East, 25. *R.* v. *Chesterfield*, 2 Salk. 479. So, if he be an adult. *R.* v. *Ripon*, 9 East, 295.

(*p*) Ibid. and *R.* v. *Fleet*, 17 G. 3; 2 Bott. 371.

(*q*) *R.* v. *St. Nicholas in Nottingham*, 2 T. R. 726.

(*r*) *R.* v. *All Saints, Derby*, 13 East, 143.

(*s*) *R.* v. *St. Margaret, Leicester*, 2 B. & A. 209. See the stat. 56 G. 3, c. 139, as to parish apprentices. Where the apprentice is bound to a master residing within an exclusive jurisdiction, notice to the overseers

Apprentice.

By the stat. 54 Geo. 3, c. 107, it is sufficient that such indentures be executed by the overseers of a township, hamlet, or chapelry, and the person or persons acting as churchwardens or chapelwardens for such township, hamlet, or chapelry, provided such person or persons shall have been duly sworn into the office of churchwarden of the parish in which such township, hamlet, or chapelry is contained, or into the office of churchwarden or chapelwarden of such township, hamlet, or chapelry. And by sect. 2 of the same statute, indentures executed by the overseers and by the churchwardens, &c. or chapelwardens, &c. acting for or appointed in respect of any township, hamlet, chapelry, or place, or the major part of them, shall be valid.

The assent of two justices under the stat. of Eliz. c. 43, must be proved in writing (*t*); and as this act is a judicial one, a separate signing, without mutual conference, is insufficient (*u*). But it is sufficient that one sign alone, and that, after meeting on the subject, the other signs in his presence (*x*).

It is sufficient to prove that the justices who assented acted as justices for the county at the time.

Where the respondents, in order to vacate an indenture of apprenticeship, by proof that one overseer only had been appointed, gave notice to the appellants to produce all papers and writings in their custody and power, and the appellants produced one book, which was the only one in existence, and the parish officer who produced it proved that no appointments were kept by the parish, it was held that the respondents could not inquire of a witness whether, in that year, there had been one or more overseers, without proof that the parish had the actual custody of the appointment; for the overseer himself has the legal custody of his appointment, which he keeps for his own justification; and no notice had been given to him to produce his appointment; recourse could not therefore be had to secondary evidence, before the means of obtaining primary evidence had been exhausted (*y*).

Proof of assent.

In order to render a service under another person than the original master effectual for the purpose of gaining a settlement, evidence is necessary of an express consent by the master to such service (*z*); the mere knowledge, on the part of the master, that the apprentice served another, is insufficient (*a*); and so is a general consent to the apprentice to work where he will (*b*).

Where the evidence of assent is circumstantial, it is for the sessions to draw the conclusion (*c*).

of the poor of the parish within which the apprentice is bound, is essential. *R.* v. *Newark*, 3 B. & C. 59. Abbott, L. C. J. *dissentiente*. The signature by two justices under sec. 1, need not be under seal. *Secus*, under the 11th sec. where the overseers are not parties. *R.* v. *St. Paul, Exeter*, 10 B. & C. 12; and see also 1 & 2 G. 4, c. 32, and *R.* v. *Shipton*, 8 B. & C. 88, as to the allowance of the indenture, where the apprentice is bound to a master resident in another county.

(*t*) *R.* v. *Saltern*, 1 Bott. 613; 4 Burn. 383.

(*u*) *R.* v. *Hamstall Ridgware*, 3 T. R. 380.

(*x*) *R.* v. *Winwick*, 8 T. R. 455.

(*y*) Per Ld. Ellenborough, *R.* v. *Stoke Golding*, 1 B. & A. 173.

(*z*) *R.* v. *Holy Trinity in the Minories*, 8 T. R. 605. *R.* v. *Crediton*, 1 East, 59. *R.* v. *Inhabitants of Ashby-de-la-Zouch*, 1 B. & A. 116. *R.* v. *Shebbear*, 1 East, 73. See *R.* v. *Burslem*, 3 P. & D. 38.

(*a*) *R.* v. *Ideford*, Burr. S. C. 821; 4 Burn. 417.

(*b*) *R.* v. *St. Luke, Middlesex*, 1 Bl. 553; Burr. S. C. 542. *R.* v. *Inhabitants of Bow*, 4 M. & S. 383. *R.* v. *St. Helen, Stonegate*, 1 East, 285.

(*c*) *R.* v. *Crediton*, 1 East, 59. *R.* v. *Inhabitants of Ashby-de-la-Zouch*, 1 B. & A. 116. *R.* v. *Inhabitants of Whitechurch*, 1 B. & C. 574. The question in such case is, whether there be a continuance of the former service of apprenticeship. See *R.* v. *Wainfleet, All Saints*, 3 P. & D. 72.

In the case of a settlement by serving a public office for a year, if the office be of a public nature, as that of constable, or collector of the land-tax, the law recognizes the existence of the office (*d*). But if the office be of a local nature, its existence must be established according to the circumstances of the case; by means of the original grant, if it still exist; by the court-rolls of a manor (*e*), ancient customaries, or entries in the parish books (*f*), &c. By serving a public office.

And proof must be given of the election or appointment of the party (*g*). The appointment of a bors-holder must be proved by the presentment of a jury at the leet (*h*).

The words of the stat. 3 & 4 W. & M. c. 11, s. 6, are, "shall for himself, and on his own account, execute any public office or charge." Those of the stat. 9 & 10 W. 3, c. 11, are, "shall execute some annual office in such parish, *being legally placed in such office.*" It seems to have been considered by a writer of great experience and authority on this branch of the law, to be doubtful whether it be necessary to prove a regular title to the office, as in a proceeding by *quo warranto*; or whether acting in the office for a year is not *primâ facie* evidence of a legal appointment (*i*). It is therefore, at all events, a matter of prudence to be prepared with the proper evidence to show a legal appointment, although it seems that evidence of the actual execution of a public office by the party for a year would afford presumptive evidence of a legal appointment, against the inhabitants of the parish where he so acted, for the purpose of a settlement (*j*). Proof of residence is essential (*k*).

For evidence of a settlement by estate, the observations which have already been made, as to the proof of a legal title, may be referred to (*l*). Proof of an equitable title is sufficient; and this must be proved, as in the case of a legal title, by means of the original will, probate, or deed, by virtue of which the right accrues (*m*). By estate.

It has been said, that in settlement cases the same strictness of proof is

(*d*) *Bisham* v. *Cook*, 2 Const, 167.

(*e*) 4 Leon. 242.

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

(*g*) *Supra*, tit. CHARACTER.—CONSTABLE.

(*h*) *Wingham* v. *Sellindge*, Burr. S. C. 223.

(*i*) 1 Nolan, 489. A party not certificated was, upon the nomination of his employer, chosen tithing-man at a court-leet, and ordered to be sworn into office within a month, under a penalty; he executed the office for a year from the time of his having been so chosen, but was never sworn in; held, that he gained a settlement by executing *de facto* an annual office on his own account, under the st. 3 & 4 W. & M. c. 11, s. 6. The oath, although required as a sanction to the fit and proper execution of the office for the interest of the public, is not essential to its due execution. *R.* v. *Corfe Mullen*, 1 B. & Ad. 211. Where the pauper performed the duties of parish clerk, and afterwards received a salary from the parish officers, but never received any appointment; held that there could not be any execution of the office within the 3 & 4 W. & M. c. 11, and that no settlement was gained. *R.* v. *Stogursey*, 1 B. & Ad. 795. And *qu.* whether such an office can be considered an annual one within the statute.

(*j*) See *Berryman* v. *Wise*, 4 T. R. 366, and *supra*, 627.

(*k*) *R.* v. *Woodbridge*, 4 B. & Ad. 711. Residence by a curate in a rectory-house assigned according to the stat. 57 Geo. 3, c. 99, is a coming to settle. *R.* v. *Newington*, 5 B. & Ad. 540.

(*l*) Tit. EJECTMENT.

(*m*) A pauper seised of copyhold lands, and who covenants with trustees for the payment of his debts, and to surrender to a purchaser, has the legal estate till surrender. *R.* v. *Ardleigh*, 2 N. & P. 240. The mere local privilege of a burgess, who has no estate legal or equitable, does not confer a settlement. *R.* v. *Bedford*, 10 B. & C. 54. Nor will an estate in remainder. *R* v. *Willoughby*, 10 B. & C. 62. *R.* v. *Eatington*, 4 T. R. 177. *R.* v. *Ringstead*, 8 B. & C. 218.

By estate.

not requisite as in ejectment, where the object is to change the possession and affect the right (*n*).

It has been seen, that the sum stated in the deeds of conveyance, as the consideration paid for an estate, is not conclusive in a case of settlement (*o*).

By renting a tenement.

The evidence to prove a settlement by coming to settle on a tenement of the annual value of 10*l.*, or by *bonâ fide* taking a lease of such a tenement, with forty days' residence (*p*) in the parish, requires little notice in the present work. The question whether the tenement be of such a nature as will confer a settlement, seems to be one of mere law (*q*). It must be proved that the pauper occupied a tenement of the yearly value of 10*l.* during the whole of the forty days' residence (*r*).

It is not necessary to prove an express contract for the tenement; it is sufficient if the pauper reside forty days in a tenement of sufficient value with the permission and assent of the landlord; for the law implies a contract (*s*).

And it has been held, that parol evidence of the fact of tenancy was admissible, although the party held under a written agreement (*t*).

The parties may show that the real annual value of the premises was

(*n*) *R.* v. *Butterton*, 6 T. R. 554.

(*o*) *Supra*, 791.

(*p*) By the stat. 6 Geo. 4, c. 57, no settlement shall be gained, unless the tenement consist of a house or building, being a separate and distinct dwelling-house or building, or of land within the parish, or of both, *bonâ fide* rented by such person, at the sum of 10*l.* at least, for the term of one whole year, nor unless the house or building or land shall be occupied, and rent actually paid for the term of one whole year at the least.

(*q*) See *R.* v. *North Bedburn*, Cald. 452; 2 Nolan, 31, 32. And therefore a case reserved should state the nature of the tenement, to enable the Court above to judge. It was held to be insufficient to state that the pauper rented a landsale colliery. Ib. See *R.* v. *Fladbury*, 2 P. & D. 271.

(*r*) *R.* v. *Bowness*, 4 M. & S. 210.

(*s*) Per Ashurst, J., *R.* v. *Netherseal*, 4 T. R. 258; *i. e.* before the st. 59 G. 3, c. 50; see above, note (*p*). A *primâ facie* case of tenancy having been made out by occupation and payment of rates, the opposite party attempted to show that in fact the premises were let to the pauper and others; this letting appeared to have been by a written instrument; and it was held that it could only be proved by the production of such written instrument. *R.* v. *Rawden*, 8 B. & C. 708. Under the 6 Geo. 4, c. 57, the terms of the tenancy are material to ascertain what is the rent contracted for, and this can be proved only by reference to the agreement itself, if in writing, and not by parol; where the sessions acted upon parol evidence, the written document being in existence and not produced, the Court quashed the order. *R.* v. *Merthyr Tydril*, 1 B. & Ad. 29. A tenement, consisting of a dwelling-house and 32 acres of land, was, since the 6 Geo. 4, c. 57, hired and occupied for a year at an annual rent of 20*l.*, and a year's rent paid; 27 acres of the land were situate in the township of *N.*, and five acres within that of *P.*; held, that evidence was admissible to show how much of the entire annual rent of 20*l.* was paid in respect of the land in *N.* *R.* v. *The Inhabitants of Pickering*, 2 B. & Ad. 267. Yet the intention of the Legislature clearly was to exclude evidence as to value. Where under the 6 Geo. 4, c. 57, the pauper *bonâ fide* rented a tenement, being a distinct and separate dwelling-house and land, at a rent exceeding 10*l.* per annum, the rent for one whole year having been paid, but it appeared that he underlet the land; held, that the statute not expressly requiring the land to be occupied "by the person hiring the same," it was a sufficient occupation under the yearly hiring. *R.* v. *Great Bentley*, 10 B. & C. 520. After the 6 Geo. 4, c. 57, the sessions found that the pauper *bonâ fide* hired the tenement of 10*l.* value in an adjoining parish, but that being unable to pay the rent remaining due, it was paid fraudulently by the officers of his own parish; held that no settlement was obtained. *R.* v. *St. Sepulchre's, Cambridge*, 1 B. & A. 924.

(*t*) *R.* v. *Inhabitants of the Holy Trinity*, 7 B. & C. 611. But where it was proved that the pauper occupied a tenement of 10*l.* value, and paid rent and taxes, it was held that parol evidence could not be given on the other side, of a letting to the pauper jointly with others, the witness having stated that there was a letting by writing. *R.* v. *Inhabitants of Rawden*, 8 B. & C. 708.

greater or less than 10*l.*, although a greater or less sum was actually paid (*u*). Renting a tenement.

The Court above will not presume that a taking of a tenement was fraudulent, unless fraud be stated, although the case be pregnant with suspicion (*v*). And therefore, where fraud is objected, the Court below ought to draw the conclusion; and their finding will, it seems, be conclusive, if there be evidence tending to the conclusion that the taking was merely colourable and fraudulent (*w*).

A settlement is gained under the late statute, 6 G. 4, c. 57, although the lessee underlets part (*x*); and although he takes two tenements, each under 10*l.* rent, but together exceeding 10*l.* (*y*).

A settlement is obtained by payment of rates, without reference to the occupation (*z*).

An order of removal, duly executed, and either confirmed or unappealed from, is an adjudication *in rem*, and therefore final (*a*); and is conclusive, not only as to the settlement of the parties actually removed, but also as to the facts stated in the order by way of description of those parties. Thus, where *A. B.* and his wife and four children were removed by that description to *F.*, it was held that *F.* was concluded, as to the marriage, and legitimacy of the children, by omitting to appeal against the order, although it turned out that the marriage was totally void (*b*). And such an order, unappealed from, is conclusive, not only as to the settlement of the parties removed, but also as to all facts which are necessarily involved in the adjudication. Thus, if a woman be described in the removal-order as the wife of *A. B.*, the order unappealed against will be conclusive, not only as to the settlement of the woman, but also as to the fact of marriage and the settlement of the husband, for they are involved in the judgment of the justices (*c*). Order of removal, conclusive effect of.

Again, where two were removed as man and wife, and after removal had children, which were bastards, the man having a former wife living at the time of the second marriage, it was held that the order unappealed from was conclusive as to the derivative settlement of the children, for that could not be impeached without entering into the merits of the first order (*d*).

So where a woman was described in the order as *Elizabeth*, the wife of *W. T.*, and the order was unappealed from, it was held that the parties thus acquiescing could not afterwards insist that *Elizabeth* was not the wife of *W. T.*, and that it was conclusive, not only as to her, but also as to the derivative settlement of three children who were born during the cohabitation of the mother with *W. T.* (*e*).

(*u*) *R.* v. *Bilsdale Kirkham*, 2 Nolan, 28, 29.

(*v*) Per Lord Kenyon, *R.* v. *Fillongley*, 2 T. R. 709.

(*w*) See *R.* v. *Tedford*, Burr. S. C. 60. *R.* v. *Woodland*, 1 T. R. 261. But see *R.* v. *St. Nicholas, Harwich*, B. S. C. 171.

(*x*) By Littledale and Park, Js., Bayley, J. diss. *R.* v. *Ditcheat*, 9 B. & C. 176. Under this statute, (which repeals the stat. 59 G. 3, c. 50,) the tenement, to confer a settlement, must consist of a separate and distinct dwelling-house, or of land, or both, *bonâ fide* rented at the sum of 10*l.* per annum for one whole year, and be occupied during such yearly hiring.

(*y*) *R.* v. *Tadcaster*, 4 B. & Ad. 703.

(*z*) *R.* v. *St. Mary, Kalendar*, 9 Ad. & Ell. 626; 1 P. & D. 497.

(*a*) For the general principle, see Vol. I. tit. JUDGMENT; and see *Malendine* v. *Hunsdon*, Fol. 273. *Chalbury* v. *Chipping Farringdon*, 2 Salk. 488. *R.* v. *Leverington*, Burr. S. C. 715; 2 Salk. 524. 527; 3 Salk. 524. 261; Str. 232.

(*b*) *R.* v. *Northfeatherton*, 1 Sess. C. 154; 4 Burn, 666. *Nympsfield* v. *Woodchester*, 2 Str. 1172.

(*c*) *R.* v. *Binegar*, 7 East, 377. *R.* v. *Silchester*, Burr. S. C. 551.

(*d*) *Nympsfield* v. *Woodchester*, 2 Str. 1172. *R.* v. *Silchester*, Burr. S. C. 551.

(*e*) *R.* v. *St. Mary, Lambeth*, 6 T. R. 615.

Order of removal, conclusive effect of.

And such an order is conclusive, although the party removed be misdescribed in the order. Thus, where a woman was removed as *Elizabeth Smith*, widow, it was held that this was conclusive, not only as to her settlement, but even as to that of her husband, *Emanuel Smith*, who was still living (*f*).

So it is conclusive as to all legal consequences. Thus, where a servant, during the year's service, was removed from his master by an order, against which there was no appeal, and in four days after the removal returned to his master, and completed the year's service, it was held that the order was conclusive as to the settlement, the legal effect being to dissolve the contract of service (*g*).

Being a judgment *in rem*, it is conclusive, not only upon the parish to which the removal is made, but against all the world (*h*).

The principle of these decisions is, that the fact to be proved by the order has already been decided by the magistrates. Hence the rule does not apply where the adjudication does not necessarily involve the settlement, or fact in issue. In other words, an order of sessions is not admissible in evidence on any collateral point, although evidence be tendered to show that the order was in fact founded on a decision of the sessions upon that collateral point (*i*). Thus, where the question was as to the settlement of *Jeremiah Booth*, who was proved to have derived a birth-settlement from his father in Halifax, it was held that an order of removal of the father, *William Booth*, from Halifax to North Owram, made and executed after the separation of the son from his father's family, and his marriage, although unappealed against, was not conclusive, or even sufficient to rebut the evidence of the birth-settlement, although it did not appear that *William Booth* had done any thing to gain a settlement. Here it is to be observed, that the settlement of *Jeremiah Booth* was not involved in the adjudication, for the settlement of *William Booth* in North Owram was perfectly consistent with the settlement of the son in Halifax; and, according to the general rule, it was not competent to the parties, who relied upon the order, to show what the grounds of the judgment were, and that it was not founded upon any subsequently acquired settlement of the father in North Owram, but upon an original settlement there, which would therefore be communicated to the son (*k*).

But an order, though not appealed against, is wholly inoperative where the justices who made it had no jurisdiction (*l*); or where the removal is made to a place which does not maintain its own poor separately, for then

(*f*) *R.* v. *Rudgeley*, 8 T. R. 620. *R.* v. *Silchester*, Burr. S. C. 551. *R.* v. *St. Mary, Lambeth*, 6 T. R. 615. *R.* v. *Binegar*, 7 East, 377.

(*g*) *R.* v. *Kenilworth*, 2 T. R. 598.

(*h*) *R.* v. *Corsham*, 11 East, 388.

(*i*) *R.* v. *Knaptoft*, 2 B. & C. 883.

(*k*) *R.* v. *South Owram*, 1 T. R. 353. So where the appellant parish offered in evidence an order of sessions, upon an appeal against an order of removal of the pauper's brother to the appellant parish, quashing the order, and tendered parol evidence to show the grounds of that decision; it was held, that such former order was properly rejected by the sessions, as the point decided, with respect to the brother was not necessarily the same as in the case then sought to be established; and that the point as to the father's settlement might only have come collaterally in question, and therefore could not be conclusive. *R.* v. *Knaptoft*, 2 B. & C. 883. And see the *Duchess of Kingston's Case*, 11 St. Tr. 255; *R.* v. *Wheelock*, 5 B. & C. 511, where it was held that the respondents may show that a former order was quashed on the preliminary objection that the pauper was not chargeable; and see Vol. I. tit. JUDGMENT.

(*l*) *R.* v. *Chilvers Coton*, 8 T. R. 178.

Order of removal.

there are no parties to make the appeal (*m*); or where the order has been abandoned by the removing parish (*n*).

If an order of removal from the parish *A.* to the parish *B.* be quashed upon appeal, it is clear that this will not bind any third parish (*o*). Nor the removing parish, where it has been quashed for want of form (*p*); but, in many instances, a discharged order has been held to be conclusive as between the contending parishes, the removing parish failing to prove that any new settlement had been acquired since the former removal (*q*); and it is to be presumed that the former order was discharged upon the merits. Where, however, upon a second removal and appeal, it appeared that the pauper was a certificated man, and that the first removal was before he became chargeable, and the latter after he became so, it was held that the reversal of the first order was not conclusive even between the same parishes (*r*). And the principle, it seems, is applicable to all removals made subsequently to the stat. 35 Geo. 3, c. 101, which renders a party irremovable till actually chargeable; for the first order may have been discharged for want of proof that the party was chargeable.

Examination of soldier.

By the stat. 55 Geo. 3, c. 108, s. 70, two magistrates for the county where any soldier shall be quartered (*s*), in case he has either a wife or child, may examine him on oath touching his settlement; and a copy of the affidavit, attested by a magistrate, and delivered to the party making it, is to be admitted in evidence at the sessions with respect to such settlement. The intention of the Act was to prevent the inconvenience which might accrue from taking a soldier from his quarters to give evidence; and the copy, thus attested, is to be lodged in the hands of the commanding officer. If the soldier go abroad, the inconvenience is not likely to happen, and the statute does not apply (*t*). Whilst the attested copy is in existence, no other copy can be received in evidence (*u*); but the original itself is evidence, as well as the copy, for it is at least of equal authority, and therefore it would be unreasonable to exclude it (*x*).

(*m*) *R.* v. *Swaleliffe*, Cald. 248.

(*n*) *R.* v. *Inhab. of Diddlesbury*, 12 East, 359. *R.* v. *Llanrydd*, Burr. S. C. 688. Or where the order is suspended for several years, and the pauper dies without notice of the order to the other parish. *R.* v. *Inh. of Lampeter*, 3 B. & C. 454. There must to make such an order valid, either be a delivery of the order itself, or a service of a copy, at the same time producing the original. *R.* v. *Inhu. of Alnwick*, 5 B. & C. 184.

(*o*) *R.* v. *Bentley*, Burr. S. C. 425; 4 Burn. 72. *R.* v. *Cirencester*, Burr. S. C. 17; 4 Burn. 672.

(*p*) *R.* v. *St. Andrew, Holborn*, 6 T. R. 613.

(*q*) *Foston* v. *Carleton*, 1 Str. 567. *R.* v. *Bradenham*, 2 Burr. S. C. 394. *R.* v. *Cirencester*, 4 Burn, 672.

(*r*) *R.* v. *Osgathorpe*, 2 Str. 1256. See *R.* v. *Wheelock*, 5 B. & C. 511. *R.* v. *Inhab. of Wick, St. Laurence*, 5 B. & Ad. 520, where the Court held evidence to be admissible to show that the first order was quashed, the pauper being then irremovable.

(*s*) Where upon the face of an examination of a soldier, taken by two justices under the Act, it did not appear, either on the face of the instrument or by evidence, that the soldier was quartered in the place where the justices had jurisdiction, it was held to be inadmissible, though it was forty-five years old. *R.* v. *Inh. of All Saints, Southampton*, 7 B. & C. 790; and see *R.* v. *Warley*, 6 T. R. 534. *R.* v. *Bilton*, 1 East, 14. *R.* v. *Chilvers Cotton*, 8 T. R. 178. *R.* v. *Holme*, 11 East, 380. *R.* v. *Stoke Ursey*, 1 Str. 9. *R.* v. *Tipper*, ib. *R.* v. *Hall*, 3 Burr. 1636. *R.* v. *York*, 5 Burr. 2684. *R.* v. *Furness*, 1 Str. 263. *R.* v. *Corbett*, 3 Salk. 261. *R.* v. *Helling*, 1 Str. 7. *R.* v. *Hulcott*, 6 T. R. 583. The case of the *Banbury Peerage* is in point, and it was necessary at all events to prove *aliunde* that the soldier was quartered within the jurisdiction. The rule *omnia præsumuntur rite esse acta*, does not apply to proceedings by magistrates in inferior courts. Per Holroyd, J. in *R.* v. *Inhab. of All Saints, Southampton*, 7 B. & C. 790. See the stat. 59 G. 3, c. 12, s. 28.

(*t*) Per Lawrence, J., *R.* v. *Clayton-le-Moors*, 5 T. R. 708.

(*u*) *R.* v. *Clayton-le-Moors*, 5 T. R. 706.

(*x*) *R.* v. *Warley*, 6 T. R. 534.

Relief.

Relief given by a parish to a pauper during his residence in another parish is evidence of a settlement in the former (*y*); but this merely shows the opinion of the relieving parish at the time, and is by no means conclusive, but is open to explanation, showing that the parish acted under mistake, or ignorance of the facts (*z*). But it has been held, that relief given to a pauper resident within the relieving parish is no evidence whatever to prove a settlement (*a*), for overseers are bound to give relief whether the pauper be settled there or elsewhere; and this was so held, not merely where the relief had been confined to a single instance, but even where relief had been several times afforded, and where the pauper had, on two different occasions, been received into the poor-house for a fortnight together, and had been buried at the expense of the parish, and where there was no evidence tending to show a settlement in any other place (*b*).

A notice of the ground of appeal, setting up a settlement by being rated to a tenement, omitting to state the name of the landlord, is not sufficient to admit evidence of such settlement (*c*).

(*y*) *R.* v. *Wakefield*, 5 East. 335. *R.* v. *Maidstone*, 2 Nolan, 121. Although it was given in one instance only, and afterwards refused. *R.* v. *Edmonstone*, 8 B. & C. 671. And see *R.* v. *Inhab. of Dunton*, 15 East, 350. Where only one instance of relief given whilst the pauper resided out of the parish was proved, and relief had been refused upon a second application, the sessions having found the settlement to be in the relieving parish, the Court refused to reverse that decision. *R.* v. *Edwinstowe*, 8 B. & C. 671. Where the respondents relied entirely on evidence of frequent relief given by the appellant parish to the pauper whilst residing in the respondent parish, and the sessions nevertheless quashed the order, the Court, holding that the sessions were not bound to act merely on such *primâ facie* evidence of settlement, refused to disturb the decision. *R.* v. *Yarwell*, 9 B. & C. 894. If there be evidence on one side, and the sessions act on what is not evidence on the other, the Court will adjudicate. Where the sessions acted upon continued relief generally, as establishing a settlement, the Court quashed the order, and held, that relief by binding out a child apprentice, does not carry the effect of relief farther. *R.* v. *Colcorton*, 1 B. & Ad. 25.

(*z*) Ibid. And the Court below are not bound to find on such evidence that the pauper was settled in the relieving parish. *R.* v. *Yarwell*, 9 B. & C. 894.

(*a*) *R.* v. *Chadderton*, 2 East, 27; 8 East, 498.

(*b*) *R.* v. *Chatham*, 8 East, 498. Lord Ellenborough, in giving judgment in this case, considered the same principle to be applicable as in the case of *R.* v. *Chadderton*, 2 East, 27; where Lord Kenyon held, that a single instance of relief was not evidence of settlement, inasmuch as overseers were bound to relieve casual poor. But it is difficult to rely upon this reason, where the parish gives continued relief for a great length of time; for, although they are bound to relieve casual poor, they are not bound to continue such relief indefinitely. If a parish has maintained an impotent pauper for the space of twenty years, it seems to be going a very great length to say that this is no evidence whatsoever of their liability to maintain him, merely because they might be bound to afford casual relief in the first instance, especially considering that the relieving parish have the means in their own power of explaining the reason why relief was given. Another reason assigned for excluding such evidence by a general rule is the impolicy of admitting such evidence. But may it not be fairly inquired, on the other hand, whether it be not impolitic to exclude the truth; and whether it be not impolitic, and even dangerous, to fetter the general rules and principles of evidence with sweeping and peremptory rules, founded upon considerations of policy and convenience wholly collateral to the investigation of truth? Such a rule is capable of being perverted to the worst of purposes: a parish may support a pauper for an indefinite period, and wilfully suspend the removal until those witnesses who could have proved a settlement are dead. In the case of the *King* v. *Long Buckley*, 7 East, 45, relief given by the parish to a pauper resident from time to time for twelve years, was held to be evidence of the due stamping of the pauper's indentures of apprenticeship. In a late case (*R.* v. *Coleorton*, 1 B. & Ad. 25), the Court of K. B. held that relief to a pauper within the parish ought to be excluded on the ground of policy and convenience.

(*c*) *R.* v. *Justices of Sussex*, 3 P. & D. 42.

SHERIFF (*d*).

In an action against the sheriff for a false return of mesne process, the plaintiff must prove: Mesne process. False return.

First. The obligation on the part of the sheriff to arrest or detain.

Secondly. The default of the sheriff, either in neglecting to execute the writ when he might have done so, or his misconduct subsequent to the arrest.

Thirdly. The damage resulting to the plaintiff.

First. It is essential to prove:

1. The issuing of the process;
2. The delivery of that process to the sheriff.

If the process has been returned and filed, an examined copy of the writ and return will prove the issuing and delivery of the writ to the sheriff (*e*). But if it has not been returned, the sheriff's attorney should be served with notice to produce the writ; and on proof of such notice, and of the delivery of the writ at the sheriff's office, or to his agent the under-sheriff, and also that search has been made at the Treasury, and that the writ has not been returned (*f*), the writ may be proved by secondary evidence (*g*). Proof of the writ.

It seems that the sheriff's warrant is evidence against himself to prove the issuing the writ, although it would not be evidence for him (*h*).

The production of a bill of sale executed by the sheriff, reciting the issuing of the writ and the seizure under it, is sufficient evidence against the sheriff of the taking, without producing the writ, or directly proving the seizure by the officer (*i*).

A variance in the description of the process, as well in the action for not arresting on mesne process as in an action for an escape on mesne process, or any other action against a sheriff, founded on his misconduct or negligence in respect of the execution of process, would be fatal (*k*): as, if the declaration allege that the plaintiff sued out a *latitat* in a plea of trespass, Variance.

(*d*) All actions for breach of duty must be brought against the high sheriff, though for the default of the under-sheriff or his bailiff. *Cameron* v. *Reynolds*, Cowp. 403. But it has been held that the act of the bailiff is not to be considered as the act of the sheriff, so as to fix the latter with the knowledge of the misconduct of the former. And see *Windle* v. *Ricardo*, 1 B. & B. 17, where it was held that the sheriff was not bound by the act of the officer who had improperly indorsed on a writ of summons or a writ of right, that the four knights were sworn. *Crowder* v. *Long*, 8 B. & C. 598.

(*e*) The indorsement by the sheriff of *non est inventus* on a writ of *ca. sa.* is evidence of the delivery to him. *Blatch* v. *Archer*, Cowp. 63. *Tildar* v. *Sutton*, B. N. P. 66. *M'Neil* v. *Perchard*, 1 Esp. C. 263. *Jones* v. *Wood*, 3 Camp. 229. *Fairlie* v. *Birch*, 3 Camp. 397.

(*f*) The sheriff is bound to return the writ within a reasonable time, although until ruled he cannot be in contempt for not doing so. *Woodman* v. *Gist*, 8 C. & P. 213. The bailiff of a franchise having received an instrument purporting on the face of it to be a common sheriff's warrant to levy, and having by the lord's direction paid the proceeds to the assignees of the plaintiff, is bound by such adoption of the warrant to make a return. *Platel* v. *Dowze*, 4 Bing. N. C. 204.

(*g*) In an action for an escape on mesne process, upon the question whether notice to produce the writ should be given to the sheriff (the defendant), or his successor, the defendant having gone out of office, Coltman, J. held that as it did not appear that it was incumbent on sheriff to hand over writ to his successor; notice should be given to the defendant. *Aldridge* v. *Locke*, Liv. Sum. Ass. 1837.

(*h*) B. N. P. 66.

(*i*) *Woodward* v. *Larking*, 3 Esp. C. 286.

(*k*) *i. e.* if not amended under the late statute.

Proof of the writ. Variance.

and the proof be of a *latitat* in trespass with an *ac etiam* (*l*); but if a *ca. sa.* be alleged, it will be supported by proof of an *alias ca. sa.* (*m*).

Where the declaration alleged that the party was brought before a Judge by virtue of a writ of *habeas corpus*, and committed by him to the marshal's custody, at the suit of the plaintiff, as by the record thereof now remaining in the Court of King's Bench manifestly appears, it was held that the allegation was satisfied by the production of the writ of *habeas corpus*, with the *committitur* indorsed thereon from the office of the clerk of the papers of the King's Bench prison; for where a party on arrest is committed by a Judge of the Court of King's Bench at chambers by *habeas corpus*, this writ and the *committitur* thereon are not returned to, or filed, or kept by the Court or its officers at Westminster, but are kept by the clerk of the papers of the King's Bench prison, in whose hands they remain as a voucher for the detention of the party; and therefore they are neither of record, nor properly capable of being entered of record, either by themselves, or as part of any other record or proceeding. It was therefore held, that the allegation might either be rejected as surplusage, or at any rate might be considered as satisfied by the production of the writ and return, which were *quasi* of record (*n*).

But where the declaration alleged that the party was arrested under a writ indorsed for bail by virtue of an affidavit *now on record*, but no affidavit was produced upon the trial, the Court of Common Pleas held that the plaintiff had properly been nonsuited (*o*).

Where the declaration averred that a recognizance of bail was entered into before a Judge at chambers, on which the defendant was committed, and on the record it purported to have been taken before the Court of King's Bench, the variance was held to be fatal (*p*), and it was held to be incompetent to the plaintiff to show by the Judge's book that bail had in fact been put in at chambers.

So where the declaration alleged the judgment to be for breach of promises, and the record showed a judgment for breach of *one* promise only (*q*).

In an action for a false return to a *testatum fieri facias* against bail, an averment that the plaintiff recovered by the judgment of the Court, is not proved by a record which shows merely an award of execution (*r*).

So in an action for removing goods without paying the year's rent, under the stat. of Anne, where the declaration alleged that the seizure was under a *fi. fa.* from the K. B., and the evidence was of a writ from the C. B. (*s*).

(*l*) *Gunter* v. *Clayton*, 2 Lev. 85; B. N. P. 66.

(*m*) Cro. Jac. 380; B. N. P. 65.

(*n*) *Wigley* v. *Jones*, 5 East, 440. See the observations of Heath, J. 3 B. & P. 458.

(*o*) *Webb* v. *Herne*, 1 B. P. 281. Yet *qu.* whether according to the doctrine in *Wigley* v. *Jones*, the allegation "by virtue of an affidavit now on record, might not be rejected as surplusage;" it was wholly unnecessary; and it was impossible that this superfluous allegation could at all mislead. And see *Stoddart* v. *Palmer*, 3 B. & C. 2; *infra*, 1011. It seems that, at all events, an examined copy of the affidavit would have been sufficient. B. N. P. 114. See tit. VARIANCE. Where the declaration alleges that the affidavit was made, generally, without saying by whom, it is sufficient to produce an office copy. *Casburn* v. *Reed*, 2 Moore, 60; and see B. N. P. 14. In *Barns* v. *Eyles*, 2 Moore, 565, it was held that a recommitment by the Court in execution was to be considered as a record, and alleged to be so, either express or in substance. But see *Cooper* v. *Jones*, 2 M. & S. 202.

(*p*) *Bevan* v. *Jones*, 4 B. & C. 658.

(*q*) *Edwards* v. *Lucas*, 5 B. & C. 658.

(*r*) *Phillipson* v. *Mangles*, 11 East, 516.

(*s*) *Sheldon* v. *Whitaker*, 4 B. & C. 658. See also *Gunter* v. *Clayton*, 2 Lev. 85; *infra*, tit. VARIANCE.

But an unnecessary allegation of a *scire facias*, the writ having been issued within a year of the judgment, need not be proved (*t*). Writ. Variance.

Where the declaration, in an action for a false return to a *fieri facias*, stated that the judgment was recovered in a particular term, with a *prout patet*, and it appeared from the record that it was in fact recovered in a different term, it was held that the *prout patet* might be rejected (*u*).

In the case of *Hendray* v. *Spencer* (*x*), the declaration, in an action for permitting a defendant who had been arrested under a *latitat* to escape, alleged a *latitat* against *Donner* and *J. Doe*; the writ produced in evidence was against *Donner* and two others, but not against *Donner* and *J. Doe*; but Lord Mansfield overruled the objection.

Secondly. The sheriff's default or misconduct.—If the cause of action be an omission to arrest, it is essential to show that the sheriff or his agent might have arrested the debtor had he done his duty. For this purpose, as the default is usually that of the sheriff's agent or bailiff employed to execute the sheriff's warrant issued upon the writ, it is essential to prove that such bailiff was employed by the sheriff or under-sheriff (*y*). This fact should be proved by means of the warrant to the bailiff, which is the best evidence for that purpose (*z*). It is not sufficient to prove him to be a general bailiff to the sheriff, and that he has given a bond of indemnity to the sheriff (*a*). For this purpose, the bailiff, who usually keeps the warrant, should be served with a *subpœnâ duces tecum* to produce it. Warrant, &c.

Where the warrant has not been executed, it is in general returned to the sheriff's office; where it has been executed, the bailiff usually retains it for his own justification, and returns to the office a memorandum of what has been done, from which the sheriff makes his return (*b*).

(*t*) *Bromfield* v. *Jones*, 4 B. & C. 385.

(*u*) *Stoddart* v. *Palmer*, 3 B. & C. 2.

(*x*) Cited in *R.* v. *Pippett*, 1 T. R. 240; and see *R.* v. *Lookup*, cited in the same case.

(*y*) Where the under-sheriff gave the officer directions to follow the instructions of *W.* in the execution, who arranged to take goods instead of money, and a package was also taken by the officer as a security for his poundage and fees, and upon their being paid was also forwarded to the execution creditor, a commission founded upon an act of bankruptcy prior to the levy having issued; held that the sheriff was bound by the act of *W.*, and that there was a sufficient conversion to enable the assignees to maintain trover. *Carlisle* v. *Garland*, 7 Bing. 298; and 5 M. & P. 102. And see *Price* v. *Helyar*, 4 Bing. 597. Where the officer executing a *fi. fa.* at the request of the parties continued in possession and managed the farm, and the under-sheriff afterwards acknowledged by letter the receipt of further sums which were "to be added to the return," and referred the defendant's attorney to his office for inspecting the accounts, held that the sheriff must be taken to have adopted the acts of his officer, and was therefore liable for the balance to the defendant in the execution. *Underhill* v. *Wilson*, 6 Bing. 697. The defendant, an execution creditor of *R.*, having permitted the officer to withdraw from the possession, afterwards ruled the sheriff to return the writ and obtained the proceeds of the sale, but in the interval another creditor had issued execution, and upon a return of *nulla bona*, had sued the sheriff for a false return, and obtained a verdict against him; held that although by the general rule, the sheriff was bound by the act of his officer acting in the execution of his authority, yet that he was not liable for his misconduct, of which he had no knowledge, and which had been induced by the act of the defendant himself, and that the sheriff was therefore entitled to recover back the proceeds which had been paid him. *Crowder* v. *Long*, 8 B. & C. 598. And see *Cook* v. *Palmer*, 6 B. & C. 739. Where the custom of the county was for the sheriff to appoint a special bailiff at the party's request, who indemnified the sheriff, held that the sale under the writ of execution and receipt of the money by such bailiff, were to be deemed acts of the creditor himself, and that the sheriff would be discharged from any demands in respect of such proceeds. *Higgins* v. *M'Adam*, 3 Y. & J. 1.

(*z*) *Drake* v. *Sykes*, 7 T. R. 113. *Wilson* v. *Norman*, 1 Esp. C. 154. *M'Neil*, v. *Perchard*, 1 Esp. C. 263. *Lloyd* v. *Harris*, Peake's C. 174.

(*a*) Ibid.

(*b*) *Martin* v. *Bell*, 1 Starkie's C. 415.

Warrant to the bailiff.

If the warrant has been returned to the office (*c*), the defendant's attorney should be served with notice to produce it; such a notice, indeed, ought always to be served where there is the least doubt as to the custody of the warrant. Where the warrant had been returned by the bailiff to the under-sheriff, the sheriff still being in office, it was held that notice served on the sheriff was sufficient (*d*). And if the warrant has not been returned, notice to the defendant to produce it is insufficient, without service of a *subpœnâ duces tecum* on the bailiff (*e*). Where the warrant was not returned to the sheriff's office, but given by the officer to a third person, and could not be found after diligent inquiry, secondary evidence of the contents was held to be admissible without notice to the defendant's attorney to produce the warrant (*f*).

If the bailiff does not produce the warrant, but proves that it has been delivered at the sheriff's office, parol evidence of the contents (after notice to produce) is admissible. But as the bailiff is usually the real defendant in the cause, having given a bond of indemnity to the sheriff, it is of course impolitic to make him a witness, if the sheriff's authority to him can be proved by other means.

The necessity of proving the warrant may be superseded by evidence of an admission on the part of the sheriff, or his under-sheriff, that the bailiff was appointed by the sheriff to execute the writ (*g*); but no declaration by the bailiff, that he acted under a warrant from the sheriff, operates by way of admission against the sheriff, even although he has given a general bond of indemnity, for he is not a general agent, but acts under a special authority (*h*). And even a written paper, purporting to be a copy of the warrant, and delivered as such by the bailiff at the time of levying, is not evidence against the sheriff, for it amounts to no more than an admission by the bailiff (*i*).

Proof that the name of a bailiff has been indorsed on the writ in the sheriff's office, together with proof that it is the usual course in the sheriff's office to indorse upon the writ the name of the bailiff who is to execute it, is sufficient evidence of authority (*k*); but the mere proof of an examined copy of a writ returned and filed, with the name of a bailiff indorsed as employed to execute the writ, is not in itself sufficient to show the agency, without some further evidence to show that the indorsement was made by authority of the sheriff (*l*).

But proof of a document produced, on notice given, from the sheriff's office, containing an order to a bailiff to give the necessary instructions for

(*c*) A warrant obtained from the office of the London agent of the sheriff, is sufficient to connect the sheriff with the acts of the officer executing it. *Shepherd* v. *Wheeble*, 8 C. & P. 534.

(*d*) *Taplin* v. *Atty*, 3 Bing. 165.

(*e*) Ibid.

(*f*) *Minshull* v. *Lloyd*, 2 M. & W. 450.

(*g*) *Sanderson* v. *Baker*, 3 Wils. 309. *Jones* v. *Wood*, 3 Camp. 228.

(*h*) *Drake* v. *Sykes*, 7 T. R. 113.

(*i*) Ibid.

(*k*) *Blatch* v. *Archer*, Cowp. 63. *Tealby* v. *Gascoigne*, 2 Starkie's C. 202. *Francis* v. *Neave*, 3 B. & B. 26. So in an action for extortion, *Bowden* v. *Waithman*, 5 Moore, 183. *Fermor* v. *Philips*, cited ibid; 1 Marsh, 554. In *Fermor* v. *Phillips*, the writ being produced with the name of *B.* indorsed upon it, it was held to be a question for the jury whether *B.* acted under the sheriff's authority, the indorsement being *primâ facie* evidence of the fact. But the admission of the under-sheriff is not admissible against the sheriff, unless the declaration accompany an official act, or unless he charge himself being the real party in the cause. *Snowball* v. *Goodrick*, 4 B. & Ad. 541. *Supra*, tit. ADMISSION.

(*l*) *Hill* v. *Sheriff of Middlesex*, 7 Taunt. 8. *Jones* v. *Wood*, 3 Camp. 229. Contra, *M'Neil* v. *Perchard*, 1 Esp. C. 263. *Hill* v. *Leigh*, 1 Holt, 217.

making a return to the writ in question, and containing his answer, is sufficient to show that he was the agent of the sheriff in the execution of the writ (*m*). Warrant to the bailiff.

Where an examined copy of the writ, as returned by the sheriff with the officer's name indorsed was produced, and it was shown to have been executed by a person of that name, and proof was given of the course of the sheriff's office to grant a warrant to the officer whose name was indorsed, or if not, to strike out the name and insert that of another, it was held to be sufficient *primâ facie* evidence (*n*).

Evidence by the officer, that he had seized under a warrant brought to him by one who said that it came from the sheriff's office, and that he knew the hand-writing upon it, but had since lost it, was held to be sufficient (*o*).

Next, the default of the sheriff, either in allowing the debtor to escape after an arrest (*p*), or by showing that after notice (*q*) to the sheriff where the debtor was to be found he neglected to arrest him, or that the debtor was to be met with in the places which he was known to frequent, and might have been arrested (*r*); for the sheriff is bound to use all lawful means in his power for the purpose of discovering and arresting the debtor. Sheriff's default.

Proof of notice to the agent of the under-sheriff in London will not avail as notice to the under-sheriff, inasmuch as his agency is in its nature wholly unconnected with such purposes (*s*).

But independently of any notice to the sheriff, he is bound to make due inquiry for the purpose of arresting the debtor (*t*).

The declaration of the under-sheriff is admissible to affect the sheriff, because he is the general agent of the sheriff, but the declaration of the bailiff is not evidence against the sheriff, even although he has given a bond of indemnity, until it be proved by the warrant, or otherwise, that he is the special agent of the sheriff, and then such admissions by him in his capacity of agent are admissible evidence against the sheriff (*u*).

And accordingly, in the case of *North* v. *Miles* (*x*), on an action for a false return of *non inventus*, it was held, that an acknowledgment by the bailiff to the plaintiff's attorney, in answer to his inquiry why the writ had not been executed, was admissible; for what he said on that occasion might be considered as part of his act touching the execution of the writ, for which the defendant was responsible.

(*m*) *Jones* v. *Wood & another*, 3 Camp. 228. Note, the action was for a false return to a *fi. fa.* that the goods remained in hand for want of buyers, and the answer indorsed on the order was, "Goods in hand for want of buyers." The same was held by Bayley, J. in *Baxter* v. *Sykes*, York Sum. Ass. 1829); a note having been sent from the sheriff's office, stating that Foster, a sheriff's officer, had returned *nulla bona*.

(*n*) *Scott* v. *Marshall*, 2 C. & J. 238.

(*o*) *Moon* v. *Raphael*, 2 Scott, 489; 7 C. & P. 115.

(*p*) *Blatch* v. *Archer*, Cowp. 63. Bare words will not in general amount to an arrest. *Russen* v. *Lucas*, 1 Ry. & M. 27. *Berry* v. *Adamson*, 6 B. & C. 530; *infra*, tit. TRESPASS. Where the defendant is in custody, the delivery of a writ to the sheriff is an arrest in law. B. N. P. 66; and vide *infra*, tit. TRESPASS.

(*q*) He may show that at the time when the party ought to have been arrested he was at large, following his ordinary occupation. *Beckford* v. *Montague*, 2 Esp. C. 475.

(*r*) If a party against whom the sheriff has a writ does not abscond, but continues the usual exercise of his daily occupation, being visible to every person that comes to him on business, and the bailiff, neglecting to arrest him, returns *non est inventus*, it is a false return. *Beckford* v. *Montague*, 2 Esp. C. 475. The plaintiff is not bound to furnish the sheriff with information, to enable him to identify and arrest the debtor. *Dyke* v. *Duke*, 4 Bing. N. C. 197.

(*s*) *Gibbon* v. *Coggon*, 2 Camp. 189.

(*t*) *Dyke* v. *Duke*, 4 Bing. N. C. 197; and see 1 M. & W 713.

(*u*) See the observations of Lawrence, J. in *Drake* v. *Sykes*, 7 T. R. 113.

(*x*) 1 Camp. 389.

Sheriff's default.

An admission of an escape by the under-sheriff is evidence against the sheriff in an action for an escape (*y*), or for a false return (*z*); and declarations made by the bailiff whilst he has the debtor in custody (*a*), are also evidence against the sheriff.

Damage.

Thirdly. The damage resulting to the plaintiff; that is, either that the plaintiff has been delayed in recovering his debt, or that he has lost it, or is likely to lose it. For this purpose, he must prove the original debt as averred in the declaration (*b*), with the same degree of particularity as, it seems, and no more than, would have been requisite in the original action against the debtor himself (*c*).

But the law will infer a damage from the mere breach of duty; and therefore where the sheriff had the debtor in custody the day after the return of the writ, and no actual damage had been sustained, the Court held that the plaintiff was entitled to recover (*d*).

And the plaintiff, it seems, may avail himself of any evidence for this purpose that he could have used against the debtor; even an admission by the debtor as to the existence or amount of the debt, made previously to the default, is evidence for this purpose. Thus, where the debtor was sued as the drawer of a bill of exchange, proof of an acknowledgment by him that he had received notice of the dishonour, is evidence of the fact (*e*).

The reason of this seems to be, not that there is any privity between the original debtor and the sheriff, but because, otherwise, the plaintiff would be placed in a worse situation by the defendant's wrongful act: for if the defendant had done his duty, the acknowledgment of the original debtor would have been evidence of the debt, and the defendant ought not to take advantage of his own wrong in depriving the plaintiff of this evidence. The very loss of the evidence would constitute a damage to support the action. Or the case may be considered in this point of view:—After proof of the defendant's default, the question is as to the damage sustained by the plaintiff; and an acknowledgment by the debtor is evidence to prove that damage, for it shows to what extent the plaintiff might legally have recovered against the original debtor. Such evidence should also be given as the nature and circumstances of the case supply, to show the extent to which the plaintiff has been damnified; as, that subsequent attempts to arrest the debtor had been ineffectual; that he is since dead, or that he has absconded

(*y*) *Yabsley* v. *Doble*, 1 Lord Raym. 190; Peake's C. 65.

(*z*) *Kempland* v. *Macauley*, Peake's C. 65.

(*a*) *Bowsher* v. *Calley*, 1 Camp. 391, n.

(*b*) *Parker* v. *Fenn*, 2 Esp. C. 476; 4 T. R. 611. If the plaintiff has lost the whole debt, the jury may give him damages to that extent, together with what he has lost in costs; but if he can still recover his debt, the damages may be diminished accordingly. *Scott* v. *Henley*, 1 Mo. & R. 227. No action lies, unless some damage has been sustained. *Williams* v. *Mostyn*, 4 M. & W. 145; but see below, 1114.

(*c*) *Alexander* v. *Macauley*, 4 T. R. 611. *Gunter* v. *Cleyton*, 2 Lev. 85; B. N. P. 66. Proof of the precise sum is unnecessary, ib.; but if the debt arose on a sale of goods on credit, and it appeared that at the time of arrest the credit was unexpired, the variance would be fatal. *White* v. *Jones*, 5 Esp. C. 162. If the declaration state that the party was indebted for goods sold and delivered, it must be so proved. *Parker* v. *Fenn*, 2 Esp. C. 477, n.; although the exact sum need not be proved, B. N. P. 66.

(*d*) *Barker* v. *Green*, 2 Bing. 317; and see *Brown* v. *Jarvis*, 1 M. & W. 704. *Williams* v. *Mostyn*, 4 M. & W. 145. *Gibbon* v. *Coggon*, 2 Camp. 188. If the defendant take issue on a collateral matter, some damage will be presumed. *Brown* v. *Jarvis*, 1 M. & W. 704.

(*e*) *Williams* v. *Bridges*, 2 Starkie's C. 42, cor. Abbott, J. *Sloman* v. *Herne*, 2 Esp. C. 695. An acknowledgment of a debt made by debtor after arrest, but before an escape, is evidence in an action for the escape. *Rogers* v. *Jones*, 7 B. & C. 86; and see *Gibbon* v. *Coggon*, 2 Camp. 188.

or become insolvent. If the plaintiff has not, in fact, been injured by the sheriff's laches, the damages will be merely nominal (*f*).

In an action for an *escape* on *mesne process* (*g*), if no return has been made, the writ itself may be produced, and proof must be given of the delivery of the writ to the under-sheriff, of the warrant to the bailiff (*h*), and of an arrest (*i*) by the latter before the return of the writ. Escape on mesne process.

If the action be brought against the marshal of the Queen's Bench for an escape after a commitment by a Judge upon an *habeas corpus*, the *habeas corpus*, with the *committitur* annexed, should also be proved; and as this remains in the custody of the marshal, notice should be given to produce it (*j*).

It must also be shown, that after the arrest, &c., the defendant suffered him to escape, and that he was at large, or in improper custody, after the return of the writ (*k*), and that bail above has not been put in. Proof by the defendant that bail has been put in, and perfected in a term subsequent to the return of the writ, will not afford any defence to an action which has been previously commenced (*l*). But if the defendant in the original action has put in and perfected bail, or having put in bail, has rendered himself in their discharge before the time for bringing in the body has expired, the action will not be maintainable, although no bail-bond has been taken (*m*).

If the sheriff has returned *cepi corpus*, proof of the writ and return will prove the arrest (*n*).

The production of the writ by the plaintiff, in order to show the obligation on the sheriff to arrest and detain the debtor, does not entitle the sheriff to have his return, which is indorsed upon the writ, read in evidence as part of the document (*o*).

The admission of the under-sheriff of an escape is evidence against the sheriff (*p*).

Lastly. The plaintiff must prove his debt, and the damage which he has sustained from the sheriff's negligence (*q*). Damage.

(*f*) *Tempest* v. *Linley*, Clay. 34.

(*g*) A serjeant-at-mace is liable for an escape permitted by his officer. *Morris* v. *Parkinson*, 1 C. M. & R. 163.

(*h*) *Supra*, 1012.

(*i*) It is not sufficient to show that the officer told the party he had a writ against him, to which the party said, 'I'll come,' but made his escape. *Rosser* v. *Lucas*, 1 R. & M. 26. *Genner* v. *Sparks*, 1 Salk. 79. Vide *infra*, tit. TRESPASS. A warrant directed to *A.* and *B.* is returned indorsed by *A.*, but the arrest is proved to have been made by a person calling himself *B.*; this is evidence to charge *B.* with the arrest. *Stack* v. *Brander and Tebbs, Sheriffs of London, and Coulson*, 1 Esp. C. 42.

(*j*) *Wigley* v. *Jones*, 5 East, 440. See *Watson* v. *Sutton*, Salk. 272. See also the stat. 8 & 9 W. 3, c. 27, s. 9; *infra*, 1020.

(*k*) In the case of mesne process, the sheriff is to take the body of the debtor, and have him ready to produce on a certain day; it is therefore sufficient if he bring in the body on that day. But in the case of an arrest in execution, if the party be at large for the shortest space of time, whether before or after the return, it will be an escape. *Hawkins* v. *Plomer*, 2 Bl. 1048. *Atkinson* v. *Matteson*, 2 T. R. 172. Proof that the debtor was seen abroad after the return of the writ, and that bail has not been put in, is evidence of an escape. *Fairlie* v. *Birch*, 3 Camp. 397. The sheriff is bound to keep the party in strict custody after the return day, and it is an escape if the gaoler take him out of prison for a period, however short, although he never have him out of his own custody. *Williams* v. *Mostyn*, 4 M. & W. 145.

(*l*) *Moses* v. *Norris*, 4 M. & S. 397.

(*m*) *Pariente* v. *Plumtree*, 2 B. & P. 35.

(*n*) *Fairlie* v. *Birch*, 3 Camp. 397. And the sheriff is bound by his return as well as to the fact as the time of the arrest. 1 Mo. & R. 512.

(*o*) *Adey* v. *Bridges*, 2 Starkie's C. 189, cor. Holroyd, J. But the return, which was that the party had been rescued, was afterwards admitted to be read as part of the defendant's evidence. *Qu.*

(*p*) *Yabsley* v. *Doble*, 1 Ld. Raym. 190. *Kempland* v. *Macauley*, Peake's C. 75; *supra*, 1014.

(*q*) *Supra*, 1014.

Escape. Damage.

If the plaintiff allege that he has a good cause of action against the party suffered to escape, he must prove a cause of action, or he will be liable to be nonsuited (*r*).

Where a sheriff's officer kept the defendant in his custody after the return of the writ, and then took him to prison, it was held, that as the plaintiff had sustained no damage, the action was not maintainable (*s*).

By the new rules of Hil. Term, 4 W. 4, in actions on the case for an escape, the plea of not guilty shall only operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

Defence.

The sheriff may show in defence, that the defendant in the original action did in fact put in and perfect bail, or that he put in bail and rendered himself in their discharge before the time for bringing in the body had expired, although no bail-bond was taken (*t*). But the putting in bail after the expiration of the term in which the writ is returnable, will be no defence to an action previously commenced (*u*).

The sheriff may also show that the debtor was rescued in going to gaol; but after he has once been within the walls of a prison, a rescue by any but the King's enemies will be no excuse (*x*).

It is no defence to show that the plaintiff knew of the escape, yet proceeded in his action to judgment, but had not charged the debtor, who returned to gaol, in execution (*y*), for it is no waiver.

It is a good defence to show that the bailiff who permitted the escape was appointed at the special request of the plaintiff (*z*), but the mere suggestion of a particular officer by the plaintiff is no defence (*a*).

If the bailiff of a liberty arrest on the sheriff's mandate, and suffer an escape, the bailiff, and not the sheriff, is responsible (*b*).

A mere request that a particular person named should be employed, does not constitute him a special bailiff of the party, and relieve the sheriff (*c*).

False return to a fi. fa.

In an action for a false return to a writ of *fieri facias*, the plaintiff must prove, if put in issue, 1st. The judgment (*d*), the writ of *fieri facias*, and

(*r*) 2 Lev. 85; B. N. P. 66. But a variance as to the amount will not be material. Ibid.

(*s*) *Plank* v. *Anderson*, 5 T. R. 37. A plea of a bail-bond taken with a condition according to the stat. and assigned to the plaintiff, the replication denying that there was any such condition, &c., the issue is not supported by proof of a bond, in the condition of which the prisoner's name is left in blank. *Holden* v. *Raphael*, 4 Ad. & Ell. 228.

(*t*) *Pariente* v. *Plumtree*, 2 B. & P. 35. But if the defendant has been permitted to go at large without a bail-bond, the Court will not stay the proceedings upon the defendant putting in bail. *Webb* v. *Matthew*, 1 B. & P. 225. *Fuller* v. *Prest*, 7 T. R. 109.

(*u*) *Moses* v. *Norris*, 4 M. & S. 397.

(*x*) B. N. P. 68. And it seems that the officer having had the party once in his custody, the subsequent escape and rescue do not defeat the liability of the sheriff, it being his duty to take sufficient means for carrying the process into execution. *Nicholl* v. *Darley*, 2 Y. & J. 399.

(*y*) *Ravenscroft* v. *Eyles*, 6 Geo. 3, C. B., B. N. P. 69.

(*z*) *Ford* v. *Leake*, 6 Ad. & Ell. 699.

(*a*) *Batson* v. *Meggott*, 4 Dowl. P. C. 557.

(*b*) Noy, 27; B. N. P. 69; 3 Wils. 309.

(*c*) But where the plaintiff's attorney requested the writ of *ca. sa.* to be executed by a particular bailiff, and himself accompanied the officer and directed him to do an act which constituted the arrest illegal, the defendant having afterwards escaped; held that it amounted to making the officer a special bailiff, and that the plaintiff could not sue the sheriff for the escape from illegal custody, and rendered so by the conduct of his own attorney. *Doe* v. *Frye*, 5 Bing. N.C. 573; 7 Sc. 704; and 7 Dowl. 606. *Corbet* v. *Brown*, 6 Dowl. 629.

(*d*) The judgment is mere inducement; the falsity of the return is the ground of action, although the injury depends on

return (*e*). 2dly. The warrant to the bailiff (*f*); and that the defendant had goods within the county (*g*); that the bailiff had express notice of such goods, where that was the fact; or that he might have levied had he used due diligence; or that he actually did seize goods of the defendant (*h*).

Title to the property.

In the latter case, where the goods having been claimed by a third person, and the sheriff, on receiving an indemnity, has returned *nulla bona*, the plaintiff should be prepared with such evidence as the case affords to prove that the goods were really the property of the debtor, as by proof of his possession of and dealing with the property as his own; and particularly with such evidence as shows that the transfer to the claimant was either merely colourable in order to defeat the execution, or that it is void as against a judgment-creditor under the statute 13 Eliz. c. 5 (*i*).

In such case, it may be advisable to give notice to the sheriff's attorney to produce the bond or agreement to indemnify the sheriff; and if it be made to appear, either by the instrument itself, or by the sheriff or his agent's admission, that the sheriff is indemnified by another, any declaration on the subject by the latter will be evidence for the plaintiff.

An allegation in a declaration for a false return of *nulla bona* to a *fieri facias* against the goods of *A.* and *B.*, that "although *A. and B.* had goods, &c. within the bailiwick," is supported by proof that either of them had goods, for the averment is severable (*k*).

The plea of not guilty puts in issue the making of the return and the breach of duty (*l*). It does not, in an action for not levying on the debtor's goods within a reasonable time, put in issue the fact of there being goods (*m*) to levy upon. For the breach is, that the defendant did not use due diligence, and returned *nulla bona*; and if it appeared that he did not return *nulla bona*, the latter part of the breach could be disproved, if he did use due diligence, the former part could be disproved (*n*). So the defen-

the right to recover on the judgment. *Stodart* v. *Palmer*, 3 B. & C. 2. An allegation of a judgment remaining in the Court of our said Lord the King with a *prout patet*, does not constitute a variance, although the action was, in fact, brought after the Queen's accession. *Lewis* v. *Alcock*, 6 Dowl. P. C. 78.

(*e*) *Supra*, Vol. I. tit. WRIT. Goods seized by a sheriff in possession under a former execution, are bound by the delivery of another *fi. fa.* (subject to the first) from the time of the delivery of the latter writ to the sheriff. *Jones* v. *Atherton*, 7 Taunt. 56. *Hutchinson* v. *Johnstone*, 1 T. R. 729.

(*f*) *Supra*, 1011.

(*g*) Prior writs having issued at the suit of *S.* & *E.* against a mining company, under which property was taken and sold by the then sheriff, but pending a reference in Chancery to the Master as to the validity of the claims, who reported that a sum less than the amount levied was due to *S.*, and nothing due to *E.*, and it was ordered that the balance, after payment of the sum found to be due to *E.*, should be paid over to the company, the plaintiff having issued an execution against the company in the same year, and after the then sheriff had gone out, issued an *alias fi. fa.* directed to the present sheriff; it was held, that the balance remaining in the hands of the bankers of the under-sheriff, who had continued all along in office, could not be considered as money in the hands of the present sheriff, and render him liable for money never transferred to his account; nor could he seize and apply, in satisfaction of the plaintiff's execution, money which still remained in the under-sheriff's hands, having been paid into his banker's to his account. *Harrison* v. *Paynter*, 8 Dowl. 349. Original writs having been wholly executed, ought not to be transferred to the new sheriff under 3 & 4 Will. 4, c. 99, s. 7, and that the balance of the proceeds constituting a debt from the former sheriff to the debtor cannot be taken in execution under 1 & 2 Vict. c. 110, s. 12. 6 M. & W. 387.

(*h*) It is not necessary to prove an actual levy. *Stubbs* v. *Lainson*, 1 M. & W. 728.

(*i*) *Supra*, tit. FRAUD.

(*k*) *Jones* v. *Clayton*, 4 M. & S. 349.

(*l*) *Wright* v. *Lainson*, 2 M. & W. 739. The *inducement*, under the new rules, includes every thing which does not involve the special charge against the sheriff. *Ib.*

(*m*) *Lewis* v. *Alcock*, 3 M. & W. 188.

(*n*) Per Parke, B. in *Lewis* v. *Alcock*,

False return to a fi. fa. Defence.

dant cannot, under this plea, set up the bankruptcy of the debtor before execution (*o*).

Where the sheriff has made default in not levying on goods the joint property of the debtor and another, the measure of damages is half the value of the goods (*p*).

If the defence be, that before the sale under the plaintiff's writ the former defendant was declared a bankrupt, having committed an act of bankruptcy previous to the execution of the writ by the sheriff (*q*), the latter will be bound to prove all the facts necessary to support the commission (*r*).

To an action for a false return of *nulla bona*, the sheriff may show that the plaintiff lost his legal priority of execution by directing him not to levy till a future day, and that in the mean time another writ was delivered to him (*s*); or that he assented to the act of the sheriff (*t*), or accepted of the amount levied with knowledge of the circumstances (*u*). Where the defence is that the execution debtor was privileged, being a domestic servant to a foreign minister, the plaintiff may prove in reply that the appointment was merely colourable (*x*). So the defendant may impeach the judgment where it is manifestly fraudulent (*y*).

To an assignment previous to the execution the plaintiff may reply by showing that the assignment was fraudulent (*z*).

The sheriff having levied under a *fi. fa.* received notice from the plaintiffs to retain the amount, and that application would be made to set aside the judgment as fraudulent; he was afterwards served with a rule to return the writ, and without informing the plaintiffs he paid over the money; held, that having lent himself to the execution creditor, he must stand or fall with his right, and that it was competent to the plaintiffs, in an action for a false return, to show that such judgment and execution were fraudulent (*a*).

3 M. & W. 188. And it seems that the plea admits the judgment, the writ, the delivery of it to the defendant, as well as that there were goods of the debtor's in his bailiwick, and notice of the fact to the defendant. S. C. 6 Dowl. P. C. 389. The word 'falsely' is but a conclusion in law, and is not traversable.

(*o*) *Wright* v. *Lainson*, 2 M. & W. 739.

(*p*) *Tyler* v. *Duke of Leeds*, 2 Starkie's C. 216.

(*q*) So although the act of bankruptcy becomes complete after the levy, as by lying in prison for two months; but when completed, has relation to a day prior to the delivery. *Cooper* v. *Chitty*, 1 Burr. 20. *Chippendale* v. *Brigden*, B. N. P. 41. The petitioning creditor is a competent witness for the sheriff. *Wright* v. *Lainson*, 2 M. & W. 739.

(*r*) Ibid.; *supra*, 120.

(*s*) *Bradley* v. *Wyndham*, 1 Wils. 44. *Kempland* v. *Macauley*, Peake's C. 95. *Smallcomb* v. *Buckingham*, 1 Ld. Raym. 251; Salk. 320.

(*t*) *Stewart* v. *Whitaker*, 1 R. & M. 310.

(*u*) *Benyon* v. *Garrett*, 1 C. & P. 154.

(*x*) *Delralle* v. *Plomer*, 3 Camp. 47. In a case of difficulty the sheriff ought to apply for an indemnity; ibid. per Lord Ellenborough.

(*y*) *Tyler* v. *The Duke of Leeds*, 2 Starkie's C. 219; Latch. 222. *Penn* v. *Scholey*, 5 Esp. C. 245. *Harrod* v. *Benton*, 8 B. & C. 219. But in the first case, Ld. Ellenborough held, that such evidence must be direct to show that the judgment was void under the statute, but that all the circumstances between the parties could not be gone into to show fraud; it might be that the indemnity to the sheriff was insufficient. In *Penn* v. *Scholey*, 5 Esp. C. 245, evidence was admitted to prove that the judgment obtained against Frost was fraudulent and collusive. In order to prove that, recently before this judgment and execution, Penn, the plaintiff in the present action against the sheriff, was in debt to Frost, an execution, at the suit of Frost against Penn, was proved, and evidence was admitted of the affidavit of Frost, made for the purpose of entering up judgment on a warrant of attorney by Penn, on which judgment was signed, in which he swore that the sum of 200*l.* secured by the warrant of attorney, was unpaid.

(*z*) *Dewey* v. *Bayntum*, 6 East, 257.

(*a*) *Warmoll* v. *Young*, 5 B. & C. 660; and 8 D. & R. 442. And see *Kempland* v. *Macauley*, Peake's C. 65; and *Saunders* v. *Bridges*, 3 B. & A. 95.

False return to a fi. fa. Defence.

Or he may show that the execution under another writ, relied on by the sheriff, was fraudulent and collusive; the execution of the first writ having been suspended by the sheriff at the request of the execution creditor (*b*).

Where a previous execution is fraudulently kept on foot, the first writ affords no defence for non-execution of a second (*c*); and where the second writ is delivered to a succeeding sheriff, the latter is bound to make inquiry whether possession under the first be not fraudulent (*d*).

The right of action for a false return to a *fi. fa.* is not waived by the acceptance of the sum levied on account, and in part satisfaction of the amount indorsed (*e*).

It is also an available defence, that the defendant has paid the money levied to the landlord, under the st. of Anne, c. 14, for arrears of rent. In such case, some evidence, it seems, should be given that the rent was due (*f*).

A verdict found on an inquisition by the sheriff to ascertain the property, is not evidence for the sheriff, even in mitigation of damages (*g*).

Escape. Execution.

The plaintiff in an action (*h*) for an escape of one in execution, must first prove that the party was once in lawful custody (*i*). If the sheriff has returned *cepi corpus*, the plaintiff should prove an examined copy of the judgment, writ and return; but if the writ has not been returned, it may be produced, and the plaintiff must then proceed to prove an arrest by the sheriff, by proof of the warrant to the bailiff, and of an arrest of the party by the bailiff (*k*). If the action be brought against the marshal of the King's Bench, or the warden of the Fleet, upon a commitment in exe-

(*b*) *Kempland* v. *Macauley*, Peake's C. 65. *Saunders* v. *Bridges*, 3 B. & A. 95.

(*c*) *Lorick* v. *Crowder*, 8 B. & C. 132.

(*d*) Ib. Being apparently the goods of the defendant under the execution, the sheriff was bound to seize them. *Rice* v. *Serjeant*, 7 Mod. 37. *Broadley* v. *Wyndham*, 1 Wils. 44; 1 Ves. 245.

(*e*) *Holmes* v. *Clifton*, 3 Perr. & D. 556.

(*f*) *Knightley* v. *Birch*, 3 Camp. 251. The landlord has been held to be an incompetent witness for this purpose, but it seems that the objection would be removed by an indorsement under the late statute. If the plaintiff after payment of rent and taxes assent to the defendant's quitting the premises and sue out a *ca. sa.*, he cannot afterwards maintain the action for a false return. *Stuart* v. *Whitaker*, R. & M. 310.

(*g*) *Glossop* v. *Pole*, 3 M. & S. 175. It might be otherwise if the question were as to malice.

(*h*) Debt lies for an escape in execution, upon an equitable construction of the stat. West. 2; and 1 R. 2, c. 12. But if a plaintiff have execution on a statute of lands, goods and body, and the prisoner escape, because the lands remain in execution, debt will not lie, but only an action on the case. Cro. Jac. 657; B. N. P. 68. It lies at the suit of a hundred, after the plaintiff has been taken on a *ca. sa.* for costs, and escaped. N. B. P. 68; Fitzg. 296.

(*i*) In an action for an escape of a party under an attachment for non-performance of an award, the plaintiff alleged a mutual submission, but offered no sufficient evidence of it; held, that the allegation was material, and was not supported by proof of the rule for the attachment, which was not alleged. The plaintiff was bound in such action to prove not only the escape, but that the party was lawfully detained, and having alleged the award, was bound also to show that it was made upon the submission of the party. *Semble*, it would have been sufficient for the declaration to have begun with the rule for the attachment: after verdict, proof can be presumed of such matters only as are alleged on the record. *Brazier* v. *Jones*, 8 B. & C. 125; and 2 M. & Ry. 88.

(*k*) As to the arrest, see above, tit. ARREST, and below, tit. TRESPASS; and *Blatch* v. *Archer*, Cowp. 65. In that case, the son of the officer stated, that at the time of the arrest he had the authority in his pocket, the officer himself being at the distance of 30 rods, and not in sight, and it was held to be a good arrest. If a party be already in custody at the suit of one plaintiff, and a writ be then delivered to the sheriff at the suit of another party, the delivery of the writ is an arrest in law, and if the prisoner escape, the second plaintiff may recover against the sheriff. B. N. P. 66.

Escape. Execution.

cution, such commitment, which is the act of the Court, should be proved by an examined copy of the *committitur* entered of record (*l*).

Where a prisoner renders himself in discharge of his bail, and the plaintiff's attorney accepts him in execution, the render is entered in the Judge's book, and a *committitur* is filed, and if the prisoner escape the marshal is not chargeable without notice, either by serving him with a rule, or entering a *committitur* also in his book without proving the party actually in prison (*m*).

If a debtor be in custody of the sheriff at the suit of one creditor, and a second creditor deliver a *ca. sa.* to the sheriff on his own suit, the delivery of the writ is an arrest in law (*n*).

The stat. 8 & 9 Will. 3, c. 27, s. 9, directs, that if any person desiring to charge another with any action or execution, shall desire to be informed by the marshal of the K. B., or warden of the C. P., or his deputy, or by any other keeper or keepers of any other prison, whether such a person be a prisoner in his custody or not, every such marshal, warden or keeper shall give a true note in writing thereof to the person requesting the same, or his attorney, on demand; and if such marshal, warden, keeper or deputy, shall give a note in writing that such person is an actual prisoner in his custody, such note shall be taken as evidence of the fact (*o*).

In practice, when a prisoner in custody of the marshal is to be charged with a King's Bench execution, a rule is obtained for the marshal to acknowledge the defendant to be in his custody. Such an acknowledgment is of course evidence to prove the fact. Where a prisoner is in custody of the warden of the Fleet, and is charged with a Common Pleas or Exchequer writ, a *habeas corpus* is obtained, the return to which proves the fact of his being in custody (*p*).

A succeeding sheriff is not liable for an escape, on mere evidence that the debtor was in custody of the preceding sheriff under an execution, without showing at what time the escape took place: and it seems in such a case to be essential to show that he was comprised in the indenture by which the sheriff's predecessor delivered over the prisoners in his custody (*q*).

Escape.

The plaintiff must then prove that the debtor was at large after the arrest, either before or after the return of the writ. The permitting the debtor to be out of the defendant's custody for any purpose, or the shortest space of time, will amount to an escape; as, where the bailiff of a liberty, after arresting the debtor, takes him out of the bailiwick, and delivers him into the county gaol (*r*); or the debtor is allowed to go out to settle his affairs, in the custody of a bailiff (*s*).

(*l*) *Turner* v. *Eyles*, 3 B. & P. 456. *Wigley* v. *Jones*, 5 East, 440. See *Barnes* v. *Eyles*, 2 Moore, 561.

(*m*) B. N. P. 67, 8; Salk. 272.

(*n*) Salk. 274; B. N. P. 66.

(*o*) See B. N. P. 68.

(*p*) Peake's Ev. 422, 5th edit.

(*q*) *Davidson* v. *Seymour*, 1 M. & M. 34; and see the cases there cited in the note. *Westley's Case*, 3 Co. 71, b.; Cro. Eliz. 365; Poph. 85; Mo. 688. B. N. P. 68; and note in M. & M. 35.

(*r*) *Benton* v. *Sutton*, 1 B. & P. 24; where the sheriff permitted the debtor to go about with a follower, before he took him to prison. And per Eyre, C. J., the custody of the follower, after the writ once executed, amounted to nothing; he could have no power to detain the prisoner, if he had chosen to escape, and the warrant would have been no justification to him if mischief had happened. Wherever the prisoner in execution is in a different custody from that likely to enforce payment, it is an escape, per Buller, J. ib. And see *Hawkins* v. *Plomer*, 2 W. Bl.

(*s*) *Boothman* v. *The Earl of Surrey*, 2 T. R. 5.

Under a count for a voluntary escape, the plaintiff may prove a negligent escape (*t*). Escape.

By the stat. 8 & 9 Will. 3, c. 48, "If the marshal or warden, or their leputies, or the keeper of any prison, after one day's notice in writing given for the purpose, shall refuse to show a prisoner committed in execution to the creditor, or his attorney, such refusal shall be adjudged to be an escape."

And although the debtor be not permitted to depart out of custody, he ought to be taken to prison within a convenient time (*u*). If the officer use unreasonable delay, or give more liberty than he ought, it will be an escape (*v*).

If a sheriff on going out of office omit to deliver over a prisoner charged with his execution to his successor, it is an escape; and if a sheriff die, the new sheriff must at his peril take notice of all prisoners in his custody, and the executions with which they are charged (*x*).

If the plaintiff allege that the sheriff took *A. B.* and his wife in execution (on a judgment against both for a debt due from the wife *dum sola*), and that he permitted both to escape, and prove only that he took the husband, and permitted him to escape, the variance is not fatal (*y*). Variance.

Where the declaration stated mutual bonds of submission to arbitration, an attachment against *E. F.* for non-performance of the award, an arrest on the attachment, and a committal by a Judge at chambers (on *E. F.* being brought before him by *habeas corpus*) to the custody of the marshal; held that the plaintiff was bound to prove the execution of the submission bonds by *himself* as well as *E. F.* (*z*).

The plaintiff is entitled to recover the whole debt; and therefore, in an action of debt, evidence as to the situation and circumstances of the debtor is immaterial (*a*).

If the debtor has not been taken on a fresh pursuit, the defendant cannot avail himself of any excuse, by way of defence (*b*), short of showing that the Defence.

1049. But a sheriff is not bound to take the prisoner immediately to the county gaol. *Houlditch* v. *Birch*, 4 Taunt. 608; where the prisoner was detained for fourteen days before the return of the writ, in a lock-up house which did not belong to the arresting officer. If the sheriff receive the sum indorsed on the writ from the prisoner, and before payment over to the plaintiff liberates the prisoner, it is an escape. *Slackford* v. *Austin*, 14 East, 466; 4 B. & C. 31.

(*t*) *Bonafous* v. *Walker*, 5 T. R. 126. A release by mistake is a voluntary escape. *Filewood* v. *Clement*, 6 Dowl. P. C. 508; and see 2 Str. 873.

(*u*) Per Heath, J., 1 B. & P. 28; and what is a convenient time is a question for the judge. Ibid.

(*v*) Ibid.

(*x*) 3 Co. 71; B. N. P. 68. By the stat. 3 Geo. 1, the under-sheriff is answerable till a new sheriff be appointed. An assignment by an under-sheriff to the succeeding sheriff, although not by indenture, is a good assignment (B. N. P. 69; 1 Barnes, 259). If a man in execution escape, and return again, and afterwards be made over with other prisoners, and again escape, the second sheriff will be chargeable. B. N. P. 69; 2 Lev. 109.

(*y*) 1 Sid. 5; B. N. P. 65. If both baron and feme be taken in execution, and the feme be suffered to escape, an action lies, although the baron continue in prison. 1 Roll. Ab. 810; B. N. P. 65. But the present practice is to discharge the wife, where both are taken in execution. Tidd, 1043, 7th edit.

(*z*) *Brazier* v. *Jones*, 8 B. & C. 124.

(*a*) 2 T. R. 126; 2 Bl. 1048. *Robinson* v. *Taylor*, 2 Ch. C. T. M. 456. In an action on the case, the jury may give such damages as will cover the loss, and the plaintiff may still recover against the debtor. See 2 T. R. 126.

(*b*) The defendant must either traverse some particular fact or plead specially. See tit. RULES. See the stat. 8 & 9 W. 3, c. 27, s. 6, as to the plea of retaking on fresh pursuit. By the stat. 7 G. 4, c. 57, s. 81, the defendant may show under the general issue that he discharged the prisoner under an order of the Insolvent Court. See *Saffery* v. *Jones*, 2 B. & Ad. 196.

Escape. Execution. Defence.

escape was occasioned by the act of God, or the King's enemies (*c*), or by the fraud and covin of the party really interested in the judgment (*d*). A rescue from the defendant's officers while they were conveying the debtor under a *habeas corpus* (*e*), or the destruction of the prison by a mob (*f*), affords no defence.

Fresh pursuit.

The defendant cannot defend himself by proof that the debtor escaped against his will, and that he made fresh pursuit, and retook him before the commencement of the action, without a special plea supported by affidavit (*g*). The defendant may also, under a special plea, prove that the debtor returned into his custody before the commencement of the action; but he must show that the debtor remained in custody till the commencement of the action. Where the replication traversed the keeping and detaining *modo et formâ*, and the plaintiff proved that the debtor again escaped, and died out of custody, it was held that he was entitled to a verdict (*h*). The plea of *no escape* admits an arrest (*i*).

It is no defence to show that the debtor in execution paid the debt to the sheriff (*j*).

A sheriff or other officer cannot take advantage of an error in the process (*k*); but he may show that the judgment was actually void as *coram non judice* (*l*); as, where the action is for an escape after the execution of a *ca. sa.* on a judgment given in an inferior court on a bond which was made beyond the limits of the jurisdiction (*m*). But the sheriff is liable, although the *ca. sa.* issued after a year from the judgment without a *scire facias*; for this process, though erroneous, is not void (*n*).

It is a good defence to an action against a sheriff or gaoler for an escape, that he discharged the prisoner from custody by virtue of an order of the Insolvent Debtor's Court; he need not show that the proceedings upon which the order is grounded were properly taken, or that the insolvent was within the walls of a prison when he petitioned for his discharge (*o*).

In an action for an escape on final process, a plea that the party escaped through the fraud and covin of an unknown person, unto and to the use and benefit of whom the judgment had been assigned, was held to be supported by showing that the escape was by the contrivance of the party who had really paid the consideration of the assignment, though in form made to

(*c*) 1 Roll. Ab. 808; 4 Co. 84; B. N. P. 66. As from the prison taking fire, or being broken open by the King's enemies.

(*d*) *Hiscocks* v. *Jones*, M. & M. 269.

(*e*) *O'Niel* v. *Marson*, Burr. 2812. *Fitz Jeffries' Case*, 1 Sid. 13; 3 Co. 44; B. N. P. 67; 3 Keb. 51. 305; 1 Stra. 431.

(*f*) *Alsept* v. *Eyles*, 1 H. B. 108.

(*g*) Roll. Ab. 808, pl. 1. By the stat. 8 & 9 W. 3, c. 27, this plea may be pleaded to an action charging a voluntary escape. *Bonafous* v. *Walker*, 2 T. R. 126; and the plaintiff may reply a voluntary escape. 1 Vent. 211; B. N. P. 67. See Gil. Ev. 240. Plea of *nil debet*.

(*h*) *Chambers* v. *Jones*, 11 East, 406.

(*i*) B. N. P. 67.

(*j*) *Slackford* v. *Austen*, 14 East, 468; and see *Crozer* v. *Pilling*, 4 B. & C. 31.

(*k*) B. N. P. 65. *Wearer* v. *Clifford*, Cro. J., 3. *Burton* v. *Eyre*, ib. 288. As a sheriff, where he is charged with an escape, shall not take advantage of any error in the proceeding, so the defendant, if he kill the sheriff, shall not take advantage of error in the process. *Macally's Case*, 9 Co. 68; B. N. P. 65. But where an action was brought against the marshal of the K. B. for not receiving a copy of the declaration against a prisoner, *per quod* the plaintiff lost his suit; and it appeared that the declaration was tendered at the prison before the bill was filed; the plaintiff was nonsuited. *Ekins* v. *Ashton*, Midd. 1752, per Lee, C. J.; B. N. P. 65.

(*l*) Carth. 148; B. N. P. 65, 66.

(*m*) B. N. P. 65. Where the Court has cognizance of the cause the judgment is only erroneous; but if the Court has no jurisdiction it is void. B. N. P. 66.

(*n*) Cro. Eliz. 188; B. N. P. 66; Cro. J. 3. 289. And the sheriff may justify in an action of false imprisonment.

(*o*) *Saffery* v. *Jones*, 2 B. & Ad. 598.

another; the substance of the plea being that it was by the covin of the party really interested in the judgment (*p*).

Where a sheriff seizes goods in execution after an act of bankruptcy committed by the judgment-debtor, on which a commission afterwards issues, and he sells part of the goods on the day on which the commission issues, and part the next day, he is liable in an action by the assignees for money had and received to their use, unless he can show that he paid over the money to the execution-creditor before he had notice of the commission (*q*). Money had and received.

Where the sheriff has returned to a writ of *fieri facias* that he has levied the money, debt or assumpsit lies to recover it (*r*), although no demand has been made (*s*); and the sheriff's return upon the writ proves conclusively the receipt of the amount to the use of the plaintiff (*t*), but raises no presumption that the money has been paid over to the execution-creditor (*u*). It is not sufficient to prove the taking and selling of the goods by a person reputed to be the officer of the sheriff without proof of the writ of execution and warrant (*x*). He is entitled to retain his poundage, but no more (*y*). He may prove in defence that the sum was levied on goods which were not the property of the defendant in the former suit (*z*).

In an action on the case against a sheriff, who has returned to a writ of *venditioni exponas*, that he has sold part, and that the residue remains in his hands for want of buyers, and where the declaration alleges that he had not the money levied at the return of the writ before the King, &c., but that, contrary to his duty, he had paid the sum levied, and delivered the goods to divers persons unknown, the sheriff may show that the goods

(*p*) *Hiscocks* v. *Jones*, 1 M. & M. 260.

(*q*) *Lee* v. *Lopez*, 15 East, 230. Where the sheriff seizes goods of a bankrupt before an act of bankruptcy, on an execution within the scope of the stat. 6 G. 4, c. 16, s. 101, the execution being on a judgment by *nil dicit*, and after notice of an act of bankruptcy, sells the goods, and pays the proceeds to the execution-creditor, he is liable to the assignees for money had and received to their use. *Notley* v. *Buck*, 8 B. & C. 160. But in this case great stress was laid on the fact of previous notice. In a later case, the sheriff had seized the goods under a *fi. fa.* on a judgment entered on a warrant of attorney, and sold the goods, and paid over the money to the judgment-creditor, but without any notice of the act of bankruptcy, and before the issuing the commission; the case was argued in the Court of King's Bench, but no judgment has been given. In the case of *Vernon* v. *Hankey*, 2 T. R. 121, it was held, that a banker was not justified in paying the drafts of a trader after the notice of the act of bankruptcy; and Buller, J. observed in his judgment, "If the sheriff had a right to levy money under an execution, he was bound to pay it over to the party at whose suit the execution issued; and therefore it is inconsistent to say that the sheriff levied the money legally, but paid it over illegally." Where a sheriff levied after an act of bankruptcy, the Court stayed the proceedings on payment of the money levied, and costs up to the time of the application, deducting poundage and costs of execution. *Probinia* v. *Roberts*, 1 Chitty, 577; Deacon's B. L. 750. Where the sheriff had seized and sold goods of a bankrupt without notice, but had afterwards paid over the proceeds, upon an indemnity from the execution-creditor, held that the indemnity was virtually notice before the payment, and that the assignees were entitled to waive the tort, and recover in the action for money had and received. *Young* v. *Marshall*, 8 Bing. 45.

(*r*) Hob. 206.

(*s*) *Dale* v. *Birch*, 3 Camp. 347. *Longdill* v. *Jones*, 1 Starkie's C. 345. *Jefferies* v. *Sheppard*, 3 B. & A. 696.

(*t*) *Dale* v. *Birch*, 3 Camp. 347. *Cator* v. *Stokes*, 1 M. & S. 599.

(*u*) *Cator* v. *Stokes*, 1 M. & S. 599.

(*x*) *Wilson* v. *Norman*, 1 Esp. C. 154.

(*y*) *Londill* v. *Jones*, 1 Starkie's C. 346. Where the proceeds are not sufficient to satisfy the plaintiff's damages, the sheriff is not entitled to any more than the poundage allowed by the stat. 29 Eliz. c. 4. *Buckle* v. *Bewes*, 3 B. & C. 688. The right to poundage under the stat. of Eliz. is not affected by the late stat. 1 Vict. c. 55. *Davies* v. *Griffith*, Ex. M. T. 1838, Roscoe on Ev. 640.

(*z*) *Brydges* v. *Walford*, 1 Starkie's C. 389.

were in fact the property of the assignees of the defendant, who had become bankrupt (*a*).

Case for taking insufficient sureties.

In an action for taking insufficient pledges on a replevin-bond (*b*), the plaintiff (*c*) must, according to the issues taken (*d*), prove the sum due for rent, the taking the distress, the replevin, the bond, the judgment in the replevin-suit, &c. as alleged, and the insufficiency of one or both the sureties. The replevin must be proved by the warrant or precept of the sheriff or his deputy (*e*). The bond is usually proved by means of the attesting witness, notice having been given to the defendant to produce it; but it seems that where the sheriff, or his officer, has taken a replevin-bond according to the statute, which is produced by the defendant upon the trial, proof of its execution by means of the attesting witness is not essential (*f*). The proceedings and judgment must be proved as alleged (*g*).

Insufficiency.

It seems that slight evidence of the insufficiency of the sureties is sufficient to throw the burthen on the sheriff, for they are known to him, and it is his duty to take care that they are sufficient (*h*). It is competent to show that they were in debt, and that on application for payment they promised payment but did not pay (*i*). But if the sureties were apparently responsible persons, the sheriff is not liable, although they are not actually so, and although he neglected to inquire into their actual responsibility (*j*); and therefore it is essential to prove either that the sheriff or his agent actually knew that they were insufficient, or that the badness of their credit, or insolvency, was notorious in the neighbourhood of their residence, so that the sheriff or his deputy might have ascertained the fact if they would (*k*).

(*a*) *Brydges* v. *Walford and another*, 1 Starkie's C. 380, in the note. *Semble*, an action does not lie against the sheriff, who has not been ruled to return the writ, for not having the money in court according to the exigency of the writ. *Moreland* v. *Leigh and another*, 1 Starkie's C. 388. See 2 Inst. 452. Com. Dig. *Return*, F. 1.

(*b*) The stat. 11 Geo. 2, c. 23, enacts, "that all sheriffs, and other officers having authority to grant replevins, shall in any replevin of a distress for rent take from the plaintiff and two *responsible* persons, as sureties, in their own names, a bond in double the value of the goods distrained, conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded. The sheriff on a replevin of distress taken damage feasant is not bound to take more than one surety. *Hucker* v. *Gordon*, 3 Tyr. 107; 1 C. & M. 58.

(*c*) A bailiff who makes cognizance may maintain the action. *Page* v. *Eamer*, 1 B. & P. 378.

(*d*) See the new rules, Hil. Term, 4 W. 4, *infra*, tit. RULES.

(*e*) The bailiff should be served with a *subpœna duces tecum*, to produce the precept, and notice should be given to the defendant's attorney to produce it at the trial.

(*f*) Per Abbott, C. J. in *Scott* v. *Waithman*, Westm. sitt. after Mich. term, 3 Geo. 4; 3 Starkie's C. 168. *Barnes* v. *Lucas*, 1 R. & M. 264. Where the bond had been put in evidence and referred to on both sides, the court, on a motion for a new trial, held it to be equivalent to an admission of the bond. *Jeffery* v. *Bastard*, 4 Ad. & Ell. 823.

(*g*) *Supra*, Vol. I. tit. JUDGMENT. And see as to variance in the names of the suitors in the county court, *Draper* v. *Garratt*, 2 B. & C. 2; and Vol. I. tit. VARIANCE.

(*h*) B. N. P. 60. *Saunders* v. *Darling*, sitt. at Westm. C. B. Trin. 10 Geo. 3. He is bound to exercise reasonable discretion and caution, and whether he has done so or not is a question for the jury. *Jeffery* v. *Bastard*, 4 Ad. & Ell. 823. He ought not to rest satisfied with the representations of sureties themselves. Ib.

(*i*) The circumstance of one of the pledges having repeatedly promised payment to his creditors, and of his having broken such promises, is evidence against the sheriff. *Gwyllim* v. *Scholey*, 6 Esp. C. 100. *Axford* v. *Perrott*, 4 Bing. 586. *Archer* v. *Hall*, ib. 464.

(*j*) *Hindle* v. *Blades*, 5 Taunt. 225.

(*k*) Per Abbott, C. J. in *Scott* v. *Waithman*, Westm. sitt. after Mich. term, 3 Geo. 4. 3 Starkie's C. 168. Where a surety does not reside within the sheriff's bailiwick, it is proper to search the sheriff's office where he does reside, in order, previous to taking his bond, to ascertain

The sureties are competent as to their own sufficiency (*l*).

Doubts have been entertained as to the extent of the sheriff's liability (*m*), but it seems, that if in the replevin suit the present plaintiff has had judgment merely for the return of the goods, he cannot recover more than double their value.

Insufficient sureties.

And no more can be recovered against the sheriff for taking insufficient sureties, than could have been recovered against the sureties, supposing them to have been sufficient (*n*). And the plaintiff cannot recover the costs of an action against the sureties without giving notice to the sheriff, for he has a right to be furnished with the opportunity of saving the expense (*o*).

In an action againt the sheriff for arresting and taking an insufficient bail-bond, the declaration alleged a cause of action against *W. S.*, who before the arrest was as well known by the name of *F. S.*, and had oftentimes admitted the same to the plaintiff, of all which the defendant had notice, and that after arresting him upon a writ, in the name of *W. S.*, the sheriff had released him upon insufficient bail; the plea denied the having such notice that the party was as well known by the one name as the other, and then went on to answer insufficiently the latter branch of the declaration, it was held on demurrer, that as being mere matter of evidence, the declaration as to that part was bad; held also, that the sheriff, by having in the first instance taken the bail-bond, had not rendered himself liable, as having elected to treat the arrest as valid (*p*).

For negligence in losing the replevin bond.

In an action against a sheriff of a Welch county, for negligence in losing a replevin bond taken by him upon a distress for rent due to plaintiff, by which he was prevented from having an assignment, and suing thereon; the declaration alleged that the plaint was removed out of the county court of the *said* sheriff, by *re. fa. lo.*, into the court of great sessions, but it appeared that such removal was after the defendant had gone out of office: held that the averment being not an allegation of description but of substance, it was wholly immaterial who the individual was who presided in the court at the time of the plaint being removed, and that the word *said* might be rejected as surplusage (*q*).

The third count, after stating the plaint and its removal and proceedings above, with the bond conditioned for the appearance of the tenant,

whether any process is out against him. *Sutton* v. *Waite*, 8 Moore, 27. It is not necessary that the sheriff should make personal inquiry; it is sufficient if a person known to the sheriff make inquiry as to the credit and reputation of a tradesman and communicate a favourable result to the sheriff, Ib. Reputation is evidence of credit. *Scott* v. *Waithman*, 3 Starkie's C. 170.

(*l*) *Hindle* v. *Blades*, 5 Taunt. 225; 1 Saund. 195. g. (*n*).

(*m*) See *Yea* v. *Lethbridge*, 4 T. R. 433. *Evans* v. *Brander*, 2 H. B. 547; where damages were limited to double the value of the goods distrained. In a later case (Peake's L. Ev. 425, 5th edit.) the Court of C. P. is stated to have held that the defendant was liable to the full extent of the penalty of the bond. In *Concannon* v. *Lethbridge* (2 H. B. 36), it was held that the defendant was liable beyond the penalty of the bond. This case, however, seems to have been deliberately over-ruled in the subsequent case of *Evans* v. *Brander*, 2 H. B. 547. In *Hefford* v. *Alger* (1 Taunt. 218), it was held that the two sureties were together liable only to the amount of the penalty of the bond, and the costs of the suit on the bond, even although a greater loss is admitted on the pleadings. *Jeffery* v. *Bastard*, 4 Ad. & Ell. 823.

(*n*) *Evans* v. *Brander*, 2 H. B. 36. And per Best, C. J. in *Baker* v. *Garrett*, 3 Bing. 59.

(*o*) *Baker* v. *Garrett*, 3 Bing. 56.

(*p*) *Brunskill* v. *Robertson*, 2 Perr. & D. 269; and 10 Ad. & Ell. 840.

(*q*) *Perreau* v. *Bevan*, 5 B. & C. 285; 8 D. & R. 72.

For negligence in losing the replevin bond.

and *prosecuting his suit with effect*, averred the judgment that the tenant should take nothing by his writ, but be in mercy, &c. with an award of the return of the goods, that the tenant did not make a return, whereby the bond became forfeited, the defendant's breach of duty in losing the bond, whereby plaintiff was damnified; and it was objected at the trial, first, that the action was not maintainable, as the replevin bond could not have been enforced upon the judgment for want of a writ *de retorno habendo* being awarded, and return of *elongata* thereon; and secondly, that the avowant having elected to proceed under 17 Car. 2, c. 7, was confined to his execution under that statute: held that the not having prosecuted the suit with success was a breach within the meaning of the words "prosecuting *with effect*," and the plaintiff would have been entitled to recover in respect thereof if the bond had been assigned without any writ *de retorno* having been issued, although a breach in that respect had not been formally assigned: held also, that although it appeared that the jury had proceeded to inquire into the arrears and value of the distress, according to the 17 Car. 2, and a judgment had been signed according thereto, as well as the common-law judgment, yet that the plaintiff having elected to prove under that statute, was not confined to his execution under the statute, but might also have proceeded against the sureties on the bond, and therefore against the sheriff for the damage occasioned by his negligence in losing it (*r*).

By sheriff against a surety.

A sheriff having taken one surety only in a replevin bond, may sue him (*s*); but in an action against him for not having returned the goods, the declaration suggesting breaches according to the stat. 8 & 9 Wil. 3, the defendant is liable to a moiety only of the damages recovered against the sheriff. He is not liable to the costs incurred by the sheriff in defending an action against him for taking insufficient pledges (*t*).

Action by a landlord.

In an action against the sheriff by a landlord, for not paying rent due in respect of the premises on which goods are taken in execution (*u*), the

(*r*) Ibid. And see *Chapman* v. *Butcher*, Carth. 248. *Grillin* v. *Holbrook*, 1 B. & P. 410. *D. of Ormond* v. *Bicchey*, Carth. 519. *Turner* v. *Turner*, 2 B. & B. 107.

(*s*) *Austen* v. *Howard*, 1 Moore, 682; 2 Marsh. 352; 7 Taunt. 28.

(*t*) *Austen* v. *Howard*, 1 Moore, 68. Sureties in a replevin bond are not discharged by giving time to the principal. *Moore* v. *Bowmaker*, 6 Taunt. 379.

(*u*) Under the stat. 8 Ann. c. 14, s. 1, which enacts, that no goods or chattels upon any messuage, lands or tenements, leased for life, term of years, at will, or otherwise, shall be liable to be taken by virtue of an execution *, on any pretence whatsoever,

* The plain sense of the words is confined to executions on judgments. Per Ld. Tenterden, C. J. in *Brandling* v. *Barrington*, 7 B. & C. 467. These words include an execution for costs of a nonsuit (*Hewlet* v. *Kingston*, 2 Wils. 140; an outlawry in a civil suit (*St. John's College* v. *Murcott*, 7 T. R. 259; a seizure under a commission of bankrupt (*Buckley* v. *Taylor*, 2 T. R. 600). *Sykes*, *Lee* v. *Lopez*, 15 East, 230; *ex parte Devisme*, Co. B. L. 190; 15 East, 230. If the sheriff seize goods under an execution, which is afterwards overhaled by a commission of bankrupt, the sheriff, as against the assignees, will not be allowed to deduct a year's rent as due to the landlord, unless he had actually paid it over before notice of the commission. *Lee* v. *Lopez*, 15 East, 230. And a sheriff who has seized goods under an execution after an act of bankruptcy committed, cannot defend himself on the ground of liability to the assignees. *Duck* v. *Braddyll*, M'Clelland, 207. *St. John's College* v. *Murcott*, 7 T. R. 259. An extent in aid is not within the stat. *R.* v. *De Caux*, 2 Price, 17. The trustee of an outstanding satisfied term assigned to attend the inheritance, is a landlord within the statute. *Colyer* v. *Spear*, 2 B. & B. 67. A vendee, on taking possession, agrees to pay 100*l.* per annum until the completion of the purchase: this is *rent*, and within the statute. *Saunders* v. *Musgrave*, 6 B. & C. 524. The action may be brought by an executor or administrator. *Palgrave* v. *Windham*, 1 Str. 212.

The statute contemplates adverse executions issued by third persons, and not by the

plaintiff must prove, 1. The demise to the tenant, and that the rent is due, as stated in the declaration; 2. The levy by the sheriff; 3. Notice of the sum in arrear, to the sheriff or his deputy; 4. The removal by the sheriff; 5. The value of the goods seized. Action by a landlord.

After proving the demise and occupation by the tenant, it is not necessary to prove the state of accounts between the plaintiff and his tenant; it lies on the defendant to prove that the rent has been paid (*x*). It is sufficient to prove the rent due by virtue of an agreement to pay rent in advance (*y*). Rent due.

The plaintiff will not be entitled to recover in respect of any rent which has accrued after the seizure (*z*), although the sheriff still remained in possession (*a*). Levy.

The act of levying must be proved against the sheriff, and he must be connected with the acts of the bailiff in the same manner as in action for an escape or false return (*b*).

Although some notice to the sheriff of the landlord's claim is necessary (*c*), no specific form of notice is required by the statute; it is sufficient if the sheriff's knowledge can be proved from circumstances (*d*). Notice.

It is sufficient for the plaintiff to prove the removal of part of the goods of the tenant, without showing that enough is not left to satisfy the rent (*e*). Removal.

It is no defence to show that the goods after removal were replaced upon

unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord, or his bailiff, all such sums of money as are due for rent for the said premises at the time of such taking of the goods, provided the arrears of rent do not amount to more than one year's rent. By the stat. 11 G. 4, c. 11, these provisions are extended to the seizure and sale of goods under process out of the Common Pleas at Durham. See *Brandling* v. *Barrington*, 7 B. & C. 467.

(*x*) *Harrison* v. *Barry*, 7 Price, 690. It is therefore unnecessary for the plaintiff to call the tenant as a witness. Ibid.

(*y*) Ibid. And such rent may be distrained for by a landlord who anticipates an execution by a judgment-creditor.

(*z*) 1 M. & S. 245.

(*a*) *Hoskins* v. *Knight*, 1 M. & S. 245. Even although growing corn was the subject of seizure, which must necessarily remain on the premises to ripen. *Gwilliam* v. *Barker*, 1 Price, 274. But where the plaintiff declared on a special count for taking goods of a tenant in execution, without leaving sufficient to satisfy the arrears of rent, with a count in trover; held that the pleadings admitting the defendant to have taken the goods, and having no right to take them without leaving sufficient to satisfy the plaintiff's rent, the verdict was right on the first count, and that no other execution appearing, the statement of the party levying sufficiently connected him with the defendant, without producing any warrant. *Reed* v. *Thoyts*, 6 M. & W. 410; and 8 Dowl. 410.

(*b*) *Supra*, 1011.

(*c*) See *Arnitt* v. *Garnett*, 3 B. & A. 441. *Smith* v. *Russell*, 3 Taunt. 400.

(*d*) Where the sale has been conducted with great secrecy and dispatch, it is for the jury to say whether the sheriff knew that rent was in arrear. *Andrews* v. *Dixon*, 3 B. & A. 645.

(*e*) *Colyer* v. *Spear*, 2 B. & B. 70.

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landlord; where, therefore, he had issued an execution against the tenant, the fruits of which he was compelled to refund to the assignees of the latter under the Insolvent Act, 7 G. 4, c. 57, s. 34, it was held that he was not entitled to retain the year's rent. *Taylor* v. *Lanyon*, 6 Bing. 536.

The stat. applies to goods in *apartments*, parcel of a messuage, &c. *Thurgood* v. *Richardson*, 4 C. & P. 481.

In an action against the sheriff by the landlord for not reserving a year's rent, a release given to the tenant after the jury are sworn, does not prevent the plaintiff from recovering. The lease of an under-tenant is equally within the 11 G. 2, c. 19, as that of an immediate lessee. *Thurgood* v. *Richardson*, 7 Bing. 48.

The landlord is entitled to the full year's rent, as against an executi n creditor, and is not bound by any abatement he had previously allowed to his tenant. *Williams* v. *Lewsey*, 8 Bing. 28.

Removal.

the premises (*f*); otherwise to show that the plaintiff assented to a removal (*g*), although the assent were founded on an undertaking by the bailiff and auctioneer, which cannot be enforced.

Proof of the value of the goods is necessary for the purpose only of showing the amount of the plaintiff's loss, by the defendant's act. The parties are not bound by the amount actually produced by the sale (*h*).

In an action against the sheriff for having wrongfully paid a year's rent to the landlord of the premises on which the debtor's goods were seized under a *fi. fa.*, it is incumbent on the sheriff to give *some* evidence to show that the sum was due (*i*); and it seems that the landlord would not be a competent witness for this purpose; for if the plaintiff succeeded, the witness would be liable to the sheriff, and the judgment would be evidence to prove special damage.

The sheriff cannot maintain trespass against a landlord for distraining goods taken in execution, where the sheriff has abandoned the possession of the goods (*k*).

Trespass or trover.

In an action of trespass or trover against the sheriff, for seizing the plaintiff's goods under a *fieri facias*, proof of the warrant is sufficient to connect the sheriff with the acts of the bailiff (*l*); and this evidence will be no proof of the writ to the sheriff, but he must prove it in support of his plea of justification (*m*). A bill of sale executed by the sheriff, reciting the writ and seizure, is evidence of the taking (*n*).

Proof that the bailiff, under the sheriff's warrant, upon an execution against the goods of *A.*, seized those of *B.*, is evidence to support an action

(*f*) *Lane* v. *Crockett*, 7 Price, 566.

(*g*) *Rothery* v. *Wood*, 3 Camp. C. 25.

(*h*) The plaintiff may show that more might have been produced. *See Foster* v. *Hilton*, 1 Dowl. P. C. 35. The jury are not bound to give even the sum for which they sold. Per Parke, J. *Calvert* v. *Jolliffe*, 2 B. & Ad. 422.

(*i*) *Keightly* v. *Birch & another*, 3 Camp. 521.

(*k*) 1 H. B. 543; 3 M. & S. 175; Peake's C. 65.

(*l*) *Gibbins* v. *Phillips*, 7 B. & C. 535. *Grey* v. *Smith*, 1 Camp. 387. The sheriff it has been seen (*supra*, tit BANKRUPT), is held to be liable where he seizes and sells the goods of a bankrupt after an act of bankruptcy, although he had no notice of the bankruptcy or commission. *Potter* v. *Starkie*, cited in *Stephens* v. *Elwall*, 4 M. & S. 259; 2 M. & S. 260. This goes much beyond the former decision of *Bayley* v. *Bunning*, 1 Liv. 173, and *Cooper* v. *Chitty*, *supra*, 116; but has been recognized in several instances. See *Price* v. *Helyer*, 1 Bing. 397. *Lazarus* v. *Waithman*, 5 Moore, 313. *Stead* v. *Gasgoigne*, 8 Taunt. 527. *Dillon* v. *Langley*, 2 B. & Ad. 131. *Carlisle* v. *Garland*, 7 Bing. 298. In the case of *Balme* v. *Hutton*, 2 C. & J. 19, the Court of Exchequer decided to the contrary; but the judgment was reversed in the Exchequer Chamber, 9 Bing. 471; and in *Garland* v. *Carlisle*, 4 Bing. N. C. 7; the same question was determined accordingly in the House of Lords. And see *Groves* v. *Cowham*, 10 Bing. 5. Where the sheriff sells goods which were the bankrupt's, after a secret act of bankruptcy, without notice, but under an indemnity pays over the amount to the judgment-creditor, he is liable to the assignees for money had and received. *Young* v. *Marshall*, 8 Bing. 43. Goods had been taken in execution about the time of the change of sheriffs, and after an action of trover by assignees was set down for trial, the writ which had not been returned had been seen with a form of return, with the defendant's (the present sheriff's) name indorsed, but at the trial the writ was produced with that name erased, and the name of the former sheriff instead; held that as the first indorsement if produced would have been conclusive against the defendant, as rendering him responsible for the sale, it was for the jury to say whether his name had been put thereon by mistake in the officer, or subsequently erased as an afterthought, to turn the plaintiff round. *Waterhouse* v. *Atkinson*, 2 C. & P. 345. The plaintiff is not bound by the price of the goods at the sale, though where the plaintiffs as assignees would be bound to sell them, it may be considered a fair measure of damages. *Waterhouse* v. *Atkinson*, 3 C. & P. 345.

(*m*) *Grey* v. *Smith*, 1 Camp. 387.

(*n*) *Woodward* v. *Larking*, 3 Esp. C. 286.

of trespass against the sheriff, who is liable *civiliter* for the acts of his bailiff (*o*). Trespass or trover.

A sheriff seizing goods under a distress for taxes, is not entitled to notice of action (*p*).

The sheriff cannot justify the arresting the real defendant, or taking his goods, where his name is mistaken in the writ (*q*).

But it is a good defence to an action by the husband and wife, for seizing goods belonging to the wife as executrix, to show that the goods were treated as the goods of the husband (*r*). So case lies against the sheriff for selling goods absolutely under an execution against a party who had hired them, provided on seizure made he gave notice that the debtor had but a qualified

(*o*) *Sanderson* v. *Baker*, 3 Wils. 309; and the cases there cited. And see *Woodgate* v. *Knatchbull*, 2 T. R. 148. *Ackworth* v. *Kempe*, 1 Doug. 40. Even where he arrests after the return of the writ. Per Tindal, C. J. *Price* v. *Peck*, 1 Bing. N. C. 385. And see *Underhill* v. *Wilson*, 6 Bing. 697. The sheriff is not liable for the acts of his bailiff, where the sheriff acts in a judicial character. *Tunno* v. *Morris*, 2 C. M. & R. 298; *infra*, tit. TRESPASS. He is liable *civiliter* for all done by bailiff, which he would not have done but for the warrant. *Smart* v. *Hutton*, K. B. Mich. T. 1833. He is liable in trespass for seizing defendant's goods after notice of writ of error, although there be no further supersedeas. *Belshaw* v. *Marshall*, 4 B. & Ad. 336. Where an indemnity bond has been fraudulently obtained by the sheriff's officer, it is a good defence to an action on the bond by the sheriff. *Raphael* v. *Goodman*, 3 Nev. & P. 547.

(*p*) 1 Bing. 369.

(*q*) *Shadgett* v. *Clipson*, 8 East, 328. *Morgan* v. *Bridges*, 2 B. & A. 647. 2 Starkie's C. 314. *Cole* v. *Hindson*, 6 T. R. 234. *Scandover* v. *Warner*, 2 Camp. 270. Where a defendant has been arrested by a wrong christian name, and the sheriff returns, "I have taken *A. B.* sued by the name of *C. B.*" he is a trespasser. *R.* v. *Sheriff of Surrey*, 1 Marsh. 75. But if a party being asked his real name previous to the issuing of process, admit it to be *John*, he cannot afterwards insist that his name is *William*. *Price* v. *Harwood*, 3 Camp. 108.

(*r*) *Quicke* v. *Staines*, 1 B. & P. 298. And see *Mace* v. *Cadell*, Cowp. 232, and *infra*, tit. TROVER. For where the executrix, or her husband by her permission, has converted the goods, it does not lie in the mouth of either to say that they are not the property of the husband, in a case between the executrix and one of his creditors. Per Eyre, C. J. This might be to the delusion of creditors. But if *A.* and *B.* cohabit as man and wife, and the sheriff seize the goods of *B.* in the house of *A.* under an execution against *A.*, and sell them after notice that they are the goods of *B.*, he will be liable. *Edwards* v. *Bridges*, 2 Starkie's C. 396. And where a sheriff, under a writ of *fi. fa.* against *A.*, sold the furniture in his house, where he lived with a woman to whom he had been married, and to whom the goods belonged before the marriage, it was held that the woman, having afterwards discovered that the marriage was void, might recover from the sheriff the value of the goods, although it exceeded the price for which they were sold. *Glasspoole* v. *Young*, 8 B. & C. 696. For the sheriff has, under a writ against *A.* in fact taken the goods of *B.*, and the plaintiff acquiesced merely because *she did not know* that she had power to resist. In an action against the sheriff for a false return of *nulla bona*, it appeared that previous to the marriage of the party by an agreement reciting that certain furniture, &c. was the property of the wife, it was agreed that she was to have it if she survived, but if he survived she was to be entitled to dispose of it by will, and he then covenanted that he would not sell or dispose of it, and that if she survived he would, by his will or otherwise, convey or insure to her all the real or personal estate he should die possessed of; but the whole provision of the agreement purported to leave him in possession of his marital rights, and her interests upon the events happening were to be enforced by means of his covenant; held, that under such circumstances, the return of *nulla bona* to a *fi. fa.* against the husband, was improper; but it appearing that the wife, being in the separate possession of such goods, had demised them with certain premises for a term, as she was to be taken to be the agent of her husband, the sheriff could not during the continuance of such demise seize the goods, and therefore in that respect the return of *nulla bona* was warranted by law. *Izod* v. *Lamb*, 1 J. & C. 35. Where the plaintiff, who had long cohabited with the party whose goods had been seized by the defendant in execution, claimed part of the goods as her separate property, the Court held that it had been properly left to the jury whether they had not been given up by her, and become the property of the party with whom she had cohabited. *Edwards* v. *Farebrother*, 2 M. & P. 293; and 3 C. & P. 524. See *Mace* v. *Cadell*, Cowp. 232.

Trespass or trover.

interest in the goods (*s*). Under an execution on final process, a party is estopped from denying the name in which he has been sued (*t*). But trespass lies against the sheriff for taking one in execution who is not the real defendant, although of the same name; yet if the party so arrested led the sheriff into error, he cannot recover, but the defence it seems ought to be specially pleaded (*u*).

Sheriff.*

Where the defence is (*x*), that the goods were fraudulently assigned to the plaintiff by a debtor against whom the process issued, in order to defeat the execution of his creditor, the assignment is void against that creditor; but in such case, in order to defeat the assignment, it is necessary to prove the judgment as well as the writ (*y*). But if the assignment or delivery of possession were merely colourable, and the property still remained in the debtor against whose goods the execution issued (*z*), the sheriff would, it seems, be entitled to a verdict without proof of the judgment, the plaintiff having no property in the goods (*a*).

The defendant cannot, under a plea traversing the plaintiff's possession, show that the plaintiff became owner under an assignment after the delivery

(*s*) *Dean* v. *Whitaker*, 1 C. & P. 347.

(*t*) *Reeves* v. *Slater*, 7 B. & C. 487. And see *Gould* v. *Barnes*, 3 Taunt. 488.

(*u*) *Laidley* v. *Sykes and others*, York Assizes. A writ of execution for the costs of a non pros. was issued against Edward Laidley, under which the sheriff arrested Edward Laidley, the son of the real party. After the arrest, the attorney of the party who sued out the execution knew that the plaintiff had been arrested. Bayley, J. held that the party who sued out the execution was liable for not having corrected the mistake, although no evidence was given to prove his knowledge of it. Evidence having been given to show that the plaintiff had been guilty of a trick in personating the father, against whom the writ had been issued, Bayley, J. said, that if he had been guilty of a trick, and had foisted himself on the officer as the party against whom the execution issued, it might have been pleaded in excuse, but the general issue only having been pleaded, he admitted the evidence in extenuation. See *Morgan* v. *Bridges*, 1 B. & A. 647.

(*x*) This defence may be given in evidence under a plea traversing property in the plaintiff. Trespass by the plaintiff for taking goods, which the plaintiff claimed by sale from the sheriff, the defendant, under the plea that the goods are not the plaintiff's, may show that the plaintiff took them under an assignment from the sheriff, which was fraudulent as regarded the defendant, who had seized them under a *bonâ fide* execution. *Ashey* v. *Minett*, 3 N. & P. 231. Such evidence, it seems, would not be admissible under the general issue. But see *Howell* v. *White*, 2 Mo. & R. 200, *contra*.

(*y*) *Lake* v. *Billers*, 1 Lord Raym. 733. *Martin* v. *Podger*, 5 Bur. 2631. *Glasier* v. *Eve*, 1 Bing. 209. *Ackworth* v. *Kemp*, Doug. 40; 2 Bl. 404. See the observations of Bayley, J. in *Doe* v. *Murless*, 6 M. & S. 114. If the sheriff levy under a writ against the goods of A., who brings an action, the writ is a defence; he was bound to obey it. If *B.* brings the action, and the sheriff insists that the assignment, as against a judgment-creditor, is fraudulent, he must show the judgment to prove the fraud, for he relies on a matter dehors the writ, which is essential to his justification.

(*z*) The fact that goods after an assignment remained in the possession of the vendor or assignor, is a badge of fraud, but is not conclusive evidence of fraud; *supra*, tit. FRAUDULENT CONVEYANCE; and per Lord Tenterden, C. J. in *Eastwood* v. *Brown*, 1 Ry. & M. 313. And see *Benton* v. *Thornhill*, 7 Taunt. 149. *Latimer* v. *Batson*, 4 B. & C. 652. *Watkins* v. *Birch*, 4 Taunt. 833. *Joseph* v. *Ingram*, 8 Taunt. 838; and the cases cited *supra*, tit. FRAUDULENT CONVEYANCE.

(*a*) See *Martin* v. *Podger*, 5 Burr. 2631. Trespass for seizing the goods of John Martin under an execution against William Martin; the defendant proved the *fieri facias* against the goods of William, and also that he seized the goods as William's, but did not prove the judgment; the Court, on a motion for a new trial, after a verdict for the plaintiff, held that the judgment ought to have been proved; but held also, that it ought to have been left to the jury, whether the plaintiff was not in possession under a fraudulent bill of sale from William.

* For the proofs in an action by the assignees of a bankrupt against the sheriff, vide *supra*, tit. BANKRUPT, 117, &c.

of the writ to the sheriff, for the assignment, if *bonâ fide*, transferred the property, although the sheriff, unless in the case of a sale in market overt, might still levy (*b*).

Competency.

The judgment debtor is not a competent witness to prove that he did not assign the goods to the plaintiff, which have been taken in execution by the sheriff; for the effect of his testimony would be to pay his own debt at the plaintiff's expense (*c*). In an action by the plaintiffs as assignees of a bankrupt, against the sheriff and a judgment-creditor, for seizing goods in the possession of the bankrupt after the bankruptcy, under an execution on the judgment, which had been obtained on a debt contracted by the trader subsequently to the commission, Lord Tenterden, C. J. held that evidence was admissible on the part of the plaintiffs to prove the acquiescence of the bankrupt under the commission (*d*).

A declaration made by a party at the time of executing an instrument, tending to show that the assignment was made for the purpose of defrauding creditors, is admissible to prove the fact; otherwise of declarations made at a different time (*e*).

An action does not lie against a sheriff for an act done by him in a judicial capacity (*f*).

Extortion.

In an action against a sheriff for extortion committed by his bailiff (*g*), the plaintiff must prove the issuing the writ (*h*), the warrant (*i*), and the extortion committed by the bailiff (*k*); but where it appears from the return to the writ itself, that more has been taken for executing the writ than the sheriff was entitled to, proof of the warrant is unnecessary (*l*).

(*b*) *Samuel* v. *Duke*, 3 M. & W. 662.

(*c*) *Bland* v. *Ansley*, 2 N. R. 331. Note, that the judgment-debtor had sold a house to the plaintiff, and whether the goods in that house were sold, or not, at the same time, was *matter of dispute*. If the judgment-debtor would have been liable to the plaintiff, in case of his failure, to the amount of the goods, he would, it seems, have stood indifferent.

(*d*) *Bernasconi* v. *Farebrother*, sitting after Mich. 1830.

(*e*) *Phillips* v. *Eamer*, 1 Esp. C. 357. And see *Penn* v. *Scholey*, 5 Esp. C. 243. *Lewis* v. *Rogers*, 1 C. M. & R. 48. *A.* sued out a writ of *fi. fa.* against the goods of *B.*, the sheriff executed a bill of sale of certain goods to *A.*, after which, *B.* remaining in possession of the goods, the sheriff retook them under another execution against *B.*; the declarations of *B.* at the time of the second execution are evidence for the sheriff to show that *A.*'s execution was colourable. *Willies* v. *Farley*, 3 C. & P. 395. See also Vol. I. 351.

(*f*) And therefore, it is said, an action does not lie against the sheriff for the act of his bailiff in taking goods in execution on a judgment in the county court. *Tinsley* v. *Nassau*, 1 M. & M. 52. And see *Holroyd* v. *Breare*, 3 B. & A. 473; *infra*, tit. TRESPASS.

(*g*) See the provisions of the stat. 28 Eliz. c. 4, and 32 Geo. 2, c. 28. An action under the former of these statutes, for taking more for a levy than the statute allows, may be maintained by the party against whose goods the writ was issued, although there were not goods to the amount of the debt and costs, and the sum overcharged is deducted out of the sum to be paid over to the creditor. Judgment was arrested where the declaration pleaded the statute of 28th Eliz. as of the 29th Eliz. *Rumsey* v. *Taffnell*, 9 Moore, 425; 2 Bing. 555. The plaintiff is entitled to three times the full amount of the damages. 4 B. & C. 154.

(*h*) *Supra*, 1009. And if the judgment be alleged in the declaration, it should also be proved. *Savage* v. *Smith*, 2 Bl. 1101.

(*i*) *Supra*, 1011. The sheriff is not liable in respect of extortion committed by one, to whom the execution of the warrant is not entrusted with authority as bailiff. *George* v. *Perring*, 4 Esp. C. 63. If a writ directed to the coroner be executed by an officer of the sheriff, the latter is not liable. *Sargeant* v. *Cowan*, 3 Tyr. 538; S. C. 1 C. & M. 491.

(*k*) *Semble*, that the stat. 43 G. 3, c. 46, includes the expense of levying. Where the amount levied is insufficient to satisfy the plaintiff's claim, a bailiff who retains any part which ought to be paid over is guilty of a taking or receiving within the statute 28 Eliz. c. 4. *Buckle* v. *Bewes*, 3 B. & C. 688.

(*l*) *Woodgate* v. *Knatchbull*, 2 T. R. 148.

Extortion.

In an action under the stat. 32 Geo. 2, c. 28 (*m*), to recover the penalty of 50*l.* for taking more than is by law allowed for waiting till bail is given, it has been held, that it is essential to prove a regular table of fees settled in pursuance of the Act (*n*); but if the plaintiff fail upon the counts for the penalties, he may still recover the excessive payment, in an action for money had and received (*o*).

In debt against the sheriff for penalties, on 32 Geo. 2, c. 28, for taking the plaintiff on arrest to a public drinking house without his consent, held, that the plea admitting the arrest to have been made by the defendant's officer, and the evidence showing the same person to have taken the plaintiff to such house, it was not necessary to produce the warrant to connect the defendant with the officer to make him liable (*p*).

Refusing vote, &c.

In an action against a sheriff, or other returning officer, for refusing a legal vote, it seems to be settled that it is not sufficient merely to prove that the defendant obstructed the legal right of the plaintiff to vote, provided he acted *bonâ fide*, and to the best of his judgment; but that it is essential to show that he acted maliciously, and from some improper motive (*q*).

Action for escape.

An action lies at the suit of a sheriff against a defendant who has wrongfully escaped, previous to any recovery or action or demand against the sheriff himself (*r*).

Sale by a sheriff.

Where a sheriff sells a term under a writ of *fieri facias*, which is afterwards set aside for irregularity, the produce of the sale being directed to be returned to the termor, the latter cannot afterwards maintain ejectment against the vendee (*s*).

(*m*) An officer making an arrest is not justified in taking the party to gaol within twenty-four hours, on the mere omission of the party to nominate a convenient house to be taken to; to refuse implies a request. *Simpson* v. *Renton*, 5 B. & Ad. 35.

(*n*) *Jacques* v. *Whitcomb*, 1 Esp. C. 361. *Martin* v. *Slade*, 2 N. R. 59. *Hannam* v. *Ormerod*, 1 Esp. C. 362, n. The stat. 23 H. 6, which prohibits the sheriff from taking more than 1*s.* 8*d.*, and the bailiff from taking more than 4*d.* on an arrest, is repealed by the stat. 7 W. 4, and 1 Vict. c. 55, which allows sheriffs and their officers to take such fees, and no more, as are allowed by the officers of the courts at Westminster, under the sanction of the Judges. Previously to this statute, the Courts of C. P. and Exc. held that the stat. 23 H. 6, was still in force, and that no more could be taken than was allowed by that statute. *Innes* v. *Levy*, 2 Scott, 189. *Philpott* v. *Selby*, Exch. Trin. T. 1835. Although in *Martin* v. *Bell*, 6 M. & S. 220, it was held by the Court of K. B. that the table did not apply to the sheriff's fees for an arrest, but that he was entitled to take what was allowed by the Master on taxation.

(*o*) *Lovell* v. *Simpson*, 3 Esp. C. 153. In *Martin* v. *Slade* (2 N. R. 59), the plaintiff having been nonsuited for not proving the special counts, the Court refused to grant a new trial in order to let the plaintiff in to recover the excess on the money counts; but it is not intimated that the plaintiff might not have recovered for money had and received at the trial, had he made the point. See *Martin* v. *Bell*, 1 Starkie's C. 413.

(*p*) *Barcham* v. *Bullock*, 2 Per. & D. 241; and 10 Ad. & Ell. 23.

(*q*) See *Cullen* v. *Morris*, 2 Starkie's C. 577. *Sergeant* v. *Milward*, Luders, 248. The *Bridgwater* case, 1 Peck, 108; Orme's Dig. 242. The *Seaford* case, Simeon, 129; Orme's Dig. 251. *Drew* v. *Colton*, 2 Lud. 245. Contrary to the opinion of Holt, C. J. in *Ashby* v. *White*, 2 Lord Raym. 938; 6 Mod. 46; 1 Salk. 19; Holt. 524; 1 Brown, 45. And see *Grew* v. *Milward*, 2 Lud. 245.

(*r*) *Sheriff of Norwich* v. *Bradshaw*, Cro. Eliz. 53. For if the sheriff were obliged to wait, the action might be too late, and the very escape is a wrong.

(*s*) *Doe* v. *Thorn*, 1 M. & S. 425. That a sale of a chattel is valid, although the execution be afterwards set aside for irregularity, see Dyer, 363, pl. 4; 5 Rep. 90; 8 Rep. 96, b. 183. But see *Turner* v. *Folgate*, T. Ray, 73. And the sheriff cannot be treated as a trespasser (per Bayley, J. in *Doe* v. *Thorn*, 1 M. & S. 427). But *qu.* when the term is extended on an *elegit*, or forfeited on outlawry, and sold, and the judgment of outlawry is reversed. Cro. J. 246; Cro. Eliz. 278. A sheriff may justify under an irregular as well as under an erroneous judgment, so as the writ be not void; and a purchaser may gain a title under him, for they are not privy to the

Where a lessor in ejectment claims as purchaser from the sheriff, who sells under a *fieri facias* at the suit of the lessor, he should prove the judgment as well as the writ (*t*). Sale by a sheriff.

But where the vendee is a stranger, it is sufficient to produce the *fieri facias*, without proving a copy of the judgment (*u*).

The property in goods is not divested out of the owner till execution executed; and therefore a sale and execution under a second writ will bind the goods, and the plaintiff who sued the first may recover against the sheriff (*x*).

Evidence of an assignment of a lease taken in execution by one who acts as under-sheriff, is evidence of an assignment, without proof of the appointment of the under-sheriff (*y*). Assignment.

A return by the sheriff being the official act of a public officer, is evidence against third persons. If he return a rescue, the Court will so far give credence to it as to issue an attachment in the first instance (*z*). So it is evidence against the defendant upon an indictment for a rescue, although not conclusive (*a*). Return.

The sheriff's return that he has levied, is, it seems, evidence of the fact as against third persons (*b*); but the return that he has levied under a writ of *fi. fa.* does not afford even *primâ facie* evidence that he has paid the money over to the judgment-creditor (*c*).

A sheriff may recover money paid to *B.* under an execution at his suit against the goods of *C.*, the sheriff having been compelled to pay the amount in an action by another execution creditor, for a false return, unless *B.* can show that the sheriff had notice of his bailiff's misconduct (*d*).

Where before the execution of a writ of *fieri facias*, the attornies of another creditor obtained a warrant under a *fieri facias*, from the same sheriff, directed to their clerk, and executed it before the first execution was put in, it was held, that the attornies were liable to the sheriff for money had and received to his use, he having returned that he had levied under the first writ, and in fact paid over the money (*e*).

The debtor is a competent witness for the plaintiff in an action for an escape on mesne process, for he could neither plead the recovery in bar of an action for the debt, nor give it in evidence in reduction of damages (*f*). And an owner of goods, who has forcibly taken them out of the sheriff's possession, is a competent witness for the sheriff in an action for a false return of *nulla bona* to a writ of *fieri facias*, to prove that the goods were not Competency.

irregularity. Tidd, 924, 3d ed. A party may justify under an erroneous judgment, for it is the act of the Court, but not under an irregular judgment. 1 Str. 509; Tidd, 924, 3d. edit.

(*t*) *Doe* d. *Bland* v. *Smith*, 2 Starkie's C. 199. *Burton* v. *Cole*, Carth. 443.

(*u*) *Doe* d. *Batten* v. *Murless*, 6 M. & S. 110. *Hoffman* v. *Pitt*, 5 Esp. C. 22.

(*x*) *Payne* v. *Drew*, 4 East; and see Peake's C. 66.

(*y*) *Doe* d. *James* v. *Brawn*, 5 B. & A. 243.

(*z*) *R.* v. *Elkins*, 4 Burr. 2129. *Gyfford* v. *Woodgate*, 11 East, 297.

(*a*) Per Ld. Ellenborough, in *Gyfford* v. *Woodgate*, 11 East, 297.

(*b*) *Gyfford* v. *Woodgate*, 11 East, 267; where, in an action against a judgment-creditor for having sued out an *alias fi. fa.* after a sufficient execution levied under the first, it was held, that the sheriff's returns on the two writs (which were produced by the plaintiff), in which he stated that he had forborne to sell under the first, and had sold under the second writ at the request of the plaintiff, were evidence of the fact for the defendant.

(*c*) *Cator* v. *Stokes*, 1 M. & S. 599.

(*d*) *Crowder* v. *Long*, 8 B. & C 598.

(*e*) *Sawle* v. *Paynter*, 1 D. & R. 307.

(*f*) Per Abbott, C. J. in *Hunter* v. *King*, 4 B. & A. 210; B. N. P. 67. *R.* v. *Warden of the Fleet*, 12 Mod. 337. *Cass* v. *Cameron*, Peake's C. 124. *Powell* v. *Hord*, Str. 650; and see *Richardson* v. *Smith*, 1 Camp. 277.

Competency.

the property of the debtor; for the sheriff, after returning *nulla bona*, could not maintain an action against him for the rescue, in case the plaintiff were to succeed (*g*).

On a charge against the warden of the Fleet for permitting the escape of prisoners, a prisoner who has escaped, but who has been retaken, is a competent witness against the warden, although he has given a bond conditioned for his being a true prisoner; for the record of conviction would be no evidence against the warden either in an action by him upon the bond, or in an action of false imprisonment by the witness (*h*); and in an action for the original debt, the defendant could not avail himself of the judgment against the sheriff (*i*).

A surety is competent, in an action for taking insufficient sureties, as to his sufficiency (*k*).

A declaration by a sheriff's officer respecting goods which he has seized under a *fi. fa.*, and are in his possession, was held to be evidence against the sheriff, although made after the return day of the writ (*l*).

A sheriff's officer who has given security for the due execution of arrests, is not a competent witness for the defendant (*m*).

But an assistant employed by the sheriff's officer is a competent witness for the defendant, without a release (*n*).

STAMP.

1. Where necessary with reference to the subject-matter:—*Administration, Agreement, Appraisement*, &c. 1034.
2. Re-stamping, when necessary, 1051.
3. Several stamps, when necessary, 1052.
4. Stamp of a different denomination, when sufficient, 1054.
5. Objection, when and how to be taken as to the want of a proper stamp, or the time or manner of stamping, ibid.
6. Presumptive evidence that an instrument has been properly stamped, 1055.
7. The consequence of the want of a proper stamp, 1056.
8. For what collateral purposes an unstamped writing may be used, 1058.

Administration.

Where a party is bound to prove his title as administrator, at the trial, by evidence of letters of administration, and it appears that he sues for a greater value than is covered by the *ad valorem* stamp of his letters of administration, they cannot be received in evidence (*o*).

(*g*) *Thomas* v. *Pearce*, 5 Price, 547. See *Pitcher* v. *Bailey* (8 East, 171), where it was held, that an officer guilty of breach of duty in permitting a prisoner to go at large on his promise to pay, could not, after being obliged to pay the money to the creditor, recover it from the debtor. And see *Eyles* v. *Faikney*, cited Peake's C. 144. A verdict against the sheriff in an action for a false return of *nulla bona*, does not, as in trover, vest any property in the goods in him, but they remain liable to a subsequent execution (*Underwood* v. *Mordant*, 2 Vern. 237). And where a debtor in execution escapes, though with the consent of the gaoler or sheriff, a recovery against the sheriff of less than the whole debt will not preclude the creditor from retaking the debtor, even although twelve months have expired, without a *scire facias*. B. N. P. 69, cites *Lenthal* v. *Gardiner*, Hil. 26 & 29 Car. 2. per Hales. *Collop* v. *Brandley*, Trin. 31 Car. 2; Th. Br. 282.

(*h*) *R.* v. *The Warden of the Fleet*, 12 Mod. 337. *R.* v. *Ford*, 2 Salk, 690.

(*i*) Per Ld. Tenterden, C. J. 4 B. & A. 210. The sheriff could maintain no action against the debtor for a voluntary escape. *Eyles* v. *Faikney*, Peake's C. 143. *Pitcher* v. *Bailey*, 8 East, 171.

(*k*) 1 Will. Saund. 195 (*f*). *Hindle* v. *Blades*, 5 Taunt. 225.

(*l*) *Jacob* v. *Humphrey*, 2 C. & M. 413. S. C. 4 Tyr. 272.

(*m*) *Powell* v. *Hord*, 2 Ld. Ray. 1411.

(*n*) *Clarke* v. *Lucas*, 1 Ry. & M. 32.

(*o*) *Hunt* v. *Stevens*, 3 Taunt. 113.

Administration.

But it is otherwise where the character in which the plaintiff sues is admitted by the plea; as, where an administrator sues upon promises to the intestate, and makes profert of the letters of administration, and the defendant pleads merely *non assumpsit* (*p*).

Where *A.* sued out a commission of bankruptcy on a debt due to him as executor, but the probate was insufficiently stamped, a sufficient stamp being afterwards affixed, it was held to be sufficient to support the commission (*q*).

A probate stamp is, it has been held, *primâ facie* evidence against an executor of the receipt of assets to an amount covered by the stamp (*r*).

The 55 Geo. 3, c. 184, sched. part 3, imposes an *ad valorem* duty on letters of administration, where the estate is above 20*l.* in value, exclusive of what the deceased shall have been possessed of or entitled to as a trustee, and not beneficially. An intestate had granted an annuity to *A.*, and had afterwards by deed conveyed his property to *B.*, who covenanted to indemnify him against the payment of the annuity, default being subsequently made in the payments during the intestate's lifetime; the annuitant sued the grantor's administratrix, and recovered judgment for debt and costs, exceeding 20*l.* The administratrix paid this, and then sued *B.* on his covenant for the amount. Held that the right to recover this sum was part of the intestate's estate, and rendered the letters of administration liable to stamp duty; and that the intestate, if he had lived, could not have been considered in respect of this sum as a mere trustee for the annuitant, having no beneficial interest (*s*).

Such a merely contingent covenant, or the damages to be recovered under it, could not be a matter of valuation, or be treated as part of the intestate's estate, so as to be taken into account in the amount of the stamp or the letters of administration (*t*).

Affidavit.

In an action on a replevin bond by the sheriff's assignee, the valuation by the broker appeared on the margin of the bond, as "on oath;" held that the 11 G. 2, c. 19, s. 23, though requiring the value to be ascertained on oath, did not make it necessary that such value should be ascertained by affidavit in writing, and that no affidavit stamp was therefore necessary to such memorandum on the bond (*u*).

Agreement.

By the stat. 55 G. 3, c. 184, an agreement, or any minute or memorandum of an agreement (*x*), made in England (*y*) under hand only (*z*), or made in

(*p*) *Thynne* v. *Protheroe*, 2 M. & S. 553. *Supra*, 440.

(*q*) *Rogers* v. *James*, 7 Taunt. 147; 2 Marsh. 425.

(*r*) *Foster* v. *Blakelocke*, 5 B. & C. 328. As to the duty on legacies in India, see *The Attorney General* v. *Sir C. Cockerell*, 1 Price, 165. On bequests of real property to be sold, and the profits to be deemed part of the residue, *Attorney General* v. *Holford*, 1 Price, 426.

(*s*) *Carr, Administratrix, &c. of Walker* v. *Roberts*, 2 B. & Ad. 905.

(*t*) *Carr* v. *Roberts*, 2 Mood. & M. C. 45.

(*u*) *Dunn* v. *Lowe*, 4 Bing. 193.

(*x*) A mere collateral writing not signed

(*y*) A letter written in England, agreeing to accept a bill drawn in Jamaica, requires a stamp. *Crutchley* v. *Mann*, 5 Taunt. 529.

(*z*) If the instrument be sealed, though it be but an agreement for a lease, it must be stamped as a deed. *Clayton* v. *Burtenshaw*, 7 D. & R. 800. *Robinson* v. *Dryborough*, 6 T. R. 317. Where time had been given to the acceptor by taking a warrant of attorney, it was held that a paper, containing a consent to the indorsee's using any means to enforce payment by the acceptor, without prejudice to his right to

Agreement.

Scotland without any clause of registration (and not otherwise charged in

by the parties is not within the statute. A written paper delivered by the auctioneer to one to whom lands were let by auction, containing the description of the lands, the term for which they were let, and the rent, but not signed by the auctioneer nor any of the parties, was held to be admissible in evidence without a stamp (*Ramsbottom* v. *Tunbridge*, 2 M. & S. 434); for it was held to be no more than a mere declaration by the auctioneer, and not like an original minute. And see *Adams* v. *Fairbain*, 2 Starkie's C. 277; *Ingram* v. *Lea*, 2 Camp. 521. But in a similar case, where the note was *signed* by the auctioneer, it was held that a stamp was necessary (*Rumsbottom* v. *Mortley*, 2 M. & S. 445), although the name of the lessee was omitted; for it was evidence of part of a contract, although not of a complete contract, to satisfy the Statute of Frauds. Ibid. And see *Dickson* v. *Stark*, 4 Esp. C. 163. *Doe* v. *Cartwright*, *supra*, 57. A paper which operates but incidentally as evidence of an agreement, is admissible without a stamp. Notice of a dissolution of partnership is evidence to prove that a partnership once subsisted. *Wheldon* v. *Matthews*, 2 Ch. 390. Where a broker sought to recover for doing business by commission, it was held that a prospectus of the terms on which he did business was *functus officio* previous to the entering into a parol contract, and might be read, though unstamped. *Edgar* v. *Black*, 1 Starkie's C. 464. But see *Williams* v. *Sought on*, *infra*. Where land was let by parol, on the same terms as were contained in a former lease, it was held that the former lease could not be read without a stamp. *Turner* v. *Power*, 1 M. & M. 131; 7 B. & C. 625. Where the plaintiff declared on two agreements, by the second of which alterations were made in the first, but the second only was stamped, held that the second might be looked at to see whether it contained variations, and that the plaintiff could not waive the second and proceed on the first, for the first agreement was at an end by the alterations made. *Reed* v. *Deere*, 7 B. & C. 261. In an action for work and labour, a mere proposal and estimate made by the plaintiff, but not finally acceded to, is evidence for the defendant, without a stamp, in reduction of the demand (*Penniford* v. *Hamilton*, 2 Starkie's C. 475). In an action for not delivering goods manufactured by the defendant in consequence of an order from the plaintiff, a memorandum signed by the plaintiff only, describing the nature and quantity of the goods, but not specifying the price, may be given in evidence without a stamp, and it was held that the acceptance of the order, and the precise terms of the contract, might be proved by other evidence. *Ingram* v. *Lea*, 2 Camp. 521. Where *B.* was directed by letter from *C.* to pay a sum of money to *D.* out of the proceeds of goods in the hands of *B.*, and *B.* by letter to *D.* agreed to pay the money, it was held that this was not an agreement between *B.* and *C.*, and therefore that an agreement-stamp was improper; but that the order from *B.* to *C.* ought to have been stamped as an order for payment of money out of a fund which might or might not be available, under the statute 55 Geo. 3, c. 184. *Firbank* v. *Bell*, 1 B. & A. 36.

A *cognovit* requires no stamp (*Ames* v. *Hill*, 2 B. & P. 150), unless it contain matter of agreement (*Reardon* v. *Swabey*, 4 East, 188); neither does a mere notice to others of a dissolution of partnership (*Jenkins* v. *Blizard*, 1 Starkie's C. 418, cor. Lord Ellenborough); but it has been held that the instructions for advertising the dissolution in the Gazette, written in the form of an agreement, signed by the parties, and attested, required a stamp. *May* v. *Smith*, 1 Esp. C. 283.

It seems that a mere acknowledgment in writing that money is due, requires no stamp. *Fisher* v. *Leslie*, 1 Esp. C. 426; 1 Camp. 199, per Abbott, C. J. Sitt. after Hil. 1822. *Israel* v. *Israel*, 1 Camp. 499. Contra, *Guy* v. *Harris*, Chitty, O. B. 428, n. And see *Barlow* v. *Broadhurst*, 3 Moore, 471; *infra*, 1367, n. (*e*) (*p*). See also *Watkins* v. *Hewlett*, 1 B. & B. 1. So an acknowledgment "Mr. T. has left in my hands 200*l.*" requires no stamp; the action was brought to recover the money. *Tomkins* v. *Ashley*, 6 B. & C. 541. And a note sent by a broker to his principal, of a purchase he has made of shares, requires no stamp. *Josephs* v. *Pebner*, 1 C. & P.

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recover against the drawer, might be read without a stamp. *Hill* v. *Johnson*, 3 Carr. & P. C. 455. Where the defendant had upon a treaty for a lease, got into possession, but the lease had never been prepared, the defendant saying he should dispute the lessor's title; held, that the draft-lease, signed by the plaintiff and defendant, "we approve of the within draught," did not import an agreement to require a stamp. *Doe* d. *Lambourn* v. *Pedgriph*, 4 C. & P. 312. A broker's note, "Bought for Mr. *T.* 50 Continental-gas shares, at 2*l.*; premium, 8*l.*; already paid, 500*l.*; commission, 6*l.* 5*s.*; 506*l.* 5*s.*;" sent by a broker to his principal, is evidence against the broker, though not stamped. *Tomkins* v. *Saverey*, 4 Mann. & Ry. 538. For it is a mere note by the broker to his principal to inform him of what he has done. S. P. *Josephs* v. *Pebner*, 1 C. & P. 341. And see *Mullett* v. *Hutchinson*, 7 B. & C. 639; *Langton* v. *Wilson*, 7 B. & C. 640.

that schedule, nor expressly exempted from all stamp-duty), where the

341; 3 B. & C. 639. See *Childers* v. *Boulnois*, 1 D. & R. 8. A written acknowledgment that a statement of payments made is correct requires no stamp. *Willard* v. *Moss*, 1 Bing. 134; and see *Jacob* v. *Lindsay*, 1 East, 460. *Barlow* v. *Broadhurst*, 4 Moore, 471. So an acknowledgment of holding bills for the purpose of procuring discount, requires no stamp. *Mullett* v. *Hutchison*, 7 B. & C. 639.

Letters containing evidence of a contract to marry require no stamp. *Orford* v. *Cole*, 2 Starkie's C. 351; *infra*, 1038. Neither, as it seems, do contracts relating to such matters as admit of no pecuniary estimate of value; vide *infra*, 1038. Where *A.* entered into a written agreement with *B.* for land to make bricks, and *C.* afterwards made an offer of another piece of land to *A.* on the terms mentioned in that agreement, and at a subsequent time *A.* orally accepted the offer; it was held that the written proposal was admissible without a stamp. *Drant* v. *Brown*, 3 B. & C. 665. But a written paper signed by an auctioneer, and delivered to the bidder to whom lands were let by auction, containing such a description, must be stamped. *Rumsbottom* v. *Mortley*, 2 M. & S. 445. An agreement made at sea requires no stamp. *Ximenes* v. *Jaques*, 1 Esp. 311; 6 T. R. 499. An agreement made in a foreign country must be stamped according to the law of that country. *Alves* v. *Hodgson*, 7 T. R. 241.

The following have been held to require a stamp:—A joint and several note expressing no time of payment, with an indorsement which states it to be given as a security for balances which one of the makers may owe the payee, to be in force for six months, and no money to be called for sooner in any case, as between the real parties, is an agreement, and must be stamped. *Leeds and others* v. *Lancashire*, 2 Camp. 205. See 2 B. & P. 213; Willes, 393. A letter undertaking to pay interest for a debt admitted to be due. *Smith* v. *Nightingale*, 2 Starkie's C. 377. A written paper tending to alter the terms of another written contract, which requires a stamp. *Marsden* v. *Reid*, 3 East, 572. An instrument by which a tenant under a lease from *A.* states "that he attorns, and becomes tenant to *C.* and *D.* sequestrators in a writ issued out of Chancery," and as the tenant did not receive possession from *C.* and *D.*, he may dispute their title, and the lease is an answer to the action. *Cornish* v. *Sewell*, 8 B. & C. 471. A stipulation in an instrument not under seal, purporting to convey land, not to disturb the party intended to take the premises. *R.* v. *Ridgwell*, 6 B. & C. 665. A bill of exchange, expressing the terms of agreement between a landlord and in-coming tenant. *Nicholson* v. *Smith*, 3 Starkie's C. 128.

It is not sufficient to produce in evidence a copy of the original printed agreement, with a stamp affixed to it. *Williams* v. *Stoughton*, 2 Starkie's C. 292.

The agreement on which the action was brought was contained in a prospectus of terms delivered by the plaintiff to the defendant, by which it was stipulated that unless three months' notice was given of the intention to remove a child from his school, he should be entitled to be paid for the whole year: it was held to be necessary to produce the printed copy of the prospectus so delivered; and that it was not sufficient to produce another copy, though stamped with an agreement-stamp. Ibid.

If several things requiring distinct stamps are written on the same paper with only one stamp, they cannot be made available by annexing distinct stamps on separate papers. Ld. Ray. 1445; Str. 716.

Where the instrument contains several contracts of demise to several tenants for different estates, at different rents, set against each signature, with but one stamp, it is a matter of circumstantial evidence to which contract the stamp shall be applied. *Doe* d. *Copley* v. *Day*, 13 East, 241.

And if the same piece of paper contain two agreements, and one stamp be affixed to that part of the paper which contains the defendant's contract, and on which the stamp officer's receipt for the penalty is written, it is sufficient. *Powell* v. *Edmunds*, 12 East, 3.

If a paper be produced with a single stamp, and it appear to have contained originally two distinct agreements, one of which has been erased, it lies on the objector to show that the stamp is to be applied to the erased agreement. *Waddington* v. *Francis*, 5 Esp. 182.

Where a written wager is doubled by an indorsement on the same paper, two stamps are requisite. *Robson* v. *Hall*, Peake's C. 127. But if there be one stamp only, the instrument is admissible as evidence of the first wager. Ibid. And see *Henfree* v. *Bromley*, 6 East, 309.

Where a contract is signed by one party, and previously to the accession of the other party a new stipulation is inserted, the agreement is single and entire, and requires but one stamp. *Knight* v. *Crockford*, 1 Esp. C. 189.

An agreement by several for a subscription to one common fund, such as for making a wet dock, though several as to each subscriber, requires but one stamp. *Davis* v. *Williams*, 13 East, 232. See also *Baker* v. *Jardine*, 13 East, 235, n. as to the assignment of the prize-money of several seamen payable out of one fund; and *Godson* v. *Forbes*, 1 Marshall, 525.

B. copies a letter containing an agreement between himself and *A.*, and acknowledges it by a memorandum written on the copy; *B.*'s father indorses a guaranty upon it,

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matter thereof shall be of the value of 20*l.* (*y*) or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument, together with every schedule, receipt, or other matter (*z*) put or indorsed thereon, or annexed thereto, shall bear a 1*l.* stamp (*a*).

The schedule provides, that where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it shall be sufficient if any one of such letters shall be stamped with a duty of 1*l.* 15*s.*, although the same shall in the whole contain twice the number of 1,080 words or upwards (*b*).

referring to the written copy; one stamp was held to be sufficient. *Stead* v. *Liddiard*, 1 Bing. 196. An agreement in consideration of 7,000*l.* to present to a living on the next vacancy, does not require an *ad valorem* stamp. *Wilmot* v. *Wilkinson*, 6 B. & C. 506.

(*y*) This is a substantive enactment, and not an exception, and does not operate unless the matter of agreement shall be of the value of 20*l.* or upwards; this supposes that the value of the contract is measurable in money. The clause, therefore, does not apply to a mere contract to marry (*Oxford* v. *Cole*, 2 Starkie's C. 351), nor to the sale of several lots by auction, where the separate value of each lot is under 20*l.* *Emmerson* v. *Heelis*, 2 Taunt. 38. But see *Baldey* v. *Parker*, 2 B. & C. 37. The parties agreed to refer a claim for 133 bundles of willow, and costs; it appeared that the value of 133 bundles was 13*l.*, the award was for 8*l.*; and it was held by Bayley, J. that a stamp was not necessary. *Cooke* v. *Green*, York Summ. Ass. 1829. The words of the Act are ambignous, and it is incumbent on the objecting party to make out the affirmation. Per Lord Tenterden, in *Doe* v. *Avis*, Sitt. 28 Ap. 1828, cited Chitty on Stat. 964. Therefore an agreement by a tenant to hold premises, with fixtures, at 2*s.* 6*d.* per annum, is admissible, in the absence of proof that the right to occupy is of the value of 20*l.* Ib. So in the case of an agreement to carry and deliver a parcel of the value of 260*l.*; for the subject-matter of agreement is not the value of the parcel, but the price of carriage. *Latham* v. *Rutley*, 1 Ry. & M. 13. See also *Chadwicke* v. *Sills*, 1 R. & M. 15. An agreement to indemnify from all costs and charges which another may incur as bail for a party arrested for more than 20*l.* was held to require a stamp, although the costs, &c. incurred did not amount to that sum. *Williams* v. *Jarratt*, 5 B. & Ad. 32. An agreement is not liable to be stamped except where it is binding *per se* as such. Per Patteson, J. *R.* v. *St. Martins*, 2 A. & E. 210. An attornment requires no stamp. *Doe* v. *Edwards*, 6 N. & M. 633. And see *Parker* v. *Dubois*, 1 M. & W. 30. *Shackell* v. *Rosier*, 2 Bing. N. C. 640. A letter from an attorney, containing an acknowledgment of money received, a 50*l.* bill, to be applied by him professionally, requires no stamp. *Langdon* v. *Wilson*, 7 B. & C. 640, (*n*). *Mullett* v. *Hutchinson*, 7 B. & C. 639. And see *Tomkins* v. *Savory*, 9 B. & C. 704. On appeal against an order of removal, the appellants, to show that the pauper served more than forty days as an apprentice in the respondent parish, with the assent of his master, produced a written paper, purporting to certify that the father of the pauper agreed to give his master 8*s.* for the term of his apprenticeship; held, that there being nothing to show that the value of the subject-matter of the agreement was 20*l.* it did not require a stamp. *R.* v. *Inhabitants of Enderby*, 1 B. & Ad. 205. An agreement by the execution creditor to the sheriff, to indemnify him on the sale of goods, was held to require a stamp, although the value of the goods was under 20*l.* *Shepherd* v. *Wheeble*, 8 C. & P. 534. *qu.*

(*z*) A schedule, or inventory, annexed to a deed or agreement, must be included in the calculation as part of the instrument (*Lake* v. *Ashwell*, 3 East, 526); but a schedule or inventory not annexed to the instrument, but merely referred to, is subject to a duty of 1*l.* 5*s.*, and if it contain 2,160 words or upwards, for every entire quantity of words after the first 1,080, is liable to a duty of 1*l.* 5*s.* See 55 G. 3. c. 184, Schedule, tit. *Agreement*.

(*a*) That is, where the agreement does not contain more than 1,080 words; but if more than 1,080 words, a stamp duty of 1*l.* 15*s.* is payable: and for every entire quantity of 1,080 words over and above the first 1,080 words, a further progressive duty of 1*l.* 5*s.*

(*b*) Similar provisions are made by the statute 48 G. 3. c. 149. A clause in former agreement, referred to in subsequent agreement, not to be included in estimating the stamp necessary. *Attwood* v. *Small*, 7 B. & C. 399. An instrument legally stamped is admissible, though it refer to other instruments which are not stamped. *Duck* v. *Braddyl*, M'Clell. 207; 13 Price, 455. In *Parkins* v. *Moravia*, 1 C. & P. 376, it was doubted whether an agreement in a series of letters containing fewer than 1,080 words, re-

The schedule also contains the following exemptions from stamp duties. Label, slip, or memorandum, containing the heads of insurances to be made by the corporations of the Royal Exchange Assurance, or London Assurance, of houses and goods from fire, and also any memorandum or agreement made between master and mariners of any coasting vessel, for wages.

Memorandum or agreement for granting a lease or tack, at rack-rent, of any messuage, land, or tenement, under the yearly rent of 5 *l.* (*c*).

Or for the hire of any labourer, artificer, manufacturer, or menial servant (*d*).

Memorandum or agreement made for or relating to the sale of any goods, wares, or merchandize (*e*).

quired a 1 *l.* 15 *s.* stamp; but it seems that the higher stamp is not necessary. Chitty on Stat. 964. Figures are to be counted as words; but an indorsement on the back and page of the particulars, containing a mere repetition of the description of the property described in another page of the same particulars, are not to be counted. *Lord Dudley and Ward* v. *Robins*, Chitty on Stat. 964. Several subscribers to an agreement to contribute to a defence against a claim to compel them to grind at a soke mill, agreed to subscribe the sums underwritten, and to pay in proportion to those sums; it was held that the names and sums underwritten were to be reckoned as part of the agreement. *Lindey* v. *Clarkson*, Exc. Hilary T. 1833. In an agreement referring to a map annexed, held that the names of the place in the map were to be counted with the view to the amount of the stamp. *Wickers* v. *Evans*, 4 C. & P. 359. *A. R. P.* are to be counted as words, so of £. *s. d.* at head of column, but need not be counted for each item separately. Coventry on Stamps, 147. *Dudley and Ward* v. *Robins*, 3 C. & P. 28.

(*c*) A building lease under 5 *l.* per annum is not within this exception. *Doe* d. *Hunter* v. *Bouleot*, 2 Esp. C. 595.

(*d*) It has been held that the term hiring does not extend to an apprentice, and that the assignment of an apprentice is not within the exemption. 4 T. R. 769. *R.* v. *St. Paul's, Bedford*, 6 T. R. 452.

(*e*) The following agreements have been held to fall within this clause:—An agreement by a broker, on the sale of goods, to indemnify a purchaser. *Curry* v. *Edensor*, 3 T. R. 524. A guaranty for the payment of goods bought by a third person. *Watkins* v. *Vince*, 2 Starkie's C. 369. *Warrington* v. *Furbor*, 8 East, 242. An agreement to take a share of the goods purchased by another on their joint account, and to pay for them at a fixed price. *Venning* v. *Leckie*, 13 East, 7. An agreement to cancel a former agreement relating to a sale of goods. *Whitworth* v. *Crockett*, 2 Starkie's C. 431. All agreements which have for their primary object the sale of goods. *Smith* v. *Cator*, 2 B. & A. 778. For a quantity of linseed oil, not made, but to be prepared out of materials in the vend r's possession. *Wilks* v. *Atkinson*, 2 Taunt. 11; 1 Marshall, 412. *Ingram* v. *Lea*, 2 Camp. 521. *Hughes* v. *Breeds*, 2 C. & P. 159. *Garbutt* v. *Watson*, 5 B. & A. 613. An agreement to make and deliver a chattel within a certain time. *Prince* v. *Arnold*, 2 C. M. & R. 613. *Hughes* v. *Breeds*, 2 C. & P. 159. A receipt for the price of a horse, containing a warranty of soundness. *Skrine* v. *Elmore*, 2 Camp. 407. For a crop of potatoes, although growing in a close, but to be removed immediately, and conferring no interest in the land. *Warwick* v. *Bruce*, 2 M. & S. 205. *Parker* v. *Staniland*, 11 East, 362. *Evans* v. *Roberts*, 5 B. & C. 829. *Watts* v. *Friend*, 10 B. & C. 446. *Earl of Falmouth* v. *Thomas*, 1 C. & M. 89. *Smith* v. *Sumner*, 9 B. & C. 561. An unstamped agreement is valid as far as it relates to the sale of goods, although it contains stipulations concerning the mode of payment and other things. *Heron* v. *Granger*, 5 Esp. 269. *Forsyth* v. *Jervis*, 1 Starkie's C. 437; and see *Grey* v. *Smith*, 1 Camp. 388. An agreement that the plaintiff will sell a ship, part of the price to be secured by a mortgage; that plaintiff will procure the ship to be chartered on a voyage, and that the earnings shall be paid to the plaintiff as part of the price; and that at the end of the voyage the mortgage shall close. *Meering* v. *Duke*, 2 M. & R. 121. An agreement to supply a house with water. *West Middlesex W. Co.* v. *Sucereropp*, M. & M. 408.

The following, it has been held, are not within the exemption:—A contract in *fieri* for the *making* of goods. *Buxton* v. *Bedall*, 3 East, 303. *Towers* v. *Osborne*, 1 Stra. 506, *tam qu.*; and vid. *Wilks* v. *Atkinson*, 6 Taunt. 11; 1 Marshall, 412. An engagement to provide for bills in case certain goods in the factor's hands should remain unsold when the bills became due. *Smith* v. *Cator*, 2 B. & A. 778. An agreement for the sale of growing crops, which give an interest in the land. *Waddington*

Agreement.

Memorandum or agreement made between the master and mariners of any ship or vessel, for wages, or any voyage coastwise from port to port in Great Britain.

Also letters containing any agreement not before exempted in respect of any merchandize, or evidence of such agreement, which shall pass by the post between merchants or other persons carrying on trade or commerce in Great Britain, and residing and actually being, at the time of sending such letters, at the distance of fifty miles from each other (*f*).

Appointment.

The appointment of an assistant overseer requires a 2*l.* stamp (*g*).

Appraisement.

Where nothing but the mere value of the goods is referred to appraisers, an appraisement-stamp upon the written valuation is sufficient (*h*). An appraisement made merely for the private information of the person employing the valuer is not liable to any duty (*i*).

Apprentice.

Money paid by parish officers as the consideration for taking an apprentice is not liable to the stamp-duty imposed by the stat. 8 Ann. c. 9, s. 35 (*k*). Nor is any duty payable where the premium is paid out of a public annual charitable subscription (*l*), or out of any charitable donation-fund belonging to the parish (*m*, or out of money given by a will to put out children appren-

v. *Bristow*, 2 B. & P. 453. *Emerson* v. *Heelis*, 2 Taunt. 38. *Crosby* v. *Wadsworth*, 6 East, 602. *Sowell* v. *Bazall*, 1 Y. & J. 396. An agreement to supply from time to time numbers of a periodical work. *Bogdel* v. *Drummond*, 11 East, 142. An agreement between merchants that one shall take a share in the outfit and adventure. *Lee* v. *Banner*, 1 Esp. C. 498. An engagement by a principal to a factor to provide for bills drawn on the latter when they became due, if certain goods in the possession of the factor have not been then sold. *Smith* v. *Cator*, 2 B. & A. 778. An agreement for the sale of goods and goodwill. *South* v. *Finch*, 3 Bing. N. C. 506. An agreement by a principal to provide for bills drawn on his factor in case certain goods should remain unsold by the factor when the bills became due. *Smith* v. *Cator*, 2 B. & A. 778. Contracts under seal. *Clayton* v. *Burtenshaw*, 5 B. & C. 41. A warranty of a horse is within these exceptions. *Skrine* v. *Elmore*, 2 Camp. 407. If a lease in writing contain also a contract for the sale of goods, it cannot be read unless it be stamped as a lease. *Corder* v. *Drakeford*, 3 Taunt. 382. Note, the reason assigned by Mansfield, C. J. was, that it was not intended that the defendant should buy the goods, unless he had the lease of the premises. This case differs from that of *Grey* v. *Smith*, 1 Camp. 387, where a receipt for money and agreement being written on the same piece of paper, Lord Ellenborough held, that a receipt-stamp warranted the reading of the paper as a receipt; but he said that if what followed had at all controlled or qualified what went before, he should have rejected the whole. See *Heron* v. *Granger*, 5 Esp. C. 269, where Lord Ellenborough held that an agreement for the sale of goods need not be stamped, although it contained other stipulations; but it is to be observed that all those stipulations were connected with the sale of the goods. If a *cognovit* contain matter of agreement, it must be stamped as an agreement. *Ames* v. *Hill*, 2 B. & P. 150. It seems, in general, that where two distinct and unconnected matters are written on the same parchment or paper, so that either may be rejected in toto, without altering or affecting the terms of the other, each may be read if properly stamped, just as if the other did not exist; but that if they be so connected as to qualify each other, neither can be read without a stamp which will cover both.

(*f*) See the provisions of the statute 32 Geo. 3. An agreement between merchants residing within fifty miles of each other, for the outfit of a ship, requires a stamp. *Leigh* v. *Banner*, 1 Esp. C. 403. The letter of an agent written to a creditor residing above fifty miles from him is exempted (*Mackenzie* v. *Banks*, 5 T. R. 176), although it bind the agent, and not the principal; *semble*, ibid.

(*g*) *R.* v. *Inh. of Kew*, 8 B. & C. 655.

(*h*) *Leeds* v. *Burrows*, 12 East, 1; see also *Perkins* v. *Potts*, 2 Ch. 329.

(*i*) Under the stat. 46 Geo. 3, c. 43, 48 Geo. 3, c. 149, 55 Geo. 3, c. 184, a valuation of parish lands by two parishioners, for the purpose of making a rate, requires no stamp. *Atkinson* v. *Fell*, 5 M. & S. 240. *Jackson* v. *Shepherd*, 2 C. & M. 361. A broker called to prove the value of goods, is not bound to produce an inventory written on an appraisement stamp. *Stafford* v. *Clarke*, 1 C. & P. 25.

(*k*) *R.* v. *St. Petrox*, 4 T. R. 196.

(*l*) *R.* v. *St. Matthew, Bethnal Green*, 4 Burn, 388, 23d edit. 8 Mod. 365. See 44 G. 3, c. 98, s. 190.

(*m*) *R.* v. *Sheffington*, 3 B. & A. 382.

tices (*n*). But where it is proved *aliunde* that a premium was paid, a mere recital in the deed that it was paid out of a charitable fund is not sufficient to prove the fact (*o*). Apprentice.

A stipulation that the master shall have part of the earnings of an apprentice does not render an additional duty necessary (*p*).

Where the mother of an illegitimate child agreed with the intended master that 10*l.* should be paid as the premium, to be inserted in the indenture, and that he should receive something more, and her husband paid the 10*l.*, which was inserted, and she, without her husband's knowledge, paid two guineas and a half more, it was held that the full sum was inserted (*q*); there was no valid contract to pay more.

Where it was agreed that five guineas should be given as a premium, and that sum was inserted in the indenture, and the duty paid, it was held to be well, although, in fact, four guineas only had been paid (*r*); the sum contracted for having been inserted, the stamp being of the same description, and the duty appropriated to the same fund, as if four guineas had been inserted and paid for.

An indenture placing out an apprentice with the consent of trustees of certain funds bequeathed for the binding out of poor apprentices, is exempt from duty, although the trustees are not parties to the deed (*s*).

In an action on an apprentice-deed, it is no objection that the plaintiff was not called at the trial to make oath as to the amount of premium actually paid (*t*).

A covenant by the friends of the apprentice to provide him with clothes, is not a benefit within the stat. 8 Anne, c. 9, s. 45 (*u*).

It seems that a lease operating as an assignment ought to be stamped as such (*x*).

A mere attornment does not require a stamp (*y*).

A writing by which a party admits a recovery against him in ejectment and a demise by the lessor to *A. B.*, to whom he thereby attorns as tenant, does not require a stamp (*z*).

An award in writing, and under seal, need not be stamped as a deed, unless it be delivered as a deed (*a*). Award.

An arbitration bond does not require an agreement stamp, although it contains stipulations as to the mode of paying costs (*b*).

The appointment of an umpire by two arbitrators requires no stamp (*c*).

(*n*) *R.* v. *Clifton-upon-Dunsmore*, 4 Burn, 389, 23d edit.

(*o*) *R.* v. *Skeffington*, 3 B. & A. 382.

(*p*) *R.* v. *Wantage*, 1 East, 601. And see 44 G. 3, c. 98; and *R.* v. *Bradford*, 1 M. & S. 151; and stat. 48 Geo. 3, c. 149; and *Gye* & *Felton*, 4 Taunt. 876.

(*q*) *R.* v. *Bourton-on-Dunsmore Inh.*, 9 B. & C. 872.

(*r*) *R.* v. *Keynsham*, 5 East, 309.

(*s*) *R.* v. *Quainton*, 2 M. & S. 338.

(*t*) *Stewart* v. *Lawton*, 1 Bing. 374; and see *Leigh* v. *Kent*, 3 T. R. 364. *Gye* v. *Felton*, 4 Taunt. 880.

(*u*) *R.* v. *Leighton*, 4 T. R. 732. *R.* v. *Walton-le-Dale*, 3 T. R. 515.

(*x*) *Baker* v. *Gostling*, 1 Bing. N. C. 246. Where the plaintiff, a termor, in consideration of 100*l.*, and a yearly sum of 75*l.* payable quarterly, under-leased to the defendant for a longer term than he had, it was held, that the counterpart executed by the defendant, and bearing a 30*s.* stamp, was inadmissible on an issue on the assignment. Ib.

(*y*) *Doe* v. *Edwards*, 1 A. & E. 95.

(*z*) *Doe* v. *Smith*, 3 N. P. 335.

(*a*) *Brown* v. *Vauser*, 4 East, 584. Where an Inclosure Act gave commissioners a power to award lands in exchange for others in an adjoining parish, and also to award lands to those who bought them of persons entitled to allotments, it was held that they might award lands given in exchange partly for other lands and partly for money, and that the award need not have an *ad valorem* stamp. *Doe* d. *Suffield* v. *Preston*, 7 B. & C. 392.

(*b*) *In re Wansborough*, 2 Chitty, 40.

(*c*) *Routledge* v. *Thornton*, 4 Taunt. 704.

Award. A paper drawn up in pursuance of an agreement by two parties to ascertain the amount of an account, requires an agreement stamp (*d*).

Bills of exchange. All bills of exchange (*e*), and promissory notes for the payment of 2*l.* or upwards, require a stamp (*f*).

The Court will not set aside an award for being made on an improper stamp, if no attempt be made to enforce it. *Preston* v. *Eastwood*, 7 T. R. 95.

(*d*) *Jebb* v. *M'Kinnon*, M. & M. 340. But it seems that the opinion of counsel, by which parties agree to abide does not require an award stamp. *Boyd* v. *Emerson*, 2 A. & E. 184. An award of land by commissioners of inclosure requires an award not an *ad valorem* stamp. *Doe* v. *Preston*, 7 B. & C. 392.

(*e*) An unstamped bill is a nullity, and imposes no obligation to present it. *Wilson* v. *Vysan*, 4 Taunt. 288. An invoice of goods to which a memorandum is subjoined, "Mr. *S.*, please to pay the above account to Messrs. *D.*," and signed by the plaintiff (in an action for goods sold), is not a bill or order for the payment of money. *Norris* v. *Solomon*, 2 Mo. & R. 266.

(*f*) By the stat. 55 Geo. 3, c. 184, schedule, tit. *Bill of Exchange*.

Inland Bills of Exchange, draft, or order to the bearer, or to order, either on demand or otherwise;

	Not exceeding two months after date, or sixty days after sight.									For a longer period.		
If	2*l.*	0*s.*			5*l.*	5*s.*	-	0*l.*	1*s.* 0*d.*	-	0*l.*	1*s.* 6*d.*
Above	5	5			20	0	-	0	1 6	-	0	2 0
Above	20	0			30	0	-	0	2 0	-	0	2 6
Above	30	0			50	0	-	0	2 6	-	0	3 6
Above	50	0			100	0	-	0	3 6	-	0	4 6
Above	100	0			200	0	-	0	4 6	-	0	5 0
Above	200	0			300	0	-	0	5 0	-	0	6 0
Above	300	0			500	0	-	0	6 0	-	0	8 6
Above	500	0			1,000	0	-	0	8 6	-	0	12 6
Above	1,000	0			2,000	0	-	0	12 6	-	0	15 0
Above	2,000	0			3,000	0	-	0	15 0	-	1	5 0
Above	3,000	0	-	-	-	-	-	1	5 0	-	1	10 0

"Received of *A. B.* 100*l.* which I promise to pay with lawful interest," is a promissory note. *Green* v. *Davis*, 4 B. & C. 235. An instrument inoperative as a promissory note, not being for the payment of any definite sum, is admissible in evidence under the count, on an account stated, although improperly stamped as a promissory note. *Barlow* v. *Broadhurst*, 4 Moore, 471. *A.* having consigned goods to *B.* sent him the following order; "pay to *C. D.* the proceeds of a shipment of goods, value about 2,000*l.* consigned by me to you;" *B.* consented by writing; held, that neither of these writings required a stamp as a bill, draft, or order for payment of money, &c. *Jones* v. *Simpson*, 2 B. & C. 318.

A stamp for a bill payable at a time not exceeding two months after date, or sixty days after sight, is insufficient for a note payable two months after *sight*. *Sturdy* v. *Henderson*, 4 B. & A. 592. A letter from *A.* to *B.* requesting him to pay to *C.* 600*l.* out of the first proceeds that should become due from goods of *A.* then in the hands of *B.*, is an order for the payment of money, and an agreement-stamp is insufficient, although the letter formed part of a correspondence between the three parties. *Butts* v. *Swann*, 2 B. & B. 78. And see *Firbank* v. *Bell*, 1 B. & A. 36. *Supra*, 1036.

An inland bill for the payment of any sum of money weekly, monthly, or at any other stated periods, if made payable to the bearer, or to order, or if delivered to the payee, or some person on his or her behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom, is liable to the same duty as a bill of exchange for the like sum payable to the bearer or order. Notes under the Lords' Act need not be stamped. (*Tekel* v. *Casey*, 7 T. R. 670. *Bowring* v. *Edgar*, 1 B. & P. 270. Contra, *Pitman* v. *Haynes*, 7 T. R. 530.) A bill for the payment of 30*l.* and interest, three months after date, requires only a stamp applicable to a bill for a sum not exceeding 30*l.* *Prussing* v. *Ing*, 4 B. & A. 204. *Peacock* v. *Murrell*, 2 Starkie's C. 558. *Dearden* v. *Binns*, 1 Mann. & R. 130. A promissory note for 11*l.* payable to *A. B.* on demand, is a promissory note payable to the bearer on demand, within the meaning of the 55 G. 3, c. 184, and requires a 2*s.* stamp. *Keates* v. *Whieldon*, 8 B. & C. 7. Note, it was insisted that the first division of that part of the schedule applied only to such notes as were re-issuable; but it was answered that others than bankers might take out a licence to re-issue such notes. But in *Moyser* v. *Whitaker*, 9 B. & C. 409, where the note was payable to *A. B.* or order on demand,

By the 55 G. 3, c. 184, drafts, or orders (*y*) for the payment of money to Bankers' drafts.

the Court held that the note was within the second class mentioned in the schedule, being a note payable in any other manner than to the bearer on demand, and not exceeding two months after date; and see also *Armitage* v. *Berry*, 5 Bing. 50, and *quære* as to *Keates* v. *Whielden*. A promissory note, payable to *M. M.*, without the words "order," or "bearer," or any words to indicate the time of payment, is not a promissory note payable to the bearer on demand within the statute. *Chertham* v. *Butler*, 5 B. & Ad. 837. And see *Dixon* v. *Chambers*, 1 C. M. & R. 845, where the same was held as to a note payable to *A.* on demand, with lawful interest until payment. A memorandum acknowledging an advance as a loan, "in promise of payment, of which I am thankful for, and shall never be forgotten by," &c., was held to be a promissory note. *Ellis* v. *Mason*, 7 Dowl. 598. So of a memorandum, "Mem. That I, *B. P.*, had 5*l.* 5*s.* for one month of my mother, and from this date to be paid by me to her." *Shrivell* v. *Payne*, 8 Dowl. 441. Where the note was expressed to pay the sum, "to be held as a collateral security for any monies owing to the holder from *M.*, if the securities then or afterwards placed in their hands should not be realized," was held not to be a promissory note, being payable only on a contingency. *Robins* v. *May*, 3 P. & D. 147. A note to pay the amount by certain instalments at certain periods, and 10*l.*, (the remainder), to go as a set-off for an order of *R.* to *T.*, and the remainder of his debt from *D.* to him, requires an agreement-stamp, and is evidence of an account stated. *Davies* v. *Wilkinson*, 2 P. & D. 256; 10 Ad. & Ell. 98. S. C. A promissory note for 40*l.* payable to *A. B.* or bearer, is in law payable on demand; and therefore requires a 5*s.* stamp under the stat. 55 Geo. 3, c. 184, schedule, part i. tit. *Promissory Note*; *Whitlock* v. *Underwood*, 2 B. & C. 157. The word *date* means the actual date on the face of the bill; a bill payable at two months' date, and stamped as such, is good, though post-dated and issued before the day, the party being liable to a penalty only. *Williams* v. *Jarrett*, 5 B. & Ad. 32. A bill payable to the order of the drawer and taken up by him, may be re-issued without a fresh stamp. *Hubbard* v. *Jackson*, 4 Bing. 390. *Callow* v. *Lawrence*, 3 M. & S. 97. *Secus*, of a bill payable to the order of a third person, and paid by the drawer. See *Beck* v. *Robly*, 1 H. B. 89. *Supra*, tit. BILL OF EXCHANGE. A bill of exchange is liable to alteration without a new stamp (as it seems) until it is in the hands of a person entitled to make a claim upon it. *Downes* v. *Richardson*, 5 B. & A. 674; and see *Stephens* v. *Lloyd*, M. & M. 292. *Jacobs* v. *Hart*, 6 M. & S. 143. *Kennerly* v. *Nash*, 1 Starkie's C. 452. An exchange of acceptances is an issuing. *Cardwell* v. *Martin*, 9 East, 190. As to the onus of proving the time when an alteration was made, when it becomes material, see above, 250, and *Hannan* v. *Dickinson*, 5 Bing. 183. *Johnson* v. *Duke of Marlborough*, 2 Starkie's C. 313. A bill written out and accepted here to be transmitted to one abroad for his signature as drawer, does not require an English stamp. Gow. 56. So a bill drawn in Ireland in blank and transmitted to England to be filled up, does not require an English stamp. *Snaith* v. *Mingay*, 1 M. & S. 87. *Crutchly* v. *Mann*, 5 Taunt. 529. But an acceptance of a bill in England, though drawn abroad, is an inland bill. *Amner* v. *Clark*, 2 C. M. & R. 418.

The stat. 55 G. 3, c. 184, s. 12, imposes a penalty of 100*l.* on any person issuing a bill or note dated subsequently to the issuing, so as not in fact to become payable in two months, if made payable after *date*, or in sixty days, if made payable after sight after the day of issuing, unless it be stamped as a bill or note for payment of money at any time exceeding two months from the date, or sixty days after sight. This section, it is to be observed, merely imposes a penalty, on the issuer, and does not, as it seems, preclude a *bonâ fide* holder without notice from giving it in evidence. See *Peacock* v. *Murrell*, 2 Starkie's C. 558. A note for the payment of 400*l.* (awarded to *J. S.*) to the representatives of *J. S.*, three months after his decease, deducting thereout any interest or money which *J. S.* might owe to the defendant on any account, is not a promissory note to pay a definite sum at all events, and may, although improperly stamped, as a note, be given in evidence under the account stated. *Barlow* v. *Broadhurst*, 4 Moore, 471. And see *Watkins* v. *Hewlett*, 3 Moore, 211. The word date is intended to mean the time of payment, on the face of the bill. *Upstone* v. *Marchant*, 2 B. & C. 10. *Peacock* v. *Murrell*, 2 Starkie's C. 158.

(*y*) Where a letter was addressed by the holders of a fund out of which payment was to be made in these terms, "after paying yourselves the balance we owe, we authorize you to pay one half of the remainder of the proceeds of said shipments to *Messrs. R. & Co.*, provided the same shall not exceed 5,000*l.*;" it was held not to require a stamp as an order for the payment of money within 55 Geo. 3, c. 184, sch. p. 1, the parties to whom the payment was to be made being the agents to *H. & L.*, on whose account it was to be made, and to be supplied or paid over as circumstances required. *Hutchieson* v. *Heyworth*, 1 Per. & D. 266.

Bankers' drafts.

the bearer, on demand, and drawn upon any banker (*h*), or person acting as a banker, who shall reside or transact the business of a banker within ten miles of the place where such drafts or orders shall be issued, are exempted from duty, *provided* such *place* be specified in such draft, and that it bear date on or before the day when issued, and do not direct the payment to be made by bills or promissory notes.

The effect of an alteration in a bill of exchange (*i*) has already been considered.

Bill of lading.

Goods carried from a port in Scotland to another in England are not *exported* so as to render the bill of lading liable to a stamp-duty (*k*).

Bill of sale.

A bill of sale of a ship is not void although it omits to set out the true consideration, and is not stamped with an *ad valorem* stamp (*l*): but the parties are liable to a penalty for not setting out the true consideration (*m*).

Parties may legally stipulate for the loan of a less sum, in order to avoid a higher duty (*n*).

Bond.

A bond conditioned for not converting a house to a particular purpose does not require an *ad valorem* stamp (*o*). Neither does a covenant to pay an annuity as a consideration for giving up a trade (*p*) require an *ad valorem* stamp, although the covenantor was to have possession of a house for the purpose of carrying on the business.

A bond conditioned for the safe custody and production of a box containing the subscriptions of a benefit club, is within the exemption in the 33 G. 3, c. 54, s. 4 (*q*).

If several persons bind themselves in a penalty by one bond, conditioned for the performance by each and every of them of the same matter, one stamp only is requisite (*r*), for it is all one transaction. A bond conditioned for the payment of annual rent for a definite period ought to be stamped according to the aggregate amount of the whole rent secured (*s*). Where a bond is conditioned for the payment of all sums of money advanced and

(*h*) An unstamped draft drawn on *A. B.* bricklayer, is not within the exception; *Castleman* v. *Ray*, 2 B. & P. 383; and an acknowledgment by the drawer at the bottom that a third person paid it for him, is not receivable to give effect to the draft. Ibid. A check bearing date after the day when issued, required a stamp under the 31 G. 3, c. 25. (*Allen* v. *Keeves*, 1 East, 435; 3 Esp. C. 281. *Whitwell* v. *Bennett*, 3 B. & P. 559.) As to an order for paying money out of a fund which may or may not be available, see *Firbank* v. *Bell*, 1 B. & A. 36; *supra*, 755, note (*q*).

(*i*) *Supra*, 254. *A.* and *B.* agree to give a bill drawn by *A.* and accepted by *B.*, to *C.*, for a debt due from them to him; they send instead a promissory note, which he immediately returns to be altered; a fresh stamp is unnecessary. *Webber* v. *Maddocks*, 3 Camp. 1. An accommodation bill may be altered before it has been negotiated. *Downes* v. *Richardson*, 5 B. & A. 674. *Atwood* v. *Griffin*, 2 C. & P. 368.

(*k*) *Scotland* v. *Wilson*, 5 Taunt. 533, under the stat. 48 Geo. 3, c. 149. But a 3*s.* stamp-duty is imposed by the stat. 55 Geo. 3, c. 184, on bills of lading of goods carried *coastwise*. Though a bill of lading be improperly stamped, the plaintiff may in trover prove his title by parol evidence. *Davis* v. *Reynolds*, 1 Starkie's C. 115.

(*l*) *Robinson* v. *Macdonnell*, 5 M. & S. 228. *Duck* v. *Braddyll*, 13 Price, 445. No bill of sale or transfer need now be stamped. 6 Geo. 4, c. 41.

(*m*) By the stat. 55 G. 3, c. 184, s. 22.

(*n*) *Shepherd* v. *Hall*, 3 Camp. 180.

(*o*) *Hughes* v. *King*, 1 Starkie's C. 119.

(*p*) *Lyburn* v. *Warrington*, 1 Starkie's C. 162. Under the stat. 48 G. 3, c. 149, which imposes an *ad valorem* duty upon the conveyance of any lands, tenements, rents, annuities, &c.

(*q*) *Carter* v. *Bond*, 4 Esp. C. 253.

(*r*) *Bowen* v. *Ashley*, 1 N. R. 274. By the stat. 55 G. 3, c. 184, tit. *Bond*, where the sum to be recovered is wholly unlimited, a stamp of the value of 25*l.* is requisite. Where the sum to be recovered is limited to a particular amount, the same duty is payable as if that sum were payable.

(*s*) *Attree* v. *Anscomb*, 2 M. & S. 88. See *Collins* v. *Collins*, 2 Burr. 820. *Walcot* v. *Goulding*, 8 T. R. 126. *Willoughby* v. *Swinton*, 6 East, 550.

to be advanced, it ought to be stamped as for an unlimited sum, although a sum certain be specified as a penalty (*t*). Bond.

A bond conditioned to secure a London banker in respect of the balance due from a country banker, stipulating that the whole amount ultimately recoverable should not exceed 1,000*l.*, does not require a 25*l.* stamp (*u*).

A bond to secure damages to be recovered on a new trial, where plaintiff has already recovered, requires a 35*s.* stamp, as a bond not otherwise charged (*v*). So of a bond under a penalty of 500*l.* not to convert a public-house into wine-vaults (*x*).

A bond and mortgage-deed being given to secure the same sum, are executed at the same time, but are dated on different days, the mortgage-deed bearing an *ad valorem* stamp, the bond a 1*l.* stamp; it was held that the bond was improperly stamped (*y*).

In debt, on a bond stamped with a 1*l.* stamp, to secure a sum due upon an indenture of even date, it was held to be necessary to produce the indenture, in order to show whether the bond required an *ad valorem* stamp (*z*).

A bond given to secure the amount of a verdict on a new trial granted, is a mere indemnity bond, and a 35*s.* stamp is sufficient.

A bond conditioned for the payment of 1,000*l.* and interest on a day certain, requires only a 35*s.* stamp (*a*). But in the case of a bond given to secure 1,000*l.*, and broker's charges for commission (a matter not merely collateral), a 5*l.* stamp is not sufficient (*b*).

A composition deed between a debtor and his creditors, though executed by a number of creditors, requires but one stamp (*c*). Composition deed.

A conveyance to trustees, in trust, to sell, with a primary trust to pay all the other creditors, and a resulting trust, as to the residue, to pay to the parties conveying, does not require an *ad valorem* stamp. The stat. 55 G. 3, c. 184, sch. 1, tit. *Conveyance*, operates upon actual sales between vendor and vendee only, and therefore a common deed-stamp is sufficient (*d*). Conveyance, &c.

A lease is not a conveyance (*e*), neither is a mere agreement to convey (*f*). A conveyance by a father to a son, of a freehold estate, in consideration of natural love and affection, and of a provision made by the son to augment his sister's fortune, is not a conveyance upon *sale*, so as to require an *ad valorem* stamp (*g*).

(*t*) *Scott* v. *Allsop*, 2 Price, 20. *Secus*, where the amount is limited, although the instrument operates as a continuing guarantee. *Williams* v. *Rawlinson*, 3 Bing. 71; 1 R. & M. 283. *Thompson* v. *Cooke*, 8 Moore, 588; and see *Jay* v. *Warren*, 1 C. & P. 532.

(*u*) *Lloyd* v. *Heathcote*, 1 C. & M. 336.

(*v*) *Lopez* v. *De Tastet*, 8 Taunt. 712.

(*x*) *Hughes* v. *King*, 1 Starkie's C. 119.

(*y*) *Wood* v. *Norton*, 9 B. & C. 885. For the words of the exempting clause are, "*bearing even date*," 55 G. 3, c. 184, schedule, tit. *Bond*.

(*z*) *Walmer* v. *Brierly*, 1 Mo. & R. 529. *Secus*, where it appears that the other instrument requires an *ad val.* stamp. Ib. And *Quin* v. *King*, 1 M. & W. 42.

(*a*) *Dixon* v. *Robinson*, 1 Mo. & R. 113. So if the bond be also conditioned for the performance of collateral acts, it requires only the stamp appropriated to the principal sum (exceeding 35*s.*). *Dearden* v. *Binns*, 1 M. & Ry. 130.

(*b*) *Dickson* v. *Cass*, 1 B. & Ad. 343. *Paddon* v. *Bartlett*, 2 Ad. & Ell. 9.

(*c*) See the observations of Mansfield, C. J. in *Boncen* v. *Ashley*, 1 N. R. 274. By the stat. 55 Geo. 3, c. 184, schedule, tit. *Composition*, a duty of 1*l.* 15*s.* is payable, with a further progressive duty for every entire quantity of 1,080 words, over and above the first 1,080.

(*d*) *Coates* v. *Perry*, 3 B. & B. 48; and see *Whitwell* v. *Dimsdale*, Peake's C. 168. An assignment by indenture of a judgment-debt does not require an *ad valorem* stamp, but only an ordinary deed-stamp. *Warren* v. *Hoice*, 2 B. & C. 281.

(*e*) *Roe* v. *Chenhals*, 4 M. & S. 23.

(*f*) *Wilmot* v. *Wilkinson*, 6 B. & C. 506.

(*g*) *Denn* v. *Manifold*, 4 B. & C. 243. *Belcher* v. *Sykes*, 6 B. & C. 434. See *Whit-*

Conveyance, &c.

A. covenants to give up his trade to *C.*, and allow him to carry it on in his house for ten years, *C.* covenanting to pay 1,000*l.* for the fixtures at the time of executing the deed, and 1,000*l.* per annum for ten years; an *ad valorem* stamp is not requisite, the good-will of the trade not being distinct substantive property (*h*). An agreement is entered into by *A.* and *B.* under seal to dissolve partnership, *A.* agreeing to take the whole interest and debts, and to pay *B.* 50,000*l.*; this is not a *sale* of property, and an *ad valorem* stamp is unnecessary (*i*). The stat. 55 G. 3, c. 184, tit. *Conveyance*, which requires the consideration for the lease to be set out, applies only to considerations which pass between the lessor and lessee (*k*).

Copies.

Close *copies* (*l*) of law proceedings may be used as evidence without any additional stamp (*m*).

A copy of a judgment in the House of Lords requires no stamp (*n*).

Although a copy of a court-roll must be stamped, the original need not (*o*).

Cognovit.

A *cognovit* requires no stamp, unless it contain matter of agreement (*p*).

Deed.

It seems to be a general principle, that where several concur in the same transaction, although each be severally bound, and the deed or covenant be the separate deed or covenant of each, one stamp only is requisite. As, if a debtor compound with his creditors, and each creditor executes the deed, covenanting either to give further day of payment, or to accept of a certain sum as a composition (*q*).

An indorsement on an annuity deed subsequent to the execution, making it subject to redemption, requires a new stamp (*r*).

An agreement under seal for a lease requires a 1*l.* 15*s.* stamp, as a deed not otherwise charged (*s*). A deed produced stamped with the stamp required by the 48 G. 3, c. 149, was held to be admissible, although it had not affixed a stamp of less value required at the time when the deed was executed (*t*).

It was held under the stat. 37 G. 3, c. 90, s. 7, that a schedule of goods referred to by a deed to which it had been annexed, &c. must be stamped according to the number of words, according to the progressive duty im-

well v. *Dimsdale*, Peake's C. 168. *Coates* v. *Perry*, 6 Moore, 188.

(*h*) *Lyburn* v. *Warrington*, 1 Starkie's C. 162.

(*i*) *Belcher* v. *Sykes*, 6 B. & C. 234; and see also *Mounsey* v. *Stephenson*, 7 B. & C. 403, as to an agreement under seal not to set up a shop; see also *Blandy* v. *Herbert*, 9 B. & C. 396.

(*k*) *Boone* v. *Mitchell*, 1 B. & C. 18.

(*l*) By the stat. 55 G. 3, c. 184, tit. *Copy*, an attested copy of an agreement, contract, &c. made for the security or use of any person being a party to, or taking any benefit or interest immediately under it, shall be subject to the same amount of duty with the original. It is reported to have been held, that an attested copy of a deed on a 1*s* stamp was admissible as secondary evidence. *Dilcher* v. *Kenrick*, 1 C. & P. 161.

(*m*) *Doe* d. *Lucas* v. *Fulford*, 1 Blacks. 288. Copies of court-rolls are admissible, although the surrenders be made out of Court; revenue laws do not alter the rules of evidence. *Doe* v. *Mee*, 4 B. & Ad. 617.

(*n*) *Jones* v. *Randall*, Cowp. 17; Bl. 289.

(*o*) *Doe* v. *Hall*, 16 East, 208.

(*p*) *Ames* v. *Hill*, 2 B. & P. 150. *Reardon* v. *Swabey*, 4 East, 188. *Supra*, 1036. An agreement contemporary with the cognovit to give time, does not render a stamp on the cognovit necessary. *Morley* v. *Hall*, 2 Dowl. P. C. 494.

(*q*) Per Mansfield, C. J. *Bowen* v. *Ashley*, 1 N. R. 278. A deed not otherwise charged in the schedule to the Act 55 Geo. 3, c. 184, not expressly exempted, is liable to a duty of 1*l.* 15*s.*, and also to a progressive duty of 1*l.* 5*s.* for every additional quantity of 1,080 words

(*r*) *Shaman* v. *Wetherhead*, 1 East, 537. It has been held that an indorsement on a deed limiting the power of trustees, need not be stamped. *Herne* v. *Hale*, 3 Esp. C. 237. *Qu.* and vide Chitty on St. 988.

(*s*) *Clayton* v. *Burtenshaw*, 5 B. & C. 41; 7 D. & R. 800. And see as to articles of agreement under seal which do not require an *ad valorem* duty, *supra*, 1045.

(*t*) *Doe* v. *Whittingham*, 4 Taunt. 20.

posed by that Act, and not merely the single schedule stamp imposed by the first section (*u*). Deed.

A deed indorsed on a former deed, as a further security for advances made and to be made under the first deed, is exempted from an *ad valorem* duty if the first deed be stamped with an *ad valorem* stamp (*x*).

A conveyance to trustees in trust to sell, pay debts, &c., with a resulting trust to the debtors, does not require an *ad valorem* stamp, as on a sale or mortgage (*y*.)

Where seventeen copies of a declaration in ejeetment had been ingrossed on both sides of the paper, the Court set them aside as irregular (*z*). Ejectment.

A feoffment in consideration of natural love and affection, and 10 *s.*, does not require two stamps of 1 *l.* 15 *s.* each (*a*).

An instrument made in a foreign country must be stamped according to the law of that country (*b*); but until the law of that country be proved, it will be presumed that no stamp is requisite (*c*). Foreign instrument.

A contract made at sea requires no stamp (*d*).

An instrument made here for the performance of acts abroad is liable to the stamp-laws of this country (*e*). A bill of exchange indorsed in Ireland, with blanks being left for the date and time of payment, and name of the drawee, and completed in England, is to be considered by relation as a bill drawn in Ireland (*f*).

The articles of a Swedish ship made in Sweden, and deposited by the captain on his arrival in England with the Swedish consul, were held to be admissible, without a stamp, to show the terms on which a Swedish sailor was subsequently hired in London (*g*).

The stat. 55 G. 3, c. 184, which requires an *ad valorem* stamp according to the amount of the consideration given for the lease (*h*), applies only to the consideration as between the lessor and lessee; and therefore does not apply to a consideration given by the lessee to procure a lease from the lessor (*i*). Lease.

A lease (*j*) for years at a pepper-corn rent, in consideration of a sum

(*u*) *Luke* v. *Ashwell*, 3 East, 326. An indorsement on a deed of exchange of the executing parties, date, &c. is no part of the deed. *Windler* v. *Fearon*, 4 B. & C. 663; 7 D. & R. 185.

(*x*) Under the stat. 48 Geo. 3, c. 149. *Robinson* v. *Macdonnell*, 5 M. & S. 228.

(*y*) *Coates* v. *Perry*, 3 B. & B. 48.

(*z*) *Doe* d. *Irwin* v. *Roe*, 1 D. & R. 562. See the stat. 55 Geo. 3, c. 184.

(*a*) *Doe* v. *Wheeler*, 2 Ad. & Ell. 28.

(*b*) *Alves* v. *Hodgson*, 7 T. R. 241. *Clegg* v. *Levy*, 3 Camp. 166. *Snaith* v. *Mingay*, 1 M. & S. 87. 90.

(*c*) *Clegg* v. *Levy*, 3 Camp. 166. In general the courts do not notice the revenue laws of a foreign country. *James* v. *Catherwood*, 3 D. & R. 190; Chitty on Bills, 7th edit. 57, n.

(*d*) *Ximenes* v. *Jaques*, 1 Esp. C. 311.

(*e*) *Stonelake* v. *Babb*, 5 Burr. 2673. So as to bills drawn in England on a foreign country. See 55 Geo. 3, s. 184, Sched. 1. So promissory notes made abroad must pay the same duty as English notes before they are negotiated, except notes payable in Ireland only. Ibid. s. 20. A bill purporting to be made abroad, but really made in England, cannot be enforced here. *Jordaine* v. *Lashbrooke*, 7 T. R. 631. *Abraham* v. *Dubois*, 4 Camp. 269. By the 1 & 2 G. 4, c. 55, deeds executed in England relating to Ireland are to be stamped as deeds executed in that country ought to be, although they contain covenants to pay obligatory in England.

(*f*) *Snaith* v. *Mingay*, 1 M. & S. 87.

(*g*) *Whinbled* v. *Malmberg*, 2 Esp. C. 454.

(*h*) The stamp is regulated by the fine or rent *expressed* to be paid; a misstatement, although criminal, does not avoid the lease. *Doe* v. *Lewis*, 10 B. & C. 673.

(*i*) *Boone* v. *Mitchell*, 1 B. & C. 18. The *ad valorem* stamp is to be regulated by the consideration on the face of the lease. *Duck* v. *Braddyll*, 12 Price, 455.

(*j*) For the decisions upon the point, whether an instrument is to be considered as an agreement or a lease, vide *infra*, tit. USE AND OCCUPATION. Upon a sale by auction of the "herbage of closes" for five months for 46 *l.* paying a deposit of 10 *l.*, and a joint note for the remainder payable

Lease.

certain, did not require an *ad valorem* stamp under the stat. 48 G. 3, c. 149, but merely a lease-stamp (*k*). A lease containing several distinct demises of several tenements, at several rents, commencing from different periods, ought to be stamped, not according to the aggregate of the rents, but with a stamp equal in amount to the aggregate of the duties on the several demises (*l*).

Where the same instrument contains an agreement for the sale of fixtures and words of present demise of house, a lease-stamp is requisite (*m*).

Where by instrument under seal, *A.* agreed to hire premises of *B.* at a certain rent, but no time was fixed for the commencement or determination of the tenancy, and it was also agreed that *A.* should take the fixtures and stock in trade at a valuation, it was held that a stamp of 30*s.* was not sufficient (*n*).

A lease of two farms has different habendums and covenants; an *ad valorem* stamp for the amount of both rents is sufficient (*o*).

Where an instrument for want of a seal can operate as an agreement only, an agreement stamp is sufficient (*p*).

Where a farming lease refers for the covenants to an expired lease, which is properly stamped, the latter cannot be considered as a schedule, catalogue, or inventory, within the 55 G. 3, c. 184 (*q*).

An agreement not under seal demising a dairy and specific land, is not void as containing a demise of incorporeal hereditaments: and as demising several matters at a fixed rent, is properly stamped with an *ad valorem* stamp (*r*).

A. agrees orally to lease to *B.* land on the terms contained in a written lease of premises let by *A.* to *C.* The lease cannot be read without being stamped (*s*).

Newspaper.

A newspaper may be read in evidence without a stamp (*t*).

A mortgage deed is stamped with the *ad valorem* duty stamp for 400*l.*; upon a transfer and further advance of 1,000*l.* the new *ad valorem* stamp must cover both sums (*u*). But a further *ad valorem* stamp on each sum on

within that period, and if not given to the satisfaction of the vendor, that he should be at liberty to relet the premises, held to be properly stamped with a 1*l.* stamp, as a conveyance or lease upon the sale of any lands or tenements under 50*l.* *Cattle* v. *Gamble*, 5 Bing. N. C. 46.

(*k*) *Roe* v. *Chenhals*, 4 M. & S. 23. But by the stat. 55 Geo. 3, c. 184, tit. *Lease*, where a lease is granted in consideration of a fine or premium, at a yearly rent not exceeding 20*l.*, or without any rent, the same duty is payable as for the conveyance on a sale of lands of the same amount, except in case of leases for a life or lives, not exceeding three, and leases for a term absolute, not exceeding twenty-one, by ecclesiastical bodies.

(*l*) *Boaze* v. *Jackson*, 3 B. & B. 185. But no fraud being intended, the Court refused to set aside the verdict on account of the insufficiency of the stamp. So a 3*l.* stamp is not sufficient on a lease reserving 370*l.* for house and land, but containing also a distinct reservation of 50*l.* for furniture and fixtures. *Coster* v. *Cowling*, 7 Bing. 457.

(*m*) *Corder* v. *Drakeford*, 3 Taunt. 382.

(*n*) *Clayton* v. *Burtenshaw*, 5 B. & C. 41. For the instrument was not a lease, but an agreement for a lease, and being under seal, *semble*, it required a stamp of 1*l.* 15*s.* as a deed not otherwise charged; but even considered as a lease, the stamp would be insufficient, for the agreement as to goods, being by deed, is not within the exception, and the goods were not merely accessory to the demise.

(*o*) *Blount* v. *Pearman*, 1 Bing. N. C. 458; and see *Parry* v. *Deane*, 5 A. & E. 551.

(*p*) *Stone* v. *Rogers*, 2 M. & W. 443.

(*q*) Which (schedule, p. 1.) requires a 25*s.* stamp. *Strutt* v. *Robinson*, 3 B. & Ad. 395. Where a lease duly stamped refers to one not stamped (having been abandoned), the whole may be regarded as one lease. *Pearce* v. *Cheslyn*, 4 Ad. & Ell. 225.

(*r*) *R.* v. *Hockworthy*, 2 N. & P. 383.

(*s*) *Turner* v. *Power*, 7 B. & C. 625.

(*t*) *R.* v. *Pearce*, Peake's C. 75.

(*u*) *Lant* v. *Pearce*, 3 N. & M. 329.

on a transfer and further advance, is sufficient without a further deed-stamp (*x*).

Policy. A mere extension of the time of a ship's sailing does not render a new stamp on a policy of insurance necessary (*y*). A policy on goods to be thereafter declared and valued, which, in fact, covers several distinct interests, which are afterwards declared and indorsed upon the policy, cannot be read unless it be stamped according to the fractional parts of 100*l.* included in each separate interest, although the stamp be sufficient to cover the whole amount (*z*).

A policy of insurance effected without a stamp is an absolute nullity (*a*), and cannot be rendered valid by a stamp subsequently affixed by the commissioners on payment of a penalty (*b*).

Postea. It was held that a *postea* could not be read in evidence in another cause without being stamped (*c*).

Receipt. A paper in the handwriting of a party, containing acknowledgments of sums paid at specified times, upon the times of payment requires a stamp (*d*). But a written acknowledgment at the foot of an account current, stating that it is correct, is evidence without a stamp (*e*). If a

(*x*) *Doe* v. *Rowe*, 4 Bing. N. C. 737; 6 Sc. 525.

(*y*) *Kensington* v. *Inglis*, 8 East, 273. See *Brocklebank* v. *Sugrue*, 1 B. & Ad. 81. Neither does a memorandum giving leave to put back and discharge part of the cargo, the ship being too deep in the water. *Weir* v. *Aberdeen*, 2 B. & A. 320. Nor an alteration rendered necessary by circumstances after the ship has sailed, by which the voyage described as from *A.* to *B.* is altered, by adding *E.* or *F.* *Ramstrom* v. *Bell*, 5 M. & S. 267. Nor an alteration which does not vary the legal effect of the risk already insured against. *Sanderson* v. *Simons*, 4 Moore, 42. See also *Saunderson* v. *M'Cullum*, 4 Moore, 5. *Langhorne* v. *Calogan*, 4 Taunt. 329. See the stat. 25 Geo. 3, c. 63, s. 13, which provides that the Act shall not extend to prohibit the making any lawful alteration in the terms or conditions of any policy. The alteration of a policy "on ship and outfit," by substituting "ship and goods," requires a new stamp. *Hill* v. *Patten*, 8 East, 173. *Supra*, 867.

(*z*) *Rapp* v. *Allnutt*, 15 East, 601. The stat. 35 Geo. 3, c. 63, s. 1, imposes a duty of 2*s.* 6*d.* for every 100*l.*, and a like duty for every fractional part of 100*l.* Sect. 14 avoids every such contract unless properly stamped. The stat. 48 Geo. 3, c. 149, Schedule, tit. *Policy of Assurance*, provides, that if separate interests shall be included in one policy, the duty shall be charged in respect of each and every fractional part of 100*l.* as well as in respect of every full sum of 100*l.* insured upon every separate and distinct interest.

(*a*) By the stat. 35 Geo. 3, c. 63, s. 14 & 15.

(*b*) *Roderick* v. *Horil*, 3 Camp. 103.

(*c*) *R.* v. *Hammond Paye*, 2 Esp. C. 649, in the note.

(*d*) *Wright* v. *Shawcross*, 2 B. & A. 501, in the note. But it was intimated by the Court, according to the report of this case, that the case of an account current would be different, for there the sums stated to be received are not written in the account upon the receipt of the money, but long after, and only amount to admissions of money received at an antecedent time. This case is very shortly reported, and the distinction stated to have been made by the Court between a written acknowledgment made at the time of payment, and one made at a subsequent period, is not a very clear and distinct one. See *Clarke* v. *Houghton*, 3 D. & R. 325. A bill of parcels subscribed, "Settled by two bills, one at nine and the other at twelve months," requires (as has been held) a receipt-stamp. *Smith* v. *Kelby*, Peake's C. 25, n. Or an agreement-stamp, according to the report 4 Esp. C. 249. So an acknowledgment of having received acceptances, accompanied with an undertaking to provide for them, requires, it is said, a receipt-stamp. *Scholey* v. *Walsby*, Peake's C. 24. *Watkins* v. *Hewlett*, 2 B. & B. 1; *supra*, 1036.

(*e*) *Wellard* v. *Moss*, 1 Bing. 134; 7 Moore, 533. Note, the account contained items of sums admitted to have been received. In *Jacob* v. *Lindsey*, 1 East, 460, where the defendant had, at the bottom of each page of a written account of goods and cash furnished him by the plaintiff, written the words, "Received the contents—J. Lindsey," it was held that the account and admissions were not receivable in evidence; but that the plaintiff might prove that the defendant, on calling over each item, admitted it to be correct. In the later case of *Wellard* v. *Moss*, it was observed, that in *Jacob* v. *Lindsey* the term used by the admitting party was not

Receipt.

tradesman write "settled" under his bill, and subscribe his initials, he is liable to a penalty for giving a receipt without a stamp (*b*). A mere acknowledgment, not of the payment of money, but that money is due and owing, requires, it seems, no stamp (*c*).

In an action on an attorney's bill by a surviving partner, a memorandum, "settled all accounts of law business up to this day, and will give a receipt in full of all demands when called for," requires an agreement-stamp only (*d*).

A receipt is admissible when stamped as such, although it notices the terms or consideration of payment (*e*); as, where a parish officer gave a receipt to the plaintiff in these terms, "Received of *A. B.* a bill at two months for 35*l.*, which, when paid, will discharge him from the expenses of an illegitimate child, &c." The child afterwards dying, it was held that the document, properly stamped as a receipt, was evidence in an action brought to recover back the money; for the action was brought not on any agreement contained in that paper, but on the ground that upon the facts of the case the money was recoverable. The receipt merely showed that the money had been paid on account of the maintenance of a bastard child (*f*); but if the terms of acknowledgment be connected with, and qualified by, the terms of an agreement contained in the same instrument, it cannot, it seems, be read as a receipt without an agreement-stamp (*g*).

A receipt for money paid to deputy receivers requires no stamp, though signed by their clerk (*h*).

Where the indorsements on a bond had left no space for receipts on subsequent payments, it was held that such receipts written on plain paper, and annexed to the bond, were admissible in evidence (*i*). It seems that an indorsement by a bailiff on a warrant issued on a *fi. fa.*, acknowledging the receipt of the levy-money, is admissible, in an action against the bailiff's surety, to prove the receipt of the money, without a stamp (*k*). A receipt for the sum of 52*l.* 10*s.* was held to require a stamp for that sum, and although it expressed that a former sum of 100*l.* had been paid before (*l*).

acknowledged, but *received*. And see *Clarke* v. *Houghton*, 3 D. & R. 325. *Dibdin* v. *Morris*, 2 C. & P. 44. *Hawkins* v. *Warre*, 3 B. & C. 690. *Qu.* whether an indorsement by a bailiff on a warrant under a *fi. fa.*, "Discharge the defendant—I have received the within levy money," requires a stamp. *Sheriffs of London* v. *Tyndall*, 1 Esp. C. 394.

(*b*) *Spaulforth* v. *Alexander*, 2 Esp. C. 621.

(*c*) Thus, a writing containing the words and letters *i. o. u.* eight guineas, is neither a receipt nor a promissory note, and is evidence without a stamp. *Fisher* v. *Leslie*, 1 Esp. C. 426. *Israel* v. *Israel*, 1 Camp. 499. *Childers* v. *Boulbois*, 1 D & R. C. 8; and per Abbott, L. C. J. *Guy* v. *Davis*, Chitty, O. B. 428, n. *Secus*, where the instrument does not merely acknowledge that such a sum is due, but the receipt of so much money on account of another person, to be applied, &c. *Catt* v. *Howard*, 3 Starkie's C. 3. "*H.* has advanced me 50*l.* on furniture, &c., delivered to him at *S.*" The memorandum does not require a stamped receipt. *Huxley* v. *O'Connor*, 8 C. & P. 204.

(*d*) *Tebbutt* v. *Ambler*, 9 C. & P. 60.

(*e*) *Watkins* v. *Hewlett*, 1 B. & B. 1.

(*f*) Ibid. Per Richardson, J.—Note, Burrough, J. seems to have considered that a receipt would be evidence of an agreement. He says, "Suppose there were a receipt for 500*l.* for building a house, would that be incapable of being produced in evidence as being proof of an agreement?" A receipt for the price of a horse, with the words subjoined, "Warranted sound," upon a receipt-stamp, is admissible without an agreement-stamp. *Skrine* v. *Elmore*, 2 Camp. 407. *Brown* v. *Frye*, Devon Summ. Assizes, cor. Lawrence, J. there cited; and see 2 Atk. 135. But this rests upon the exception as to agreements relating to the sale of goods, &c.

(*g*) *Grey* v. *Smith*, 1 Camp. 387, cor. Lord Ellenborough. And see *Corder* v. *Drakeford*, 3 Taunt. 382. *Odye* v. *Cookney*, 1 Mo. & R. 517.

(*h*) *Edden* v. *Read*, 3 Camp. 338.

(*i*) *Orme* v. *Young*, 4 Camp. 336.

(*k*) *Perchard and another* v. *Tindall*, 1 Esp. C. 394.

(*l*) *Dibdin* v. *Morris*, 2 C. & P. 44.

A receipt by a stage-manager of a theatre in satisfaction of "all my arrears for the last season," does not require a stamp for a receipt in full (*m*). Receipt.

Where a witness, on being shown an unstamped receipt signed by himself, said that he had no doubt that he had received it, but that he had no recollection of the fact, it was held to be sufficient evidence of the payment, and that the receipt having been used not as an acknowledgment but to refresh the recollection of the witness, did not require a stamp (*n*).

Where an agreement between landlord and tenant operates as a surrender of a term of years by the latter to the former, the agreement must be stamped as a surrender (*o*). Surrender.

A defeazance on a warrant of attorney to confess judgment does not require a stamp in addition to that imposed on the warrant of attorney (*p*). Warrant of attorney.

2dly. It is a general rule that a stamp which has once been used for a particular purpose cannot be again used for a similar purpose. Where a redeemable annuity was granted, and afterwards redeemed, and the deeds delivered up uncancelled, it was held, that on a re-delivery of the same deeds to secure a subsequent advance, fresh stamps were necessary (*q*). So it was held that affidavits used on showing cause at chambers cannot be used in court unless they be re-sworn and re-stamped (*r*). But that an affidavit defective for want of title might be intitled and re-sworn without a fresh stamp (*s*). Re-stamping. Stamp discharged by satisfaction.

An instrument altered whilst in *fieri*, and before it is completed, requires but one stamp. As, where a contract is signed by one party, and, previous to the accession of the other, a fresh stipulation is added (*t*); or another obligor is added to a bail-bond before it has been accepted by the obligee (*u*); or a promissory note, before it is negotiated, is converted into a bill of exchange, in furtherance of the original intention of the parties (*x*); or the date on a bill of exchange is altered after acceptance, with the assent of all parties (*y*); or a promissory note is first signed by one party and Alteration whilst in fieri.

(*m*) *Dibdin* v. *Morris*, 2 C. & P. 44.

(*n*) *Maugham* v. *Hubbard*, 8 B. & C. 14. *Rambert* v. *Cohen*, 4 Esp. C. 213.

(*o*) *Williams* v. *Sawyer*, 3 B. & B. 70. The stat. 55 Geo 3, c. 184, Schedule I, tit. *Surrender*, requires a stamp of the amount of 1 *l.* 15 *s.*

(*p*) *Cawthorne* v. *Holben*, 1 N. R. 279; as to the stamp, see *Barrow* v. *Mashiter*, 4 East, 431. By the stat. 55 Geo. 3, c. 184, the duty is the same as upon a bond to the same amount. *Qu.* whether an authority to a proxy to vote requires a stamp under the stat. 55 Geo. 3, c. 184, Schedule, tit. *Letter of Attorney*, which imposes a general duty of 1 *l.* 15 *s.* on letters or powers of attorney. See *Monmouth Canal Company* v. *Kendall*, 4 B. & A. 453.

(*q*) *Hammond* v. *Foster*, 5 T. R. 635. It was also held that a memorial was requisite. So a bill of exchange once issued, if altered afterwards in a material part, requires a new stamp. *Master* v. *Miller*, 2 H. B. 141. And see *Downes* v. *Richardson*, 5 B. & A. 689. And see *Knill* v. *Williams*, 10 East, 437. *Kershaw* v. *Cox*, 3 Esp. C. 246. *Cowie* v. *Halsall*, 4 B. & A. 197. *Duthwaite* v. *Luntly*, 4 Camp. 179. *M'Intosh* v. *Hayden*, R. & M. 363. But it has been seen that the mere correction of a mistake in the drawing of a bill of exchange will not render a new stamp necessary. *Supra*, 1042; and see *Hutchins* v. *Scott*, 2 M. & W. 809. *Brutt* v. *Picard*, R. & M. 37. *Walter* v. *Cobly*, 1 C. & P. 151. An alteration by the drawer without the consent of the acceptor, by adding the words "payable at Mr. B.'s, Chigwell-street," is a material alteration. *Cowie* v. *Halsall*, 4 B. & A. 197.

(*r*) 4 Moore, 414.

(*s*) *Prince and others* v. *Nicholson*, C. B. Mich. 1813. Mann. Ind. 367. And see 3 Taunt. 469.

(*t*) *Knight* v. *Crockford*, 1 Esp. C. 189.

(*u*) *Matson* v. *Booth*, 5 M. & S. 223. And note, that the alteration being made with the concurrence of the agent of the other obligors, the alteration does not avoid the bond. Ibid. And *Zouch* v. *Clay*, 1 Vent. 185; 2 Keb. 872. 881; 2 Lev. 35. *Markman* v. *Gonaston*, Moor, 574; Cro. Eliz. 626.

(*x*) *Webber* v. *Maddox*, 3 Camp. 1; and vide *supra*, 1042.

(*y*) *Johnson* v. *Garnett*, 2 Chitty's R. 122. But see *Walton* v. *Hastings*, 2 Ch. 121

Alteration whilst in fieri.

afterwards by another, who has agreed to join as a surety before the advance of money to a third person, and who signs before the money is advanced (*z*).

An alteration by a drawer who has a general authority to draw on the acceptor, does not render a new stamp necessary (*a*).

Where a bill of sale of a ship misrecited the certificate of registry, and was re-executed by consent of all parties after the mistake had been rectified, it was held that a new stamp was not necessary (*b*).

Mistake.

And it seems to be a general rule, that a mere mistake in the terms of an instrument may be altered so as to make it correspond with the real intention and meaning of the parties, without a fresh stamp; as where an agent makes a mistake in a policy of insurance, by declaring the interest in a wrong name (*c*).

Where an indorsement was made on an annuity deed, after the execution of the deed, containing a clause of redemption, it was held that such indorsement required a stamp (*d*). So, where a written wager was afterwards doubled by an indorsement on the original, a second stamp was held to be necessary; but there being one stamp only, the instrument was held to be evidence of the first wager (*e*).

The insertion of the words "or order" in a bill of exchange, according to the intention of the parties, but accidentally omitted, does not render a new stamp necessary (*f*).

If a paper produced bear a single stamp, and has contained two agreements, one of which has been erased, the stamp is *primâ facie* sufficient, and it lies on the adversary to show that both the agreements were on the paper when the stamp was affixed (*g*).

Several stamps.

3dly. It was held that an affidavit intitled in several causes could not be read unless it were impressed with the corresponding number of stamps (*h*). If several admissions of corporators as freemen be written on the same paper, stamped but with one stamp, the first admission only can be read (*i*); so if two separate affidavits be written on the same paper (*j*). A lease containing several distinct demises at distinct rents, must be stamped according to the aggregate of the stamps required for the several demises (*k*).

Where one paper contains several matters.

If different matters (*l*) wholly unconnected be written on the same parchment or paper, they may, it seems, be considered as distinct and detached instruments with reference to stamp-duties; but if the two parts qualify each other, such a stamp as will cover both is requisite (*m*). Where a pro-

(*z*) *Ex parte White*, 3 Deacon & Chitty, 366.

(*a*) *Johnson* v. *Gibbs*, 2 Chitt. 103.

(*b*) *Cole* v. *Parkins*, 12 East, 471.

(*c*) *Robinson* v. *Touray*, 1 M. & S. 218. *Sawtell* v. *Loudon*, 5 Taunt. 359; *supra*, 869.

(*d*) *Schuman* v. *Weatherhead*, 1 East, 537. But see *Herne* v. *Hale*, 3 Esp. C. 237. An annuity deed and memorial require but one stamp. *Cooke* v. *Jones*, 15 East, 237.

(*e*) *Robson* v. *Hall*, Peake's C. 127. So where after the agreement was complete and stamped, the parties made an alteration by an indorsement upon the back of the agreement. *Reed* v. *Deere*, 2 C. & P. 624; 7 B. & C. 261.

(*f*) *Byrom* v. *Thomson*, 3 P. & D. 71.

(*g*) *Waddington* v. *Francis*, 5 Esp. C. 182.

(*h*) Anon. 3 Taunt. 469. *R.* v. *Carlile*, 1 Chitty, 451.

(*i*) *Gilby* v. *Lockyer*, Doug. 217. *R.* v. *Recks*, 2 Ld. Ray. 1446; 12 East, 8. *Perry* v. *Bourchier*, 4 Camp. 80. *Waddington* v. *Francis*, 5 Esp. C. 182. Chitty on St. tit. *Stamps*, 961. 965. And if several things requiring several stamps be written on the same paper, with only one stamp, they cannot be made available by annexing distinct stamps on separate papers. Lord Ray. 1445; 2 Str. 716.

(*j*) 1 Chitty, 452, n.

(*k*) *Bouze* v. *Jackson*, 3 B. & B. 185; 13 East, 241.

(*l*) Vide *supra*, 1048.

(*m*) *Corder* v. *Drakeford*, 3 Taunt. 382.

missory note was given without a stamp, and the maker indorsed upon it a memorandum that he had paid a certain sum for interest, it was held that the memorandum might be read as an admission that a principal sum was due which would yield so much interest (*n*). Where the same paper contains several different contracts by different persons relating to different things, and bears but one stamp, the contract may be read to which the stamp is applicable, if such application can properly be made. In general the stamp will be considered as applicable to the contract by the party who first executed the instrument (*o*).

Where one paper contains several matters.

An agreement by several subscribers to a common fund (*p*), or of reference by several underwriters (*q*) of a policy, or an assignment of the prize-money of several seamen on board a privateer payable out of the same fund, requires but one stamp (*r*).

Single stamp, when sufficient.

Where *A.* wrote a letter to *B.*, containing the terms of an agreement, to which *B.* became party by signing his name at the bottom of the letter, and *C.* became guarantee for *A.* to *B.* by an indorsement on the other side of the paper, it was held that one stamp was sufficient, the whole constituting one transaction (*s*).

So, if an agreement refer to another document, and the two form in fact but one agreement (*t*).

Where an apprentice was bound by indenture to serve *A.* *B.* for the first four years, and his father for the last three, it was held that one stamp only was necessary (*u*).

So where *A.* as principal, and *B.* as surety, were jointly and severally bound to pay to the creditors of *C.* 14 *s.* in the pound on account of their debts, and by the same bond *B.* was bound to indemnify *A.* against all loss (*x*).

Where two parts of an agreement are signed by both plaintiff and defendant, and the plaintiff proves that one of those parts, properly stamped, is in the possession of the defendant, who has had notice to produce it, but does not produce it, the plaintiff may prove the agreement by means of the unstamped part in his own possession (*y*).

Supra, 1040. *Grey* v. *Smith*, 1 Camp. 387. *Heron* v. *Granger*, 5 Esp. C. 269. *Ames* v. *Hill*, 2 B. & P. 150. Where the primary object of an agreement is the sale of a ship, the introduction of other matter connected with the sale, or an agreement to cause the ship to be chartered, does not render another stamp necessary. *Tooke* v. *Meering*, 1 Danson & Loyd, 35.

(*n*) *Manley* v. *Peel*, 5 Esp. C. 121.

(*o*) *Doe* v. *Day*, 13 East, 241. *Powell* v. *Edwards*, 12 East, 6. *Perry* v. *Bourchier*, 4 Cowp. 80. But see below, 1055.

(*p*) *Davis* v. *Williams*, 13 East, 232. See *Bowen* v. *Ashley*, 1 N. R. 274. *Cook* v. *Jones*, 15 East, 237. *Allen* v. *Morrison*, 8 B. & C. 565: where it was held that a power of attorney executed by the members of a club of mutual insurance, authorizing particular persons to sign the club policies, required but one stamp. And see *Stead* v. *Liddiard*, 1 Bing. 196. *Boaze* v. *Jackson*, 3 B. & B. 185. *Allen* v. *Morrison*, 8 B. & C. 565. *Qu.* Whether a release to two witnesses with one stamp only is good. *Spicer* v. *Burgess*, 1 C. M. & R. 129. Where a party released one witness, and on its appearing on the trial that the release of another witness would be necessary, the name was introduced and executed by the party before delivery to either, a fresh stamp was held to be unnecessary. *Ib.*

(*q*) *Goodson* v. *Forbes*, 6 Taunt. 171.

(*r*) *Baker* v. *Jardine*, 13 East, 235, n. Vide *supra*, 1037.

(*s*) *Stead* v. *Liddiard*, 1 Bing. 196.

(*t*) *Peate* v. *Dickon*, 1 C. M. & R. 422.

(*u*) *R.* v. *Louth*, 8 B. & C. 247.

(*x*) *Annandale* v. *Pattison*, 9 B. & C. 919. Where three parties, in consideration of plaintiff discharging a debt of a third party, severally undertook to indemnify to the extent of —— *l.* each, and in the meantime severally to execute bills for such respective sums, held that one stamp to the instrument was sufficient. *Ramsbottom* v. *Davis*, 7 Dowl. 173; and 4 Mees. & W. 584.

(*y*) *Waller* v. *Horsfall*, 1 Camp. 501. *Garnous* v. *Swift*, 1 Taunt. 507, n.

Of different denomination.

4. By the 55 Geo. 3, c. 184, s. 10, all instruments upon which stamps shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole, with or than the regular stamps, shall be deemed valid and effectual in law, except in cases where the stamp used on such instruments shall have been specially appropriated to any other instrument, by having its name on the face thereof (*z*).

Where a latter agreement incorporates a former one by reference, the amount of stamp is regulated by the number of words in the latter agreement, not including the former one (*a*).

By the stat. 1 & 2 Vict. c. 85, stamps denoting the duties payable on deeds, &c. in either part of the United Kingdom are permitted to be used in the other.

Objection, when taken.

5. An objection to the want of a stamp must be taken at the trial (*b*), before the instrument is read, and the party objecting ought to be prepared with the statute which requires the stamp, and to sustain his objection by collateral proof, where it is necessary (*c*). If the defect appear collaterally, the objection cannot be removed by the contents of the instrument itself. Thus, where it appears that 12*l.* has been paid to the master as a premium with an apprentice, a recital in the deed itself is not admissible to show that the premium was payable out of a public charitable fund (*d*). But it seems that it would be otherwise if the objection should appear from the instrument alone (*e*).

After consent to a Judge's order for the admission of an original instru-

(*z*) See *Robinson* v. *Dryborough*, 6 T. R. 317, where it was held that articles of agreement under seal could not be received in evidence, being stamped with an agreement-stamp of the same value, but differently formed. See also *Manning* v. *Livie*, Bayley on Bills, 37; and *Fare* v. *Price*, 1 East, 55, where it was held that a promissory note made after the passing of the stat. 37 G. 3, c. 90, but stamped with a stamp of the value of 9*d.* instead of 8*d.*, could not be received in evidence. See also *Chamberlain* v. *Porter*, 1 N. R. 30. The stat. 37 G. 3, c. 136, enacted, that bills and notes subsequently made, and stamped with an improper stamp, but of equal or greater value than the stamp required, might be stamped by the commissioners on payment of the duty and a penalty. In *Taylor* v. *Hague*, 2 East, 414, where the proper stamp on a promissory note was 1*s.* 6*d.* applicable to three different funds, and a stamp of 2*s.* value was imposed, payable to the same funds in larger proportions, it was held that the stamp was sufficient. And see *Aicheson* v. *Sharland*, 1 Esp. C. 292. Where five guineas was agreed to be given as an apprentice fee, and that sum was inserted in the indenture, and the duty paid according to the stat. 8 Anne, c. 9, it was held to be sufficient, although, in fact, four guineas only were paid; for the full sum received, given, &c. was inserted, and the duty paid for it, and the stamp was of the same description, and the duty appropriated to the same fund, as if four guineas only had been paid. *R.* v. *Keynsham*, 5 East, 309. And see *R.* v. *Inhabitants of Quainton*, 2 M. & S. 338. Where a deed was produced, properly stamped according to the stat. 48 Geo. 3, c. 149, it was held to be admissible in evidence, although not stamped with a stamp of less value, such as was requisite at the time when the deed was executed. *Doe* d. *Dyke* v. *Whittingham*, 4 Taunt. 20.

(*a*) *Attwood* v. *Small*, 7 B. & C. 390. But where an agreement, and a writing described as annexed to it, contains more than 1,080 words, a 35*s.* stamp is required, although the writing was in fact annexed after the execution of the agreement. *Veal* v. *Nicholls*, 1 Mo. & R. 248. And see *Linly* v. *Clarkson*, 1 C. & M. 437.

(*b*) A plea to an action on a bill that it was not duly stamped, was held ill on special demurrer. *Howard* v. *Smith*, 4 Bing. N. C. 684; and 6 Sc. 438.

(*c*) *Waddington* v. *Francis*, 5 Esp. C. 182. *Lord Dudley and Ward* v. *Robins*, 3 C. & P. 26. If it be objected that the stamp is sufficient to cover the quantity of words contained in an agreement, proof should be given by a witness who has counted the counterpart. *Bowring* v. *Stevens*, 2 C. & P. 337. The Judge in that case directed the officer of the court to count the original, and refused to call another cause, to give time to have the instrument properly stamped. Ibid.

(*d*) *R.* v. *Skeffington*, 3 B. & A. 382.

(*e*) Ibid. And see the opinion of Holroyd, J. in that case.

ment or a counterpart of a deed, an objection cannot be taken to the insufficiency of the stamp (*f*). The refusal by a party to produce an instrument, to enable the other party to get it stamped, does not exclude the latter from objecting to the want of a proper stamp (*g*). Objection, when taken.

It is sufficient if the instrument bear a proper stamp when it is produced upon the trial, although it was not stamped when it was executed, or when it was produced on a former occasion (*h*); and the adversary cannot show that the instrument was not stamped when made (*i*), unless the commissioners are expressly prohibited from subsequently affixing a stamp (*k*). And in such case an inquiry as to the time of stamping is admissible (*l*). Time and manner of stamping.

Where the instrument has been stamped, on payment of a penalty it is admissible, although the commissioners' receipt has been erased; and it is unnecessary to prove the receipt (*m*).

The instrument itself must bear the stamp; it is not sufficient to produce another piece of parchment or paper with the stamp annexed to it (*n*).

Where the instrument contains several demises to several tenants, with but one stamp, it is a matter of circumstantial evidence to show to which of the demises the stamp is applicable (*o*).

6. Previous to the admission of secondary evidence to prove the contents of a deed or other instrument which has been lost or destroyed, evidence is necessary to show that it was properly stamped (*p*). But the fact that it was so stamped may be presumed from circumstances. Where an apprentice Presumptive evidence of stamp.

(*f*) *Doe* v. *Smith*, 2 Mo. & R. 7.

(*g*) *Gardiner* v. *Childs*, 8 C. & P. 347.

(*h*) *R.* v. *The Bishop of Chester*, Str. 624. *Rogers* v. *James*, 7 Taunt. 147; 2 Marsh. 425. Even where a motion has been made on the express ground that the stamp is insufficient. *Burton* v. *Kirkby*, 7 Taunt. 174. With some exceptions, as in the cases of bills, notes, receipts, and policies, instruments unstamped or improperly stamped may be properly stamped on payment of the proper duty and 5*l.* penalty. See the stat. 37 G. 3, c. 136; 44 G. 3, c. 98; 48 G. 3, c. 14, s. 2. The Court will enlarge a rule to show cause for the purpose of procuring the instrument to be properly stamped. *Doe* v. *Roe*, 5 B. & A. 768; Str. 624; Chitty on the Stat. 939. So in Equity. *Huddlestone* v. *Briscoe*, 11 Ves. 595; 9 Ves. 231. 291. With respect to the *effect* of a stamp, the Court will inquire as to the time when a period is limited by a statute. *R.* v. *Preston*, 5 B. & Ad. 1028. *R.* v. *Tomlinson*, 3 Dowl. P. C. 49.

(*i*) *Wright* v. *Riley*, Peake's C. 173; and see *R.* v. *The Bishop of Chester*, Stra. 624. The statutes do not *avoid* deeds which are not properly stamped, but prevent them from being read in evidence whilst unstamped, and subject the parties to penalties. Ibid. See 8 Mod. 364.

(*k*) As in the case of a policy of insurance under the statute 35 Geo. 3, c. 63, s. 14. 16. *Roderick* v. *Hovil*, 3 Camp. 103. *Rapp* v. *Allnutt*, cited 3 Camp. 106, n. Or an indenture of apprenticeship under the stat. 8 Ann. c. 9. *R.* v. *Chipping Norton*, 5 B. & A. 412. And 31 Geo. 3, c. 25, s. 19, as to bills of exchange, &c.

(*l*) *Green* v. *Davies*, 4 B. & C. 235. *Butts* v. *Swann*, 2 B. & B. 78. And an indorsement on the instrument, showing that the stamp had been affixed after the making of it, is evidence of the fact against the party producing it. Ib. An order for the payment of money out of a particular fund, cannot be made available by a subsequent stamping of the order by the commissioners. *Butts* v. *Swann*, 2 B. & B. 78; 1 B. & A. 36.

(*m*) *Apothecaries' Company* v. *Fernyhough*, 2 C. & P. 438.

(*n*) Str. 617; Ld. Ray. 1445.

(*o*) *Doe* d. *Copley* v. *Day*, 13 East, 241. So where the captain and crew were released, and the captain's name stood first, and the instrument bore but a single stamp, and the release was first tendered to him, it was held that he was competent. *Perry* v. *Bourchier*, 4 Camp. 80.

(*p*) *Supra*, Vol. I. But if it appear that the instrument was not stamped, evidence of its contents is inadmissible, even for the purpose of proving the value of the land which was the subject of the agreement. *R.* v. *Castlemorton*, 3 B. & A. 588. Even although it has been destroyed by the wrongful act of the party who takes the objection. *Rippiner* v. *Wright*, 2 B. & A. 478. An instrument, though it come out of the possession of the adversary, cannot be read unless it be properly stamped. *Doe* d. *St. John* v. *Hore*, 2 Esp. C. 724.

Presumptive evidence of stamp.

had regularly served under an indenture executed thirty years ago, and the parish in which the apprentice was settled under that indenture had relieved him for the last twelve years, it was held that the sessions had rightly presumed that the indenture was stamped, although it was proved on the other side by the deputy-registrar and comptroller of the apprentice duties, that it did not appear that any such indenture had been stamped or enrolled (*q*); for the presumption of law is *omnia ritè esse acta*; and against the negative evidence, the justices below might reasonably set the possibility of an irregularity in the returns made to the office. And where a party refuses to produce an agreement after notice given, it will be presumed, as against him, that it is properly stamped until the contrary appear (*r*).

Consequence of want of stamp.

7. Where a stamp is necessary, an unstamped instrument cannot be read in evidence for the purpose of giving to it any legal operation (*s*); neither can its place be supplied by parol evidence. Thus, a bill of sale unstamped cannot be received in evidence, neither can the vendee resort to parol evidence (*t*). And it makes no difference that the agreement is *functus officio*. Thus an agreement to assign an apprentice cannot without a stamp be received as evidence in a settlement case, after the expiration of the apprenticeship (*u*). And it made no difference whether the instrument be framed in pursuance of an agreement, or the parties agree expressly or impliedly to be bound by the terms of an existing instrument (*v*).

A note given as an apprentice fee cannot be enforced, the indentures of apprenticeship being void for want of a proper stamp; although the master has, in fact, maintained the apprentice for a time (*x*). Where a creditor is paid by an unstamped draft, he may recover on his original demand, although he has neglected to present the draft for payment (*y*).

(*q*) *R.* v. *Long Buckby*, 7 East, 45. And see *R.* v. *East Knoyle*, 4 Burn, 441; Burr. S. C. 151. *R.* v. *Badby*, 1 Const, 490.

(*r*) *Crisp* v. *Anderson*, 1 Starkie's C. 35.

(*s*) By the provision of the stat. 9 & 10 W. 3, c. 25, s. 59, which enacts, *inter alia*, that no such record, deed, instrument, or writing, shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful or available in law or equity, until the vellum, parchment, or paper on which such deed, instrument, or writing shall be written or made, shall be marked or stamped with a lawful mark or stamp. These provisions have been continued by the subsequent Acts: see 37 G. 3, c. 136, s. 2. 3 Taunt. 116; and see the statutes 23 G. 3, c. 49, s. 14; ib. c. 50, s. 14; 35 G. 3, c. 55, s. 10; 37 G. 3, c. 19, s. 3. By the stat. 37 G. 3, c. 19, s. 3, no indenture, lease, bond, or other deed shall be pleaded, or be good, useful, or available in any manner whatever, unless the same be stamped as required by that Act. See also the stat. 55 G. 3, c. 184, s. 8, which re-enacts the provisions of former Stamp Acts. See *Green* v. *Davies*, 4 B. & C. 235. *Wright* v. *Riley*, Peake's C. 173. Service under indentures of apprenticeship not stamped gives no settlement. *R.* v. *Edgworth*, 3 T. R. 353. And see *Hunt* v. *Stevens*, 3 Taunt. 116. The payment of money into court admits the validity of the instrument. *Israel* v. *Benjamin*, 3 Camp. 40; *supra*, 828. The want of a stamp does not avoid a sale of a ship by a bill of sale. *Robinson* v. *Macdonnell*, 5 M. & S. 228. The statute 48 G. 3, c. 129, s. 22, directs that on the sale of any interest in lands or other property, real or personal, the true consideration shall be set forth under a penalty; the omission does not avoid the deed; per Abbott, C. J. *Doe* v. *Hodgson*, Sitt. after Easter 1823. Vide *supra*, tit. LEASE.

(*t*) Per Lord Kenyon, *Rolleston* v. *Hibbert*, 3 T. R. 406. And see *Brewer* v. *Palmer*, *supra*, 57; 3 Esp. C. 213. P. C. in *White* v. *Wilson*, 2 B. & P. 116.

(*u*) *R.* v. *Inhabitants of St. Paul, Bedford*, 6 T. R. 452.

(*v*) *Turner* v. *Power*, 7 B. & C. 625. *Drant* v. *Brown*, 3 B. & C. 665. *Wallis* v. *Brown*, 4 A. & E. 877. *R.* v. *Castlemorton*, 3 B. & A. 588. *Rippiner* v. *Wright*, 2 B. & Ald. 478, *supra*, 56.

(*x*) *Jackson* v. *Warwick*, 7 T. R. 121. *R.* v. *Chipping Norton*, 5 B. & A. 412. Where the plaintiff declared in assumpsit for meat, drink, &c. supplied to the defendant's apprentice, and it appeared that the indentures were void for want of a stamp, the plaintiff was non-suited. *Aldridge* v. *Ewen*, 3 Esp. 188; cor. Lord Kenyon.

(*y*) *Wilson* v. *Vysar*, 4 Taunt. 288

Consequence of want of stamp.

The giving a bill of exchange or note without stamp, or improperly stamped, in discharge of a debt, will not preclude the creditor from proving his original debt (*z*). Such a bill is no payment, although the parties would have paid it if presented in due time (*a*).

The same rule applies where the original document is in the adversary's possession (*b*), and in that case it is not sufficient to produce a copy properly stamped. Where a schoolmaster sought to recover on the ground of a removal of a scholar without notice, contrary to the terms of a printed prospectus delivered to the defendant, it was held, that the identical copy so delivered must be produced duly stamped. It has been seen that parol evidence is inadmissible, although the instrument has been lost (*c*), or even destroyed by the party who objects to the want of a stamp (*d*); yet in such a case, or where the adverse party refuses to produce the instrument, it seems that it will be presumed to have been properly stamped until the contrary appear (*e*). But if the adversary produce the instrument upon notice, it cannot be read unless it be properly stamped (*f*).

If a plaintiff establish a *primâ facie* case of contract by oral or circumstantial evidence, without its appearing that any written contract was made, the defendant cannot defeat the claim by means of an unstamped written contract (*g*). But if it appear, by the plaintiff's own showing, or cross-examination of his witnesses, that an original agreement, written or oral, has been superseded by a written one, it must be produced, properly stamped (*h*).

Where an instrument had been improperly stamped under the advice of

supra, 307. *Wilson* v. *Kennedy*, 1 Esp. C. 245. *Farr* v. *Price*, 1 East, 58. *Singleton* v. *Barrett*, 2 C. & J. 368. *Cundy* v. *Marriott*, 1 B. & Ad. 696. *Tyte* v. *Jones*, 1 East, 58, n. And see *Puckford* v. *Maxwell*, 6 T. R. 52. *Alves* v. *Hodgson*, 7 T. R. 241. *White* v. *Wilson*, 2 B. & P. 118. Where a draft is given in payment of a demand before the time of credit is expired, payable at the expiration of the credit, the creditor cannot sue on the original debt until the expiration of the credit. *Swears* v. *Wells*, 1 Esp. C. 317. So an unstamped receipt having been given, the debtor may prove the fact of payment by oral evidence. *Rambert* v. *Cohen*, 4 Esp. C. 213; and see PAROL EVIDENCE. The Court will not entertain an objection founded on the want of a proper stamp to an instrument which it is not necessary to produce in evidence. *Thynne* v. *Protheroe*, 2 M. & S. 553, and per Lord Eldon, in *Huddleston* v. *Briscoe*, 11 Ves. 596. A party who executes the counterpart of a deed properly stamped cannot object that the original is not properly stamped. *Paul* v. *Mecke*, 2 Y. & J. 116.

(*z*) *Brown* v. *Watts*, 1 Taunt. 353.

(*a*) *Wilson* v. *Vysar*, 4 Taunt. 228.

(*b*) *Williams* v. *Stoughton*, 2 Starkie's C. 292; cor. Lord Ellenborough, C. J.

(*c*) *R.* v. *Castlemorton*, 3 B. & A. 588; *supra*, 1055.

(*d*) *Rippiner* v. *Wright*, 2 B. & A. 478.

(*e*) *Crisp* v. *Anderson*, 1 Starkie's C. 35.

(*f*) *Doe* d. *St. John* v. *Hore*, 2 Esp. C. 724.

(*g*) *Reed* v. *Deere*, 7 B. & C. 266. *R.* v. *Padstow*, 4 B. & Ad. 208. *Fielder* v. *Ray*, 6 Bing. 332. *Supra*, tit. ASSUMPSIT. The defendant cannot, it seems, for this purpose, insist on reading an unstamped agreement written on the paper which contains the contract on which the plaintiff sues. It appeared in an action against an acceptor, that on the bill becoming due, his name had been erased, and another bill had been drawn on the back of the first, and it was held that the latter being unstamped could not be read to the jury as evidence to show that the original had been cancelled. *Sweeting* v. *Halse*, 9 B. & C. 365.

(*h*) The plaintiff declared on two agreements, the latter had been substituted for the former containing variations; the first was stamped, the latter not: it was held that the plaintiff could not recover on either. *Reed* v. *Deere*, 7 B. & C. 261. Where the terms of an agreement were incorporated in a promissory note, duly stamped, and the note was altered by consent, so as to require a fresh stamp, the note was still held to be admissible to prove the terms of the contract. *Sutton* v. *Toomer*, 7 B. & C. 416. In this case it is observable that the agreement itself remained unaltered, and the written evidence to prove it was in relation to that agreement properly stamped.

officers of the Stamp-office, the Court set aside the nonsuit on payment of costs as between attorney and client (*i*).

A memorandum in the form of a promissory note is inadmissible for the purpose of taking a case out of the Statute of Limitations, unless it be stamped (*k*).

May be used for some collateral purposes.

8. But an unstamped instrument, although inadmissible where a stamp is requisite to give effect to the instrument, may yet be receivable in evidence for *collateral* purposes (*l*). Thus, upon an indictment for the forgery of the instrument, it is always receivable in evidence, though unstamped (*m*). So an unstamped cheque is admissible for the purpose of identifying property stolen, on an indictment for larceny (*n*). But on an indictment for a conspiracy to cheat and defraud "the just and lawful creditors" of a party, an agreement entered into by the party is admissible in evidence to show the fraud intended, or other crime, although not stamped (*o*). And where the defence in an action on a note for money lent, was that the loan was usurious, it was held that a memorandum of agreement as to the terms might be given in evidence without a stamp (*p*). In some instances it has been held that an unstamped instrument cannot be read in a criminal case as evidence for the purpose for which it was intended. Thus, on an indictment for setting fire to a house with intent to defraud an insurer, an unstamped policy is not admissible in evidence to prove the contract of insurance (*q*). And upon an indictment against a clerk for embezzling his master's money, it has been held that an unstamped receipt given by the servant to the debtor who paid him the money was not evidence against the prisoner (*r*).

And even in a civil action, an agreement, although unstamped, is admissible for the collateral purpose of proving usury (*s*). So, an illegal and unstamped policy may be read in evidence to prove the effecting of a lottery insurance (*t*). And in an action against a candidate at an election for bribery, an unstamped paper, purporting to be a promissory note, which had been given by the voter as a cloak for the bribe, is evidence to prove the fact of payment (*u*), or to confirm the testimony of a witness (*x*). But an unstamped agreement for letting a tenement is not evidence in a settlement case to prove the value, for that is the essence of the contract (*y*).

(*i*) *Clayton* v. *Burtenshaw*, 5 B. & C. 41. *R.* v. *Chipping Norton*, 5 B. & A. 412.

(*k*) *Jones* v. *Ryder*, 4 M. & W. 32, although the stat. 9. G. 4, c. 14, s. 8, exempts memorandums made *for that purpose*.

(*l*) The Court may inspect an unstamped writing in order to ascertain whether its contents be such as to exclude parol evidence. *R.* v. *Pendleton*, 15 East, 449; or to require a stamp, or different stamp. But an unstamped instrument cannot be read as evidence to the jury of the contract on which the party sues. *Jardine* v. *Payne*, 1 B. & Ad. 670.

(*m*) *R.* v. *Hawkeswood*, Leach, 295; East's P. C. 955. *R.* v. *Morton*, ibid. *R.* v. *Reculist*, ibid. 956. *R.* v. *Davis*, ibid. and *supra*, tit. FORGERY; Starkie's Crim. Pl. 110. *R.* v. *Hawkesworth*, 1 T. R. 450. So trover lies for an unstamped instrument. *Scott* v. *Jones*, 4 Taunt. 865. In *Whitwell* v. *Dimsdale*, Peake's C. 107, Lord Kenyon is represented to have said that an unstamped agreement was not admissible in evidence for any purpose whatsoever; the instrument was offered there to show an intention on the part of a trader to defraud his creditors by a fraudulent agreement with his children in order to prove an act of bankruptcy.

(*n*) *R.* v. *Pooley*, 3 B. & P. 311; Russ. & Ry. C. C. L. 31.

(*o*) *R.* v. *Fowle*, 4 C. & P. 592.

(*p*) *Nash* v. *Duncombe*, 2 M. & M. 104.

(*q*) *R.* v. *Gilson*, 1 Taunt. 95; *supra*, 51.

(*r*) Per Bayley, J. Lancaster Sum. Ass. 1821. So in the case of a fraudulent conveyance, *supra*, 138.

(*s*) So ruled by Abbott, L. C. J., Guild. Sitt. after Mich. 1822. *Nash* v. *Duncombe*, 1 M. & R. 104.

(*t*) *Holland* v. *Duffin*, Peake's C. 58.

(*u*) *Dover* v. *Mestaer*, 5 Esp. C. 93.

(*x*) Ibid.

(*y*) *R.* v. *Castlemorton*, 3 B. & A. 588.

In an action for money lent, the defendant was permitted to give a promissory note in evidence, although unstamped, given by him to the plaintiff, to prove that the latter had fraudulently procured him to write it when he was in a state of intoxication (*z*). Collateral purposes.

An unstamped receipt may be used by a witness who saw the money paid, to refresh his memory (*a*). An unstamped contract containing directions to an agent, is evidence to prove those directions (*b*). And although an instrument be inadmissible in evidence for want of a stamp, yet the Court may look at it for collateral purposes, and to see how far it affects the reception of other evidence. If an unstamped contract relate to the sale and delivery of goods, and a contract be proved by parol only, the Court will look at the instrument to see whether it applies to the goods then sought to be recovered upon (*c*). So, justices at sessions may look at an unstamped agreement relating to an expired hiring and service, to see when it ceased to operate, in order to guide them in receiving or rejecting parol evidence to prove a subsequent hiring and service (*d*).

But an unstamped bill of exchange, though written on the back of a stamped bill, is not admissible as evidence to the jury that the stamped bill has been cancelled by the consent of the parties (*e*).

STATUTE.

As to the proof of a private Act, see Vol. I. tit. STATUTE. As to the distinctions between public and private Acts, see Com. Dig. tit. *Parliament*, R. 7 (*f*).

By the stat. 33 Geo. 3, c. 13, the clerks of the Parliaments shall indorse on every Act the day on which it receives the royal assent, and such indorsement shall be taken to be part of the Act, and to be the date of its commencement where no other shall be produced (*g*). As to the effect of the preamble on the construction (*h*) of a statute, see *Crespigny* v. *Williams*,

(*z*) *Gregory* v. *Frazer*, 3 Camp. 454. In an action to recover the price of goods obtained by a third party from the plaintiff, an unstamped instrument which had been made use of in the transaction was received as evidence, and it was held to be immaterial whether the fraud was committed by a party to the trust or by a third person. *Keable* v. *Payne*, 3 Nev. & P. 531.

(*a*) *Rambert* v. *Cohen*, 4 Esp. C. 213. *Jacob* v. *Lindsay*, 1 East, 460. *Maugham* v. *Hubbard*, 8 B. & C. 14. Though a witness (a bankrupt), in an action against his assignees, has no recollection of the fact of 20*l.* having been paid to him, except from an entry in the books of the plaintiff signed by him, but on seeing the books, says that he has no doubt of having received the money, this is evidence of the fact. K. B. Easter T. 1828.

(*b*) *Hedge's Case*, 28 Howell's St. Tr. 1344.

(*c*) Per Bayley, J. 15 East, 455

(*d*) *R.* v. *Inhabitants of Pendleton*, 15 East, 449.

(*e*) *Sweeting* v. *Halse*, 9 B. & C. 365.

(*f*) Acts procured by public companies are to be considered in the light of contracts made by the Legislature on the behalf of every person interested in anything to be done under them; per Lord Eldon, in *Blakemore* v. *Glamorganshire Canal Co.*, 1 Mylne & Keene, 162.

(*g*) Although an offence be committed previous to the repeal of a penal statute, judgment cannot be given after the repeal. *R.* v. *M'Kenzie*, R. & R. 429; and see *Phillips* v. *Hopwood*, 10 B. & C. 39. A repealed statute is to be considered as if it had never existed. It is clear, however, that it enures to justify all that is done according to it whilst it was in force.

(*h*) The general must yield to the particular intent, per Best, J. *Crease* v. ———, 5 Bing. *Barham's Case*, 8 Rep. 118 b.; and see Dwarris on the Statutes. A case within the meaning of a statute, when to be deemed included to be within its general words, see the observations of Holroyd, J. in *Doe* v. *Waterton*, 2 B. & A. 149.

4 T. R. 690; Bac. Ab. *Statute*, I. Statutes, when permissive, when compulsory, *Crisp* v. *Bunbury*, 8 Bing. 394. The effect of variance in the description of, *R.* v. *Biers*, 1 Ad. & Ell. 327.

SURETY (*i*).

Action against principal.

In an action by a surety against a principal for money paid on account of the latter, the plaintiff must prove the original obligation by proof of the bond, agreement, or other instrument by which he became surety. And unless the fact appear from the instrument itself as executed by the defendant, proof must be given that the plaintiff became a party at the instance of the defendant in the character of surety. In the next place he must prove, that he was called upon to pay the money, and that he paid it after notice given to the defendant, or that the latter has refused to pay the money. If he has been compelled to pay by legal process (*k*), it should be proved in the usual way; and if the money has been levied by execution, a copy of the judgment and writ should be proved. The surety cannot support the action for money paid if he has merely given a security for payment (*l*). He must prove actual payment by the testimony of the agent who paid it, or the party who received it (*m*). The mere acknowledgment by the latter that he has received the money will not be sufficient (*n*).

Actual payment of money.

One who has been bail for the defendant may recover the expenses to which he has been put in taking him, as money paid to his use; but a surety cannot recover the costs of a suit brought by an agent against himself to recover those expenses, which suit he has unnecessarily defended (*o*).

Action against a co-surety.

A surety in an action against a co-surety, must in like manner prove their obligation as co-sureties (*p*), his application to the defendant to pay his share, and the payment by himself. It has been held that the record of the judgment against several co-defendants in *assumpsit* will be evidence for one

(*i*) An executor stands in the situation of a surety for the payment of legacy duty by a legatee. *Hales* v. *Freeman*, 2 B. & B. 391. As to the construction of instruments binding parties as sureties, see above, tit. GUARANTEE. Where a bond was given to commissioners of sewers for *H.*, a collector who had acted in the same office under a commission which had expired, and had received various sums under that commission which had not been accounted for, the language of the bond being "to receive all rates, and to render an account to the said commissioners for the time being of all money *already* received or to be thereafter received by virtue of any rate;" held, that it was a breach in not accounting for the rates received by him under assessments made by the commissioners under the former commission. *Saunders* v. *Taylor*, 9 B. & C. 35.

(*k*) An allegation of the payment of money *recovered* is satisfied by evidence of the payment, and production of the *postea*, no judgment having been entered up. *Harrop* v. *Bradshaw*, 9 Price, 358.

(*l*) *Taylor* v. *Higgins*, 3 East, 169; *supra*, tit. ASSUMPSIT.

(*m*) An accommodation acceptor may recover against a drawer for whom he has accepted a bill, and compelled to pay the amount, on the count for money paid. *Vanderheyden* v. *Paiba*, 3 Wils. 528. An accommodation acceptor of bills proved by the holders cannot by payment or otherwise have the benefit of further proof. 1 Gl. & J. 224.

(*n*) *Dunn* v. *Slee*, Holt's C. 339; where, in an action by one co-surety against another, the evidence of the principal to prove that one of the creditors had admitted payment of the debt was rejected by Park, J.; and the Court of C. B., after a verdict for the plaintiff, refused a rule *nisi* for a new trial. *Supra*, 260; *infra*, 1063.

(*o*) *Fisher* v. *Fallows*, 5 Esp. C. 171. Neither, as it seems, can he recover from the principal the costs of defending the suit by the creditor against himself.

(*p*) See as to the obligation to contribute where the sureties are bound by separate instruments, *Mayhew* v. *Crickett*, 2 Swanst 185; *infra*, 1062 (*g*).

upon whom the whole of the damages has been levied, to obtain contribution from the rest (*q*). Action against a co-surety.

If two co-sureties join in such action, either against the principal or against a third co-surety, it will be incumbent on them to prove that they paid the money out of a joint fund; for if each pays money out of his own private funds, they cannot maintain a joint action (*r*). A co-surety cannot charge another with the moiety of the costs of an action defended without the others' consent (*s*).

In an action by one assignee under a commission of bankrupt, who has been compelled to pay the charges of the messenger under the commission, against another assignee, it is not necessary to prove that the defendant has in his hands any funds from the bankrupt's estate (*t*).

By the statute 6 Geo. 4, c. 16, s. 52 (*u*), where, at the time of issuing the commission (*x*), any person shall be surety (*y*), or liable for any Surety for a bankrupt.

(*q*) *Supra*, 75; 2 N. R. 371.

(*r*) *Osborne* v. *Harper*, 5 East, 225, where, after a dissolution of partnership, one of three partners drew a bill in the name of the firm, which the other two were obliged to pay; and a joint action by them against the former was held to be maintainable, because they had jointly borrowed money to pay the bill, and had given their joint note for it. Where two sureties have been compelled to pay money for their principal, each should bring a separate action against the principal for the money which he has personally paid (*Brand* v. *Boulcot*, 3 B. & P. 235); or against each of the other sureties for contribution. *Cowel* v. *Edwards*, 2 B. & P. 268. *A.*, *B.*, *C.* and *D.*, being joint-owners of one ship, and *E.* the owner of another, a prize was taken and condemned, and by agreement shared between them. Sentence of condemnation being afterwards reversed, *A.* and *B.* paid the whole amount, *C.* and *D.* having become bankrupts. It was held that *A.* and *B.* could not sue *E.* for a moiety; for either the money was paid on the partnership account, in which case all ought to have joined, or on the separate account of each, in which case each should have sued separately. *Graham* v. *Robertson*, 2 T. R. 282. Note, it does not appear that the money paid was the joint property of *A.* and *B.*

(*s*) One of two sureties having been called upon to make good deficiencies of the principal, and judgment having been obtained against him, cannot charge his co-surety for the costs unless he was authorized by him to defend; and having obtained back from the Crown, monies received from the principal, he is bound to apply that money to the payment of the debt, and the verdict must be for half the damages, deducting half the sum recovered. *Knight* v. *Hughes*, 1 M. & M. C. 247, and 3 C. & P. 467.

(*t*) *Hart* v. *Biggs*, Holt's C. 245.

(*u*) The stat. 49 Geo. 3, c. 121, s. 8, and the above clause, were passed to relieve sureties from the difficulties under which they were before placed. Before these statutes, if a surety had no counter-security, and the creditor had not proved, he had no remedy by proof under the commission; but if the creditor had proved, then the surety had an equitable right to stand in the place of the creditor. *Ex parte Ryswicke*, 2 P. Wms. 89. *Ex parte Matthews*, 6 Ves. 285. *Ex parte Atkinson*, C. B. L. 210; Deacon's B. L. 291. *Beardmore* v. *Crattenden*, C. B. L. 211. And where he had a counter-security, he could not, according to the later authorities, be admitted to prove under that security, unless he had paid the original debt. *In re Bowness*, C. B. L. 161. *Ex parte Findon*, ibid. 149. *Ex parte Walker*, 4 Ves. 385. But see *Toussaint* v. *Martinnant*, 2 T. R. 100. *Martin* v. *Court*, ibid. 640. *Hodgson* v. *Bell*, 7 T. R. 97. *Rolfe* v. *Caslon*, 2 H. B. 570. Or unless, where the principal debt accrued by breach of a bond, the breach was committed and the debt accrued before the bankruptcy. *Martin* v. *Const*, 2 T. R. 640. *Crookshank* v. *Thompson*, 2 Str. 1160. The provisions of these statutes seem to have been devised for the benefit of the *surety*, who is *enabled*, not compelled, to stand in the place of the creditor. See *Mead* v. *Braham*, 3 M. & S. 91. *Townsend* v. *Downing*, 14 East, 565. But if he receive dividends on the proof of the creditor, he is estopped from afterwards proceeding against the bankrupt. *Ex parte Lobbon*, 17 Ves. 334. And they are so far compulsory, that where the surety *might* have proved, the certificate will be a bar. *Westcott* v. *Hodges*, 5 B. & A. 12. *Vansandau* v. *Corsbie*, 8 Taunt. 550; 3 B. & A. 13.

(*x*) The stat. does not apply to any debt which accrues after the issuing the commission. *Macdougal* v. *Paton*, 2 Moore, 644.

(*y*) A retiring partner compelled to pay debts which the continuing partner, who became bankrupt, has covenanted to pay, is within the statute. *Wood* v. *Dodgson*, 2 M. & S. 195. But the rule does not include co-sureties for a debt where one co-surety becomes bankrupt, but (*semble*) those

Surety for a bankrupt.

debt (*z*) of the bankrupt, or bail (*a*) for the bankrupt, either to the sheriff or to the action, if he shall have paid the debt, or any part thereof in discharge of the whole debt (*b*), although he may have paid the same after the commission issued, if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of the creditor as to the dividends, and all other rights under the said commission which the creditor possessed or would be entitled to in respect of such proof (*c*); or if the creditor shall not have proved under the commission, such surety or person liable shall be entitled to prove his demand in respect of such payment as a debt under the commission.

The surety in a lease, the principal having become bankrupt, is liable for breaches of covenant between the date of the commission and the surrender of the lease by the assignees to the lessor, under the provisions of 6 Geo. 4, c. 16, s. 75 (*d*).

The law implies a promise of indemnity in all cases where several are jointly liable to another upon a contract. But the law implies no promise where the liability arises *ex malefício* (*e*); and therefore will not enforce even an express promise to indemnify, where money is knowingly advanced in furtherance of an illegal purpose (*f*).

Action against a surety.

In an action against a surety to recover the debt of the principal, it is, as has already been seen, necessary to prove a promise in writing (*g*). Proof of a demand is unnecessary, for a surety is bound to inquire whether his

cases only where the bankrupt is the principal debtor. *Clements* v. *Langley*, 5 B. & Ad. 372. Where, upon the grant of an annuity, the bankrupt, as surety, covenanted jointly and severally with the grantee to pay the annuity, in case default should be made by the grantor, provided that the grantee should, in such case, give twenty-one days' notice, in writing, of the sum in arrear, previous to any proceeding against the surety; held, that, on the bankruptcy of the surety, before any default made, the grantor was not entitled to prove for the value of the annuity under 6 Geo. 4, c. 16, s. 54. *Marks, ex parte*, 3 Deac. (B. C.) 133; and 3 Mont. & Ayr. 621.

(*z*) This word does not extend to the value of an annuity paid by the surety after the bankruptcy. *Flanagan* v. *Watkins*, 1 B. & C. 316; 1 Bing. 413. A discharge by a certificate from the debt discharges the bankrupt also from all consequential damages; and therefore the acceptor of a bill for the accommodation of the drawer cannot, after the bankruptcy and certificate of the latter, maintain an action against him for not providing him with funds, whereby he had incurred the costs of an action, and had been obliged to sell an estate to raise money to pay the bills. *Vansandau* v. *Corsbie*, 3 B. & A. 13; 2 Moore, 602. *Brind* v. *Bacon*, 5 Taunt. 183. A surety for the payment of rents where none is due at the time of the bankruptcy, is not within the statute. *Macdougall* v. *Paton*, 2 Moore, 644; 8 Taunt. 584. See *Inglis* v. *M'Dougal*, 1 Moore, 196. An accommodation indorser is a person liable to pay the debt. *Bassett* v. *Dodgin*, 9 Bing. 653. See *Perryman* v. *Steggall*, 8 Bing. 369.

(*a*) These words as to bail were not contained in the stat. 49 Geo. 3, c. 121, s. 8.

(*b*) A payment of *part* merely in discharge of the surety's personal liability is not within this clause. *Soutten* v. *Soutten*, 5 B. & A. 852. The joining in a new bond is not a payment within the statute. *Ex parte Sejeant*, 1 G. & J. 183; 2 G. & J. 23. And see *Ex parte Hunter*, 5 Madd. 165; 2 G. & J. 7.

(*c*) These latter words were not in the stat. 49 Geo. 3, c. 121, s. 8. Therefore he stands in the place of the creditor as to his right as to the bankrupt's certificate. *Ex parte Gee*, 1 G. & J. 330.

(*d*) *Tuck* v. *Fyson*, 6 Bing. 321.

(*e*) *Merryweather* v. *Nixon*, 8 T. R. 186. *Farbrother* v. *Ansley*, 1 Camp. 343. Where the sheriff, upon the representation of the execution creditor, took the goods of a stranger in execution, and afterwards was sued by him, and paid damages, held that he was entitled to recover them against the original plaintiff; and affirmed in Dom. Proc. *Humphreys* v. *Pratt*, 2 Dow & C. 288. See the cases and distinctions on this subject, *supra*, 75, 76.

(*f*) *Cannan* v. *Bryce*, 3 B. & A. 179; *supra*, 78.

(*g*) *Supra*, 475. The obligation to contribute exists, although the sureties are constituted by different instruments. Per Lord Eldon, C., in *Mayhew* v. *Crickett*, 2 Swanst. 185.

principal has paid or not (*h*). But one who engages as surety for the debt of another, is not liable to the expenses of a fruitless suit against the principal, at all events unless he has had notice of the creditor's intention to sue (*i*). So a sheriff, in an action for taking insufficient sureties in replevin, is not liable, without such notice, to the costs of a fruitless suit against the sureties in the replevin bond (*k*). The declaration or admission of the principal is not, it seems, evidence to prove the debt to be due from the principal to the plaintiff, for the principal himself may be called (*l*). Action against a surety.

If *A.* guarantee the payment of such goods as *B.* shall deliver to *C.*, the declaration of *C.* of his having had goods is not admissible to prove the fact against *A.* (*m*), for the engagement is to pay for such goods as shall be delivered, not for such as *C.* shall acknowledge to have received; the defendant has a right, therefore, to have the delivery proved. Besides this, the evidence is not the best that the case admits, and to receive it would be to open a door to collusion (*n*). Neither are the subsequent declarations of the principal admissible to prove the terms of the original contract (*o*).

So, on the execution of a writ of inquiry on an indemnity-bond, admissions by the principal as to the amount of the damage are inadmissible (*p*).

And in an action against a co-surety on a bond for contribution, a declaration by one of the obligees, after the payment of part of the money by the principal obligor, that it had been received on account of the bond, is not admissible evidence for the defendant (*q*), although such a declaration made at the time of payment seems to be admissible as part of the *res gestæ* (*r*).

It is otherwise where the principal himself is the real defendant in the action: as, where the sheriff brings an action against a surety for his bailiff, who is the real defendant in the action (*s*), having indemnified the surety.

But although the declarations or entries of the principal, whilst living, cannot be admitted against the surety, it is a very different question whether such evidence may not be admissible after the death of the party.

In the case of *Goss* v. *Watlington* (*t*), the action was on a bond given by the defendant as surety for a collector of taxes, then deceased; the condition was, that Watts, the principal, should collect all duties, should render an account of such collection to the plaintiff, and deliver up to him all books and accounts entrusted to his care. The alleged breach was, that Watts had received 100 *l.*, but had not paid it over when required. On a writ of inquiry, after judgment by default, the plaintiff produced the books of Watts, which had been handed over by him to his successor in office,

(*h*) *Atkinson* v. *Carter*, 2 Chitty, 203. But *semble*, that in an action against a guarantee for goods supplied to another, a demand from the guarantee is necessary. Per Abbott, L. C. J., in *Brooklebank* v. *Moore*, Sitt. after Trin. 1823.

(*i*) *Baker* v. *Garratt*, 3 Bing. 56.

(*k*) Ibid.

(*l*) *Supra*, Vol. I. tit. HEARSAY.—DECLARATIONS.

(*m*) *Evans* v. *Beattie*, 5 Esp. C. 26.

(*n*) See Ld. Ellenborough's observations, 5 Esp. C. 26.

(*o*) *Bacon* v. *Chesney*, 1 Starkie's C. 192.

(*p*) *Cutler* v. *Newlin*, cor. Holroyd, J., Winch. Spring Ass. 1819; Manning's Ind. 137.

(*q*) *Dunn* v. *Slee*, Holt's C. 399.

(*r*) Ibid.; see tit. PAYMENT.

(*s*) *Perchard* v. *Tindall*, 1 Esp. C. 394. Note, that it does not appear that in this case any evidence was given to show that the defendant was indemnified by the bailiff. Vide *supra*, tit. ADMISSIONS, 23; and see *Duke* v. *Aldridge*, cited 11 East, 584, n.

(*t*) 3 B. & B. 132.

Action against a surety.

containing the names of parishioners, the sums with which they had been charged, with marks at the side to indicate payment. Receipts, signed by Watts, for sums received by him in his official character, were also produced. The plaintiff had a verdict for the whole of the claim, subject to reduction in case the Court should be of opinion that this evidence was inadmissible. The Court decided professedly upon a very narrow ground, viz. that the entries in the book were admissible as being entries in a public book, especially as the due delivery of such books was part of the condition of the bond. But the Court is stated to have held that there was not enough in the circumstances of the case to admit the receipts of Watts against his surety (*u*).

A private book kept by a deceased collector of taxes, containing entries by him acknowledging the receipt of sums in his character of collector, is admissible in evidence in an action against his surety, although the parties who have paid them are alive, and might have been called (*v*).

And in the case of *Whitnash* v. *George* (*x*), in an action on a bond to bankers conditioned for fidelity of clerk, it was held that entries by the clerk in books which it was his duty to keep, of receipt of sums of money, were evidence after his death to prove the fact of such receipt.

Surety when discharged.

In general, giving time to the principal affords no defence to an action against the surety, where he is bound by a specialty (*y*). But this seems

(*u*) It is, however, to be observed, that it was unnecessary to decide the question as to the receipts, and that no evidence was given of the death of the parties who paid the money; and, with great deference to the opinion of the Court, it may be submitted whether private entries thus made by a collector do not, after the death of the collector, and of the party who paid the money, fall within the general rule as to entries made by a receiver against his own interest. The admissibility of such evidence in general rests upon the improbability that a receiver would, against his own interest, make a false entry of a fact peculiarly within his knowledge; a principle which seems to be as applicable to the case of a collector as to that of any other receiver. And it is very difficult to say that the same principle does not apply to the case of *receipts*, even more forcibly than to entries in a private book; for the collector, by delivering the receipt to the party interested, at once openly avows his receipt of the money, charges himself, and discharges the party liable. The admissibility of such evidence rests, therefore, on the great improbability that the collector has given a false receipt, to his own obvious and immediate detriment, and that both he and the party to whom the receipt was given were parties to an enormous fraud, for the remote prospect of injuring the surety after the collector's decease. See the general principles, Vol. I.

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

(*x*) 8 B. & C. 556. There, according to Lord Tenterden, C.J., the entries were admitted, not altogether as entries made by him against his interest, but because the entries were made by him in those accounts which it was his duty as clerk to keep, and which the defendant had contracted he should keep faithfully.

(*y*) It is no defence at law to an action on a bond against a surety, that the obligor, by a parol agreement, has given time to the principal, where no injury has been sustained (*Dary* v. *Prendergast*, 5 B. & A. 187). Nor is it any defence in equity. *Prendergast* v. *Dary*, 6 Mad. 124. The same point was decided in *Bulteel* v. *Jarrold* (cited ibid.) in the Exchequer (8 Price, 467), and in the house of Lords. (And see *The Trent Navigation Company* v. *Harley*, 10 East, 34; *supra*, 511.) The case of *Dary* v. *Prendergast*, 5 B. & A. 165, seems to have been decided on the ground that an obligation by an instrument under seal cannot be discharged by parol.

It has been seen, that in the case of bills of exchange, the giving time to the acceptor, without the assent of the drawer, will usually discharge the latter. *Supra*, 250.

The cases of bail and replevin-bonds are provided for by the statutes which give the Courts jurisdiction over them. 5 B. & A. 192. See further, *Bank of Ireland* v. *Beresford*, 6 Dow, 234. *Boultbee* v. *Stubbs*, 18 Ves. 20. *Hamilton* v. *Stratton*, cor. Abbott, C. J., Sitt. Westm., July 9th, 1819, Mann. Index, 284.

Sureties in a replevin-bond are not discharged by giving time to the plaintiff. *Moore* v. *Bowmaker*, 6 Taunt. 379. In a bill by the sureties to be relieved against a replevin-bond, upon the ground of their having been placed in a worse situation by

to be founded mainly on a technical consideration of the nature of the instrument (*z*). Surety when discharged.

Where the guarantee is not under seal, there is no technical rule which restrains a court of law from doing justice; still less is there any which constrains the Court to compel payment by a surety who, in justice and equity, has been discharged by the conduct of the creditor (*a*).

The surety is discharged by an agreement with the principal, which alters his situation for the worse, and increases his risk (*b*). In such cases, the transaction between the creditor and the principal may be regarded as a fraud upon the surety (*c*). It is otherwise where the surety himself is a party, or assents to the arrangement, for then he cannot complain of fraud (*d*). The surety is also discharged where a recovery against him, and which in turn enabled him to recover over against the principal, would be contrary to an agreement on the part of the creditor to discharge the principal, for it would operate as a fraud upon the principal (*e*). But where the

dealings of the creditor with their principal without their consent, it appearing that on the trial at law of the replevin-suit the parties had consented to a general reference of rent as well then due as at the time of the distress, and the landlord thereby obtained the advantage of a general and final adjustment, at the same time that the sureties might, if bound thereby, be fixed with rent for which they were not strictly liable; held, that the landlord must be considered to have waived all claims upon the replevin bond, and a perpetual injunction therefore decreed. *Ward* v. *Henley*, 1 Y. & J. 285.

(*z*) See the last note.

(*a*) See the observations of Abbott, L. C. J., in *Dary* v. *Prendergast*, 5 B. & A. 187. And see *Murray* v. *King*, 5 B. & A. 165. *Bulteel* v. *Jarrold*, 8 Price, 467. *Peel* v. *Tatlock*, 1 B. & P. 419. *Coombe* v. *Woolf*, 8 Bing. 156. *R.* and *S.*, partners, executed joint and several bonds to *O.*, on an advance of money to the firm, and before the day of payment of the first, *S.* died, and *K.* being introduced as partner, the firm, in consideration of the effects and outstanding debts, agreed to pay a certain sum to the executors of *S.*, and indemnify against the bonds, amongst other scheduled partnership debts; the new firm continued to pay *O.* the interest, and he subsequently, without the consent of *S.*'s executors, extended the time of payment of the bonds for three years, and on a further advance, took a collateral security, reserving his right against *S.*'s executors, but the arrangement was concealed from them; held, that by such indulgence, the representatives of *S.* were discharged from liability (affirming the judgment below of the Master of the Rolls). *Oakeley* v. *Pasheller*, 4 Cl. & Fi. 207.

(*b*) *Rees* v. *Berrington*, 2 Ves. jun., 540. *Low* v. *E. I. Company*, 4 Ves. jun. 824. *Nisbet* v. *Smith*, 2 Bro. C. C. 579. *Ex parte Smith*, 3 Bro. C. C. 1. *Eyre* v. *Bartrop*, 3 Mad. 221.

(*c*) Ib. And see *Jones* v. *Lewis*, 4 B. & C. 515, note (*a*).

(*d*) Where a party who had lent his name to bills deposited with the plaintiff as a security, upon a deed of composition being entered into, giving time to the principal, consented thereto before the bills became due, it was held sufficient to revive the liability, and that such promise was valid without any new consideration, not as the constitution of a new but the revival of an old debt. *Smith* v. *Winter*, 4 M. & W. 462. Where the guaranty provided that the principal might extend the period of credit, and hold over or renew bills, and compound with him or the parties liable, as the plaintiff might think fit, without in any manner discharging the surety, held that a discharge and release under a composition-deed of the debtor did not discharge the surety. *Cowper* v. *Smith*, 4 M. & W. 519.

(*e*) *Supra*, tit. Bill of Exchange, 250. *Burke's Case*, cited in *English* v. *Darley*, 2 B. & P. 61. *Ex parte Gifford*, 6 Ves. 805. *Boultbee* v. *Stubbs*, 18 Ves. 20. *Ex parte Glendinning*, Buck. 517. In that case, the Chancellor, Lord Eldon, held that if a creditor, entering into an agreement for composition with the principal, meant to retain his remedy against the surety, the reservation must be expressed on the face of the deed, and could not be shown by parol evidence. In such a case, the proceeding against the surety could not operate as a fraud against the principal. Ibid. And see *Burke's Case*, cited *Ex parte Gifford*, 6 Ves. 809. In the case of *Perfect* v. *Musgreave*, 6 Price, 111, it was held that the surety, a joint maker of a promissory note, was not discharged by the creditor's (the payee) entering into a composition with the principal (the other joint maker), and receiving the amount; for the taking the composition was an advantage to the surety. But *qu.* whether it would not operate as a fraud on the principal. See also *Nicholls* v. *Norris*,

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surety, though called on to pay the debt, has deprived himself of the right to claim over against the principal, he may still be liable notwithstanding the discharge of the principal. The taking a further security from the principal, even by deed, does not discharge the surety, the joint maker of a promissory note with the principal (*f*), when it appears to have been the intention of the parties that the original security should still remain in force (*g*).

It has been held that an agreement between the creditor and one co-surety, by which the former gives time for payment, made without the privity of another co-surety, will not discharge the latter (*h*). A surety is not discharged by a fraudulent payment by the principal (*i*). In general, any concealment from the surety of an agreement between the principals which enhances his responsibility, will vitiate the contract (*k*). Neither the principal nor the surety is a competent witness for the other (*l*).

It is a general rule, that one who is surety or guarantee for the conduct

3 B. & Ad. 41; and *Harrison* v. *Courtauld*, 3 B. & Ad. 36; and tit. BILL OF EXCHANGE, 251. An action by the holder of a bill of exchange or promissory note, accepted or made for the accommodation of another, is not barred by a composition made between the holder and principal, where by the terms of the composition the power of enforcing payment from the principal is reserved. *Nicholls* v. *Norris*, 3 B. & Ad. 41. Nor where the remedy against the sureties is reserved. Ib. And *Fentum* v. *Pocock*, 5 Taunt. 192. *Carstairs* v. *Rolleston*, 5 Taunt. 551. Nor even by a composition and release, though nothing is said as to the bill or note, where the holder on taking the bill or note did not know that it was for accommodation. An acceptor for the accommodation of the drawer is not discharged from an action at the suit of the indorsee by the circumstance of the latter having released the assignees of the drawer, who had become bankrupt, the indorsee knowing at the time of his agreement with the assignees, though not at the time of indorsement, that the bill was for accommodation. *Harrison* v. *Courtauld*, 3 B. & Ad. 36. A surety contesting his liability to an action against him, pending which the principal becomes bankrupt, and the creditor proves for the debt, and by his signature enables the bankrupt to obtain his certificate, is not thereby discharged in law. *Browne* v. *Carr*, 7 Bing. 505. Nor does he acquire any equity, since by admitting his liability he might himself have proved against his principal's estate. *Browne* v. *Carr*, 2 Russ. 600. The mere passive act of the obligee not suing the principal, is no ground for relieving the surety; so although the principal become a separate debtor by a separate instrument in a higher sum. *Eyre* v. *Everett*, 2 Russ. 381. It is a settled rule in courts of equity that where a surety pays the debt of the principal, he has a clear right to the benefit of all instruments and securities given for payment of the debt. *Dowbiggen* v. *Bourne*, 1 Younge, 111. Where the defendant entered into a guarantee for another to the extent of 400*l*., and the party afterwards becoming insolvent, assigned his effects to trustees for the benefit of his creditors, under which the plaintiff received 8*s*. 7*d*. in the pound on his entire debt of 625*l*., held that the surety was entitled to the benefit of such dividend in respect of so much of the debt as he had guaranteed, which was therefore to be deducted from the amount of his guarantee. *Bardwell* v. *Lydall*, 7 Bing. 489. See *Paley* v. *Field*, 12 Ves. 435.

(*f*) *Twopenny* v. *Young*, 3 B. & C. 208.

(*g*) Ibid. *See Dean* v. *Newhall*, 8 T. R. 168; where it was held that a covenant not to sue one of two joint and several obligors did not operate as a release, and could not be pleaded in bar of an action against the other. In general, where it appears to be the intention of the parties to a new instrument, that the former shall remain in force, the new one does not extinguish the former. *Sully* v. *Forbes*, 2 B. & B. 38; 3 B. & C. 211.

(*h*) *Dunn* v. *Slee*, 1 Holt's C. 399.

(*i*) *Gregory* v. *Bissell*, 6 Madd. 186.

(*k*) *Pidcock* v. *Bishop*, 3 B. & C. 605; *supra*, 511. Where the defendant joined in a note as surety on an advance to a third party, with a mortgage as a collateral security, in which it was recited that a previous debt from *C*. had been paid, but was in fact agreed to be retained out of the second advance, it was held to amount to such a fraud in law as to invalidate the defendant's liability as surety on the note. *Stone* v. *Compton*, 5 Bing. N. C. 142.

(*l*) *Supra*, 119, and Vol. I. tit. WITNESS. See *Townsend* v. *Downing*, 14 East, 565; where it was held that an uncertificated bankrupt was not competent to prove payment in an action against his surety, on a bond at the suit of a creditor who had elected to prove his debt under the commission under the statute.

or liability of another to several parties, is discharged from further liability on the death of one of those parties, for he may have engaged from confidence in the prudence and superintendance of the deceased party (*m*). Action against a surety.

In an action by the indorsee against an acceptor for the accommodation of the drawer, the drawer, who has become bankrupt and obtained his certificate, is a competent witness to prove that the bill had been usuriously discounted; for as the statute enables the defendant to prove under the commission, as soon as he has paid the witness is discharged (*n*).

SURRENDER (*o*). *See* COPYHOLD.

TENDER.

Onus probandi.

If the defendant plead a tender (*p*), which the plaintiff denies, the debt stands admitted, and proof of the tender is incumbent on the defendant.

If the general issue be pleaded as to part of the demand, and a tender as to the residue, it will be incumbent on the plaintiff to prove that the defendant was indebted in a larger sum than that admitted by the plea of tender. If he fail in that proof, the only question will be as to the tender, which admits the debt *pro tanto*.

When sufficient in law.

In order to constitute a legal tender, it is essential to prove an *actual offer* of the sum due, unless the actual production and offer of the money be dispensed with by the express declaration of the creditor that he will not accept it, or by some equivalent act (*q*).

(*m*) *Ld. Arlington* v. *Merricke*, 2 Saund. 411. *Weston* v. *Barton*, 4 Taunt. 673. *Simpson* v. *Cook*, 1 Bing. 452. *Strange* v. *Lee*, 3 East, 484. And see *Bodenham* v. *Purchas*, 2 B. & A. 39. So in the case of a new partnership. *Wright* v. *Russell*, 2 Bl. 934; 3 Wils. 530. *Dance* v. *Gilden*, 2 M. & M. 34. Or an addition by taking in a new member. *Bellairs* v. *Elsworth*, 3 Camp. C. 53. But see *Barclay* v. *Lucas*, 1 T. R. 291, n. *Secus*, if an intention be manifested by the terms of the instrument, that the liability to a fluctuating body should be continued. *Metcalf* v. *Brain*, 12 East, 400. Where the plaintiff took a joint note, with the knowledge that the defendant, one of the makers, was only a surety, and afterwards accepted a composition from the other, and discharged him from arrest; held, that unless such composition were taken with the express consent of the defendant, he was discharged. *Hall* v. *Wilcox*, 2 M. & M. 58. The principle of discharging a surety by the giving time by the creditor, is a refinement of a court of equity, and will not be extended; where by the arrangement, taking a cognovit with a stay of execution until a day earlier than that on which judgment could have been regularly obtained, time was not given, but the remedy in fact accelerated, the Court refused to interfere. *Hulme* v. *Coles*, 2 Sim. 12.

(*n*) *Ashton* v. *Longes*, 1 M. & M. 127.

(*o*) *Qu.* whether it can operate *in futuro*. See Watkins on Copyholds. Of office, how made, see Bac. Ab., Corporations, E. 8. Where the representatives of a party who held premises for ninety-nine years, at a peppercorn rent, after his death, signed a paper, whereby they did "renounce and disclaim, and also surrender and yield up, &c. all right, title, &c. in the premises formerly in the possession of their testator as tenant thereof," held that on a finding of the tenancy still subsisting, the instrument could only be construed as a surrender, and not as a disclaimer. *Doe* v. *Stagg*, 5 Bing. N. C. 564; and 7 Sc. 690.

(*p*) The defendant, on pleading a tender, pays the money into court (*Maclellan* v. *Howard*, 4 T. R. 194. *Jenkins* v. *Edwards*, 5 T. R. 97); and as he admits the debt *pro tanto*, he cannot plead the general issue as to that part of the demand.

(*q*) See *Thomas* v. *Evans*, 10 East, 101; *infra*, 1070; and *Dickinson* v. *Shee*, 4 Esp. C. 68, cor. Lord Kenyon, cited by Bayley, J. in the former case. There the defendant went to the plaintiff's attorney, saying that he was come to settle with him on the plaintiff's account, and produced a paper containing the statement of the account, in which he made the balance 5*l*. 5*s*., which, he said, he was ready to pay, but produced no money or notes. The plaintiff's attorney said he could not take that sum, as his client's demand was about 8*l*. And this was held to be no tender; for there should have been an offer to pay by actually producing the money, unless the plaintiff dispensed with the tender expressly, by saying that the defendant need not produce the money, as he would

When sufficient in law.

A tender, to be legal and effectual, must be unqualified by any condition; where, therefore, the offer was accompanied with a requisition that the party should sign a receipt expressing that it was received as the balance of the plaintiff's demand, held that it was insufficient (*r*).

If the plaintiff do not object to receive the money, it is not sufficient for the defendant to show that he had the money with him, and held it in a bag under his arm; he ought to have laid it down for him (*s*).

A legal tender must be of money, and not of bills (*t*). And by the stat. 56 Geo. 3, c. 68, s. 12, no tender of payment of money made in the silver coin of the realm, of any sum exceeding the sum of 40*s.* at one time, shall be a legal tender. By the stat. 3 & 4 Will. 4, c. 98, s. 6, a tender in Bank of England notes shall be a good tender for all sums above 5*l.* so long as the Bank of England shall continue to pay on demand their said notes in legal coin. Before the statute a tender in bank-notes was good unless specially objected to (*u*). So a tender in country bank-notes (*v*), or in a banker's cheque (*x*), if unobjected to as regards the quality of the tender to be used, has been held to be sufficient.

A tender of a larger sum than is due is a legal tender; for the creditor ought to accept so much of it as is due to him (*y*).

A tender to *A.* of a sum including both a debt due to *A.*, *B.* and *C.*, and also a debt due to *C.*, is a good tender of the debt due to the three (*z*).

And if several creditors, to whom money is due in the same right, assembled for the purpose of demanding payment, a tender of the gross sum,

not accept it. But see *Glascott* v. *Day*, 5 Esp. C. 48; where Lord Ellenborough seems to have been of opinion, that if the defendant had the money ready for immediate delivery, a declaration by the plaintiff that he would not receive it on account of insufficiency, would dispense with the actual production and offer. In that case, however, the tender was held to be insufficient, the defendant not having the money ready. Where the defendant told the plaintiff he had eight guineas in his pocket, which he had brought to satisfy his demand, but the plaintiff said he need not give himself the trouble of offering it, for he should not take it, the tender was held to be good. *Douglas* v. *Patrick*, 3 T. R. 684. See *Ryder* v. *Townsend*, 7 D. & R. 119. *Read* v. *Golding*, 2 M. & S. 86. So where the defendant being willing to pay the plaintiff 10*l.*, the witness offered to go upstairs and fetch that sum, but the plaintiff said she need not trouble herself, he would not take it, it was held to be a good tender, although the defendant took no notice of the witness's offer, the witness also proving that the money was upstairs. *Harding* v. *Davis*, 2 C. & P. 77, cor. Best, C. J. But where *A.* being ordered to pay the plaintiff 7*l.* 12*s.* the clerk of the plaintiff's attorney demanded 8*l.*, on which *A.* said that he was ordered to pay 7*l.* 12*s.* only, which sum was in the hands of *B.* who was present, and *B.* put his hand in his pocket as if to pull out his pocket-book, which *A.* desired him not to do, as he was ordered to pay 7*l.* 12*s.* only, and 8*l.* was demanded; and *B.* could not say whether he had 7*l.* 12*s.* in his pocket or not, but swore that he had it in his house, at the door of which he was standing; the tender was held to be insufficient. *Kraus* v. *Arnold*, 7 Moore, 59.

(*r*) *Higham* v. *Baddeley*, 1 Gow C. 213.

(*s*) B. N. P. 151. Where the defendant threw a guinea and some bank-notes on a table, saying to the plaintiff, "There is the balance of the account," and the plaintiff refused to take up the money, and went away, and the money was counted over by the witness, and found to amount to 17*l.* 1*s.*, it was held to be a sufficient tender of that sum. *Holland* v. *Phillips*, 6 Esp. C. 46.

(*t*) *Mills* v. *Safford*, Peake's C. 180, n.

(*u*) *Wright* v. *Reed*, 3 T. R. 554. *Grigby* v. *Oakes*, 2 B. & P. 526. *Brown* v. *Saul*, 4 Esp. C. 257.

(*v*) *Polglass* v. *Oliver*, 2 C. & J. 15. *Lockyer* v. *Jones*, Peake's C. 180; *contra*, *Mills* v. *Safford*, Peake's C. 180.

(*x*) *Welby* v. *Warren*, Tidd, 183.

(*y*) *Wade's Case*, 5 Rep. 114; Noy's R. 74. Quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est. Et in majore summâ continetur minor. See also *Douglas* v. *Patrick*, 8 T. & R. 683. But see *Watkins* v. *Robb*, 2 Esp. C. 711.

(*z*) *Douglas* v. *Patrick*, 3 T. R. 683.

which they all refuse on account of the insufficiency of the amount, is good (*a*). But a tender of a larger sum, requiring change, is insufficient (*b*). When sufficient in law.

A plea of tender of half a year's rent is not supported by evidence of a tender of the half-year's rent, requiring the lessor to get change and pay the property-tax (*c*). The offer of the money must, it seems, be an absolute and unconditional one in payment of the debt. Where the defendant offered to pay the money as a boon, but accompanied the offer with a protestation against the right of the party to receive it, the tender was held to be insufficient (*d*).

Where the sum tendered was as for half a year's rent, which the plaintiff's agent refused, it was held to be only a conditional tender, as, if taken, involving an admission of the amount of rent, and therefore bad (*e*).

So a tender accompanied with the demand of a receipt in full (*f*), or under the condition that it shall be received as the whole of the balance due (*g*), or that a particular document shall be given up to be cancelled (*h*), is insufficient. But an allegation, at the time of the tender, that it was all he considered to be due, was held not to make it a conditional one, if otherwise good (*i*). Where the creditor asked how much was due, and laid down a sum exceeding what was due, it was held that, the offer not being coupled with any condition, the tender was legal (*j*).

But an informality in the tender will be cured by a refusal on the part of the plaintiff to receive the money; as, if the tender be of Bank of England

(*a*) *Black* v. *Smith*, Peake's C. 88. See 2 T. R. 414; and *Dame Gresham's Case*, Moore, 201, 2. 1st point. *Saunders* v. *Graham*, Gow, 121. But where a party owes debts to several creditors, a tender of one sum for the debts of all is insufficient in respect of all. *Strong* v. *Harvey*, 3 Bing. 304. See *Dean* v. *Jones*, 4 B. & Ad. 546.

(*b*) *Robinson* v. *Cook*, 6 Taunt. 336. A tender of a 5*l.* note, demanding 6*d.* in change, is not, it seems, a good tender of 4*l.* 19*s.* 6*d.* *Watkins* v. *Robb*, 2 Esp. C. 711. S. P. *Betterbee* v. *Davis*, 3 Camp. 70. *Bradey* v. *Jones*, 2 D. & R. 205; where a tender of seven sovereigns, the party making a counter demand in writing, and saying, "Take your debt," was held to be insufficient.

(*c*) Ibid.

(*d*) *Simmons* v. *Wilmot & others*, 3 Esp. C. 91, cor. Eldon, C. J.

(*e*) *Hastings* (*Marquis of*) v. *Hurley*, 8 C. & P. 573.

(*f*) *Glascott* v. *Day*, 5 Esp. C. 48, cor. Ellenborough, C. J. *Huxham* v. *Smith*, 2 Camp. 21. But see *Cole* v. *Blake*, Peake's C. 179; where the tender was held to be good, although the defendant insisted on a receipt in full. But there the objection to the receiving the money was founded wholly on the insufficiency of the amount; and *qu.* whether the case was not decided on the ground of the general right of a debtor to demand a receipt on payment of money to his creditor, without adverting to the particular form of the receipt required. It has been said, that formerly such a right did not exist, except in cases of payment to the King's receiver. See Bunb. 348. But see Fitz. Damage, 75; Bro. Ab. Taile d'Exchequer, 7. By the stat. 43 Geo. 3, c. 126, s. 5, a debtor is empowered to tender a blank receipt at the time of payment, which the creditor is bound to fill up and pay the amount of the stamp, under a penalty of 10*l.* Abbott, C. J. in *Laing* v. *Meader*, 1 C. & P. 257, is stated to have held that such a tender was insufficient. The debtor is bound to bring a receipt with him, and require the creditor to sign it; if he do not he is liable to a penalty by the above stat. 43 Geo. 3, c. 126, s. 4, 5. Where a cheque was sent in a letter requiring a receipt to be sent in return, which the plaintiff returned, saying he would not receive it, and requesting a cheque for a larger sum, it was held to be sufficient and not conditional. *Jones* v. *Arthur*, 8 Dowl. P. C. 442.

(*g*) *Evans* v. *Judkins*, 4 Camp. 156, cor. Gibbs, C. J. *Free* v. *Kingston*, Ibid. *Strong* v. *Harvey*, 3 Bing. 304. *Sutton* v. *Hawkins*, 8 C. & P. 259. For a plaintiff, who takes a sum properly tendered, does not compromise his claim for more, as he would do if he took it as the whole of his demand. Ibid. And see *Mitchell* v. *King*, 6 C. & P. 237. *Ryder* v. *Townsend*, 7 D. & R. 119. *Higham* v. *Baddely*, Gow, 213. *Glascott* v. *Day*, 5 Esp. C. 48; where the defendant took the money out of his pocket and said, "If you will give me a stamped receipt, I will pay you the money," and the plaintiff replied that he would not take it, but would serve him with a Marshalsea writ.

(*h*) *Huxham* v. *Smith*, 2 Camp. 21.

(*i*) *Robinson* v. *Ferriday*, 8 C. & P. 753.

(*j*) *Bevan* v. *Rees*, 7 Dowl. 510.

When sufficient in law.

notes (*k*), or even of provincial bank-notes (*l*), and not of money; or although more than the precise sum be tendered, and change be demanded (*m*); or although, on making the tender, the defendant require a receipt to be given (*n*).

Where the agent of the defendant pulled out his pocket-book, and offered to pay the whole sum to the plaintiff if he would go into a neighbouring public-house, and the plaintiff refused to take it, the tender was held to be good (*o*).

But an actual production of the money is essential, unless the creditor dispense with it, either by an express declaration or by some equivalent act. Thus, where the debtor, on leaving home, left 10*l.* with his clerk for the plaintiff, and the plaintiff was informed of this when he called, and demanded a larger sum, and said that he would not receive anything less than his whole demand, and the clerk did not offer the 10*l.*, it was held to be no tender (*p*).

To an agent.

A tender to an authorised agent is a tender to the principal (*q*). And a tender to an agent was held to be good, although the principal had previously prohibited the agent from receiving the money if offered, the principal having put the business into the hands of his attorney (*r*). But a tender to the managing clerk of the plaintiff's attorney, who at the time disclaimed authority from his master to receive the debt, was held to be insufficient (*s*). Circumstantial evidence is sufficient (*t*). A tender of a debt due, or tender to a collector employed under a commission against the trader by the solicitor to the commissioners, is, it seems, insufficient (*u*).

To one of several creditors.

A tender to one of several joint-creditors is a tender to all (*v*). And if *A.*, *B.* and *C.* have a joint, and *C.* a separate demand on *D.*, and *D.* offers to pay both debts to *A.*, which *A.* refuses, without objecting that he is

(*k*) *Wright* v. *Reed*, 3 T. R. 554; 2 B. & P. 526. Where the offer in payment of 13*l.* 14*s.* 2*d.* was by 14*l.* in bank notes and sovereigns, but which the party refused to accept, but made no objection to the sum offered not being the precise amount, held sufficient, and that it was unnecessary to get the change and offer the precise sum. *Atkin* v. *Acton*, 4 C. & P. 208. So where the tender was in country bank-notes, and the only objection was as to the amount. *Polglass* v. *Oliver*, 2 C. & J. 15. So proof of a tender of 20*l.* 9*s* 6*d.* in bank-notes and silver will support a plea of tender of 20*l.* *Dean* v. *James*, 4 B. & Ad. 546; 1 N. & M. 392. Where after an offer made by the defendant, the plaintiff quitted the room before the defendant could take out the money, and it was not produced until after he was gone, held that it was no tender. *Leatherdale* v. *Sweepstone*, 3 C. & P. 341. A tender made to the attorney, or his clerk, after a letter sent by the attorney to demand payment, the authority not being disclaimed at the time, was held to be good. 3 C. & P. 453.

(*l*) *Lockyer* v. *Jones*, Peake's C. 180.

(*m*) *Black* v. *Smith*, Peake's C. 88. See note (*k*).

(*n*) *Cole* v. *Blake*, Peake's C. 179. But see *Glascot* v. *Day*, 3 Esp. C. 48. *Huxham* v. *Smith*, 2 Camp. 21.

(*o*) *Read* v. *Goldring*, 2 M. & S. 86. Although the agent had not been authorized to tender the whole, but tendered part at his own risk. Ibid. See also *Black* v. *Smith*, Peake's C. 88.

(*p*) *Thomas* v. *Evans*, 10 East, 101. S. P. *Dickenson* v. *Shee*, 4 Esp. C. 68, cor. Lord Kenyon. And see *Douglas* v. *Patrick*, 3 T. R. 684.

(*q*) *Goodland* v. *Blewith*, 1 Camp. 477. *Kirton* v. *Braithwaite*, 1 M. & W. 310. But *semble*, that a bailiff who makes a distress cannot delegate his authority, and that a tender to his agent is insufficient. *Pimm* v. *Grenville*, 6 Esp. C. 95.

(*r*) *Moffatt* v. *Parsons*, 5 Taunt. 307.

(*s*) *Bingham* v. *Allport*, 1 N. & M. 398. But a tender to the attorney on the record is a good tender to the plaintiff. *Crozer* v. *Pilling*, 4 B. & C. 26. And a tender to one at the office of the plaintiff's attorney, who is referred to on the subject by a clerk in the office, and who refuses the tender as being of an insufficient sum, is good, without showing who that person is. *Wilmott* v. *Smith*, M. & M. 238. See *Barrett* v. *Deer*, Ibid. 200.

(*t*) As where the money was brought to the house of the plaintiff and delivered to his servant, who retired and appeared to go to his master, it was held to be evidence to go to a jury. 1 Esp. C. 349.

(*u*) *Blow* v. *Russell*, 1 C. & P. 365.

(*v*) *Douglas* v. *Patrick*, 3 T. R. 683. So a request to one is a request to all who

entitled on the joint demand only, it is a good tender of the debt to he three (*w*).

The tender, to be available, must have been made before the action was brought (*x*). Where the declaration was intitled generally of the term, it was held that the defendant could not give evidence of a tender made after the first day of the term, although he was able to show that the *latitat* was sued out after the tender (*y*). This, however, appears to be doubtful; for as the plaintiff may, on proof of a *latitat* issued after the first day of term, give evidence of a cause of action arising after the commencement of the term, but before the suing out the *latitat*, notwithstanding the general memorandum, there seems to be no reason why the defendant should not also resort to the *latitat* to show that his tender was in time (*z*). Time.

Issue having been joined on a plea of tender, the defendant is not entitled to judgment where the jury merely find special facts which do not show an actual tender, although they be facts from which a tender might properly have been implied (*a*).

If the plaintiff, to a plea of tender, reply a previous or subsequent demand and refusal (*b*), on which issue is joined, the proof will lie on the plaintiff. He must prove a demand of the same sum; for, after a tender of 5 *l.*, the plaintiff cannot get rid of it by demanding a larger sum (*c*). The demand, to be available, must also have been made either by the plaintiff, or by an agent authorised to give a discharge for the money (*d*). Subsequent demand.

A demand made by the clerk of the plaintiff's attorney, who was an entire stranger to the defendant, was held to be insufficient (*e*). So was a subsequent demand, accompanied by a further demand of another sum which was not due (*f*).

After a tender made by *A.* and *B.*, a subsequent refusal by *A.* alone, on a demand made upon him, enures as the refusal of both (*g*).

have jointly promised. *Brunton's Case*, Noy, 135; Vin. Ab. *Ev.* T. b. 115.

(*w*) Ibid.

(*x*) It is no answer to a plea of tender before the exhibiting the plaintiff's bill, that the plaintiff had before the tender instructed an attorney to sue out the writ, and that he had applied before the tender for the writ, which was afterwards sued out. *Briggs* v. *Calverley*, 8 T. R. 629.

(*y*) *Rolfe* v. *Norden*, 4 Esp. C. 72. See *Southouse* v. *Allen*, Selw. N. P. 146; Tidd, 360. Note, that in *Rolfe* v. *Norden*, Le Blanc, J. said that he would admit the evidence of the *latitat*, reserving the point; but the defendant was not prepared with the writ, and the plaintiff had a verdict. Where the suing out a *latitat* is not replied to the Stat. of Limitations, or to avoid a tender, or given in evidence to support a penal action, it is considered but as process, and not as the commencement of the suit. *Foster* v. *Bonner*, Cowp. 454.

(*z*) See TIME. The memorandum on the record may in such case be set right by summons before a Judge at the assizes. *Sugden* v. *Wilcocke*, cor. Bayley, J. York Spring Assizes, 1825. The record was from the Exchequer.

(*a*) *Finch* v. *Brook*, 1 Bing. N. C. 253. The jury found that the defendant's attorney called on the plaintiff, saying, "I am come to pay you 1 *l.* 12 *s.* 6 *d.*, which the defendant owes you;" that the attorney put his hand in his pocket, but did not produce the money, the plaintiff saying, "I can't take it, the matter is now in the hands of my attorney."

(*b*) The defendant cannot plead a tender after the day of payment of a bill of exchange, although he aver that he was always ready to pay from the time of the tender, and that the sum tendered was the whole of the sum due in respect of principle and interest. *Hume* v. *Peploe*, 8 East, 168.

(*c*) *Spybey* v. *Hide*, 1 Camp. 181. And where issue was joined on a previous demand of 4 *l.* 7 *s.* 6 *d.*, it was held that this was not supported by proof of a previous demand of 10 *l.* 4 *s.* then due on a bill of exchange. *Rivers* v. *Griffiths*, 5 B. & A. 630.

(*d*) 1 Camp. 478. *Coore* v. *Callaway*, 1 Esp. C. 115. See *Palliser* v. *Ord*, Bunb. 166.

(*e*) *Coles* v. *Bell*, 1 Camp. 478.

(*f*) *Coore* v. *Callaway*, 1 Esp. C. 115. *Strutt* v. *Rogers*, 7 Taunt. 213.

(*g*) *Haywood* v. *Hague*, 4 Esp. C. 93;

Proof of the delivery of a letter at the defendant's house, to a clerk, who returned with an answer that the debt should be settled, was held to be *primâ facie* evidence of a demand (*h*).

Original sued out before tender.

Upon a replication that before the tender the plaintiff sued out an original, it was held to be sufficient to produce the *capias ad respondendum* (*i*).

To relieve goods from lien.

Where a tender is made to relieve goods from a claim of lien, the same degree of form and precision are not necessary as where it is made in discharge of a debt. In such a case it has been held to be unnecessary to tender the precise sum.

Although a tender of the sum due is not evidence under the general issue in *assumpsit* or debt, but must be specially pleaded, yet a tender of money due on a promissory note, accompanied with a demand of the note, is sufficient to stop the running of interest (*k*).

Effect of.

The effect of a plea of tender is to admit the ground of action, and facts as alleged. Where one count of the declaration alleged that the defendant agreed to pay 41 *l.* for certain tithes let to him by the plaintiff, and that the plaintiff did let the tithes to him, and permit him to take them, it was held that the defendant, after having pleaded a tender to all the counts, was precluded from insisting that he had been interrupted in taking the tithes (*l*).

Proof of a tender of money does not supersede the necessity of a demand, where a previous demand is essential to the maintenance of the action (*m*).

The acceptance of the sum tendered does not prejudice the right of the plaintiff to sue for more (*n*).

It has been held, that after a plea of tender the plaintiff cannot be nonsuited (*o*).

When necessary.

Where a party has wrongfully possessed himself of goods, no tender of freight is necessary in order to enable the party to maintain his action (*p*).

Where a tender and refusal are necessarily averred, the party must show an actual tender and refusal, or that everything has been done on the part of the plaintiff which could be done to carry the contract into effect (*q*).

The plaintiff averred that he was ready and willing, and offered to transfer stock, but that the defendant would not accept it, but no proof was given of any *direct offer* made on the day appointed, or that the plaintiff had waited till the close of the transfer books on that day for the defendant

and see 1 Esp. C. 439. *Pilkington* v. *Hastings*, 5 Co. 76; Cro. Eliz. 613.

(*h*) *Peirse* v. *Bowles and another*, 1 Starkie's C. 323. It has been held that a letter written by the plaintiff's attorney and received by the defendant, is not sufficient evidence of a subsequent demand of the sum tendered, for at the time of the demand the defendant ought to have an opportunity of paying the money. *Edwards* v. *Yates*, R. & M. 360. But see *Haywood* v. *Hague*, 4 Esp. C. 93.

(*i*) *Gosling* v. *Witherspoon*, 2 Will. Saund. note (1.) See TIME.

(*k*) *Dent* v. *Dunn*, 3 Camp. 296. See *Hume* v. *Peploe*, 8 East, 168; 4 Leon. 209.

(*l*) *Cox* v. *Brain*, 3 Taunt. 95. So a plea of tender to a count on a promise to pay the debt of another in consideration of forbearance, dispenses with proof of an undertaking in writing. *Middleton* v. *Brewer*, Peake's C. 15.

(*m*) *Simpson* v. *Routh*, 2 B. & C. 682, where the action was brought for not paying over the surplus after a distress for poor's rates.

(*n*) *Spybey* v. *Hide*, 1 Camp. 181. A defendant cannot plead *non est factum* in an action on a bond and tender as to part (*Jenkins* v. *Edwards*, 5 T. R. 97); or *non assumpsit* as to the whole, and tender as to part. *Maclellan* v. *Howard*, 4 T. R. 194.

(*o*) 2 H. B. 377. *Harding* v. *Spicer*, 1 Camp. 327; and see Bac. Ab. tit. *Tender*, and the observations of Eyre, C. J. in *Gutteridge* v. *Smith*, 2 H. B. 374.

(*p*) *Lempriere* v. *Pasley*, 2 T. R. 485.

(*q*) 5 East, 107.

to appear and accept; after a verdict for the plaintiff, on a rule *nisi* to set it aside, the Court held that he ought to have shown a direct tender and refusal, or that he had done everything in his power towards completing the contract, by staying at the Bank as long as the transfer books remained open on the day appointed for the transfer (*r*). But where a tender on the part of the plaintiff would be nugatory on account of the defendant's inability to accept it, it need not be made (*s*). When necessary.

In an action of *assumpsit* to recover money paid as part of the purchase-money of an estate, the title of the defendant being defective, it is not incumbent on the plaintiff to prove the tender of a conveyance; for the title being bad the tender would be nugatory (*t*).

TIME.

Computation of time.

In temporal proceedings, time is estimated by lunar, in ecclesiastical, by solar, months (*u*). The word *month*, as used in a statute, means a lunar month, unless from the express words, or from the context, it appears that a calendar month was intended (*x*). In matters of private contract the word may be construed to mean either a lunar or calendar month, according to the intention of the parties (*y*). But if upon the face of the contract it stood indifferent which kind of month was meant, a lunar month would probably be understood, in analogy to the construction in the case of a statute. In the case of a bill of exchange, the computation, according to the law-merchant, is by calendar months (*z*).

It has been held that where a thing is to be done in a time specified after a particular fact, the day of the fact is to be reckoned as inclusive; as under the stat. 27 Eliz. c. 18, which limits an action against the hundred to a year after the robbery (*a*); or where a month's notice of an intended action is required, for then the month is to be computed inclusive of the day on which the notice was served (*b*).

(*r*) *Bordenave* v. *Gregory*, 5 East, 107. Unless there was a refusal, an averment of which shows that the defendant was present, the plaintiff must show that he was there and made a tender the last time of the day when it could be done conveniently. *Lancashire* v. *Killingworth*, 12 Mod. 531.

(*s*) Per Lord Ellenborough, C. J. 5 East, 202.

(*t*) *Seaward* v. *Willock*, 5 East, 138. In orders for payment of money (by the Court), month means a lunar month. *Attorney-general* v. *Newbury Corporation*, 1 Cooper (Ch. C.), 383.

(*u*) 1 Blk. Rep. 450; Doug. 463.

(*x*) *Lacon* v. *Hooper*, 6 T. R. 224. *R.* v. *Adderley*, Doug. 446; 2 Bl. Comm. 141.

(*y*) *Lang* v. *Gale*, 1 M. & S. 111. See *Smith* v. *Brown*, 2 Marsh. 41.

(*z*) Bayley, O. B.

(*a*) Hob. 139; 2 Roll. 520, l. 27; Doug. 465; 3 T. R., 623; Com. Dig. *Temps.* A.

(*b*) *Castle* v. *Burditt*, 3 T. R. 623. *Clayton's Case*, 5 Rep. 1. *Osborne* v. *Rider*, Cro. Jac. 135. *Bellasis* v. *Hester*, 1 Ld. Raym. 280. So under the stat. 21 Jac. 1, c. 92, s. 2, the day of a trader's arrest is to be reckoned in the two months lying in prison, which constitutes bankruptcy. *Glassington* v. *Rawlins*, 3 East. 407. But the 1st sect. of the Annuity Act, which requires deeds to be enrolled within twenty days of the execution, &c. means twenty days exclusive of the day of execution. *Ex parte Fallon*, 5 T. R. 283. Vide *supra*, tit. HUNDRED. Where under a statute time is to be computed from an act done, the day on which it is done is to be included in the computation; where, therefore, the execution of a deed (the act of bankruptcy) was made on the 18th February, the two calendar months expired on the 17th April, it was held, that any fraction of the day on the 18th April was sufficient to bring the time within what was required by the words "more than two calendar months." *Ex parte Farquhar*, 1 Mont. & M. 7. And see *ex parte Whitby*, 1 Mont. & M. 671; 4 Deac. 139; and *ex parte Rhodes*, 4 Deac. 125. Where the prohibitory clause in the charter provided that no mayor should be re-elected within three years next following his former mayoralty;

Computation of time.

Where a month's notice of action was requisite, and notice was given on the 28th of April, and the writ was sued out on the 28th of May, it was held that the action was not premature (*c*).

Where the cause of action is the seizure of goods, the time limited by statute runs from the seizure (*d*). But where the time is limited not after the fact but after the day of the date, that day is not to be included (*e*).

And it is now held that the time of giving notice in actions under statutes requiring notice is to be computed exclusively of the day of giving the notice and of bringing the action (*f*).

Term.

The whole term (*g*) is, in consideration of law, but one day, and all allegations and entries which are of the term generally have relation to the first day of the term; as in the case of a judgment (*h*); so if a deed be alleged to have been enrolled of a specified term, the law will intend that it was enrolled on the first day of the term (*i*); and where the bill is intitled generally of the term, it refers to the first day of the term. But if the cause of action has, in fact, arisen after the commencement of the term, but before the bill was actually filed, and there be no special memorandum of the time of filing the bill, the plaintiff may show that the action was not premature, by proof of the writ (*j*),

held that it was to be understood to mean charter or mayor's years, and not calendar years, and that there should be three intervening mayoralties between the time of serving the office. *R.* v. *Sayer*, 10 B. & C. 486. As to the doing of an act, see *R.* v. *Denbighshire J.*, 4 East, 142. In the case of an appointment of overseers within a month, 2 Str. 1123. Ten days' notice of appeal, means one inclusive, the other exclusive. *R.* v. *J. of W. R. of Yorkshire*, 4 B. & Ad. 685.

(*c*) 3 T. R. 623.

(*d*) *Godin* v. *Ferris*, 2 H. B. 14; *Saunders* v. *Saunders*, 2 East, 254, P. C.; *Smith* v. *Wiltshire*, 2 B. & B. 622. *Secus*, where the cause of action is a continuing one, as by imprisonment, *supra*, 584.

(*e*) Hob. 139; Com. Dig. *Bargain and Sale*, B. 8.

(*f*). *Young* v. *Higgon*, 8 Dowl. 212; 6 M. & W. 49. And see *Lester* v. *Garland*, 15 Ves. 248, overruling *Castle* v. *Burditt*. And see *Webb* v. *Fairmaner*, 3 M. & W. 473; and App. ii. 1074.

(*g*) The essoign day is for some, though not all purposes, the first day of the term. It is so under the stat. 9 & 10 W. 3, c. 15, s. 2, in respect of an application to set aside an award. *In re Burt*, 5 B. & C. 668. And in legal proceedings the ensoign day is in general considered the first day of the term. Ib., and *Stanford* v. *Cooper*, Cro. Car. 102. *Bolton* v. *Eyles*, 2 B. & B. 51. *Laidler* v. *Elliott*, 3 B. & C. 758. But now see the stat. for the regulation of Terms.

(*h*) 1 Bulst. 35. 69.

(*i*) 4 Co. 71, a. Where the day is material, a particular day of the term should be alleged. 4 Co. 71; Yel. 35.

(*j*) *Morris* v. *Pugh*, 3 Burr. 1241; 1 Bl. 312. *Southouse* v. *Allen*, Tr. 8 G. 2, Com. Dig. *Temps.* C. 8; 3 Burr. 1241. *Proger's Case*, 2 Sid. 432; B. N. P. 137. Even in a penal action, ib. If the defect appear on the record, the objection is fatal on demurrer. *Pugh* v. *Robinson*, 1 T. R. 116. But if the cause of action be laid on the first day of the term, it is sufficient, although the memorandum be general, for the term does not commence for the purpose of delivering a declaration until the sitting of the Court. Ibid., and *Dobson* v. *Bell*, 2 Lev. 176. In *Wilton* v. *Girdlestone*, 5 B. & A. 847, where the bill against an attorney was intitled generally of Michaelmas Term, but the memorandum showed that it was filed November 28th, evidence was admitted that it was actually filed on the 24th of December. Abbott, C. J. saved the point, but the Court seem to have decided upon the sole ground that proof of a demand and refusal on the 29th of November was evidence of a conversion previous to the 28th. In *Venables* v. *Duffe*, Carth. 113, B. N. P. 137, where in an action for a malicious prosecution the acquittal was laid to be after Michaelmas Term began, and the memorandum was general of Michaelmas Term, judgment was arrested because it was not shown that the bill was filed after the first day of term. But it seems that in such cases the Court, according to former practice, would after verdict inquire whether the bill was in fact filed after commencement of the term. According to the present practice, such evidence should be given on the trial, and if not the plaintiff would be nonsuited, but after verdict it would not be a ground for arresting the judgment. Writs, whether bailable or not, are indorsed (by rule of the Court of King's Bench) with the day on which they are sued out; so in the Exchequer.

or by proof that the declaration was subsequently filed (*k*); but otherwise he would be nonsuited (*l*). Term.

A judgment signed in vacation may be pleaded by an executor *puis darrein continuance*, although the last continuance was the last day of the preceding term (*m*).

In proceeding by bill in the King's Bench, and in actions in the Exchequer, the memorandum on the record is of the term when the declaration was filed. But where the suit is by original in the King's Bench, or is in the Common Pleas, the title of the record is of the term in which issue was joined, without reference to the time of filing the declaration or plea (*n*). Hence, the record in an action by bill will sometimes show that an action has been properly brought within a time limited, where the record in a suit by original or in the Common Pleas would show the contrary, and would render it necessary to prove the real commencement of the action by means of the writ, to show that it was in time; as where an action is brought against a constable for an act done by him in the execution of his office. So, on the contrary, a record in a suit by original, or in the Common Pleas, might show that the action had not been brought too soon, where the record in an action by bill would show that it was premature, and render it necessary to prove the real commencement of the action at a later time; as where an action is brought by an attorney for fees, within the stat. 2 Geo. 2, c. 23 (*o*).

A plaintiff may consider the issuing of a *latitat* either as mere process, or as the commencement of his action (*p*); and he may prove a cause of action between the issuing of the *latitat* and filing of the declaration, in the case of bailable as well as of common writs (*q*). Commencement of action.

(*k*) It may be proved by the attorney, without producing the writ, that the suit had a later commencement. *Lester* v. *Jenkins*, 8 B. & C. 339. Declaration on a bill of exchange, dated 29th November 1829, payable two months after date, the declaration was intitled generally of Hilary Term 1828, and it was held that the attorney might prove the time of commencing the action without producing the writ; and see *Wilton* v. *Girdlestone*, 5 B. & A. 847. So in *Howe* v. *Cooker*, 3 Starkie's C. 138, where in an action against the owner of a bill of exchange, it was proved to have been dishonoured on the second day of the term of which the declaration was intitled generally, and on proof by the plaintiff's attorney that he filed the bill (of which he produced the draft), the plaintiff recovered, the defendant having liberty to move, but I never heard that he did.

(*l*) *Hollingworth* v. *Thompson*, Guildh. 1752: cor. Dennison, 7 B. N. P. 137.

(*m*) *Lyttleton* v. *Cross*, 3 B. & C. 317; and see *Prince* v. *Nicholson*, 5 Taunt. 665; see 3 G. 4, c. 102. Issue joined on the allegation, that at the time of exhibiting the plaintiff's bill the plaintiff was not administratrix; it appeared in evidence that the bill was delivered with a special memorandum, January 20th, and filed as of Michaelmas Term, and that administration was granted 10th January; held, that the verdict was properly found for the plaintiff. *Woolbridge* v. *Bishop*, 7 B. & C. 406.

(*n*) 2 Will. Saund. n. 1.

(*o*) *Supra*, 109. Where the plaintiff's bill had been delivered September 30th, 1797, and the record on attachment of privilege in C. B. was intitled generally of Hilary Term 1798, it was held to be incumbent on the defendant to prove, if he could, by the production of the writ, that the action had been in reality commenced before the expiration of the month. *Webb* v. *Pritchett*, 1 B. & P. 263.

(*p*) *Wood* v. *Newton*, 1 Wils. 141. The bill is the commencement of the action, unless the justice of the case require an earlier date, as in the case of a plea of the Statute of Limitations, or a tender; and therefore payment of the expenses of the writ, with accord and satisfaction in an action of trover, between the issuing the writ and the filing of the bill, is evidence for the defendant in bar. The production of one writ against three defendants, and of three declarations and three rules to plead, is evidence of three actions. 11 Price, 235.

(*q*) *Best* v. *Wilding*, 7 T. R. 4. That is, where the declaration is entitled of the term in which the writ is returnable; but in *Smith* v. *Muller*, 3 T. R. 624, it was held that the plaintiff could not recover in respect of a cause of action which arose between the term when the writ was returnable and a later term, of which the declaration was intitled. Formerly the declaration was actually delivered in the

Commencement of action.

A bill of Middlesex or *latitat* is a good commencement of an action, to save the Statute of Limitations or a tender (*r*).

A defendant may show the real day of exhibiting the bill, where it is necessary, in opposition to the general memorandum of the term. Where in an action of trover, an issue was where the cause of action arose within six years next before the exhibiting the plaintiff's bill, and where the memorandum was generally of Michaelmas term, and the writ was tested on the 26th, returnable on the 29th of November, it was held to be evidence for the defendant to show that the bill was exhibited on the latter day (*s*).

In the Common Pleas the production of the *capias ad respondendum* proved the commencement of a penal or other action (*t*). And if to a plea of tender, or of the Statute of Limitations, the plaintiff replied an original sued out within the time, it was proved by the production of a *capias ad respondendum*, for the Court will presume an original (*u*).

How connected with declaration.

Where the issuing of common process is relied upon as the commencement of the action, evidence is frequently necessary to connect the process with the subsequent proceedings, and to show that the process was issued with a view to the same cause of action (*x*). Where one writ only had been sued out, and the plaintiff had declared within the time allowed by the Court for declaring, it was held to be sufficient to prove it, without showing a return (*y*), and without any evidence to connect the declaration with the writ (*z*).

same term, and still must be considered as delivered *nunc pro tunc*. Per Buller, J. ibid.

(*r*) *Day* v. *Church*, 1 Sid. 53. *Foster* v. *Bonner*, Cowp. 454. *Hollister* v. *Coulson*, 1 Str. 550. *Crokatt* v. *Jones*, 2 Str. 736. *Johnson* v. *Smith*, 2 Burr. 961. *Morris* v. *Pugh*, 3 Burr. 1243. *Supra*, tit. TENDER.

(*s*) *Granger* v. *George*, 5 B. & C. 149.

(*t*) *Leader* v. *Moxon*, 2 Bl. 924, 5; S. C. 3 Wils. 461. *Kinsey* v. *Heyward*, 1 Ld. Ray, 434. *Karver* v. *James*, Willes, 255. But see *Mois* v. *Bruerton*, 1 Ld. Ray. 553. *Brown* v. *Babington*, 2 Ld. Ray. 880. Where the bill on which the action was brought became due after the first day of the term of which the declaration was generally intitled; held that the plaintiff might prove by parol the time of the commencement of the action without producing the writ, the indorsement thereon being only a memorandum of the attorney in the cause. *Lester* v. *Jenkins*, 8 B. & C. 339. The indorsement on a writ of *latitat*, showing the time of sealing, is evident of the time of issuing the writ. *Hopwood* v. *Beckett*, cor. Alderson, York, Sp. Ass. 1832. In suits by bill the memorandum is but presumptive evidence of the time when the suit was commenced; the real time may be shown by the defendant. *Swancott* v. *Westgarth*, 4 East, 75. By means of the writ. *Morris* v. *Pugh*, 3 Burr. 1241; 1 Bl. 312; *Leader* v. *Moxon*, 3 Wils. 461. In an action for goods sold, where the *nisi prius* record is entitled of Easter Term, the declaration delivered by the plaintiff in Hilary Term, is admissible to show that the action was commenced before the expiration of the credit. *Harris* v. *Orme*, 2 Camp. C. 497. In an action by original, the production of the declaration is not evidence of the commencement of the suit, but it is evidence that a suit was pending at the time of the delivery of such declaration. *Mathews* v. *Haigh*, 4 Esp. C. 100.

(*u*) Per Ld. Kenyon, in *Gosling* v. *Witherspoon*, Sittings after Michaelmas, 1788; 3 Wils. 465; Tidd. 183, 7th edit.

(*x*) See *Stratton* v. *Savignac*, 3 B. & P. 330; where it was held that a replication to a plea of tender, stating the issuing of an original *quare clausum fregit*, and return, and a second writ sued out after the tender and proceeded on, but not connected with the first writ, was bad; and the Court said that the mere circumstance of process sued out was not sufficient, since it might possibly be for some other ground of action; and if allowed to operate in the way contended for, would open a door to much inconvenience, by enabling persons to keep process secretly in their pockets till the state of the proceedings disposed them to bring it forward.

(*y*) *Parsons* v. *King*, 7 T. R. 6. *Stanway* v. *Perry*, 2 B. & P. 157; 4 Taunt. 555; 6 Taunt. 142, 3; Tidd. 184, 7th edit. It is sufficient if the plaintiff declare within a year after the return of a *latitat*. 7 T. R. 6.

(*z*) *Hutchinson* v. *Piper*, 4 Taunt. 455; 6 Taunt. 141. *Parsons* v. *King*, 7 T. R. 6. Even although a common *capias* is issued, and the plaintiff declares in a *qui tam* action. *Hutchinson* v. *Piper*, 4

Commencement of action.

For the declaration being within time is presumed to be connected with the writ (*a*); but unless it appear from the record that the plaintiff has declared in due time, as by the memorandum where the proceeding is by bill in the King's Bench, the plaintiff must prove that the declaration has been filed or delivered in time (*b*), as, in the Common Pleas, where the issue is of a term subsequent to that allowed by the course of the Court for declaring (*c*). Where in an action on a penal statute the writ was sued out February 22d, 1813, returnable the next Easter Term, but was not returned, and the trial was after Hilary Term, 1815, and the declaration on the record appeared to be of Hilary, 1815, and the plaintiff did not show that the declaration was delivered in due time after the writ, it was held that he ought to be nonsuited (*d*).

If there be two writs, the Court will presume that the plaintiff proceeded on the second, unless he can show that the first was returned or served (*e*); and therefore if the plaintiff show two writs issued, the first of which is in time, with reference to the cause of action, but the second is not, he will fail, unless he prove that the first has been returned or served (*f*), even although he declared in time after the first writ (*g*).

Where a continuance of the first writ must be shown, it is essential to show that the first writ was returned (*h*). Where, in a penal action, a *capias ad respondendum* issued on the 8th of November, and within the year, but had not been returned, and a second *capias* was issued on the 13th of November, but after the expiration of the year, and the declaration was of the same term, the Court, on the above distinction, held that there was not sufficient proof that the action had been commenced in time; and said, that if two writs be issued, one within a year after the offence committed, but the other not, it is necessary that the first should be returned to connect it with the second (*i*).

So, where in an action of debt for a penalty, the offence was proved to have been committed on the 23d of July, 1791, and a *latitat* was produced tested July 13th, indorsed July 27th, and returnable on the morrow of All

Taunt. 555. Usury was committed April 30, 1810, the writ sued out 14th of March 1811; time to declare had been repeatedly obtained, and the declaration was ultimately delivered on the last day of Michaelmas Term, 1811, intitled of Easter Term, 1811; and the Court held that the production of the writ within time was sufficient, and that evidence was unnecessary to show that the action proceeded on that writ.

(*a*) Ibid. And see the observations of Gibbs. C. J. in *Thistlewood* v. *Cracroft*, 6 Taunt. 141.

(*b*) 4 Taunt. 555; 6 Taunt. 141.

(*c*) *Thistlewood* v. *Cracroft*, 6 Taunt. 141; 1 Marsh. 499. In the Common Pleas, if the trial be in term, the *placitum* is of the term; if it be in vacation, it is of the preceding term. By the course of the Common Pleas the plaintiff has all the vacation of the term ensuing the term in which process is returnable to declare in. Tidd's Prac. 426, 7th edit., but he may be ruled to declare at the end of the second term. Ibid.

(*d*) *Thistlewood* v. *Cracroft*, 6 Taunt. 141.

(*e*) *Stanway* q. t. v. *Perry*, 2 B. & P. 157. *Weston* v. *Fournier*, 14 East, 491; *supra*, 584; 6 T. R. 617.

(*f*) Ibid.

(*g*) Ibid.

(*h*) *Harris* v. *Woolford*, 6 T. R. 617. For until that be done the Court is not in possession of the cause, so as to award an *alias* or *pluries* for bringing the defendant into court. 7 Mod. 3; 1 Lutw 260; 1 Ld. Ray. 435; 2 Ld. Ray. 833; Willes, 253; Tidd. 184, 7th edit. It was also objected, in the case of *Harris* v. *Woolford*, that the writ did not state the cause of action, the proceeding being under the Lottery Act, 27 Geo. 3, c. 1, but it was held that it could not be considered at *Nisi Prius* whether the proceedings had been regular or not. See *King* v. *Horne*, 4 T. R. 349; 2 B. & P. 157; 14 East, 491; 6 Taunt. 102.

(*i*) Ibid.

Commencement of action.

Souls (*k*), and a second *latitat* was produced, tested November 28th, 1791, indorsed January 13th, 1792, returnable on Monday next after eight days of St. Hilary, and the memorandum of the declaration was of Hilary Term, 1795, and the first writ had not been returned, it was held that a nonsuit ought to be entered (*l*).

In an action of assumpsit it was held to be no defence to show that the defendant paid the debt after the issuing an *alias pluries latitat*, although the writ of *latitat* was not returned, and although the debt was paid without any knowledge on the part of the defendant that the action was commenced.

Here it was unnecessary to connect the last writ with the preceding ones, and the irregularity in proceeding on the *pluries* writ was waived by the defendant's appearance (*m*). But it seems that if the payment had been previous to the issuing the *pluries* writ, then, inasmuch as the plaintiff must, to entitle himself to costs, have proved a commencement of the action previous to the payment, he would have failed if he could not have proved the return of the *latitat* (*n*).

In general, it seems that an irregularity in the commencement of the action will not support the objection that the action has not been commenced in time (*o*).

The real time of suing out a writ may be shown in opposition to the teste (*p*); and if in a penal action the writ be not sued out till after the expiration of the year, although by relation it be within the time, the plaintiff ought to be nonsuited (*q*).

A judgment of discontinuance has relation to the date of the rule to discontinue (*r*).

By the stat. 39 & 40 Geo. 3, c. 105, parties in any personal action, or action of ejectment, in the Common Pleas at Lancaster, may give in evidence any cause of action, or bar, which has occurred prior to the day of the actual signing of the *capias ad respondendum*, or other process, first issued forth in such action, or prior to the day of actually serving such declaration in ejectment, although such matters may not have occurred prior to the teste and return of the original writ, or prior to the assizes, or time within or whereof such declaration shall be filed or recorded (*s*).

Modern practice.

Many of the above decisions respecting the commencement of actions are inapplicable in respect of actions brought subsequently to the uniformity of

(*k*) In all continued writs the *alias* must be tested on the day when the former was returnable, 2 Salk. 699.

(*l*) *Harris* q. t. v. *Woolford*, 6 T. R. 617. In *Bates* q. t. v. *Jenkinson*, there cited, the contrary was held, on the ground that the first writ had been returned. There the plaintiff proved two writs, the first of which was not *served*, but was *returned*; and it was objected, that proof ought to be given that the first writ was continued. Ld. Mansfield overruled the objection, and the Court, on a motion for a new trial, held that the continuances might be entered at any time.

(*m*) *Toms* v. *Powell*, 7 East, 536.

(*n*) See the observations of Lawrence, J. 7 East, 538.

(*o*) *Harris* q. t. v. *Woolford*, 6 T. R. 617; 7 East, 536.

(*p*) *Johnson* v. *Smith*, Burr. 960; *supra*, 584. An original writ should always be test d after the cause of action; and if a plaintiff, to save the Statute of Limitations, reply an original, bearing date before the cause of action, it is abateable, 2 Burr. 967. So, in the case of a writ of privilege by an attorney, which is in the nature of an original. *Jones* v. *Burnet*, cited, ibid. As to the teste of an original, see *Price* v. *The Hundred of Chewton*, 1 P. Wms. 427.

(*q*) *Morris* v. *Harwood*, Mic. 5 Geo. 3. B. N. P. 195.

(*r*) *Brandt* v. *Peacock*, 1 B. & C. 649.

(*s*) For further observations, see tit. HUNDRED—JUSTICES—LIMITATIONS—TENDER.

process Act and modern practice, the time of issuing the writ, which is the commencement of the action, being now stated on the record (*t*). Modern practice.

The information before the magistrate is the commencement of a criminal prosecution (*u*).

It is a general rule of law that several acts done at several times, yet done in performance of the original contract and agreement of the parties, shall be adjudged as executed at one and the same time; and, therefore, if a man make a deed of feoffment, with warranty, and deliver the deed, and at another time makes livery *secundum formam chartæ*, the warranty is good, although no estate passed at the time of the deed to which the warranty could be annexed (*x*). Acts done at several times.

Although the law does not in general regard a fraction of a day, yet a day is always considered to be divisible for the purposes of justice (*y*). If a cause of action be laid on the first day of the term, a general memorandum is sufficient, for the term for the purpose of delivering a declaration does not commence till the sitting of the Court on that day (*z*). A permit under the stat. 26 Geo. 2, c. 59, s. 30, dated at nine o'clock in the morning, and allowing an hour for the removal of wine from *A*'s stock, and two days more for the delivery of wine into *B*'s stock, expires at ten in the morning of the second day after the date (*a*). Where a sheriff seizes the goods of a trader under a *fieri facias*, and after the seizure, but on the same day, the trader is arrested, and becomes bankrupt from lying in prison for two months, the assignees cannot recover against the sheriff (*b*). Fraction of day.

Where a declaration was served on a Saturday, it was held that Sunday was to be reckoned in computing the time of signing judgment for want of a plea (*c*).

It has been said, that reasonable time is a question of law (*d*). In the abstract, reasonable time includes both law and fact; but it seems to be clear, that in particular cases reasonable time may either be an inference of law from the particular facts, that is, where they are such as fall within any general known rule of law, or may depend upon the conclusion of the jury that the time is reasonable or not, in point of fact, with reference to the ordinary practice and course of dealing, or to a man's duty as a moral agent, under the particular circumstances of the case (*e*). Reasonable time.

(*t*) See above, tit. PENAL ACTION—HUNDRED.

(*u*) *Supra*, 312.

(*x*) Second resolution, *Lord Cromwell's Case*, 2 Rep. 74. See further, 2 Ld. Ray. 1096; 2 Burr. 1162.

(*y*) 3 Burr. 1241. 1334; Dy. 345; Salk. 625; 3 Wils. 274. In the older authorities it is stated, with a precision somewhat amusing, that as an instant is the end of one time and beginning of another, it may be divided into two parts. So that in consideration of law there is a *priority* of time in an instant, Co. Litt. 185, b. This nice operation of bisecting an instant, is, however, permitted, merely *ex indulgentiâ legis*; for though according to what is termed "the *learning* of instants," an instant may be divided into two parts, yet the law will by no means permit it to be carved out into three; *Fitzwilliam's Case*, 6 Co. 33. Where the word *instanter* occurs in a rule to abide by a special plea, according to the practice of the Common Pleas, it appears that twenty-four hours is meant. (*Price* v. *Simpson*, 1 Taunt. 343.) But *qu.* whether *instanter*, as applied to the subject-matter, may not be taken to mean before the rising of the Court, where the act is to be done in Court, or before the shutting of the office on the same night when the act is to be done there. *R.* v. *Johnson*, 6 East, 587, n.

(*z*) *Pugh* v. *Robinson*, 1 T. R. 116.

(*a*) *Cooke* v. *Scholl*, 5 T. R. 255. *Ex parte Furquhar*, *infra*. *Cowie* v. *Harris*, 1 M. & M. 141. *Hardy* v. *Ryle*, 9 B. & C. 603, *infra*, 1137. Lord Holt's rule as to age, 1 Salk. 44; 4 B. & Ad. 264. *Godson* v. *Sanctuary*, 4 B. & Ad. 255.

(*b*) *Thomas* v. *Desanges*, 2 B. & A. 586.

(*c*) *Shoebridge* v. *Tewin*, 6 Dowl. P. C. 126.

(*d*) Com. Dig. Temps. D.

(*e*) 4 B. & A. 389; Stra. 1271; Co. Litt. 56, b.; Willes, 135. 206. Vol. I. tit. LAW and FACT.

Reasonable time.

If a bill of lading stipulate for the payment of demurrage by the consignee of goods after a limited time from the ship's arrival, if the goods of the particular consignee are not ready for discharge at the time of the ship's arrival, he must have a reasonable time for removing them after they are ready; and in such a case, if, after using reasonable dispatch, he cannot clear them within the stipulated period, he will not be liable for demurrage till the expiration of such reasonable time; but when that is expired, he will be liable, though the stipulated period, reckoning from the time when the discharge of his own goods might have commenced, has not elapsed (*f*).

If a deed be proved to have been delivered, but the time of delivery does not appear, it shall be intended to have been delivered on the day of the date (*g*).

An action will not lie on a contract made on a Sunday (*h*).

Unless the date of an instrument be impeached by evidence, it will be taken to be the true date (*i*).

TITHES.

Particulars of proof.

In an action of debt under the stat. 2 & 3 Ed. 6, c. 13 (*k*), for not setting out tithes, the plaintiff must establish, 1st, his title as rector, lay impropriator, &c.; and 2dly, the defendant's liability as an occupier of lands within the parish, &c.; 3dly, the value of the tithe.

1st, Direct evidence of title in detail consists in proof of the plaintiff's ordination by the bishop, and his institution and induction, his subscription to the Act of Uniformity in the presence of the bishop, and his reading the 39 Articles within two months, and declaring his assent to them (*l*); but it will be presumed that he has read them till the contrary be proved (*m*).

(*f*) *Rogers* v. *Hunter*, 1 M. & M. 63; and see *Harman* v. *Gandolph*, 1 Holt's C. 35. *Harman* v. *Maut*, 4 Camp. 161; *Leer* v. *Yates*, 3 Taunt. 387.

(*g*) Per Coke, C. J. who directed the jury accordingly, 1 Rol. R. 3, pl. 5. *Stone* v. *Grabham*, 12 Vin. Ab. Q. a. A lease dated the 1st of May, to hold from the *date*, or *day of the date*, commences on the 2d of May, Co. Litt. 46 b.; but to hold from the making thereof, or *thenceforth*, commences on the day on which delivered. A lease dated on the *fortieth* of March, to begin from the date, takes effect from the time of delivery. A. on the 2d of August makes an obligation to *B.*; afterwards, on the same day, *B.* releases all actions *usque datum scripti*, the obligation is discharged, for date means delivery. *Secus* if the release be to the day of the date, *Rooke* v. *Richards*, 9 Car. B. R. Harg. Co. Litt. 46 b. (8.) Condition to stand to an award made within four days of the date, an award made afterwards on the same day is binding. *Street's Case*, Stiles, 382. The day of the date may be construed either exclusively or inclusively, according to the intention of the parties as collected from the context and subject-matter. *Pugh* v. *Duke of Leeds*, Cowp. 714.

(*h*) *Smith* v. *Sparrow*, 4 Bingh. 84. *Fennell* v. *Ridler*, 5 B. & C. 406.

(*i*) *Anderson* v. *Weston*, 7 Bing. N. C. 296. The time of an indorsement without date is a question for the jury. Ib.

(*k*) This stat. gives treble the value of the tithes withheld; and when the single value found by the jury does not exceed 20 nobles (6*l.* 13*s.* 4*d.*) the stat. 8 & 9 W. 3, c. 11, s. 3, gives the plaintiff his costs; if the jury find the single value above that sum, or an arbitrator awards a less sum, or where the plaintiff declaring for a less sum, the defendant suffers judgment by default, so that the value is not found by the jury, the defendant is not liable to these costs. See *Barnard* v. *Moss*, 1 H. B. 107. But still the costs may be taxed for the plaintiff on a count for the single value. Ib. Small tithes to the value of 10*l.* are recoverable before two justices, by stat. 7 & 8 W. 3, c. 6; 53 G. 3, c. 127; 5 & 6 W. 4, c. 74. See 2 Burn's J. tit. TITHES. Where the appellant against a summary proceeding for tithes under the statute 7 & 8 W. 3, c. 6, s. 1, appeared before the justices, but offered no evidence of a modus, held that such evidence was properly rejected by the justices at sessions. *R* v. *Jefferys*, 1 B. & C. 604. See the Commutation Act, 6 & 7 W. 4, c. 71.

(*l*) B. N. P. 188. See Watson's C. L. 6.

(*m*) *Powell* v. *Milbank*, 3 Wils. 355; 2 Bl. 851. After fifteen years' possession of a benefice, the testimony of several persons, who stated that they had generally

Presumptive evidence of title is usually sufficient, as, by proof of undisturbed possession of the rectory and perception of tithes without dispute (*n*). But evidence that the plaintiff, as farmer of the tithes, called a meeting of the parishioners, and proposed a composition, which was not followed by any agreement, although no one of the meeting disputed his title, was held to be insufficient (*o*). Presumptive evidence of title.

The stat. 2 & 3 Ed. 6, c. 13, which gives the action, enacts, "that no person shall from thenceforth take or carry away any such or like tithes which have been yielded or paid within forty years, or of right ought to have been paid, &c." (*p*). If the declaration state that tithes have been paid within the forty years, evidence, it seems, is requisite to prove the fact (*q*). But if it be merely alleged that the tithes were payable, it will be presumed that tithes were then payable to the rector (*r*), even although tithe of corn be claimed, and it appear that as far as living memory extends the lands have been in pasture, and have paid no tithe (*s*). And if the defendant object that the articles of which tithe is claimed were not cultivated in England previous to the stat. of Ed. 6, the burthen of proof will lie upon him (*t*).

Tithes are due to the rector of common right; but where a vicar (*u*) or other person claims, proof of the endowment or other title is necessary.

attended divine service for the two months next after the plaintiff's possession, and that none of them had heard him read the 39 Articles, was held to be of no weight. *Chapman* v. *Beard*, Gwill. 1482; 3 Anstr. 942.

(*n*) *Radford* v. *Macintosh*, 3 T. R. 635. *Barnes* v. *Messenger*, 13 East, 250; *infra*, 790. *Chapman* v. *Beard*, Gwill. 1482; B. N. P. 188. Possession of tithes is sufficient. *Wheeler* v. *Heydon*, Cro. Jac. 328.

(*o*) *Wybird* v. *Tuck*, 1 B. & P. 458; Gwill. 1517.

(*p*) The omission of this allegation is fatal, even after verdict. *Butt* v. *Howard*, 4 B. & A. 655.

(*q*) *Lord Mansfield* v. *Clarke*, 9 Geo. 3, 5 T. R. 264, n.

(*r*) *Mitchell* v. *Walker*, 5 T. R. 260.

(*s*) Ibid. In *Kinaston* v. *Clarke*, Summer Assizes, Salop, 1769, cited, 5 T. R. 265, n. Yates, J. is stated to have said, that he thought it necessary to prove perception of tithe in kind, in analogy to the meaning of the legislature at the time of passing the Act; but Buller, J. said that the note of this case was a loose one, and not to be depended on.

(*t*) *Hallirell* v *Trapps*, 2 N. R. 173.

(*u*) The vicar can only make out his title to the claim of small tithes by evidence either of endowment or of prescriptive enjoyment. *Hiscocks* v. *Wilmot*, 1 Gow. C. 197. Where there had been long continued enjoyment according to recitals in ancient leases, which was answered by putting in the original grant of 32 Hen. 8, subject to a condition of endowment as to the vicar, the court presumed that the Crown dispensed with a strict performance of the condition, and that by some intermediate acts not appearing, the particular endowment was subsequently sanctioned and validated. *Woolley* v. *Birkenshaw*, 12 Pri. 702. Where, in the absence of any endowment, it was clear that agistment *eo nomine* had never been rendered either to the rector or vicar, but the result of the evidence of terriers from 1685 downwards, tended to show that the parishioners conceived the vicar to have under the lost endowment a right to all the small tithes of the parish except certain tithes specifically stated to belong to the rector: and on the other side there was much, and clear evidence of a money-payment to the vicar, which covered hay and *grassing*, and an absence of all perception, the Court declined to decree for the vicar for agistment, but offered an issue; with respect also to certain townships wherein the vicar never had received nor shown any title to receive the whole of the small tithes, the Court held that it should not be presumed that the endowment contained a gift to him in general terms within the rule established by the authorities. *Willis* v. *Farrer*, 2 Y. & J. 217. And see *Clark* v. *Stapler*, Gow. 926. *Cartwright* v. *Bailey*, ib. 937; and *Kennicott* v. *Watson*, 2 Pri. 250, n. *Jeremy* v. *Strangeways*, ib. 472. Where the endowment is lost and the rector has received no small tithes, but the vicar all that have been rendered, it is to be presumed in favour of the vicar, that the endowment conferred on him by a general expression all small tithes whatsoever, and when that is inferred, they carry not only such as were then actually received, but such as although then neglected, came afterwards into existence by reason of improvements in husbandry. *Ib.* Upon a question whether the vicar was entitled to certain small tithes claimed throughout the parish generally, and the issue tendered

Proof of perception.

Proof of the actual perception of tithes of the kind claimed is forcible evidence of the right (*x*). Evidence, even in a single instance within thirty years, of a composition with the vicar for agistment tithe of a particular close, has been held to be sufficient to entitle him to small tithes, on a bill filed by him for tithe herbage and furze (*y*).

Proof of the payment even of a bad modus is evidence of title to tithes in kind; for it is a temporary composition for the tithes demanded, which is evidence of the enjoyment of and title to the tithes themselves (*z*).

An endowment may be established by evidence of usage, which would not support a prescription. Many endowments have been made within the time of legal memory, and the deeds being lost can be proved by usage only (*a*). Usage is the broad ground of presuming in favour of the vicar's endowment; and if tithes have been usually received by the vicar which are not expressed in the original endowment, a subsequent endowment will be presumed (*b*).

Evidence of the perception of the tithe of hay, and of small tithes by a vicar, is evidence of a prescription which supposes an endowment (*c*).

Proof that the rector of the parish *B.* has for many years received tithes for land in the parish *H.* is evidence of title in the rector of *B.* to the tithe of that land as against the occupier (*d*).

Payment, &c.

A receipt for tithes, signed not by the receiver, but merely by his deputy, has been held to be inadmissible (*e*). And where a modus of every tenth day's cheese for a certain period of the year, in lieu of milk, was insisted on, proof of the delivery of the cheese at the house of the tithe gatherer, but not to himself, was held to be inadmissible to prove the perception of the modus (*f*). Payment of a composition for turnips, whether pulled or eaten off the ground, was held to be no evidence of perception of agistment tithe (*g*).

Lay impropriator.

If the plaintiff sue as lay impropriator, proof of his title usually consists

by the defendant was, whether he was entitled to those of a small part of the parish, in which the defendant's lands were situate, alleged to belong to the owner of the lay fee, held, that admitting thereby the vicar's general title, it was for the defendant to make out the exemption, and very slight evidence of perception by the plaintiff being sufficient, the defendant was not permitted to avail himself merely of supposed inadmissibility of evidence where he offered none in support of his own case, and that sequestrator's accounts produced from the bishop's registry were admissible and alone sufficient to sustain the verdict in favour of the plaintiff. If the evidence were improperly received, still if there was any which was unobjectionable and sufficient to sustain the verdict, the Court would act upon it. *Pulley* v. *Hinton*, 12 Pri. 625.

(*x*) Where several species of small tithes have been received by the vicar, which have not been included in the original endowment, which enumerated certain articles only, it was held that it extended to tithes *ejusdem generis*. *Manby* v. *Lodge*, 9 Price, 244. *Manby* v. *Curtis*, 1 Price, 225. So if he has taken other small tithes, agistment tithes will be decreed. *Scott* v. *Lawson*, 7 Price, 267; *infra* note (*b*).

(*y*) *Goole* v. *Jordan*, Gwill. 648.

(*z*) *Travis* v. *Oxton*, Gwill. 1074.

(*a*) *Jackson* v. *Walker*, Gwill. 1231.

(*b*) *Williams* v. *Price and others*, 4 *Price*, 156. *Cunliffe* v. *Taylor*, 2 Price, 329. *Parsons* v. *Bellamy*, 4 Price, 190. But where the vicar rests on presumptive evidence of endowment arising from perception, unless he show that he has received tithe from the part of the parish in respect of which exemption is claimed, the defendants will be entitled to an issue. *Armstrong* v. *Hewett and others*, 4 Price, 216. Vide *etiam*, *Kennicott* v. *Watson*, 2 Price, 250, n. The vicar must show actual perception of such other tithes. *Ibid.* If we find the vicar receiving small tithes and no one else receiving any portion, it is to be presumed he is endowed of all; per Gibbs, C. B. 1b.

(*c*) *Travis* v. *Oxton*, Gwill. 1066.

(*d*) *Barnes* v. *Messenger*, 13 East, 250.

(*e*) *Yate* v. *Leigh*, Gwill. 861.

(*f*) *Wake* v. *Russ*, Gwill. 1396; 1 Anstr. 295.

(*g*) Gwill. 1462.

in showing that the tithes belonged to one of the dissolved monasteries, and were granted to one from whom he deduces his own title (*h*). Enjoyment of the tithes and ancient deeds conveying the tithes, are in such cases evidence of title (*i*). Lay impropriator.

If he sue as lessee of tithes, he must, in addition to the title of his lessor, prove the lease (*k*). And it seems that if he show himself to be entitled to a moiety only (*l*), as under an assignment of a lease by one of two joint-tenants, he will be entitled to recover (*m*). Lessee.

It seems that if a lessee of tithes describe himself as the owner and proprietor, the objection is fatal (*n*).

The notice of determining a composition for tithes is on the same footing as a notice to quit lands, *i. e.* a six months' notice terminating at the end of the year of composition; where therefore the year ended at Michaelmas, and the notice was given in, held that it did not apply to tithes of wool which became due in May (*o*).

If there has been any composition for tithes with the plaintiff, he must show that it has been determined by a six months' notice previous to the end of the current year (*p*). Where the inhabitants had for many years been in the habit of paying a composition for vicarial tithes, and the vicar at the usual time of settlement gave oral notice that he should for the future require tithes to be paid in kind, the notice was held to be sufficient to determine the composition (*q*). But a mere conversation, and demand of tithes, and refusal of the annual composition of 40*s.* without any formal notice, was held to be insufficient (*r*). Determination of composition.

Where the defendant sets up a modus, but fails, it seems that he cannot afterwards insist upon the want of notice (*s*), any more than a tenant can after setting up an adverse title.

(*h*) Com. Rep. 651; *infra*, 791.

(*i*) *Supra*, PRESCRIPTION — GRANT. *Kinaston* v. *Clarke*, 5 T. R. 265; Gwill. 960.

(*k*) B. N. P. 188. And a lessee cannot maintain an action under the statute in respect of tithes severed before the lease, for on severance they vested in the lessor, *Wyburd* v. *Tuck*, 1 B. & P. 158. If a parson sows his glebe and then leases it, he is entitled to tithe. Burn's Ecc. Law, tit. *Vacation; Tithe*. So if he sell the emblements, reserving the lands. If a parson let his rectory, reserving the glebe lands, he shall pay tithe to the lessee. Gib. 661. Burn's Eccl. Law, *Tithe*, iii. 7.

(*l*) *Nelthorpe* v. *Dorrington*, 2 Lev. 113. Per Buller, J., 1 B. & P. 464.

(*m*) *Wyburd* v. *Tuck*, 1 B. & P. 458.

(*n*) *Stevens* v. *Aldridge*, 5 Price, 334. The objection was not taken on the trial, but after a verdict for the defendant. Wood, B. said, that there had been many instances of new trials being refused where a fatal objection appeared on the record.

(*o*) *Goode* v. *Howells*, 4 M. & W. 198.

(*p*) *Bishop* v. *Chichester*, 2 Bro. Ch. R. 161; Gwill. 1217. 1220. The same notice must be given as to a tenant of lands. *Hewitt* v. *Adams*, Dom. Proc. April 19th, 1782; 12 East, 84, n. cited; 1 B. & P. 460. If *A.* lease tithes to *B.* pending a composition, and *A.* afterwards determines the lease of *B.* before any alteration is made in the composition, *A.* cannot determine it without six months' notice. *Wyburd* v. *Tuck*, 1 B. & P. 458. If the bargainee of tithes for one year underlet them to the occupiers, no notice from the bargainee for the following year is necessary. *Cox* v. *Braine*, 3 Taunt. 95. A composition for tithes ceases with the death of the incumbent, as far as regards his successor. *Paynton* v. *Kirby*, 2 Ch. 405. If the successor receives the next payment, he is liable to the executors of his predecessor for such part only as would have been paid to him in kind had he survived, and not *pro rata*, in proportion to the time which had run between the last payment and his death. *Williams* v. *Powell*. 10 East, 269. *Qu.* Whether a composition with the predecessor be *primâ facie* evidence of value. *Paynton* v. *Kirby*, 2 Ch. 405.

(*q*) *Leech* v. *Bailey*, 6 Price, 504.

(*r*) *Fell* v. *Wilson*, 12 East, 83.

(*s*) Per Richards, C. B. in *Leech* v. *Bailey*, 6 Price, 504. Lord Thurlow was of a different opinion in *Bishop* v. *Chichester*, on the authority, it seems, of *Adams* v. *Hewitt*, and contrary to his own judgment. See Peake's L. E. 443, note (*c*). But in *Bower* v. *Major*, 3 Moore, 216;

Defence.

The defendant may, it seems, in an action for tithes in specie, prove a simoniacal presentation, which, under the stat. 31 Eliz. c. 6, renders the clerk's admission, institution and induction, wholly void (*t*). But this is no defence to an action for a composition for tithes, where one year's composition has been paid (*u*), or to an action for use and occupation, where rent has been paid to the parson (*x*).

An incumbent *de facto* has a right to sue for tithes (*y*).

Severance.

A layman (*z*) cannot prescribe *de non decimando*, either as against a priest or lay rector (*a*); for the maxim of law is *nullum tempus occurrit ecclesiæ*; and therefore the mere fact that tithe has not been paid affords no defence. Tithe is every day claimed for lands inclosed out of wastes which have never paid tithe before (*b*). But as ecclesiastics might, previously to the restraining statutes, have alienated their possessions *sub modo* (*c*), the defendant may prove either an actual severance of the tithes, or that a composition real has been entered into.

And the fact of severance may be established, not only by means of the deed, but also by such presumptive evidence as warrants the conclusion of severance in fact. Thus, in the case of *The Countess of Dartmouth* v. *Roberts* (*d*), it was proved that the vicar had been endowed of the tithe of hay throughout the whole parish in the year 1253, and that the right remained annexed to the vicarage on the dissolution of the monasteries. The plaintiff, on the other hand, claimed under a deed, purporting to convey the tithe, dated 1676, and proved perception as far as living memory extended. Evidence was also given that the vicar had in the year 1777 instituted a suit for the tithe of hay against an occupier of land held by the present plaintiff, but that the right had been denied by the defendant's answer, and the suit abandoned. The jury by their verdict negatived the claim of the vicar; and the Court held that the verdict was right. Lord Ellenborough observed, "Assuming that under the endowment the vicar was once well entitled to the tithe of hay co-extensive with the limits of his parish, he might, before the restraining statutes, have granted it to another ecclesiastical person, with the consent of the patron and ordinary; there would then have been a portion of tithes dissevered from the vicarage; and there was evidence that it was so dissevered, from the conveyance of the tithe in 1676 to Lord Halifax, which, after their disseverance, but prior to the restraining statutes, might have got into lay hands. We therefore want to pray in aid only this supposition as to these portions of tithe which appear to have been enjoyed, dissevered from the vicarage, that they were so dissevered. And in favour of modern enjoyment, which is the best interpreter of right where docu-

1 B. & B. 4, a refusal to pay a composition, alleging a modus, was held to be sufficient to determine the composition.

(*t*) Hob. 168. *Brooksby* v. *Watts*, 6 Taunt. 333.

(*u*) *Brooksby* v. *Watts*, 6 Taunt. 333.

(*x*) *Cooke* v. *Loxley*, 5 T. R. 4.

(*y*) Per Tenterden, L. C. J., *Halton* v. *Lore*, 1 B. & Ad. 559.

(*z*) But a bishop, his tenant or copyholder, may show that he and all his predecessors have held the manor by them and their tenants discharged of tithes. *Bishop of Winchester's Case*, 2 Co. 44.

(*a*) See *Lord Mansfield* v. *Clarke*, 5 T. R. 264, n.

(*b*) Per Ld. Kenyon, *Mitchell* v. *Walker*, 5 T. R. 260.

(*c*) See the observations of Buller, J. in *Mitchell* v. *Walker*, 5 T. R. 260; and of Wilmot, C. J. in *Lord Mansfield* v. *Clarke*, 5 T. R. 264, n. So, although a college is disabled by the stat. 13 Eliz. from making a grant, yet, as before that statute colleges were at liberty to make such grants, if it appear that land, although constantly ploughed, has paid no tithes, the case will lie open to the presumption of a grant. *Ibid.*

(*d*) 16 East, 334.

mentary evidence does not exist, we will, in conformity with Lord Kenyon, who said that he would presume two hundred deeds if necessary, presume that a disseverance took place." Severance.

A composition real in the case of an ecclesiastical rector must have been made before the 13th of Eliz. by deed executed by the incumbent, together with the patron and ordinary, by which the particular lands were freed of tithes, in consideration of a recompense to the incumbent and his successors (*e*). The direct evidence of such a composition is the deed itself; this evidence can, however, rarely be expected (*f*). And such a composition may be established by evidence short of the production of the deed (*g*). Composition, real.

But mere usage in receiving a specific money payment in lieu of tithes is not in itself sufficient evidence on which to found a presumption of such a deed; for temporary agreements may be continued for convenience by a succession of incumbents; and there is no adverse enjoyment, such as supplies a presumption of a grant in ordinary cases (*h*).

The rule is also to be considered, it seems, partly as a rule of policy, to prevent the church from being defrauded: were it otherwise, every bad modus would be turned into a good composition (*i*), and consequently none can be presumed which is subsequent to the stat. 13 Eliz. Hence it is now an established rule that some evidence, independently of mere usage, must be adduced, to show that such a composition did once exist (*k*). As, where instruments are given in evidence which strongly denote that such a transaction has taken place (*l*).

So, where in fact the occupier has long retained that which by law he ought not to retain, and yielded to the parson that which of common right he is not bound to yield, this mutuality of loss and gain, acquiesced in for a length of time, is strong corroborating evidence that such an agreement has been executed by the necessary parties. But the bare fact that the parson has received less than of common right is due, or that which is due in a less beneficial manner, is not a ground for presuming a real composition; for where there is no mutuality, it cannot be presumed that the parson, with the consent of the patron and ordinary, agreed to forego his legal rights (*m*).

(*e*) Gibson's Codex, tit. 30, c. 5. Degge's P. C. part 2, c. 20. *Knight* v. *Halsey*, 2 B. & P. 204.

(*f*) 2 B. & P. 206.

(*g*) Ibid.; and *Sawbridge* v. *Benton*, Anstr. 375. The evidence in support of a composition real was the partition of the lands *temp.* C. 2, and a title deduced by various deeds therefrom, by which it appeared that a money-payment was payable in lieu of tithes; there was also a verdict in favour of the defendant, in a suit by the rector for such tithes, and there was no evidence of their having been rendered since the time of Ed. 2.; it was held, that in the total absence of reference to any deed of composition, the evidence to sustain it was insufficient, and an account was therefore decreed. *Lediard* v. *Anstey*, 3 Y. & J. 548. See also *Berney* v. *Harvey*, 17 Ves. 119. Upon an issue in a suit for tithes by a lay impropriator, against parties setting up title by grant in another, claiming also by lay fee the tithe of particular lands in their occupation, and a verdict for the defendants, the Court refused a new trial on the ground of misdirection as to the doctrine of legal presumption applying against lay impropriators against whom a grant may be presumed, if sustained by evidence; held also, that the question of locality having been decided by the jury, and being within their peculiar province, the Court was bound by it. *Ringrose* v. *Todd*, 12 Pri. 650.

(*h*) P. C. *Knight* v. *Halsey*, 2 B. & P. 206; *supra*, 912.

(*i*) *Knight* v. *Halsey*, 2 B. & P. 206. *Heathcote* v. *Mainwaring*, 3 Bro. C. C. 217.

(*k*) *Robinson* v. *Appleton*, 4 Wood, 10. *Hawes* v. *Swain*, 4 Wood, 313. *Knight* v. *Halsey*, in Dom. Proc. 2 B. & P. 172. 206. Per Lord Hardwicke, *Rotherham* v. *Fanshawe*, 3 Atk. 628.

(*l*) *Sawbridge* v. *Benton*, Anst. 375.

(*m*) *Knight* v. *Halsey*, 2 B. & P. 206. Rolle's opinion in the case of the *Earl of*

Composition, real.

A disseverance, or composition real, cannot be presumed from the mere fact of non-payment of tithes to the church. Upon a bill filed by the vicar of Chatteris for an account of the tithes of a tract of land called Acre Fen, and where it was answered, that from time immemorial, and before the endowment of the vicarage, the rector impropriate held the Miles Lands in lieu of the tithes of Acre Fen, but no evidence was offered to prove this, except that no tithe within living memory had been paid in respect of Acre Fen, and the deposition of a witness as to hearsay declarations by old persons, since deceased, that the Miles Lands had been given in lieu of the tithes of Acre Fen, the deposition was rejected, and the evidence held to be insufficient (*n*).

As an ecclesiastical rector cannot sever the tithes by grant, no grant can be presumed; but inasmuch as a lay impropriator may sever and aliene the tithes, it may no doubt be presumed, upon proper evidence, that he has done so. Doubts, however, have occurred upon the question, what evidence will be sufficient to support such a presumption. It is clear, that proof of actual and continued possession of the tithes by the party who claims adversely to the rector, is evidence on which the existence of a grant may be founded (*o*).

But in the cases of *The Corporation of Bury* v. *Evans* (*p*), *Nagle* v. *Edwards* (*q*), and *Meade* v. *Norbury* (*r*), it was held that the long enjoyment of lands without payment of tithes was not a sufficient foundation for presuming a grant from the lay impropriator. On the other hand, Wilmot, C. J., in the case of *Lord Mansfield* v. *Clarke* (*s*), was of opinion, that if in the case of a lay impropriator it appeared that land had been constantly ploughed, and that tithes had never been paid, the case was open to the presumption of a grant, and that it had been so settled in *Rotherham* v. *Fanshawe* (*t*).

Buller, J. in the case of *Mitchell* v. *Walker* (*u*), intimated his opinion that such non-payment would afford some ground for such a presumption.

Lord Loughborough, in the case of *Rose* v. *Calland* (*x*), expressed his disapprobation of the doctrine in the Court of Exchequer, in not presuming a grant under such circumstances by the lay impropriator.

Lord Mansfield, in the case of *Franklin* v. *Holmes* (*y*), expressed his disapprobation of the doctrine, that a composition real could not be proved by presuming a grant before the stat. 13 Eliz.

Lord Eldon, C. observed (*z*), that there was a decision in the Court of Exchequer against it in the year 1727, and that both Lord Talbot and Lord Hardwicke struggled against it.

In the case of *Meade* v. *Norbury* (*a*), Wood, B. argued very strongly that

Hertford v. *Leech*, 8 Car. 1; 2 Danv. Abr. 611, tit. *Dismes*, 1. pl. 2; Vin. Ab. tit. *Dismes*, (I. a) pl. 2.

(*n*) *Chatfield* v. *Fryer*, 1 Price 253; Wood, B. *dissentiente*.

(*o*) *Strutt* v. *Baker*, 4 Gwill. 1430, and the cases there cited; and per Richards, C. B. in *Meade* v. *Norbury*, 2 Price, 345. *Scott* v. *Airey*, 4 Gwill. 1174.

(*p*) 2 Gwill. 757.

(*q*) 3 Anst. 702.

(*r*) 2 Price, 338. Note, that in this case, in addition to the mere evidence of non-payment, it appeared that the land in question had once been in the possession of the lay impropriator; that a former impropriator had declared that the land was tithe-free; and that fifteen years before the impropriator had executed a lease of tithes, excepting the land in question. But the Court held that this evidence was not sufficient to support the presumption of a grant.

(*s*) 5 T. R. 264, n.

(*t*) 3 Atk. 628; 1 Eden's Cases in Chan. 276.

(*u*) 5 T. R. 260.

(*x*) 5 Ves. 186. Note, the *dictum* of Lord Loughborough in that case was extrajudicial. Per Richards, B., 2 Price, 367.

(*y*) 3 Gwill. 1229.

(*z*) 17 Ves. 127.

(*a*) 2 Price, 345.

a grant was to be presumed, insisting, that upon general and established legal principles a grant was to be presumed from long-continued enjoyment; and that as a grant on such evidence might be presumed, and had frequently been presumed, against the Crown itself (*b*) *à fortiori*, it might be presumed against a grantee under the Crown. Composition, real.

Without entering into any discussion on this question, it may be observed, that at all events the grounds of presumption in the two cases differ very essentially. An ecclesiastical rector could not enter into any composition even before the statute 13 Eliz., without receiving in return a recompence which should enure to himself and his *successors*; and a rule of policy intervenes, founded on the necessity of preserving the rights of the church, and perhaps also, the consideration that ecclesiastical incumbents, who have mere life-interests in the temporal revenues of the church, are likely to be more negligent in permitting encroachments than laymen would be in respect of their own private absolute property. A layman, on the other hand, might aliene at any time, as well before as after the statute, of his own authority, for a sum in gross; he is as likely to guard and husband such property with as much vigilance and industry as any other, so that the same degree of presumption is afforded by his laches as in any other case of private property; and, finally, no rule of policy intervenes to counteract the usual and ordinary rules of presumption. Whatever, therefore, the law may be on this question, it is impossible, in principle, to doubt that stronger evidence is necessary to prove a composition in the case of an ecclesiastical than in that of a lay rector.

It has since been held, that mere non-payment does not furnish a presumption of a grant against a lay impropriator (*c*).

Where the defendant insists upon a discharge by a modus, it is of course incumbent upon him to prove the payment of a sum in lieu of tithes so small that it may be considered to have been an immemorial payment. Such payment, when established in evidence, as far as living memory goes, will usually impose upon the plaintiff the burden of showing its origin, although the witnesses term it a composition (*d*). Modus.

The nature of the evidence adapted to establish or rebut a modus, or to establish a right to tithe by special custom, has already been adverted to (*e*).

(*b*) *R.* v. *Carpenter*, Show. 47. *Mayor of Hull* v. *Horner*, Cowp. 102. *Powell* v. *Milbanke*, 1 T. R. 399; Cowp. 103. *Oxenden* v. *Skinner*, 4 Gwill. 1513. Vide *supra*, 915. See also the opinion of Clarke, B. in *Fanshawe* v. *More*, 2 Gwill. 780. In the case of *Berney* v. *Harvey* (17 Ves. 119), Eldon, C. adopted the distinction between actual pernancy and a mere retainer.

(*c*) *Bayley* v. *Driver*, 1 A. & E. 449.

(*d*) *Driffield* v. *Orrell*, 6 Price, 325. Or a rent; *Manby* v. *Lodge*, 9 Price, 246.

(*e*) See tit. PRESCRIPTION—CUSTOM—REPUTATION. A variance in the amount paid destroys the modus. *Short* v. *Lee*, 2 J. & W. 493; and see tit. PRESCRIPTION. Where a modus has covered a farm and common, and all tithes arising from them, it also covers the new crops raised on the allotment. *Askew* v. *Wilkinson*, 2 B. & Ad. 152; *Stockwell* v. *Terry*, 1 Ves. 115; *Steele* v. *Manns*, 5 B. & A. 22. In the first of these the Court called in question the judgment of the C. B. of the Exchequer, in the case of *The Bishop of Carlisle* v. *Blair*, 1 Y. & J. 123. A plea of a modus of 4*d*. an acre for ancient pasture land in the hands of an out-dweller, and where restored to pasture after being broken up, the same modus payable, held bad; the antiquity on which such a payment could be valid can only be referred to the time of legal memory, viz. of Richard 1st, and must continue such; *semble*, however, that if properly pleaded, a modus might be supported in respect of the land when in a particular state of cultivation, and that a modus may be good for lands occupied by an out-dweller, which nevertheless pays tithes in the hands of an inhabitant. *Cooper* v. *Byron*, 3 Younge & C. 467. The questions of rankness, and in respect of what a sum of money has been paid for more than a century, are peculiarly fit for the consideration of a jury, upon an issue directed. *Lord Redes-*

Modus.

The documentary evidence in such cases consists in judgments, decrees, depositions, bills and answers, public surveys, inspeximuses, terriers, books of account, or other private writings.

By the stat. 2 & 3 W. 4, c. 100, s. 1 (*f*), the time of prescription in the case of tithes claimed by the King, Duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate, is thirty years, and shall be valid, unless in the case of a modus, a different kind of payment, or in case of a claim to exemption or discharge, a render or payment shall be proved before the thirty years, or that such payment or render of modus was made or enjoyment had, by some consent or agreement, expressly made or given for that purpose, by deed or writing; and if such proof be extended to sixty years next before the time of such demand, the claim shall be deemed absolute and indefeasible, unless it be proved that such payment or render was made or enjoyment had, by some consent or agreement expressly made or given for that purpose, by deed or writing; and where the render shall be demanded by any archbishop, bishop, &c., or other corporation sole, spiritual, or temporal, such prescription and claim shall be valid and indefeasible, upon evidence showing such payment or render made or enjoyment had, as before-mentioned, during the time that two persons in succession shall have held the office or benefice, and for not less than three years after the appointment and institution or induction of a third person thereto; provided that if the whole time of holding by such two persons shall be less than sixty years, it shall be necessary to show such payment or render made, or enjoyment had, not only during the whole of such time, but also during such further number of years before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years; and also for and during the further period of three years after the appointment and institution or induction of a third person to the said office or benefice, unless it shall be proved that such payment or render was made or enjoyment had by some consent

dale v. *Walby*, 1 Younge, 202. Where the plaintiff claimed only by his bill an account of tithe of hay, which the defendant set up as covered by a modus of 2*d.* an acre in lieu of the tithes of hay or ancient meadows, and went on to allege that it covered also the tithe of agistment as to part of the year, and the evidence established the modus for the tithe of hay, but not the agistment; held that the variation between the modus as laid and proved, was not fatal to the defence, the right to the tithe of agistment not being in any manner a question in the cause. *Pope* v. *Farthing*, 1 Younge, 263. Upon an issue whether a certain district called *A.* park was covered by a modus of 3*l.* 6*s.* 8*d.* in lieu of tithes, it was held that the word *tithes* in ancient documents does not necessarily import tithes in kind, but may mean, according to circumstances, either tithes in kind, or a money-payment in lieu thereof; 2dly, that after payment shown in respect of the entire district for above 150 years, although the extent might be inconsistent with the description of the *A.* park in ancient documents so denominated, and the question not being what was the ancient district so called, but whether the payment had always been for the district now so denominated, it was for the jury to decide upon the documentary evidence; and lastly, upon the supposition that the modus was to cover the whole district, it could not be deemed bad as being rank. *Beck* v. *Bree*, 1 Cr. & J. 246. Contemporaneous documents and proceedings in causes, and also parol testimony, may be used to explain a deed and give it a construction, under certain modifications; but not to contradict it, or make it a different deed. *Lucton Governors, &c.* v. *Scarlett*, 2 Y. & J. 360.

(*f*) Where at the time of the passing of the 2 & 3 W. 4, c. 100, a suit was pending in equity, under which a composition was set aside, held that he was not prevented from proceeding in an action of debt on 2 & 3 Ed. 6, for not setting out the tithes before the determination of an appeal pending before the House of Lords against the decree in equity. *Thorpe* v. *Mettingley*, 5 M. & W. 302.

or agreement, expressly made or given for that purpose, by deed or writing. Modus.

By section 2, certain compositions for tithes are rendered valid.

By section 4, the Act is not to extend to cases where tithes have been demised, &c.

Sections 5 and 6 exclude from the computation times during which lands shall be held by persons entitled to tithes, and during infancy, &c.

A verdict between a parson and occupier of lands is evidence, though not conclusive, upon the like point between the parson and another occupier relating to the same lands (*g*). Verdict, decree, &c.

A decree between the same parties on the same point is conclusive evidence (*h*). But it is not conclusive on others where the parties to the suit were not competent to bind the right in question. Thus, in a suit between the vicar and occupiers for an account of small tithes, a former decree between the vicar and impropriator, declaring the former to be entitled to all small tithes under the endowment, was held to be inconclusive; for the vicar had no power to bind the interests of his successors, and the decree in his favour could not be more conclusive than if it had been to his prejudice, and it was considered to be of no more force in respect of the successors of the vicar, who was a party to it, than a decree for an account of the tithes (*i*).

Where the defendants in an action by a rector for tithes, insisted that the lands formerly belonged to a monastery, dissolved by the stat. 31 Hen. 8, and offered in evidence a decree to which the lessee, and not the impropriator, was a party, it was held that it was admissible (*k*), on the ground that it would have been evidence for the plaintiff, had the lessee prevailed.

But in general a decree is not admissible unless it relate to the same lands and title (*l*).

A decree professing to establish customs of tithing, and modes of payment, obviously illegal, as moduses founded on agreements not ratified by the ordinary and patron, and not on a *bonâ fide* adverse suit to establish the moduses, and pronounced in a cause to which the patron and ordinary were not parties, is not binding either on the church or the court (*m*).

Depositions taken in a former cause between the parties, or those who claim under them, upon the same question, are admissible (*n*) after the death of the deponents (*o*). And it has even been held, that on the trial of an issue to try whether the vicar was entitled to agistment tithe, depositions in a former suit between a lessee and an occupier were admissible against the vicar, although neither the bill nor answer were produced, and although the vicar was not a party but a witness in that suit (*p*). But the principle of this decision seems to be very questionable. Depositions.

Upon a question of modus, the answer of the defendant to a former bill filed by the same plaintiff, in which he set up a different modus relating to the same lands, was held to be admissible evidence (*q*). An answer by a Bill and answer.

(*g*) *Benson* v. *Olive*, Gwill. 702. *Travis* v. *Chaloner*, Gwill. 1235.

(*h*) Vol I. tit. JUDGMENT. *Carr* v. *Heaton*, Gwill. 1258.

(*i*) *Carr* v. *Heaton*, Gwill. 1258. The ordinary, who has a temporal interest in the lapsed presentation to a church, must be made a party to a bill to establish a modus. *Cook* v. *Batt*, 6 Madd. 53; Gwil. 2029.

(*k*) *Bishop of Lincoln* v. *Ellis*, Gwill. 632; Bun. 110. Per Montague, C. B. and Price, B.; but Page, B. dissented.

(*l*) *Benson* v. *Olive*, Gwill. 701; Bunb. 284.

(*m*) *Jenkinson* v. *Royston*, 5 Price, 495.

(*n*) *Morgan* v. *Nevill*, Gwill. 1046.

(*o*) Vol. I. tit. DEPOSITIONS.

(*p*) *Illingworth* v. *Leigh*, Gwill. 1615. But see *Scott* v. *Allgood*, Gwill. 1369.

(*q*) *Ashby* v. *Power*, Gwill. 1239.

Bill and answer.

rector to a bill filed to establish a modus of a certain measure of meal as to one farm, admitting that the *parish* was exempt in consideration of a commutation for meal, was held to be strong evidence to prove a district modus (*r*).

Surveys.

Ancient documents of a public nature, made under authority, are also admissible, and frequently very material evidence in cases of this description, such as Pope Nicholas's taxation; the ecclesiastical survey (*s*), and ministers' accounts in the time of Henry the 8th, and the parliamentary surveys in the time of the Commonwealth. These documents are, however, by no means conclusive in their nature, especially where an inference is attempted to be made from their silence as to a modus, in opposition to positive testimony (*t*).

The King's books are conclusive evidence of the value of a living (*u*); but ancient valuations are not conclusive, either as to the value of lands or of livings (*x*).

A survey of a religious house taken in the year 1563, was held to be good evidence to prove the vicar's right to small tithes (*y*). And copies from the cathedral churches of the surveys of crown and church lands, made under parliamentary commissions in 1647, have been held to be admissible evidence, the originals having been lost in the fire of London (*z*).

Terrier.

A terrier, as has been seen (*a*), is an instrument made under the authority of the canon law, and it derives its authority from being found in a proper place of deposit, the church chest (*b*), the bishop's register-office (*c*), or the registry of the archdeacon of the diocese (*d*), or from such a connection established between the instrument and the place where it is found, as reasonably accounts for its situation (*e*).

A terrier is always strong evidence against the parson, but not for him,

(*r*) *De Whelpdale* v. *Milburn*, 5 Price, 485.

(*s*) The ecclesiastical survey does not mention moduses, therefore no inference can be drawn from its silence. *Robinson* v. *Williamson*, 9 Price, 139.

(*t*) In a late case, *Driffield* v. *Orrell*, 6 Price, 325, where a parliamentary survey was offered in evidence to impeach a modus, Richards, C. B. observed, "The fact of a parliamentary survey not referring to a modus is nothing when opposed to proof of actual payment. Had that document, though it is certainly entitled to great weight on some questions, even stated that there was no modus, it would not, as being on that subject, *res inter alios acta*, be strong enough to overturn the positive evidence of actual payment; still less is the mere omission to mention it sufficient." And see *Jee* v. *Hockley*, 4 Price, 87; 5 Price, 377. Lord Ellenborough, C. J. in the case of *Roe* v. *Ireland*, 11 East, 284, observed, "The parliamentary survey stands very high in estimation for accuracy; it has happened to me to know several instances in which the extreme and minute accuracy of the commissioners who drew it has exceeded any thing that could be expected." *Supra*, tit. PRESCRIPTION. In *Blundell* v. *Howard*, 1 M. & S. 292, the same learned judge said, "That the parliamentary survey had been taken with great pains and accuracy; and that document being silent as to the modus, of itself afforded strong evidence against its existence."

(*u*) *Stump* v. *Ayliffe*, Gwill. 536; Dy. 237; Cro. Eliz. 853; Cro. Car. 456; 2 Lutw. 1305; 17 Vin. Ab. 362.

(*x*) Gwill. 857. 1240. 1347.

(*y*) *Travis* v. *Oxton*, Gwill. 1066.

(*z*) *Underhill* v. *Durham*, Gwill. 542. The object of the ecclesiastical survey was to ascertain the amount of the benefice, and not the resources from which it arose; it may therefore be controlled or explained by collateral documents and usage. Where it stated a vicarage to be worth a stated sum "in decimis minutis et oblationibus," but it appeared from documents and usage, that the vicar had only received certain small tithes, the court decided against his title to all small tithes. *Fletcher* v. *Masters*, Young. 25; *contra*, *Cunliffe* v. *Taylor*, 2 Pri. 329.

(*a*) Vol. I. tit. TERRIER.

(*b*) 4 Price, 218.

(*c*) Vol. I. p. 170. *Atkins* v. *Hatton*, Gwill. 1406; 2 Anst. 386; 3 Burn's Ecc. L. 379.

(*d*) 4 Price, 218.

(*e*) *Miller* v. *Foster*, Gwill. 1406; *supra*, Vol. I. tit. TERRIER.

unless it be signed by the churchwardens; and where they are of his nomination, by some of the substantial inhabitants also. Terrier.

In a suit between the vicar and an impropriatrix for the recovery of agistment tithe, it was held that terriers signed by the churchwardens only, stating that the vicar had all small tithes generally, were admissible; for it was signed by persons not only disinterested, but bound from their official duty to sign it, and the want of the vicar's signature made it stronger evidence in his favour (*f*).

Such instruments, when signed by the minister and parishioners, frequently afford the strongest evidence that can be adduced, either to disprove a modus altogether, or to determine the legal nature of a payment (*g*).

Where subsequent terriers all mention a money payment, their effect is not overcome by the omission in former terriers, one of which stated that there was no prescription, and another that all petit tithes were due (*h*).

A map made by one as lord of a manor, and produced by him, is evidence against him on an issue between himself and the rector, whether the former by himself, or by his agent, was in possession of glebe lands belonging to the plaintiff (*i*).

It has been seen that books of account of a preceding rector or vicar, relating to tithes, are evidence for his successors (*k*). So also are the books of a deceased lessee of an impropriate rectory, after the expiration of his interest (*l*). For he was under no greater temptation to fabricate false entries than a rector or vicar would be. What he might insert would not be evidence during the term, either for himself or his assignee. So a book of a former collector, of ancient date, found in the hands of his successor, was admitted in evidence, although his hand-writing could not be proved (*m*). Books of account.

(*f*) *Illingworth* v. *Leigh*, Gwill. 1615, B. N. P. 248. A terrier signed by churchwardens only is admissible to show that, generally speaking, the vicar was entitled to the small tithes. *Lewis* v. *Bridgman*, 3 Sim. 325. An ancient document signed by the rector, and headed "Notification of the tithes of the parish," although not coming out of the proper repository of a terrier, was yet held to be admissible evidence against a succeeding rector, as the admission of one of his predecessors, and upon the same principle as a receipt. *Maddison* v. *Nuttall*, 6 Bing. 226. Evidence of a single terrier, unsupported by usage, is insufficient evidence of a modus to entitle a defendant to an issue, and mere proof of non-render of tithes in kind is not sufficient to support a parochial modus; a party setting it up is bound to show distinctly the acceptance of it for some time and to some extent. *Lynes* v. *Lett*, 3 Y. & J. 405. Terriers stating the rector to be entitled to the small tithes of the parish, do not exclude the possible existence of money-payments in lieu thereof. *Fairfax* v. *Houldsworth*, 1 Younge, 79. Where, as well from the endowment as from subsequent surveys and early terriers, there appeared to be no evidence of any modus, but on the part of the defendant many terriers during a century stated payments as moduses, and the parol evidence for thirty years past showed such payments as moduses, the Court refused to direct an account without first directing an issue; held also, that terriers showing the modus payable for a district consisting of two townships, supported the modus laid in the answer, although it went on to state its being paid by a contribution amongst the inhabitants of the district, and that it was sufficient if the external boundaries of the whole district were defined with reasonable certainty. *Warmington* v. *Sadler*, 1 Younge, 283.

(*g*) See *Mytton* v. *Harris*, 3 Price, 19; *Drake* v. *Smith*, 5 Price, 369.

(*h*) *Stuart* v. *Greenall*, 9 Price, 113.

(*i*) *Allott* v. *Wilkinson*, Gwill. 1585; *supra*, Vol. I. tit. MAP.

(*k*) Vol. I. tit. RECEIVER'S BOOKS. *Lord Arundel's Case*, Gwill. 620; 12 Vin. Abr. 255; pl. 3; *Legross* v. *Loremore*, Gwill. 529. A rector's books, which remain in his own possession, are less entitled to credit than receipts. *Robinson* v. *Williamson*, 9 Price, 139. It has been held that the books of a lay impropriator are also admissible in evidence. *Short* v. *Lee*, 2 J. & W. 479.

(*l*) *Illingworth* v. *Leigh*, Gwill. 1617.

(*m*) *Jones* v. *Waller*, Gwill. 847. As the character of a tithe collector is a

Books of account.

A memorandum in an old book, purporting to be a parish register, and kept in an iron chest in the vicarage, and containing a memorandum by a former vicar, as to his gathering tithes in kind from some, and agreeing with others, has been admitted as evidence for a succeeding vicar (*n*).

The vicar's books have also been received in evidence to show that money payments made in lieu of tithe were regulated by the poor's rate (*o*).

Custom of other parishes.

The custom of tithing in other parishes is not admissible (*p*). Where the plaintiff on a bill for tithes in kind alleged that he was entitled to such tithes in the townships *A.* and *B.* and offered evidence of payment of such tithes throughout the rest of the parish, it was doubted whether such evidence was admissible; and the Court decided in favour of the claim on other grounds (*q*).

Reputation.

Reputation and traditionary evidence are also admissible (*r*), subject to the rules already adverted to (*s*). Such evidence must be general in its nature, and is inadmissible for the purpose of proving a particular fact (*t*).

And evidence of traditionary declarations is admissible, although it be derived from persons who had an interest in the declarations made. Declarations by old persons, who at the time occupied lands in the parish, that it had always been the custom to make such payments, are evidence to support the allegation of a parochial modus (*u*).

Evidence to prove a farm modus must show that the farm was an ancient one (*x*).

Where the defence was a farm modus, and the plaintiff on the one hand showed surveys and terriers in which no modus was mentioned, and the defendant on the other proved by witnesses the uniform payment of a sum certain in respect of his tenement, for the space of 50 years, it was held that the plaintiff might cross-examine those witnesses to show that other tenements in the same township paid a similar sum, for if they did, it was the less probable that if such payments were made by way of modus, they

private one, proof of his being such must usually be given to warrant the reading of his entries. *Short* v. *Lee*, 2 J. & W. 490; and see *Bullen* v. *Mitchell*, 2 Price, 399. *Manby* v. *Curtis*, 1 Price, 229. *Illingworth* v. *Leigh*, 4 Gwill. 1618. But where a charter of incorporation required the appointment of two proctors annually to receive tithes, it was held that their accounts, coming out of the archives of the corporation, were admissible. *Short* v. *Lee*, 2 J. & W. 490.

(*n*) *Drake* v. *Smyth*, 5 Price, 369. In a suit for tithes, books of collectors of tithes and statements for the opinion of counsel were ordered to be produced, being alleged to relate to the matters in the bill, although denied that they would assist the plaintiff's case. *Newton* v. *Beresford*, 1 Younge, 377. *Semble aliter* as to cases laid before counsel in the progress of a cause, or in contemplation of it. *Bolton* v. *Leicester Corporation*, 1 Younge, 377.

(*o*) *Walter* v. *Helman*, 4 Price, 171.

(*p*) *Erskine* v. *Ruffle*, Gwill. 964.

(*q*) *Travis* v. *Chaloner*, Gwill. 1237.

(*r*) *Stransham* v. *Cullington*, Cro. Eliz. 228. *Congley* v. *Hall*, 2 Roll. R. 125.

(*s*) *Supra*, Vol. I. tit. REPUTATION—TRADITION; Vol. II. p. 906.

(*t*) *Harwood* v. *Sims*, 1 Wightw. 112. In *Chatfield* v. *Fryer*, 1 Price, 253, where the defendant contended that lands called the Miles had been given to the rector in lieu of tithe upon Acre Fen, and proof was given that tithe had never been paid for Acre Fen, the Court of Exchequer (Wood, B. *dissentiente*) held that a deposition stating that the deponent had heard many old people declare that the Miles had been given to the vicar in lieu of tithes was inadmissible. It is to be observed, that in that case no evidence was given of possession of the Miles by the vicar, but that, on the contrary, it appeared that it was in the possession of a person who was not shown to have derived his title from the rector.

(*u*) *Moseley* v. *Davies*, 11 Price, 162. And see *Harwood* v. *Sims*, 11 Price, 170, in the note. Per Wood, B. Evidence of reputation of payments in lieu of tithes is entitled to respect. *Robinson* v. *Williamson*, 9 Price, 139. Hearsay evidence of deceased persons that moduses were payable and paid by the occupiers for the time being of certain farms, in lieu of certain tithes, was rejected as being evidence of reputation of private right. *Lonsdale* v. *Heaton*, 1 Younge, 60.

(*x*) *Stuart* v. *Greenall*, 9 Price, 112.

should have been omitted in the surveys and terriers, and more probable that they were paid under composition (*y*).

Lands of a dissolved monastery.

Next, it is a good defence to show that the lands belonged to a monastery dissolved by one of the statutes 31 H. 8, c. 13; 32 H. 8, c. 24 (*z*), which held the land discharged from tithes by prescription, or the Pope's bull, or composition real, or by the privilege of a particular order.

The fact that the lands belonged to a monastery is usually proved by means of the survey taken at or soon after the time of the dissolution, or other public documents, most of which are deposited either in the augmentation-office, or chapter-house.

Mere proof that the lands belonged to such a religious house, is *primâ facie* evidence that they immemorially held it so discharged (*a*). A presumption which cannot exist unless the monastery itself was founded before the time of legal memory.

2dly. The exemption may be established by evidence of the Pope's bull, which, as has been seen, must be proved by the production of the bull itself, or an exemplification of it under the bishop's seal.

3dly. By evidence that the lands belonged to a privileged order, as the Templars, Cistertians, and Hospitallers, before the council of Lateran in the year 1215; for the stat. 2 H. 4, c. 4, operated to prevent Cistertian or other orders from acquiring further exemptions, but left those untouched which existed before that council (*b*). But if the lands have paid tithes, a presumption will arise that they were purchased after that time (*c*). This privilege, however, extends no farther than to lands in the possession of a tenant in fee, or in tail (*d*); a lessee for life or years, unless he hold immediately from the Crown, is chargeable for such lands during his occupation (*e*).

Barren lands.

Barren lands newly inclosed are also exempted from tithe (*f*) for the space of seven years. This is matter of proof on the part of him who claims the exemption (*g*). The question in such cases is, whether the land

(*y*) *Blundell* v. *Haward*, 1 M. & S. 292.

(*z*) These statutes continued the exemption in the grantee which was before enjoyed by the monastery. Hence, if a monastery seised of lands and a rectory, had paid no tithes within memory, such lands also are exempted on the ground of a perpetual unity of possession, for they could not pay tithe to themselves. *Clavill* v. *Deane*, Gwill. 1354. *Slade* v. *Drake*, Hob. 293; Gwill. 390. And if the unity be proved, the presumption will be in favour of the exemption; this is therefore in effect a discharge by prescription. See Sav. 62; Hob. 299. The exemptions do not extend to lands which came to the Crown by the stat. 27 Hen. 8, c. 28, which dissolved the lesser abbeys; or by the 1st Edw. 6, c. 14, 2 Co. 47. *Fosset* v. *Franklin*, Sir T. Ray. 225. Where it appeared that the lands were in lay hands shortly before the Dissolution, it was held that the exemption could not be supported. *Page* v. *Wilson*, 2 J. & W. 524. In a suit by the impropriate rector, where no tithes appeared ever to have been tendered, but there was no evidence to show a legal origin to the exemption claimed, viz. that the lands belonged to a dissolved priory, and were a portion of tithes distinct from the rectory; the Court having all the evidence before it, and it not being possible to throw further light on it, and the evidence insufficient to justify a jury in so finding, the Court refused to direct an issue. *Ross* v. *Aylionby*, 4 Russ. 489.

(*a*) Hob. 300; *supra*, note (*z*).

(*b*) Toller on Tithes, 173; 3 Burn's Ecc. L. 403, 5th edit.

(*c*) *Lord* v. *Turk*, Bunb. 122.

(*d*) *Wilson* v. *Redman*, Hard. 174; Peake's L. E. 446.

(*e*) Owen, 46.

(*f*) 2 & 3 Edw. 6, c. 13, s. 5. Where upon an inclosure of barren lands, the defendant put in cattle on his land, but did no other act of improvement, it was held that the seven years began to run only from the first act of ploughing to render the land productive. *Ross* v. *Smith*, 1 B. & Ad. 907. *Semble*, the Act is to be construed as to apply to such improvement as would make the land produce more corn or hay for tithe. *Ibid.*

(*g*) *Lord Selsea* v. *Powell*, 6 Taunt. 297.

Barren lands.

be *sudpte naturâ sterilis* (*h*), or, according to Lord Coke, be not apt for tillage (*i*). The object of the Act was to encourage agriculture (*k*); and therefore, although the land produce some fruit, it may still be barren within the meaning of the Act, for no land is so sterile that it will not, with the aid of labour and pains, produce something. On the other hand, no land is so fertile as to yield titheable fruit spontaneously. The question therefore seems to be, whether the land in its natural state be so barren and ungrateful, so unapt for tillage, as to require an extraordinary expense, either in manure or labour, to subdue its evil qualities, and reduce it to a proper state of cultivation (*l*).

Custom of tithing.

If the plaintiff declare for a tenth, but it turn out that by the custom he is entitled to an eleventh part only, he cannot recover (*m*). But he does not lose his common-law right unless the custom or modus be found by the jury (*n*). Where the plaintiff declared for the tenth, but gave in evidence a terrier, which showed that he was entitled to an eleventh only, and the witnesses on both sides proved different money payments by way of composition, but the custom of tithing was not left to the jury, it was held that the evidence was not a ground of nonsuit, and that no modus or custom being established, the plaintiff was entitled to the common-law tithe.

Whether tithes have been regularly set out is of course a question of law. At common law, grass is titheable in grass cocks, after having been tedded in the process of making it into hay (*o*). And wheat is titheable in the sheaf and not in the shock (*p*); and the parishioner must leave his nine parts in the field a reasonable time to enable the parson to compare his tithe with them (*q*). But the common law mode of setting out tithes may frequently be shown to be varied by proof of a particular custom; as a custom throughout the parish for the parson to take only the eleventh shock of wheat in

(*h*) 2 M. & S. 358.

(*i*) 2 Inst. 656.

(*k*) B. N. P. 191; 1 Ves. 117.

(*l*) *Warwick* v. *Collins*, 2 M. & S. 349; 5 M. & S. 216. *Lord Selsea* v. *Powell* 6 Taunt. 297. And see 2 Ins. 656. *Witt* v. *Buck*, 3 Buls. 166. *Stockwell* v. *Tery*, 1 Ves. 117. *Jones* v. *Le Darid*, 4 Gwill. 1336; Freem. 335; Dyer, 170 b. *Sherrington* v. *Fleetwood*, Cro. Eliz. 475. *Byron* v. *Lamb*, 4 Gwill. 1504; Com. Dig. *Dismes*, H. 15.

(*m*) See *Blundell* v. *Mawdesley*, 15 East, 641.

(*n*) Ibid.

(*o*) *Newman* v. *Morgan*, 10 East, 5. *Hallirell* v. *Trapps*, 2 Taunt. 55. A reasonable quantity of a potatoe crop must be raised before setting out the tenth for inspection and view; and therefore the filling ten baskets as they were dug, turning out one for the tithe, and removing the other nine, is an illegal mode of setting out the tithe. *Bearblock* v. *Meekins*, 2 Hagg. 495. Where the order of birth is ascertained, the tenth calf in order of birth is the tithe calf, and the tithe-owner cannot insist upon the calves being kept until the tenth is weaned, and then choose an average calf out of the ten, *Tratman* v. *Carrington*, 1 C. & J. 320, and 1 Tyr. 169. So the tithe of calves is to be set out at such time as the animal is fit to be weaned and can live alone upon the food provided by nature for animals of that kind. *Bearblock* v. *Tyler*, Jac. 560. The law does not dispense with the tithe of the rakings of hay as it does of corn. *Ibid.* Although there may be inconvenience and expense to the tithe-owner in the mode of setting out the tithe, yet, if it be necessary and proper to enable the proprietor to have the full benefit of his crops, it is no legal objection, in an action for not carrying away the tithe set out. Where the jury found that the exposure of new potatoes on the ground, or even in sacks, would subject the farmer to a great diminution in the value of his produce, and that by the mode used of setting them out in the early season in small baskets, the tithe could be as well judged of as otherwise, and gave a verdict for the plaintiff, the Court refused to disturb the verdict. *Thompson* v. *Bearblock*, 1 B. & A. 812. See *Bearblock* v. *Meekins*, 2 Hagg. 495, *supra*.

(*p*) *Halliwell* v. *Trapps*, 2 Taunt. 55. *Shalleross* v. *Jowle*, 13 East, 261. As to hops, see *Knight* v. *Halsey*, 7 T. R. 86; 2 B. & P. 172; turnips, *Blaney* v. *Whitaker*, cited 10 East, 12.

(*q*) Ibid.

consideration of the farmer putting sheaves into shocks, and in bad weather opening them to dry (*r*); but to support such a custom proof of consideration is necessary. A custom to set out only the eleventh cock of barley, without proof that the farmer did anything for the benefit of the parson, but only for the benefit of the whole crop previous to the tithing, was held to be bad (*s*). So, although clover-hay be titheable in the cock and not in the swathe, yet, where by the particular course of husbandry it is not put into cocks, it may be set out in the swathe (*t*). Although the statute of Ed. 6 be penal in its nature, the proof of a custom to take less than the tenth will not avail the defendant, unless it be valid in law (*u*). Custom of tithing.

Where the issue is on any custom, all those who are interested in either establishing or defeating the custom are incompetent to further such interest by their testimony (*x*). Competency.

In an action on the case for not setting out tithe corn, an allegation that the tithe was lawfully and in due manner set out, is supported by evidence that it was set out in the manner agreed on by the parties, although not according to the rule of common law; for *modus et conventio vincunt legem* (*y*).

What shall be reasonable time is usually a question of fact (*z*).

In an ejectment against the lessee of tithes, after a determination of the lease by notice, proof must be given of possession after the expiration of the notice. This fact may be established by means of the rule to defend (*a*), as also by evidence that upon a demand made after the expiration of the notice the defendant refused or was silent (*b*). Notice to quit at one time is waived by a subsequent notice to quit at a later term (*c*). Provided evidence be given to show that a grant existed, it is not essential to produce it any more than in the case of a composition real (*d*). Ejectment.

Where the receipts in the possession of the defendant, given by the predecessors of the plaintiff, related to some compositions for tithes of corn, not matters in dispute, and others to moduses for the tithes claimed, and therefore evidence for the defendant, the Court refused to compel him to produce them (*e*).

TOLL.

A man may take amends for trespass in unloading from the sea upon his land, but cannot take it as a certain common toll (*f*). See tit. Way.

TREASON.

At common law, one witness was sufficient in the case of treason, as well as on any other capital charge; but by the stat. 7 Will. 3, c. 3, and various other statutes (*g*), two witnesses are essential, either both to the same overt

(*r*) *Smyth* v. *Sambrook*, 1 M. & S. 66.
(*s*) Ibid.
(*t*) *Collyer* v. *Howes*, 2 Ans. 481. *Baker* v. *Athill*, 2 Ans. 491.
(*u*) *Phillips* v. *Davies*, 8 East, 178.
(*x*) *Supra*, 364. Where the question was as to the payment of tithe-wood in the weald of Kent, all those who as owners or farmers were entitled to any wood there were held to be incompetent. *Earl of Clanrickard* v. *Lady Denton*, Gwill. 360.
(*y*) *Facey* v. *Hurdom*, 3 B. & C. 213.
(*z*) Ibid.
(*a*) See the rule, *supra*, 432.
(*b*) *Doe* v. *Palmer*, 16 East, 53.
(*c*) Ibid. (*i. e.*) if given with intent to waive the first notice. See *Doe* v. *Humphrys*, 2 East, 237.
(*d*) *Bennett* v. *Neale*, Wight. 324. *Chatfield* v. *Fryer*, 1 Price, 253. *Heathcote* v. *Mainwaring*, 3 Bro. C. C. 217. *Supra*, 913.
(*e*) *Tomlinson* v. *Lymer*, 2 Sim. 489.
(*f*) Lord Hale, *De Portibus Maris*, 51; and per Holroyd, *Blundell* v. *Catterell*, 5 B. & A. 295. As to proof of title to, see *Middleton* v. *Lambert*, 1 A. & E. 401.
(*g*) 1 Edw. 6, c. 12; 5 & 6 Edw. 6, c. 11, s. 12; 1 & 2 Phil. & Mary, c. 10.

act, or one of them to one, and the other of them to another overt act of the same treason. But the stat. 7 Will. 3, c. 3, does not require that each overt act shall be proved by two witnesses, but that the treason shall be so proved, there being one witness to one overt act, and another witness to another overt act of the same species of treason (*h*).

Overt acts.

It is sufficient if any one overt act be proved as it is laid to have been committed within the county; the precise time and place are immaterial (*i*).

Letters are evidence to prove overt acts, although the substance and purport only are set forth in the indictment (*k*).

If an overt act be alleged, with circumstances which are not essential to the particular species of treason charged, they may be rejected as surplusage. Thus, if the overt act of treason in levying war be alleged to be an arraying in a hostile manner, and thereby killing divers of the King's subjects, if the arraying in a hostile manner be proved, that will be sufficient, without proof of the rest (*l*).

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Although one overt act at least must be proved as laid to have been committed within the county, yet after such an act has been proved, evidence may be given of any other overt acts of the same species of treason committed in other counties, for the purpose of explaining the object and intention of the overt act proved within the county. Thus, in *Sir H. Vane's Case*, the treason charged was a compassing of the King's death, and a levying of war in Middlesex was alleged as an overt act, and it was held that a levying of war in Surry might be given in evidence; for not being laid as the treason, it was a transitory thing, which might be proved in another county (*m*).

An overt act of treason may be in itself, and unconnected with the traitorous intention of the actor, purely innocent. Thus, in *Lord Preston's Case* (*n*), the mere taking boat in Middlesex was held to be an overt act of treason within the county, being proved to have been done with an intention of going to France for the purpose of inciting foreigners to invade the kingdom.

For the purpose of proving the traitorous intention, overt acts of treason, although not laid in the indictment, are admissible evidence. *In Layer's Case* (*o*) a conspiracy to depose, and to place the Pretender on the throne,

(*h*) *Lord Stafford's Case*, 3 St. Tr. 204; Fost. 235, 7. *Case of the Regicides*, Kel. 9; East's P. C. 129. And the stat. 7 Will. 3, c. 3, expressly enacts and declares, that if two or more distinct heads or kinds of treason be alleged in the same indictment, one witness to prove one of the said treasons, and another witness to prove another of the said treasons, shall not be deemed to be two witnesses of the same treason within the meaning of the Act.

(*i*) *Charnock's Case*, 4 St. Tr. 570. *Townley's Case*, Fost. 8, 9; 3 Inst, 230; 1 Hale, 361; 2 Hale, 179. 291; Kel. 16. *Lord Balmerino's Case*, Dom. Proc. 9 St. Tr. 607; East's P. C. 125.

(*k*) *Coleman's Case*, 2 St. Tr. 661. *Lord Preston's Case*, 4 St. Tr. 411. *Staley's Case*, 2 St. Tr. 655. *Francia's Case*, 6 St. Tr. 73. *Layer's Case*, 6 St. Tr. 330. *Watson's Case*, 2 Starkie's C. 116.

(*l*) Fost. 124; 1 Hale, 122. *Lowick's Case*, 4 St. Tr. 722. *Layer's Case*, 6 St. Tr. 329, 330.

(*m*) *Sir H. Vane's Case*, Kel. 14, 15. *Layer's Case*, 6 St. Tr. 260.

(*n*) 4 St. Tr. 477; Fost. 196.

(*o*) 4 St. Tr. 286, 7. See also the cases of *Deacon*, Fost. 9; and *Sir J. Wedderburn*, ibid. 22. In Mr. East's Pleas of the Crown it is stated, "On the other hand, if the overt act offered in evidence, and not laid in the indictment, be no direct proof of any of the overt acts charged, but merely go to strengthen the evidence or suspicion of some of those overt acts by a collateral circumstance, such evidence cannot be admitted, notwithstanding the opinion of Ld. Hale to the contrary (1 Hale, 121, 2). As in the case of *Capt. Vaughan*, who was indicted for adhering to the King's enemies on the high seas; the overt act was his cruising upon the King's subjects in a vessel called the Loyal Clanearty; and the counsel for the Crown offered to give in evidence that he had some time before cut away the custom-house barge, and gone a cruising

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being laid as an overt act, a corresponding with the Pretender, although made an overt act of treason by the stat. 12 & 13 Will. 3, was held to be admissible, as directly tending to prove the overt act laid.

And in *Rookwood's Case* (*p*), where, upon a charge of treason in compassing the King's death, a meeting and consultation to waylay him was alleged as an overt act, as also an agreement to provide forty men for that purpose, it was held that a list of the names of a small party who were to join in the attempt of which the prisoner was to have the command, with his own name at the head of the list as their commander, was admissible as direct proof of the overt acts laid, although not alleged in the indictment. And it seems that the evidence would also have been admissible, although no agreement to provide forty men had been alleged, but merely a meeting and consultation to waylay the King (*q*).

The publication of treasonable papers may amount to an overt act of treason (*r*).

Writings found in the prisoner's possession, but not published, if plainly connected by their contents with a treasonable design, are evidence of such design, though not published (*s*). But it seems, that if it be doubtful whether writings found in the possession of the prisoner were connected with the treasonable design charged, they ought not to be read (*t*).

Where the writings are connected with a treasonable object, either by their contents, or by collateral evidence that they were intended to be used in furtherance of that purpose, they may be read, on proof of their having been found in the custody of the prisoner, without proof that they are in his hand-writing (*u*).

In *Watson's Case* (*x*), where writings had been found at the lodgings of one connected by the evidence with the prisoner, as a joint conspirator, but after the apprehension of the prisoner, it was held that they might be read in evidence, although no absolute proof was given of their previous exist-

in that vessel; but as that was no proof of his cruising in the Loyal Clancarty, the Court rejected the evidence." It is, however, to be observed, that Lord Hale merely says, that if an overt act be laid and proved, any other overt acts may be given in evidence to aggravate the crime, and *render it more probable*. By this Lord Hale does not appear to have meant that any other evidence was admissible than such as was in itself legal evidence to show the real nature and object of the overt act proved. In *Vaughan's Case*, the proof of cruising in the custom-house barge, no more tended to prove a cruising in the Loyal Clancarty, than evidence of a robbing of *A.* on one day tends to establish the robbing of *B.* the day after.

(*p*) 4 St. Tr. 687.

(*q*) See *Lowick's Case*, 4 St. Tr. 722.

(*r*) East's P. C. 119; Fost. 198.

(*s*) Fost. 196; 4 Bl. Com. 80. *Gregg's Case*, 10 St. Tr. App. 77. *Layer's Case*, 6 St. Tr. 279. *Dr. Hensey's Case*, 1 Burr. 644. *Tooke's Case*, cited East's P. C. 119. *Stone's Case*, 6 T. R. 527. If (says Mr. J. Foster and Mr. J. Blackstone) the papers found in Sidney's closet had been plainly relative to the other treasonable practices charged in the indictment, they might have been read in evidence against him. See *Watson's Case*, 2 Starkie's C. 141.

(*t*) *R.* v. *Watson*, 2 Starkie's C. 141.

(*u*) East's P. C. 119. *Layer's Case*, 6 St. Tr. 279. So in case of treason or felony, it may be proved that articles were found secreted in the prisoner's house after his apprehension. In *Watson's Case*, (2 Starkie's C. 137,) evidence was admitted that a quantity of pikes had been found secreted in the prisoner's house subsequently to his apprehension. Lord Ellenborough, upon that occasion, cited a case from memory, where a butler to a banker at Malton had been taken up on suspicion of having committed a great robbery; the prisoner had been seen near the privy, and this circumstance having excited suspicion in the minds of the counsel who considered the case during the assizes at York, at their instance search was made, and in the privy all the plate was found; the prisoner was in consequence convicted, no doubt being entertained as to the admissibility of the evidence.

(*x*) 2 Starkie's C. 140.

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ence; strong presumptive evidence having been given that the lodgings had not been entered by any one in the interval between the time of the prisoner's apprehension and the finding of the papers.

But in *Hardy's Case*, where writings were found in the possession of conspirators with the prisoner, but subsequently to his apprehension, it was held, that as there was no evidence to show the previous existence of the writings, or that the prisoner was a party to them, they could not be read.

In cases of this nature, where the offence involves a conspiracy, the declarations, acts and conduct of others proved to have been engaged in the same common design with the prisoner, are usually resorted to for the purpose of proving the illegal and traitorous intention. After proof of an association for such a purpose, all acts done by any of the parties so united in furtherance of the common design, are evidence against the rest. Hence, writings sufficiently connected with the general object, which have not been published, but found in the possession of a joint conspirator, are admissible in evidence against the prisoner (*y*).

Upon this point the same principles and rules are applicable as in ordinary cases of conspiracy (*z*).

It has been already seen, that for reasons of policy witnesses in cases of this nature are precluded from disclosing facts the publication of which might be of public detriment (*a*).

By the statute 9 Geo. 4, c. 31, s. 2, every offence which before that Act would have amounted to petit treason, shall be deemed to be murder only.

TRESPASS (*b*).

In an *action* of trespass for an injury to the person, lands or goods of the plaintiff, the evidence relates,

1. To proof of the possession of the identical lands or goods, 1099.
2. Of the acts of trespass committed directly or indirectly by the defendant against the person, lands or goods of the plaintiff, 1104.
3. To the damages, 1114.
4. To proof of circumstances, with a view to costs, &c. 1117.
5. To proof of notices of action, 1117.
6. To the defence under the general issue, 1117.
7. Under the plea of *liberum tenementum*, or other claim of property, 1123.
8. Right of way, &c., 1128.
9. On issue taken on the replication of *de injuriâ suâ propriâ*, &c. generally, 1131, and to the pleas of *son assault*, 1134; justifications in *defence of property*, 1137; under a *license*, 1137; under *process*, &c. 1139.
10. On issue taken on a *new assignment*, 1141, or plea of *excess*, &c. 1143.
11. Malicious trespasses, 1143.

(*y*) *R.* v. *Watson*, 2 Starkie's C. 140. And see the cases cited *supra*, tit. Conspiracy.

(*z*) *Vide supra*, tit. Conspiracy; *infra*, Unlawful Assembly.

(*a*) *Supra*, Vol. I.

(*b*) Trespass is the proper form of action wherever the act occasions an immediate wrong; case, where the injury is the consequence of some other act. *Gates* v. *Bayley*, 2 Will. 313. Trespass also lies for a forcible injury to the wife or servant of the plaintiff; but it seems that there the *per quod* is the gist of the action, and the incidents are in many respects similar to those which belong to an action on the case. See *Woodward* v. *Walton*, 2 N. R. 476. *Mary's Case*, 9 Co. 113. Where the action is brought to recover substantial damages, and the plaintiff is under the necessity of

1. An action of trespass *quare clausum fregit* is local (*c*), and must be proved to have been committed within the county as alleged. The description of the local situation of the close within a particular parish or township is also material (*d*). And where the *locus in quo* is described by its abuttals, a variance from the description of any one abuttal in evidence will be fatal (*e*). Quare clausum fregit.

Where the close is described by name or abuttals (*f*), it is sufficient to prove the plaintiff's possession of part of that close, provided a trespass by the defendant be proved to have been committed in that part (*g*).

A particular stating trespasses to have been committed in a close, "which now is or heretofore was a rail or tram road," the facts being that the defendants had taken up the plates of the railroad, altered its course, and laid others transversely, is sufficient (*h*).

The action of trespass to lands being a possessory remedy, possession *actual or constructive* is essential (*i*); but an actual exclusive possession is Possession.

satisfying the jury as to what amount they ought to be, he has a right to begin. *Hoggett* v. *Oxley*, 2 Mo. & R. 251; and 9 C. & P. 324. See Vol. I. tit. ONUS PROBANDI.

(*c*) An action will not lie in the courts of this country in respect of a trespass to land abroad. 4 T. R. 503.

(*d*) *Taylor* v. *Hooman*, 1 Moore, 161. Premises laid in the parish of Clerkenwell, proof that Clerkenwell consists of two parishes, although generally known by the name of St. James's, Clerkenwell, held to be insufficient. Ibid. And see 5 B. & A. 221.

(*e*) Thus, if the description be "abutting on the south on the mill of *A.*," the proof of a mill there in the tenure of *A.* is essential. B. N. P. 89. *Nowell* v. *Sands*, 2 Roll. Ab. 678. But strict literal proof is not essential; if the description be of a close abutting on the mill of *A.*, it is satisfied by proof of such a mill adjoining, although a highway intervene. B. N. P. 89. *Nowell* v. *Sands*, 2 Roll. Ab. 678. If the close be described as abutting towards the east, and in fact it abuts towards the north, inclining to the east, it is sufficient. *Roberts* v. *Carr*, 1 Taunt. 501. If a close be described as abutting in the direction of the four cardinal points towards specified closes, although it be in fact a triangular close, the description, it seems, would be sufficient if it abutted towards such closes. *Lempriere* v. *Humphrey*, 3 A. & E. 181; 4 N. & M. 636. Although a variance from the parish would be material. *Taylor* v. *Hooman*, 1 Moore, 161, yet if it be stated to be situate in the parish of *A.*, it is enough if it has a church and overseers; the Court will not try the question of parochiality. 2 Camp. 4. In trespass, every part of the description is material, and must be proved. Per Lawrence, J. in *Vowles* v. *Miller*, 3 Taunt. 139. Trespass against several named only "defendants" on the record, the plaintiff stated the defendants to have broke and entered a close of the said plaintiff abutting on a close "of the said *defendant*," the proof being that the close in which, &c. abutted a close of one defendant only, held to be an ambiguity only, and not a variance. *Walford* v. *Anthony*, 8 Bing. 75.

(*f*) Formerly it was not necessary to describe the close by name or abuttals; but now, by the rules of H. T., 4 Will. 4, the *locus in quo* must be designated in the declaration by name or abuttals, or other description, in failure whereof the defendant may demur specially.

(*g*) *Stevens* v. *Whistler*, 11 East, 51.

(*h*) *Monmouth Canal Co.* v. *Harford*, 1 Cr. M. & R. 614.

(*i*) *Topham* v. *Dent*, 6 Bing. 516. Possession alone is sufficient against a wrong-doer. *Catteris* v. *Cowper*, 4 Taunt. 547. *Oughton* v. *Seppings*, 1 B. & Ad. 241. *Revett* v. *Brown*, 5 Bing. 7. *Graham* v. *Peat*, 1 East, 246. Overseers who enclose waste without consent of the lord may bring trespass against a mere stranger. *Matson* v. *Cooke*, 4 Bing. N. C. 392; but it must be a clear and exclusive possession; per Best, C. J., 5 Bing. 9. Where the plaintiff had conveyed a chapel built by him to a third person, who had taken possession of it, and left it in the care of a gardener, to whom he gave the key, with permission to allow the plaintiff to preach in the chapel, it was held that it was not a sufficient possession to enable him to maintain trespass. *Revett* v. *Brown*, 5 Bing. 7. The delivery of the key of premises to a carpenter, for the purpose of repairing them, was held to be a sufficient possession to enable him to maintain a plea of possession, and *molliter manus imposuit*, &c. to turn his own servant out. *Hall* v. *Davis*, 2 C. & P. Cas. 33. The proprietors of a canal who have erected a dam across a stream with the consent of the proprietors of the land, may maintain trespass against one who injures the dam. *Dyson* v. *Col-*

Quare clausum fregit. Possession.

sufficient, as against a wrong-doer, without regard to the title of the possessor (*h*).

The mere prior occupancy of land, however recent, will give a good title to the occupier to recover in trespass against all, except such as can prove an older and better title in themselves (*l*).

So it is no objection that the plaintiff holds under a lease which is void under the statute 13 Eliz. c. 20, by reason of the non-residence of the lessor (*m*).

And proof of *title* does not dispense with the proof of actual *possession*. A lessee cannot support the action before entry (*n*); neither can an heir at

liek, 5 B. & A. 601. But commissioners who erect a wall across a navigable river for the benefit of the public, cannot maintain trespass for throwing it down; for they have no property or possessory interest. *Duke of Newcastle* v. *Clarke*, 2 Moore, 666. And see *Hollis* v. *Goldfinch*, 1 B. & C. 205; *infra*, 1127. The purchaser of a growing crop of grass sold under a distress, who has nailed up the gates, and made the grass into hay, may maintain trespass against the sheriff for the acts of his bailiff in entering and levying under a *fi. fa.* *Tompkinson* v. *Russel*, 9 Price, 287. If a tenant after the expiration of his lease hold over, or incurs a forfeiture, and the landlord permit him to continue in possession, he may maintain trespass against any one who enters upon him, having no better title than himself. See the observations of Littledale, J. 4 B. & C. 594. In copyhold lands, although the property in the mines be in the lord, the possession of them is in the tenant. *Lewis* v. *Branthwaite*, 2 B. & Ad. 437. A lease was of a tenement called *W.*, containing nineteen acres, including a piece of woodland, "except all timber and other trees, wood and underwoods," &c.; held that the soil on which trees not timber grew, was not excepted by the words "wood and underwoods," and passed to the lessee. *Leigh* v. *Heald*, 1 B. & Ad. 622; and see *Whilster* v. *Paslow*, Cro. Jac. 487; and *Liford's Case*, 11 Co. 49. A pauper occupying a parish house is not to be deemed a tenant; where, therefore, having quitted, although the children of the party were left in the premises, the overseers had without any breach of the peace resumed possession, held that they had a right so to do, and were not obliged to have recourse to the provisions of 59 Geo. 3, c. 12. s. 24. *Wildbor* v. *Rainsforth*, 8 B. & C. 4; and 2 M. & R. 185. Where the interest of a mere tenant at will is determined by demand of possession, he has no legal right to continue for a reasonable time for the purpose of removing his goods, although it seems that if he entered and continued there no longer than was necessary for that purpose, and did not exclude the landlord, he might not be deemed a trespasser. *Doe* v. *Jones*, 10 B. & C. 724. Where in trespass for pulling down the plaintiff's wall, and building another, there was strong evidence of the common use of the wall, and the jury found it to be a party-wall, the Court refused to send down the case again to have it distinctly presented to the jury whether it was common property or not, it not having been desired at the trial; held also, that the temporary removal was not such a destruction of the common subject-matter as to entitle one to maintain trespass; so, if it be raised higher than before, his only remedy is to remove it. *Cubitt* v. *Porter*, 8 B. & C. 257. And see *Wiltshire* v. *Sidford*, ib. in the note, and 2 M. & Ry. 267. A landlord has no right to enter in order to repair without some stipulation to that effect, and the tenant may maintain trespass against him. *Barker* v. *Barker*, 3 C. & P. 557. A declaration for breaking, &c. plaintiff's dwelling-house, and part of the leads and roof of the said dwelling-house, is not supported by proof of injury to the leads of the counting-house of one of the defendants, adjoining to the plaintiff's dwelling-house, used by him as an easement, and on which he had erected a meat-safe, it being no proof of a breaking of any part of the plaintiff's dwelling-house. *Mudie* v. *Bell*, 3 C. & P. 331.

(*h*) *Chambers* v. *Donaldson*, 11 East, 63; per Bayley, J., 4 B. & C. 585. And there is no distinction in this respect between land which belongs to the Crown, and land which belongs to a private person. *Harper* v. *Charlesworth*, 4 B. & C. 574. *Johnson* v. *Barrett*, Aleyn, 10; *secus*, 4 Leon. 184; Godb. 133. Although the plaintiff pays merely a nominal rent, and not a rent to the amount of one-third of the value of the land, as required by the stat. 1 Ann. st. 1, c. 7, s. 5. The payment of a nominal rent to the Crown for 1,000 acres of woodland, the wood being reserved to the Crown, and the exercising of the privilege of shooting and taking the grass, is sufficient evidence of possession. *Harper* v. *Charlesworth*, 4 B. & C. 574. Vide *supra*, note (*i*).

(*l*) *Catteris* v. *Cowper*, 4 Taunt. 547; and see tit. POSSESSION.

(*m*) *Graham* v. *Peat*, 1 East, 244.

(*n*) *Cook* v. *Harris*, 1 Lord Raym. 367.

law maintain this action against an abater (*o*); nor can a bargainee, although the Statute of Uses transfers the possession (*p*); nor a devisee (*q*); or surrenderee (*r*); or reversioner (*s*); or comisee of a fine (*t*); or parson before induction (*u*); or lessee for years before entry (*x*). Quare clausum fregit. Possession.

But if he who has the right enter and take possession, he may maintain trespass against one who being wrongfully in possession at the time of the entry, continues in possession (*y*).

And if a disseisee re-enter, he may maintain trespass in respect of any act of trespass intervening between the disseisin and re-entry (*z*).

And it is sufficient if he has taken legal possession of a part of a farm or estate in the name of the whole, and the *locus in quo* be part of that entire estate. Thus, by his induction, the parson is put in possession of a part for the whole, and may maintain an action for a trespass to the glebe land, although he has not actually taken possession of the whole (*a*).

Where there is no actual possession in another, possession follows the property. It is not necessary that there should be a manual occupation every day (*b*). Thus, the lord may bring trespass for injuries done to the wastes of a manor of which no one is in the actual enjoyment. But possession actual or constructive is necessary.

Where the interest of the plaintiff (an insolvent) in a house had passed to the provisional assignee, but his wife continued to reside in it, with some part of the furniture, and whilst she was absent and the house locked up, the landlord (the defendant) had broke and entered it, in order to distrain, it was held, that as it did not appear that she was residing there with the consent of the assignee, the husband had not a sufficient possession to maintain trespass; he must have had either actual or constructive possession (*c*).

If trees be excepted in a lease, the lessor may maintain trespass against any one who cuts them down (*d*). For by the exception of the trees, the land on which they grow is excepted also.

One who has exclusive possession of land, although for a limited purpose, Possession for a limited purpose.

Barker v. *Keat*, 2 Mod. 201. *Geary* v. *Beareroft*, Carth. 66. See however Cro. Eliz. 46.

(*o*) Com. Dig. tit. *Trespass*, B. 3; 2 Roll. Ab. 553. Yet where the ancestor dies seised, and the possession is vacant, the law casts the seisin upon the heir.

(*p*) Com. Dig. tit. *Trespass*, B. 3; Ventr. 361.

(*q*) 2 Mod. 7.

(*r*) Bro. Ab. Surrend. 50.

(*s*) Com. Dig. *Trespass*; Keil. 63. a. But on the determination of a lease at will by the death of the lessee, the lessor may maintain trespass before entry. *Geary* v. *Beareroft*, 1 Lev. 202; Co. Litt. 62, b.; *qu.* whether where land is let at will, both lessor and lessee may not maintain trespass. See the observations of Holroyd, J. in *Harper* v. *Charlesworth*, 4 B. & C. 583. See further 2 Roll. Ab. 551. By committing voluntary waste a lessee at will determines the will, and trespass is maintainable. 5 Rep. 13, b.

(*t*) See *Berry* v. *Goodman*, 2 Leon. 147.

(*u*) Plow. 528.

(*x*) Bac. Ab. *Leases*, M.; Keil. 163, a.

(*y*) *Butcher* v. *Butcher*, 7 B. & C. 399.

(*z*) 2 Roll. Ab. 550, l. 7; Co. Litt. 257, a. So in the case of an action for mesne profits; see EJECTMENT. In the case of re-entry to avoid a fine levied with proclamation, the re-entry does not revest the possession by relation *ab initio*. *Compere* v. *Hicks*, 7 T. R. 727. *Hughes* v. *Thomas*, 13 East, 486.

(*a*) *Bulwer* v. *Bulwer*, 2 B. & A. 470. So it should seem if livery of seisin be given of a part for the whole. See Com. Dig. *Feoffment*, B. 4. If a lease be of a house and several closes, possession by the lessee of the house or any part of the land avoids a feoffment by the lessor of the whole. Com. Dig. *Feoffment*, B. 7.

(*b*) Per Lord Kenyon, in *The King* v. *Mayor, &c. of London*, 4 T. R. 26.

(*c*) *Topham* v. *Dent*, 6 Bing. 515.

(*d*) *Ashmead* v. *Ranger*, 1 Lord Raym. 552. *Rolls* v. *Rock*, 2 Sel. N. P. 1342.

Possession for a limited purpose.

as under a contract for the purchase of a crop of grass growing there, or who is entitled to the vesture or *prima tonsura*, may maintain trespass against any one who enters the close and injures the herbage, although he does it by consent of the owner of the land (*e*).

So if several have the exclusive possession for a limited time, the portion of each being appointed annually by lot (*f*).

So one who has only the herbage of a forest or close may bring trespass, as well as he who has the land (*g*).

And the owner of the soil of a public way (*h*), or market (*i*), may bring trespass against one who makes any use of it extending beyond those privileges which the public possess, without the license of the owner.

A copyholder may maintain trespass for taking coals, although no injury be done to the surface (*k*).

The perpetual curate of a chapelry, augmented by Queen Anne's bounty, may maintain trespass even against a churchwarden, for pulling down a pew (*l*).

A judgment in ejectment upon the several demises of two plaintiffs in trespass, was held to be evidence to support a joint action of trespass against two of the defendants in the ejectment (*m*).

In some instances, parties holding over after the determination of particular estates, are adjudged to be trespassers by the provisions of the statute 6 Anne, c. 18, s. 5 (*n*).

Trespass to chattels personal.

In an action for trespass to a personal chattel (*o*), the plaintiff may either

(*e*) *Crosby* v. *Wadsworth*, 6 East, 602. *Tomkinson* v. *Russell*, 8 Price, 287. So where a party has the exclusive right of digging turves, *Wilson* v. *Macreth*, 3 Bur. 1824, or a grant of underwood, *Hoe* v. *Taylor*, Cro. Eliz. 413, may maintain trespass; so also, as it seems, may the owner of a free warren. F. N. B. 86; Com. Dig. *Trespass*, A. 2; but see Cro. Eliz. 421. If *A.* covenant that none but *B.*'s cattle shall be fed in the *locus in quo*, *B.* may maintain trespass against strangers, and may distrain *A.*'s cattle damage-feasant. *Burt* v. *More*, 5 T. R. 333. So, if *J. S.* agree with the owner of the soil to plough and sow the ground, and give him half the profits, he may have an action for treading down the corn, and the owner is not jointly concerned in the growing corn. B. N. P. 85.

(*f*) *Weldon* v. *Bridgwater*, Cro. Eliz. 421.

(*g*) 2 Roll. Ab. 549, H. pl. 1. *Weldon* v. *Bridgwater*, Cro. Eliz. 421. *Evans* v. *Roberts*, 5 B. & C. 837; B. N. P. 85. *Parker* v. *Staniland*, 11 East, 366.

(*h*) *Sir John Lade* v. *Shepherd*, Hil. 1 Geo. 2, cited 1 Wils. 110. And see 1 Roll. Ab. 549, H. pl. 1; 1 Roll. Ab. 406, pl. 7. Where the plaintiff demised land for sixty years, for building, at a rent, reserving a right of way to the grantor over the streets between the houses to be built, and he agreed to grant leases of the houses as they should be built; the grantee entered, paid rent, and proceeded to build houses, for which he obtained leases, and built a wall across one of the streets; held that he was to be deemed in possession of the land on which the wall was built, and that the grantor could not maintain trespass for such erection. *Alexander* v. *Bonner*, 4 Bing. N. C. 799; and 6 Sc. 611.

(*i*) *Mayor of Northampton* v. *Ward*, 1 Wils. 107.

(*k*) *Lewis* v. *Braithwaite*, 2 B. & Ad. 437.

(*l*) *Jones* v. *Ellis*, 2 Y. & J. 265; *supra*, tit. PEW.

(*m*) *Chamier* v. *Willett*, 5 M. & S. 64; *supra*, tit. EJECTMENT, 313.

(*n*) Which enacts, that every person who, as guardian or trustee for an infant, and every husband seised in right of his wife only, and every other person having an estate determinable upon life, who after the determination of that estate or interest, without the express consent of the person immediately entitled upon the determination, holds over and continues in possession of any lands or tenements, shall be adjudged to be trespassers; and every person so immediately entitled, or his executors or administrators, may recover in damages, against the person holding over, the full value of the profits received during the wrongful possession.

(*o*) Trespass does not lie in respect of animals *feræ naturæ*, unless they have been reclaimed, or are privileged *ratione loci*. Bac. Ab. Tresp. E. Where the plaintiff had left a certificate of character, it was held (by Lord Abinger) that trespass

show actual possession (*p*), or prove his title in law to the possession; for in construction of law the right of property draws after it the possession (*q*). If he has the actual possession, his title, as against a mere wrong-doer, is immaterial (*r*). Trespass to chattels personal.

The action of trespass differs materially from that of trover; the former is founded on possession, the latter on property (*s*), to which possession is incident by construction.

If a party hire a chariot for the day, appoint the coachman, and furnish the horses, he may be described as the owner and proprietor, and may maintain an action for an injury to the carriage whilst it is in his possession (*t*).

So he may show a *legal right* to the chattel vested in him, although he has never had the *actual possession*; as that he is entitled, as lord of the manor, to the property as a wreck or estray, although there has been no seizure (*u*); or that he is entitled as executor where the trespass was committed before probate; for the right accrues under the will, and the probate is merely evidence of it (*x*).

If *A.* gratuitously permit *B.* to use his carriage, *A.* still remains in legal possession, and may maintain trespass for an injury done to the carriage whilst it is used by *B.* (*y*).

So if *A.* deliver to *B.* a box to be kept, and *B.* break it open and convert the goods, trespass lies (*z*). Possession.

But the owner cannot maintain trespass for taking his goods where he is

was not maintainable in respect of an injury to it whilst it was in the defendant's custody. *Taylor* v. *Rowan*, 1 Mo. & R. 491. In trespass for taking the plaintiff's goods, chattels, and effects, it is no variance that some of them were fixtures. *Pitt* v. *Shew*, 4 B. & A. 206. In trespass for an injury to the defendant's cart, a variance as to the name of the person who was riding in it is immaterial. *Howard* v. *Peete*, 2 Chitt. 315.

(*p*) In an action of trespass to goods, it is sufficient for the plaintiff to prove possession, without showing how he obtained it. Per Holroyd, J. in *Lee* v. *Shore*, 1 B. & C. 94; 2 D. & R. 198. But where the owner of property which has been taken away by another, waives the tort, and brings an action of *assumpsit* for the value, it is incumbent on him to show a clear and indisputable title to the property. Per Abbott, C. J. ibid.; vide *infra*, VENDOR AND VENDEE.

(*q*) Bro. tit. *Trespass*, pl. 303. One who has leased lands without any reservation of the timber, may maintain trespass *de bonis asportatis*, against one who during the term cuts down timber and carries it away. *Ward* v. *Andrews*, 2 Chitty, 636. *A.* covenants to build a bridge, and to keep it in repair, for the use of the public; the property in the materials remains in the hands of *A.*, and he may maintain trespass against a wrong-doer who removes them. 6 East, 154. Where a sheriff seizes goods under a *fi. fa.*, the property remains in the owner till execution executed, as well after the Statute of Frauds as before. The meaning of the words, "that the goods shall be bound from the delivery of the writ to the sheriff," is, that after the writ is so delivered, if the defendant make an assignment of the goods, except in market overt, the sheriff may take them in execution. Per Lord Hardwicke, 2 Eq. Cas. Ab. 381. The lord of a manor may maintain trespass for a wreck or estray before seizure. Com. Dig. Trespass, B. 4; and see *Smith* v. *Milles*, 1 T. R. 480; *Dunwich* v. *Sterry*, 1 B. & Ad. 831. As to the title of an executor to maintain trespass after probate granted, see tit. EXECUTOR. As to the case of a vendee, see tit. VENDOR AND VENDEE, and *Thomas* v. *Phillips*, 7 C. & P. 573. B. N. P. 91. See tit. SHERIFF.—TROVER.

(*r*) *Moore* v. *Robinson*, 4 B. & Ad. 817. *Nelson* v. *Cherrill*, 8 Bing. 316; Com. Dig. Trespass, B. 4. A master of a fly-boat, who is hired by a canal company at weekly wages, may maintain trespass for cutting a rope fastened to the vessel, whereby it was towed along an inland navigation, although the vessel and the rope were the property of the company. *Moore* v. *Robinson*, 2 B. & Ad. 817.

(*s*) Per Lord Kenyon, C. J. in *Ward* v. *Macauley*, 4 T. R. 490. And see further, as to the distinction between trespass and trover, *Cooper* v. *Chitty*, 1 Burr. 20; 1 Bl. 65. *Smith* v. *Milles*, 1 T. R. 475.

(*t*) *Croft and another* v. *Alison*, 4 B. & A. 590.

(*u*) *Smith* v. *Milles*, 1 T. R. 480; F. N. B. 91.

(*x*) 1 T. R. 480; 2 Buls. 268.

(*y*) *Lotan* v. *Cross*, 2 Camp. 464. Otherwise if he had let the carriage for a time. Ib.

(*z*) B. N. P. 83; Moor, 248.

Possession.

not entitled to the possession. Thus, a landlord having let his furniture to a tenant, cannot maintain trespass against the sheriff for taking the goods in execution (*a*).

The plaintiff declaring for trespass to goods, chattels and effects, may recover in respect of fixtures (*b*).

One who erects a tombstone may maintain a trespass against another who wrongfully removes it, and erases the inscription, though the freehold be in the parson (*c*).

A variance found in the proof of the close in which, &c. will not preclude the plaintiff from recovering in respect of an *asportavit* of a chattel, alleged in the same count, provided such chattel be not described as affixed to the freehold (*d*).

Time and number of trespasses.

2dly. Evidence of acts of trespass committed against the person, lands or goods of the plaintiff, relates to the *time and number* of such acts, the *place*, or to the *nature and manner* of the act.

Assault. Several trespasses.

It is universally true, that the plaintiff may prove as many distinct trespasses as there are counts in the declaration, and that the day laid in every count which alleges a single act of trespass is immaterial. If the declaration for an assault and battery contain but one count, the plaintiff cannot give evidence of more than one battery (*e*); and after proof of one, he cannot waive it and prove another (*f*). And if the declaration contain two counts, and the defendant suffer judgment by default on one, and plead not guilty to the other, and on the trial one trespass only be proved, the defendant will be entitled to a verdict (*g*).

So, if the declaration contain two counts, and there be a justification pleaded to one of them, which is admitted by the replication, the plaintiff cannot recover, unless he show that two trespasses were committed.

A declaration against *A.* and *B.* contained two counts; the defendants pleaded the general issue, and a justification to one count. The replication, admitting the arrest to be lawful, alleged that *B.*, with the consent of *A.*, after the arrest, released the plaintiff, and afterwards imprisoned him for the time mentioned in the second count. The plaintiff having failed to prove the consent of *A.*, it was held that he could not prove the same trespass against *B.* on the second count (*h*). But if it be alleged that the defendant on divers days and times between two days specified assaulted the plaintiff, he may give in evidence any number of assaults between those days, or a single trespass at any time before the commencement of the action (*i*).

To lands.

Trespasses to land are usually alleged to have been committed on a day

(*a*) *Ward* v. *Macaulay*, 4 T. R. 489. *Hall* v. *Pichard*, 3 Camp. 187. Where a ship was seized as forfeited under the Navigation Act (12 Car. 2, c. 18), by the governor of a British colony, it was held that trespass could not be maintained against the party who seized the ship, although he did not proceed to condemnation; for by the forfeiture the property was divested out of the owner. *Wilkins* v. *Despard*, 5 T. R. 112.

(*b*) *Pitt* v. *Shew*, 4 B. & A. 206.

(*c*) *Spooner* v. *Brewster*, 3 Bing. 136. *Dawtrie* v. *Dee*, 2 Roll. R. 140.

(*d*) *Beniman* v. *Peacock*, North Circ. York, *cor. Parke*, J.

(*e*) *Staute* v. *Prickett*, 1 Camp. 473. Trespass for assault and false imprisonment may be laid *diversis diebus et vicibus*. *Burgess* v. *Freelove*, 2 B. & P. 425. But a declaration alleging that the defendant, on such a day, and on divers other days and times, made an assault, &c. was held to be bad on special demurrer. *English* v. *Purser*, 6 East, 395.

(*f*) Ibid.

(*g*) *Compere* v. *Hicks*, 7 T. R. 727.

(*h*) *Atkinson* v. *Matteson*, 2 T. R. 172; *infra*, 1142. A sheriff enters a house under a *fi. fa.*, sells goods, and keeps possession after the return of the writ; this is but one continued trespass. *Aitkenhead* v. *Blades*, 1 Marsh. 17.

(*i*) B. N. P. 86; 1 Saund. 24. n.

specified, and on divers other days and times between that day and the commencement of the action; and under such an allegation the plaintiff may prove any number of trespasses committed within that space of time, or one single act of trespass previous to the day first mentioned (*k*). To lands.

If in an action against *A.* and *B.* the plaintiff proceed for several trespasses, but cannot show that *A.* and *B.* were concerned in all of them (*l*), he must either elect to proceed on those only which they committed jointly, or if he choose to proceed in respect of any trespass committed by *A.* alone, *B.* will be entitled to a verdict of acquittal (*m*). And it has been ruled, Several defendants.

(*k*) B. N. P. 86. Per Holt, C. J. 4 Ann, at Hertford, Str. 1095; 1 Salk. 639. *Hume* v. *Oldacre*, 1 Starkie's C. 351. A very learned person has intimated a doubt whether any number of trespasses may not be given in evidence, all anterior to the day first named. It seems, however, to be a general principle, that where the plaintiff has by his own description limited the extent of the injury complained of, he cannot go beyond that description in his evidence; and where a particular space of time is thus assigned for the trespasses, it seems to operate by way of description, and not as a mere formal allegation of time. It is, nevertheless, competent to the plaintiff to *waive his continuando*, and to prove a single act of trespass anterior to the day first mentioned; for the allegation of trespasses on other days than the one first named cannot, it seems, place him in a worse situation than if one trespass only had been alleged; and this was so held in *Wilson* v. *Powel*, Skinn. 641; B. N. P. 86; Co. Litt. 283. The practice on this subject appears to have been formerly much more strict. See Clay. 141, pl. 256; Ibid. 5, pl. 8; Vin. Ab. Ev. R. b. 15, 16; Leon. 302, pl. 416; Tri. per Pais, 199. It was even held, that if the plaintiff could not prove the trespass on the first day, he could not prove trespasses on the *diversis vicibus* afterwards. *Walker* v. *Dawson*, Clay. 141, pl. 256.

(*l*) The plaintiff, with two others, upon finding there was no room in the pit of a theatre, passed over into a private box, and upon being turned out, and whilst in the lobby, insisting upon going back the same way into the pit, a blow was struck by one of the party, not the plaintiff; held, that if the jury believed all were acting in a common purpose, they were all liable to be apprehended, and the action for a false imprisonment not maintainable. *Lewis* v. *Arnold*, 4 C. & P. 355.

(*m*) Alexander and Crawley upon a warrant against *A.* arrested the plaintiff, and delivered him into the custody of Solomons, the constable of the night; and Lord Ellenborough, in an action against the three, held that the jury must either be confined to the imprisonment in the watchhouse, or they must acquit Solomons; and the latter being preferred, his lordship certified, under the stat. 8 & 9 Will. 3, c. 11, that there was reasonable cause for making Solomons a defendant, for the purpose of depriving him of costs. And see *Sedley* v. *Sanderland*, 3 Esp. C. 202. *Powell* v. *Hodgetts*, 2 C. & P. 432. And so ruled by Parke, J., in *Cross* v. *Harrison and others*, Lancas. Sp. Ass. 1830. A trespass was proved against the defendants *A.* and *B.*, then *C.* and *D.*, constables, who were also defendants, came up and interfered, and the plaintiff was not allowed to go into evidence against them without consenting to the acquittal of *C.* and *D.* But still it would have been competent to the plaintiff to show an imprisonment by *C.* and *D.* by the direction of *A.* and *B.* Where the plaintiff having gone into evidence of a trespass committed jointly by six defendants, went into evidence of a wrongful sale by two of those defendants, and of the receipt of the money by a third, it was held that he must be taken to have abandoned the case as to the others, and that they were entitled to an acquittal before the other defendants went into their case. *Wynne* v. *Anderson*, 3 C. & P. 596. In the previous case of *Bonser* v. *Curtis*, Ib. 597, Abbott, C. J. held that the time of acquittal was a matter of discretion with the Judge. And see *Huxley* v. *Bery*, 1 Starkie's C. 98, where it was held that the acquittal ought not to take place before the whole of the evidence was ready for the jury; but the plaintiff, in adducing evidence in answer to that adduced by the rest of the defendants, is not allowed to implicate those against whom no evidence had been given by fresh evidence. It seems to be now settled that the acquittal ought to take place at the close of the plaintiff's case. In *Lancaster* v. *Armitage and another*, Yorkshire Summer Assizes, 1836, cor. Parke, B. the co-defendant was acquitted at the conclusion of the plaintiff's case. Note. The action was for excessive distress, selling without notice, &c. On some counts there was evidence against one only, on others, money had been paid by both defendants into court, but Parke, B. held that an election must be made. If an election were not made at that stage, the defendant, against whom no evidence had been given, would be at liberty to cross-examine witnesses for the other defendant, and to observe on the evidence; and, *qu.* how could the same counsel conduct the defence of both? He would have to cross-examine his own witnesses.

Several defendants.

that after electing to prove one trespass in which *A.* alone is implicated, the plaintiff cannot waive it, and prove a trespass committed by both (*n*). For the jury cannot award separate damages, neither can they award joint damages in respect of a trespass committed by *A.* alone. But it has since been held that a plaintiff having proved a trespass against three of four defendants, may waive it and prove a trespass against all four (*o*). But in respect of a trespass jointly committed by *A.* and *B.*, the jury may estimate the damages according to the conduct of the most culpable (*p*); for this is the measure of damage sustained by the plaintiff, and there can be no apportionment.

Trespass to the person, &c.

An action of trespass *quare clausum fregit*, it has been seen, is local; but an action for an assault or battery of the person, or false imprisonment, or trespass to personal chattels, is transitory in its nature, and a variance from the place or county will not be material (*q*), unless it be made so by the provisions of a particular statute (*r*), or by a plea of local justification (*s*).

But if a count in trespass *quare clausum et domum fregit* allege also a taking of goods in that close or house, it seems that this so far operates by way of description, that if the plaintiff failed in his proof of the local trespass, he would also fail as to the trespass to the goods (*t*).

Manner of the injury.

In all actions of trespass the nature of the complaint renders it necessary to show that the injury resulted from *force* applied by the defendant, or one acting by his authority. Where the injury is merely consequential to the act, the proper and only remedy is by an action on the case (*u*). This rule governs all cases where the defendant is sought to be made liable merely through the negligence of his agent (*x*).

If *A.* throw a log in the highway, and it hits *B.*, he may maintain trespass; but if, as it lies there, *B.* falls over it, and receives an injury, the only remedy is case (*y*).

Where *A.* threw a lighted squib, which fell on the stall of *B.*, who to protect his own property threw it away, and it fell on the standing of *C.*, who

(*n*) *Sedley* v. *Sunderland*, 3 Esp. C. 202. There the action was for false imprisonment against the solicitors of the assignees of the plaintiff under a commission of bankruptcy, who had caused the plaintiff to be arrested in Ireland, and also against magistrates in England, by whom the plaintiff had been committed to prison; and Ld. Kenyon held that the plaintiff could not, after going into evidence of the arrest in Ireland, examine as to what passed before the magistrates, and the plaintiff was nonsuited. And see *Tait* v. *Harris*, 1 Mo. & R. 282; but this was doubted by Patteson, J. in *Hitchen* v. *Teale*, 2 Mo. & R. 30, and *Roper* v. *Harper*, 5 Scott, 250. *Supra*, 1105.

(*o*) *Roper* v. *Harper*, 5 Scott, 250.

(*p*) *Brown* v. *Allen and another*, 4 Esp. C. 158.

(*q*) *Mostyn* v. *Fabrigas*, Cowp. 161.

(*r*) As under the stat. 21 Jac. 1, c. 12, s. 5; *supra*, 585. The 23 G. 3, c. 70, s. 34, in case of actions against officers of excise; 24 G. 3, c. 47, s. 35, in cases of actions against officers of the customs.

(*s*) B. N. P. 92; 1 Litt. 148. As where the defendant pleads that he took goods damage-feasant, in which case he must ascertain the place at his peril. Ib.

(*t*) See *Smith* v. *Milles*, 1 T. R. 475; and the observations of Buller, J. there. Yet in the case of an indictment, the prisoner, it seems, may be convicted of a larciny of the goods upon a count for burglary, alleging a burglarious stealing of the goods, although the prosecution should fail as to the burglary, from want of proof or variance. The effect of considering such a variance to be fatal in an action of trespass is to multiply counts. See tit. VARIANCE.

(*u*) B. N. P. 26. See *Leame* v. *Bray*, 3 East, 593; *Day* v. *Edwards*, 5 T. R. 649; *Covell* v. *Lanning*, 1 Camp. 498.

(*x*) See above, tit. NUISANCE, and *Huggett* v. *Montgomery*, 2 N. R. 446; *Morley* v. *Gainsford*, 2 H. B. 442. But even in such a case, if the master be present, the act of the servant is his own act and trespass, the servant acting under his control. *Chandler* v. *Broughton*, 1 C. & M. 29. In which respect the case differs from that of a pilot and shipmaster, the former being independent. Ib. P. C.

(*y*) 1 Str. 636. Per Ld. Kenyon, in *Day* v. *Edwards*, 5 T. R. 649.

again in his own defence threw it away, and it hit the plaintiff and put out his eye; it was held that all these acts were to be regarded as the acts of *A.* the prime mover (*z*). Manner of the injury.

Where a defendant has a right to do a particular act, but does it in an improper manner, so as to be injurious to the plaintiff in its consequences, *case* is the proper remedy. As where *A.* having a right to enter upon the yard of *B.* and to erect a spout there, does it in such a manner that it discharges rain-water upon the premises of *B.* to the injury of his house (*a*).

Where forcible injury to the plaintiff's property is the probable though not the immediate consequence of the defendant's act, trespass is maintainable, for every one must be taken to foresee the natural and probable consequences of his own act (*b*).

If the injury result from actual force, the intention (*c*) of the defendant is usually immaterial. Thus, if *A.* accidentally drive his carriage against that of *B.* (*d*), the remedy is by trespass (*e*). But where, though the force be immediate, the misdirection of it was merely negligent, not wilful, case will lie in respect of such negligence (*f*). And although where the trespass is wilful,

(*z*) *Scott* v. *Shepherd*, 3 Wils. 403. This is cited as an extreme case, the authority of which is doubtful. See 5 Taunt. 534.

(*a*) *Reynolds* v. *Clarke*, Str. 634. It was assumed by Reynolds, J. in that case, that the mere act of fixing the spout was lawful. In the course of the argument, according to the report in Strange, a distinction was taken between cases where the act is *primâ facie* lawful, and the damages consequential, and those where the act is unlawful in the first instance. That distinction is not to be found in the report of the same case, in Ld. Ray. 1399, and has been denied by Blackstone, J., in *Scott* v. *Shepherd*, 2 Bl. 894; 3 Wils. 499; and by De Grey, C. J., S. C. 2 Bl. 899; 3 Wils. 411. If the laying the spout had been in itself an act of trespass, it seems to be clear that the consequential damage to the house might be alleged and proved in aggravation. See *Courtney* v. *Collett*, cited Str. 635, and *infra*, 1114. In support of the general position, that where the injury, though immediate, is not wilful, case will lie, see *Underwood* v. *Hewson*, 1 Str. 596; *Weaver* v. *Ward*, Hob. 134. Cases of negligent steering a vessel, or driving a carriage. *Covell* v. *Laming*, 1 Camp. 497; *Leame* v. *Bray*, 3 East, 599; *infra*, note (*e*); *Hopper* v. *Reeve*, 1 B. Moore, 407; *Lotan* v. *Cross*, 2 Camp. 465; *Turner* v. *Hawkins*, 1 B. & P. 472; *Ogle* v. *Barnes*, 8 T. R. 188; *Hall* v. *Pickard*, 3 Camp. 187; *Rogers* v. *Imbleton*, 2 N. R. 117; *Moreton* v. *Hardern*, 4 B. & C. 223.

(*b*) Where the defendant had ordered his servant to lay rubbish near the plaintiff's wall, but so as not to touch it, but from the nature of the stuff the probable consequence would be, that some of it would roll down against the wall, as it did; held, that he must be taken to have contemplated all the probable consequences, and was therefore liable for such consequence as a trespasser. *Gregory* v. *Piper*, 9 B. & C. 591.

(*c*) That is, if any degree of blame attach to the defendant, although he be innocent of any intention to injure. As if he drive a horse too spirited, or pull the wrong rein, or use imperfect harness, and the horse taking fright kills another horse. Where *no blame* is imputable to the defendant, he is not liable in any form of action. See *Wakeman* v. *Robinson*, 1 Bingh. 213.

(*d*) *Leame* v. *Bray*, 3 East, 599. So if he drive it against one in which *B.* is sitting, to the injury of his person, although the latter carriage was not his property, nor in his possession. *Hopper* v. *Reeve*, 7 Taunt. 698.

(*e*) In the case of *Leame* v. *Bray*, 3 East, 599; *supra*, note (*a*), the point determined was, that *trespass* would lie, inasmuch as the injury resulted immediately from the defendant's *act* in *driving the carriage*. It may perhaps be inferred from the language of the Court, that their opinion was, that trespass in all such cases *must* be the form of action. It is however to be observed, that Le Blanc, J. who says that the remedy *must be* trespass, speaks doubtfully of the class of cases where the force is not so immediate from the act of the defendant; as where he steers a vessel impelled by the wind and waves. It seems, however, to be clear, that there is no sound distinction between the two cases; in each the direction given to a forcible and involuntary agent occasions mischief. If a wilful intention on the part of the defendant be not essential, it can make no difference, either in law or morals, whether the force which he misdirects proceeds from a living or an inanimate machine, a horse or a steam-engine.

(*f*) *Moreton* v. *Hardern*, 4 B. & C. 223. Case against three proprietors for negligently managing their coach and horses, *per quod* the coach ran against the plaintiff

Manner of the injury.

and there be no ground of action but the trespass, case may not be maintainable (*g*), yet in general where an actual damage has been sustained the trespass may be waived, and an action may be maintained on the special circumstances (*h*).

A party receiving a chattel unlawfully taken, and refusing to give it up, does not become a trespasser by relation, unless it was taken for his use or benefit (*i*).

The general result seems to be that, 1. Where the force is immediate, without consequential damage, the only remedy is by trespass. 2. Where the injury is merely consequential, the only remedy is by action on the case. 3. Where the force is immediate, and consequential damage results, the plaintiff may elect.

Trespasser ab initio.

Where the law, and not a private party, gives a license to do a particular act, and the party abuses that license by a subsequent unlawful act, he becomes a trespasser *ab initio* (*k*). For where the law gives a general license or authority, it is given conditionally that it shall be used for that purpose only for which the law allows it; and the law judges of and infers the original intention of the party from his subsequent act. But where a private party authorizes a particular act, he cannot, for any subsequent cause, punish in respect of that which was done by his own license (*l*).

If therefore any one enter a common inn or tavern, and then commit a trespass, as by carrying any thing away (*m*); or if the lord who distrains for rent, or the owner for damage-feasant, use or kill the distress, he is a

and broke his leg; it appeared that one of the defendants was driving at the time, and that the accident was occasioned by his negligence in driving, and it was held that case lay against all three, although trespass might perhaps have been maintainable against the one who drove. See also *Ogle* v. *Barnes*, 8 T. R. 188, where it was held that case would lie in respect of an accident occasioned by negligence in steering a ship. *Rogers* v. *Imbleton*, 2 N. R. 117, which was case for negligently driving a coach. See also *Huggett* v. *Montgomery*, 2 N. R. 446.

(*g*) For the position that where the injury is both wilful and immediate, trespass alone is the proper form of action, see *Ogle* v. *Barnes*, 8 T. R. 192; *Williams* v. *Holland*, 10 Bing. 112; *Tripe* v. *Potter*, cor. Yates, J. cited 8 T. R. 191.

(*h*) Per Holroyd, J. in *Moreton* v. *Hardern*, 4 B. & C. 228. *Pitts* v. *Gaince*, 1 Salk. 10. So a trespass in taking goods may be waived and trover be supported. See also *Branscomb* v. *Bridges*, 3 Starkie's C. 171; *supra*, 389. Although the defendant, by building on the plaintiff's half of a party wall, is liable in trespass, yet case lies for the injury in obstructing the plaintiff's lights. *Wills* v. *Ody*, 1 M. & W. 452. So if the defendant diverts a watercourse by erecting a wear partly on the plaintiff's land. Ib. Or, through the medium of a trespass to land in the plaintiff's possession, injures his reversionary interest in other premises. *Raine* v. *Alderson*, 4 Bing. N. C. 702. In respect of the assaulting and debauching a wife, daughter, or servant, the plaintiff may bring either trespass or case. *Bennett* v. *Alcott*, 2 T. R. 166; *supra*, 988. Where the defendant seized and detained a ship, and prevented the voyage, Ld. Holt held that the latter might declare either in case for the consequential damage so as to recover for his own particular loss, or might have declared in trespass upon his possession. *Pitts* v. *Gaince*, Salk. 10.

(*i*) *Wilson* v. *Barker*, 4 B. & Ad. 614.

(*k*) *Six Carpenters' Case*, 8 Co. 290.

(*l*) Where the officer of a court acting under process commits a subsequent breach of duty, this does not make him a trespasser *ab initio*. *Smith* v. *Eggington*, 7 Ad. & Ell. 767.

(*m*) Ibid. Cro. Car. 196; Yel. 96. See other instances, Com. Dig. *Trespass*, C. 2; as where a lessor enters to view houses, and does damage, or a commoner to view cattle, and cuts down a tree. Formerly a distrainer who was guilty of an irregularity was liable as a trespasser *ab initio*; but now, under the stat. 11 G. 2, c. 19, one having distrained for rent is not so liable in respect of a subsequent irregularity. See above, tit. DISTRESS. One who remains in possession after the five days have expired, is a trespasser for the excess only. *Winterbourn* v. *Morgan*, 11 East, 395; *Messing* v. *Kemble*, 2 Camp. 115; and see *Aithenhead* v. *Blades*, 5 Taunt. 198; *Reed* v. *Harrison*, 2 W. Bl. 1218.

trespasser *ab initio* (*n*). But a party cannot be made a trespasser *ab initio* by mere nonfeasance, for that is no trespass; so that the mere refusal to pay for wine at a tavern, or the omission to deliver cattle taken damage-feasant after a tender of amends, will not make the parties trespassers *ab initio* (*o*). As the matter which makes a defendant a trespasser *ab initio* must always be specially replied (*p*), this subject need not be further considered in this place. Trespasser ab initio.

In trespass, all procurers, and aiders and abettors, are principals (*q*), and are properly described as such. And so it is said is one who was not even privy to the commission of a trespass for his use and benefit, but who afterwards assented to it (*r*). If one or more of the defendants were not present at the act of trespass, evidence is requisite to show that they commanded (*s*) it, or assented to it (*t*). If the direction was in writing, notice should be given to produce it, as where the action is brought against a sheriff for the act of his bailiff (*u*). In such an action it is sufficient for the plaintiff to prove the sheriff's warrant to the bailiff, in order to connect the former with the act of the latter, without producing the writ; and it will still be incumbent on the defendant to prove the writ in his own justification (*x*). Agency.

The plaintiff proved that he had been detained in prison, whither he had been taken by a constable; that the defendant had declared that he had imprisoned the plaintiff. A witness for the plaintiff also stated, that the plaintiff was taken under a warrant, and that when he, the witness, was

(*n*) 12 E. 4. 8. b.; 8 Co. 290; 9 Co. 11, a.; 1 And. 65.

(*o*) 8 Co. 290.

(*p*) *Smith* v. *Eggington*, 7 Ad. & Ell. 767. Per Buller, J. in *Taylor* v. *Cole*, 3 T. R. 297. *Sir R. Bovey's Case*, 1 Vent. 211. 217; where Twisden said, that to set out such matter in the declaration was like leaping before you come to the stile. See also 3 Wils. 20. *Fisherwood* v. *Cannon*, cited 3 T. R. 297. Where the abuse is a substantive trespass, it ought to be new assigned. *Smith* v. *Eggington*, 7 Ad. & Ell. 767.

(*q*) Com. Dig. tit. *Trespass*, C. 1; 2 Roll. Ab. 555. It seems that trespass lies for procuring an independent prince, by influencing his fears, to imprison the plaintiff. *Rafael* v. *Verelst*, 2 Black. 983. So if the defendant, by false information to the commander of a press-gang, that the plaintiff is liable to the impress service, cause him to be impressed. *Flewster* v. *Royle*, 1 Camp. 187. The captain of a ship, who was active in causing and procuring the plaintiff, a seaman whom he had sent on shore, to be imprisoned and flogged by the local authorities, was held liable in trespass for his own act, the jury finding that he caused the punishment to be inflicted. *Aitken* v. *Bedwell*, 1 M. & Malk. C. 69. Where the defendant had ordered his servant to lay rubbish near the plaintiff's wall, but so as not to touch it, but from the nature of the stuff the probable consequences would be, that some of it would roll down against the wall, as it did; held, that he must be taken to have contemplated all the probable consequences, and was therefore liable for such consequences as a trespasser. *Gregory* v. *Piper*, 9 B. & C. 591.

(*r*) 4 Inst. 317; Com. Dig. tit. *Trespass*, C. 1. *Barker* v. *Braham*, 3 Wils. 377. But it must in the case of subsequent assent by the defendant appear that the trespass was for his use. *Wilson* v. *Barker*, 4 B. & Ad. 614. And it is laid down that a *feme covert* and an infant cannot become trespassers either by *prior command* or subsequent assent. Co. Litt. 180, b, note (4).

(*s*) It has been said that a servant would not be a competent witness to prove that he had no authority from the master to do the act; for if the plaintiff recovered, then in an action afterwards brought against himself, by the master, the verdict would be evidence of the measure of damages. But *quære*, for if the plaintiff failed, the witness would still be liable to the plaintiff, who might bring an action against the witness; and if the plaintiff succeeded, the verdict would show that the defendant in the former action was a wrong-doer, in which case he would not be entitled to recover at all from the witness and co-trespasser. The interest would be the other way. The case essentially differs from that of an action brought against the master for the *negligence* of the servant. Vide *supra*, Vol. I. tit. Witness. Vol. II. tit. Agent.

(*t*) Bro. pl. 133. 256. 265; 2 Haw. Pl. Cr. 312; 3 Wils. 377. A servant keeping the key of a room, knowing that a man is imprisoned therein, is a trespasser. Ibid.

(*u*) *Supra*, tit. Sheriff.

(*x*) *Grey* v. *Smith and another*, 1 Camp. 387. See also *Stanley* v. *Fielden*, 5 B. & A. 425. *Davis* v. *Morgan*, 2 C. & J. 587.

Agency.

going to arrest the plaintiff, the defendant said "make haste;" on the objection taken, it was held, that there was *primâ facie* evidence against the defendant without producing the warrant, and that it lay on the defendant to prove the warrant in justification (*y*). If a servant acting in execution of his master's orders, do a forcible injury to another undesignedly, case lies against the master, and as it seems against both; but if the servant commit the act wilfully, trespass lies against him, and no action lies against the master (*z*).

Legal process.

Where the defendant sets legal process in motion by a malicious, false and unfounded statement, without more, and in consequence the person of the plaintiff is imprisoned, or his property invaded, the remedy is by an action on the case; for the injury results not immediately from the defendant's act. The plaintiff proved that being a prisoner, he had been brought up to the Court of King's Bench by an order obtained by the defendant, and served *by him* on the gaoler, and was thereon committed on an attachment for non-payment of costs, and the Court (*dissentiente* Lord Abinger) held that this was *primâ facie* a trespass by the defendant (*a*). As, where he maliciously charges the plaintiff before a magistrate with felony, or swears to a debt which is not due, upon which the plaintiff is arrested. But where the injury results immediately from the defendant's act, the remedy is trespass. As, where a magistrate maliciously grants a warrant against one for felony, without any information laid (*b*); or where a party without warrant delivers another into the custody of a constable on an unfounded charge of felony (*c*). Or where a party is arrested on a warrant for felony after notice of his acquittal (*d*).

So where the defendant by a false representation that the plaintiff was a fit person to be impressed, wrongfully caused him to be impressed (*e*). In such a case the defendant, by his own act, causes the plaintiff to be impressed without the intervention of any civil process or valid authority (*f*).

If a party himself act in apprehending another, he is liable in trespass (*g*), but if he merely put the law in motion, although he act maliciously, and without probable cause, he is not liable as a trespasser, but in an action on the case only (*h*).

If an attorney at the instance of his client sue out process and deliver it, or cause it to be delivered to an officer to be executed, and such process be illegal, both it seems are trespassers (*i*). And even in such case, where the

(*y*) *Holroyd* v. *Doncaster*, cor. Bayley, J. York Sp. Ass. 1826. 3 Bing. 492.

(*z*) If a servant driving his master's horse strike it wantonly, and mischief ensues, the servant is liable, the master not; but if the servant in performance of his master's orders strike injudiciously and such mischief ensues, the master is liable in law. *Croft* v. *Alison*, 4 B. & A. 490. *Infra*, 1111.

(*a*) *Bryant* v. *Clutton*, 1 M. & W. 408.

(*b*) *Morgan* v. *Hughes*, 2 T. R. 225.

(*c*) *Stonehouse* v. *Elliott*, 6 T. R. 315.

(*d*) *Webb* v. *Allen*, 1 Anst. 261.

(*e*) *Flewster* v. *Royle*, 1 Camp. 187.

(*f*) Per Lord Ellenborough. Ibid. This is not like a malicious prosecution, where the party gets a *calid* warrant or writ and gives it to an officer to be executed. There was clearly a trespass here in seizing the plaintiff, and the defendant was therefore a trespasser in procuring it to be done; nor is proof of malice necessary.

(*g*) *West* v. *Smallwood*, 3 M. & W. 418.

(*h*) *Elsee* v. *Smith*, 1 D. & R. 103; *Barber* v. *Rollinson*, 1 C. & M. 330.

(*i*) *Barker* v. *Braham*, 3 Wils. 368. See 2 Taunt. 400. *A.* employed *B.*, an attorney, to enforce payment of a debt; *B.* by his agent sued out a justicies in the county court; before the return of the justicies the debtor paid the debt and costs to *B.*, but his agent, in ignorance of such payment, signed judgment and sued out execution, on which the goods of the debtor were seized. It was held that *A.* was liable for the act of *B.* who was identified with his agent, and that according to the

process is legal, they must plead their justification specially (*k*); for unless a justification be shown, a trespass has been committed; and if a trespass has been committed, they were the actors, and therefore were principals (*l*). By agent. Legal process.

In order to identify the principal with an agent who commits a trespass, it is not sufficient to prove merely that the agent when he offended had the conduct of his master's lawful business; for although a principal is responsible for the negligence of his agent, he is not responsible for his wilful misconduct. If the agent of *A.* negligently drove the carriage of *A.* against that of *B.* the agent would be liable in trespass, and *A.* would be liable in case for the negligence of his servant (*m*). But if the agent in such case wilfully drove the carriage of *A.* against that of *B.* without the assent of *A.*, the latter would not be responsible (*n*). Proof of agency.

Where persons have the execution of a limited authority, and act *ex parte*, trespass lies if they exceed it in fact. Thus, an action lies against commissioners of bankrupts for the seizure of the supposed bankrupt's goods, if he was not in fact a bankrupt within the statutes. So it does against searchers of leather, appointed under the statute 2 J. 1, c. 22, for seizing leather suf- Judicial acts.

case of *Barker* v. *Braham*, 3 Wils. 368, both *A.* and *B.* were liable in trespass. *Bates* v. *Pilling*, 6 B. & C. 38. See also *Crook* v. *Wright*, R. & M. 278. *Secus*, where the parties are merely passive. Ib. *Scheibel* v. *Fairbain*, 1 B. & P. 588. *Page* v. *Wiple*, 3 East, 314. Judgment and execution against one who has not appeared in the county court are void. *Williams* v. *Lord Bagot*, 3 B. & C. 772. An attorney placing a writ in the hands of an officer to be executed, is not guilty of a trespass, although he may be persuaded that the officer will execute it in a place which may turn out to be out of his jurisdiction. *Sowell* v. *Champion*, 6 Ad. & Ell. 417; but it may be otherwise if he direct the officer so to execute it, or being told by the officer of his intention, he acquiesces in it. Ibid. And see 1 Saund. 74 a. (*n*).

(*k*) A sheriff or his officers may justify under the writ only, although there be no judgment or record to support or warrant such writ; but if a stranger interpose, and set the sheriff to do execution, he must take care to find a record that warrants the writ, and must plead it; so must the party himself at whose suit such an execution is made; per De Grey, C. J. in *Barker* v. *Braham*, 3 Wils. 376. In that case the defendant, Braham, obtained judgment by default against the plaintiff, as administratrix, for 400 *l.*, and after levying 150 *l.* on the goods of the intestate in the hands of the plaintiff, Norwood, the other defendant, as her attorney, sued out a *ca. sa.* against the plaintiff for the residue, and Norwood delivered the writ to the officer to be executed, and it was executed. The Court set aside the *ca. sa.*; the plaintiff then brought trespass, and the defendant having pleaded the general issue, it was held that trespass was the proper form of action. And see *Rogers* v. *Popkin*, 2 Starkie's C. 404. A judgment vacated by the Court is as if it had never been, and is not like a judgment reversed by error. See the observations of De Gr y, C. J. 3 Wils. 376; 1 Lev. 95. *Turner* v. *Felgate*, T. Ray. 73; Carth. 274; Salk. 674; 12 Mod. 178; 2 Wils. 385; 1 Str. 509; T. Jones, 215; B. N. P. 84. A writ of *capias* filled up by the attorney after the writ has been signed and sealed, is bad; and if the party be arrested upon it, an action lies. *Burslem* v. *Fern*, 2 Wils. 47.

(*l*) *Barker* v. *Braham*, 3 Wils. 368.

(*m*) *Morley* v. *Gainsford*, 2 H. B. 441. Yet trespass lies against the sheriff for the act of his bailiff in arresting the wrong person by mistake.

(*n*) *Macmanus* v. *Crickett*, 1 East, 106; and see *Savignac* v. *Roome*, 6 T. R. 125. *Tripe* v. *Potter*, 6 T. R. 128, n. *Supra*, 1107, note (*f*); 1110, note (*z*). A master is not liable for the wilful trespass of his servant. 2 Rol. Ab. 553, l. 25. See *Chandler* v. *Broughton*, 1 C. & M. 29. But where a trespass is the natural consequence of the act directed to be done by a servant, the master is liable, although he direct the servant to avoid the trespass. *Gregory* v. *Piper*, 9 B. & C. 591.

If the defendant's servant in driving his master's carriage wantonly strike the horses of the plaintiff, in consequence of which the carriage of the plaintiff is injured, the defendant is not responsible; but if the servant so strike, although injudiciously, in the course of his employment, and in furtherance of it, the defendant is liable in case. *Croft* v. *Alison*, 4 B. & A. 590.

Judicial acts.

ficiently dried, and carrying it before officers called triers, although in their judgment it be insufficiently dried (*o*). But where a party acts judicially, trespass does not lie against him in respect of any judicial act, unless it appear that he has exceeded his jurisdiction, although his judgment with reference to the particular circumstances may have been erroneous (*p*).

The steward of a court-baron is a judicial officer, and trespass does not lie against him, where his bailiff by mistake seizes the goods of *A.* under a precept commanding him to take the goods of *B.* (*q*).

Intention.

In an action for a mere assault the intention is material, and the plaintiff ought to be provided with such evidence as the case affords, to show that the defendant intended to do him bodily harm (*r*). Every battery includes an assault, and if the plaintiff declare for both he may recover for an assault only (*s*).

Trespass to the person.

In an action for false imprisonment, it is essential to prove that the defendant has by his act deprived the plaintiff of his personal freedom for some portion of time however short. Bare words, indeed, without laying hold of the person of the plaintiff, or restraint on submission without force, will not constitute an arrest or imprisonment (*t*). Where, upon a magistrate's warrant being shown to the plaintiff, the latter voluntarily and with-

(*o*) *Warne* v. *Varley*, 6 T. R. 443. Trespass lies against a magistrate for granting a warrant to levy poor-rates against one who has no land in the parish. *Weaver* v. *Price*, 3 B. & Ad. 409.

(*p*) *Supra*, 585. Where a military officer arrests his inferior officer for disobedience of orders, under colour but not under the authority of military law, trespass lies, although the arrest had been followed by a court-martial. *Warden* v. *Bailey*, 4 Taunt. 67. And per Mansfield, C. J., the only point decided in *Sutton* v. *Johnstone*, was, that there was probable cause for the imprisonment in that case. Where the defendant, in an action by a master of a man of war against the captain, relies on the sentence of a court-martial, he must, in order to make it conclusive, plead it by way of estoppel. *Hannaford* v. *Hunn*, 2 C. & P. 148.

(*q*) *Holroyd* v. *Breare*, 2 B. & A. 473. So the sheriff is not liable for the act of the bailiff in taking the goods of *A.* under a warrant from the sheriff against the goods of *B.* in execution of a judgment of the county court. *Tinsley* v. *Nassau*, 1 M. & M. 52. A Judge may plead that an action done by him in his judicial capacity was done by him as a Judge of record, and it will be a complete justification; per Lord Mansfield, in *Mostyn* v. *Fabrigas*, Cowp. 172; and see *Garnett* v. *Ferrand*, 6 B. & C. 611. Where it did not appear that the plaintiff had any interest in the matter of the inquest about to be taken, or any information to offer which might further the objects of the inquiry, held that he could not maintain an action of trespass against the coroner for causing him to be put out of the room after his refusal to depart. Ib. And trespass is not maintainable against commissioners of bankrupts for committing a bankrupt for not answering satisfactorily. *Doswell* v. *Impey*, 1 B. & C. 163, under the st. 5 G. 2, c. 30; and though the bankrupt should afterwards be discharged upon *habeas corpus* on the ground that the Court thinks that his answers are satisfactory, yet the action will not lie, for the commissioners are *required* to commit if the answers be not to *their* satisfaction. Ib. And see *Miller* v. *Jean*, 2 Bl. 1141.

(*r*) See *Griffin* v. *Parsons*, Selw. N. P. 27, n. *Supra* tit. ASSAULT. An attempt to do a personal injury to another, coupled with a present ability, is an assault. *Genner* v. *Sparkes*, 1 Salk. 79. The upsetting of a carriage or chair in which a person is sitting, is a trespass against the person. *Hopper* v. *Reeve*, 7 Taunt. 698. So if parish officers cut off a pauper's hair without his consent. *Ford* v. *Skinner*, 4 C. & P. 289. Riding after the plaintiff and threatening to horsewhip him, so as to compel him to run into a place of shelter to avoid being beaten, amounts to an assault in law. *Martin* v. *Shoppee*, 3 C. & P. 373. So where the defendant advanced with his fist clenched in a threatening attitude to within a very short distance, although not near enough to have struck at the moment when he was prevented. *Stephens* v. *Myers*, 4 C. & P. 349.

(*s*) Bro. Tres. pl. 40; Lib. Ass. Ann. 22. f. 99, pl. 60. A battery includes the doing of a personal injury, be it ever so small, as by throwing water upon the person. *Powell* v. *Horne*, 3 N. & P. 564. Or spitting on or jostling him. B. N. P. 15; and *supra*, tit. ASSAULT. e further, tit. DEFENCE.

(*t*) Dalt. c. 170.

Trespass to the person.

out compulsion attended the constable who had the warrant to the magistrate, it was held, that there was no sufficient imprisonment to support an action (*u*). And where a sheriff's officer having a warrant against *A.*, sent a message requesting him to call and give bail, and *A.* accordingly called and gave bail, it was held to be no arrest (*x*). Yet it seems that in ordinary practice words are sufficient to constitute an imprisonment if they impose a restraint upon the person, and the plaintiff is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence be used (*y*).

It frequently happens that false imprisonment includes a battery (*z*); but it is obvious that the latter is not necessarily included in the former (*a*).

It has been seen that a conviction of the defendant upon an indictment for an assault and battery is not evidence in a civil action (*b*), but that a confession by pleading guilty is evidence of the fact (*c*).

The mere admission by one of several defendants in trespass will not be evidence against the rest to prove them co-trespassers; but if several be proved to be co-trespassers by competent evidence, the declaration of one as to the motives and circumstances of the trespass will be evidence

(*u*) *Arrowsmith* v. *Mesurier*, 2 N. R. 211.

(*x*) *Berry* v. *Adamson*, 6 B. & C. 528.

(*y*) I have known more than one instance in which words alone have been held to be sufficient. In one case, where a constable required the plaintiff to go along with him before a magistrate, information having been given to the constable by the defendant that the plaintiff had committed a felony, and the plaintiff accordingly accompanied the constable, Bayley, J. held (after the cases on the subject had been cited), that there was a sufficient imprisonment to sustain the action. In B. N. P. 62, it is laid down that bare words will not make an arrest (Salk. 79), but that if a bailiff who has process against one, says to him when he is on horseback or in a coach, "you are my prisoner, I have a writ against you," on which he submits and goes with him, though the bailiff never touched him, it is an arrest *because* he submitted; but if instead of going with the bailiff he had gone or fled from him, it would be no arrest unless the bailiff had laid hold of him. Where an officer told the party at his house that he had a writ against him, and did not take him into custody or touch him, but took his word that he would attend and give bail in a day or two, and the debtor afterwards procured bail to be put in, it was held to be no arrest. *George* v. *Radford*, 1 M. & M. Cas. 244. See also *Russen* v. *Lucas*, 1 Ry. & M C. 26. *Simpson* v. *Hill*, 1 Esp. C. 431. Here bare words were used without actual restraint or submission. But where a constable, directed by the defendant to take the plaintiff on a charge of felony, said, "you must go with me," on which the plaintiff said he was ready to go, and actually went towards a police office, and on his way attempted to escape, but was seized by the constable, the defendant not being present, it was held to be an imprisonment. *Pocock* v. *Moore*, 1 Ry. & M. C. 321. See also *Chinn* v. *Morris*, 2 Carr. & P. C. 361. Where the plaintiff being taken before the defendant, a magistrate, on the complaint of having killed a dog, and refusing to adopt the recommendation to make terms, was told by the defendant, that unless he paid a certain sum he should convict him in a penalty of that amount under the Malicious Trespass Act, which the plaintiff also rejected, and declared he would carry the case elsewhere, upon which the defendant called in a constable and ordered him to take the plaintiff out, and if the parties did not settle, to bring him in again, and he would proceed to convict him under the Act, and the plaintiff accordingly went out with the constable, it was held that there was sufficient evidence of an imprisonment of the plaintiff by order of the defendant, and nothing to furnish a justification as a ground for disturbing the verdict of the jury for the plaintiff. *Bridgett* v. *Coyney*, 1 M. & Ry. 211.

(*z*) B. N. P. 22. *Oxley* v. *Flower and another*, Selw. N. P. 894, where Ld. Kenyon is said to have held that every imprisonment included a battery; but see 1 N. R. 255.

(*a*) *Emmett* v. *Lyne*, 1 N. R. 255. False imprisonment usually includes an assault. *Pocock* v. *Moody*, 1 Ry. & M. Cas 321.

(*b*) *Supra*, Vol. I. tit. JUDGMENT. On the same principle, the conviction of the defendant before a magistrate of an assault, upon the information of the plaintiff, is not evidence. *Smith* v. *Rummens*, 1 Camp. 9.

(*c*) Vol. I. tit. JUDGMENT.

against all who are proved to have combined together for the common object (*d*).

Damages.

3. As the jury in an action of trespass are not restrained in their assessment of damages to the amount of the mere pecuniary loss sustained by the plaintiff, but may award damages in respect of the malicious conduct of the defendant, and the degree of insult with which the trespass has been attended (*e*), the plaintiff is at liberty to give in evidence the circumstances which accompany and give a character to the trespass (*f*).

Aggravation.

If the defendant, whilst he is an actual trespasser in the plaintiff's house, or on his land, commit any other trespass to the person of the plaintiff, or to the persons of his wife, children or servants, then, although distinct and substantive actions of trespass might have been maintained in respect of such trespasses, or actions on the case might have been supported, for the consequential damage in respect of the loss of service, or expenses of cure, &c. yet such acts of trespass and their consequences may be alleged and proved in aggravation of the damages. Thus, in an action for breaking and entering the plaintiff's house, the debauching of his daughter and servant, and the consequential damage to the plaintiff, may be laid and proved in aggravation (*g*). Where, however, the trespass to the house or land is the gist of

(*d*) Per Ld. Ellenborough, 11 East, 584. But *semble*, this must be limited to such declarations as are made in furtherance of the common object; *supra*, 325. The acts and declarations of a co-defendant, not implicated in the act of trespass relied on against the other defendants, he being a constable to whom the plaintiff had been given in charge by the other defendants, were held to be admissible in evidence against the others. *Powell* v. *Hodgetts*, 2 Carr. & P. C. 432.

(*e*) 2 M. & S. 77. *Merest* v. *Harvey*, 5 Taunt. 442; 1 Marsh. 139; 2 Starkie's C. 318. *Cox* v. *Dugdale*, 12 Price, 708. After a certificate on an indictment for an assault, the prosecutor receives part of the fine from the Treasury, although he is strictly entitled to maintain an action, yet it is the duty of an attorney to tell him he ought not to bring it, and the jury may give merely nominal damages. *Jacks* v. *Bell*, 3 C. & P. 315. Where upon a tenancy continuing after a holding for a year, under a written agreement, the tenant appeared by the custom as well as the stipulation, to be entitled to take away two-thirds of the way-going crops, and in an action against the landlord for removing the whole, and other minute acts of injury, the jury having given damages somewhat exceeding the supposed value of the crops, yet being entitled to consider the other grounds of complaint, the Court refused a new trial on account of such excess. In trespass, *qu. cl. fregit*, the jury are not to be confined to the precise value of the subject matter of damages, although they are not allowed to go out of the way to an unreasonable amount. *Cox* v. *Dugdale*, 12 Pri. 708.

(*f*) See the observations of Le Blanc, J. 2 M. & S. 77. In an action for breaking and entering the plaintiff's close, and searching for game therein, the plaintiff was permitted to prove that the defendant being a Member of Parliament and a magistrate, had, on being warned off the plaintiff's land, used very intemperate language, and threatened to commit the plaintiff. The jury gave 500 *l.* damages, and the Court of C. B. refused to grant a new trial. Where the plaintiff, having importunately intruded himself on the defendant for relief, the latter had ordered him to be taken into custody, and on the following morning the plaintiff accepted a small sum offered him, took refreshments, and expressed himself satisfied, but subsequently brought an action for the false imprisonment, and the jury gave 100*l.* damages, the Court, thinking that if accord and satisfaction had been pleaded, it would have been a bar to the action, and the damages excessive, granted a new trial on payment of costs. *Price* v. *Severn*, 7 Bing. 316, and 5 M. & P. 125. The Court afterwards discharged a Judge's order to withdraw the general issue and plead accord and satisfaction, as raising an entirely different issue which might subject the plaintiff to the costs of the action antecedent to the former trial. Ib. 402. A party is put into possession of the plaintiff's goods under a wrongful distress; the plaintiff is entitled to recover damages, although he continued to have the use of the goods. *Bayliss* v. *Fisher*, 7 Bing. 153. The plaintiff's dog having worried the defendant's sheep, is shot by the defendant after he had left the field, and was in an adjoining close; not being shot in actual protection of his property, the defendant is liable, but the habits of the dog may be considered in mitigation of damages. *Wells* v. *Head*, 4 C. & P. 568.

(*g*) *Bennett* v. *Alcott*, 2 T. R. 166; and

the action, and consequential damage is laid *merely in aggravation*, if the principal tresspass can be justified, it is an answer to the whole action, and the plaintiff cannot recover in respect of matter laid *merely in aggravation*; although if alleged alone it would have afforded a substantive ground of action. Thus, if the defendant can justify the entering into the house under a licence, it will be an answer to the counts alleging a breaking and entering; although a debauching of the servant and daughter, and loss of service, be laid *in aggravation* (*h*). Aggravation.

The rule seems, however, to be confined to such injuries as amount to trespasses, for the obvious reason, that to permit a substantive injury requiring a different form of action, to be alleged by way of aggravation, would be in effect to confound the forms of action, which ought, on principles of policy and convenience, to be kept separate. Still it seems that the defendant's intention, and his conduct and expressions, whilst he was in the act of committing the injury, are always evidence to show his malice, and the degree of insult offered to the plaintiff; although where they afford a distinct ground of action to be brought in a different form, the jury are not to award damages in respect of that distinct injury or its consequences, but only in respect of the principal trespass. In the case of *Bracegirdle* v. *Orford* (*i*), the declaration was for breaking and entering the plaintiff's house, and without any probable cause, and under a false and unfounded charge and assertion that the plaintiff had stolen property in her house, searching and ransacking the same, by means whereof the plaintiff was interrupted in the quiet enjoyment of her house, and her character injured. The learned Judge who tried the cause, informed the jury that if there was a charge of having stolen goods in the house, the damages ought not to be merely nominal. After a verdict for the plaintiff, damages 50 *l.*, it was afterwards objected, in arrest of judgment, and on a motion for a new trial, that the declaration was bad, and the direction of the Judge wrong; but Lord Ellenborough said, "As to the exception taken to the declaration, the trespass is the substantive allegation, and the rest is laid as matter of aggravation only. On the other point it does not appear that the learned Judge told the jury they might go beyond the damages for the trespass, and consider the rest as a subject of substantive damage, or in any otherwise than as connected with the trespass; and that is the constant course of considering it. In actions for false imprisonment the jury look to all the circum-

see B. N. P. 89; Holt, 699; Salk. 642; 1 Sid. 255. But note, that the assaulting and debauching the daughter is properly an action of trespass, notwithstanding what Mr. J. Buller has observed in that case. See *Woodward* v. *Walton*, 2 N. R. 476; and *Grey* v. *Livesey*, Cro. J. 501. It seems that any consequential damage resulting from the trespass may be laid in aggravation. See *Anderson* v. *Buckton*, Str. 192. Action of battery lies by husband or master, *per quod consortium* or *servitium amisit*, of the wife or servant. A spoliation of trees may be laid as an aggravation in trespass, though trover lies. If a man enter and chase or kill cattle, the latter may be charged as matter of aggravation. *Thompson* v. *Berry*, Str. 551. If a watercourse flow through two distinct closes, *A.* and *B.*, and the defendant by a trespass in *A.* stop the water from flowing to *B.* it may be stated as aggravation. Str. 192. If trespass be for the entry of diseased cattle, damage from infection may be stated in aggravation. *Anderson* v. *Buckton*, Str. 192. And recovery in such action will be a bar. Ib.

(*h*) *Bennett* v. *Alcott*, 2 T. R. 166. So in trespass for breaking and entering the plaintiff's house, and expelling him therefrom, the expulsion is mere aggravation, and a justification of the breaking and entering covers the whole. *Taylor* v. *Cole*, 3 T. R. 292. *Secus*, where a *distinct trespass* to the person or goods is alleged. See *Phillips* v. *Howgate*, 5 B. & A. 220. And note, that the case of *Bennett* v. *Alcott* seems to have been decided on the supposition that trespass did not lie for assaulting and debauching a servant, *per quod*, &c.

(*i*) 2 M. & S. 77.

Aggravation.

stances attending the imprisonment, and not merely to the time for which the party was imprisoned, and give damages accordingly. So here the breaking and entering the plaintiff's house for the purpose of searching it, and under the false charge, constitutes the trespass; and the false charge was not left as a distinct substantive ground of damage."

So in order to show how violent and outrageous the trespass was, the plaintiff may prove that his wife was so terrified that she was taken ill immediately, and soon afterwards died (*k*).

So the time and place of committing a personal outrage are circumstances which may materially tend to enhance the insult and damages (*l*).

But the plaintiff cannot recover in respect of any injury for which an action lies by another, or by himself and another jointly.

In an action of trespass for an assault on the wife or servant of the plaintiff, *per quod consortium amisit*, or *servitium amisit*, the jury cannot take into consideration the injury suffered by the wife or servant, in respect of which a distinct action lies (*m*).

So, if the action be brought by the husband and wife, for a trespass to the latter, no evidence is admissible of any consequential damage to the husband alone (*n*).

The plaintiff cannot give evidence of any matters merely in aggravation (*o*) not stated on the record (although they would not have supported any substantive action), which do not naturally and even necessarily result from the injury alleged on the record. Thus, if the declaration merely allege a false imprisonment, he cannot give evidence in aggravation that he was stinted in his food (*p*), or that he caught an infectious disorder (*q*). But he may prove intemperate language to have been used by the defendant, for this shows the intention to injure or insult.

Proof of special damage from the loss of lodgers is not maintainable, unless the loss, and the names of the lodgers, be specified in the declaration (*r*).

Alia enormia.

It seems to have been held formerly that matters might be given in evidence under the *alia enormia*, which could not with decency be stated on the record (*s*); and therefore that the plaintiff in an action of trespass for breaking and entering his house, might prove in aggravation, although it was not stated on the record, that whilst there he debauched the plaintiff's daughter (*t*).

(*k*) *Huxley* v. *Berg*, 1 Starkie's C. 98.

(*l*) It is a greater insult to be beaten on the Royal Exchange than in a private room. Per Bathurst, J. in *Tullidge* v. *Wade*, 3 Wils. 19.

(*m*) *Edmondson* v. *Machell*, 2 T. R. 4. In an action for assaulting and beating the plaintiff's niece, *per quod servitium amisit*, it seems that the jury cannot take into consideration the injury sustained by the niece herself, who has been deflowered. Ibid.

(*n*) *Supra*, 535

(*o*) It has been seen that the plaintiff is at liberty to give in evidence facts attending the trespass, to show the malice of the defendant and the degree of violence and magnitude of the trespass. See *Huxley* v. *Berg*, 1 Starkie's C. 98; he may show not only the pecuniary amount of the damage, but also that it was done for the purpose of insult or injury. Per Abbott, J. *Sears* v. *Lyons*, 2 Starkie's C. 318. And see *Merest* v. *Harvey*, 1 Marsh. 139.

(*p*) *Lowden* v. *Goodrich*, Peake's C. 46.

(*q*) *Pettit* v. *Addington*, Ibid. 62.

(*r*) *Westwood* v. *Cowne*, 1 Starkie's C. 172. See 1 Vin. Ab. 469. *Hartly* v. *Herring*, 8 T. R. 130. *Fenn* v. *Dixin*, 1 Roll. Ab. 58; B. N. B. 7; 2 Will. Saund. 411, n (4). Sed vide *supra*, tit. LIBEL.

(*s*) See *Lowden* v. *Goodrich*, Peake's C. 46; 6 Mod. 127.

(*t*) Per Holt, C. J. *Russel* v. *Corn*, 6 Mod. 127. Cas. Temp. Holt, 699. *Sippora* v. *Basset*, 1 Sid. 225; Keil. 787; Cro. J. 534. Gilb. L. E. 240, 2d edit.; Mr. Peake's observations, Peake's L. E. 323, 5th edit.

Considering, however, that it is the common practice to allege the debauching of a daughter and servant on the record, in an action of trespass and assault, or in an action on the case, this doctrine, as applied to such a case, savours of an excess of modesty and refinement, and weighs but little against the general principle, which requires that the defendant shall be specially informed by the record of the facts on which the plaintiff relies. Quare clausum fregit. Aggravation.

The defendant may be found guilty of any part of the trespass alleged. If the declaration be for cutting and taking away trees, he may be found guilty of the taking, although the cutting be not proved (*u*).

Where goods are taken under process in a place beyond the jurisdiction, the plaintiff is entitled to recover the value of the goods, and not merely the amount of damage sustained by their having been taken in the wrong place (*x*).

4. It is frequently requisite, with a view to costs, to prove that the trespass was wilful and malicious under the statute (*y*). The usual evidence for this purpose consists in proof that the trespass was committed after notice. It has been held that where the trespass has been committed after proof of notice, the Judge is bound to certify (*z*); but in a later instance this was held to be discretionary (*a*). Wilful trespasses. Notice.

So, with a view to costs, it may be necessary to prove that the defendant is an inferior tradesman, apprentice, or other dissolute person, within the stat. 4 & 5 W. & M. c. 23, s. 10 (*b*).

If the tearing of the plaintiff's clothes, in an action of assault and false imprisonment, be laid as a substantive injury, and the jury find it to be so, the plaintiff is entitled to full costs, though the jury find damages under 40 *s.*; but if the jury find the tearing of the clothes to have been in consequence of the beating, the plaintiff in such case is not entitled to more costs than damages (*c*).

5. In actions against magistrates, constables, and other peace officers, it has been seen that notice of action, and a demand of a copy of the warrant, is frequently necessary (*d*); and proof of notice of action is sometimes necessary in other cases, under the provisions of particular statutes. Notice of action.

Where an Act provides that no action shall be maintained without notice to the defendant or defendants of such intended action, a separate notice to each defendant, not mentioning the names of the other defendants, is sufficient in a joint action against all (*e*).

6. The defendant, before the new rules, might have given in evidence, under the general issue (*f*), any matter which contradicted the plaintiff's evidence, or showed that the act complained of was not in its own nature a trespass at common law (*g*). Thus he might prove that the Defence. General issue.

(*u*) B. N. P. 94.

(*x*) *Sowell* v. *Champion*, 8 Ad. & Ell. 407.

(*y*) 8 & 9 Will. 3, c. 11, s. 4. And 3 & 4 Vict., c. 4.

(*z*) *Reynolds* v. *Edwards*, 6 T. R. 11.

(*a*) *Good* v. *Watkins*, 3 East, 495.

(*b*) It has been held that a clothier keeping an alehouse, and not qualified, is within the statute. Barnes, 125. Vide *supra*, tit. GAME.

(*c*) *Cotterill* v. *Tolly*, 1 T. R. 655. *Mears* v. *Greenaway*, 1 H. B. 291. So if the asportavit laid be but a mode or qualification of the trespass; as in an action for breaking the close, and digging and carrying away turves. *Clegg* v. *Molyneux*, Doug. 684.

(*d*) *Supra*, 580.

(*e*) *Agar* v. *Morgan*, 2 Price, 126.

(*f*) And he may do so still by virtue of any statute which enables him to give any special matter in evidence, under the general issue, provided, according to the new rules, he insert in the margin of the plea, the words "by statute."

(*g*) Per Buller, J. Dougl. 610. *Le Caux* v. *Eden*, Doug. 494. It is no answer to an action of trespass, that the plaintiff might have maintained covenant. Per Buller, J. in *Best* v. *Moore*, 5 T. R. 334.

Defence. General Issue.

locus in quo was his own freehold, or that of another by whose authority he entered (*h*); or that he had any other title or right to the possession (*i*); or that he is tenant in possession under the plaintiff (*k*); that he was entitled under a demise from a mortgagee (*l*); or that he was tenant in common with the plaintiff (*m*); or that he entered by command of another who is tenant in common with the plaintiff (*n*); for a man cannot, in point of law, be a trespasser in merely exercising a right which the law gives him (*o*); or, where the action was brought for cutting down trees, that he was lessee for years of the lands on which the trees grew (*p*), for he has a special property in them for repairs and shade; or that the trees were sold to the defendant by the tenant in tail in possession (*q*).

But by one of the rules of Hil. Term, 4 W. 4, it is ordered that "In actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass as alleged in the place

(*h*) *Dodd* v. *Kyffin*, 7 T. R. 354. *Derisley* v. *Neville*, 1 Leon. 301. *Argent* v. *Durrant*, 8 T. R. 403. *Garr* v. *Fletcher*, 2 Starkie's C. 71; Gilb. Ev. 358; Bro. Gen. Issue, pl. 82. *Chambers* v. *Donaldson*, 11 East, 72. In *Philpot* v. *Holmes* (Peake's C. 67), it is said that the defendant cannot under the general issue prove title in another, and an entry by his command. But see the above cases. The declaration of the owner after the trespass has been held to be inadmissible to prove the command. *Garr* v. *Fletcher*, 2 Starkie's C. 71.

(*i*) As that the interest of the plaintiff, who held under the defendant, had expired at the time of the alleged trespass. *Argent* v. *Durrant*, 8 T. R. 403. Trespass for cutting and taking furze; under the general issue the defendant may prove an exclusive right of possession. *Pearce* v. *Lodge*, 12 Moore, 50.

(*k*) *Barton* v. *Cordy*, 1 M. & Y. 278. And notice to quit by plaintiff to defendant, subsequently to the alleged trespass, entitles the defendant to a nonsuit. Ib.

(*l*) *Johnson* v. *Hewson*, 2 M. & R. 227. Note, that in a special plea he would have been bound to give colour.

(*m*) Gilb. Ev. 204. But the defendant cannot, as tenant in common, justify under the general issue the destruction of the common property. Thus, though as tenant in common of a hedge, he may justify the mere exercise of a right of ownership over the common subject-matter, as by clipping the hedge, he cannot justify a complete removal and destruction of the hedge. *Voyce* v. *Voyce*, 1 Gow, 201. See tit. TROVER.

(*n*) Gilb. Ev. 204. *Rosse's Case*, 3 Leon. 83.

(*o*) See Gilb. Ev. 221. It is true, that by making a forcible entry upon a party in actual possession, the party entitled to the possession may be criminally responsible for his breach of the peace. See the statute 8 H. 6, c. 9, s. 6. But in an action for a forcible entry, he would, it seems, be entitled to a verdict, on proof of his title to the possession, just as in a common action of trespass. The effect of the statutes of Forcible Entry, in relation to civil actions, seems to be confined to the giving treble damages where a forcible entry is alleged and proved, instead of the single damages recoverable in a civil action.

A landlord may enter on the premises after a determination of the tenancy by a notice to quit, although the tenant keeps possession. *Turner* v. *Meymott*, 1 Bing. 158. And see *Taunton* v. *Costar*, 7 T. R. 431. *Davies* v. *Connop*, 1 Price, 53. A party occupying parish premises is not to be deemed a tenant; and held, therefore, that where a party had quitted the premises, although he left his children there, the overseers might peaceably resume possession, without having recourse to the provisions of the stat. 59 Geo. 3, c. 12, s. 24. *Wildbore* v. *Rainsforth*, 8 B. & C. 4. The owner of goods may retake them by force from a person refusing to deliver them up. *R.* v. *Milton*, 1 M. & M. 107.

(*p*) B. N. P. 84; Aleyn, 82. *Sceus*, where trees are excepted in the lease, or are taken away after severance (*Herlakenden's Case*, 4 Co. More, 248), or where the party is mere tenant at will, for the tortious act determines the will. Ib. and Co. Litt. 57. If *A.* plant a tree at the extreme limit of his own land, and the tree growing, extend its roots into the land of *B.*, *A.* and *B.* are tenants in common of the tree; but if all the roots grow in *A.*'s land, though the bough shadow the land of *B.*, the property is in *A.* B. N. P. 85; 1 Ray. 737.

(*q*) Sir *R. H.*, under whom the plaintiff claimed as heir in tail, being tenant in tail, sold to the defendant 300 of the best trees in such a wood, to be taken within a limited time, for a valuable consideration; Sir *R.* died, and the defendant within the time took the trees. Upon not guilty pleaded, Jones, C. J. held that the sale was within the stat. 27 Eliz. c. 4, and bound the heir in tail, and the plaintiff was nonsuited. *Hatton* v. *Neale*, B. N. P. 90. Note, that the settlement was with a power of revocation.

Defence. General issue.

mentioned, but not as a denial of the plaintiff's possession or right of possession, which, if intended to be denied, must be traversed specially (*r*).

Before the late rules the defendant might show that the goods were sold to him under an execution upon a judgment obtained by him against the plaintiff; in such case he was bound to prove the judgment as well as the writ (*s*); or that the plaintiff had parted with the possession, and was not entitled to it at the time of the trespass (*t*); or that the property had been divested by forfeiture (*u*).

But now one of the rules of Hii. T. 4 Will. 4, provides that the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein (*v*).

In the case of an assault, the intention of the defendant is material, and he may go into evidence to prove *quo animo* the act was done, in order to show that there was no assault (*w*).

In the case of a battery, an actual intention to injure is not essential to the action, and a defendant is responsible in damages for any immediate injury to the person of another, although the injury was not wilful (*x*). Yet it seems that some degree of negligence or inattention is even in this case essential, and that it is a good defence to show that the accident was inevitable. Thus, if *A.* beat the horse of *B.*, which runs against *C.*, or if *A.* take the hand of *B*, and with it beat *C.*, *A.* and not *B.* is the trespasser; and this would be a good defence for *B.* under the general issue (*y*).

So if the injury was accidental on the part of the defendant, and might have been avoided by the plaintiff; as where the defendant's horse runs away with him, and the plaintiff refuses to go out of the way, and is hurt (*z*).

(*r*) See tit. RULES. Under the general issue the defendants cannot show, in mitigation of damages, that they acted under the landlord against whom an action had been brought and damages obtained for the same trespass. *Day* v. *Porter*, 2 Mo. & R. 151.

(*s*) See *Doe* v. *Smith*, 2 Starkie's C. 199.

(*t*) *Ward* v. *Macauley*, 4 T. R. 489.

(*u*) *Wilkins* v. *Despard*, 5 T. R. 112.

(*v*) By the stat. 11 Geo. 2, c. 19, s. 21, the seizure of goods for rent is evidence in justification under the general issue; but where goods clandestinely removed have been followed and seized, the defence must be specially pleaded. *Furneaux* v. *Fotherby*, 4 Camp. 136. *Vaughan* v. *Davis*, 1 Esp. C. 256.

(*w*) See *Griffin* v. *Parsons*, Gloucester Lent Assizes, 1754, Selw. N. P. 27. Trespass for an assault, plea *son assault demesne*, replication *de injuriâ*; the defendant and another were fighting, and the plaintiff came up and took hold of the defendant by the collar, in order to separate the combatants, whereupon the defendant beat the plaintiff. It was objected, that to warrant this evidence, the matter ought to have replied specially; but Legge, B. overruled the objection, observing that the evidence was not offered by way of justification, but for the purpose of showing that there was no assault, for it was the *quo animo* which constituted the assault, which was left to the jury. See also Gilb. L. Ev. 256, 2d edit.

(*x*) *Weaver* v. *Ward*, Hob. 134. *Underwood* v. *Hewson*, Str. 596; Salk. 637; Lord Raym. 38. *Wakeman* v. *Robinson*, 1 Bing. 213.

(*y*) See the cases cited in the last note; and also *Scott* v. *Shepherd*, 3 Wils. 403. A mere involuntary trespass may be justified. *Beckwith* v. *Shordyke*, 4 Burr. 2092. If in the prosecution of a lawful act a mere accident arises, no action is maintainable. *Davis* v. *Saunders*, 2 Chitty's R. 639. *Secus*, where any degree of blame is imputable. *Wakeman* v. *Robinson*, 1 Bing. 213.

(*z*) *Gibbons* v. *Pepper*, Salk. 637; 1 Lord Raym. 38. Note, the defendant pleaded a special justification, which was held to be bad for not confessing the trespass; but the Court held that the defence would have been available under the general issue. In trespass for an injury by driving against the plaintiff whilst crossing the road, held that any defence amounting to an allegation that the matter did not arise from any fault of the defendant, mus tbe specially pleaded; *aliter* in *case* for negligently driving. A foot passenger

Defence. General issue.

It is no defence that the plaintiff was arrested under a *mistake*; as if *A.* be by mistake apprehended under a Judge's warrant directed against *B.* (*a*); or that the defendant, supposing the plaintiff to be liable to be impressed, caused him to be impressed, when in fact he was not liable (*b*).

Where a ship was taken as a prize, but afterwards acquitted, it was held that trespass for false imprisonment would not lie at common law (*c*).

So it has been held, that under this issue the defendant might show that the plaintiff's horses, which had been seized under pretence of their being estrays, were delivered to him as pound-keeper; for he was not a trespasser in receiving and detaining them (*d*).

It is a good defence to show that the injury arose from the negligence of the defendant's agent in the management of his vessel, for there the proper remedy is by an action on the case (*e*).

Merger.

No action will lie if it appear that the civil action has merged in a felony; but after an acquittal for the felony, an action is maintainable (*f*), provided there be no collusion (*g*). The acquittal must be proved by the production of the record, or an examined copy of it; and the defendant may give evidence to show that it was collusive.

Mitigation.

The defendant cannot give in evidence under the general issue matters which might have been pleaded in bar (*h*). In an action for a battery, the defendant cannot, under this issue, prove that the beating in question was inflicted by way of punishment for misbehaviour (*i*); yet he may give any circumstances in evidence in mitigation, which tend to reduce the quantum of damage sustained by the plaintiff, and which could not have been pleaded. Thus, in trespass for cutting trees, the defendant was permitted to show that the trees had been applied to purposes for which the plaintiff had covenanted to furnish timber by assignment of his bailiff (*h*). So matter

has a right to cross a road, and a party driving along it is bound to use proper caution; and if the injury arise from his not having power to control his horse, by reins, &c. breaking, it is no ground of defence; said also, that the rule of the road does not apply to foot passengers; as regards them, the carriage may go on which side the driver pleases. *Cotterill* v. *Starkey*, 8 C. & P. 691. See *Boss v. Liston*, 5 C. & P. 407.

(*a*) *Aaron* v. *Alexander and others*, 3 Camp. 35.

(*b*) *Fleurster* v. *Royle*, 1 Camp. 187.

(*c*) *Le Caux* v. *Eden*, Doug. 594.

(*d*) *Badkin* v. *Powell & Chancellor*, Cowp. 476. Yet the same may be said in the case of a gaoler, who is nevertheless bound to justify specially in an action for false imprisonment. Aston, J. in the above case, distinguished it from the case of a gaoler, the latter always acting under a warrant. But this is to make the necessity of a special plea to depend, not upon the nature of the justification, but upon the nature of the proof by which it is to be supported. It is, indeed, a general principle, that if an officer do only that which belongs to his office, he shall not be liable for any precedent tortious acts of which he could know nothing (2 Jones, 214, cited by Aston, J. in the foregoing case). But if this doctrine bears upon the question of pleading, it is also applicable to the case of a gaoler, and was equally applicable to the cases of constables and other peace officers previous to the statute 24 Geo. 2, c. 44.

(*e*) *Huggett* v. *Montgomery*, 2 N. R. 446.

(*f*) *Crosby* v. *Leng*, 12 East, 409.

(*g*) Ibid.

(*h*) *Watson* v. *Christie*, 2 B. & P. 224. Vin. Ab. Ev. I. b. pl. 16. That which is matter of aggravation need not be answered in the plea. Trespass for taking, carrying away and converting a bag; plea, damage-feasant, justifying the impounding, &c. the replication alleging a conversion was held to be good, for it shows that the defendant was a trespasser *ab initio*. *Dye* v. *Leatherdale*, 3 Wils. 20; and see *Taylor* v. *Cole*, 3 T. R. 493, where it was held that a justification of the breaking and entering was sufficient, without noticing the additional allegation of an expulsion.

(*i*) Ibid. For where the trespass has been established which is not justified, the only remaining question is as to the extent of the damage.

(*k*) *Rennell and others* v. *Wither*, cor. Abbott, J. Winch. Spring Ass 1813, Manning's Ind. *Trespass*, 36.

Defence. General issue.

of provocation which could not have been pleaded in bar may, it seems, be given in evidence (*l*). And although the matter might have been pleaded in bar, yet if it tend to reduce the value of the chattel injured it is proveable under this issue.

Thus, although the defendant cannot under this plea prove, in bar of an action for destroying a picture, that it was a gross caricature (*m*), yet he may prove the fact in mitigation of damages, and the plaintiff can recover no more than the value of the canvas (*n*).

In trespass for false imprisonment, evidence of reasonable suspicion of a felony committed is admissible (*o*); and all circumstances which took place at the time of the imprisonment are admissible in evidence as part of the transaction which is the subject of inquiry, and to show the real nature and extent of the injury, but not for the purpose of proving misbehaviour on the part of the defendant, no justification being pleaded; and therefore, although, in such an action against the captain of a ship, evidence of expressions used by the defendant at the time tending to mutiny are admissible under the general issue (*p*); yet in an action against a captain of a ship for a battery, evidence having been given that the beating was inflicted as punishment for misbehaviour, and it being insisted that the conduct of the defendant at the time of the assault being necessarily in evidence, proved that misbehaviour, it was held (*q*), that no justification having been pleaded, the jury should give damages to the amount of the injury suffered, without diminution in respect of misbehaviour.

Some of the statutes which enable a defendant to give special matter of justification in evidence under the general issue have already been adverted to (*r*).

By the stat. 11 Geo. 2, c. 19, s. 21, it is enacted, that in actions of trespass, or on the case, brought against any person entitled to rents or services of any kind, or against their bailiff or receiver, or other person, relating to any entry by virtue of this Act, or otherwise, *upon the premises* (*s*), chargeable with such rents or services, or relating to any distress or seizure, sale or

(*l*) In *Dennis* v. *Pawling*, (Vin. Ab. tit. *Evidence*, I. b. pl. 16), Price, B. refused to admit anything in evidence which tended to justify the words, although offered in mitigation only; saying, that anything which tended to show a provocation, or any transaction between the parties giving occasion for speaking the words, was proper in the defendant to make out, because these matters cannot be pleaded.

So in *Coot* v. *Bertie*, (12 Mod. 232), it was said that license by the husband, or the lewd character of the wife, could not be pleaded in bar of trespass by the husband; yet that those matters were evidence in mitigation of damages.

If trespass be brought by an executor against an executor *de son tort*, he may give in evidence payment of debts to value in mitigation of damages; but he is still a trespasser, and there must be a verdict against him. B. N. P. 91; Ca. K. B. 441.

(*m*) *Du Bost* v. *Beresford*, 2 Camp. 511. And where such a caricature is openly exhibited, it seems that the defendant might justify the destruction as abating a public nuisance. Ibid.

(*n*) Ibid.

(*o*) *Chinn* v. *Morris*, R. & M. 424.

(*p*) *Bingham* v. *Garnault*, B. N. P. 17; 1 Esp. D. 337.

(*q*) By Lord Eldon, at N. P., and afterwards by the Court. *Watson* v. *Christie*, 2 B. & P. 224.

(*r*) The statute 21 Jac. 1, c. 12, s. 5, relating to justices, mayors, bailiffs, headboroughs, portreeves, constables, tithingmen, churchwardens, overseers, and their deputies, &c. *supra*, 585. See the stat. 43 Eliz. c. 3, s. 19, as to taking distresses, making sales, and other acts done by the authority of that statute. A churchwarden cannot justify the cutting and breaking to pieces a pew, although wrongfully erected. Noy, 108; Burn's Ecc. L. 365, 7th edit.

(*s*) If the defendant justify the seizing goods (under the first sect.) which have been fraudulently removed to avoid a distress, he must still plead the defence specially. *Vaughan* v. *Davis*, 1 Esp. C. 257. *Furneaux* v. *Fotherby*, 4 Camp. 136.

Defence. General issue.

disposal of any goods or chattels thereupon, the defendant may plead the general issue, and give the special matter in evidence (*t*).

But the defendant cannot under the general issue, except by virtue of the positive enactment of a statute, give in evidence any matter in excuse, justification or satisfaction of the alleged trespass; such as a release (*u*), or accord and satisfaction (*v*), or recovery against another party, and payment by him (*w*), or that goods were seized as a deodand (*x*), or heriot, or for a distress damage-feasant (*y*), or leave and license (*z*); or any interest short of property and right of possession; such as a right of common (*a*), or a public or private right of way (*b*), or a right to an easement (*c*), or defect in the plaintiff's fences (*d*), or that the supposed trespass arose from necessity (*e*), or accident, or from the negligence of the plaintiff (*f*), or that the defendant entered to take his emblements or cattle (*g*), or to remove a nuisance (*h*), or to execute process (*i*), or in fresh pursuit of a felon (*j*), or that a stranger is tenant in common with the plaintiff (*k*). For these are matters which do not directly contradict that which the plaintiff would be bound to prove under the general issue, but which show collaterally that the action is not maintainable.

And facts which might have been pleaded cannot be given in evidence under the general issue (*l*). Neither can the defendant prove in bar that the plaintiff has no property in the lands or goods where he proves possession, for that is sufficient to support the action (*m*). So he cannot under this issue justify the cutting down posts of the plaintiff, although they were fixed in the defendant's own soil (*n*).

In an action of trespass for breaking and entering the plaintiff's close, and pulling down certain buildings there, the defendant, as to the breaking and entering, let judgment go by default, and pleaded the general issue as to the residue; and it was held that his plea was supported by evidence that the building, which was of wood, had been erected by him, being tenant of the premises, on a foundation of brick, for the purposes of trade, and that he still remained in possession at the time of the removal, although his term had expired (*o*).

(*t*) Trespass lies where the landlord, after making distress, turns the family out, and keeps possession (*Etherton* v. *Popplewell*, 1 East, 139). So, if entering with a warrant of distress, the party remains on the premises beyond the time allowed by law. *Winterborne* v. *Morgan*, 11 East, 395.

(*u*) Burr. 1353.

(*v*) Ibid.

(*w*) Ibid.

(*x*) *Dryer* v. *Mills*, Str. 61.

(*y*) B. N. P. 90; Co. Litt. 233; Salk. 151.

(*z*) Plowd. 14; Gilb. C. P. 63. In an action of trespass *quare clausum fregit*, and debauching the plaintiff's daughter, the defendant cannot, under the general issue, give evidence of a license from the wife. *Bennett* v. *Alcott*, 2 T. R. 166; Gilb. Ev. 216.

(*a*) 1 Inst. 282, 3.

(*b*) *Selman* v. *Courtney*, Vin. Ab. *Evidence*, Z. pl. 91; Burr. 145. 175; 1 Salk. 287.

(*c*) *Hawkins* v. *Wallis*, 2 Wils. 173. Although it has been exercised for thirty years. Ibid. Gilb. Ev. 217. 220.

(*d*) Co. Litt. 183, a; Gilb. Ev. 216; B. N. P. 90.

(*e*) Com. Dig. *Pleader*, 3 M. 20. 30.

(*f*) *Knapp* v. *Salsbury*, 2 Camp. 500. It is otherwise, it seems, where the defendant is a mere passive instrument by means of which the injury is occasioned; as if *A.* seize the hand of *B.*, and beat *C.* with it; vide *supra*, 1119. So it seems, that if *B.* were against his will seized by force, and thrown on the land of *C.*, and again removed without his consent.

(*g*) B. N. P. 90. 54. 85.

(*h*) Ibid.

(*i*) Bro. Gen. Issue, 81; B. N. P. 90.

(*j*) Ibid.

(*k*) B. N. P. 91.

(*l*) *Watson* v. *Christie*, 2 B. & P. 224.

(*m*) B. N. P. 91; Salk. 4.

(*n*) *Welsh* v. *Nash*, 8 East, 394.

(*o*) *Penton* v. *Robart*, 2 East, 88.

Justification in general.

It is a general rule, that if the defendant show anything which excuses the trespass, it is sufficient, although the proof be not commensurate with the extent, quantity or number alleged and proved (*l*).

If in trespass for taking cattle, the defendant justify, as lord of the manor, the taking, as a distress damage-feasant, and the plaintiff reply a right of common for commonable cattle, levant and couchant, &c. and the defendant traverse the levancy and couchancy of the cattle distrained, and it appear in evidence that some were levant and couchant, and others not, the defendant will be entitled to the verdict (*m*). But now by the rule of Hil. Term, 4 Will. 4, the plea is divisible, and the plaintiff in such case would be entitled to recover in respect of such cattle as were levant and couchant. But if the lord were in such case to bring trespass *quare clausum fregit*, and the defendant to plead the right of common, and that the cattle were levant and couchant, and issue were to be joined on the levancy and couchancy, on proof that some were levant and couchant, the defendant would succeed (*n*).

Liberum tenementum.

7. As the object of the plea of *liberum tenementum* usually is to compel the plaintiff to assign the place in which he alleges the trespass to have been committed with greater precision (*o*), and as upon this plea being pleaded the plaintiff usually amends, or new assigns the *locus in quo*, it seldom happens that the plaintiff's title to damages rests upon this plea, especially as the defendant may give the matter in evidence under the general issue (*p*). Now, however, as has been seen, such evidence in cases to which the new rules are applicable, is inadmissible under the general issue, but as these rules require a more particular description of the *locus in quo*, than formerly was necessary, the former object of this plea no longer exists (*q*). Proof of the issue lies on the defendant (*r*), who undertakes to prove a freehold interest (*s*), admitting the plaintiff's possession, but denying his right to possess (*t*).

If issue be joined on the plea of *liberum tenementum*, the defendant may elect to what parcel he will apply his plea, and the plaintiff cannot insist on a trespass in any other parcels without a new assignment (*u*). And therefore if the plaintiff allege a trespass in his close, situate in the parish of *A.* generally, and issue be joined on this plea, the defendant would be entitled to a verdict on proving that he had any quantity of land, however small, within the parish (*v*). Where, however, the close is described by name, and the plaintiff proves a trespass in his close of that name, he is entitled to recover, although the defendant prove title to another close in the parish of the same name (*w*). Where, therefore, the plaintiff in his

(*l*) See 1 Will. Saund. 46, d.

(*m*) *Supra*, 319.

(*n*) Ibid.

(*o*) See *Stevens* v. *Whistler*, 11 East, 51. Where the plaintiff in his declaration names the close, he is not bound, on *liberum tenementum* pleaded, to new assign, although it appears that the defendant has a close of the same name within the parish. *Cocker* v. *Crompton*, 1 B. & C. 489.

(*p*) This observation was written previously to the making the new rules.

(*q*) And the plea ought not to be pleaded unless it be really necessary; 1 B. & C. 391; 3 A. & E. 187.

(*r*) *Pearson* v. *Coles*, 1 Mo. & R. 206.

(*s*) Saund. 347, d.

(*t*) Per Patteson, J., in *Lempriere* v. *Humphrey*, 3 A. & E. 186.

(*u*) *Hawke* v. *Bacon*, 2 Taunt. 156. See the rules of the K. B. and C. B. of Mich. 1654, as to new assignments. And see *Bond* v. *Downton*, 2 A. & E. 26.

(*v*) *Elwis* v. *Lombe*, 6 Mod. 117. Per Willes, C. J. in *Lambert* v. *Strother*, Willes, 223. Per Lawrence, J. in *Goodright* v. *Rich*, 7 T. R. 335; B. N. P. 90; 6 Mod. 117; 1 Litt. 148, sec. 84. 23, c. 147; 1 Saund. 299, b. (n).

(*w*) *Cocker* v. *Crompton*, 1 B. & C. 489. *Cooke* v. *Jackson*, 9 D. & R. 495. In

Liberum tenementum.

declaration describes the *locus in quo*, he is in general, on issue taken on this plea, entitled to recover in respect of trespasses committed there, unless the defendant prove his title to the very close so described, although the latter may have title to some *other* close to which the *same description* is applicable. Suppose, however, that the defendant proves title to part of the very close described by the plaintiff, some doubt has been entertained in such cases, partly from a supposed analogy, as it seems, to the old cases, where no sufficient description was given of the *locus in quo*, whether the defendant having proved freehold as to some part, was not entitled to the verdict. It seems, however, to be settled, that by *the place in which*, &c., is to be understood the place in which the alleged trespass is proved to have been committed, and that the defendant may so apply it, and that it is sufficient to prove the right as alleged in the plea in that part of the close in which the trespass is proved (*x*); and that the plaintiff is entitled to recover in respect of trespasses proved in other parts of the close to which the defendant has no title. In other words, that the plea is divisible (*y*), and operates as a defence commensurate with the right proved, and no further.

It has been held, that if the defendant plead that the *locus in quo* has been immemorially parcel of land on which the defendant is entitled to a right of common, &c. and the plaintiff reply that the *locus in quo* has been inclosed for twenty years, on issue joined on this replication the plaintiff would fail, if it appeared that any part of the common had been inclosed within the twenty years (*z*).

But this, according to the later case of *Richards* v. *Peake* (*a*), must, it seems, be understood with this limitation, viz. that the trespasses proved were confined to that part of the common. The defendant pleaded a right of common in the *locus in quo*, as parcel of Frentishoe Common, and issue was joined on the replication that the *locus in quo* was a close, called Burgey Cleave Garden, which had been inclosed from the said common, and enjoyed in severalty for thirty years. The jury found that part of the garden had been inclosed within thirty years, and that the alleged trespass was committed in that part; and the Court held that the defendant was entitled to the verdict, whether the allegation in the replication was entire or divisible;

order to compel a new assignment the defendant must give a further description of the close. So if the close be described in the declaration not by name, but by abuttals. *Lempriere* v. *Humphrey*, 3 A. & E. 181.

(*x*) Per Cur. B. R. Hil. 1831. *Bassett* v. *Mitchell*, 2 B. & Ad. 99. Declaration for breaking the plaintiff's close set out by abuttals. Justification alleging that the close in which, &c. was part of an allotment of six acres made by commissioners authorised for certain purposes, in execution of which he entered. Replication that the said close in which, &c. was not part of the six acres in the plea supposed to have been allotted, and thereupon issue was joined. It appeared that the close set out by abuttals was not *all* within the allotment, but that the part in which the actual trespass was committed was within it; it was held that the justification was made out by this evidence; for the words, "close in which," &c. mean that part of the close described, in which the trespass is proved to have been committed, and if the record should be used in a future action, either party might narrow its effect by evidence of the part to which it applied.

(*y*) If the declaration be for trespass to three closes, and the defendant plead *liberum tenementum* to all, and the plaintiff reply a title to all, the verdict may be for the plaintiff as to two, and the defendant as to one close. *Phytian* v. *White*, 1 M. & W. 216.

(*z*) 2 Taunt. 156; *i. e.* if the alleged trespassing were confined to that part. See *Richards* v. *Peake*, *infra*.

(*a*) 2 B. & C. 918.

Liberum tenementum.

for if entire, it had not been proved; if divisible, no trespass had been proved in that part which had been inclosed for thirty years.

If the defendant justify under an alleged grant of a close, and it appear in evidence that he has a partial interest only in the land, such as the first crop, the variance will be fatal; for a grant of the close imports a grant of the soil (*b*).

A plea of *liberum tenementum* in the defendant is not supported by evidence showing a tenancy in common (*c*).

It has been doubted whether, on issue joined on this plea, the plaintiff could show that the defendant was barred by continued possession (*d*); but under the late statute, which operates to extinguish the claimant's right, there can be no doubt that such evidence is admissible in bar of the defendant's claim (*e*).

Some observations have already been made with respect to presumptive evidence of title to land (*f*). Where a strip of waste land lies between a highway and an adjoining freehold, the *primâ facie* presumption is, that both the strip of land and the soil of the highway *ad medium filum viæ*, are the property of the owner of the inclosure (*g*), whether he be freeholder, leaseholder or copyholder (*h*): a presumption capable of being rebutted by proof

(*b*) *Stammers* v. *Dixon*, 7 East, 207. One may hold the *prima tonsura* of land as copyhold, and another may have the soil and every other beneficial enjoyment of it as freehold. And ancient admissions of the copyholder, and those under whom he claims the land by the description of *tres acras prati*, may be construed only to enjoy the *prima tonsura*, if in fact they have enjoyed no more under such admissions, while another has had the after-crop, and has cut tares and furze, and scoured the ditches, repaired the fencing, and kept the drains, though the copyholder (in his own wrong) may have paid the rates and taxes. Ibid.

(*c*) *Voyce* v. *Voyce*, 1 Gow, 201.

(*d*) *Lowe* v. *Govett*, 3 B. & Ad. 863.

(*e*) See above, tit. LIMITATIONS.

(*f*) *Supra*, tit. CUSTOM.—COMMON.—POSSESSION. Any act done upon the land is admissible, not as evidence of acquiescence but of possession; per Parke, B. 2 M. & W. 328. A perambulation is evidence of the limits of a manor, although no person against whom it operates was present or had notice of it. *Woolway* v. *Rowe*, 1 Ad. & Ell. 114. And acts of tenants are admissible against the reversioner, although their declarations are not. *Tickle* v. *Brown*, 4 A. & E. 378. Where small rents had been paid without any variation for a long period to the lord, held that it afforded no evidence of a title to the land, the presumption being that they were quit-rents. *Doe* d. *Whittick* v. *Johnson*, 1 Gow, 173. Where a cottage standing in the corner of a meadow belonging to the lord of a manor, but separated from it by a high hedge, had been occupied for above 20 years, without payment of rent, and on the lord's demanding possession it was reluctantly given, the pauper being told that if he did resume the possession it should be for life only, and he did remain and occupy for 15 years without payment of rent, held that the jury were warranted in concluding that the possession was permissive. *Thompson* v. *Clark*, 8 B. & C. 717. Possession by a feoffee for less than 20 years is not sufficient evidence to warrant the presumption of livery of seisin. *Doe* v. *Cleveland*, 4 M. & R. 666. Acts of ownership exercised over one part of a waste, are evidence to rebut a presumption that another was inclosed by grant from the lord. *Bryan* v. *Winwood*, 1 Taunt. 208.

(*g*) *Steel* v. *Prichett and others*, 2 Starkie's C. 463. *Grose* v. *West*, 7 Taunt. 39. *Stevens* v. *Whistler*, 14 East, 51. Where the question was whether a slip of land between an old inclosure and the highway belonged to the lord of the manor, or to the owner of the adjoining land; held, that acts of ownership by the lord, as inclosure of other slips in open places in the same manor, were properly admitted in evidence, and not merely acts with reference to the part in dispute, the circumstance of all being in the same manor giving a general unity of character. *Doe* d. *Barrett* v. *Kemp*, 7 Bing. 332, and 5 M. & P. 173.

(*h*) *Doe* v. *Pearsey*, 7 B. & C. 304. *Berry* v. *Goodman*, 2 Leon. 149; Vin. Ab. T. b. 102. *R.* v. *Edmonton*, 2 M. & M. 24. *Cooke* v. *Green*, 11 Price, 736. *Doe* v. *Kemp*, 7 Bing. 332. But where the herbage of a road is vested, by the General Inclosure Act (41 G. 3, c. 109), in the owners of the adjoining allotments, it seems that no presumption arises that the soil belongs to them. *R.* v. *Hatfield*, 4 Ad. & Ell. 156. And see further as to the presumption in cases of roads under In-

Right of way, easement, &c.

of acts of dominion exercised upon such wastes by the lord of the manor or others (*i*). Where strips of land so situated are connected with open commons, the presumption is liable to be much weakened by evidence of ownership applicable to such commons (*k*).

Where a reasonable probability exists that a particular district of land has formerly belonged to the same owner, and subject to one and the same burthen, acts of ownership done on other parts of such lands are admissible evidence to show what the right is as to the particular part in dispute. Thus in the case of *Stanley* v. *White* (*l*), where the question was as to the plaintiff's freehold right to certain trees, evidence was admitted in proof of the right that they grew in a certain woody belt, fifteen feet wide, which surrounded the plaintiff's land, but which was undivided by any fences from any lands adjoining, of which it formed part, belonging to different owners, and that from time to time the plaintiff and his ancestors, at their pleasure, cut down for their own use the trees growing within the belt, and that the several owners of the different closes never cut down the trees there, though they felled them in other parts of the same closes, and that when they made sale of their estates the trees in the belt were never valued by their agents, because they were reputed and considered to belong to the plaintiff and his ancestors, in which the several owners acquiesced; and Lord Ellenborough, C. J. observed, "If lands be held all under one general title, throughout one entire district, and here the entire belt may be considered as one entire district, I see no objection to receiving evidence of acts of ownership in different parts as evidence of the same right throughout the whole. The presumption from the evidence is, that all the land of the belt belonged originally to the same person, and that when he granted it out to others, he reserved the right to the trees then growing, or thereafter to grow in the soil; and he, and those claiming under him, prove their right by exercising rights of ownership in cutting and taking away the trees from time to time, as occasion requires, in different parts of the belt. It is evidence of one reserved right in the original grantor, and not of different rights created by different conveyances. The soil of the whole was probably granted out in the first instance, reserving the trees, and the original grantee may have afterwards granted it out in divided portions to different persons. Whatever title is consistent with the established course of enjoyment may be proved by such enjoyment."

But without preliminary evidence to show that the whole of the lands formed one entire district, one property belonging to one person, or held under one title, such evidence of acts done in other places is inadmissible.

Where (as is usual in mining districts) the surface and minerals are several inheritances, the ownership of one is no evidence of title to the other (*m*).

In an action of trespass by canal proprietors, acts of ownership done by them on other parts of the canal are not evidence of the right of property

closure Acts, *R.* v. *Edmonton*, 1 Mo. & R. 32; *R.* v. *Wright*, 3 B. & Ad. 681.

(*i*) *Steel* v. *Prichett and others*, 2 Starkie's C. 463.

(*k*) *Grose* v. *West*, 7 Taunt. 39. *Headlam* v. *Hedley*, Holt, 463.

(*l*) *Stanley* v. *White*, 14 East, 332. Note, that it was held that there might be a reservation of trees to grow as well as of growing trees. And see *Barrington's Case*, 8 Rep. 136, b.; *Tyrwhitt* v. *Wynne*, 2 B. & A. 554; *supra*, tit. COPYHOLD, 442. *Buckridge* v. *Ingham*, 2 Ves. jun. 652.

(*m*) *Rowe* v. *Grenfell*, Ry. & M. 396. *Hodgkinson* v. *Fletcher*, 3 Doug. 31.

in a particular branch of the canal, unless they show that they are parts of one entire district (*n*).

The owners of land on each side of a fresh river, are presumed to have property in the soil, and the right of fishing each on his own side *ad medium filum aquæ* (*o*).

The cutting down trees (*p*) by the side of a highway, and the cleaning and repairing the way, are evidence of ownership of the soil (*q*).

Where two adjacent fields are separated by a hedge and ditch, the hedge *primâ facie* belongs to the owner of the field where the ditch is not; and if there are two ditches, one on each side, the ownership must depend on the evidence of acts of ownership (*r*).

The common user of a wall, separating lands belonging to different owners, is *primâ facie* evidence that the land on which it stands belongs to them in equal moieties as tenants in common (*s*).

But it is presumed that a wall is the property of a party who is bound to repair it (*t*).

If the plea either deny that the close is the plaintiff's, or that it is in his possession (*u*), it is sufficient for the plaintiff in the first instance to prove possession; but on issue taken on the former plea, the defendant may show

(*n*) *Hollis* v. *Goldfinch*, 1 B. & C. 205; 2 D. & R. 316. It was also held, that under the particular provisions of the Canal Act, the proprietors did not necessarily acquire such an interest in a bank formed from land excavated from a new channel as would enable them to maintain trespass.

(*o*) *Infra*, tit. WATERCOURSE. *R.* v. *Landulph*, 1 Mo. & R. 303.

(*p*) A tree belongs to the owner of the land where it is planted, although the roots extend into other land. *Halder* v. *Coates*, 1 Mo. & M. 112. *Cubitt* v. *Porter*, 8 B. & C. 257. See tit. *Fences*, Law Mag. No. 3. According to Lord Holt, in *Waterman* v. *Soper*, 1 Lord Ray. 737, if *A.* plant a tree at the extremity of his land, and the roots extend into the land of *B.*, he and *A.* are tenants in common of the tree; and see B. N. P. 85; 2 Rol. R. 225. But according to *Masters* v. *Pollie*, 2 Rol. R. 141, if a tree grow in *A.*'s close, and root in *B.*'s, yet the main body of the tree being in *A.*'s soil, the whole tree belongs to him. The property in trees is in the landlord; of bushes, in the tenant. *Berriman* v. *Peacock*, 9 Bing. 384.

(*q*) Vin. Ab. Ev. T. b. 102; 2 Leon. 148, pl. 182.

(*r*) *Guy* v. *West*, 2 Sel. N. P. 1287. A man making a ditch cannot cut into his neighbour's soil; cutting to the extremity of his own, he is bound to throw the soil which he digs out upon his own land. *Vowles* v. *Miller*, 3 Taunt. 138. And therefore the land which constituted the ditch is part of the close, although it be outside the bank. Per Holroyd, J. *Doe* v. *Pearsey*, 7 B. & C. 308.

(*s*) *Cubitt* v. *Porter*, 8 B. & C. 257; where the jury found a wall to be a party-wall, there being strong evidence of common use, the Court refused to send the case down again to have the case more distinctly presented to the jury; and held, that the temporary removal was not such a destruction of the subject-matter as to entitle one to maintain trespass; and that if one raised it higher, the only remedy was to remove it. See *Wiltshire* v. *Sidford*, ibid. in notes; 2 M. & R. 267. *Noye* v. *Reed*, 1 M. & P. 63. Where in trespass to plaintiff's close, being the ditch adjoining his close by the side of an occupation-lane common to the plaintiff's and defendant's premises, the landlord being called by the plaintiff, said he had let the lane jointly to both, held that as the plaintiff had not called for the lease by which the defendant held, but his landlord, to show how and what he held, the landlord's evidence was admissible; and proving that the plaintiff and defendant were tenants in common, the action of trespass could not be supported. If two tenants in severalty contribute land in moieties to a party-wall (under the Building Act, 14 G. 3, c. 78), the ownership of the wall follows that of the land, and the owners of the land are not tenants in common of the soil. *Motts* v. *Hawkins*, 5 Taunt. 20. *Murphy* v. *M'Dermott*, 3 N & P. 396.

(*t*) For a wall is an artificial edifice, and in this respect is said to differ from a bank, the property in which follows that of the soil on which it is constructed. *Callis* v. *Sewers*, 74. *Duke of Newcastle* v. *Clarke*, 8 Taunt. 602.

(*u*) *Fleming* v. *Cooper*, 5 A. & E. 221.

Liberum tenementum.

title in himself (*x*). Under the latter he cannot, although he may object a variance as to the description of the close (*y*).

A judgment in ejectment is a good answer to a plea of *liberum tenementum* to a declaration in trespass for mesne profits (*z*).

Land cannot be claimed as appurtenant to land (*a*). On issue taken on plea denying that the goods specified in the declaration were the goods of the plaintiff, the plea is divisible, and the plaintiff may recover in respect of such as were his (*b*). Mere possession in the plaintiff, being sufficient against a wrong-doer upon pleas of not guilty, and that the goods were not the property of the plaintiff, the defendant cannot set up property in a stranger under whom he does not justify the act complained of (*c*).

Right of way, easement, &c.

8. If the defendant justify under a claim of a right of way, or other easement in the lands of the plaintiff, the latter cannot dispute the right upon issue taken on the general replication *de injuriâ suâ propriâ*, &c. but must specifically traverse the right as claimed, whether by prescription or grant (*d*). And the same rule holds where the defendant justifies under the command of another who claims a right (*e*).

A traverse of the right of way puts in issue merely the right of way (*f*); evidence on this issue is inadmissible to show that the right, though it exist, does not justify the trespasses complained of, to enable the plaintiff to do this he must new assign (*g*).

(*x*) *Purnell* v. *Young*, 3 M. & W. 288. *Heath* v. *Milward*, 2 Bing. N. C. 98.

(*y*) *Murly* v. *M'Dermott*, 8 A. & E. 138.

(*z*) In trespass for mesne profits of manors, tithes, &c., pleas denying the plaintiff's possession and *liberum tenementum* in the defendant, the expulsion being laid on 10th July 1826; up to the commencement of the action (1837), the plaintiff by way of estoppel replied a judgment in ejectment by plaintiff on the demise of *S.*; against the defendant, two demises were laid, one on the 10th July 1826 for 14 years, and another on 26th December 1831 for seven years, with a single ouster on 27th December 1831, but no possession appeared to have been given under the judgment, and the plaintiff in fact had not the possession; held that the first plea being pleaded to the whole declaration, was to be taken to deny any such possession in the plaintiff as was necessary for his bringing the action at all, viz. a denial of a possession at the time the alleged trespass was committed, which by the record appeared to be from 10th July 1826, to the time of ouster; the plea and replication, therefore, were inconsistent to that extent with the judgment set out in the replication; that the defendant was estopped from pleading it, and the first plea sufficiently answered; held also, that the second plea being pleaded in answer to a possessory action, admitted such a possession as if unanswered, or as against a wrong-doer, would suffice to maintain the action; and there being nothing inconsistent in an allegation of freehold, and the recovery of a term of years, the replication was also good by way of estoppel to that plea; and lastly, a rejoinder to both, that a writ of error on the judgment was pending in the House of Lords, did not destroy the effect of the estoppel in the pleas. *Doe* v. *Wright*, 2 Perr. & D. 691.

(*a*) *Buzzard* v. *Capel*, 8 B. & C. 441.

(*b*) Plea, in trespass for entering plaintiff's house and taking his goods, that the house was not the house of the plaintiff, nor were the goods his; on the trial the jury found that certain parts of the goods only belonged to the plaintiff; held, that the issue as to the property in the goods was divisible, and the postea was ordered to be amended as to the goods found not to be his. *Routledge* v. *Abbott*, 3 Nev. & P. 560.

(*c*) *Carter* v. *Johnson*, 2 Mo. & R. 263; and see *Heath* v. *Millward*, 2 Bing. N. C. 98.

(*d*) *Crogate's Case*, 8 Rep. 16. *Ruishbrook* v. *Presanil*, 4 Leon. 16. See *Proud* v. *Hollis*, 1 B. & C. 8. See above, tit. HIGHWAY.—LIMITATIONS; and below, tit. WAY.

(*e*) *Cooper* v. *Monke*, Willes, 54. *Cockerill* v. *Armstrong*, Willes, 99.

(*f*) The defendant prescribes for a right of way as appertaining to a messuage of which he is seised in fee; on a traverse of the right, proof of its existence is sufficient to bar the action, although the messuage was at the time in the occupation of a tenant, and the defendant occupied only a new-built house in the parish. *Stott* v. *Stott*, 16 East, 643.

(*g*) Ib. He may both traverse and new assign as to such trespasses as are not covered by the right to use the way, sup-

Right of way, easement, &c.

Where in trespass and plea that one *A. C.* was seised in fee, and by a lost deed, granted a right of way, and the plaintiff in his replication traversed the grant, held, that he was estopped by his plea from contradicting by evidence the seisin in fee of *A. C.*, and that evidence negativing it was not receivable as a ground for the jury to rebut the presumption of a grant (*h*).

Trespass on a close *L.*; plea a right of common of taking stone from *B.*, and that *L.* was part of it; the replication, protesting that *L.* was no part of *B.*, traversed the right to take stone on the close *L.*; on which issue was taken: it appearing by admissions, that the defendant had no evidence of exercise of the right on *L.*, held, that it must be taken also that he had none from which an inference might be raised in support of it, and that the burthen of establishing the issue being on the defendant, the plaintiff was entitled to the verdict (*i*).

Trespass for taking plaintiff's pigs; plea that they were wrongfully eating, &c. in Harding close; replication that the defendant was not possessed of the said close wherein the pigs were alleged to be eating. It is not sufficient for the defendant to show his possession of a close called Harding, without showing that the pigs were eating in that close (*j*).

It has already been seen that long-continued usage and enjoyment afford evidence of a title by prescription or grant, and in what manner such evidence may be answered (*k*).

Issue on a customary right.

On issue joined on a customary right claimed by the defendant, the plaintiff is entitled to go into any evidence which disproves the existence of the right as stated, without specially replying the circumstances which put an end to the right.

Plea in trespass that the plaintiff's close was parcel of a manor, and that the defendant was seised of a customary tenement of the said manor, and that he was entitled by custom, in right of such tenement, to common (*l*) of pasture upon the plaintiff's close, and issue taken upon such custom; held that the plaintiffs might show a custom for the lord to enclose parcels of the waste, and that his close had been enclosed by the lord, and granted to him, as showing that the right of common no longer existed, without pleading the latter custom specially (*m*); but as right to *approve* depended upon the question of a sufficiency having been left at the time for all persons having rights of common, that question ought to have been submitted to the jury, and not having been done, a new trial granted; held also, that a custom for the lord to enclose without limit is bad, as tending to destroy the rights of the commoner altogether; but that a custom to enclose (even against a common right of turbary), leaving sufficiency of common, was good, but the *onus* of proving a sufficiency left lies on the plaintiff.

Trespass for breaking defendant's close, destroying hedges, &c. pleas *inter alia*, claiming a right of common of pasture by a custom within the manor, for every customary tenant of an ancient customary tenement, of a messuage and land whereof the defendant was seised, and issue taken upon the custom, it appeared that the defendant, being the customary tenant of such premises as in the plea stated, in 1812 built a new dwelling-house on part of

posing such right to exist, and he will then be entitled to prove trespasses in every part of the close. 1 Saund. 300.

(*h*) *Cowlishaw* v. *Cheslyn*, 1 C. & J. 48. See further, *Lowe* v. *Govett*, 3 B. & Ad. 863. *Infra*, tit. WATERCOURSE.

(*i*) *Maxwell* v. *Martin*, 6 Bing. 523.

(*j*) *Bond* v. *Downton*, 2 A. & E. 26.

(*k*) *Supra*, tit. PRESCRIPTION, 639. And see tit. HIGHWAY.—WAY; and *Pickering* v. *Noyes*, 4 B. & C. 639.

(*l*) See tit. COMMON.

(*m*) *Arlett* v. *Ellis*, 7 B. & C. 346.

Issue on a customary right.

the premises, which he afterwards occupied, the old house remaining unoccupied until 1825, when having fallen into great decay, it was pulled down, and that during the interval whilst the tenant occupied the old, and afterwards when he occupied the new house, he continued to exercise the same customary rights; held that he was entitled to have the issue joined upon the right of common of pasture found for him in respect of an ancient customary tenement (*n*).

On pleas in trespass claiming the enjoyment in right of a privilege of entering on plaintiff's land for the purpose of cleaning and repairing the banks of a mill stream, to show such right to be merely permissive, the plaintiff may show a former lease to the plaintiff's predecessor, giving the privilege during the term, without replying it specially, under the 2 & 3 Will. 4, c. 71, s. 5 (*o*).

Time, &c. of custom.

Where it was pleaded that an ancient messuage and twelve acres of land were immemorially parcel and a customary tenement of the manor of *A.*, and that there was an immemorial custom within the manor for the customary tenant of the tenement to have a right of common, &c., and the replication traversed the custom, it was held that the replication did not admit the antiquity of the messuage; but that the plaintiff might prove that it was built within twenty years, and not on the site of an ancient house (*p*).

The plea of a right of common is divisible, and the place in which, &c., means only the particular place in which the trespass was committed (*q*).

In general a prescription is regarded as entire, and unless proved to the full extent alleged, the party pleading it would fail (*r*). But by one of the rules of Hil. T. 4 Will. 4, it is provided that where, in an action of trespass, *quare clausum fregit*, the defendant pleads a right of common pasture for divers kinds of cattle, *ex. gr.* horses, sheep, oxen and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found; and for the plaintiff, in respect of the trespasses which shall not be so justified.

And in all actions in which such right of common as aforesaid, *or other similar right*, is so pleaded that the allegations as to the extent of the right are capable of being construed distributionary, they shall be taken distributionary (*s*).

Traverse of command.

A traverse of a fact material to the defendant's justification puts the law as well as fact in issue. In trespass for taking hares, where the defendant justified the seizure by command of the lord of the manor, as being found in the possession of an unqualified person, and issue was taken on the com-

(*n*) *Arlett* v. *Ellis*, 9 B. & C. 671.

(*o*) *Clay* v. *Thackeray*, 2 Mo. & R. 244; and 9 C. & P. 47.

(*p*) *Dunstan* v. *Tresider*, 5 T. R. 2. *Vide supra*, 1128.

(*q*) *Tapley* v. *Wainwright*, 5 B. & Ad. 398. *Richards* v. *Peake*, 2 B. & C. 918; overruling the dictum in *Hawke* v. *Bacon*, 2 Taunt. 157.

(*r*) See tit. PRESCRIPTION.——VARIANCE. *Maxwell* v. *Martin*, 6 Bing. 522. *Rogers* v. *Allen*, 1 Camp. 309. *Evans* v. *Ogilvie*, 2 Y. & J. 78.

(*s*). See above, and see the stat. 2 & 3 W. 4, c. 71, as to prescription in case of common right. Plea in trespass, a general right of way on foot, and with horses, carts, &c., the jury having found a right only for carting timber and wood from the close in which, &c., held that the plea could not be taken distributively, and the verdict entered accordingly, but leave was given to amend on payment of costs, the plaintiff to reply *de novo*. *Higham* v. *Rabett*, 5 Bing. N. C. 622; 7 Sc. 827; and 7 Dowl. 653.

mand, it was held that proof was necessary of a command, which would legalize the seizure, and that proof of a wrongful command would not maintain the issue (*t*).

De injuriâ in general.

9. Where issue is joined on the general replication *de injuriâ suâ propriâ absque tali causâ* (*u*), it is incumbent on the defendant to prove every material allegation in his plea (*v*). For the *cause* alleged is the *matter of excuse* alleged, and all the material allegations constitute but one cause or excuse (*x*), the proof of which lies on the defendant.

Where, to a declaration for several trespasses the defendant pleads leave and license, and issue is joined on the replication *de injuriâ, &c.*, and the defendant proves licenses which cover some but not all the trespasses proved, the plaintiff is entitled to a verdict in respect of those which are not covered (*y*). For the excuse in this case is that there was a license co-extensive with the trespass complained of.

The plaintiff declared in the first count for breaking and entering his house, imprisoning him, and for a battery; 2dly, for an assault and false imprisonment; 3dly, for a common assault. The defendant to the first count pleaded a writ of attachment and sheriff's warrant upon it, by virtue of which he entered the house and arrested the plaintiff, and alleged that because the plaintiff after he had been taken into custody behaved himself in a violent and outrageous manner, and could not otherwise be kept in safe custody by the defendant, the defendant was obliged to push and pull about the plaintiff. Replication *de injuriâ, &c.* (*z*). Upon the trial the arrest

(*t*) *Bird* v. *Dale*, 7 Taunt. 560. *R.* v. *Scarth*, 5 M. & S. 271. It was formerly held that in trespass, *quare clausum fregit*, where the defendant justified as servant to the holder, the plaintiff could not traverse the command, for he admitted by the traverse that another was entitled to the possession. 1 East, 245; 6 Co. 24; Salk. 107; 1 Saund. 347, c. note (4). But the contrary was held in *Chambers* v. *Donaldson*, 11 East, 65.

(*u*) *De injuriâ* is pleadable in bar to avowry for distress under poor's rate. *Selby* v. *Bardons*, 3 B. & Ad. 2. See *Robinson* v. *Raley*, 1 Burr. 316; *Piggott* v. *Kemp*, 1 C. & M. 197; *O'Brien* v. *Saxon*, 2 B. & C. 908.

(*v*) See *Cockerill* v. *Armstrong*, Willes, 99. *Crogate's Case*, 8 Co. 67; Com. Dig. Pleader, F. 18, &c.; 1 B. & P. 79, 80; Finch. Law, 359. 6. This replication is in general sufficient where the defendant's plea consists merely in matter of excuse, without claiming any title or interest. Ibid. Justification of defendant's entering into the plaintiff's house to execute process, the outer door being open, the replication puts the fact of that door being open in issue. *Kerby* v. *Denby*, 1 M. & W. 336. Plea in trespass, justifying the entry and seizure of the plaintiff's goods under a *fi. fa.*; replication, admitting the issuing of the writ and warrant thereon, that the defendant committed, &c., *de injuriâ, &c.*; held that the seizure was not thereby admitted, and that it was competent to the plaintiff to show on that issue, either that there had not been any seizure, or a merely colourable one; and *semble*, it would have been sufficient for him to have relied on his mere possession, without going on to establish his title to the possession. *Carnaby* v. *Welby*, 1 P. & D. 98. And see *Lucas* v. *Nockells*, 10 Bing. 157. In *Selby* v. *Bandons*, 3 B. & Ad. 2, it was held, that a plea, &c. to an avowry *de injuriâ*, &c. put in issue all the allegations by which the plea justified the distraining for a poor's-rate, by Parke & Patteson, Justices. Tenderden, C. J. *dissentient*. In the case of *Simpson* v. *Dean*, Lanc. Spring Ass. 1832, Patteson, J. held the same as to a replication in trespass to a plea, justifying a seizure of meat by a defendant as a market inspector under a local Act, as unsound meat, &c.

(*x*) *Crogate's Case*, 8 Rep. 1832. Trespass for taking goods, plea removal of the goods because they were encumbering the defendant's room, replication *de injuriâ*, &c.; it was held that the defendant did not support his plea by evidence that the plaintiff locked up the goods in the room, and took away the key. *Jones* v. *Lewis*, 7 C. & P. 343. Cor. Coleridge, J. But in *Breton* v. *Knight*, Ex. H. T. 1838, Roscoe on Ev. 497, Parke, B. is stated to have held that the wrongfulness of the alleged incumbrance was not put in issue by the replication.

(*y*) *Barnes* v. *Hunt*, 11 East, 451.

(*z*) There were similar justifications, except as to the battery, to the second and third counts.

De injuriâ in general.

under the writ and warrant was proved, and the plaintiff also proved a battery after the arrest, and it was held that this rendered it necessary for the defendant under the latter part of his justification to give evidence of some outrageous conduct on the part of the plaintiff when in custody (*a*), and that a new assignment was unnecessary.

Justification in general.

But it is sufficient to prove so much of the facts alleged as will in point of law amount to a justification, although other facts are alleged which might have been rendered essential to the defendant's justification, by the plaintiff's proof, but which turn out to be immaterial. Thus, if the plea allege a request to depart previous to a *mollis impositio*, the proof is unnecessary, if the fact of the request be not essential to the justification. The plea of justification alleged that the plaintiff assaulted the defendant whilst he was attending as high sheriff at a county election, and also that he obstructed him in the execution of his duty at that election, wherefore the defendant caused the plaintiff to be committed, &c.; the plaintiff having replied *de injuriâ, &c.* the jury, by their verdict, negatived the assault, but found that the rest of the justification was proved. And it was held that the proof was sufficient to support the justification; and Mansfield, C. J. said, if a plea of justification to an action of this nature consist of two facts, each of which would, when pleaded alone, amount to a good defence, it will sufficiently support the declaration if one of these facts be found by the jury (*b*).

So although the allegations omitted to be proved were wholly unnecessary (*c*). And it is sufficient to prove so much as covers the trespass alleged, although it do not cover mere matter of aggravation (*d*).

As the general replication *de injuriâ* is a traverse of the whole plea, the plaintiff is at liberty to go into any evidence which disproves the facts of the plea (*e*). But he cannot go into evidence of new matter which shows that the defendant's assertion, though true, does not justify the trespass committed. Thus, in an action of trespass and false imprisonment, where the defendant justifies the commitment as a magistrate for a bailable offence, the plaintiff cannot, under this replication, give in evidence a tender and refusal of bail (*f*); neither can he under the same replication to a plea of *son assault demesne* prove that the defendant having entered the plaintiff's house, misbehaved himself there (*g*). And it seems, that in general, all matters which confess and avoid, such as subsequent misbehaviours with regard to a distress, must be replied specially, to enable the defendant to meet them in evidence.

Thus, if the defendant plead facts which show a forfeiture of a lease by the plaintiff, the plaintiff cannot, under a replication (admitting the demise) *de injuriâ suâ propriâ absque residuo causæ*, give evidence of a waiver of the forfeiture by the subsequent acceptance of rent (*h*).

(*a*) *Phillips* v. *Howgate*, 5 B. & A. 220. Bayley, J. left it to the jury to say whether the defendant had done more than was necessary for the purpose of keeping the plaintiff safely in custody.

(*b*) *Spilsbury* v *Micklethwaite*, 1 Taunt. 146. See also *Redford* v. *Birley*, 3 Starkie's C. 83; *Baillie* v. *Kell*, 4 Bing. N. C. 650.

(*c*) *Atkinson* v. *Warne*, 1 C. M. & R. 827.

(*d*) *Taylor* v. *Cole*, 3 T. R. 292. *Monprivatt*, v. *Smith*, 2 Camp. 175, *infra*, 1134, note (*o*).

(*e*) Per De Grey, C. J. in *Sayre* v. *The Earl of Rochford*, 2 Bl. R. 1169. Where the issue in an action of assault and false imprisonment was, whether the plaintiff was wilfully committing damage and spoil on defendant's close, held that evidence was admissible to show that the plaintiff was entitled to a right of way over the defendant's soil. *Looker* v. *Halcombe*, 4 Bing. 183.

(*f*) Ibid.

(*g*) *King* v. *Phipard*, Carth. 280.

(*h*) *Warrall* v. *Clare*, 2 Camp. C. 629.

De injuria, &c.

Upon this general replication to the plea of *son assault demesne* it has been frequently held that the plaintiff cannot insist upon an excess. But it has been questioned whether the defendant does not, by his plea, undertake to prove such a cause as is proportioned to and will justify his own act (*i*).

Where the lord of the manor brought trespass against a commoner for spoiling and destroying his peat, and filling up holes out of which it was dug, and the defendant pleaded a right of common through the waste, and that the plaintiff had dug up peat in some parts of the common and laid it up in other parts, whereby the defendant was hindered from enjoying his right of common in so ample and beneficial a manner as he had used, and had a right to do, the plaintiff replied *de injuriâ, &c.*, and upon this issue it was held that he was not at liberty to show that there was a sufficiency of common left (*j*).

Excess, &c. replication of, when unnecessary.

A new assignment is not in any case necessary to warrant the admission of evidence to defeat a *special* justification which is not supported by the facts. Thus, if the defendant justify the entering part of a house occupied by the plaintiff, under a writ of *fieri facias* against the goods of *B.*, whereas in fact no goods of *B.* were there, this is evidence on a traverse of the justification (*k*). And a new assignment in such a case would preclude the plaintiff from recovering, for it would admit that an act of entry was justified (*l*).

Where, however, the plea affords an answer to the gist of the action, and the plaintiff means to rely on matter which makes the defendant a trespasser *ab initio*, or insists that he has been guilty of an excess, he cannot give this in evidence under this general replication, without specially replying such matter of excess (*m*).

Excess.

Where, in trespass for breaking and entering the plaintiff's house, and

(*i*) Vide *supra*, 53. In *Phillips* v. *Howgate*, 5 B. & A. 220; *supra*, 1132, it was left to the jury to say whether more had not been done by the defendant than was necessary for keeping the plaintiff safely in custody. But note, that the cause put in issue was, whether the plaintiff had conducted himself in so violent a manner as to render the act justified necessary, &c.; in the ordinary case the existence of a fact which affords *some* cause, and not the extent, as compared with the return made, seems to be put in issue.

(*j*) *D'Ayrolles* v. *Howard*, 3 Burr. 1385; B. N. P. 93. The principle seems to be, that the digging for peat, &c. is to be considered *primâ facie* as a prejudice to the right of common, and that the sufficiency of common left is a new fact, and therefore to be pleaded in avoidance.

(*k*) *Fallon* v. *Anderson*, Peake's C. 109. If the sheriff enter the house of a stranger to execute a writ, he is justified or not according to the event. *Johnson* v. *Leigh*, 6 Taunt. 246. See *Chambers* v. *Jones*, 11 East, 406.

(*l*) B. N. P. 92. *Oakley* v. *Davis*, 16 East, 82. *Pratt* v. *Groome*, 15 East, 235. *Atkinson* v. *Matteson*, 2 T. R. 176; *supra*, 1104. See *Smith* v. *Milles*, 1 T. R. 479. If the plaintiff aver a single act of trespass which the defendant justifies, there can be no new assignment. *Taylor* v. *Smith*, 7 Taunt. 156. If there be two counts, and a justification to each, the plaintiff cannot take issue, and also new assign. *Cheasly* v. *Barnes*, 10 East, 73. *Lucas* v. *Nockells*, 10 Bing. 180; and per Littledale, J. in *Franks* v. *Morris*, 10 East, 81. The circumstance that the plaintiff's land abuts on a public highway, affords *primâ facie* evidence that the soil is his *ad filum viæ*, and therefore the defendant must plead *liberum tenementum*, in order to compel the plaintiff to new assign the trespass in his own exclusive property. *Stevens* v. *Whistler*, 11 East, 51.

(*m*) *Gates* v. *Bayley*, 2 Wils. 313. *Moore* v. *Taylor*, 5 Taunt. 69. As, where the defendant justifies the taking goods as a distress, and the plaintiff replies a conversion, it would be premature to state the conversion in the declaration, and the defendant would not be bound to answer it. *Sir Ralph Bovey's Case*, 1 Vent. 217. *Gargrave* v. *Smith*, Salk. 221; B. N. P. 81; *supra*, 1109. By the stat. 11 Geo. 2, c. 19, an irregularity in the disposition of a distress for rent will not render the party a trespasser *ab initio*. And see the provisions of the stat. 17 Geo. 2, c. 38, as to a distress made for money justly due for the relief of the poor.

Excess.

expelling him from it, the defendant justified the breaking and entering under a writ of *fieri facias*, it was held that the justification covered the expulsion also, and that the plaintiff could not rely upon it as an excess which made the defendant a trespasser *ab initio* without replying it (*n*).

So, if the justification be an answer to the breaking and entering, and justify the continuing there for a limited time, the plaintiff cannot, without replying the excess, give it in evidence under the general issue, but ought to reply the excess. Thus, where to an action for breaking, &c. the house, and staying there three weeks, the defendant pleaded not guilty, and a justification as to the breaking and entering, and remaining there for the space of twenty-four hours, *part of the time in the declaration mentioned* under a writ of *fieri facias*, and the plaintiff admitting the writ, replied *de injuriâ suâ propriâ absque residuo causæ*, it was held (*o*) that the plaintiff could not, without a new assignment, go into evidence of the excess.

It is otherwise where the justification does not profess to extend to the whole of the trespasses alleged; as to such part as is proved and not justified the plaintiff is entitled to damages without any new assignment (*p*).

Trespass for assault and imprisonment, plea *son assault demesne*, whereupon the defendant gave the plaintiff in charge of a peace officer, replication, that the plaintiff was employed to serve the defendant with process, and in so doing necessarily laid his hands on him, which was the assault, &c.; rejoinder, excessive violence: held, that the defendant thereby admitted, that if in any case it might be necessary, in order to serve such process, to touch the party, it was so in that case; and *semble*, it may under circumstances be lawful so to do (*q*).

Son assault.

On issue taken on a replication *de injuriâ*, &c. to a plea of *son assault demesne*, which must be pleaded specially (*r*), the proof is of course upon the defendant, and the plaintiff need not adduce evidence except for the purpose of encountering the defendant's evidence, and also for the purpose of increasing the damages (*s*).

The day stated in the declaration is not material; the defendant may therefore prove an assault by the plaintiff on any other day than that alleged (*t*). And in such case, if the declaration allege but one assault, and there be no new assignment to the plea of *son assault demesne*, the defendant will be entitled to a verdict (*u*). But if in such case there be several

(*n*) By Buller and Grose, Js. in *Taylor* v. *Cole*, 3 T. R. 296. This case was relied upon for the defendant in the above-cited case of *Phillips* v. *Howgate*, but no notice was taken of it by the Court in giving judgment. In *Taylor* v. *Cole*, the expulsion was a mere aggravation of the trespass, which was justified; but in *Phillips* v. *Howgate* the imprisonment and battery were distinct trespasses, in addition to the breaking and entering, and consequently the battery was not covered by a mere justification of the entry and of the arrest, and a special justification of the battery was pleaded and required proof.

(*o*) *Monprivatt* v. *Smith*, 2 Camp, 175. And see *Lambert* v. *Hodgson*, 1 Bing. 317; 1 Saund. 28, a. (n.) Declaration for breaking the plaintiff's house and taking his "goods, chattels, and effects," plea, 1st, not guilty; 2dly, a justification of taking the goods for rent due, replication denying the tenancy. The plaintiff cannot insist that some of the effects were fixtures, and not distrainable. *Twigg* v. *Potts*, 1 C. M. & R. 89.

(*p*) Declaration for breaking the house, taking goods and throwing them out of a barn, justification as to all, except the throwing out of the barn; as to the part excepted, it was held that the plaintiff was entitled to a verdict and damages, although it was contended that this was merely matter of aggravation. *Neville* v. *Cooper*, 2 C. & M. 239.

(*q*) *Harrison* v. *Hodgson*, 10 B. & C. 445.

(*r*) Co. Litt. 282, b. 283.

(*s*) *Guy* v. *Kitchener*, Str. 1271; 1 Wils. 171.

(*t*) Roll. Ab. tit. *Trial*, (C.) pl. 3.

(*u*) Roll. Ab. 680; and per Ld. Kenyon,

counts, the plaintiff may prove as many assaults as there are counts, and will be entitled to recover in respect of such as are not justified both in allegation and proof (*x*); or if there be but one count, yet if there be a new assignment, the plaintiff will be entitled to go into evidence of another than that which is justified (*y*). Son assault.

But in such case, having by his replication admitted that one assault is justified, he must be prepared to prove two assaults. The defendant admits as many different assaults as he justifies.

In support of this plea, it is essential to prove that the plaintiff committed the first assault on the defendant (*z*) by some attempt at personal violence, as by laying his hand upon his sword (*a*), or raising his stick to strike him (*b*), for these are signs of intended violence; he need not wait until the plaintiff has actually struck him. But this is merely evidence of the intention to use violence, to be considered in conjunction with other circumstances; for if, from the expressions of the plaintiff at the time, or otherwise, it appear that he did not meditate violence, it is no assault (*c*).

It has been the practice to preclude the plaintiff from proving under this issue that the violence used by the defendant was excessive, and not at all proportioned to the original assault (*d*), the excess not having been specially replied.

It has indeed been doubted by most learned judges, in former as well as in modern times, whether it be necessary to reply the excess. Lord Holt held, that the meaning of the plea was, that he struck in his own defence; and that "if *A.* strike *B.*, and *B.* strike again, and they close immediately, and in the scuffle *B.* maims *A.*, that is *son assault;* but if upon a little blow given by *A.* to *B.*, *B.* give him a blow that maims him, that is not *son assault demesne* (*e*)."

But it seems to be settled, that if the defendant prove that the plaintiff committed the first assault, as alleged in the plea, the plaintiff cannot under the replication *de injuriâ* justify the assault (*f*).

It is, however, clear, that it is incumbent on the defendant to prove under his plea so much of that which is alleged as is sufficient to justify all

in *Walsby* v. *Oakeley*, Sitt. after Trin. Term, 40 Geo. 3, Sel. N. P. 32.

(*x*) B. N. P. 17. *Smith* v. *Milles*, 1 T. R. 479.

(*y*) Roll. Ab. 680.

(*z*) *Timothy* v. *Simpson*, 1 C. M. & R. 757.

(*a*) Gilb. Ev. 256, 2d edit.

(*b*) B. N. P. 18.

(*c*) Gilb. L. Ev. 256. As if, clenching his fist, he say, that were it not assize-time, he would show the defendant more of his mind. (Ibid.) Also, if a man punch another with his elbow in *earnest discourse*, there is no assault; for it is no sign of violence intended, or of any hurt, and therefore doth not call for defence; nor is it necessary that it should be obviated by a resistance. Ibid. and 2 Keb. 545.

(*d*) Skinn. 387; Willes, 17. See the observations of Holt, C. J. *supra*, 53, 1131. And *Franks* v. *Morrice*, 10 East, 81 (n). *Dale* v. *Wood*, 7 Moore, 33. *Oakes* v. *Wood*, 3 M. & W. 150.

(*e*) *Cockcroft* v. *Smith*, 2 Salk. 642; *supra*, 53; and see B. N. P. 18; Gilb. C. P. 154. A plea which justifies the removal of the defendant from a boat in his possession, is not supported by evidence that the defendant had contracted with the owner of the boat for the temporary use of it on a particular occasion, to be navigated by the owner's servants. *Dean* v. *Hogg*, 10 Bing. 345.

(*f*) *King* v. *Sheppard*, Carth. 280; where to a plea of *son assault demesne* the plaintiff replied that the defendant entered the plaintiff's house and misbehaved himself, whereupon he gently put him out; and it was held that the replication was good, and that the plaintiff could not give such new matter in evidence under the general replication *de injuriâ*, &c. See *Sayre* v. *The Earl of Rochford*, 2 Bl. 1165. B. N. P. 18. *Griffin* v. *Parsons*, 1 Sel. N. P. 27 (n). *Supra*, p. 8; and tit. Assault.

Son assault.

the trespasses alleged. If the plaintiff allege an assault and battery, and the defendant allege matter to justify both, he must prove so much of his plea as justifies both (*g*). So if the plaintiff allege that the defendant assaulted, turned him out of his house, and imprisoned him, and the plea justifies the assault and imprisonment, and because the plaintiff assaulted him the defendant gave him in charge to a constable, it was held that on the plaintiff's proving the imprisonment, the defendant must prove the assault by the plaintiff (*h*).

If the declaration contain but one count, and the defendant plead *son assault demesne*, and prove an assault on any day before action brought, the plaintiff will not be allowed to prove any assault by the defendant at any other time (*i*).

In defence of wife, &c.

If the defendant justify in defence of his wife, child, or servant, the proof of course varies accordingly, and he must show that the assault and battery was committed in their defence (*k*). So a child may justify in defence of a parent, or a wife in defence of her husband (*l*), or a servant in defence of his master; but he must both allege and prove that the plaintiff would have beaten his master if he had not interposed (*m*).

Defence of possession.

If the defendant justify the battery in defence of the possession of his property, and issue be joined upon the plea of *de injuriâ*, &c., it is of course incumbent on the defendant to prove the substance of his plea.

Where a request to the plaintiff to depart is essential to the defence (*n*)

(*g*) *Lamb* v. *Burnett*, 1 C. & J. 294.

(*h*) *Reece* v. *Taylor*, 4 N. & M. 469. But where the defendant as to assaulting with a stick pleaded *son assault demesne* to a declaration for assaulting and *beating*, it was held that the defendant, on proof of his plea, was entitled to a verdict generally, and that the omission to justify the beating was matter of special demurrer only. *Blunt* v. *Beaumont*, 2 C. M. & R. 412. *qu.*

(*i*) *Downes* v. *Skrymshyre*, 1 Brownl. 235. B. N. P. 17. In such case the plaintiff, if there were in fact two assaults, should new assign, but if the declaration contain two counts, a new assignment is unnecessary. B. N. P. 17. Yet, even in that case, if the defendant plead not guilty, and a justification alleging the identity of the trespasses, the plaintiff would, on issue taken on the replication *de injuriâ*, be confined to proof of one trespass only. See *Gale* v. *Dalrymple*, R. & M. 118; and *supra*, *Gibson* v. *Hawkey*, ib. 121 (n).

(*k*) 2 Roll. Ab. 546; Bro. Tr. pl. 128. But see Ld. Raym. 62; B. N. P. 18. Plea in trespass for entering plaintiff's chamber, that the defendant's wife was there, and that he entered to reclaim her, where the plaintiff unlawfully harboured her, held that having separated himself from her by deed of separation, it amounted to a license, and that whilst it stood without any notice of having revoked it, he could not enter into the house of a stranger for the purpose of reclaiming her; held also, that mere exclusive possession by the plaintiff of the house was sufficient to entitle the plaintiff to maintain the action. *Lewis* v. *Ponsford*, 8 C. & P. 687.

(*l*) 2 Roll. Ab. 546; Ld. Raym. 62; Salk. 407.

(*m*) *Barfoot* v. *Reynolds & another*, Str. 593.

(*n*) If *A.* enter *B.*'s close, *B.* may remove him, but must first request him to depart (2 Roll. Ab. 548; 2 Inst. 316); and if *A.* resist, any degree of force which is necessary for the purpose of removal is justifiable (Ibid.); but *B.* cannot justify an imprisonment as for a riot and disturbance, though angry words have taken place. *Green* v. *Bartram*, 4 C. & P. 308. But if the entry be forcible, a request is unnecessary (*Green* v. *Goddard*, Salk, 641). So the defendant may justify the *mollis impositio* in the protection of a personal chattel, without making any previous request (Selw. 28). But the plea of *mollis impositio* is no answer to a charge of striking the plaintiff many blows, and knocking him down. *Gregory & Ux.* v. *Hill*, 8 T. R. 299. Where the plaintiff had called for payment of a debt, and upon refusal and some angry words, said he should not go until he was paid, when the defendant gave him into custody on a charge of making a riot and disturbance; it was held, that although he might have justified removing him from the house, he could not the imprisonment. *Green* v. *Bartram*, 4 C. & P. 308. Trespass for throwing a stone at plaintiff, whereby he received a severe injury; pleas, justifying the act in order to compel the plaintiff to unfasten his boat, which he had

in point of law, the request must be proved as alleged. But the allegations in the plea are divisible; and if a request to depart be not essential to the justification in point of law, it need not be proved, although it be alleged. De injuriâ. Defence of possession.

The defendant in justification of his possession of a house, &c. must on the issue of *de injuriâ* prove the allegations in his plea, viz. possession of the house, the disturbance of that possession by the defendant, and the request to depart previous to the removal (*o*).

If the plaintiff allege a beating and *wounding* or other serious injury, and the defendant plead a justification as to the *beating* only, the plaintiff is entitled to a verdict in respect of the wounding without a new assignment (*p*). If the defendant allege and prove under the issue *de injuriâ* a good cause of justification, it is not competent to the plaintiff to show that he acted on another and a bad one (*q*).

Where the defendant justifies the destruction of the plaintiff's property in defence of his own, he must both allege and prove that he could not otherwise preserve his own property (*r*). Where a justification of the killing of the plaintiff's dog alleged that the dog was worrying and attempting to kill a fowl of the defendant's, and could not otherwise be prevented, it was held that it was necessary to prove that the dog, when shot, was shot in the very act of destroying the fowl (*s*). Defence of property.

Where issue is taken on a plea of license, the proof is also incumbent on the defendant. Whether the license proved affords a sufficient justification, is a question at law (*t*). Licence.

attached to the plaintiff's steam-boat, were held insufficient, it not appearing to be the only mode of compelling its removal, and there being no immediate danger to the plaintiff's vessel therefrom. *Eyre* v. *Nosworthy*, 4 C. & P. 502. In trespass for assault and false imprisonment, it appearing that the plaintiff, seeking payment for a debt, had threatened to expose the defendant, and would follow him through every room in the house, whereupon the defendant gave him in charge of a police officer; it was held to amount to a giving into custody, and also that a plea alleging the plaintiff to be in a great fury and ready and desirous to make an affray and breach of the peace, wherefore in order to prevent such affray, &c., was bad. *Wheeler* v. *Whiting*, 9 C. & P. 262.

(*o*) See *Weaver* v. *Bush*, 8 T. R. 78. The owner may justify, on a forcible attempt to enter his house, the opposing force to force, in which case the plea should allege the endeavour forcibly to break and enter the house with a strong hand, &c. See Com. Dig. *Pleader*, 3 M. 16, 17.

(*p*) *Oakes* v. *Wood*, 2 M. & W. 791. *Bush* v. *Parker*, 1 Bing. N. C. 72.

(*q*) *Oakes* v. *Wood*, 2 M. & W. 791; and see *Baillie* v. *Kell*, 4 Bing. N. C. 650. *Supra*, tit. INTENTION.

(*r*) *Vere* v. *Lord Cawdor*, 11 East, 568; and *Wright* v. *Ramscot*, 1 Saunders, 84. *Jansen* v. *Brown*, 1 Camp. 41.

(*s*) *Jansen* v. *Brown*, 1 Camp. 41.

(*t*) If a person be licensed to do an act, he may do every thing without which the act cannot be done (*Bennett* v. *Grorer*, Willes, 195). There is a distinction between a license for pleasure and a license for profit; the former is personal (13 H. 7, 13; Finch, 16, 17); but in the latter case the person licensed may take others with him to exercise the right. 13 H. 7, 13; M. 13 H. 7. 10; Willes, 197. Where the gist of the action is the breaking and entering the plaintiff's house, a license to enter will be a bar to the action, although the debauching of the daughter be laid in aggravation. 2 T. R. 166. Where in trespass upon a plea of leave and license, it appeared that the plaintiff (when under age) had suffered the defendant to erect buildings on the common without objection, and had afterwards, when of full age, upon discovering an additional encroachment, required an increase of rent or annual acknowledgment, it was held that the plea was supported. *Hervey* v. *Reynolds*, 12 Pri. 724. A landlord undertakes to let the house in the absence of the tenant, the person with whom the key was left having absconded; the landlord, in order to show the premises, puts up a ladder to the window and forcibly opens it; the house having been robbed shortly afterwards, trespass lies for breaking and entering, and leaving the premises unsafe. *Ancaster* v. *Milling*, 2 D. & R. 714. Leave given by *A.* to *B.* on application to *A.* to put up a ladder on *A.*'s land, for the purpose of more conveniently finishing a window opened in *B.*'s house, does not amount to an implied license to *B.* to open the window, espe-

De injuriâ. License.

The keeping open the doors of a house in which a public billiard-table is kept, is evidence of a license in fact to all persons to enter for the purpose of playing (*u*).

Where the declaration was for several trespasses, plea that they were committed by license of the plaintiff, replication that the defendant, of his own wrong, and without the *cause* (*x*) alleged, committed the several trespasses, &c. and evidence was given of a license which covered some but not all of the trespasses proved, it was held that the evidence did not sustain the justification on the issue taken by the replication; that it was to be understood *reddendo singula singulis*; and the effect of the plea was to deny a license co-extensive with the trespasses complained of (*y*).

If the defendant plead a license in law, and the plaintiff rely upon some subsequent act of the defendant which renders him a trespasser *ab initio*, the plaintiff must plead it, and cannot give it in evidence on issue taken upon the plea of license (*z*).

So if the plaintiff rely on any excess beyond the terms of the license (*a*). But a revocation of the license previously to the act complained of, need not be replied to a plea that the act was done by the plaintiff's license, for after revocation there was no license (*b*). By a new assignment to a plea of entry to abate a nuisance, the plaintiff admits the nuisance (*c*).

If the defendant justify, as preventing a tortious act by the plaintiff, and the latter rely on a license, he cannot give it in evidence under the general issue *de injuriâ*, but must reply the license specially (*d*).

If the defendant rely on a license by any other person than the plaintiff the authority of the party granting the license must be proved (*e*).

cially if the situation and nature of the window be not pointed out. *Bridges* v. *Blanshard*, 1 Ad. & Ell. 536.

Trespass for breaking the plaintiff's house, the defendant having pleaded leave and license, it appeared that the defendant, the landlord, having distrained, it was by a memorandum, signed by the plaintiff, agreed that, in consideration of the remitting the rent, the plaintiff should give up the possession on or before the expiration of one week from the date, within which time the plaintiff proceeded to sell some of the goods, and admitted the defendant's gardener to work in the garden, the jury having found the agreement to have been voluntarily signed, and to have been acted on, it was held that it amounted to a license to the defendant to treat the premises as his own after the period stated. It also appeared that some of the trespasses were committed by two only of the three defendants before that period, but others by all afterwards; held that the plaintiff could not proceed for the two sets of trespasses, but must elect. *Feltham* v. *Cartwright and others*, 5 Bing. N. C. 569, and 7 Sc. 695.

(*u*) *Ditcham* v. *Bond*, 3 Camp. 525. And if the license be abused, the plaintiff must new assign. Ibid. *Semble*, as this was a mere license in *fact*, the defendant could not become a trespasser *ab initio*; *supra*, 1108.

(*x*) The *cause* in such a case is the *matter of excuse* alleged, and the replication in effect denies an excuse co-extensive with the trespasses.

(*y*) *Barnes* v. *Hunt*, 11 East, 451. S. P. *Symmons* v. *Hearson*, 12 Price, 369. The plea there was in the ordinary form, but it seems that a plea might be so framed as to render a new assignment necessary. See the observations of Parke, B. in *Bolton* v. *Sherman*, 2 M. & W. 400, and in *Solly* v. *Neish*, 4 Dowl. P. C. 252.

(*z*) *Aitkenhead* v. *Blades*, 5 Taunt. 198. *Taylor* v. *Cole*, 3 T. R. 296; 1 H. B. 555; *infra*, 1143.

(*a*) *Ditcham* v. *Bond*, 3 Camp. 524; 1 Saund. 300, d. See 12 Price, 369.

(*b*) Per Best, C. J. and Holroyd, J., *Bridge* v. *Seddall*, Derby Sp. Ass. 1837, cited, 2 Phill. Ev. 194, 7th edit. Roscoe on Ev. 514. See 1 Saund. 300, d. *Ditcham* v. *Bond*, 3 Camp. 524. 1 Saund. 300, d.

(*c*) *Pickering* v. *Rudd*, 1 Starkie's C. 56.

(*d*) *Taylor* v. *Smith*, 7 Taunt. 156.

(*e*) A license by a servant is not sufficient, unless it be by law the license of the master. *Holdingshaw* v. *Ray*, Cro. Eliz. 876. So a license by a wife or daughter,

De injuriâ. Process.

An entry by virtue of process must usually be pleaded (*f*), with all the circumstances essential to the justification, and the evidence must of course depend upon the nature of the issue taken.

If the defendant plead a justification of his entry by virtue of process, and the replication, admitting the process, deny the residue of the justification, and the defendant show that in point of fact he was armed with process which authorized him to do the act complained of, it cannot be left as a question for the jury, to say whether the defendant did not commit the act for some other cause (*g*), although he declared at the time that he entered the plaintiff's premises for a different purpose (*h*). But it is competent to the plaintiff to show that the defendant did not act under the writ at all (*i*).

Where the plea to a declaration for battery and imprisonment alleged an arrest for felony, and because the plaintiff resisted, the defendant beat him, it is unnecessary on issue on the plea of *de injuriâ* to prove the resistance, the rest of the plea being a justification of the alleged trespass (*k*).

Wherever there is reason to apprehend that the defendant was armed with a warrant, so as to bring the case within the stat. 24 Geo. 2, c. 44, or any similar statute made for the protection of particular persons, notices should be given, and a demand made accordingly (*l*).

In trespass for seizing goods, it appearing that the defendant, a custom-house officer, had seized the articles violently, without any previous demand, from the person of the plaintiff; held, that as they were liable to be seized and forfeited, the defendant was not liable for trespass *de bonis asportatis*, although he might be so in trespass to the person, unless some proof of concealment were adduced (*m*).

A justification by a magistrate (*n*), constable, or other officer, or private

Taylor v. *Fisher*, Cro. Eliz. 245, Sel. N. P. 1040, is insufficient unless the authority be proved either by direct evidence or circumstances. See above, tit. AGENT.

(*f*) See *Ratcliffe* v. *Burton*, 3 B. & P. 223. In many instances, as has been seen, magistrates and officers of justice may prove their defence under the general issue. A party may defend under an erroneous, but not under an irregular judgment; *supra*, 1032. But if the process be irregular only, and not void or set aside for irregularity, it is a good defence, and the plaintiff cannot go into evidence of irregularity to defeat the plea. *Riddell* v. *Pakeman*, 2 C. M. & R. 30. As to the plea and evidence in justification of breaking doors, see *Pugh* v. *Griffith*, 3 N. & P. 187.

(*g*) *Crowther* v. *Rumsbottom*, 7 T. R. 654.

(*h*) Ibid. A man may distrain for rent, and avow for heriot service. Ibid. Per Lord Kenyon, Fitz. *Avowry*, 232; 3 Co. 26. *Dr. Grenville* v. *College of Physicians*, 12 Mod. 386. But it has lately been decided that a *virtute cujus* is traversable if it involve matter of fact. *Lucas* v. *Nockells*, 10 Bing. 157; where the defendant seized goods, and justified under a *fi. fa.*, having obtained possession by exhibiting the *fi. fa.* in order to defeat the plaintiff's claim to a lien, but sold the goods as importer. But where it only collects matters alleged before, drawing a conclusion from them, this being matter of law, it is not traversable. If a person having a valid debt and judgment sue out execution, although his object were to get possession of goods which he could not otherwise so conveniently have done, his motive is not inquirable into. Entry and distress for four several rates, one of which is bad, the distrainer may justify under the good warrants. *Governors of Poor of Bristol* v. *Wait*, 2 A. & E. 264, and vide ib. and Pleading.

(*i*) *Price* v. *Peck*, 1 Bing. N. C. 380. But he cannot show that the defendant was a trespasser *ab initio* by reason of antecedent matter, without a special replication. Ib.

(*k*) *Atkinson* v. *Warne*, 1 C. M. & R. 827.

(*l*) *Supra*, 580.

(*m*) *De Gondouin* v. *Lewis*, 2 Perr. & D. 283, and 10 Ad. & Ell. 117.

(*n*) A magistrate may commit for re-examination a party charged with felony, but he cannot do so arbitrarily or for an unreasonable time. (See Ind. *Reasonable Time.*) *Davis* v. *Capper*, 10 B. & C. 28. A commitment for an *unreasonable* time is wholly void, and trespass, therefore, lies against the magistrate; where the defendant had committed the plaintiff for 14 days for re-examination, although the jury found that it was done *bonâ fide* and with-

De injuriâ. Process.

person (*o*), acting either with or without warrant (*p*), has already been considered (*q*). A private person may justify an act done for the purpose of preventing the commission of a felony (*r*).

out any improper motive, yet that it was for an unreasonable time, the Court refused to enter a nonsuit. *Scaraye* v. *Tatcham*, Cro. El. 829. *R.* v. *Gooding*, 1 Burn's J. 1009, 24th ed. In an action against a justice for false imprisonment, upon a conviction void for want of jurisdiction, the imprisonment expiring on the 14th of December, the writ sued out on the 14th of June following; held, that in computing the six months, the former day was to be excluded, and the action therefore brought in time. *Hardy* v. *Ryle*, 9 B. & C. 603.

(*o*) Where one of the defendants gave the plaintiff into the custody of the other defendant, a constable, on a charge of felony, and assisted in arresting him; held, that it afforded no title to an acquittal as to him on the general issue in trespass under 7 Jac. I, c. 5. *Hough* v. *Marchant*, 1 M. & M. 510.

(*p*) A marshalman whose duty it is to clear a passage, is not justified in striking a party in the front of a crowd, after desiring him to fall back; he is only justified in using a moderate degree of pressure, or attempting to remove the party by other means. *Imason* v. *Cope*, 5 C. & P. 194. Where the defendant, being plaintiff in an inferior court, attended the officer executing its process; held that he was responsible for the officer's acts, and that it was his duty to point out the goods to be seized, but that he was not answerable for an unjustifiable assault committed by the officer, unless it were shown to have been in some way committed by his direction. *Meredith* v. *Flaxman*, 5 C. & P. 99. Magistrates sitting to hear an information have authority to regulate their own proceedings; and no person has a right to act as an advocate in such a matter without leave of the justices. *Collier* v. *Hicks*, 2 B. & A. 663. Justices who are not bound by any usage as the superior courts are, may exercise their discretion whether they will allow any, and what, persons to act as advocates before them. Ibid. Trespass for an assault, plea justifying, on the ground of the plaintiff having intruded himself into a special vestry meeting duly assembled; it appearing that one of the select vestry had not been summoned, and that the meeting was not held on a general day of meeting, held that unless the meeting was shown to have been duly assembled, there was no authority in them to treat the plaintiff as an intruder, nor right to turn him out. *Dobson* v. *Fussy*, 7 Bing. 305; and 5 M. & P. 112. In trespass against commissioners of a court of requests for taking goods, &c. plea alleging that at a court holden, &c., the plaintiff committed a contempt, whereupon the defendants, as commissioners, imposed a fine and issued their warrant to levy it, &c.; a conviction by the commissioners for such contempt and warrant was produced at the trial; held, that neither the matters appearing on those documents, nor the fact of contempt, could be inquired into, and that they established the justification. *Aldridge* v. *Haines*, 2 B. & Ad. 395. Where the party was arrested on a Sunday upon criminal process (a charge of assault), and detained until the Monday, when he was charged with civil process, the Court held that an arrest on civil process so effected was illegal, and discharged the party. *Wells* v. *Gurney*, 8 B. & C. 768. A medical man is not justified merely on the statements of relatives in seizing and confining a party supposed to be insane, unless he be satisfied from such statements that it is necessary to prevent immediate injury: in an action by the party for assault and imprisonment, held, that the question was whether there was reasonable and probable cause for the relatives to consider him insane. If access cannot be obtained, the proper course is to apply to the court having jurisdiction in such matters, and have the party taken up that he may be examined. *Anderdon* v. *Burrows*, 4 C. & P. 210.

(*q*) *Supra*, tit. JUSTICES, 580; and tit. BANKRUPTCY. It is a general rule with respect to such as act under a limited authority, that if they do any act beyond the limits of such authority, they subject themselves to an action of trespass, but if the act be done within the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not liable to such an action. Per Abbott, J. in *Doswell* v. *Impey*, 1 B. & C. 169. And see tit. JUSTICES. There is, however, a wide distinction between a special authority to act under particular circumstances, and a judicial authority to act in particular cases. So long in either case as the party acts within the limits of his authority, he is of course justified in what he does, and in either case, if he plainly exceed the limits of his authority, he is without justification; the material difference is this, that in the former case, *i. e.* where he has a mere authority to execute, it is open to inquiry whether facts existed which warranted his act; in the latter, where he acts judicially in a matter within his jurisdiction, his adjudication is usually conclusive,

(*r*) *Hancock* v. *Baker*, 2 B. & P. 260; 2 Roll. Ab. 559.

A pound-keeper is not liable for receiving goods distrained, unless he exceed his duty or assent to the trespass (*s*). De Injuriâ. Process.

Where to a plea of reasonable correction or chastisement, the plaintiff replies *de injuriâ*, on which issue is joined, it is not competent to the plaintiff to give evidence to show that the punishment was disproportionate to the offence (*t*).

A party being under arrest in the custody of the sheriff's officer, on two writs, has a right to be discharged on one; yet trespass does not lie for his detention if he be liable to be detained on the other (*u*).

10. In general, where a special justification is pleaded, a new assignment (*x*), or replication of excess, admits the cause of justification as alleged. If the plaintiff in trespass *quare clausum fregit* merely new assign, and the defendant plead the general issue to such new assignment, the plaintiff waives all trespasses in the place mentioned in the bar (*y*). New assignment.

The defendant pleaded that the *locus in quo* was part of a common field, which had been allotted to him by the leet jury of the manor, and the plaintiff new assigned the trespasses in closes, setting out the abuttals, alleging them to be different closes from the defendant's allotment, and the defendant pleaded not guilty to the new assignment. It appeared upon the trial that they were the same; and it was held that the defendant was entitled to a verdict upon the new assignment (*z*).

If the plaintiff new assign that the trespass was committed on another and different occasion than that which is justified, he thereby admits that one trespass is justified; and therefore if there be but one trespass, the plaintiff will fail upon the new assignment, although if issue had been taken on the justification, it could not have been established in fact. Thus, where the defendant justified an imprisonment under a writ sued out by him as attorney to *J. M.*, which was delivered to the sheriff, who, by virtue thereof, arrested the plaintiff, and the plaintiff new assigned that the trespass complained of was committed upon another and different occasion from that stated in the plea, and after the supposed arrest therein mentioned, it was held that the defendant was entitled to a verdict, on evidence of the facts, although the arrest was made irregularly by the bailiff, and without any warrant from the sheriff (*a*).

upon the question whether the particular facts warranted that judgment, and to protect him from an action of trespass, see above, tit. JUSTICES.—BANKRUPT. See above, 1111. The exercise of an authority in a harsh or oppressive manner, does not subject the party to an action of trespass. *Willes* v. *Bridger*, 2 B. & A. 286.

(*s*) *Bodkin* v. *Powell*, Cowp. 278.

(*t*) *Lamb* v. *Burnett*, 1 C. & J. 295; *Penn* v. *Ward*, 1 C. M. & R. 338.

(*u*) *Blessby* v. *Sloman*, 3 M. & W. 40.

(*x*) If the defendant let judgment go by default as to the new assignment, but lets the general issue remain, the plaintiff will be entitled to the *postea* and general costs of the cause, if he prove the trespasses new assigned under the general issue, although the defendant establish the special justification on which the plaintiff has new assigned; for the plaintiff would in that case have obtained a verdict as to part of his demand. See *Booth* v. *Ibbotson*, 1 Y. & J. 354; *Vickers* v. *Gallimore*, 5 Bing. 196; *Longdon* v. *Bourne*, 1 B. & C. 278; *House* v. *Commissioners of Thames Navigation*, 3 B. & B. 117; *Cross* v. *Johnson*, 9 B. & C. 613. Trespass against a railroad company, the defendants justified doing the acts as in the exercise of rights reserved in the deeds of conveyance by the plaintiff, to which the plaintiff new assigned that the acts done were done on other and different occasions, and to a greater extent, &c. as to which there was judgment by default; held that the plaintiff could only raise the question, whether the railroad was constructed in a direction or manner not authorized by the deeds, and could not dispute that some species of railroad was within the meaning of the reservation. *Dand* v. *Kingscote*, 6 M. & W. 174.

(*y*) Cro. Eliz. 492; B. N. P. 92.

(*z*) *Pratt* v. *Groome*, 15 East, 235.

(*a*) *Oakley* v. *Davis*, 16 East, 82.

New assignment.

So where in trespass against *A.* and *B.*, the declaration contained two counts, and the defendants pleaded not guilty to both, and justified an arrest upon mesne process, and the plaintiff new assigned a subsequent arrest made after he had been released from the first imprisonment by *B.* with the consent of *A.*, and the plaintiff failed in the proof of his new assignment for want of proving the assent of *A.*, it was held that he could not prove the same trespass against *B.* under the second count; for the justification of one trespass had been admitted, and the plaintiff could not avail himself of the same act of imprisonment both on the new assignment and also on the second count (*b*).

And it is to be observed generally, that where there are as many counts as assaults in fact, and there be special justifications to some or all, a new assignment is never necessary; for the plaintiff may go into evidence of all, and will be entitled to recover in respect of all which are not justified both in allegation and proof. Whereas, by a new assignment he admits one assault to be justified, and should he fail in proving more assaults than are admitted, the defendant would be entitled to a verdict, although had the plaintiff traversed the justifications, the defendant might not have been able to establish them in law or fact.

The plaintiff cannot under a new assignment prove that the sheriff continued in possession after the return-day of the writ; for, although he becomes a trespasser *ab initio*, it is not a new trespass (*c*).

A defendant is not guilty of an excess under a new assignment, who has done no more than he has a right to do, in order to remove a nuisance, although such total removal was not necessary in the particular instance to enable him to enjoy the right obstructed (*d*).

Where to a plea of right of common by the custom of the manor, and justification of the throwing down fences to use the common, the plaintiff new assigned the removing the obstructions on other and different occasions, and in a greater degree, and to a greater extent, &c.; the Court, after a verdict for the plaintiff on the new assignment, held, that as a commoner, where fences have been wrongfully erected upon land subject to his right of com-

(*b*) *Atkinson* v. *Matteson*, 2 T. R. 176. Although there were in fact two takings, yet they were both under the same process, and were covered by the justification. The new assignment admitted a legal arrest, but alleged a subsequent one illegal, by reason of *A.*'s consent; this being, as was observed by Mr. Justice Buller, *falsified*, there was no trespass unanswered; the first taking was confessedly *legal*, and the plaintiff failed in proof of a second *illegal* taking. And though the new assignment, falsified as to *A.*, might still be good as to *B.*, yet as the Court was of opinion that *B.* had a right to retake the plaintiff (who had been arrested on mesne process) before the return of the writ, there was in fact no sufficient new assignment as to *B.* Where in trespass and for false imprisonment against the sheriff, the defendant justified under a *latitat*, to which the plaintiff replied detention, after giving a bail-bond by way of new assignment; held that two arrests must be proved, and that as there had been no actual arrest in the first instance, but only that he executed a bail-bond, the plaintiff had failed in so doing. *Reece* v. *Griffiths*, 5 M. & Ry. 1208.

(*c*) *Aitkenhead* v. *Blades*, 5 Taunt. 198. Neither can the plaintiff rely on the plea of *de injuriâ* generally. *Lambert* v. *Hodgson*, 1 Bing. 317. The act should be replied which makes the party a trespasser. Where in trespass for arrest and false imprisonment, plea a judgment, and the taking in execution thereon, replication, new assigning another and different arrest, &c. than that justified; held, that although it was not essentially necessary to prove two arrests, and that it might be sufficient to prove an arrest different in its circumstances from the one pleaded, yet that where the facts showed the arrest to have been founded on the same writ, the same having been only altered in consequence of part payment, the jury might presume it to be the same arrest. *Darby* v. *Smith*, 2 Mo. & R. 184.

(*d*) *Arlett* v. *Ellis*, 7 B. & C. 346.

mon, in exercising such right is not restricted to pulling down so much of the fence as may be necessary for him to remove in order to enter upon the land, but that he may altogether remove the *nocumentum injuriorum*, therefore that upon the new assignment the jury were not warranted in finding that the defendant had done more than was necessary for the purpose of asserting the right of common (*e*). New assignment.

If the defendant, having pleaded the general issue, lets judgment go by default as to any part of the trespasses newly assigned, without withdrawing the plea of the general issue as to those trespasses, it is incumbent on the plaintiff to prove them, for they are still denied by the plea (*f*).

A replication of excess admits the cause of justification, and precludes the plaintiff from going into evidence to negative the justification (*g*). Thus, if the defendant justify as abating a nuisance, and the plaintiff reply excess, he cannot go into evidence to negative the nuisance (*h*). If the replication deny the excess, the proof of the issue is on the plaintiff. Excess.

Upon a justification of cutting ropes for the purpose of disengaging two vessels which had run foul of each other, and issue taken on a new assignment of excess, it was held that the plaintiff must prove a clear excess and unnecessary injury (*i*).

Where, in an action for an assault and false imprisonment, the defendant justified as acting under the warrant of the Speaker of the House of Commons, and issue was joined upon an alleged excess of the officer who executed the warrant, in using such a military force as was improper, excessive, and unnecessary for the purpose, and breaking into the plaintiff's house, evidence was admitted of acts of violence committed by the mob in parts adjacent, though out of view and hearing of the plaintiff in his house, but who appeared to be actuated by the same intentions with those who were near the plaintiff's house, for the purpose of showing the danger and difficulty of executing the warrant by force against the plaintiff in his own house, without the aid of the military (*j*).

Where the plaintiff brought trespass for pulling down a gate, plea a right of way, &c., replication that the defendant subsequently converted the gate, upon issue joined on the conversion, it was held that evidence that the defendant laid the gate on his own land, where the plaintiff might take it, did not prove a conversion (*k*). Trespass ab initio.

11. The defendant is entitled to notice of action under the stat. 7 & 8 Geo. 4, c. 30, s. 24, if he had reason to suppose that he had a right to arrest the plaintiff under the provisions of the statute, although in fact he was mistaken (*l*). As where the defendant being fenreeve of certain lands over which the plaintiff was making a road, asked him by what authority he acted; the plaintiff said by authority of the magistrates, but showed no Malicious trespass.

(*e*) *Mason* v. *Cæsar*, 2 Mod. 65. *Badger* v. *Ford*, 3 B. & A. 153.

(*f*) *Broadbent* v. *Shaw*, 2 B. & Ad. 940.

(*g*) 1 Starkie's C. 56. Upon an indictment, the question of excess arises under the general issue. The owner of goods, which another refuses to deliver up, is justified in using so much violence as is necessary to retake them, and it is for the jury to say whether unnecessary force has been used. *R.* v. *Milton*, 1 M. & Malk. 107.

(*h*) *Pickering* v. *Rudd*, 1 Starkie's C. 56.

(*i*) *Hockless and another* v. *Mitchell*, 4 Esp. C. 86.

(*j*) *Burdett* v. *Colman*, 14 East, 183.

(*k*) *Houghton* v. *Butler*, 4 T. R. 364.

(*l*) *Wright* v. *Wales*, 5 Bing. 336; *Beechey* v. *Sides*, 9 B. & C. 806. These cases are distinguishable from that of *Edge* v. *Parker*, cited 9 B. & C. 809; for there was no ground in the latter case for saying that the stat. 6 G. 4, gave the assignee of a bankrupt any right to enter the house of a third person to seize the goods of the bankrupt; the assignee there entered as owner, and not under the statute.

Malicious trespass.

authority, on which the defendant arrested him, and took him before a magistrate (*m*). On an information before a magistrate in respect of a malicious trespass, under the stat. 1 Geo. 4, c. 56, s. 3 (*n*), the complainant must show an actual pecuniary damage (*o*). It is necessary to show that the act was done maliciously; that it was mischief done for mischief's sake (*p*).

Some observations have already been made upon the competency of witnesses in actions of trespass (*q*).

As a verdict and judgment in trespass do not change the possession, as they might do in ejectment, a witness is competent to support the defence by evidence of his title to the land in dispute, and of his letting it to the defendant (*r*).

TRIAL.

THERE being two records entered for the trial of issues on a charge of misdemeanor, the first having been entered by the defendant, who had removed the indictment by *certiorari*, the second by the prosecutor, Bayley, J. held that the trial ought to be on the first record, on the authority of a similar decision by Holroyd, J.

A party moving to put off a trial on account of the alleged absence of a material witness, ought to show by his affidavit not only that he has endeavoured to procure his attendance, but also at what time he so endeavoured (*s*).

(*m*) *Wright* v. *Wales*, 5 Bing. 336.

(*n*) This statute is repealed, and re-enacted with alterations by the stat. 7 & 8 G. 4, c. 30. The defendant's dog ran at the plaintiff, a pedlar, approaching the defendant's house, when the former struck at the dog and knocked out one of its eyes; upon which the defendant's wife caused the plaintiff to be pursued by a constable and apprehended, and his pack to be taken from him; held, that in order to authorize the charge and imprisonment of the plaintiff under the 7 & 8 Geo. 4, c. 3, the jury were to say, whether the act was done in protecting himself, or was a wilful and malicious injury to the dog; and 2dly, whether the plaintiff having departed and being apprehended by a constable at half a mile distance from the premises, it was a quick pursuit; under the Act a party can only be apprehended when taken in the fact, or else on quick pursuit. *Hanway* v. *Boultbee*, 4 C. & P. 350. Where a party cut valuable shrubs planted on a spot in dispute, upon a pretence that they might injure her wall, there appearing to be no well-founded pretence either of her claim or of the supposed injury, held that it was a case within the Malicious Trespass Act, and the Court refused a criminal information against a magistrate, the party injured, and who had himself issued the summons and acted in his own case, but without costs. *R.* v. *Whately*, 4 M. & Ry. 431. Magistrates have jurisdiction in cases of wilful trespasses, although the damage to growing wood does not exceed the value of 6 *d.*, notwithstanding sec. 20 of 7 & 8 Geo. 4, c. 90; and the mere statement of a claim of title without proof, does not prevent the justices from exercising their discretion as to the act being done under a *bonâ fide* claim or not. *Reg.* v. *Dodson*, 9 Ad. & Ell. 704.

(*o*) *Butler* v. *Turley*, 1 M. & M. 54; 3 Bing. 336.

(*p*) Per Lord Tenterden.

(*q*) *Supra*, Vol. I. tit. WITNESS. And see *Noye* v. *Reed*, *supra*, 1127, note (*s*).

(*r*) *Rees* v. *Walters*, 3 M. & W. 527.

(*s*) Per Lord Tenterden, C. J., Dec. 17, 1827. Fresh notice of trial must be given, except where the cause is made a *remanet*. 4 Burr. 1988; Say. 272; Tidd, 600; or by rule of court; but it is unnecessary where it is made a *remanet* by order of Nisi Prius. *Shepherd* v. *Butler*, 1 D. & R. 15.

TROVER.

1. Proof of property in the plaintiff.—General or special.—Of title in detail.—When necessary.—How proved.—Direct and presumptive evidence of.—Proof of strict title, when unnecessary.—Relation to the time of conversion.—Variance.
2. Of the conversion.—Direct proof.—Presumptive proof.—Variance.
3. Of damages.
4. Proofs by the defendant.

Particulars of proof.

In this action it is essential to prove (*t*), in case the matter be put in issue under the late rules (*u*), 1st. Property in the plaintiff (*x*), and a right of possession at the time of the conversion by the defendant; 2dly. A conversion by the defendant; and 3dly. The value of the chattel.

Special property.

Property in a chattel (*y*) is either absolute or special, and the evidence to prove it is either direct and positive, or it is presumptive. It is sufficient if the plaintiff has a special property (*z*) in the goods; and it seems that any temporary interest in the goods, either in his own right, and for his own use, or by authority of law for legal purposes, coupled with the right to take and keep possession, or to maintain a possession already subsisting, is sufficient. Thus, if a party having a temporary interest in the possession of a chattel, deliver it to the owner for a special purpose, he may, after that purpose has been answered, if the owner refuse to deliver it up, maintain trover (*a*).

So bailees of goods (*b*), as carriers, factors, consignees, pawnees, trustees (*c*), agisters of cattle (*d*), one who borrows a horse to till his land (*e*), churchwardens, in respect of goods the property of the parishioners (*f*), a sheriff taking goods in execution (*g*), or the lord of a manor in possession of goods seized as wreck or estrays, before the expiration of a year (*h*), may maintain this action against one who converts the property.

And a bailee who has received goods into his possession under a written agreement, may maintain trover against one who wrongfully seizes them without proving the agreement (*i*).

(*t*) In trover against a constable, &c. acting under a justice's warrant, the plaintiff must prove a demand of the perusal, and a copy of the warrant under 24 Geo. 2, c. 114; where a copy has been given he cannot recover, unless he join the justice as a co-defendant. *Lyons* v. *Golding*, 3 C. & P. 586. The allegation that the plaintiff lost the goods is merely formal, and it seems to be unnecessary on the part of a plaintiff to give any account of the mode in which the property passed out of his hands. *Down* v. *Halling*, 4 B. & C. 334.

(*u*) Of Hil. Term, 4 W. 4. See tit. Rules, and the observations on the defence made below.

(*x*) Per Lord Mansfield, in *Cooper* v. *Chitty*, 1 Burr. 31.

(*y*) Trover does not lie for fixtures. *Minshall* v. *Lloyd*, 2 M. & W. 450.

(*z*) A denial of property in the plaintiff under the new rules, merely puts in issue the plaintiff's right of property as against the defendant. *Nicolls* v. *Bastard*, 2 C. M. & R. 659.

(*a*) *Roberts* v. *Wyatt*, 2 Taunt. 268.

(*b*) Bro. Tres. 92; Ld. Raym. 275; B. N. P. 33; 1 Mod. 31; Str. 505.

(*c*) 1 Roll. Ab. 4; B. N. P. 33: 2 Will. Saund. 47, a.

(*d*) Bro. Tres. 67.

(*e*) Ibid.

(*f*) *Dent* v. *Prudence*, 2 Str. 852. *Attorney-general* v. *Ruper*, 2 P. Wms. 126; 2 Will. Saund. 47, c.

(*g*) B. N. P. 33. But it has been held a landlord who distrains cannot maintain trover; he has only a pledge, with power to sell. *Moneaux* v. *Gorcham*, Sel. N. P. 1303; *R.* v. *Cotton*, Packer, 121; Roscoe on Evid. 524. But *qu.*; for although he has no property he has the present right of possession, and he might maintain the action in the case of a pledge by private agreement.

(*h*) B. N. P. 33.

(*i*) *Burton* v. *Hughes*, 2 Bing. 173. And see *Sutton* v. *Buck*, 2 Taunt. 302.

Special property.

Where the house of a lessee for life is blown down, he may maintain trover against one who takes the materials; for he has a special property in them for the purpose of rebuilding the house (*l*).

And where a person has built a bridge and dedicated it to the public, the materials continue to be his property; and where they are severed and taken away by a wrong-doer, he may maintain trespass or trover (*m*).

Possession is not indispensably necessary to enable a plaintiff to recover in respect of special property. A factor, though he has not received goods consigned to him, may maintain the action (*n*). A special owner delivering a chattel to the general owner for a particular purpose, may recover against the latter if he refuse to deliver the chattel after that purpose has been satisfied (*o*).

A special property, which may be sufficient as against a stranger, gives no right against one who has the general property (*p*). A carrier, or the depositary of goods for safe custody, may, by reason of special property, maintain trover against a stranger, although he could not succeed against an owner or co-proprietor (*q*).

Title when necessary to be proved.

In general, possession of a chattel is *primâ facie* evidence of property in the possessor (*r*); but if the plaintiff has never had possession of the chattel, or if the contest be not with a mere stranger, but with one who will succeed in his proof of title unless the plaintiff can prove a better, it is necessary for the latter to resort to strict evidence of title.

In the first place, where the plaintiff has not had actual possession, he must resort to proof of his title, in order to show his right of possession; as by evidence of the transfer of a ship by means of the proper documents (*s*); or of a title to any other chattel by purchase, where there has been no delivery (*t*); or of his title as executor under a will, where the conversion was previous to the taking of actual possession, which must be proved by means of the probate (*u*); or of his title as lord of a manor to a wreck or estray which has been converted by the defendant before seizure by the lord (*x*).

Secus, in a question arising between the bailor and bailee; 1 Bing. 175.

(*l*) 2 Will. Saund. 74, a.

(*m*) *Harrison* v. *Parker*, 6 East, 154. *A.* the purchaser of an estate, having paid part to *B.*, the vendor, prepares deeds of conveyance, and sends them to *B.* to be executed; *B.* executes them, and delivers them to a servant, to be taken to *A.*; the servant delivers them to *C.*, who claims a debt from *B.*; the contract is repudiated by *A.*, two necessary parties not having executed the conveyance, and part of the purchase-money is repaid: *A.* is entitled to recover from *C.* in trover, for he is entitled to have the deeds, either cancelled or uncancelled; for the deeds were the plaintiff's property originally, and never ceased to be so, and he had a right to recover them, either as deeds or pieces of stamped parchment. *Esdaile* v. *Oxenham*, 3 B. & C. 225. Littledale, J. *dubitante*.—He thought the case was distinguishable from that of *Harrison* v. *Parker*, for the plaintiff having possession of the deeds might perhaps be enabled to bring ejectment.

(*n*) Per Eyre, C. J. in *Fowler* v. *Down*, 1 B. & P. 47. See *Morrison* v. *Gray*, 2 Bing. 260. *Waring* v. *Cox*, 1 Camp. 369. *Sargent* v. *Morris*, 2 B. & A. 277.

(*o*) *Roberts* v. *Wyatt*, 2 Taunt. 268.

(*p*) *Holliday* v. *Camsell*, 1 T. R. 658. *Gordon* v. *Harper*, 7 T. R. 9. *Nicolls* v. *Bastard*, 2 C. M. & R. 659; 2 Saund. 47, b. (*n*). Though a special bailee wrongfully transfer the property, (otherwise than by sale in market overt,) the owner may recover against the transferee. *Loesehman* v. *Makin*, 2 Starkie's C. 311. *Wilkinson* v. *King*, 2 Camp. 335. But as to factors, see the statute 6 Geo. 4, c. 94, and *infra*, 1151.

(*q*) Ibid.

(*r*) One who has property in possession, though he be but a simple bailee, may maintain trover without showing by what right he holds; *supra*, 1145.

(*s*) *Supra*, 868.

(*t*) See tit. VENDOR AND VENDEE.

(*u*) 2 Will. Saund. 47, a.; Latch. 214; cited by Lawrence, J. 7 T. R. 13.

(*x*) 1 T. R. 480; F. N. B. 91.

If during an estate in trustees *pur autre vie*, a tree were to be cut down, the property would vest in the owner of the inheritance, and he might maintain trover against one who converted it; but in such case, if he had not actual possession before the conversion, proof of his title to the inheritance would, it seems, be requisite (*y*). Title when necessary to be proved.

Where *A.* was indebted to *B.*, and *B.* to *C.*, and it was agreed between the parties that goods in *A.*'s possession should be delivered to *C.* in satisfaction of the debt, and *A.* afterwards converted the goods to his own use, it was held that trover was maintainable by *C.* (*z*).

In such a case proof of the special circumstances would be necessary, and is essential in all cases where the plaintiff claims by virtue of his title, independent of actual possession.

Next, where there is a conflict as to the title and right of possession between parties, such that the title of either would prevail in the absence of proof of title and right of possession in the other, it is usually necessary to go into evidence of title, and it is not sufficient to rest upon proof of mere possession; as in cases of disputed titles between vendors and purchasers of personal chattels (*a*), or their assignees (*b*), or between the sheriff and the owner of property, or his assignees under a commission of bankruptcy (*c*). Conflicting titles.

Direct evidence of title in detail consists of course in the proof of the documents and circumstances which are essential in point of law. As by proof of the different steps of bankruptcy, and the assignment, where the suit is by the assignees. By the probate or letters of administration, in the case of an executor or administrator (*d*), or by agreement (*e*). By proof of Evidence of title.

(*y*) *Blaker* v. *Anscomb*, 1 N. R. 25. So if trees be felled during a lease, the landlord may maintain trover (*Berry* v. *Heard*, Pal. 327, cited 7 T. R. 13; 5 B. & A. 829); but a tenant in tail cannot maintain trover for trees cut during the life of a tenant for life without impeachment of waste. *Pyne* v. *Dor*, 1 T. R. 55. And see *Williams* v. *Williams*, 12 East, 209. *Channon* v. *Patch*, 5 B. & C. 897. As to a forfeiture for cutting trees, vide *supra*, tit. COPYHOLD, 337. If a customary tenant of a manor, being entitled to cut down wood or estovers, cut them down for a foreign purpose, he is liable to the lord in trover. *Blackett* v. *Lowes*, 2 M. & S. 494. But evidence that the tenant had for thirty years and upwards, publicly and without interruption from the lord, and with his knowledge, cut and sold the planted wood on his estate, is admissible evidence to prove a grant. Ib.; and *supra*, tit. PRESCRIPTION. See further as to trees, *supra*, tit. TRESPASS; and Com. Dig. *Biens*; and *Aubrey* v. *Fisher*, 10 East, 446.

(*z*) *Flewellan* v. *Rann*, Bulst. 68. *W.*, the owner of a chronometer, being about to proceed on a voyage, obtained from the defendants a loan upon a memorandum that he thereby made over to them the instrument, to be held until repayment, they allowing him the use of the instrument for the voyage; on his return he placed it in the hands of *B.*; and subsequently the plaintiff, an attorney, having a *fi. fa.* against *W.*, obtained a note to *B.* for delivery over of the instrument, which *B.*, in ignorance of the circumstances, agreed to hold for the plaintiff; held, in trover, that the possession of *W.* being consistent with the terms of delivery, the property remained in the defendants until the condition of repayment was performed. *Reeves* v. *Capper*, 5 Bing. N. C. 136; and 6 Sco. 877.

(*a*) *Infra*, tit. VENDOR AND VENDEE.

(*b*) *Supra*, tit. BANKRUPT; and *infra*, tit. VENDOR AND VENDEE.

(*c*) *Supra*, tit. SHERIFF.

(*d*) See tit. EXECUTOR. The title of the executor on probate granted has relation to the death; but it was held by Abbott, C. J. that the title of the administrator accruing on administration granted, had no such relation. *Woolley* v. *Clarke*, 5 B. & A. 746. But see 2 Rol. Ab. 554, l. 15. 25. *R.* v. *Horsley*, 8 East, 410. See *Fraser* v. *Swansea*, 1 Ad. & Ell. 394.

(*e*) Property vests by agreement without delivery. If *A.* be indebted to *B.*, and *B.* to *C.*, and it is agreed that *A.* shall deliver goods to *C.* in satisfaction of *B.*'s debt, the right vests in *C.* B. N. P. 35; 1 Buls. 68.

But one who contracts for a chattel to be made acquires no property till delivery, although he pays the whole price in advance. *Mucklow* v. *Mangles*, 1 Taunt. 318. And see *Thompson* v. *Maceroni*, 3 B. & C. 2. *Goode* v. *Langley*, 7 B. & C. 26.

Evidence of title.

a gift accompanied with a delivery (*f*), or exchange (*g*), or sale (*h*), or pawning of the goods (*i*), or of an assignment by the owner or his agent

A custom that calico printers shall take damaged prints does not alter the property without the consent of the owner. *Lucloneh* v. *Towle*, 3 Esp. C. 114.

Property does not pass by an award. *Hunter* v. *Riee*, 15 East, 100.

A conditional delivery does not vest property. If *A.* sell goods to be paid for on delivery, and *A.*'s servant deliver them without receiving the money, *A.* may, after a demand and refusal, maintain trover. 2 B. & A. 329, n. And where *A.* contracted to deliver iron to *B.*, the latter agreeing to withdraw from circulation certain bills outstanding against *A.*, and after delivery of part of the iron the bills were not withdrawn, and the jury found that the delivery of the iron and withdrawing of the bills were to be cotemporary, it was held that *A.* might maintain trover for the iron delivered. See *Bishop* v. *Shillito*, 2 B. & A. 329, n.

Where an outgoing tenant has covenanted to leave the manure on the farm, and to sell it to the in-coming tenant at a valuation to be made by certain persons, the effect is to give the outgone tenant a right of on-stand for the manure on the farm, and the property and possession remain in him in the meantime. *Beaty* v. *Gibbons*, 16 East, 116.

Overseers lease parish lands, covenanting that it shall be lawful for the lessee to take all manure, &c. from the poor-house, he covenanting to find straw for the use of the poor; the lessee has not such a vested interest as will enable him to maintain trover against a succeeding overseer for carrying away the manure, and using it on his own farm, although made from straw furnished by the plaintiff. *Sowden* v. *Emsley*, 3 Starkie's C. 28. *Bishop* v. *Crawshaw*, 3 B. & C. 419. *Carruthers* v. *Payne*, 5 Bing. 270. *Atkinson* v. *Bell*, 8 B. & C. 283. *A. B.* contracted with a shipbuilder to build a ship, to be paid for by instalments at certain stages of progress in the work, which was to be done under the superintendance of the agent of *A. B.*; the vessel was built under such superintendence, the materials having been all approved of before they were used. The builder became bankrupt before the ship was completed; afterwards the assignees completed the ship. All the instalments were paid or tendered. In an action of trover by *A. B.* against the assignees for the ship, the Court of King's Bench held, that on the first instalment being paid, the property in the portion then finished became, by virtue of the above contract, vested in *A. B.*, subject to the right of the builder to retain such portion for the purpose of completing the work and earning the rest of the price, and that each material subsequently added, became, as it was added, the property of *A. B.* as the general owner. And they also held, that under the above circumstances, the ship did not pass to the assignees as having been in the possession, order, or disposition of the bankrupt by consent of the true owner, within the stat. 6 Geo. 4, c. 16, s. 72. *Clarke* v. *Spence*, 4 Add. & Ell. 448.

(*f*) A verbal gift of a chattel does not pass the property without delivery. *Irons* v. *Smallpiece*, 2 B. & A. 551. But it seems that if *A.*, in London, gives to *J. S.* his goods at York, and before *J. S.* obtains possession another takes them, *J. S.* may maintain trover or trespass. *Hudson* v. *Hudson*, Latch. 214; Br. Ab. *Trespass*, 303; 2 Saun d. 47, a. *infra*, 1152 (*x*). A father gives a watch and other chattels to a son of the age of 16; the father cannot maintain trover. *Hunter* v. *Westbrook*, 2 C. & P. 578.

(*g*) If *A.* and *B.* exchange bills, *A.* cannot maintain trover to recover the bill which he has delivered, although *B.*'s security be dishonoured. *Hornblower* v. *Proud*, 2 B. & A. 327.

(*h*) Property is not altered by a sale by a stranger, unless it be in market-overt. As if goods be sold on a wharf in Southwark by the wharfinger, without leave of the owner. *Wilkinson* v. *King and others*, 2 Camp. 335. See tit. VENDOR AND VENDEE. Where goods feloniously stolen (and the party convicted) were sold by him in a shop in London, it was held to be a sale in market-overt, and to pass the property, and it is not material that the sale should have taken place within an inclosed shop. *Lyon* v. *De Paas*, 3 P. & D. 177; and 9 C. & P. 68.

Property is altered by a sale by the sheriff under an execution against the goods of the owner, although the judgment itself be erroneous, and be reversed by writ of error. *Matthew Manning's Case*, 8 Co. 187; 1 Burr. 35. See tit. SHERIFF.—VENDOR AND VENDEE.

(*i*) Where goods obtained by fraud are pawned without notice, although the owner prosecute the offender, on conviction he is not entitled to restitution by virtue of the statute. *Parker* v. *Patrick*, 5 T. R. 175. See *Horwood* v. *Smith*, 2 T. R. 750. But where goods are obtained from the owner by fraud, the property is not changed. *Noble* v. *Adams*, 7 Taunt. 59; *infra*, VENDOR AND VENDEE.

Where goods stolen are pawned, the property is not changed, even in London. *Packer* v. *Gillies*, 2 Camp. 336. *Wilkin's Case*, 1 Leach, 522. It is provided by the stat. 1 J. 1, c. 21, that the sale of goods wrongfully taken to any pawnbroker in London, or within two miles thereof, shall not alter the property. Where the pawnbroker had not complied with the requisites

having competent authority (*k*), or by sale under an execution (*l*), or by transfer of a negotiable security (*m*). Evidence of title.

of the Act, held, as they precede the contract and accompany it, and are not collateral, he acquired no property in the pledge; and the contract being void, his lien was void also. *Fergusson* v. *Norman*, 5 Bing. N. C. 76, and 6 Sc. 794. And where a person purchases goods stolen, not in market-overt, and sells them after notice of their having been stolen in market-overt, the owner having prosecuted the thief to conviction, is entitled to maintain trover against him. *Peer* v. *Humphrey*, 2 Ad. & Ell. 495; S. C. 4 N. & M. 430.

(*k*) An agent with a limited authority cannot confer an interest beyond the extent of that authority. If *A.* deliver lottery tickets to a goldsmith to receive money for them, and the latter deliver them to *B.* in discharge of a contract between himself and *B.*, the property is not changed. Salk. 284; B. N. P. 34. So an agent who receives money for his principal cannot transfer it by way of gift. Salk. 289; B. N. P. 35. And see *Glynn* v. *Baker*, 13 East, 509. A factor has not power to pledge, &c. See *Quiroz* v. *Freeman*, 3 B. & C. 342. But see the stat. 6 G. 4, c. 94, as to contracts entered into in relation to goods, wares and merchandizes entrusted to factors or agents.

By sec. 1, factors or agents having goods, &c. in possession, are deemed to be the owners, so as to give validity to contracts with persons dealing *bonâ fide* on the faith of such property, without notice that such agents were not the owners.

Sec. 2. Persons entrusted with and in possession of bills of lading, &c. are to be deemed to be the owners, so far as to be enabled to make valid contracts for the sale or disposition of the goods, or deposit or pledge thereof, &c. as a security for any money or negotiable instrument advanced or given on the faith of such documents, with those who have no notice, &c.

Sec. 3. Provided that no person shall acquire an interest in goods in the hands of an agent in deposit or pledge as a security for an antecedent debt due from the party so entrusted, beyond the interest of the agent.

Sec. 4. Contracts and payments with and to agents entrusted with goods, &c. are binding against the owner, provided such contract or payment be made in the usual course of business, and without notice that the agent was *not authorized*.

Sec. 5. Persons may accept goods from a factor or agent in pledge, &c. notwithstanding notice, but shall acquire no right beyond what such factor or agent had.

Sec. 6 provides for the right of the true owner to follow his goods whilst in the hands of his agent, or his agent in case of bankruptcy, or to recover them from a third person on paying his advances secured upon them.

East India warrants, which pass by delivery only, are not negotiable instruments within the 2d section. *Taylor* v. *Trueman*, 1 M. & M. C. 453.

Warrants for the delivery of indigo on sales by the East India Company, are not negotiable instruments within 6 Geo. 4, c. 94, s. 2. *Taylor* v. *Kymer*, 3 B. & Ad. 320.

A wharfinger having received flour in that capacity, and without any authority to sell, disposed of it to a purchaser who had no notice of the want of authority. The wharfinger was in the habit of doing business as a flour-factor; held, nevertheless, that the Act 6 Geo. 4, c. 94, s. 4, which protects purchases made innocently and in the ordinary course of business from agents entrusted with goods, did not apply to this case, the wharfinger not being an

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(*l*) Till execution executed the property remains in the owner, although he cannot transfer the property but by sale in market-overt after the delivery of the *fieri facias* to the sheriff. *Payne* v. *Drew*, 4 East, 523; *supra*, 1033. *Lucas* v. *Nockells*, 10 Bing. 182; but see the opinion of Littledale, J., in *Giles* v. *Grover*, 1 Clark & F. 177. By the stat. 29 C. 2, c. 3, the property is bound, as between subject and subject, by the delivery of the writ to the sheriff. This means (per Lord Ellenborough, in *Payne* v. *Drew*, 4 East, 523) that the goods are bound, as regards the party himself, and all claiming by assignment from, or representation through or under him; and see the observations of Patteson, J. in *Giles* v. *Grover*, 1 Clark & F. 74; and of Lord Hardwicke in *Lewthal* v. *Tomkins*, B. N. P. 91; and *R.* v. *Wells*, 16 East, 278. The debtor may, after the delivery of the writ to the sheriff, make a valid sale of the goods, subject to the rights of the execution creditor, to which they will be liable in the hands of a purchaser, unless they have been sold in market-overt. *Samuel* v. *Duke*, 3 M. & W. 622.

(*m*) Where a promissory note or bill of exchange has been stolen, and discounted by the holder, the question of property has frequently been made to depend on the question whether the party taking the note under circumstances which ought to have excited suspicion used due caution, the general rule being clear, that bank notes, promissory notes, bills, &c., payable to the bearer, or indorsed in blank, and other such negotiable securities, when taken *bonâ*

Evidence of title.

A wrongful taking does not alter the property (*n*); and where the act of transfer is illegal, no property passes (*o*).

an agent within the meaning of the statute. *Monk* v. *Whittenbury*, 2 B. & Ad. 484.

A. the owner of certain East India indigo warrants, entrusted them to a broker without any authority to pledge or sell; the broker pledged them to *B.* In an action brought by *A.* against *B.* for the proceeds of the goods, the broker being called as a witness for the plaintiff stated that he parted with the warrants to the defendant

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bonâ fide and for a valuable consideration, pass by delivery, notwithstanding any defect of title in the party transferring. See above tit. BILLS OF EXCHANGE; and per Holroyd, J., *Wookey* v. *Pole*, 4 B. & A. 1. And the same rule applies to other negotiable securities, such as exchequer bills, &c. See *Wookey* v. *Pole*, 4 B. & A. 1. *Gorgier* v. *Mieville*, 3 B. & C. 45.

A bill of exchange was stolen during the night and taken to the office of a discount broker early in the morning, who discounted it, although the person who brought it was unknown to him, and without inquiry. It was left to the jury to say whether he had not taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man. Having found for the defendant, who was sued as indorsee of the bill, the Court refused to disturb the verdict. *Gill* v. *Cubitt*, 3 B. & C. 466. So in *Snow* v. *Peacock*, 3 Bing. 406, it was left to the jury to say whether the plaintiffs, from whom a 500*l.* bank-note had been stolen, had used due diligence in advertising the loss, and whether the defendant had used due and reasonable caution in taking the note. Therefore *qu.* as to *Lawson* v. *Weston*, 4 Esp. C. 56.

The plaintiff, having lost a 100*l.* bank post-bill indorsed in blank, in a hackney coach in London, used every means to publish the loss and to recover it; shortly afterwards the defendants, bankers at Brighton, cashed the bill for a stranger on the usual commission, who wrote in a very illiterate hand a false address on the bill, stating that he was going to Southampton; the Judge directed the jury to consider whether there was want of proper caution in the plaintiff as to the property, and a want of diligence after the loss, or negligence on the part of the defendants receiving it; and the jury having found their verdict for the plaintiff, the Court refused to disturb it. *Strange* v. *Wigney*, 6 Bing. 677.

Certain bordereaus and coupons (in the nature of scrip for foreign stock, and with which a certificate was originally given, entitling the holder to further advantages of renewal) had been deposited by the plaintiff with his broker in order to have them renewed, keeping the certificates in his own possession; the broker tranferred the bordereaus and coupons to the defendant, upon a deposit of a large sum for investment, and subsequently absconded: in an action of debt for the sum received by the defendant on the instruments, and *detinue* for the instruments themselves; held, that the jury were properly directed to say whether such instruments passed by delivery, and whether the defendant acted with due caution in receiving them without requiring the certificates; both which points the jury having negatived, the Court refused a new trial. *Lang* v. *Smith*, 7 Bing. 284; and 5 M. & P. 78.

Where a party took cheques *bonâ fide* after they became due, which had been fraudulently obtained, and received the amount; it was held, in an action to recover back the amount, that it was properly left to the jury to find for the plaintiff, if they thought that the circumstances of the case were such as ought to have excited the suspicions of prudent men, and that the defendant had not acted with reasonable caution; but otherwise to find for the latter. *Rothschild* v. *Corney*, 9 B. & C. 388.

The rule as to bills and notes, that a party taking them after they are due takes with the same title as the party from whom he receives them, is not applicable to cheques. Ibid.

Where after the 6 Geo. 4, c. 94, s. 2, the defendants received East India warrants in pledge for money advanced from a factor; it was held to have been properly left to the jury to say whether the circumstances were such that a reasonable man of business applying his understanding to them would know that the warrants were not the property of the party pledging; and if so, that the defendants were not entitled to retain them (Tenterden, L. C. J.) *Evans* v. *Trueman*, 2 M. & M. 10. And see *Eastby* v. *Crockford*, 10 Bing. 245.

But in later cases the principle of the above decisions has been questioned, particularly by Mr. Baron Parke, in giving judgment in the case of *Foster* v. *Pearson*, 1 C. M. & R. 855, referring to the cases of *Crook* v. *Jadis*, 5 B. & Add. 909; and *Backhouse* v. *Harrison*, ib. And it seems now to be settled that the real question in principle is, whether the taker acted *bonâ fide*. *Goodman* v. *Harvey*, 4 Ad. & Ell. 870.

(*n*) Com. Dig. *Biens*, E.

(*o*) *Supra*, notes (*u*) and (*x*). A sale of living pheasants transfers no property. *Helps* v. *Glenister*, 8 B. & C. 553.

Evidence of title.

The consignee of goods landed on the defendant's wharf may prove his title by parol, although the bill of lading indorsed to him cannot be received in evidence for want of a stamp (*p*).

Where a vendor has delivered goods to a carrier, which are converted by a stranger, either the owner or the carrier may maintain trover; the carrier by virtue of his interest as a bailee (*q*); the owner, by reason of his title, not having parted with the right of possession. But whether the vendor or vendee is the owner, and entitled to bring trover, usually depends upon the nature of the contract between them (*r*).

defendant under a contract which was in writing; held that a defendant seeking to avail himself of the statute must prove his contract with the broker, and consequently that it was incumbent on *B.* to produce the written agreement. *Evans* v. *Trueman and others*, 2 B. & Ad. 886.

Where during the months of December 1825 and January 1826, the plaintiff, a foreign merchant, consigned wines to his agent here, who pledged the dock-warrants to raise money, being at the time under acceptances, making the balance thereon in his favour to the amount of 2,050*l.*; but the cash account being 1,400*l.* against him, the plaintiff, according to his usual course of dealing, provided for all acceptances before they became due, and did so for the bills running at the time of the pledge; held that the factor could not under such circumstances pledge; he had only a right to detain *nomine pœnæ* till the liabilities were discharged. *Blandy* v. *Allan*, 3 C. & P. 447; and see *Fletcher* v. *Heath*, 1 M. & Ry. 335, and 7 B. & C. 517.

The plaintiff accepted a bill drawn by *N.* in order to be discounted for a specific purpose, which being accomplished by other means, the plaintiff directed *N.* to retain it in his own hands, in order to raise money on it if the plaintiff should want it; *N.* having afterwards transferred it to the defendants with knowledge that it was the plaintiff's, and that *N.* had no title to dispose of it, held that the plaintiff might maintain trover, and that it was immaterial that it might be of no value to the plaintiff when he had obtained it. *Evans* v. *Kymer*, 1 B. & Ad. 528; and see *Goggerley* v. *Cuthbert*, 2 N. R. 170.

If goods or bills be deposited for a specific object, and the bailee will not perform that object, he must return them; the property of the bailor is not divested or transferred until that object is performed. *Buchanan* v. *Findley*, 9 B. & C. 738.

Where goods are sold by an agent without authority, and the principal brings trover against the vendee, the jury should be directed to find for the plaintiff, or to say whether the plaintiff, by his conduct, had enabled the agent to hold himself out as having property as well as possession. *Dyer* v. *Pearson*, 3 B. & C. 38.

Secus in the case of a negotiable instrument which passes by delivery. The owner of an Exchequer bill (the blank not being filled up) placed it in the hands of *J. S.* for sale. *J. S.* deposited it at his banker's, who made advances to the amount; held, that the property in the bill passed by delivery, as in cases of bank-notes and bills of exchange. *Wookey* v. *Pole*, 4 B. & A. 1. So in the case of a Prussian bond payable to the holder. *Gorgier* v. *Mieville*, 3 B. & C. 45.

But if a negotiable security be delivered by the owner to another, for the purpose of raising money, and it passes into the hands of one who receives it without consideration, the property is not altered, and the owner may maintain trover against the holder. Thus, if *A.* indorse a bill drawn in his favour, and accepted by *B.* in order that he may receive money upon it for *A.* by negotiating it, and *B.* gives it to *C.*, who puts it into the hands of *D.* without consideration two years after the bill is due, *A.* may maintain trover against *D.* *Goggerley* v. *Cuthbert*, 2 N. R. 170.

If *A.* supply *B.* with money for a specific purpose, and *B.* in violation of the trust buys another chattel with the money, as a horse for his own use; *A.* may maintain trover for the horse against *B.* or his assignees under a commission of bankrupt. *Taylor* v. *Plomer*, 3 M. & S. 562.

A delivery of a chattel by an agent authorized to sell it, to his own agent for the purpose of sale, is not a conversion. 2 B. & P. 438.

(*p*) *Davis* v. *Reynolds*, 1 Starkie's C. 115.

(*q*) *Dawes* v. *Peck*, 8 T. R. 330; although the vendor pay for booking. Ibid.

(*r*) Where goods are ordered from a tradesman to be sent by a particular carrier, the delivery to the carrier or his agent vests the property in the vendee. *Dawes* v. *Peck*, 8 T. R. 330; *Dutton* v. *Solomonson*, 3 B. & P. 583; *King* v. *Meredith*, 2 Camp. 639; B. N. P. 35, 6; Salk. 18. *Secus*, where the goods are delivered by mistake to a mere stranger. Salk. 18; B. N. P. 36. So the goods vest in the vendee by the delivery to a carrier not named, after a general order. B. N. P. 36; *Godfrey* v. *Furzo*, 3 P. W. 186. And per Ld. Alvanley in *Dutton* v. *Solomonson*, 3 B. & P. 584. And per Lord Hardwicke in *Snee* v. *Prescot*, 1 Atk. 248; *Copeland* v. *Lewis*, 2 Starkie's C. 83. Although the goods be sent on condition that the vendee may reject them if he dislikes

Evidence of title.

The possession of land is *primâ facie* evidence of title to all minerals under the land (*s*).

It is an established principle, that whoever is entitled to the land, has also a right to all the title-deeds affecting it (*t*). And although he may have been guilty of negligence, and thereby enabled a prior owner to obtain money by a deposit of the deeds, he may recover them without tendering the mortgage-money.

A prior incumbrancer who takes an assignment of a lease, which is duly registered, but through ignorance and mistake leaves it in the possession of the mortgagor, who surrenders it, and takes a new lease at an increased rent, may (in the absence of fraud) recover the original lease in trover (*u*).

Possession.

In general the right of property draws after it the possession. But even in the case of special property the special owner may sometimes maintain trover, although he has not had actual possession. Thus, a factor to whom goods have been consigned, but who has never received them, may maintain the action (*x*). But in other cases of special property possession is often

them. B. N. P. 36; cites *Haynes* v. *Wood*, per Herbert, J., Surrey, 1636. And he will be bound to pay the price if the carrier keep them. Ib. And he only could recover against the carrier. Ib. Unless the vendor can establish fraud as between the carrier and the vendee; as, that it was agreed between them that the carrier should keep the goods to satisfy a debt due to him from the vendee, who was about to abscond; for if there was no intention on the part of the carrier to deliver the goods to the vendee, he never accepted them for the vendee, and the property never vested in the latter, but remained in the vendor. Ib. And the question of fraud is for the jury. Ib. But if the vendor engage to deliver the goods to the vendee, the carrier is the agent of the vendor, who is liable to the risk. *Vale* v. *Bayle*, Cowp. 286. If the vendor agree with the carrier to pay him for the carriage, the vendor may maintain an action on the contract, for there the property is out of the question. *Davis* v. *James*, 5 Burr. 2680; *Moore* v. *Wilson*, 1 T. R. 659.

(*s*) The sinking a shaft and raising ore in the plaintiff's land, is *primâ facie* evidence of ownership. Although the same witness prove that the ore was taken away by a person who had a shaft in an adjoining close, and was getting the same lode of copper under the plaintiff's land when the plaintiff sunk his shaft. *Rowe* v. *Brenton*, 8 B. & C. 737.

(*t*) *Harrington* v. *Price*, 3 B. & Ad. 170. Where a husband having made a post-nuptial settlement of certain premises, afterwards obtained the title-deeds from the wife's trustees, and deposited them with his banker as a security for advances; held, that the trustees were entitled to recover the deeds in trover, and that the bankers were not to be deemed purchasers within the 27 Eliz. c. 4, s. 2. *Kerrison* v. *Dorrien*, 9 Bing. 76.

(*u*) *Bailey* v. *Fermor*, 9 Price, 262; see *Evans* v. *Bicknell*, 6 Ves. 174; *Barnett* v. *Weston*, 12 Ves. 130.

(*x*) Per Eyre, C. J. in *Fowler* v. *Down*, 1 B. & P. 47. And see 2 Will. Saund. 47 d. So in the case of a gift of a chattel not perfected by delivery; so if the consignor of goods in *transitu*, on hearing of the consignee's insolvency, indorses the bill of lading to the plaintiff, directing him to take possession, he may maintain trover against a wharfinger who refuses to deliver them. *Morrison* v. *Gray*, 2 Bing. 260. *Sargent* v. *Morris*, 2 B. & A. 277. By the law of England property may be divested without actual delivery, *e. g.* horse sold in stable. *Secus*, according to the civil law; per Fortescue, J. Str. 167.

Property is not changed by a gift to a specified intent, as of marriage, which is broken off. P. C. 5 Mod. 141.

The grantee of the Crown of *wrecks* has a special property or title to the intermediate possession until the true owner appears and makes good his claim within the prescribed period (1 & 2 Geo. 4, c. 75, s. 26). *Bailiffs, &c. Dunchurch* v. *Sterry*, 1 B. & Ad. 831.

The plaintiff being in the possession of land in which he had sunk a shaft and raised ore, held in trover against the defendant, who had a shaft in land adjoining, and had taken away the ore so raised by the plaintiff, that it was a sufficient *primâ facie* evidence of the plaintiff's title to the ore. *Rowe* v. *Brenton*, 8 B. & C. 737.

Where a toll of corn had been customarily taken by dipping into the sack, so as to bring out a certain quantity, and the collector varied from the proper mode (by *sweeping* instead of *lifting* the toll), so as to take more, held that trover lay against him for the excess. *Norman* v. *Bell and another*, 2 B. & Ad. 190.

essential, as in the case of a sheriff, who has no special property in goods to be taken in execution before seizure (*y*).

Possession where sufficient evidence.

If the action be brought against a mere wrong-doer, the mere fact of possession by the plaintiff is usually sufficient evidence of title, even although the plaintiff claim under a title which is defective. For the possession of property is, as has been seen, *primâ facie* evidence of ownership (*z*).

And bare possession is *primâ facie* sufficient against a mere wrong-doer. Thus, one who finds a jewel may maintain trover against any one who converts it except the owner (*a*). For the title depending upon possession, however recent, must prevail against a mere wrong-doer who cannot rebut it. So an uncertificated bankrupt may maintain trover for goods acquired since his bankruptcy against all but his assignees (*b*). The mere possession of a ship by one as owner, is sufficient *primâ facie* evidence of ownership (*c*). Again, where the plaintiff had possession of a ship under a transfer which was void for want of compliance with the Register Acts, it was held to be a sufficient title against a stranger who seized part of the wreck of the ship (*d*).

(*y*) And if a sheriff having taken goods in execution assent to their being taken by one who had ordered them to be made by the judgment-debtor and had paid for them, he cannot afterwards retake them to satisfy his poundage. *Goode* v. *Langley*, 5 B. & C. 26. Coals on a wharf were seized as a distress by service of notice of distress on the tenant, who by afterwards requesting that the notice of sale might not be published recognized the seizure; it was held that as between the parties it was a sufficient seizure, although no one remained in possession, and not to be deemed an abandonment, the 11 Geo. 2 authorizing the landlord to keep the goods on the premises. *Swann* v. *Earl of Falmouth*, 8 B. & C. 456. In the morning of the day in which a formal distress was made, the landlord, hearing that property was about to be removed, and his tenant and a third person disputing about a lathe, laid his hands on it, saying, "it shall not be removed until my rent is paid;" held that, there being no collusion between the landlord and the tenant, the distress was to be taken to have commenced at the time of the landlord's coming on the premises, and that the lathe having been improperly removed, he had a right to recover it back in trover. *Wood* v. *Nunn*, 5 Bing. 10, and 2 M. & P. 27.

(*z*) Per Ld. Kenyon, in *Webb* v. *Fox*, 7 T. R. 397; *Sutton* v. *Buck*, 2 Taunt. 302; *Burton* v. *Hughes*, 2 Bing. 173; *supra*, 1144; *Robertson* v. *French*, 4 East, 130; *Thomas* v. *Foyle*, 5 Esp. C. 88; Abbott's L. S. 73; *supra*, 872. 896. In *Sheriff* v. *Cadell*, 2 Esp. Ca. 617, where the plaintiff produced the ship's register, which showed that the property was in a third person, and failed in proving an assignment to himself for want of the attesting witnesses, Ld. Kenyon held that he could not afterwards resort to evidence of possession. This case seems however to be virtually overruled. See the cases above cited. If the plaintiff had inadvertently shown that the property was in another at the *time of the conversion*, the presumption arising from mere possession must have yielded to the positive proof; but the *previous* ownership of another is not inconsistent with property in the plaintiff at the time of the conversion.

(*a*) *Armory* v. *Delamirie*, Str. 505; 2 Saund. 47. a.

(*b*) *Webb* v. *Fox*, 7 T. R. 391, and the cases there cited; and *Fowler* v. *Down*, 1 B. & P. 44; *Chippendale* v. *Tomlinson*, Cooke's B. L. 260; *Evans* v. *Brown*, 1 Esp. C. 170; *La Roche* v. *Wakeman*, Peake's C. 140; *Silk* v. *Osborn*, 1 Esp. C. 140.

(*c*) *Robertson* v. *French*, 4 East, 130.

(*d*) *Sutton* v. *Buck*, 2 Taunt. 202. In trover for a quantity of rushes, it was proved that the plaintiff being possessed of a cottage at *T.*, and an inhabitant there, and as such claiming a right to cut rushes upon *T.* common for his own use, cut down about five or six loads of rushes, which the defendant seized and carried away. The Judge nonsuited the plaintiff, but a rule having been obtained why there should not be a new trial, the Court set aside the nonsuit, and said, "This is such evidence of property in the plaintiff, and conversion in the defendant, that they appear to be wrong-doers, for they have neither by evidence nor pleading shown any right or title whatever to these rushes, and appear to the Court to be mere strangers. Indeed if a person hath no colour of right at all to cut down rushes, or to take any other thing, he cannot, by cutting the rushes or taking the thing without any colour of right, acquire property therein. But in the case at bar, the plaintiff proved he had a right to cut the rushes; that he did cut them; and we are all of opinion that he thereby gained a property therein." *Packham* v. *Jesup*,

Possession where sufficient evidence.

It may be observed in general, that where there is any doubt as to the possession of the identical goods in question, it is requisite to be prepared with evidence to show the plaintiff's title, and to establish the identity of the goods by evidence of his purchasing them from a former owner, or in market-overt, or otherwise; and also with proof of the bill of sale, or bills of parcels, lading, &c. (*e*), or of other documents describing the chattels and accompanying the transfer.

Title presumptive evidence.

Where the plaintiff brought trover to recover the value of certain bank-notes which had been found by the defendant in a pocket-book, and it was proved that the notes had been delivered out by a banker's clerk in exchange for a cheque payable to the plaintiff or bearer, and there was no evidence that the cheque had been ever negotiated, or that any claim to the notes had been made on behalf of any other person, it was held to be presumptive evidence of title in the plaintiff (*f*).

Right of possession at time of conversion.

Again, the right of possession must exist at the time of the conversion. Thus, the owner of goods who has parted with the right of possession by letting them to a tenant for a term, cannot maintain trover against the sheriff for seizing them under an execution during the term (*g*). And if goods stolen be purchased in market-overt, and sold by the purchaser before the conviction of the felon, the owner cannot recover by virtue of the statute against such purchaser, for the sale in market-overt changed the property; and the plaintiff's title to possession under the statute 21 H. 8, c. 11, did not accrue till the conviction, consequently he had no title at the time of

3 Wils. 332. In the case of *Basset* v. *Maynard*, Cro. Eliz. 819, Sir T. Palmer, being seised of a great wood, granted to Cornford as many trees as would make 600 cords of wood. Cornford assigned his interest to the plaintiff. Afterwards Sir T. Palmer granted to the defendant so many trees as would make 4,000 cords of wood, to be taken at his election. The plaintiff, by the assignment of Sir T. Palmer, cut down the trees in question, and the defendant, claiming by virtue of his grant, took them; and it was found that there was sufficient wood left for the defendant. And it was held that the action was maintainable even admitting the grant to the plaintiff to have been void; for by the cutting down of them he had possession, and a good title against the defendant and every stranger; and being cut down, it was not lawful for the defendant to take them. For if one sell 1,000 cords of wood, to be taken at the vendee's election, and afterwards the grantor himself, or a stranger, cut down some of the wood, the grantee cannot take that which is cut down, but ought to make his grant good out of that which is growing. So, where in trespass for taking and dispersing a load of fern ashes, the defendant pleaded a right of common, and of cutting fern in a particular place in which the plaintiff wrongfully cut fern, and burnt it, whereupon the defendant scattered it, as well he might. On demurrer to the plea, the Court held, that if the plaintiff did him any damage he might have brought his action; but after the plaintiff had burnt the fern, and thereby acquired possession of it, a commoner had no right to disperse it. *Woadson* v. *Nawton*, 2 Str. 777. So it has been held that a waterman's widow might maintain trover for the earnings of her apprentice *de facto*. 2 Will. Saund. 47. a.

(*e*) *Supra*, 429.

(*f*) *Greenstreet and another* v. *Carr*, 1 Camp. 551. Where the plaintiff claiming to be the mortgagee of goods seized in execution, and about to be sold, stood by without any opposition or intimation of his right; held that such conduct was to be submitted for the opinion of the jury, whether he had not ceased to be the owner. *Pickard* v. *Sears*, 2 Nev. & P. 488; and 6 Ad. & Ell. 469. And see *Heane* v. *Rogers*, 9 B. & C. 686; 4 M. & Ry. 468; and *Graves* v. *Key*, 3 B. & Ad. 318, n.

(*g*) *Gordon* v. *Harper*, 7 T. R. 13. *Pine* v. *Dor*, 1 T. R. 55. *Pain* v. *Whitaker*, R. & M. 99; Cro. Car. 242; 3 Lev. 209; Pal. 327. But where the plaintiff demised a mill and machinery annexed to the mill, and the tenant wrongfully severed the machinery, and the sheriff seized and sold it under a *fi. fa.* against the goods of the tenant, it was held that trover lay against the vendee. For on severance the property vested in the plaintiff, and the sheriff wrongfully seizing the goods of the landlord under an execution against the tenant, could confer no title by sale. *Farrant* v. *Thompson*, 5 B. & A. 826.

the conversion (*h*). So though a vendee of goods acquires property in them by the contract of sale, yet he does not acquire any right of possession until he pays or tenders the price (*i*).

The property, it seems, need not be described with great minuteness, but if it be precisely described a variance will be fatal (*k*). As, if a written instrument be described by the date, sum, parties, and other particulars (*l*). Notice to produce the instrument is unnecessary (*m*). A variance from the means or manner in which the goods are alleged to have come into the defendant's possession is immaterial, for this is but inducement, and need not be proved (*n*). Variance.

A variance as to the number of owners will not be material except so far as regards the damages, provided the plaintiff be an owner, for the non-joinder is pleadable in abatement only (*o*); and the plaintiff may declare on his own possession and prove his title as assignee of a bankrupt, executor, &c. (*p*). But if he declare as assignee of *A.*, *B.* and *C.*, bankrupts, and the declaration contain but one count on a joint possession by the three, he cannot recover in respect of property which belonged to *A.* alone, and not to the three jointly, but only in respect of property which belonged to the three jointly. But had the declaration contained a count stating possession in the assignee he might have recovered the whole, as it was a joint commission, and the assignment passed both separate and joint effects (*q*).

If the plaintiff declare as the assignee of *A.*, the allegation is proved by a joint commission against *A.* and *B.* (*r*).

In trover to recover a bond or other written instrument, the action itself is sufficient notice to produce the bond or other instrument stated in the declaration (*s*).

2dly. A conversion by the defendant. The conversion is the gist of the action; the manner in which the goods came into the hands of the defendant is mere inducement, and need not be proved (*t*). But the circumstances Conversion.

(*h*) *Horwood* v. *Smith*, 2 T. R. 750. So where furniture is let to a married woman living apart from her husband, the owner may maintain trover, for she cannot acquire the right of possession by contract. *Smith* v. *Plomer*, 15 East, 607. And see as to trees cut down during a tenancy, *supra*, 1146.

(*i*) *Bloxam* v. *Sanders*, 4 B. & C. 941. *Miles* v. *Gorton*, 4 Tyr. 295; 2 C. & M. 504, S. C.; and see tit. VENDOR AND VENDEE. Goods after purchase remained in the sellers' warehouse, the invoice containing the words *on rent*; a bill was accepted by the buyer, and whilst the bill was running, part of the goods were delivered to a sub-purchaser, who paid warehouse rent to the sellers; before the bill became due the original buyer became bankrupt, and it was dishonoured at maturity. It was held that the assignee of the buyer could not maintain trover for the price. *Miles* v. *Gorton*, 2 C. & M. 504; 4 Tyr. 295.

(*k*) B. N. P. 37; Cro. Car. 262. A conversion alleged of an assignment, purporting to be a conveyance from, &c. is proved by evidence of a lease and release. *Harrison* v. *Vallance*, 1 Bing. 45. Trover for two fishing smacks, with the apparel and appurtenances thereunto belonging; a boat and new cordage cannot be recovered as apparel or appurtenances. *Shannon* v. *Owen*, 1 Moo. & M. C. 392.

(*l*) *Wilson* v. *Chambers*, Cro. Car. 262; 3 B. & P. 145, 6; 1 Esp. C. 50. See tit. VARIANCE.

(*m*) *How* v. *Hall*, 14 East, 274. *Scott* v. *Jones*, 4 Taunt, 365. For the action is notice. But see 3 T. R. 306; 3 B. & P. 143.

(*n*) 2 Buls. 306. 313; Cro. J. 428; B. N. P. 33.

(*o*) *Supra*, 800. But if the action be brought by several, unless all are owners or part-owners, they cannot recover. Ibid.

(*p*) B. N. P. 37.

(*q*) *Cock* v. *Tunno*, London Sitt. after Hil. 41 G. 3, cor. Lord Kenyon, Sel. N. P. 1274.

(*r*) *Harvey* v. *Morgan*, 2 Starkie's C. 17.

(*s*) *How* v. *Hull*, 14 East, 274; 1 Camp. 144. In trover for the certificate of a ship's registry, the certificate may be proved to have been granted, though no notice has been given to produce the certificate itself. *Butcher* v. *Jarratt*, 3 B. & P. 143.

(*t*) B. N. P. 33; *supra*, note (*n*).

Conversion. under which the chattel came into the hands of the defendant are material with a view to evidence of a conversion: if the taking itself was tortious, the taking *per se* amounts to a conversion; but if the original possession was lawful, as by delivery, finding, or bailment, then either direct proof of conversion, by evidence of some tortious act, or indirect evidence, by a wrongful detention after a demand and refusal, is essential (*u*). A conversion seems to consist in any tortious act by which the defendant deprives the plaintiff of his goods, either wholly or but for a time (*x*). When such an act can be proved, evidence of a demand and refusal is unnecessary (*y*). What act will amount to a conversion when proved, is a question of law. The proof is either direct or presumptive; direct, as by evidence that a carrier broke open a box entrusted to him for carriage (*z*), or that he sold the goods (*a*), or that the defendant, without authority, forcibly took and carried away the goods (*b*), injured them (*c*), or consumed part of them. As that the defendant drew out part of the liquor delivered to him to be carried, and filled up the vessel with water, in which case he is guilty of a conversion of the whole (*d*); or caused the plaintiff to pay money for the

(*u*) See *Bruer* v *Roe*, 1 Sid. 264.

(*x*) See *Keyworth* v. *Hill*, 3 B. & A. 685. As if *A.* take the horse of *B.* and ride him, and then deliver him to *B.* B. N. P. 46; 1 Danv. 41. So the wearing of a pearl is a conversion. *Lord Petre* v. *Heneage*, 12 Mod. 519. Goods were attached by process in London, but not taken out of the possession of the party in whose custody they were originally placed by the plaintiff; the Court would not extend the fiction of a conversion so as to support trover. *Mallalieu* v. *Laugher*, 3 C. & P. 551.

Where in trover by the owner for goods let on hire, and seized by the sheriff, the declaration alleging the carrying and *converting*, &c. but it appeared that the sheriff had not sold, the learned Judge directed a nonsuit. *Duffill* v. *Spottiswoode*, 3 Carr. & P. C. 437. See *Dunn* v. *Whitaker*, 1 C. & P. 347.

The plaintiff having chartered his ship for three voyages, on her return from the first the anchors and cables were removed to the defendant's wharf, alongside of which the ship lay, but, as the jury found, not in the ordinary course of business, and the ship was shortly after seized and sold under Admiralty process, but no demand of the anchors, &c. was proved to have been made subsequently to the sale; held, that as the defendants had received those articles from those who until the sale of the ship had the right to the possession, and who might have required them again, they were not wrong-doers in retaining them until the sale, and no subsequent demand being proved, the count in trover could not be supported; held also, that the mere removal of them from the ship was not such an injury to the plaintiff's reversionary interest as to entitle him to maintain an action as for a conversion. *Ferguson* v. *Cristall*, 5 Bing. 305.

In case for an excessive and irregular distress, and with a count in trover, it appeared that after the distress made, the sheriff's precept for re-delivering the goods on a replevy, had been served by a minor and was treated as a nullity, and the goods were sold, but under an arrangement re-delivered to the plaintiffs, and never removed off the premises; held that the serving of the warrant was illegal, and that there was, under the circumstances, no conversion. *Cuckson* v. *Winsor*, 2 M. & R. 313.

Where the customary toll of corn had been by lifting the toll-dish out of the sack, and the defendant had deviated from that mode by sweeping the dish and exceeding the lawful toll; held that the owner might maintain trover for the excess. *Norman* v. *Bell*, 2 B. & Ad. 190.

Assignees who wrongfully receive bills of exchange which have been deposited with bankers who became bankrupts, and receive their proceeds, are liable in trover, although no demand has been made. *Tenant* v. *Strachan*, 1 M. & M. 377.

Plea in trover for taking reclaimed deer, the taking as a distress damage feasant; held that the depriving the owner of the use of property, and exercising acts of dominion over it, was a sufficient conversion. *Weeding* v. *Aldritch*, 1 Perr. & D. 637, and 10 Ad. & Ell. 861.

(*y*) *Forsdick* v. *Collins*, 1 Starkie's C. 173.

(*z*) 2 Will. Saund. 47, a.

(*a*) Ibid.

(*b*) *Baldwin* v. *Cole*, 6 Mod. 212; 6 East, 540; B. N. P. 441; 2 Will. Saund. 47, a.

(*c*) 2 Will. Saund. 47, a.

(*d*) *Richardson* v. *Atkinson*, 1 Str. 576; Cro. Eliz. 219. But it seems that a conversion of part is not a conversion of the whole, if the remainder be in a fit state to be delivered up, and the party offer to deliver it up. See the observations in

release of goods from a wrongful distress (*e*); or that a carrier delivered goods by mistake to a third person (*f*); or that the defendant took cattle by way of trespass, and drove them away (*g*), or that he used the property (*h*) without license from the owner; or misused a thing found (*i*). And if *A.* take goods, and *B.* take them from *A.*, it is a conversion by *B.* (*k*). Conversion.

So if the defendant take them by transfer from one who has no right to transfer them (*l*). It is otherwise where the transfer is by an agent authorized to dispose of the property, although he deliver over the property to another to sell (*m*); or sells at a lower price than he was authorized to do (*n*); or misapplies the proceeds (*o*).

So if a sheriff seize goods under a *fieri facias* after an act of bankruptcy has been committed by the defendant (*p*), he is guilty of a conversion.

One declared a bankrupt, on being called on by his assignees, delivers up his books; this is a compulsory delivery; and not being in fact a trader, he may maintain trover without a previous demand (*q*).

The mere abuse of a chattel by a bailee is no conversion (*r*); but if he use it contrary to the design of the bailment it is otherwise; as, if a man lend his horse to go to York, and the bailee goes to Carlisle (*s*).

The discounting a bill of exchange, made payable at the defendant's bank, writing a receipt upon it, and delivering it to the acceptor, after notice that it has been lost by the holder, is a conversion (*t*).

Philpot v. *Kelley*, 3 Ad. & Ell. 106. Yet *qu.* if part be actually converted with intent to convert the whole.

(*e*) *Shipwick* v. *Blanchard*, 6T. R. 298.

(*f*) *Youle* v. *Harbottle*, Peake's C. 49; 3 Taunt. 117. *Stephenson* v. *Hart*, 4 Bing. 483. So in case of the mis-delivery of goods by a wharfinger. *Devereux* v. *Barclay*, 2 B. & A. 702. It is otherwise where the goods are lost by accident. Ib. and see *Ross* v. *Johnson*, 5 Burr. 2825. A false assertion by a carrier of his having delivered goods to the consignee, does not prove a conversion. *Attersoll* v. *Briant*, 1 Camp. 409. The delivery of goods on board a vessel by the captain to a wharfinger, supposing the latter to have a lien upon them, contrary to the express direction of the owner as to their disposition, is a conversion. *Syeds* v. *Hay*, 4 T. R. 260. Here the disposition was in direct contravention of the will and direction of the owner. Where an agent for the sale of goods in India, being unable to dispose of them, delivered them to another agent for the purpose of sale, it was held to be no conversion. *Bromley* v. *Coxwell*, 2 B. & P. 438.

(*g*) *Bruer* v. *Roe*, 1 Sid. 264. And see *Baldwin* v. *Cole*, 6 Mod. 212.

(*h*) As by wearing a pearl. *Lord Petre* v. *Heneage*, 12 Mod. 519. *Mulgrave* v. *Ogden*, Cro. Eliz. 219; 3 B. & A. 687. But a bailee in merely bottling a cask of wine, is not guilty of a conversion. *Philpot* v. *Kelley*, 3 A. & E. 106.

(*i*) P. C. *Mulgrave* v. *Ogden*, Cro. Eliz. 219. So if one coming into possession of land and finding a block of stone there belonging to another, remove it not to a convenient and adjacent place but to a distance. *Forsdick* v. *Collins*, 1 Starkie's C. 173. See *Houghton* v. *Butler*, 4 T. R. 364.

(*k*) *Wilbraham* v. *Snow*, Sid. 438.

(*l*) *M'Combie* v. *Davies*, 6 East, 538. *Baldwin* v. *Cole*, 6 Mod. 212; *infra*, 1158 (*u*). And see *Jackson* v. *Anderson*, 4 Taunt. 25.

(*m*) *Stiernhold* v. *Holden*, 4 B. & C. 5. The goods being placed in the hands of a factor for sale, he indorsed the bill of lading to the defendants, who accepted a bill for him, and he directed the defendants to sell the goods and reimburse themselves out of the proceeds; the defendants having sold the goods, are not liable in trover.

(*n*) *Defresne* v. *Hutchinson*, 3 Taunt. 117.

(*o*) *Palmer* v. *Jarman*, 2 M. & W. 282.

(*p*) B. N. P. 41; Salk. 108. *Cooper* v. *Chitty*, 1 Burr. 20; *Assignees of Potter* v. *Starkie*, in the Exchequer; *supra*, 1028, (*l*). *Lazarus* v. *Waithman*, 5 Moore, 313; *Smith* v. *Milles*, 1 T. R. 481; *Lyon* v. *Lamb*, Fell on Guar. 260; *Price* v. *Helyar*, 1 Bing. 597; *Carlisle* v. *Garland*, 7 Bing. 295. If the sheriff seize before bankruptcy, and sell also to satisfy a second execution after bankruptcy, the assignees are entitled to recover the surplus in trover. *Stead* v. *Gascoigne*, 8 Taunt. 527.

(*q*) *Summerset* v. *Jarvis*, 3 B. & B. 2.

(*r*) Gil. El. Ev. 265, 2d ed.; Tri. per Pais, 456.

(*s*) Ib. 2 Bulst. 309.

(*t*) *Lovell* v. *Martin*, 4 Taunt. 799. Note, the bill had been drawn on a customer of the bank. See *Beckwith* v. *Cor-*

Conversion. Constructive.

A party may be guilty of a conversion in dealing with goods as his own, and preventing the owner from obtaining possession of them, although he has had but a constructive and not an actual possession. Thus, the taking an assignment by way of pledge, of tobacco lodged in the King's warehouse, from a broker who had purchased it there in his own name for his principal, and a refusal to deliver it to the principal after notice and a demand made by him, no other but the person in whose name it is warehoused being able to take it out, is a conversion (*u*).

A. consigned to *B.* dollars to the use of the plaintiff, which *B.* deposited at the Bank for safe custody, and pledged the bill of lading to the defendant, who upon a sale of the dollars to the Bank received the value of the dollars, and it was held that he was guilty of a conversion (*x*) by the delivery of the bill of lading, which was the symbol of property, and the receipt of the value. It is not, however, essential that the party should deal with the goods as his own. A servant is guilty of a conversion in receiving the goods of a bankrupt, and giving a receipt in his master's name (*y*).

But it seems that, in general, evidence of some tortious act is essential to a conversion, and that it is not sufficient to prove mere nonfeasance (*z*). A refusal to deliver up a deed by one who has it not in his possession, is not a conversion, although he intended to convert it (*a*).

Assignees of bankrupt bankers, who wrongfully receive the produce of bills the property of the plaintiff, deposited with the bankers, and by them placed in the hands of *A.*, are not guilty of a conversion in merely receiving from *A.* the produce of the bills; but they are liable in trover as to other of such bills which did come into their hands, and the produce of which they received, after demand made and refusal to give them up (*b*).

Where a party claiming a ship under a defective conveyance from a trader before his bankruptcy, sent her to sea, and she was lost on the voyage, it was held to be a conversion (*c*).

By tenant in common.

Where an action is brought by one tenant in common of an indivisible chattel (*d*), against another tenant in common, it is not sufficient to show

rall, 2 C. & P. 261; and *Robson* v. *Rolls*, 1 Mo. & R. 239.

(*u*) *M'Combie* v. *Davies*, 6 East, 538. See *Baldwin* v. *Cole*, 6 Mod. 212.

(*x*) *Jackson* v. *Anderson*, 4 Taunt. 24. See *Bloxam* v. *Hubbard*, 5 East, 407.

(*y*) *Perkins* v. *Smith*, 1 Wels. 328; and see above, note (*p*).

(*z*) See *Bromley* v. *Coxwell*, 2 B. & P. 438. As that an agent employed to sell goods under certain conditions, has merely neglected to sell them.

Where goods were attached by process, but not taken out of the possession of the party in whose custody they were originally placed by the plaintiff, the Court would not extend the fiction of a conversion so as to support trover. *Mallalieu* v. *Laugher*, 3 C. & P. 551; and see *M'Combie* v. *Davies*, 6 East, 538.

The plaintiff having chartered his ship for three voyages, on her return from her first the anchors and cables were removed to the defendant's wharf, alongside of which the ship lay, but, as the jury found, not in the ordinary course of business, and the ship was shortly after seized and sold under Admiralty process, but no demand of the anchors, &c. was proved to have been made subsequently to the sale; held, that as the defendants had received those articles from those who until the sale of the ship had the right to the possession, and who might have required them again, they were not wrong-doers in retaining them until the sale, and no subsequent demand being proved, the count in trover could not be supported; held also, that the mere removal of them from the ship was not such an injury to the plaintiff's reversionary interest as to entitle him to maintain an action in respect thereof. *Ferguson* v. *Cristall*, 5 Bing. 305.

(*a*) *Smith* v. *Young*, 1 Camp. 439. Note, the deed was in the hands of the defendant's attorney, who had a lien upon it for a small sum of money.

(*b*) *Tenant* v. *Strachan*, 1 Moo. & M. C. 377.

(*c*) *Bloxam* v. *Hubbard*, 5 East, 406.

(*d*) The law, for reasons of policy, and on account of the difficulty of legislation on the subject, does not interfere to regulate the enjoyment of chattels amongst

Conversion. By tenant in common.

that the defendant took forcible possession of the chattel and carried it away (*e*), or that he changed the form of the chattel by applying it to the use for which it was intended (*f*). But if the defendant, being tenant in common, destroy the chattel, it is a conversion, and trespass or trover will lie (*g*). And where a tenant in common of a ship forcibly took it out of the possession of a co-tenant, secreted it, changed its name, and it afterwards came into the hands of one who sent it to sea, where it was lost, it was held to have been properly left to a jury whether this was not a destruction by the means of the defendant (*h*).

Notice, when essential.

In many instances proof of notice of the particular circumstances is necessary, in order to show that the act of the defendant amounts to a conversion. Thus where an agent has the goods of his principal in his custody, and delivers them according to the order of the principal, without notice of a previous transfer by the principal, he is not guilty of a conversion (*i*).

part-owners, except in the instance of ships, to prevent them from being unemployed. Abbott's L. S. 70. If one of two tenants in common take the whole into his possession, the other has no remedy but to take this from him who has done the wrong, when he can see him. Litt. s. 123, and per Lord Coke, Co. Litt. 202, a. *Brown* v. *Hedges*, 1 Salk. 290; and per Lord Mansfield, *Fox* v. *Hanbury*, Cowp. 450. After the bankruptcy of one of two partners, the other, being solvent, delivers partnership goods to a third person for a valuable consideration; the assignees of the former cannot maintain trover, for they are tenants in common with the consignee by relation. *Smith* v. *Oriel*, 1 East, 367. *Fox* v. *Hanbury*, 2 Cowp. 445. *Ramsbottom* v. *Lewis*, 1 Camp. 279. *Smith* v. *Stokes*, 1 East, 363.

(*e*) *Barnardiston* v. *Chapman and another*, cited 4 East, 120. So, a member of an amicable society, entrusted with a box containing the fund, who has given a bond for the safe custody, cannot maintain trover against another member of the society, and a stranger, who take away the box; for the members are tenants in common, and the plaintiff had but a special property in the box, which cannot prevail against a general property. *Holliday* v. *Camsell*, 1 T. R. 658. The reason why one tenant in common cannot maintain trover against a co-tenant seems to be, that possession by the one is in law the possession of both. Salk. 290. B. N. P. 34, 5. *West* v. *Pasmore*, B. N. P. 35. And where the possession of a tenant in common becomes tortious, the co-tenant may maintain trover. B. N. P. 35. In *Heath* v. *Hubbard*, 4 East, 110, the Court intimated an opinion that the mere sale of the whole chattel by a co-tenant in common would not amount to a conversion. But in *Barton* v. *Williams*, 5 B. & A. 395, great doubt seems to have been entertained upon the question whether a sale *of the whole* by a mere tenant in common would not amount to a conversion; and Abbott, C. J. and Bayley, J. seem to have been of opinion that such a sale would amount to a conversion. But see the observations of Parke, B. in *Farrer* v. *Beswick*, 1 M. & W. 688. Where a sale is made of the whole chattel in market-overt there seems to be no doubt, for then the one tenant in common is as effectually deprived of his property as by the actual destruction of the chattel. When the sale is not in market-overt, it seems that the interest of the tenant in common still remains, notwithstanding the sale of the whole by the defendant; but still the act of selling the co-tenant's share may amount to a conversion, although the property be not changed.

J. F. advised the plaintiffs that he had remitted to them 1,969 dollars consigned to Laycock, and did consign 4,700 dollars to Laycock, who pledged the bill of lading to the defendant, and the latter received the value of the dollars at the Bank of England, where they had been deposited by Laycock; it was held, that as the defendant had converted all the plaintiff's dollars as well as his own, trover would lie, although there had been no severance of the plaintiff's dollars from the rest. *Jackson* v. *Anderson*, 4 Taunt. 24. In *Smith* v. *Burridge*, 4 Taunt. 684, it was held that one of several partners in a government contract could not pledge goods consigned to him by another partner for the purpose of performing the contract.

(*f*) *Fennings* v. *Lord Grenville*, 1 Taunt. 241. See T. Ray. 15; 1 Keb. 38; 1 Lev. 29; Abbott's L. S. 70.

(*g*) Ibid. And see 2 Will. Saund. 47, g.; *Cross* v. *Abbott*, Noy, 14; 4 East, 117. *Heath* v. *Hubbard*, 4 East, 110.

(*h*) *Barnardiston* v. *Chapman*, 4 East, 121, n. The jury found in the affirmative. Abbott on S. 72, note (*n*).

(*i*) *A.* deposits goods with *B.* and then sells them to *C.*, and afterwards directs *B.* to deliver the goods to *D.*;

Conversion. Demand.

So in some instances proof of a *demand* is necessary, in order to show that a detention originally legal became illegal. Thus in trover by assignees to recover bills delivered by a trader to a creditor in contemplation of bankruptcy, on which the creditor after the bankruptcy received the amount, it is necessary to prove a demand and refusal before the bills became due (*k*). A letter demanding the deed sought to be recovered in trover may be read by the plaintiff as notice to the defendant, although it will not be evidence of any statement in it (*l*). The receipt of the money does not amount to a conversion; for until demand the defendants had no reason to consider the plaintiffs entitled; until the demand made, it was uncertain whether they would not affirm the transaction.

Presumptive evidence.

The ordinary presumptive proof of a conversion consists in evidence of a demand of the goods (*m*) by the plaintiff (*n*), and a refusal to deliver them by the defendant who has possession of them (*o*). A conversion is it seems a presumption which in point of law a jury ought to make from such evidence, unexplained by circumstances (*p*), but it is a presumption in law and fact, and if the jury simply find the fact of a demand and refusal, the

B. is not guilty of a conversion in delivering them to *D. Saxby* v. *Wynne*, K. B. Hil. 1825. *Secus* if he knew of the sale. And see *Ogle* v. *Atkinson*, 5 Taunt. 759.

(*k*) *Jones* v. *Fort*, 9 B. & C. 764. And see *Nixons* v. *Jenkins*, 2 H. B. 135; *Perkins* v. *Smith*, 1 Wils. 328; *Tenant* v. *Strachan*, M. & M. 377.

(*l*) Tenterden, L. C. J., *Whitehead* v. *Scott*, 2 M. & M. 2.

(*m*) A demand of *fixtures* and refusal of fixtures is no evidence of a conversion of goods which are not fixtures. *Colegrave* v. *Dios Santos*, 2 B. & C. 76.

(*n*) If the demand has been made by an agent, proof of authority should be given. If the party making the demand had no authority from the owner, the refusal will not be evidence of a conversion. *Gunton* v. *Nurse*, 2 B. & B. 447.

(*o*) In the case of *Baldwin* v. *Cole*, 6 Mod. 212, Lord Holt said that "the very denial of goods to him who has a right to demand them is an actual conversion, and not merely evidence of it, as has been holden; for what is a conversion but the assuming to one's self the property and right of disposing of another's goods? and he that takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them." And see Lord Ellenborough's observation in *M'Combie* v. *Davis*, 6 East, 540; and *Bloxam* v. *Hubbard*, 5 East, 407. This, however, is not quite accurate, for the Court can pronounce no judgment where the jury merely find a demand and refusal; *infra*, note (*q*). In the case of *Watkins* v. *Woolley*, Gow, 69, Richardson, J., in an action by the assignees of a bankrupt for a landau sold to the defendant after an act of bankruptcy, is stated to have ruled that mere non-delivery after a written demand proved, was evidence of a conversion. But there the property had vested by relation in the assignees previously to the sale, and the taking the landau by the defendant was in strictness a conversion. See *Davies* v. *Nicholas*, 7 C. & P. 739.

(*p*) It is not evidence of a conversion, where it is clear from the evidence that the defendant has been guilty of no conversion; as where the defendant cuts down trees on plaintiff's land, and leaves them lying there as before. 2 Mod. 245. So in the case of a carrier, a refusal to deliver goods is not evidence of a conversion, where it appears that the goods have been lost. Salk. 655. *Ross* v. *Johnson*, 5 Burr. 2825. Or stolen. *George* v. *Wyburn*, Rol. Ab. 6, pl. 4. *Secus*, if that does not appear. *Dewell* v. *Moxon*, 1 Taunt. 391; Salk. 655. If the carrier says that he has the goods in his warehouse, and that he will not deliver them, that will be evidence of a conversion, and trover may be maintained. *Secus*, of a mere non-delivery, without any refusal. Per Lord Ellenborough, *Severin* v. *Keppell*, 4 Esp. C. 157. Evidence that the carrier asserted that he had delivered the goods to *A. B.*, to whom they were directed, when in fact *A. B.* had not received them, is not evidence of a conversion sufficient to support trover. *Attersol* v. *Briant*, 1 Camp. C. 409. Trover for letters and memorandum-books; these had come into the defendant's possession, and he detained them as containing matters injurious to him, and refused to deliver them up to *B.*, who was sent to demand them, but he afterwards promised to give them up to a third person, who accepted part, with a view to obtain the rest; held that it was for the jury to say whether the whole amounted to a conversion, but that the plaintiff was entitled only to nominal damages. *Clendon* v. *Dinneford*, 5 C. & P. 13.

Court cannot infer a conversion (*q*). This proof is always necessary where the goods came lawfully into the defendant's possession, as by finding, or upon a bailment, or delivery by the owner (*r*); but it is unnecessary where a tortious taking of the goods can be proved (*s*). Previous to the proof of a demand and refusal, evidence of the possession by the defendant is essential (*t*); and proof of a possession by the servant of the defendant is insufficient, unless it be proved that he was his agent for the purpose, or that the agent was employed and the goods delivered in the course of trade (*u*). Thus, a delivery to the servant of a pawnbroker in the shop, is evidence of a delivery to a pawnbroker (*x*). Presumptive evidence.

If the demand was in writing notice should be given to produce it in the usual way (*y*). Notice left at the dwelling-house is sufficient (*z*). If an oral as well as a written demand has been made, it is sufficient to prove the former (*a*), although both were made at the same time (*b*). Demand.

A demand in writing of "the amount of the goods you have disposed of" is sufficient (*c*).

As a demand and refusal do not amount to a conversion, and are but evidence of the fact, a jury may from such evidence presume a conversion on a day previous to the refusal. Where it appeared from the memorandum that the bill had been filed on the 28th of November, it was held that a conversion previous to the filing the bill might be presumed from a demand and refusal on the 29th of November (*d*), a previous possession of the deeds in question having been proved.

If, indeed, the defendant, having possession of the plaintiff's goods, absolutely refuse to give them up, and there be no evidence to justify the refusal or to explain it, then the presumption of conversion is a presumption of law, upon which the jury ought to find a conversion (*e*). But a mere qualified refusal, alleging special grounds for not delivering the goods, if it afford any evidence of a conversion to be submitted to a jury, at all events raises no legal presumption on which the jury are to find, independently of their actual belief of a conversion in fact (*f*). As if goods be delivered to a manufacturer to work on them, and return them, and on being applied to, he merely makes excuses, but does not *refuse* to return them (*g*). So, a refusal Qualified refusal.

(*q*) *Mires* v. *Solebay*, 2 Mod. 242; 10 Coke, 57; 2 Roll. Abr. 693; 1 T. R. 478; Hob. 181; 1 Roll. R. 131. Where a bailee of goods makes himself a party by retaining them for his bailor, and refuses to deliver them without his directions, he must stand or fall by his bailor's title; and such a refusal is a sufficient conversion, unless he can show an adverse right to the immediate possession. Held, therefore, that there being no just claim of lien in the bailor, the real owner was entitled to recover against the bailee. *Wilson* v. *Anderton*, 1 B. & Ad. 450.

(*r*) *Bruer* v. *Roe*, 1 Sid. 264. See *Nixon* v. *Jenkins*, 2 H. B. 135; *supra*, 1157.

(*s*) Where cattle are tortiously taken by way of trespass a conversion shall be intended; otherwise where the defendant comes to the possession by finding. Per Holt, C. J. in *Baldwin* v. *Cole*, 6 Mod. 212; *Beckwith* v. *Elsey*, Clay. 112, pl. 191.

(*t*) B. N. P. 44; Salk. 441.

(*u*) Salk. 441.

(*x*) Ibid.

(*y*) *Supra*, tit. NOTICE.

(*z*) *Logan* v. *Houlditch and another*, 1 Esp. C. 22; *supra*, 732; *Thompson* v. *Shirley*, 1 Esp. C. 31.

(*a*) *Smith* v. *Young*, 1 Camp. 440.

(*b*) Ibid.

(*c*) *Thompson* v. *Shirley*, 1 Esp. C. 31; Clay. 122, pl. 114.

(*d*) *Wilton* v. *Girdlestone*, 5 B. & A. 847. And see *Morris* v. *Pugh*, 3 Burr. 1243.

(*e*) *Supra*, 684.

(*f*) *Severin* v. *Keppell*, Mid. Sitt. Exch. 43 G. 3. Ld. Ellenborough, Sel. N. P. 1390. 4 Esp. C. 156. *Addin* v. *Round*, 7 C. & P. 285.

(*g*) *Solomons* v. *Dawes*, 1 Esp. C. 83; 2 Buls. 312. *Green* v. *Dunn*, 3 Camp. 215; vide tit. PRESUMPTION.

Demand. Qualified refusal.

to a party who makes the demand on behalf of a third person, on the ground that the holder of the goods does not know to whom they belong, is not a conversion (*h*). So, if he state that he is not satisfied with the authority of the person making a demand on behalf of another (*i*), or refuse to deliver them until the claimant shall have proved his right (*k*); or having found goods, refuse to deliver them because he knows not whether the party demanding them be the true owner (*l*).

So, where the administratrix of an insolvent to a demand by his assignees of papers in his possession when he died, answered that they were in the hands of her attorney (*m*).

Where a servant, on being applied to for goods which were in the possession of the master, qualified his refusal to give them up by referring the plaintiff to his master; it was held that the refusal did not amount to evidence of a conversion by the servant (*n*).

So, where the servant of an insurance company, to whose warehouse the goods of the plaintiff had been carried after having been saved from fire in the plaintiff's house, said that he could not deliver them up without an order from the Albion office (*o*). So a false assertion by a carrier that he has delivered the goods does not amount to a conversion (*p*).

Where a trader made a collusive sale of goods on the eve of bankruptcy, it was held that the assignees in trover against the vendee must prove a previous demand and refusal (*q*). And where goods have been pawned to secure an advance of money on an usurious contract, the owner cannot recover the goods in trover without tendering the money and legal interest (*r*), upon the general equitable principle that he who seeks equitable relief must do equity (*s*).

But in the later case of *Hargreaves* v. *Hutchinson* (*t*), it was held that the contract being wholly void the plaintiff was entitled to recover the whole value.

Where a lease is deposited with *C.* on the joint account of *A.* and *B.*, one of them alone has not authority to demand it without the assent of the other (*u*). Where *A.* sold goods to *B.*, who paid for them, and *C.* becoming possessed of the place where the goods were deposited, *A.*'s agent, accompanied by *B.*, demanded them of *C.*, informing him that the goods had been *A.*'s and had been sold to *B.*, and *C.* answered that he would not deliver them to any person whatsoever, and afterwards *A.* repaid the money to *B.* and brought trover, it was held that *A.* was entitled to recover (*x*), for this was in effect a refusal to deliver to either party.

(*h*) *Solomons* v. *Dawes*, 1 Esp. C. 83. And see 2 Bulst. 312; B. N. P. 46.

(*i*) Ibid.

(*k*) *Green* v. *Dunn*, 3 Camp. 215.

(*l*) Per Coke, C. J. 2 Buls. 312. And see above (*g*) and (*k*); and *Clarke* v. *Chamberlain*, 2 M. & W. 78. *Gunton* v. *Nurse*, 2 B. & B. 449.

(*m*) *Canot* v. *Hughes*, 2 Bing. N. C. 448.

(*n*) *Alexander* v. *Southey*, 5 B. & A. 247. Note, the learned Judge who tried the cause left the case to the jury on the qualified refusal; but the Court of King's Bench intimated an opinion that the plaintiff ought to have been nonsuited.

(*o*) *Alexander* v. *Southey*, 5 B. & A. 247.

(*p*) *Attersol* v. *Briant*, 1 Camp. 409.

(*q*) *Nixon* v. *Jenkins*, 2 H. B. 135.

(*r*) *Fitzroy* v. *Gwillim*, 1 T. R. 153.

(*s*) Ibid. and *Bosanquet* v. *Dashwood*, Cas. Temp. Talbot, 38; Vin. Ab. tit. *Usury*, p. 315.

(*t*) 2 Ad. & El. 12. See *Roberts* v. *Gaff*, 4 B. & A. 92. *Tregoning* v. *Attenborough*, 7 Bing. 97. *Hindle* v. *O'Brien*, 1 Taunt. 412.

(*u*) *May et al.* v. *Harcey*, 13 East, 197.

(*x*) *Pattison* v. *Robinson*, 5 M. & S. 105. And see *Bishop* v. *Shillito*, 2 B. & A. 329, (n). *Infra*, 1224; and *Brandt* v. *Bowlby*, 3 B. & Ad. 932.

Demand.

Proof of a refusal by the defendant's general servant or agent, after demand made, is not evidence of a conversion by the defendant, without evidence of some direction or authority from him (*y*), or of a subsequent assent to the agent's act, where it was for the use and benefit of the principal (*z*).

A demand and refusal are not evidence of a conversion where the party cannot deliver them, as where he has them not (*a*), or they are in the custody of the law (*b*), or having a present right to the possession, by reason of a lien or otherwise, insists on his right (*c*). But if he claim to retain them as his own property, it will be evidence of a waiver of the lien (*d*).

Conversion by an agent.

Proof of a demand and refusal by an agent acting in the course of his employment, is evidence of a conversion by the principal. Thus, proof of a demand on and a refusal by the servant of a pawnbroker, who answers that he has lost the goods, is evidence of a conversion by the master (*e*). So, the sheriff is liable for a conversion by his bailiff (*f*), and so are all who indemnify the sheriff.

An agent or servant who acts under an authority from his principal, which is apparently legal, and for the benefit of his principal, is liable in trover if the latter had in fact no authority (*g*).

Thus, where a bankrupt, on absconding, left plate with his wife, who delivered it to a servant to pawn, and the defendant went along with the servant, and received the plate at the door of the pawnbroker's shop, and went in and pawned it in his own name, and gave his own note to repay the money, and on receipt of the money took it and delivered it to the wife, it it was held to be a conversion by the defendant, although he acted merely as a friend (*h*).

Particular persons.

Husband and wife.

If the husband alone sue, he must prove a conversion of the goods of the wife after marriage. If the husband and wife join, they may prove a conversion of the goods (which were the wife's sole property) either before or after marriage (*i*).

In an action against the husband and wife the plaintiff must prove a conversion by the wife before marriage, or a joint conversion, or a conversion by the wife alone after marriage (*k*), according to the allegations in the declaration. But proof of a conversion by the husband alone will warrant a verdict against himself alone, although it be alleged that they jointly converted the goods to their own use (*l*). A declaration against husband and wife for converting the plaintiff's goods, is supported by proof of any joint act by which the plaintiff was deprived of his property (*m*).

(*y*) *Pothonier* v. *Dawson*, Holt's C. 384.

(*z*) *Supra*, 1109; 4 Inst. 317.

(*a*) *Smith* v. *Young*, 1 Camp. 441.

(*b*) *Verrall* v. *Robinson*, 2 C. M. & R. 495; as where *A.* having hired a chaise of the plaintiff and placed it at livery with the defendant, it is attached under process against *A.* Ib.

(*c*) See tit. Lien, *supra*, 889. *Skinner* v. *Upshaw*, 2 Ld. Ray, 752. *York* v. *Greenaugh*, ib. 866.

(*d*) See above, tit. Lien, 889. Where the vendor of goods, in order to stop them *in transitu*, applied to the captain to deliver them up, and the captain refused, alleging that he had signed a bill of lading to deliver the goods to another, it was held that he had waived a tender of the freight, and that a demand and refusal were evidence of a conversion. *Thompson* v. *Trail*, 6 B. & C. 36.

(*e*) *Jones* v. *Hart*, Salk. 441.

(*f*) *Supra*, 1028.

(*g*) B. N. P. 47; Str. 813. *Stephens* v. *Elwall*, 4 M. & S. 259; and see *Cranch* v. *White*, 1 Bing. N. C. 414; 1 Scott, 314, S. C.

(*h*) *Parker* v. *Godin*, B. N. P. 47; Str. 813; vide *supra*, 168; 1 Taunt. 498; *infra*, 1153.

(*i*) 2 Saund. 47, a.; *supra*, 535.

(*k*) 2 Saund. 47, a.

(*l*) Yelv. 165; 1 Vent. 24.

(*m*) *Keyworth* v *Hill and Wife*, 3 B. & A. 685. And therefore such a declaration is good after verdict. Ibid. Cro. Jac. 661; Yelv. 166; B. N. P. 46; Str. 1094; Andr. 245.

Variance.

The time of the conversion is immaterial, provided it be previous to the commencement of the action (*n*). The place is also immaterial; trover lies in England for a conversion in Ireland (*o*). But a foreigner cannot recover in England in respect of the taking his goods at sea, and bringing them hither by a foreigner of a nation at enmity with his own (*p*).

All who were parties to the act of conversion are liable, although one only actually did the act (*q*). One who gives bond to indemnify the sheriff against seizing the goods of a bankrupt trader, is liable as well as the sheriff (*r*).

Several defendants.

In this as in other actions of tort, one or more defendants may be found guilty, and the rest acquitted. The plaintiff cannot recover against all, unless he prove a joint conversion by all (*s*). *A.* purchases goods of *B.* for *C.*, and pays for them by *C.*'s acceptance; *C.* becomes bankrupt, and *A.* delivers the goods back to *B.*; this is evidence of a joint conversion (*t*). Proof that *A.* and *B.*, two of the defendants, received the goods, and converted them before their bankruptcy, and that *C.* and *D.*, their assignees, took possession of them after the bankruptcy, and refused to deliver them up, is not evidence of a joint conversion by all four (*u*).

Damages.

3dly. The declaration in trover being general, the plaintiff must show what goods the defendant took into his possession, the value of which is the proper measure of damages (*x*). Where trover is brought for converting a security, the damages are usually given to the amount of the sum secured. But where trover was brought by the assignees of a bankrupt to recover a policy of insurance from the defendant, to whom it had been assigned after an act of bankruptcy, and it turned out that the policy had been effected on a life not insurable, but that the insurance company had, on a memorial being presented by the defendant, voluntarily paid him half the amount, it was held that the plaintiffs could not recover more than the value of the parchment on which the policy was written (*y*).

A. as principal, and *B.* as surety, gave a promissory note to *C.* for rent due from *A.*; *A.* having paid the rent, demanded the note, and *C.* refusing to give it up, brought an action of trover, and recovered 40 *s.* damages. The stamp on which the note had been written had been purchased by *C.* It was objected that *A.* alone could not bring the action, and that the damages were excessive, but the Court refused a new trial (*z*).

In trover for *billettes* of the Peruvian Government, it was agreed that they should be delivered up or their value ascertained by the prothonotary; held, that they were to be estimated in the same way as a bill of exchange

(*n*) 5 B. & A. 847; 3 Burr. 1243.

(*o*) *Brown* v. *Hedges*, 1 Salk. 290; Vin. Ab. Ev. T. b. 119, pl. 6; L. E. 155, pl. 7.

(*p*) 4 Ins. 154; B. N. P. 44. And (*semble*) proof that the two nations are in amity lies on the plaintiff. B. N. P. 44; *sed qu.*

(*q*) 2 Saund. 47, m. (n).

(*r*) *Rush* v. *Baker*, B. N. P. 41. And so he is, as it seems, if he receive the proceeds, although he give no bond. 2 Saund. 47, m. (n). *Nicoll* v. *Glennie*, 1 M. & S. 592.

(*s*) *Nicoll* v. *Glennie*, 1 M. & S. 588.

(*t*) *Robson* v. *Alexander*, 1 Moore & P. 448.

(*u*) *Nicoll* v. *Glennie*, 1 M. & S. 588.

(*x*) *Cork* v. *Hartle*, 8 C. & P. 568. The verdict must be for the value of the property taken. *Finch* v. *Blount*, 7 C. & P. 478. Where the owner of adjoining land had worked coal mines within the land of the plaintiff, held, that the plaintiff being entitled to the coals as chattels, the value of them, when brought to the pit's mouth, was the proper estimate of the damages. *Martin* v. *Porter*, 5 M. & W. 352.

(*y*) *Wills* v. *Wells*, 2 Moore, 2478; Taunt. 264.

(*z*) K. B. Trin. 59 Geo. 3; and see *Evans* v. *Kymer*, 1 B. & Ad. 528.

for the same number of dollars on a house in *P.* of undoubted solidity, Damages.
although such billettes were then at a great discount (*a*).

The owner of a ship freighted by the purchaser of goods to be paid for by the acceptance of bills, but which do not vest in the vendee by reason of non-performance of the condition, is liable to the vendor to the whole amount according to the value of the goods at the time of delivery to the order of the vendee (*b*).

A part-owner who sues alone is entitled to recover, unless the defendant plead in abatement (*c*), but he cannot recover more than the value of his own share (*d*).

Under the late rule H. T. 4 Will. 4, the plea of not guilty, in an action Defence.
on the case, puts in issue the *fact of conversion* (*e*) only; every matter in confession and avoidance must be pleaded. The same rules also state, by way of illustration, that "In an action for converting the plaintiff's goods the conversion only, and not the title to the goods, shall be put in issue by the plea of not guilty, and all matters in confession and avoidance are to be pleaded specially." The general issue admits that the plaintiff, if a conversion in fact be proved, has a right of action to *some extent*; but the defendant may show in mitigation that he converted the chattel by direction of a joint-owner (*f*).

Special damage may be recovered if it be laid in the declaration (*g*).

4thly. The defendant may, under the proper issue, adduce any evidence which shows that the plaintiff had no property whatsoever in the goods. Thus, if the plaintiff, being administrator, declare on his own possession, the defendant may show that another is the lawful executor (*h*); or where

(*a*) *Delegal* v. *Naylor*, 7 Bing. 460.

(*b*) *Brand* v. *Bowlby*, 3 B. & Ad. 932.

(*c*) *Addison* v. *Overend*, 6 T. R. 766. So trover lies at the suit of one of the joint makers of a promissory note, especially if the other maker be a mere surety. 1 Chitty, 501. See 2 Will. Saund. 47, a.

(*d*) *Nelthorpe* v. *Dorrington*, 2 Lev. 113. *Brown* v. *Hedges*, 1 Salk. 290; B. N. P. 35; 2 Will. Saund. 47, g.; 1 Will. Saund. 291, g. h.

(*e*) By the term *conversion*, as here used, is to be understood merely the actual conversion, the *act* done, and not the legal or illegal quality of the act. If circumstances exist which justify or excuse the fact, they must therefore be specially pleaded; consequently, the defendant cannot, under this issue, prove that he and the plaintiff being partners as carriers, each supplied two horses, and that on the dissolution of the concern, the defendant seized and sold the two horses supplied by the plaintiff, for the purpose of paying partnership debts. *Stancliffe* v. *Hardwick*, 2 C. M. & R. 1. But although the plea admits such a title in the plaintiff as enables him to maintain the action, and therefore admits *some* property in the plaintiff, the defendant may, it seems, show that he is tenant in common with the plaintiff. Ib. The defendant cannot, under this plea, show that the plaintiff had before the action transferred the property. *Pickard* v. *Sears*, 6 Ad. & Ell. 469. *Simon* v. *Shepherd*, 2 M. & W. 9. He ought to traverse the plaintiff's possession. Ib.

(*f*) *Stancliffe* v. *Hardwick*, 2 C. M. & R. 1. The plaintiff is entitled to a verdict under the plea of not guilty, if a conversion in fact be proved, although he has parted with the property. *Vernon* v. *Shipton*, 2 M. & W. 92. The defendant cannot deny the plaintiff's property, although the only evidence of a conversion be by demand and refusal. *Barton* v. *Brown*, 5 M. & W. 298. The plaintiff being joint-tenant of a chattel with *C. D.*, it seems that a seizure and sale of the chattel under legal process is no conversion. *Farrer* v. *Beswick*, Liv. Sp. Ass. 1836. Trover for horses, plea, 1st. That the plaintiff was not lawfully possessed. 2dly. Seizure and sale under a levy from the County Court against the goods of Joshua Farrer, at the suit of *A. B.*; replication, that they were the goods of the plaintiff, and not of Joshua Farrer. The jury found that they were the joint goods of the plaintiff and *Joshua Farrer:* a verdict was taken for the plaintiff, damages 25 *l.*, being half the value, &c. Parke, B. reserved the point, intimating, that if the general issue had been pleaded, it would have been a good defence. *See* 1 M. & W. 688, S. C.

(*g*) *Davis* v. *Oswell*, 7 C. & P. 804.

(*h*) Salk. 285, per Holt, C. J. *Marshfield* v. *Marsh*, Ld. Ray. 824; B. N. P. 48.

Defence, general issue.

the plaintiff claims title as purchaser of a ship, that the sale was void for non-compliance with the register Acts (*i*); or that the documents alleged to have been converted were deposited in furtherance of an illegal project (*k*); or that the plaintiff had before recovered damages in trover for the same goods, against the defendant or another; for the effect of the recovery was to vest the property in the former defendant, the plaintiff having recovered damages in their stead (*l*). Or title in another; thus, where the vendor brings trover against a carrier, the latter may show that the property has vested in the vendee (*m*); although it has been said that a carrier cannot in general dispute the title of the party who delivered the goods to him (*n*). That the goods were sold under a distress for rent, although the sale was irregular and premature (*o*); that the defendant was a gamekeeper, and took the gun by virtue of the statute (*p*); that he took the goods for toll (*q*). Or title in himself, as part-owner of the property jointly with the plaintiff (*r*); and this will throw it on the plaintiff to prove a destruction of the joint property, or at least such an alienation of it as puts an end to the joint possession (*s*).

So the defendant may show, in answer to evidence of a demand and refusal, that he was entitled (*t*) to a lien on the goods (*u*); as an innkeeper for the keep of a horse (*x*), or a lord of a manor who has seized a beast as an estray (*y*). But he cannot insist on this defence if he gave an unqualified refusal, without mentioning the lien (*z*); or if by his answer he founded his

Secus, where the defendant declares on a possession by the intestate. Ibid.

(*i*) *Supra*, 869.

(*k*) *De Watz* v. *Hendricker* 2 Bing. 314.

(*l*) *Adams* v. *Broughton*, 2 Str. 1078. In *Kitchen* v. *Campbell*, 3 Wils. 308, a recovery in trover was admitted in evidence in answer to an action for money had and received. So, a former recovery in trespass is evidence in an action of trover for the same taking. Bl. R. 831; Com. Dig. Action, K. 3. Vide *supra*, 959.

(*m*) *Dawes* v. *Peck*, 8 T. R. 390; *supra*, 1145.

(*n*) Per Gould, J. and per Lord Kenyon, in *Laclouch* v. *Towle*, 3 Esp. C. 114. But a warehouse-keeper who receives goods from a consignee to be kept for his the consignee's use, may refuse to deliver them if they be the property of another. *Ogle* v. *Atkinson*, 5 Taunt. 759. The defendant, a wharfinger, acknowledged that he held certain timber which had been sold for the plaintiff, and subsequently delivered to him a bill for wharfage; held, that he could not afterwards controvert the plaintiff's title in trover, upon the ground of a right of stoppage *in transitu* in another. *Gosling* v. *Birnie*, 7 Bing. 339; and 5 M. & P. 160. And see *Hawes* v. *Watson*, 2 B. & C. 541. *Stonard* v. *Dunkin*, 2 Camp. 341.

(*o*) *Wallace* v. *King*, 1 H. B. 13.

(*p*) 22 & 23 C. 2; B. N. P. 48.

(*q*) Sir W. Jones, 240.

(*r*) *Supra*, 1159; 1 East, 363. 368.

(*s*) *Supra*, 1159.

(*t*) Where the ship's register had been deposited to secure advances for repairs, held, that such right of lien defeated the right to recover it in trover; and *qu.* whether, upon the true construction of the 4 Geo. 4, c. 41, s. 23, a party can be said *wilfully* to detain a ship's register, if he does so by reason of a lien upon it. *Bowen* v. *Fox*, 10 B. & C. 41. Where goods are deposited on an usurious contract by a trader, the assignees, after his bankruptcy, are entitled to recover. *Tregoning* v. *Attenborg*, 7 Bing. 97.

(*u*) Parke, B. in delivering judgment in the case of *Stancliffe* v. *Hardwick*, 2 C. M. & R. 1, observed (in reference to the question whether the right of lien ought not to be pleaded), The Court are not under the necessity of pronouncing any judgment on this question at present; but nothing that has been said is to be taken as an intimation of an opinion that in such a case, where there has been a refusal to deliver on the ground of lien, the lien need not be specially pleaded. This defence may, it seems, be raised under a traverse that the plaintiff was possessed as of his own property. *Owen* v. *Knight*, 4 Bing. 54.

(*x*) B. N. P. 45; 2 Show. 161. But if *A.* put a horse to pasture with *B.* at so much per week as long as he remains at pasture, and sell him to *C.*, who brings trover against *B.*, the latter cannot, as an innkeeper or tailor, detain for the lien. Cro. Car. 271; B. N. P. 45.

(*y*) 2 Ro. Ab. 92; B. N. P. 45.

(*z*) *Boardman* v. *Sill*, 1 Camp. 410.

Defence, general issue.

refusal on a denial of the right of the plaintiff to *the possession* of the goods (*a*); and the plaintiff may reply, by evidence showing that the right of lien was waived by a special agreement as to the time and mode of payment, but not by an agreement merely as to the quantum to be paid (*b*). So he may give any other evidence which explains the refusal. He may show that the goods were stolen or lost (*c*), or taken from his possession under an execution (*d*); or, in general, that at the time of the demand he had parted with the possession by any means, or under any circumstances not amounting to a conversion (*e*); or a license from the plaintiff to do the act complained of (*f*). Thus, if goods be sold with the acquiescence of the plaintiff himself, under an invalid commission of bankruptcy against the plaintiff, no action is maintainable (*g*). Where goods were sent to the defendant by the mistake of the plaintiff's agent, and the defendant being ignorant of the plaintiff's interest in the goods, sold part and detained the rest, it was held that he was liable in trover as well for the goods sold as for those which remained in his hands (*h*).

So the defendant may show that the property was delivered under the decree of a court of competent jurisdiction (*i*), for such a delivery is not a conversion.

Proof of a demand and refusal within the space of six years, where the previous possession was with the assent of the plaintiff, is sufficient to entitle the plaintiff to recover (*k*).

A re-delivery of the goods is evidence in mitigation of damages, but is no bar to the action (*l*). As if *A.* take the horse of *B.* and ride him, and then deliver him to *B.* (*m*).

So, he may show that the articles were fixtures, which were not the subject of an action of trover (*n*).

As the action is founded in tort, it is a good defence to show that the subject-matter for which the action was brought was not taken injuriously, but with a view to the owner's benefit, or to prevent mischief, and without any

(*a*) The captain of a ship by his bill of lading undertook to deliver the goods to a person appointed by the vendee, and on the vendee's becoming bankrupt, refused to deliver the goods to the vendor, alleging that he had signed a bill of lading to deliver the goods to another; it was held that he had dispensed with a tender of the freight, and that there was presumptive evidence of a conversion. *Thompson* v. *Trail*, 6 B. & C. 36.

(*b*) *Chase* v. *Westmore*, 5 M. & S. 180.

(*c*) 1 Roll. Ab. 6; Lord Ray. 752; B. N. P. 44, 5. *Ross* v. *Johnson*, 5 Burr. 2825.

(*d*) 1 Com. Dig. tit. *Trover* (E.)

(*e*) Ibid. and see *Ogle* v. *Atkinson*, 5. Taunt. 759. *Supra*, note (*y*), and *Saxby* v. *Wynne*, *supra*, 1161.

(*f*) A power of attorney to an agent authorizing him to receive, compound, and discharge debts, does not authorize him to negotiate bills received by him, and he is guilty of a conversion in doing so. *Hogg* v. *Smith*, 1 Taunt. 347.

(*g*) *Clarke* v. *Clarke*, 6 Esp. C. 61.

(*h*) *Featherstonhaugh* v. *Johnston*, 2 Moore, 181.

(*i*) *Hossack* v. *Marson*, 4 Moor, 361.

(*k*) *Wortley Montague* v. *Ld. Sandwich*, 7 Mod. 99; B. N. P. 47.

(*l*) Vin. Ab. Ev. T. b. 119, pl. 4. The defendant having converted a lost bank-note, pays part of the proceeds to the plaintiff; his acceptance of part is no waiver of the tort. *Burn* v. *Norris*, 4 Tyr. 485; 2 C. & M. 579.

(*m*) B. N. P. 46; Danv. 21.

(*n*) 3 Atk. 13; 1 H. B. 259; Str. 1141; 1 P. W. 94. *Penton* v. *Robart*, 2 East, 88; B. N. P. 34; Hargr. Co. Litt. 55; 6 East, 604; 8 East, 339. *Herlakenden's Case*, 4 Rep. 64. Vide *infra*, tit. WASTE. *Supra*, 1104. In trover for certain goods and fixtures, &c., alleging that the same came to the hands of two of several defendants, and that the said defendants converted, &c., it was held, 1st, that the said defendants, after the verdict, must be taken to mean all the defendants; and 2dly, that the word fixtures did not necessarily mean things affixed to the freehold, and that after the verdict the Court, if it could be taken in a sense to support the declaration, would do so. *Sheen* v. *Rickie*, 7 Dowl. 335; and 5 M. & W. 175.

Defence, general issue.

intention to convert it (*o*). As that the defendant took the plaintiff's boat to go over to his own boat, which was on fire, and under the care of the plaintiff, and that as he was passing over the plaintiff's boat sunk (*p*); or that as master of a ship he threw the goods overboard from necessity, to prevent the ship from sinking (*q*).

Under the plea that the plaintiff was not possessed of the goods as of his own property, the defendants being assignees of a bankrupt, may show that at the time of the bankruptcy the goods were in the order and disposition of the bankrupt (*r*).

So the defendant, to limit the damages to the plaintiff's own share, may show that the plaintiff was a tenant in common with others (*s*). If the action be brought by the rightful executor against an executor *de son tort*, the latter may show, in diminution of damages, that he has paid debts of the deceased, and such payments are to be recouped in damages (*t*); but payments, though to the full value, afford, it seems, no bar to the action (*u*).

The defendant cannot show, in mitigation of damages under the plea of the general issue, that the goods belonged to a third person (*v*). Although a conversion cannot be purged, the defendant may prove a re-delivery in mitigation of damages (*w*).

It is no defence, that the defendant being a servant did the act under authority from his master (*x*), or for his master's benefit (*y*), if the latter had no authority, although the act was apparently legal (*z*). So the sheriff is liable in trover for seizing the goods of a bankrupt, although he has levied the money and paid it over before the commission, and although he had no notice of the bankruptcy (*a*).

Judgment.

A judgment in trover for a permanent conversion changes the property (*b*);

(*o*) Per Ld. Ellenborough, in *Drake* v. *Shorter*, 4 Esp. C. 165.

(*p*) Ibid.

(*q*) *Bird* v. *Astcock*, 2 Bulst. 280.

(*r*) *Isaacs* v. *Belcher*, 8 C. & P. 714. The evidence is not admissible under the general issue, for the assignees have no property under the Act, but only a power of sale; the sheriff, under the plea that the goods were not the property of the supposed debtor, in an action for a false return to a *fi. fa.* may show that the goods have vested by relation in the assignees of such debtor, he having become a bankrupt. *Wright* v. *Lainmer*, 3 M. & W. 44.

(*s*) 2 Lev. 113; 4 East, 121; 5 East, 420.

(*t*) B. N. P. 48. *Whitehall* v. *Squire*, Carth. 104; 4 East, 447.

(*u*) 4 East, 441; *contra*, B. N. P. 48; citing Carth. 104, which does not support the position.

(*v*) *Finch* v. *Black*, 7 C. & P. 478.

(*w*) *Countess of Rutland's Case*, 1 Rol. Ab. 5; and see *Moon* v. *Raphael*, 2 Bing. N. C. 310.

(*x*) *Stevens* v. *Elwell*, 4 M. & S. 259.

(*y*) *Perkins* v. *Smith*, 1 Wils. 328.

(*z*) Yet *qu.* in cases where the servant has no reason even for suspecting that the property delivered to him by his master is not the property of the master. And see *Saxby* v. *Wynne*, *supra*, 1161. If a servant, in dealing with property delivered to him by his master, and without the least reason for suspecting wrong, were in general to be identified with the master as to the consequences of the act directed by the master, would not the same principle extend to make a carrier or any other innocent agent liable for executing an order which he believed to be legal? Vide *supra*, 168. 1162. *Coles* v. *Wright*, 1 Taunt. 498.

(*a*) *Potter, Assignee*, v. *Starkie*, Ex. Mich. Term 1807; cited 4 M. & S. 260. *Supra*, 1164, and tit BANKRUPT and SHERIFF.

(*b*) B. N. P. 49. *Morris* v. *Robinson*, 3 B. & C. 206. *Adams* v. *Broughton*, 2 Str. 1078. Judgment for the plaintiff in replevin in the detinet for damages has the same effect. *Moor* v. *Watts*, 1 Ld. Ray. 614. So, as it seems, the defendant may show that the plaintiff brought an action against *J. S.* for the same goods, and had execution. Where a demand is of a thing certain, as on a bond, a recovery and execution against one is no bar against the other; but where the demand is for uncertain damages, a recovery against one is a bar to recovery against the other. B. N. P. 49.

but it seems to be competent to the plaintiff in that action, to show that the damages were given merely for the temporary conversion, and not as the value of the chattel (*c*). And where the declaration states a conversion by the husband and wife to their own use, as the wife cannot acquire any property by the conversion, a mere temporary conversion will be intended (*d*). Judgment, effect of.

If the value has not been recovered, the judgment will not even bar another action of trover (*e*).

As a plaintiff may recover in trover on proof of title without proof of possession, it follows that a recovery in trover for lead dug out of a mine, is not evidence in an action of ejectment to prove the plaintiff's possession of the mine (*f*). The real owner of the chattel is in general competent to defeat the action by proof of property in himself, for the record will not be evidence for him in any other action (*g*). Competency.

TRUSTEES, COMMISSIONERS, &c.

The rules of jurisprudence which determine the liability of private individuals to actions for damages, require some limitation in their application to trustees, commissioners, and other agents, who act not for their own private advantage, but in execution of some public trust for the public benefit. In respect of actions for trespasses, nuisances, and other either direct or consequential injuries to property, the general rule seems to be that such agents are not liable unless they are either guilty of an excess of authority, or some malicious or corrupt exercise of their powers. General principle as to extent of liability.

Commissioners were authorized to pave, repair, sink and alter streets, and an order was made upon petition, under an optional clause (as it was called) to repair, &c. Gravel-lane, in pursuance of which the defendants, acting under the authority of the commissioners, raised a footway within the street to the height of six feet, and by so doing obstructed the doors and windows in the ground-floor of the plaintiff's houses. It was held that the action was maintainable; and Gould, J. observed, "Every man of common sense must understand that this Act of Parliament ought to be carried into execution without doing such enormous injury to individuals as hath been manifestly done to the plaintiff in this case. Whenever a trust is put in commissioners by Act of Parliament, if they misdemean themselves in that trust, they are answerable criminally in the King's Bench; if they aggrieve and damnify the subject, as they have done in the present case, they are answerable *civiliter* in damages to the party injured" (*h*). In the subsequent case of the *Plate Glass Company* v. *Meredith* (*i*), where the defendants under the authority of commissioners under a Paving Act, had injured the access to the plaintiff's premises by raising the carriage road, it was held that the defendants were not liable, as the commissioners had not been guilty of any excess of authority (*k*).

(*c*) Gil. L. Ev. 265, 2d edit. and in Trials per Pais, 224, where it is laid down that if a jury give but 3 *l.* damages for a horse whose real value is 15 *l.*, a new action lies for damages for the horse, where evidence may be given that the first action was only for the conversion, and not for the damages for the horse itself.

(*d*) *Keyworth* v. *Hill and wife*, 3 B. & A. 685.

(*e*) Per Holroyd, J., in *Morris* v. *Robinson*, 3 B. & C. 206.

(*f*) B. N. P. 33. *Ld. Cullen's Case* at bar, K. B.

(*g*) *Nix* v. *Cutting*, 4 Taunt. 18. *Ward* v. *Wilkinson*, 4 B. & A. 410. *Joseph* v. *Adkins*, 2 Starkie's C. 76; *Thomas* v. *Pearse*, *supra*, 1033.

(*h*) *Leader* v. *Moxon*, 3 Wils. 461.

(*i*) 4 T. R. 794.

(*k*) Lord Kenyon, in giving judgment, doubted the accuracy of the report from Wilson in stating that the Judges in that case laid any stress on the enormity of

General principle as to extent of liability.

Where damage is occasioned by the negligence of the agents of commissioners appointed to execute a public work for the benefit of the public, the agents guilty of such negligence, and not the commissioners, are liable. Thus, where commissioners for lighting and paving the town of Birmingham, employed a surveyor and contractor to perform certain work, and the latter dug a deep ditch in a public street, placed a quantity of rubbish near it, and left the same without any guard, it was held that the plaintiff, who had suffered a severe injury in consequence of the neglect, could not recover against the commissioners, and consequently not against their clerks, but only from the other defendants, who had been guilty of the negligence (*l*).

It has already been seen, that where a public officer contracts on behalf of Government on account of the public, he is not personally liable in respect of contracts made in his public capacity (*m*).

Liability on contracts.

But where commissioners or trustees are appointed to execute a public duty, they act as principals, and are liable on orders given for the purpose of executing the trust (*n*); for it must be presumed that the goods were supplied or the work was performed on the individual credit of those who made the order, and not on the funds which they may happen to have at their command. In the case of *Horseley* v. *Bell* (*o*), it was held that commissioners appointed for carrying into execution a navigation at *Thirske*, who had given orders for the purpose, were personally liable. The contrary was contended, on the ground that they were executing a public trust, and that the credit was given to the undertaking itself, and not to the commissioners personally, and that the remedy was consequently in *rem*; and 2dly, that those who had been present at the meetings, and had signed some but not all the orders, were liable on those only which they had respectively

the damage sustained by the plaintiff. But the case (4 T. R.) seems to have been decided mainly on the consideration that the statute contained a clause for giving compensation to the party grieved. Bayley, J., in the case of *Boulton* v. *Crowther*, 2 B. & C. 708, *supra*, 747, intimated that in the case of *Leader* v. *Moxon*, the commissioners had exceeded their authority. See also *Jones* v. *Bird*, 5 B. & A. 837, and *supra*, tit. NUISANCE, 747.

(*l*) *Hall* v. *Smith*, 2 Bing. 156; see also *Jones* v. *Bird*, 5 B. & A. 837, where the defendants, acting under the direction of commissioners of sewers, were held to be liable; but there the defendants themselves were found to have been guilty of negligence in altering sewers running near the plaintiff's house, without proper caution. In *Matthews* v. *West London Waterworks Company*, 3 Camp. 403, it appeared that the company contracted with pipe-layers to lay down pipes for the conveyance of water; that the pipe-layers hired the men actually employed to do the work, and that those men, in laying pipes, left a quantity of rubbish in Tottenham Court-road, without light or guard, *per quod* the plaintiff, a stage-coachman, was much hurt; and Lord Ellenborough held, that the defendants (an incorporated company) were liable. Best, J., in a later case (2 Bing. 157), observed, that there the company was a corporation acting for its own benefit. See *Bush* v. *Steinman*, 1 B. & P. 404; *Yarborough* v. *Bank of England*, 16 East, 6. Where the trustees of a road were directed by the Act to place lamps along the road if they should think necessary, and to make contracts for the clearing of the road, to enable them to watch and cleanse the same, it was held that they were not liable in respect of an accident occasioned to an individual crossing the road at night, by falling over a heap of scrapings left by the side of the road without any lights. *Harris* v. *Baker*, 4 M. & S. 27. Lord Ellenborough seems to have been of opinion, that having, by the Act, a discretionary power as to the lamps, the omission to provide them could not be actionable, and that though the omission constituted an indictable offence, no action lay; *sed quære*.

(*m*) *Macbeath* v. *Haldimand*, 1 T. R. 172; *Unwin* v. *Wolseley*, 1 T. R. 174. A captain of a troop, during his absence, and whilst another officer has the actual command, by whom the orders for subsistence are issued, and by whom the subsistence money is received from Government, is not liable for subsistence furnished to the men, though he is entitled to a profit upon it. *Myrtle* v. *Beaver*, 1 East, 135.

(*n*) *Horseley* v. *Bell*, 1 Brown's C. C. 101; Amb. 770 (cited in *Eaton* v. *Bell*, 5 B. & A. 34).

(*o*) 1 Brown's C. C. 101; Amb. 770.

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signed. But it was held, 1st, that the commissioners were personally liable; and 2dly, that they were all liable in *respect* of all the orders (*p*).

So the trustees of a road are liable in their private capacity to persons employed by them in constructing and repairing the road (*q*). And a churchwarden was held to be individually responsible to a person whom he had employed to draw plans of a church, for the inspection of the commissioners for building new churches under the stat. 58 G. 3, c. 41 (*r*).

And where the affairs of a hospital were managed by a committee appointed by the subscribers at large, who issued directions for the management, and signed cheques for payment of the tradesmen's bills, it was held that they were personally liable (*s*).

If one of two churchwardens alone gives orders for goods supplied for the use of the chapel, he is liable, without joining the other warden (*t*).

But where the duty of a class of persons consists merely in directing the proper agent to execute their order, which agent is by law supplied with the means of reimbursing himself for the incident expenses, he alone is responsible for the expenses so incurred; for he, in point of law, is to be regarded as the principal who is required to do the act, and who possesses the means of reimbursing himself. Thus, vestrymen who sign a resolution ordering (*u*) the surveyor of highways to defend an indictment against the inhabitants of the parish for non-repair of a highway, are not liable for the expenses incurred in making such defence, to the attorney employed by the surveyor (*x*), nor to the surveyor, if he has paid the bill (*y*).

Twenty parishioners joined at a vestry meeting in signing an order for the repairs of the church, and one of them, a churchwarden, paid the artificers; and though the rate for reimbursing him was quashed (*z*), it was held that he could not recover for contribution against the rest; for the implica-

(*p*) By Thurlow, Ld. Ch., assisted by Ashurst and Gould, Js.; and Lord Thurlow said, "Who could make a contract on the credit of toll which it is in the power of the commissioners to waive or not at their pleasure? Then upon whose credit must the contract be? certainly on that of the commissioners who act; it is their fault if they enter into contracts when they have not money to answer them; they have made themselves liable by their own acts." So where an Inclosure Act empowered commissioners to make a rate to defray the expense of passing and executing the Act, and enacted, that persons advancing money should be paid out of the first money raised by the commissioners, and they, before any rate made, drew drafts on bankers directing them to pay the sum therein mentioned on account of the public drainage, and to place them to their account, it was held that they were personally responsible. *Eason* v. *Bell*, 5 B. & A. 34. Note, Abbott, L. C. J., said, that the question was properly submitted to the jury to decide whether credit was given *to the defendants personally* or to the fund which they had power to raise.

(*q*) *Higgins* v. *Livingston*, cited 3 Bing. 481; on an appeal from Scotland to the House of Lords. A trustee of tolls of a river navigation was held to be liable to pay the salaries of clerks to the commissioners, which by the statute were payable by the proprietors of the tolls, although he held in trust to pay creditors and discharge incumbrances, and although there was a legal estate outstanding in a trustee to secure certain annuities granted by the owner. *Tibbitts* v. *Yorke*, 5 B. & Ad. 605.

(*r*) Cor. Abbott, L. C. J., Staff. Summ. Ass. 1825, cited 3 Bing. 481.

(*s*) *Burls* v. *Smith*, 7 Bing. 705. And see *Cullen* v. *Duke of Queensberry*, 1 Br. Ch. C. 101.

(*t*) *Shaw* v. *Heslop*, 4 D. & M. 241; on issue on a plea in abatement; and the Court would not grant a new trial on the ground of surprise.

(*u*) Under the st. 13 G. 3, c. 78, s. 56.

(*x*) *Sprott* v. *Powell*, 3 Bing. 478. The plaintiff was also vestry clerk, and had delivered his bill in the first instance to the succeeding surveyor, who had refused to pay it. It was the duty of the plaintiff to have presented his bill yearly (the case was depending three years), that the parish might have determined from time to time whether they would sustain the expense of further proceedings, and that every inhabitant might be assessed in due proportion.

(*y*) Ib. 485.

(*z*) In the archdeacon's court.

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tion which would in general arise from the giving of orders is repelled by the circumstances of the case (*a*). It could not be presumed that the inhabitants met in vestry meant to make themselves personally responsible (*b*) for the repairs of the church, the effect of which would be to impose the same burthen on one who had but 5*l.* a year, with one who had a thousand; the presumption is that it was intended that the expense should be defrayed by the churchwardens, who might have been repaid by making a valid rate.

Where provision is made for suing trustees or commissioners in the name of their clerk or treasurer, the action is not maintainable against such clerk or treasurer unless it could have been maintained against the whole body, for the clerk or treasurer is merely substituted for the whole body. An action will not lie against a treasurer under a Turnpike Act, for the act of five of the trustees, although they formed a quorum (*c*).

Actions by.

Where five or more trustees were authorized to make turnpikes with suitable outbuildings and conveniences, a contract having been made between one on behalf of the rest, with the owner of land adjoining a tollhouse, by which the latter contracted to sink a well for their benefit, the expense to be borne equally, it was held that the contract was binding, and that an action was maintainable in the name of the clerk to recover a moiety of the expense of sinking the well (*d*).

An Act of Parliament directs, that actions for rates shall be brought in the name of the treasurer to commissioners for paving, &c.: an order is made for bringing an action whilst *A.* is treasurer; but before the action is brought, *B.* becomes treasurer: held, that *B.* might bring the action (*e*).

Trustees, under a local Act served the plaintiff with notice of complaint

(*a*) *Lanchester* v. *Frewer*, 2 Bing. 361.

(*b*) See *Lanchester* v. *Tricker*, 1 Bing. 202.

(*c*) *Everett* v. *Cooch*, 7 Taunt. 1. The st. 3 G. 4, c. 126, s. 74, which enables a plaintiff to sue a defendant as clerk to the trustees of a turnpike road, does not authorize execution against the person or property of the defendant; for the only provision for reimbursement is a reimbursement of all the costs, charges and expenses which he has been put to by reason of being made defendant, nothing being said as to the debt or damages recovered. *Wormwell* v. *Hailstone*, 6 Bing. 668. And see the observations of Parke, J. 4 B. & Ad. 464. By the st. 7 & 8 G. 4, c. 24, s. 3, the personal responsibility of the trustees is taken away unless where they have, in the contract or security, by express words made themselves personally liable.

(*d*) *Newman* v. *Fletcher*, 1 D. & R. 202. An original local Act enabled a mining company to extend their capital and works to a certain amount, and enabled them to sue and be sued in the name of their secretary; and sec. 11 provided that if they increased it beyond that sum, the privilege of so doing should be void, by a subsequent Act they were enabled to extend the capital, and sec. 11 of the former Act was repealed; it also empowered the company to apportion their debts amongst the partners for the time being, in proportion to their shares, and to sue for the same by action of debt or otherwise; held that the company might sue a shareholder in the name of the secretary for his proportion of the debts of the company, although incurred before the passing of the second Act, and that it was no objection that the company had directed the payment of such debts by instalments. *Lawrence* v. *Wynn*, 5 M. & W. 355.

(*e*) *Curtis* v. *Kent Waterworks Company*, 7 B. & C. 314. The Act requiring a personal demand to be made, or notice in writing to be served, before action brought: held, that a demand made at a meeting duly convened was sufficient; and *per Littledale*, J., a demand fixed on the premises charged under the rate was sufficient. Ib. The defendant in an action for a rate under the Act, cannot object that the property rated is not sufficiently described in the Act, that being ground of appeal to the quarter sessions. Where the Act provided that the action should not abate by the change of treasurers, but that the one for the time being should always be plaintiff or defendant; held that an action might be maintained in the name of any new treasurer in respect of any cause of action prior to the change of any trustees or treasurer. *Whitmore* v. *Wilkes*, 1 M. & M 214.

having been made to them that he kept a brothel, and requiring him to abate it. A notice by the plaintiff that unless they disclosed the name of their informant proceedings would be taken against them, is not sufficient as a notice of action under the Act (*f*). Actions by.

Trustees having illegally mortgaged tollhouses, are not estopped from bringing ejectment (*g*).

Where the defendant agreed with the trustees of a road to pay rent of tolls hired by him, to the treasurer of the trustees, it was held that this amounted to no more than an agreement to pay the rent to the treasurer as the agent of the trustees, and that the treasurer could not maintain an action on the agreement (*h*).

Trustees having covenanted on the marriage of *P.* to permit *P.* to receive dividends of bank-stock vested in their names, after the bankruptcy of *P.* executed a power of attorney authorizing a third person to receive the dividends; that third person having received the dividends, it was held that an action was maintainable by the assignees of *P.* to recover the amount of such dividends (*i*).

As to the appointment of a trustee of a turnpike road, see 3 G. 4, c. 126, s. 134. As to notice of action, see ib. s. 143.

UNLAWFUL ASSEMBLY.

Many of the observations which have been already made with respect to an indictment for a conspiracy, apply to the evidence on an indictment for an unlawful assembly (*k*). The evidence consists in proof of an assembly by the defendants, and of the unlawful manner in which it was conducted, or of the illegal intent with which they met, as charged in the indictment. Proof of.

An assembly of great numbers of persons which, from its general appearance and accompanying circumstances, is calculated to excite terror, alarm and consternation, is generally criminal and unlawful (*l*); and all persons who go there for purposes of that kind, and disregarding its probable effect, and the alarm and consternation which are likely to ensue, and all who give countenance and support to it, are criminal parties (*m*). And hence, evidence is admissible on the one hand to show that great alarm and apprehension has been excited by the meeting, and of the information given to the civil authorities, and of the measures taken in consequence (*n*).

(*f*) *Norris* v. *Smith*, 2 P. & D. 353.

(*g*) *Mytton* v. *Gilbert*, 2 T. R. 169. The mortgage was illegal, the Act declaring that there should be no priority among creditors. But a mortgagee to whom tolls, &c. are mortgaged in proportion to the sum advanced, &c. may recover in ejectment notwithstanding such a clause. *Doe* v. *Booth*, 2 B. & P. 219. Where the Act provided that the action should not abate by the change of treasurers, but that the one for the time being should always be plaintiff or defendant, held that an action might be maintained in the name of any new treasurer, in respect of any cause of action prior to the change of any trustees or treasurer. Ib. As to evidence of disposal of property by, under the terms of a will, see *Doe* v. *Tatchell*, 3 B. & Ad. 675.

(*h*) *Piggott* v. *Thompson*, 3 B. & P. 147.

(*i*) *Allen* v. *Impett*, 2 Moore, 240.

(*k*) *Supra*, 324. All parties present at a prize-fight, being clearly an illegal assembly, and breach of the peace, are equally guilty as principals. *R.* v. *Perkins and others*, 4 C. & P. 537. The merely meeting for an unlawful purpose, but separating without executing that purpose, constitutes an unlawful assembly, but if they meet tumultuously for such purpose, and execute it with violence, it is a riot. (Per Patteson, J.) *R.* v. *Birt*, 5 C. & P. 154.

(*l*) Per Bailey, J. in *R.* v. *Hunt and others*, York Spring Ass. 1820; and per Holroyd, J. in *Redford* v. *Birley*, Lancaster Spring Assizes, 1822; 3 Starkie's C. 76.

(*m*) Per Holroyd, J. Ibid.

(*n*) Per Holroyd, J. in *Redford* v. *Birley*, 3 Starkie's C. 76.

Proof of intent.

The proximate evidence to prove the intent consists in proof of the acts and conduct of the parties, when met their resolutions, speeches and declarations on that occasion; and of the banners, devices and inscriptions then exhibited. It has been held that parol evidence of such inscriptions and devices displayed on banners at the meeting is admissible, without producing the banners themselves (*o*).

In the next place, evidence is also admissible of acts done, resolutions carried, and declarations made in furtherance of the illegal purpose, although at other times and in other places, provided they be connected by proximity of time and place, identity of persons, or other evidence, with the meeting in question, and tend to illustrate and explain its meaning and object.

Thus, the declarations and demeanour of those who were on their way to attend the meeting is evidence to show their object (*p*). So where the question was with what intention a great number of persons assembled to drill, it was held that not only declarations made by those assembled and in the act of drilling, but also declarations made by others who were proceeding to the place, and solicitations to others to accompany them, declaring their object, were also admissible for that purpose (*q*).

And where it was proved that large bodies of men had come to the meeting from a distance, marching in regular military order, in order to show the nature and character of the meeting, evidence was admitted that within two days of the meeting considerable numbers were seen drilling and training before daybreak, at a place from which one of these bodies had come to the meeting, and that on their discovering the persons who saw them they ill-treated them, and forced one of them to take an oath never to be a King's man again (*r*). As also, that on passing the house of the person so ill-treated, in their way to the meeting, they expressed their disapprobation of his conduct by hissing (*s*).

So, upon the trial of *A. B.* and others for an unlawful meeting for the purpose of exciting sedition, it was held that resolutions passed at a former meeting where *A. B.* had presided a short time before at a distant place, were admissible to show the intention of *A. B.* in assembling and attending the meeting in question (*t*); and for this purpose it was also held that a copy of the resolutions delivered by *A. B.* to the witness at the time of the former meeting, as the resolutions then intended to be proposed, and which corresponded with those which the witness then heard read from a written paper, were evidence, without producing the original (*u*).

USE AND OCCUPATION.

St. 11 G. 2, c. 19, s. 14.

An action for use and occupation is either in debt or assumpsit. *Debt* lies for use and occupation generally at common law, without setting forth the particulars of the demise (*x*), or the place where the premises lie (*y*),

(*o*) *R.* v. *Hunt*, 3 B. & A. 566.

(*p*) *Redford* v. *Birley*, cor. Holroyd, J. Lancaster Spring Assizes, 1822.

(*q*) Ibid. See also *Burdett* v. *Colman*, 14 East, 183.

(*r*) *R.* v. *Hunt and others*, 3 B. & A. 566.

(*s*) Ibid. *Redford* v. *Birley*, cor. Holroyd, J. Lancaster Spring Assizes, 1822; 3 Starkie's C. 76.

(*t*) *R.* v. *Hunt and others*, 3 B. & A. 566.

(*u*) Ibid.

(*x*) *Williams* v. *Wingate*, 6 T. R. 62. *Davis* v. *Edwards*, 3 M. & S. 380. It was held that an action of assumpsit was not maintainable at common law to recover rent reserved on a parol demise. Roll. Ab. (O.) pl. 1. *Butt* v. *Read*, Cro. Car. 343. Although it was maintainable on a promise to pay a sum of money for the use of the premises. *Johnson* v. *May*, 3 Lev. 150; *Dartnal* v. *Morgan*, Cro. J. 598.

(*y*) *King* v. *Fraser*, 6 East, 348.

and the action is not local (*z*). The action of *assumpsit* for use and occupation depends on the statute 11 Geo. 2, c. 19, s. 14, which enacts that where the agreement is not by deed the landlord (*a*) may recover a reasonable satisfaction for lands, tenements, or hereditaments (*b*) occupied by the defendant, in an action on the case, for the use and occupation of what was so held and enjoyed; and that if it shall appear that there was a parol demise, or an agreement not being by deed (*c*), wherever a certain rent was reserved, the plaintiff shall not therefore be nonsuited, but shall make use thereof as evidence of the quantum of the damages to be recovered. St. 11 G. 2, c. 19, s. 14.

Proof of occupation.

The plaintiff must prove, 1st. An occupation by the defendant; 2dly. That it was by permission of the plaintiff; 3dly. The value. First, the occupation of the premises. If an actual occupation be proved, its continuance will be presumed (*d*).—Proof of an *actual occupation* is not essential. Where the defendant, under an agreement to take the premises for a term, put up a board in order to underlet them, it was held to be an assertion of the right of possession, and sufficient evidence of occupation (*e*). Where a house and premises are demised by a written agreement, rent is recoverable (*f*), although it has accrued after the house has been burnt down, and the defendant has ceased to occupy the premises (*g*).

(*z*) *Egler* v. *Marsden*, 5 Taunt. 25.

(*a*) Debt for use and occupation may be maintained by a corporation aggregate. *Dean and Chapter of Rochester* v. *Pierse*, 1 Camp. 466; 3 P. W. 423. And *semble*, *assumpsit* would also lie. See 1 Roll. R. 82; 2 Lev. 174; 1 Vent. 298; 16 East, 6.

(*b*) *A.* agrees to take a lease of iron ore at *D.* for a term at a certain rent. *B.* agrees to grant such lease; this constitutes a hereditament within the statute, and is not a mere licence. *Jones* v. *Reynolds*, 4 Ad. & Ell. 805.

(*c*) But the plaintiff may recover notwithstanding an agreement by deed, provided it contain no words of *present demise*. *Elliott* v. *Rogers*, 4 Esp. 59; *Banister* v. *Usborn*, Peake's L. E. 254. As to the cases where an instrument is considered to amount to a present demise, vide *infra*, 1177, and *supra*, tit. STAMP. The statute gives no remedy where the action could not before the statute have been maintained on the demise. *Hall* v. *Burgess*, 5 B. & C. 332; *infra*, *Smith* v. *Raleigh*, 3 Camp. C. 513.

(*d*) *Harland* v. *Bromly*, 1 Starkie's C. 455; *Ward* v. *Mason*, 9 Price, 291.

(*e*) *Sullivan* v. *Jones*, 3 C. & P. 579. Under an agreement "to become tenant by occupying," the lessor cannot recover, the premises being in a state unfit for occupation by a family of the defendant's condition. *Salisbury* v. *Marshal*, 4 C. & P. 165. It has been said, that payment of a poor rate assessed on the occupier of the premises is not evidence of occupation. *Rex* v. *Bristow*, Woodfall, Landlord and Tenant, 194; *sed quære*. A mere agreement to take furnished lodgings, without some evidence of possession, is not sufficient. *Edge* v. *Strafford*, 1 C. & J. 391. So in *Woolley* v. *Watkins*, 9 C. & P. 610, where the defendant had agreed to take the premises from a future day. And in *Jones* v. *Reynolds*, 7 C. & P. 335, the defendant having by writing not under seal taken a down for the purpose of digging upon it, it was held that the mere digging of holes in order to ascertain what sort of bargain he was about to make, the holes being immediately afterwards filled up, was not necessarily a taking possession; but it was held that if he had once taken possession he would be liable to the end of the tenancy, whether he got the minerals or not. So notwithstanding a parol licence to quit; *infra*, 1182.

(*f*) By an agreement for a future lease the term was to begin at once, and it was also stipulated that until the lease was executed, the parties were to stand in the same relation as if it had been, and there were also covenants inconsistent with a tenancy for a year; held that the instrument was to be taken to operate as a lease and the party as holding, and that, as long as the term continued, he was liable to be sued in an action for use and occupation, although not actually in occupation. *Pinero* v. *Judson*, 6 Bing. 206. And see *Poole* v *Bentley*, 12 East, 168; and *Burry* v. *Nugent*, 5 T. R. 165, n. A party who, pending an executory contract for a lease, takes attornments from tenants in possession, and places himself, without authority, in the place of the original lessor, and receives rent from them, is liable to an action for use and occupation, or for money had and received. *Neale* v. *Sweeny*, 2 Tyr. 464.

(*g*) *Baker* v. *Holtpzaffol*, 4 Taunt. 45. Where the defendant was tenant from year to year of part of premises which were destroyed by fire accidentally occurring in the middle of the quarter, held that the

Proof of occupation.

Where the agreement for a demise of premises was in these terms, "to become tenant by occupying," held a sufficient answer to show that they were in such a state as that no family of such condition could be reasonably expected to occupy them (*h*). Rent is recoverable in this action after an actual desertion of the premises by the defendant, provided the contract still remain in force (*i*). But where a landlord accepted the key in the middle of a quarter under a parol agreement that all rent should cease, and occupied the premises himself from that time, it was held that he could not afterwards recover for use and occupation subsequent to the time of accepting the key (*k*).

An occupation by a lessee is an occupation by the lessor. Hence, if *A.* let premises to *B.*, and *B.* let them to *C.*, who occupies them, this is an occupation by *B.* (*l*), of which his receiving rent is evidence (*m*); but a sub-lessee is not liable in respect of an antecedent occupation by the mesne lessor (*n*). Where, therefore, the assignees of a bankrupt take possession in the middle of a year, they are not liable in respect of the previous occupation by the bankrupt (*o*); nor is the bankrupt liable in this action in respect of the occupation and possession by his assignees.

defendant continued liable for rent until the tenancy was duly put an end to, and that the plaintiff might recover the rent in an action for use and occupation, the act of non-repairing by the landlord not amounting to an eviction. *Izon* v. *Gorton*, 5 Bing. N. C. 501. *Secus* where the premises, through the landlord's default in not repairing, cannot safely be inhabited. *Edwards* v. *Etherington*, 1 R. & M. C. 268.

(*h*) *Salisbury* v. *Marshal*, 4 C. & P. 65. The defendant being under an agreement for letting the premises to him for a term, put up a board in order to underlet; held that it was an assertion of the right of possession, and sufficient evidence of use and occupation. *Sullivan* v. *Jones*, 3 C. & P. 579.

(*i*) Vide *supra*, 475. *Whitehead* v. *Clifford*, 5 Taunt. 519. *Conolly* v. *Baxter*, 2 Starkie's C. 527. *Pinero* v. *Judson*, 6 Bing. 206. And it lies on the tenant to show a determination of the tenancy; *infra*, 1181. A tenant occupied lodgings in London for three quarters of a year, and then quitted, having paid half a year's rent at the end of the first half year, and tendered one quarter's rent on quitting, which was refused, and paid another half year's rent at the end of the year; a contract for a second year's tenancy is not to be presumed. *Wilson* v. *Abbott*, 3 B. & C. 88. *Secus* had he continued in possession after the commencement of the second year. A yearly tenant, paying rent half-yearly, on the expiration of his year sent the key to his landlord's agent, who at first refused to take possession, but before the end of the next half year let the premises; held, that as no rent would be due from the former tenant until the expiration of the half year, and if the action had been brought on the demise, the defendant might have pleaded the eviction as a bar, the action for use and occupation could not be maintained; the 11 Geo. 2 giving landlords that action only to avoid the difficulties of suing upon a demise, but not that the new action should be maintainable where the former was not. *Hall* v. *Burgess*, 5 B. & C. 332; 8 D. & R. 67. And see *Walls* v. *Atcheson*, 3 Bing. 462; *Grimman* v. *Legge*, 8 B. & C. 324.

(*k*) *Whitehead* v. *Clifford*, 5 Taunt. 518. The notice of quitting not having been delivered to the plaintiff himself, he afterwards took the key and put up a bill in the window, upon an understanding that it was to be for the benefit of whoever might be entitled according as the demise might be held as under a lease, or only from year to year; held, that it was for the jury to say whether the key was accepted or not upon those terms, and if so, it was no answer to the action. *Wilson* v. *Chisholm*, 4 C. & P. 476. The tenant paid the rent for two years after the payment of land-tax, without claiming it to be deducted; held, that he could not recover it back as money paid, without proof of an express agreement that it was to be paid by the landlord. A broker distraining for the rent, and deducting the land-tax, cannot be held to *allow* it, but from want of knowledge, to consent only to receive the money without it. *Saunderson* v. *Hanson*, 3 C. & P. 314.

(*l*) *Bull* v. *Sibbs*, 8 T. R. 327. And see *Conolly* v. *Baxter*, 2 Starkie's C. 527; *Dingley* v. *Angrove*, 2 Smith, 18.

(*m*) *Neal* v. *Swind*, 2 C. & J. 377.

(*n*) *Naish* v. *Tatlock*, 2 H. B. 319. See *Gibson* v. *Courthope*, 1 D. & R. 205.

(*o*) *Naish* v. *Tatlock*, 2 H. B. 319. But the bankrupt would be liable for the whole under his agreement or covenant to pay rent, although the assignees had occupied

Where a woman before her marriage held as tenant from year to year, the rent being payable half-yearly, it was held that an action was not maintainable against the husband alone in respect of rent which had accrued at the end of the half year during which the marriage took place (*p*), for he was not the occupier in the interval between the commencement of the half-year and the marriage; and the action is given in respect of the occupation, and the remedy is not co-extensive with the action of debt for rent. Proof of occupation.

An entry by one of two executors of a tenant for years does not enure as the entry of both, so as to make them both liable for use and occupation (*q*). An executor of a tenant from year to year, holding on paying rent, holds on the terms of the former tenancy, and is personally liable (*r*).

Although the situation of the premises need not be stated, a variance in the description would be fatal (*s*). As in the name of the parish where the premises are described to be situate (*t*).

2dly. The statute contemplates the relation of landlord and tenant, and therefore it seems that a stranger cannot try his title in this form of action (*u*). The plaintiff must therefore prove an *occupation* by his *permission* of the premises by the defendant. This may be proved directly by the production and proof of a written agreement (*x*), if any has been entered into, in the usual way, by the evidence of the attesting witness, if there was one, or if not, by proof of the signature of the defendant. An agreement is evidence, although it contain no terms of present demise (*y*). If the instrument be merely a prospective agreement for a lease, it must be stamped as an agreement; and if the agreement contain words of present demise, it must be stamped as a lease (*z*). If there be no written agree- Plaintiff's permission.

during part of the time, for the contract is not discharged by the certificate. *Boot* v. *Wilson*, 8 East, 311. And now see the stat. 6 G. 4, c. 16, s. 75; *supra*, 188; 4 T. R. 94. The Insolvent Act, 7 G. 4, c. 57, contains a similar clause.

(*p*) *Richardson* v. *Hall*, 3 Moore, 207; 1 B. & B. 52. *A.* having contracted for the lease of a house, permits a mistress to occupy it. It is afterwards agreed that she shall take up bills which he has accepted in part payment of the purchase-money, and that the lease shall be assigned to her; she remains in possession, and does not take up the bills, and marries the defendant, who occupies the house. *A.* cannot, without any communication upon the subject of rent, maintain an action for use and occupation against the husband. *Keating* v. *Bulkly*, 2 Starkie's C. 419.

(*q*) *Nation* v. *Tozer*, 1 C. M. & R. 179. 4 Tyr. 561, S. C.

(*r*) *Buckworth* v. *Simpson*, 1 C. M. & R. 834.

(*s*) *Wilson* v. *Clark*, 1 Esp. C. 273; *King* v. *Frazer*, 6 E. 348; *Pool* v. *Court*, 4 Taunt. 700; 13 East, 9; *Guest* v. *Caumont*, 3 Camp. 235. But see *Kirkland* v. *Pounsett*, *infra*, note (*t*). And Vol. I. tit. VARIANCE.

(*t*) But it is sufficient to describe the parish by the name by which it is ordinarily known, unless it appear that some ambiguity is occasioned by such description. See *Kirkland* v. *Pounsett*, 1 Taunt. 570; *Taylor* v. *Williams*, 3 Bing. 449; *Goodtitle* v. *Walter*, 4 Taunt. 672; *Taylor* v. *Hooman*, 1 Moore, 161; and Vol. I. tit. VARIANCE.

(*u*) *Morgan* v. *Ambrose*, cor. Wilm. J. Monmouth Sum. Ass. 1756; Peake's Ev. 255, 5th edit. And see Lord Mansfield's observations in *Powell* v. *Milbank*, 7 T. R. 401.

(*x*) *Supra*, 55.

(*y*) *Elliott* v. *Rogers*, 4 Esp. C. 59. An agreement by *A.* to let, and *B.* to take, for the whole remaining term of the lease at a yearly rent, payable quarterly, the first payment for the half quarter at the then next Christmas, *B.* agreeing to insure, the lease and counterpart, to be prepared at the expense of *B.*, and to contain all the clauses, covenants, &c. which *A.* entered into in the lease to him, amounts to a legal demise, with a right to immediate possession and not to a mere agreement for a lease. *Doe* d. *Pearson* v. *Ries*, 8 Bing. 179.

(*z*) Where the words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for a determinate time, such words will in construction of law amount to a lease for years. Bac. Ab. Lease (K.) If the instrument be so far prospective in its operation as to express the intention of the parties as to the terms

Plaintiff's permission.

ment, oral evidence of the terms is admissible; but if it appear that there is a written agreement between the parties on the subject, oral evidence is inadmissible; and if the agreement be not produced, or cannot be read in evidence for want of a stamp, the plaintiff will be nonsuited (*a*).

Indirect proof.

If there be no direct proof of the occupation by the plaintiff's permission, the plaintiff may resort to presumptive evidence of the fact; as, by proof of an admission on the part of the defendant of the payment of former rent by the defendant in respect of the same premises; and for this purpose notice should be given to the defendant to produce his receipts for such former rent, if any have been given; or the plaintiff may show that the defen-

of a future lease, it is an agreement only, although it contain a contract for present possession, unless it also provide as to the terms of such possession in the interval, or contain actual words of present demise, for then it evidently operates as an agreement in respect of the future lease, but as a lease *quousque*. Thus, an agreement to demise and let copyhold premises to *C.* on the death of *B.* with a covenant to procure a license from the lord to let the premises, operates as an agreement only, and not as an absolute demise. *Doe* d. *Coore* v. *Clare*, 2 T. R. 739. So where the instrument set forth the conditions of a future lease of lands and rent, and of the times of entry, and it was agreed that a lease should be executed on those conditions with the usual covenants. *Tempest* v. *Rawling*, 13 East, 18. So where the terms were that the lessee should take possession immediately, and that a lease should be executed in future. *Goodtitle* d. *Estwick* v. *Way*, 1 T. R. 735. Where *A.* agreed to let her house to *B.* during her life, supposing it to be occupied by *B.* or by a tenant agreeable to *A.*, and it was provided that a clause was to be added in the lease to give *A.*'s son an option to possess the house when of age; it was held that the latter clause showed that it was merely an agreement for a lease. *Doe* d. *Bromfield* v. *Smith*, 6 East, 530. Otherwise where the contract is for present possession, with a provision as to the terms *quousque*. As where the landlord agreed to let, and upon demand to execute to the tenant a lease of a farm, and the tenant agreed to take, and upon demand to execute a counterpart of the lease of the said farm, on a day specified, containing the usual covenants, &c. and the agreement was to bind until the lease was made, it was held that the contract amounted to a lease, and that the provision as to a future lease was but for better security. *Doe* d. *Walker* v. *Groves*, 15 East, 244. So, where one agreed to let, and the other to take, land for sixty-one years at a certain rent, for building, and the tenant agreed to lay out 2,000 *l.* within four years in building five or more houses, and when five or more houses were covered in the landlord agreed to grant a lease or leases, &c., but this agreement was to be considered as binding till one fully prepared could be produced; it was held to operate as a lease. *Poole* v. *Bently*, 12 East, 168. See *Sturgeon* v. *Painter*, Noy, 128. So, where the instrument contains actual words of present demise, as "be it remembered, that *J. B.* hath let, and by these presents doth demise, &c." although the instrument contained a further covenant for a future lease, 5 T. R. 165, n. And see *Fenny* d. *Eastham* v. *Child*, 2 M. & S. 255. And words in an agreement *that A. shall hold and enjoy*, &c. if not accompanied by restraining words, operate as words of present demise. Otherwise, if the intention of the parties to execute a future lease can be collected from the subsequent words. *Doe* d. *Jackson* v. *Ashburner*, 5 T. R. 163. Where the terms are doubtful the effect must depend upon the intention of the parties, as collected from the whole instrument. Ibid. And see *Morgan* d. *Dowding* v. *Bissell*, 3 Taunt. 65. *Dunk* v. *Hunter*, 5 B. & A. 322. *A.* agrees to take and hire of *B.* premises at a yearly rent, no time being mentioned for the commencement or determination of the interest, *A.* agreeing to take goods at a valuation; this (*semble*) is not a lease, for it contains no words binding on the demising party. *Clayton* v. *Burtenshaw*, 5 B. & C. 41. A lease containing a stipulation to take stock at a valuation, a lease stamp is not sufficient, for the agreement is not accessory to the subject of the demise. Ib. See further *Hope* v. *Booth*, 1 B. & Ad. 498. App. ii. 835.

(*a*) *Brewer* v. *Palmer*, 3 Esp. C. 213; *Hodges* v. *Drakeford*, 1 N. R. 270; *R.* v. *St. Paul, Bedford*, 6 T. R. 452; *Ramsbottom* v. *Martley*, 2 M. & S. 445; *R.* v. *Padstow*, 4 B. & Ad. 208. *Supra*, tit. ASSUMPSIT—PAROL EVIDENCE. In order to exclude parol evidence, it is not sufficient to show merely that there is some written agreement relative to the holding, unless it appears to have been entered into between the parties as landlord and tenant, and to have been in force at the time to which the parol evidence applies. *Doe* v. *Morris*, 12 East, 237. Although the continuing to hold according to the terms of an expired lease may be presumed, the lease itself must be produced properly stamped. *Wallis* v. *Broadbent*, 4 Ad. & Ell. 877.

dant, on a distress being made for former rent, paid the demand; and for this purpose the notice of distress should be proved, and notice should be given to the defendant to produce it as well as the receipt (*b*). Plaintiff's permission.

Proof that the defendant, on an ejectment being brought without previous notice to quit, produced in his defence a letter from the plaintiff, treating him as tenant, and claiming rent, is conclusive evidence of the tenancy(*c*).

So the permission to occupy may be an inference of law founded on the legal title (*d*). Thus, the grantee of an annuity, after recovering in ejectment against a tenant in possession under a demise from year to year, may maintain an action for use and occupation against him, in respect of all the rent in his hands at the time of notice to pay the rent to the grantee, and which has accrued from that time down to the time of the demise in the ejectment (*e*). So trustees may, without attornment, recover in this form of action from a tenant who has had notice from the *cestui que* trust to pay the rent to him, before he paid it over to his original landlord, although the tenant had no notice that the legal title was in the plaintiffs (*f*). If a landlord let the premises and mortgage them in fee, the mortgagee is entitled, after notice, to recover the rent which has accrued since the mortgage; and if he afterwards convey to *A.*, to whom the landlord has previously conveyed the equity of redemption, *A.* can afterwards recover that part only of the rent which became due after his *legal* estate accrued (*g*). Where a trespasser has occupied the lands, the plaintiff may waive the tort, and recover in this action upon an implied contract (*h*).

Where *A.* having agreed to sell premises to *B.*, the latter resold to *C.*, who entered into possession, and *A.*, after refusing to perform his contract, got possession from *B.* by availing himself of a misrepresentation that *B.*'s suit to enforce the contract had failed, but afterwards conveyed according to the contract; it was held that *C.* might recover from *A.* for use and occupation of the premises (*i*).

Evidence of payment of rent by third persons to the plaintiff, is evidence of title, although the defendant does not claim under them (*k*).

Where the defendant has taken possession under a contract of sale, which cannot be completed through a defect in the plaintiff's title, the latter cannot, it seems, recover as on an implied contract for use and occupation (*l*).

A surviving owner cannot recover for the use and occupation of premises upon his own permission and sufferance, where they were demised jointly by himself and another owner since deceased (*m*).

(*b*) *Panton* v. *Jones*, 3 Camp. 372.

(*c*) *Townsend* v. *Davis*, Forrest, 120.

(*d*) Where the legal estate of trustees of a term ceased upon the death of the tenant for life, but they supposing their term still alive, continued to receive the rents, and entered into an agreement to reduce the rents; held, that acting for all who had any interest, the plaintiff, who was but one of several parties interested, could not treat them as his agents, and maintain the action for an occupation in his own name; no tenancy can be implied under a party who has not the legal estate. *Morgell* v. *Paul*, 2 M. & R. 303.

(*e*) *Birch* v. *Wright*, 1 T. R. 378. But he cannot recover for subsequent rent, for the defendant cannot be both a tenant and a trespasser.

(*f*) *Lumley* v. *Hodgson*, 16 East, 99.

(*g*) *Cobb* v. *Carpenter*, 2 Camp. 13, n.; *Lumley* v. *Hodgson*, 16 East, 99.

(*h*) This however has been doubted. See *Hambly* v. *Trott*, Cowp. 375; *Foster* v. *Stewart*, 3 M. & S. 199; *Bennett* v. *Francis*, 2 B. & B. 554; *Birch* v. *Wright*, 1 T. R. 387.

(*i*) *Hull* v. *Vaughan*, 6 Price, 157.

(*k*) *Doe* v. *Stacey*, 6 C. & P. 139.

(*l*) *Kirtland* v. *Pounsett*, 2 Taunt. 145. Unless, as has been said, the occupation has been beneficial. *Hearn* v. *Tomlin*, Peake, 192. *Hall* v. *Vaughan*, 6 Price, 169; *infra*, 1183.

(*m*) *Israel and others* v. *Simmons*, 2 Starkie's C. 356. *Richards* v. *Heather*, 1 B. & A. 29.

Plaintiff's permission.

Where the possession is continued after the determination of the lease, whether it be by efflux of time, or by the death of a tenant for life, and consent of the remainder-man, a tenancy from year to year is usually presumed. *A.*'s lease having expired at Midsummer, he refused to give up the possession, insisting on his right to notice to quit, and paid rent at Michaelmas and Christmas; it was held that this was conclusive evidence of a tenancy, and that the landlord was entitled to recover rent due at Lady-day (*n*). If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract (*o*). And if after the death of a tenant for life, who has granted a lease which is void, the remainder-man accept rent as rent from the lessee, it is an admission of a tenancy (*p*) by the lessee, but the rent must have been paid by him in the capacity of tenant (*q*).

Payment of money into court in an action for use and occupation, admits the contract and precludes the defendant from questioning the plaintiff's title, or alleging the non-joinder of another as co-plaintiff, although the defect appear on the plaintiff's case (*r*).

Proof of value.

3dly. In the absence of an express agreement, the plaintiff must prove the value of the premises occupied.

Where the lessee took possession under an agreement which he did not sign, and the terms of which the lessor had failed to fulfil, it was held that the jury might ascertain the value without regard to the rent specified in the agreement (*s*); for the rent reserved by an agreement is evidence of amount in those cases only where the defendant has enjoyed the premises according to the agreement. But though a parol agreement for the use and occupation of land be void under the Statute of Frauds, recourse may be had to it to ascertain the amount of rent (*t*).

The plaintiff is entitled to recover for use and occupation, notwithstanding a recovery in ejectment, up to the day of the demise laid in the declaration (*u*).

Defence.

It is a general rule that a tenant shall not be allowed to dispute his landlord's title (*x*). Thus, in an action for the use and occupation of glebe lands, the defendant having paid rent to the plaintiff, cannot go into evidence to show that the presentation of the plaintiff to the living was simoniacal (*y*),

(*n*) *Bishop* v. *Howard*, 2 B. & C. 100. Note, that it was left to the jury to say, whether a tenancy was created, or whether there was a mere holding over by the defendant; but the Court held that the payment and receipt of rent were conclusive.

(*o*) Per Lord Mansfield, in *Right* v. *Darley*, 1 T. R. 159.

(*p*) *Doe* v. *Watts*, 7 T. R. 83. See also *Doe* v. *Weller*, 7 T. R. 478.

(*q*) *Strahan* v. *Smith*, 4 Bing. 21.

(*r*) *Dolby* v. *Iles*, 3 Perr. & D. 287.

(*s*) *Tomlinson* v. *Day*, 2 B. & B. 680. 5 B. Moor, 558, S. C.

(*t*) *De Medina* v. *Polson*, Holt's C. 47.

(*u*) *Birch* v. *Wright*, 1 T. R. 178. An action lies for double value under the 4 Geo. 2, c. 19, after a recovery in ejectment. *Soulsby* v. *Nevin*, 9 East, 310. A tenant holding over, after notice to quit, is liable to double rent during his possession only; he need not give fresh notice to get rid of his liability. *Booth* v. *Macfarlane*, 1 B. & Ad. 904.

(*x*) Say. R. 13. *Morgan* v. *Ambrose*, cor. Wilmot, J., Monmouth, 1756; Peake's L. E. 242. And *nil habuit in tenementis*, is no plea in such a case. *Lewis* v. *Willis*, Hil. 25 G. 2. *Richards* v. *Holditch*, Hil. 13 G. 1, cited in *Sullivan* v. *Stradling*, 2 Wils. 212. Nor to an avowry for rent, under 11 G. 2, c. 19. *Sullivan* v. *Stradling*, 2 Wils. 208. *Newsom* v. *Dugdale*, Mich. 30 G. 2, cited ibid. And see *Rennie* v. *Robinson*, 1 Bing. 147.

(*y*) *Cooke* v. *Loxley*, 5 T. R. 4. *Phipps* v. *Sculthorpe*, 1 B. & A. 50. So, where an occupier of lands has entered into an agreement for a composition for tithes, he cannot, in defence of an action on the agreement, show that the presentation was simoniacal. *Brookesby* v. *Watts*, 6 Taunt. 333; 2 Marsh. 38. *Hall* v. *Vaughan*, 6 Price, 157.

or that he had no title to the premises (*z*). So it is no defence to show that the plaintiff was mere tenant at will (*a*), or that the plaintiff had previously demised the premises to a third person whose interest has not expired (*b*). Still the defendant may show that the plaintiff's interest was but temporary, and that it has since expired (*c*); as that he has, since the demise, mortgaged the premises to another, who has given the defendant notice to pay his rent to him (*d*). Defence.

If the defendant has not come into possession under the plaintiff, or recognized his title, the plaintiff can only recover rent from the time when his legal title accrued (*e*).

And where the defendant was not let into possession by the plaintiff, he may dispute his title, notwithstanding an acknowledgment of his title (*f*), which is not in itself binding.

So the defendant may prove that the tenancy has been determined (*g*),

(*z*) *Morgan* v. *Ambrose*, Peake's L. E. 242.

(*a*) *Atkinson* v. *Pierpoint*, cor. Denison, J., Esp. D. 30.

(*b*) *Phipps* v. *Sculthorpe*, 1 B. & A. 50. The premises had been let by *A.* to *B.*, and pending the term *C.* agreed with *A.* to stand in *B.*'s place, and offered to pay rent; and it was held, that in an action brought by *A.* against *C.* for use and occupation, the latter could not insist that the title of *B.* had not been determined by a notice to quit, or a note in writing.

(*c*) *Morgan* v. *Ambrose*, Peake's L. E. 242. *England* d. *Syboarn* v. *Slade*, 4 T. R. 682. *Supra*, tit. REPLEVIN. So the defendant is not estopped from disputing the continuance of the landlord's title, where the latter has acquiesced for a considerable time in the payment of rent to another. *Neare* v. *Moss*, 1 Bing. 360.

(*d*) *Holmes* v. *Pontin*, Peake's C. 99. In *Waddilove* v. *Barnett*, 2 Bing. N. C. 538, it was held that the defendant might show, under the plea of non-assumpsit, that previous to the demise the plaintiff had mortgaged the premises, and that the mortgagee had given notice not to pay to the plaintiff any rent accruing after notice, but that a special plea was necessary as to rent which had accrued before such notice. See also *Pope* v. *Biggs*, ib. 572. But see the doubts expressed by Littledale and Patteson, Js. in *Partington* v. *Woodcock*, 6 Ad. & El. 690, as to the right of a mortgagee, under a mortgage prior to the demise, to rent accruing under the demise. Littledale, J. intimates an opinion, that in such case the mortgagee's sole remedy is by ejectment. See also *Rogers* v. *Humphries*, 4 Ad. & El. 299. In the case of *Balls* v. *Westwood*, 2 Camp. 11, Ld. Ellenborough held that it was no defence to show that the plaintiff's title had expired, without further proving that the defendant had disclaimed to hold under the plaintiff, and had re-entered under a new landlord.

(*e*) *Cobb* v. *Carpenter*, 2 Camp. 13 (n).

(*f*) *A.* being tenant to *B.* under a lease, agrees to become tenant to sequestrators under a sequestration against *B.* out of Chancery; and it was held, that as the defendant had not received possession of the premises from the sequestrators (who were the plaintiffs), he might dispute their title, and that the lease unsurrendered was an answer to the action. *Cornish* v. *Searell*, 8 B. & C. 471. So where the attornment was made under a mistake. See *Gravenor* v. *Woodhouse*, 1 Bing. 38; *supra*, 973. And see *Rogers* v. *Pilcher*, 6 Taunt. 202. *Secus*, where the defendant has been let into possession by the plaintiff. A tenant, taking premises from *A.* and *B.*, as trustees of *C.* *and D.*, is estopped from the objection that they are the trustees of *C.* *only*. *Fleming* v. *Gooding*, 10 Bing. 549. But see *Phillips* v. *Pearce*, 5 B. & C. 433; *supra*, 717.

(*g*) A tenant continues to be liable until he can show a determination of the tenancy. *Harland* v. *Bromley*, 1 Starkie's C. 455; *Harding* v. *Crethorne*, 1 Esp. C. 57; *Ward* v. *Mason*, 9 Price, 291. But where *A.* held as tenant from year to year under *B.*, and *B.* under a lease from *C.*, which expired at Christmas, and *A.* continued in possession till Lady-day, when he paid a quarter's rent, and then quitted the premises; it was held that *C.* was not entitled to recover for use and occupation to a later time; for the only evidence of a new tenancy was the payment of a quarter's rent, which was as much applicable to a mere agreement for the quarter as to a supposed new tenancy from year to year. *Freeman* v. *Jury*, 1 M. & M. 19. See 1 Mo. & R. 215. *Woodcock* v. *Nuth*, 8 Bing. 170. If *H.* holds lands at will, rendering rent quarterly, the lessor may determine his will when he pleases: if within a quarter, he shall lose his rent for that quarter; if the lessee determine the tenancy within the quarter, he shall pay for the whole quarter. *Leighton* v. *Theed*, 2 Salk. 413.

Defence, determination of tenancy.

and that subsequently to the determination he has ceased to occupy the premises. As, that the tenancy has been determined by a regular notice to quit (*h*), or by mere lapse of time according to the terms of the original agreement, or by a subsequent agreement (*i*), or that the term has been surrendered actually (*k*) or in law (*l*), or that he has actually delivered up the premises to the plaintiff, who has taken possession under an agreement to put an end to the tenancy (*m*), or that he has become bankrupt,

(*h*) Vide *supra*, 413.

(*i*) Where the rent, by express contract, was for a year from December 25th, payable quarterly, and in the middle of the April quarter, upon a dispute the tenant said, "I shall quit;" to which the landlord assented, and accepted the keys: it was held, first, that the jury might presume the original contract between the parties to be rescinded; and secondly, that as there was an express contract, the law would not imply a contract to pay rent for any period less than a quarter. *Grimman* v. *Legge*, 8 B. & C. 324.

(*k*) An actual surrender must be in writing; *supra*, 474; and the statute extends to tenancies from year to year. *Botting* v. *Martin*, 1 Camp. C. 317. A mere parol agreement to determine the tenancy is insufficient, and the tenant is liable to an action for use and occupation, notwithstanding a parol service to quit. *Supra*, 475. *Thompson* v. *Wilson*, 2 Starkie's C. 379. *Johnston* v. *Huddleston*, 4 B. & C. 922. *Mollett* v. *Brayne*, 2 Camp. C. 103. *Matthews* v. *Stowell*, 8 Taunt. 270. *Johnstone* v. *Huddlestone*, 4 B. & C. 922. A recital in a second lease of the surrender of the first, is not a sufficient note within the statute. *Roe* v. *Archbishop of York*, 6 East, 36. Words from which an intention to surrender may be inferred, will operate as an express surrender. But an agreement to surrender at a future time will not operate as a surrender when the time arrives. *Parsons' Case*, Dyer, 374, b. The cancelling of a lease of land does not destroy the continuance of the lease. *Maginnis* v. *M'Culloch*, Gilb. R. 235. *Churchwardens of St. Saviour's, Southwark*, 10 R. 66. *Roe* v. *Archbishop of York*, 6 East, 90. *Sceus*, in the case of an incorporeal hereditament lying in grant; *supra*, 382. An acceptance by the surrenderee is essential. *Leach* v. *Thompson*, 1 Show. 296. And an acceptance will not be presumed from the circumstance of rent having been paid to the landlord by a third person. *Copeland* v. *The Executors of Gubbins*, 1 Starkie's C. 96. It is essential to a complete surrender, that the landlord should have given up his old tenant and accepted a new one. *Graham* v. *Wickelo*, 1 C. & M. 188. The landlord received rent from *A.*, tenant for a term of cottages and a stable, to the day when *A.* assigned them, being in the middle of a quarter; the assignee took possession of the stable, the cottages being occupied by sub-tenants to *A.*; on their quitting, the cottages were relet by the landlord: the whole were decreed to have been surrendered by operation of law. *Reere* v. *Bird*, 1 C. M. & R. 31; 4 Tyr. 612, S. C.

(*l*) It has been seen, that the taking a new lease, though by parol, operates as a surrender in law, on the principle of giving effect to the intention of the parties, which could not otherwise take effect so long as the former lease subsisted. *Supra*, 475. And therefore a second lease, void because by parol only, will not operate as a surrender of a former valid lease. *Wilson* v. *Sewell*, 4 Burr. 1980. *Darison* v. *Stanley*, ib. 2210. But although an agreement be by a parol, yet if both parties *act* upon it, the tenant is discharged; as where the premises are given up, and the landlord takes possession. *Supra*, 475; and see *Whitehead* v. *Clifford*, 3 Taunt. 518; *Mollett* v. *Brayne*, 2 Camp. 103. *Secus*, where the landlord merely placed a bill in the window, in order to have the premises let. *Redpath* v. *Roberts*, 3 Esp. C. 225. So if a third person be substituted as tenant by consent of all parties. *Thomas* v. *Cooke*, 2 B. & A. 119. *Stone* v. *Whiting*, 2 Starkie's C. 235. *Walls* v. *Acheson*, 3 Bing. 462. And the substituted tenant is liable. *Phipps* v. *Sculthorpe*, 1 B. & A. 50. In an action for use and occupation of a house for six months, it is sufficient for the landlord to show an occupation for the preceding six months as tenant; and it is not sufficient for the defendant to prove that the keys had been previously delivered to a servant at the plaintiff's house, and a declaration on the part of the plaintiff that the keys had been lost or mislaid. *Harland* v. *Bromley*, 1 Starkie's C. 465. The defendant, who occupied under a lease which expired at Lady-day 1829, paid a quarter's rent at Midsummer 1829, deducting something for repairs; he was not afterwards seen on the premises, but the rent was paid at irregular intervals by *L.*, who was in occupation for the ensuing two years; held, that it was correctly left to a jury to find whether the lessor had accepted *L.* as a tenant, and the jury having found for the defendant, the Court refused to set aside the verdict. *Woodcock* v. *Nuth*, 8 Bing. 170.

(*m*) *Whitehead* v. *Clifford*, 5 Taunt. 518.

and that his assignees have accepted the lease or agreement, or that they declined it, and he delivered it to his lessor within fourteen days (*n*). Defence.

But it is no defence to show that the defendant has abandoned the actual possession, if the tenancy still remain undetermined (*o*). Thus, if a tenant from year to year neglect to give notice that he will quit, he will be liable to an action for use and occupation after the end of the year, although he actually quitted at the end of the year (*p*), and although the plaintiff, upon the abandonment of the premises by the defendant, advertised them to be let by putting up a bill in the window (*q*).

So the defendant may show in defence that his occupation of the premises originated in fraud or misrepresentation, and that he has in fact derived no benefit from such occupation; as, that he entered in the capacity of vendee, and gave up the possession on discovering that the vendor had no title (*r*).

So it is a good defence that the defendant, through the plaintiff's default, has had no beneficial occupation (*s*).

Where the action is brought by the assignee of the reversion, the defendant may show that he paid the rent to the assignor previous to the notice (*t*).

If the landlord evict (*u*) the tenant from parcel of the premises let at an

(*n*) Under the stat. 6 G. 4, c. 16, s. 75. *Supra*, tit. BANKRUPT.

(*o*) *Supra*, 475. 1176. 1181.

(*p*) *Redpath* v. *Roberts*, 3 Esp. C. 225.

(*q*) Ibid.

(*r*) *Hearn* v. *Tomlin*, Peake's C. 192, cor. Lord Kenyon. In that case the plaintiff representing that he had a longer term than he really had, agreed with the defendant to assign it to him, and the defendant took possession, and the occupation was rather injurious than beneficial to him; and Lord Kenyon held, that the vendor could not, on the vendee's rescinding the contract and giving up the premises, maintain this action to recover for the time during which he was in possession. In the case of *Kirtland* v. *Pounsett*, 2 Taunt. 145, the Court seemed to be of opinion, that the vendor could, in no case where the purchase went off for defect of title, maintain this action. The case was not, however, ultimately decided upon that ground, but on the consideration that the plaintiff had derived a sufficient compensation for the occupation from the interest of the defendant's money. In the subsequent case of *Hull* v. *Vaughan*, 6 Price, 169, the Court of Exchequer held, that where the contract had failed without any fault on the part of the vendor, and the occupation had been beneficial to the purchaser, the vendor might support the action, inasmuch as a title on the part of the plaintiff was not necessary to support the action, the declaration merely alleging an occupation by permission of the plaintiff. In that case, however, the action was against the vendee, who had obtained possession by *fraud*. It seems to be difficult, on legal principles, to say on what grounds the vendor is entitled to recover from the vendee where the title of the former turns out to be defective. He must recover, if at all, either on an express or an implied contract. The question then is, whether the law will imply a contract of one kind where the parties have themselves entered into an express contract of a different nature, and wholly inconsistent with the contract to be implied. Where the defendant has derived no benefit from the occupation, it would be contrary to justice and equity that he should be liable in respect of such occupation; and it would be a very precarious test to make the right to sue to depend upon a nice calculation of the quantum of benefit received. The statute, it is true, contemplates an occupation by the permission of the plaintiff, and is silent as to his title; but the statute also contemplates the relation of landlord and tenant, a relation which the parties never intended to constitute, and in fact never did constitute. It may be productive of great hardship to the defendant that the plaintiff, who is or who must be taken to be cognizant of his own title, should be able, upon a breach of his own agreement, to bind the defendant by a contract of an entirely different nature. See *Hegan* v. *Johnson*, 2 Taunt. 148; *Neale* v. *Viney*, 1 Camp. 471; *supra*, 974; *Keating* v. *Bulkeley*, *supra*, 1147. *Hope* v. *Booth*, 1 B. & Ad. 498.

(*s*) *Edwards* v. *Etherington*, R. & M. 268, *supra*. Where the premises have become unwholesome, for want of sufficient drainage and cannot be repaired without extravagant and unreasonable expense, the tenant may quit without notice. *Collins* v. *Barron*, 1 Mo. & R. 112, although he be bound to repair. Ib.

(*t*) *Birch* v. *Wright*, 1 T. R. 378. *Moss* v. *Gallimore*, Doug. 282; and see *Lumley* v. *Hodgson*, 16 East, 99.

(*u*) Where the defendant occupied

Defence.

entire rent, the latter, if he quit the residue, is discharged from the whole rent (*x*); but if he continue in possession of the remainder, he is liable *pro tanto* (*y*).

But it is no defence that the defendant quitted without notice, through fear of a distress by the superior landlord (*z*).

Where the defendant is charged on his own account, he may show in defence that he took possession merely in his representative capacity, and that he offered to deliver up the possession, having derived no benefit from the occupation; as, that he took possession as administrator, and that the premises being productive of no profit to him, he offered by parol, eight months after the death of the intestate, to deliver up the possession (*a*).

It is no defence that the plaintiff has brought an ejectment to recover the same premises, and has laid the demise on the day when the alleged tenancy commenced (*b*).

Or that the landlord has distrained goods of the full value of the rent if they have in fact been sold for less (*c*).

The plaintiff cannot recover if it appear that the premises were let for an illegal purpose (*d*). But an action is maintainable for the rent of a Jewish synagogue, such establishments not being prohibited by any law (*e*).

apartments of the plaintiff, and after complaint made of nuisances, which the jury found to be such as to render the occupation uncomfortable, and that the defendant quitted *bonâ fide* for such reason, held, that the plaintiff could not recover in use and occupation for the time between the quitting and the period of notice expiring. *Cowie* v. *Goodwin*, 9 C. & P. 378.

(*x*) *Smith* v. *Raleigh*, 2 Camp. 515. *Supra*, 48.

(*y*) *Stokes* v. *Cooper*, 3 Camp. 514, n. If *A.* lets to *B.*, who underlets to *C.* and *D.*, and *A.* give notice to *C.* and *D.* to quit, and *C.* quits accordingly, and the premises occupied by him lie vacant for a year, after which they are re-let by *B.*, *A.* cannot recover against *B.* in respect of the premises held by *C.* for the time during which they were unoccupied. *Burn* v. *Phelps*, 1 Starkie's C. 94. Where the lessee took a farm under an agreement, which he did not sign, and the lessor failed to fulfil part of his agreement, as to allowing the lessee certain sporting privileges, it was held that the lessor could not recover the stipulated rent, but only according to the value of the land as found by the jury. *Tomlinson* v. *Day*, 2 B. & B. 680. The plaintiff, having underlet to defendant from year to year, with his consent put workmen in to repair a party-wall a short time before quarter-day, but the danger and inconvenience therefrom became so great, that the defendant, with his family and lodgers, were obliged to leave the premises before the quarter-day, and take lodgings elsewhere; the defendant, however, after paying his rent up to Midsummer, occupied the shop until the 5th July, when he quitted without any notice to the plaintiff; it was left to the jury to say, if the defendant had had any beneficial occupation of the premises; having found for the defendant, the Court refused a new trial, on the ground of misdirection. *Edwards* v. *Hetherington*, 7 D. & R. 117; and 1 Ry. & M. C. 265. See also *Smith* v. *Raleigh*, 3 Camp. C. 513; *Hall* v. *Burgess*, 5 B. & C. 332; *Stokes* v. *Cooper*, 3 Camp. C. 514, n.; *Tomlinson* v. *Day*, 2 B. & B. 680; *Walls* v. *Atcheson*, 3 Bing. 362.

(*z*) *Rickett* v. *Tullieh*, 6 C. & P. 66.

(*a*) *Remmant* v. *Bremridge*, 2 Moore, 94.

(*b*) *Cobb* v. *Carpenter*, 2 Camp. 13, n. But it would furnish a ground of application to the Court. And see Cowp. 246. But see the observations of Buller, J. 1 T. R. 386. And it would be otherwise after a *recovery* in ejectment, 1 T. R. 378; and see *Bridges* v. *Smyth*, 5 Bing. 410.

(*c*) *Efford* v. *Burgess*, 1 Mo. & R. 23. If they have been sold at too low a rate, the remedy is by action. Ib.

(*d*) As for the purpose of prostitution. *Crisp* v. *Churchill*, 1 B. & P. 340—1, n. *Girarday* v. *Richardson*, ibid. 1 Esp. C. 13; Selw. 65. *Appleton* v. *Campbell*, 2 C. & P. 347. *Jennings* v. *Throgmorton*, R. & M. 251. But see *Lloyd* v. *Johnson*, 1 B. & P. 340. A party cannot recover in use and occupation for weekly rent of premises occupied for purposes of prostitution, after he has become acquainted with the character of the party, and mode of living, although originally ignorant of it.

(*e*) *Israel and others* v. *Simmons*, 2 Starkie's C. 356.

Where the tenant has not occupied the premises, paid rent, or done any act from which a tenancy can be inferred, for six years, the Statute of Limitations is a good defence, though no notice to quit has ever been given (*f*). Limitation.

Where a witness was called by the plaintiff, who stated that he held the premises of one of the plaintiffs, it was held that he could not be asked whether he had not given them up to the defendant, without being released, and that the 3 & 4 Will. 4, c. 27, s. 42, did not apply (*g*).

USURY.

To constitute usury (*h*) there must either be a direct loan, and a taking of more than legal interest for the forbearance of payment, or there must be some device for the purpose of concealing or evading the appearance of a loan, and forbearance, which really existed (*i*). What constitutes.

The offence imports a contract, a forbearance, and a taking of usurious interest (*k*).

Jennings v. *Throgmorton*, 1 Ry. & M. C. 251. In an action for board and lodging, it appeared that the defendant was a prostitute, and had boarded and lodged with the plaintiff, who kept a house of ill fame; and who, besides what she received for board and lodging, partook of the profits of her prostitution; and Lord Kenyon was of opinion that such a demand could not be heard of in a court of justice. *Howard* v. *Hodges*, Sel. N. P. 67, 4th ed.

(*f*) *Leigh* v. *Thornton*, 1 B. & A. 625.

(*g*) *Hodson* v. *Marshall*, 7 C. & P. 16.

(*h*) The stat. 12 Ann. st. 2, c. 16, enacts, that no person shall take, directly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of 5 *l.* for the forbearance of 100 *l.* for a year, and so after that rate, &c.; and that all bonds, contracts, and assurances whatsoever, for payment of any principal or money to be lent, or covenant to be performed, upon or for any thing whereupon or whereby there shall be received or taken above the rate of 5 *l.* in the 100 *l.*, shall be utterly void: * and that every person who shall take, accept and receive, by way or means of any corrupt bargain, loan, exchange, chevisance, shift, or interest of any wares, merchandize, or other thing or things whatsoever, or by any deceitful way or means, or by any covin, engine, or deceitful conveyance for the forbearing, &c., shall forfeit and lose for every such offence the treble value of the monies, wares, merchandizes, and other things so lent, bargained, exchanged, or shifted.

(*i*) *Barclay* v. *Walmesley*, 4 East, 56.

(*k*) An agreement to give more than its value for stock in the public funds belonging to a retiring partner, to remain in possession of the firm, is usurious, it being manifest that the difference was intended to be given for forbearance. *Parker* v. *Ramsbottom*, 3 B. & C. 257. So is a loan of stock to be repaid, at the option of the lender, by replacing the stock, or by the produce, with 5 *l.* per cent. interest. *White* v. *Wright*, 3 B. & C. 272. And see *Chippendale* v. *Thurston*, 1 M. & M. 421. Although the contracts be contained in different instruments. 3 B. & C. 257. It is usury in the discounter of a bill of exchange to stipulate for a premium to be paid to the agent who procured the discount, though he himself took no more than the legal discount. *Meago* v. *Simmons*, 1 M. & M. C. 121. An agreement to reinvest the sum in *consols*, at a price not exceeding —— *l.* or repay the amount in bank-notes, on the lender giving six months' notice, is usurious, as the option was with the lender, and he could not receive less than five per cent., and might receive much beyond the sum lent, if the funds rose above the stipulated amount. *Chippendale* v. *Thurston*, 1 Mo. & M. 421; and 4 C. & P. 98. An annuity was granted for a specific number of years, payable half-yearly, and for the payments promissory notes were given, payable respectively when the annuities would become due, the total amount being equal to the consideration and 12 per cent. interest; held that the transaction was plainly usurious. *Fereday* v. *Wightwick*, 1 Russ. & M. 50. Where an annuity was granted for four lives, with a covenant that the grantor would insure the principal and assign the policy to the grantee, within 30 days after the expiration of the third life; held not to be usurious. *In re Naish*, 7 Bing. 150. And see *Grigg* v. *Stoker*, Forr. 4. A loan, by way of mortgage, was secured by a deed executed 9th Sept. 1826, payable at the end of one year, and reserving five per cent. payable half-yearly on 8th March and 8th September, and the *bonus* alleged as the usurious transaction

* This provision is now modified by the stat. 5 & 6 W. 4, c. 41, s. 2, *supra*, 246.

Usury will not be presumed (*l*).

Proof of the contract.

The usurious contract, like any other contract, must be proved as alleged; and a variance as to the *quantum* of usurious interest will be fatal. In this respect, an indictment for usury differs from an indictment for taking more than 10 *s.* in the pound for brokerage (*m*); for there the offence consists in the simple excess, and the *quantum* of that excess being immaterial, a variance from it in evidence will not be material (*n*).

Contract Variance.

If the declaration state an absolute agreement, and the proof be of an agreement in the alternative to forbear to the one or other of two days, at the option of the borrower, the variance will be fatal (*o*).

But it is sufficient to prove the loan or forbearance according to its substance and legal effect (*p*).

A forbearance by *C.* to *A.* is proved by evidence that *A.* is debtor to *B.*, and *B.* to *C.*, and of an agreement for an usurious consideration to be paid to *C.* that he shall take *A.* as his debtor (*q*), although *B.* join *A.* in the security to *C.* (*r*). So it would be by evidence of a loan by *C.* to *B.*, and the giving a note as security by *A.* to *C.*, more than legal interest having been taken for forbearance on the note (*s*).

An allegation of a loan of a specific sum of money is satisfied by evidence of a loan to that amount, part in money, and part in uncoined gold of a certain definite value, which the borrower agreed to take as cash (*t*).

On a count for usury in discounting two bills of exchange, one of which is described to have been drawn by *B.* on a certain person, to wit, John K., evidence of a bill drawn on Abraham K. is a fatal variance (*u*).

In an action at the suit of an indorsee against the maker of a promissory note, a letter written by the payee to the maker, cotemporary with the making of the note, is evidence to prove usury (*x*).

Usurious interest.

The offence is completed in the county where the usurious interest is received, and the offence should be laid there (*y*).

Where usurious interest has been taken by means of an agent, it is not essential to call the agent himself; such a rule, it has been observed, would be very inconvenient (*z*).

A. lends money to *B.* at usurious interest, *B.* gives *A.* a bill for the principal and interest; A. lends money to *B.* to take up the bill; the usury is complete on *B.*'s taking up the bill (*a*).

was paid in January 1827: held that upon the payment of the first half-year's interest on the 8th March following, the offence of usury was complete, for which an action for penalties might have been brought, and that the Court would not, in order to subject a party to a penalty, presume that part of the bonus applied to the payment of interest in September; no part therefore of the usurious interest having been received within the year, the action was too late. 7 Bing. 150.

(*l*) *Ferguson* v. *Spring*, 1 Add. & Ell. 576.

(*m*) Under the stat. 17 Geo. 3, c. 26, s. 7.

(*n*) *R.* v. *Gilham*, 6 T. R. 265.

(*o*) *Tate* v. *Wellings*, 3 T. R. 531.

(*p*) In order to constitute usury there must be a loan (or forbearance) of money by one to another. And consequently an agreement of partnership which provides for an advance of money by one, which is to become joint-stock, cannot, if made *bonâ fide*, be usurious, although the partner advancing the money, 20,000 *l.*, is to take 2,000 *l.* per annum out of the profits, or out of the principal if the profits be insufficient, and 20,000 *l.* at the end of the term. And it is for the jury to decide whether the agreement was *bonâ fide* with a view to a partnership, or a mere cloak for usury. *Gilpin* v. *Enderby*, 5 B. & A. 954.

(*q*) *Wade* v. *Wilson*, 1 East, 195.

(*r*) Ibid.

(*s*) *Manners* v. *Postan*, 3 B. & P. 343.

(*t*) *Barbe* v. *Parker*, 1 H. B. 283.

(*u*) *Hutchinson* v. *Piper*, 4 Taunt. 810.

(*x*) *Kent* v. *Lowen*, 1 Camp. C. 177.

(*y*) *Supra*, 848, K. B. Hil. 1825; vide *infra*, tit. VENUE.

(*z*) Per Chambre, J., 1 N. R. 103.

(*a*) *Wright* v. *Laing*, 3 B. & C. 165.

In an action for penalties for having deducted more than legal interest in discounting a bill of exchange, in order to prove the actual receipt of the amount of the bill, it was proved that a demand had been made on the acceptor by a person of the name of Brown, and that proceedings had been instituted by him to compel payment; in consequence of which, a person on behalf of the acceptor paid to Brown the amount of the bill and the costs of suit, on his producing the bill, for which Brown gave his receipt as the agent for Barrow, the present defendant; and it was held that this was sufficient evidence of the fact to go to a jury, although the proceedings were not produced, and although it was not proved that Brown was in fact the attorney for the defendant (*b*). Usurious interest.

Whether the sum taken under the name of commission be a reasonable remuneration for trouble, or be but a cloak for usury, is a question of fact for the determination of the jury (*c*). And where there is conflicting evidence upon the subject, the Court will not grant a new trial unless it be manifest that the jury have decided erroneously (*d*).

A fresh contract made by parties privy to an usurious agreement, and in furtherance of it, is void (*e*). But a fresh contract made between the same parties in repudiation of the original usury, or with an innocent party who was not privy to the usury, is binding: thus, a fresh security given for the balance of a debt originally usurious is void (*f*); and a subsequent usurious contract does not vitiate a former one which was legal. A bargain is made for the return of stock which at the time is worth 10,000 *l.*; a subsequent agreement is made, when the same stock is worth but 8,000 *l.*, for a return of 10,000 *l.* and 5 per cent.; the latter contract is illegal, but the former remains valid (*g*). Where usurious securities have been destroyed by mutual consent, a promise by the borrower to pay the principal and legal interest is binding (*h*). If *A.* for an usurious consideration give his promissory note to *B.*, who transfers it to *C.* for value, without notice of the usury, and afterwards *A.* gives a bond to *C.* for the amount, the bond is valid (*i*). But it would be otherwise if *A.* gave the bond to *B.* (*k*). Effect of usury.

A *bonâ fide* debt is not extinguished by being mingled with an usurious transaction (*l*).

The borrower of money at usurious interest is a competent witness for the plaintiff, in an action to recover penalties from the lender (*m*). Competency.

(*b*) *Owen* v. *Barrow*, 1 N. R. 101. The circumstance upon which the Court appear to have principally relied was the possession of the bill itself by Brown. Where usury is committed by the wife, who lends money which is secured by bond to her husband, the bond is void, for the husband is liable *civiliter*, though not *criminaliter*, for the act of the wife. *Barnet* v. *Tompkyns*, Skinn. 348.

(*c*) *Corstairs* v. *Stein*, 4 M. & S. 192. See also *Doe* d. *Grimes* v. *Gooch*, 3 B. & A. 664.

(*d*) Ibid.

(*e*) A party cannot recover on a new instrument which operates as a security for any usurious interest, although it is founded on a new settlement of the account between the borrower and the lender, and the original securities have been cancelled. *Preston* v. *Jackson*, 2 Starkie's C. 237. A debt, though usuriously contracted, is still a debt; the statutes merely preclude the remedy, and a court of equity will not relieve but on the terms of paying what is really due. *Stanton* v. *Knight*, 1 Sim. 482.

(*f*) *Pickering* v. *Banks*, Forrest, 72; *Cuthbert* v. *Haley*, 8 T. R. 390.

(*g*) *Parker* v. *Ramsbottom*, 3 B. & C. 357.

(*h*) *Barnes* v. *Headley*, 2 Taunt. 184. See also *Wright* v. *Wheeler*, 1 Camp. C. 165.

(*i*) *Cuthbert* v. *Haley*, 8 T. R. 390.

(*k*) Ibid.

(*l*) *Gray* v. *Fowler*, 1 H. B. 462. If a bond be given without usury, the taking usurious interest afterwards will not avoid the bond. *Dalton's Case*, Noy, 171; Vin. Ab. Ev. T. b. 124.

(*m*) *Abrahams* v. *Bunn*, 4 Burr. 2251; *Smith* v. *Prager*, 7 T. R. 60; *supra*, 10.

Competency.

By the statute 2 & 3 Vict. c. 37, bills of exchange, &c. payable at or within twelve months after date, or not having more than twelve months to run, and contracts for the loan or forbearance of money above the sum of 10*l.*, are not to be affected by the statutes against usury, provided that the statute shall not extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein (*n*).

VENDOR AND VENDEE.

Action by the vendor of real property.

The vendor of a real estate, in an action against a purchaser for not completing the contract according to his agreement, must prove, 1st, the agreement; 2dly, the performance of conditions precedent; 3dly, damage, if he seek to recover more than nominal damages.

The contract to be valid must be in writing (*o*), and a sale by auction is within the statute (*p*).

Conditions precedent.

2dly. *The performance of conditions precedent* (*q*).—The vendor must prove, either that he has executed the conveyance, or that he has offered to do so, unless the vendee has discharged him from so doing (*r*).

Where *A.* agreed to sell an estate to *B.* before a particular day, for the sum of —*l.*, in consideration whereof *B.* agreed to pay that sum on that day, and on failure, to pay the sum of 21 *l.*, it was held that *A.* could not recover the 21 *l.* without showing that he had conveyed the estate to *B.*, or that he had tendered a conveyance properly executed (*s*).

And where the plaintiff covenanted to sell a house to the defendant, and to convey the same before the 1st of August, and to deliver possession of the same on a previous day, and the defendant in consideration thereof covenanted to pay the plaintiff 120 *l.* on or before the 1st day of August, it was held that the plaintiff could not maintain an action for the 120 *l.* without averring that he had conveyed or tendered a conveyance to the defendant (*t*).

The purchaser may refuse to accept a conveyance executed under a power of attorney (*u*).

But if on tendering a draft to the defendant he refuse to read it, and dis-

Spenceley, q. t., v. *De Willott*, 7 East, 108. Vol. 1. tit. Witness.

(*n*) *See* Appendix, 1188.

(*o*) 29 C. 2, c. 3, s. 4; *supra*, 475.

(*p*) *Supra*, 479.

(*q*) In agreements, the question whether covenants be dependent or independent, depends upon the intention of the parties. They are usually considered to be dependent, unless a contrary intention appear. See 1 Will. Saund. 320; 2 Will. Saund. 352, b.; *Smith* v. *Woodhouse*, 2 N. R. 233; *Havelock* v. *Geddes*, 10 East, 555; *supra*, tit. Assumpsit. Agreement for the purchase of premises, to pay a deposit, and sign an agreement to pay the remainder on a stated day on having a good title made; after which, and part of the purchase-money paid, a further agreemant was made as to payment for certain disputed articles, and to pay the residue of the purchase-money with interest upon the vendor's making a good title, "or otherwise, if such title was not then completed, that the vendor should execute a bond to complete such title, and to convey the estate as soon as the same could be completed;" held that such clause did not *dispense* with the engagement to make a good title, but was intended only to guard against supineness and delay in doing it, and that the question of title was therefore properly referred. *Clark* v. *Faux*, 3 Russ. 320.

(*r*) *Jones* v. *Barkley*, Dougl. 684: *Phillips* v. *Fielding*, 2 H. B. 123; 3 East, 443. But it is no defence to an action on a bill of exchange, given as a consideration for an estate, that the vendor has refused to convey. *Moggeridge* v. *Jones*, 14 East, 436; 3 Camp. 38. *Swan* v. *Cox*, 1 Marsh. 176.

(*s*) *Goodison* v. *Nunn*, 4 T. R. 761.

(*t*) *Glazebrooke* v. *Woodrow*, 8 T. R. 366. *Supra*, 69. See also *Morton* v. *Lamb*, 7 T. R. 129. *Mason* v. *Corder*, 7 Taunt. 9; 2 Marsh. 332. *Ferry* v. *Williams*, 8 Taunt. 62.

(*u*) *Coore* v. *Callaway*, 1 Esp. C. 115, cor. Lord Kenyon; *Richards* v. *Barton*, 1 Esp. 268. See *Baxter* v. *Lewis*, Forrest, 61.

charge the plaintiff from executing it, it is sufficient to prove this; it is not incumbent on the plaintiff to go on and do a nugatory act (*x*). And where by the terms of the agreement the vendee is to prepare the conveyance, the vendor may maintain an action without tendering a conveyance (*y*); and if the conveyance is to be executed at the expense of the vendee, the latter is bound to tender it (*z*). Conditions precedent.

Where the defendant agrees to pay the whole or part of the purchase-money on having a good title, it is necessary for the vendor to allege what title he had, and to prove it accordingly (*a*). But where the vendor averred that he was seised in fee, and made a good and satisfactory title to the purchaser by the time specified in the conditions of sale, it was held to be sufficient, and that it was unnecessary for him to show how he deduced his title to the fee (*b*).

And even where the title is set out, it has been held by Lord Kenyon to be sufficient to produce the title deeds at the trial, without proving their execution (*c*). He said, that where the question was respecting a title he would never allow that the party should be called upon to prove the execution of all the deeds deducing a long title; that it was never mentioned in the abstract, or expected, in making out a title in the case of any purchase, more particularly where possession has accompanied them. Yet in a later case Mansfield, C. J., held at Nisi Prius, that the vendor of the residue of a term, being the third or fourth assignee, was bound to prove all the mesne assignments (*d*). But it has since been held that in the absence of an express stipulation to the contrary, the vendor of a lease impliedly undertakes to make out the lessor's title to demise (*e*). And the vendee may insist on defects which he has discovered in the lessor's, although by the conditions of sale it is stipulated that the vendor should not produce the lessor's title (*f*).

The plaintiff sold a lease, and by the conditions "was not to produce any

(*x*) *Jones* v. *Barkley*, Dougl. 684; 5 East, 502. *Phillips* v. *Fielding*, 2 H. B. 123. *Wilmot* v. *Wilkinson*, 6 B. & C. 506. *A.*, the patron of a living, in consideration of the sum of 7,000 *l.*, agrees to present *B.*'s nominee to a living on the next avoidance, and to furnish an abstract and execute a conveyance. *A.* afterwards, with the assent of *B.*, agrees to sell the presentation to *C.*, and to convey such title as he (*A.*) had received, in consideration of 7,500 *l.*, of which 500 *l.* was to be paid to *B.* on a day appointed. *A.* furnished an abstract of such title as he had, but *B.* refused to take it, and no conveyance was tendered. Held that there was a sufficient consideration to entitle *B.* to recover the 500 *l.* from *C.*, and that it was not necessary to tender a conveyance. *Wilmot* v. *Wilkinson*, 6 B. & C. 506.

(*y*) *Hawkins* v. *Kemp*, 3 East, 410.

(*z*) *Seward* v. *Willock*, 5 East, 198. *Qu.* whether it be not a general rule, in the absence of any express stipulation, that the purchaser ought to prepare and tender the conveyance. See Sugden's Law of Vendor and Purchaser, 222. And it was so held in *Baxter* v. *Lewis*, 1 Forrest, 61. And see *Martin* v. *Smith*, 2 Smith, 543; 6 East, 555. But see *Heard* v. *Wadham*, 1 East, 627; Lord Eldon's opinion, in *Seton* v. *Slade*, 7 Ves. jun. 278; Sir A. Macdonald's, in *Growsock* v. *Smith*, 3 Anstr. 877; Lord Rosslyn's, in *Pincke* v. *Curteis*, 4 Bro. C. C. 332. Where it is stipulated that a lease shall be prepared at the expense of the lessor, in the absence of any explanation to the contrary, it is to be intended that the lessor is to prepare it also. *Price* v. *Williams*, 1 M. & W. 6. And see Sug. V. & P. 222.

(*a*) *Phillips* v. *Fielding*, 2 H. B. 123. See the *Duke of St. Alban's* v. *Shore*, 1 H. B. 270. And where a good title is to be made out by a certain day, the vendee is not bound to make any application before the day. *Berry* v. *Young*, 2 Esp. C. 640, n. cor. Lord Kenyon.

(*b*) *Martin* v. *Smith*, 6 East, 555.

(*c*) *Thomson* v. *Miles*, 1 Esp. C. 184. Sug. V. & P. 216. Contra, *Crosby* v. *Percy*, 1 Camp. 303.

(*d*) *Crosby* v. *Percy*, 1 Camp. 303. But Lord Kenyon's decision was not cited. See Sugden's V. & P. &c. 216.

(*e*) *Souter* v. *Drake*, 3 N. & M. 40.

(*f*) *Shepherd* v. *Keatley*, 1 C. M. & R. 117; 4 Tyr. 571.

Conditions precedent.

title prior to the lease;" it was held that he was bound to produce and prove the lease in the ordinary manner (*g*).

The vendor of a leasehold interest is not, without express stipulation, bound to prove the title of the lessor (*h*).

Although it is unnecessary to notice in the declaration, representations contained in the particulars of sale as to the state of repair, and other collateral matters, yet it is essential to prove at the trial that the plaintiff can make title to the several matters as sold (*i*). Thus, where the particulars of sale state a right of cart-way to be appurtenant to a house, it is sufficient to set out so much of the agreement as relates to the house, without stating that part which relates to the cart-way, but still the title to the cart-way must be proved on the trial (*k*).

What are usual covenants in a lease seems in doubtful cases to be a question of fact (*l*). In such a case, a general statement by the witness that in six cases out of ten such covenants were contained in leases, was held to be admissible without producing the leases (*m*).

The purchaser of a lease under a contract, describing it as containing none but the usual covenants, is not bound to accept an assignment if the lease contain an unusual covenant, although it be bad in law (*n*).

A defendant who has never applied for a title is not allowed to set up the want of it against the plaintiff who has obtained one (*o*), after the commencement of the action.

But upon an undertaking by the vendor to convey a new inclosure to the vendee, he must convey the legal estate; it is not sufficient for the vendor to substitute the vendee's name for his own, to entitle him to an assignment from the commissioners (*p*).

Title.

It is not sufficient to show by mere presumptive evidence that the premises have been discharged from an incumbrance to which they were formerly subject.

Where a leasehold was sold as subject to a ground-rent, which was said to have been apportioned out of a larger rent, but such an apportionment was not evidenced by any existing deed, but only by presumptive evidence, it was held that the purchaser was not bound to accept the title (*q*).

(*g*) *Laythorpe* v. *Bryant*, 1 Bing. N. C. 421; 5 M. & S. 327. Tindall, J., founded his opinion on the ground that having alleged his possession of a lease, he was bound to prove it.

(*h*) *George* v. *Pritchard*, 1 Ry. & M. C. 417. And see Sugden's V. & P. 301, 7th edit. *Gwillim* v. *Stone*, 3 Taunt. 433. *Purris* v. *Roger*, 9 Price. 488. *Fielder* v. *Hooker*, 2 Meriv. 424. *Temple* v. *Browne*, 6 Taunt. 60.

(*i*) *Thomson* v. *Miles*, 1 Esp. C. 184. Where the vendee agreed to purchase two leases, and to accept an assignment without requiring the vendor's title, it was held that he was precluded from objecting to the lessor's title, in an action by him to recover the deposit. *Spratt* v. *Jefferey*, 10 B. & C. 249.

(*k*) Ibid.

(*l*) Where the vendee of the lease of a public-house had notice of the net rent reserved, and that the lease contained the usual covenants, it was held that this included a covenant on the part of the lessee to pay sewers-rate and land-tax. K. B. Hil. 1828.

(*m*) K. B. Hil. 1828.

(*n*) *Hartley* v. *Pchall*, Peake's C. 131, cor. Lord Kenyon. See also *Waring* v. *Hoggart*, R. & M. 30.

(*o*) Per Lord Kenyon, in *Thomson* v. *Miles*, 1 Esp. C. 184. But if a good title be not made out, on the defendant's application, on the day appointed for the completion of the purchase, or afterwards, he may, it seems, abandon the contract. *Cornish* v. *Rowley*, 1 Sel. N. P. 175. *Berry* v. *Young*, 2 Esp. C. 640. See also Sugden's V. & P. 355, 7th ed. *Lang* v. *Gale*, 1 M. & S. 111. *Haydorn* v. *Laing*, 1 Marsh. 514. *Wilde* v. *Fort*, 4 Taunt. 344. *Barlett* v. *Tuchin*, 6 Taunt. 259.

(*p*) *Cane* v. *Baldwin and others*, 1 Starkie's C. 65.

(*q*) *Barnwell* v. *Harris*, 1 Taunt. 430. Where a title under a conveyance is forti-

Conditions precedent. Title.

Where the objection to a title was that it was doubtful whether the wife of a party to a deed thirty years old, was barred by that deed of her dower, it was held that it was no answer to prove upon the trial that the wife was dead, no such proof having been given before (*r*).

It seems that a court of law will take notice of equitable objections to titles. It would be fruitless to compel the defendant to pay money which a court of equity would order him to refund (*s*).

Where the words of the condition were, that the vendor should make out a good title, it was held that he must make out a title good both at law and in equity (*t*), for the question is, whether the condition has been complied with.

Ejectment by a vendor.

A vendor who has let the intended vendee into possession cannot recover the premises by ejectment without proof of a demand of possession, for till then the possession is lawful (*u*), unless the defendant agreed to quit possession on a day previous to the day of the demise, for then, on non-performance, ejectment will lie (*x*).

A vendor who has let the vendee into possession, but who can make no title, cannot recover for growing crops which were to be taken at a valuation, the contract being entire (*y*); neither, as it seems, can he recover for use and occupation (*z*).

Action by vendee.

Where the contract has been broken by the vendor, the purchaser may either proceed to recover damages for the breach of contract, or where the contract may be rescinded *in toto* (*a*), may recover his deposit.

fied by sixty years' possession, the loss of a recited deed throws no reasonable doubt upon the title. *Prosser* v. *Watts*, 6 Madd. 59.

(*r*) *Wilde* v. *Fort*, 4 Taunt. 344.

(*s*) *Maberly* v. *Robins*, 1 Marsh. 258; 5 Taunt. 625; and per Ld. Alvanley, in *Elliott* v. *Edwards*, 3 B. & P. 181; Sug. V. & P. 219. But in the case of *Allpass* v. *Watkins* (8 T. R. 516), Ld. Kenyon held that a court of law could not enter into equitable objections to a title where the purchaser is plaintiff. And see *Romilly* v. *James*, 1 Marsh. 600. *R.* v. *Toddington*, 1 B. & A. 560; 2 Phill. Ev. 101; Roscoe on Ev. 190.

(*t*) *Maberly* v. *Robins*, 1 Marsh. 258. And the Court will adjudge a title to be good or bad, and decide accordingly, without considering whether it is a marketable title. *Maberly* v. *Robins*, 5 Taunt. 625. *Camfield* v. *Gilbert*, 4 Esp. C. 221. *Romilly* v. *James*, 6 Taunt. 263. The plaintiff cannot in such case recover when he has not so exclusive an interest as he has contracted to sell. *Farrer* v. *Nightingale*, 2 Esp. C. 639; *Hibbert* v. *Shee*, 1 Camp. 113. Or where the premises are subject to an incumbrance of which no notice has been given. *Turner* v. *Beaurain*, cited Sugden's V. & P. 261. *Barnwell* v. *Harris*, 1 Taunt. 430. Where property is sold in lots, the sales will, in the absence of some stipulation to the contrary, be regarded as distinct, and a defect as to the title to one will not affect the question as to the rest. *Poole* v. *Shergood*, 2 Bro. C. C. 118. *Emmerson* v. *Heelis*, 2 Taunt. 38. *Supra*, tit. FRAUDS, STATUTE OF.

(*u*) *Right* v. *Beard*, 13 East, 210; *Doe* v. *Lawder*, 1 Starkie's C. 308. See *Hegan* v. *Johnson*, 2 Taunt. 148. If the party were lawfully in possession at the time of the action brought, it is an answer to the action, whatever be the time of the demise. *Doe* d. *Newby* v. *Jackson*, 1 B. & C. 448.

(*x*) *Doe* v. *Sayer*, 3 Camp. 8. And if a third person under such circumstances has come into possession, ejectment may be maintained against him without notice. *Doe* v. *Bolton*, 6 M. & S. 148. So where a man got into possession of a house without the privity of the landlord, and the parties having entered into a negotiation for a lease differed about the value of fixtures, it was held that at most this was a tenancy by sufferance, and that a notice was unnecessary. *Doe* v. *Quigley*, 2 Cowp. 105; and see *Doe* v. *Pullen*, 2 Bing. N. C. 749. And see *Doe* v. *Smith*, 6 East, 530. *Doe* v. *Breach*, 6 Esp. C. 106. *Note*, That the tenant had entered under an agreement for a lease which had not been granted, and the ejectment was for a breach of a covenant in the intended lease.

(*y*) *Neale* v. *Viney*, 1 Camp. 471; *supra*, 1183.

(*z*) *Hearn* v. *Tomlin*, Peake's C. 172; *supra*, 1183.

(*a*) *Supra*, tit. ASSUMPSIT.—MONEY HAD AND RECEIVED. The action may be brought in the name of the principal against the vendor.

Action by vendee of real estate.

Where the purchaser is to prepare the conveyance he cannot maintain an action for breach of contract, or to recover the deposit, without proving a tender of a conveyance, unless he be discharged by the act of the vendor; or unless the preparing a conveyance would be a nugatory act for want of title in the vendor(*b*); or where he has otherwise disposed of the estate(*c*).

Particular of objections.

Where the vendee objects to the abstract of title, as insufficient, defective and objectionable, the Court will, at the instance of the defendant, require the plaintiff to deliver a particular, specifying the matters of fact which he intends to rely upon at the trial, as being the cause of his not being able to complete the purchase(*d*); but he is not bound to state any objection in point of law arising from the abstract(*e*). And where no such particular has been obtained, the plaintiff is not confined at the trial to those objections which he has stated to the vendor, but may rely on any other(*f*).

But where on rescinding the contract a particular objection to the abstract was inscribed on it, it was held that the plaintiff could not at the trial insist on other objections which were not taken, and which, if taken, might have been removed(*g*).

Where the vendee in a special action for breach of contract relies on a defect in title, he must prove the defect; it is not sufficient to prove the mere opinions of conveyancers(*h*).

Where an auctioneer does not disclose the name of his principal, an action lies against him for breach of contract(*i*). Where the purchaser recovers the deposit only from the auctioneer, he may, in a special action against the vendor, recover interest and the expense of investigating the title(*k*).

Damages.

The plaintiff is entitled to recover as damages, not merely the expenses which he has incurred in consequence of the non-performance of the contract, but in general for the loss sustained in consequence of the defendant's failure to complete the contract, even although the defendant is unable to complete the contract in consequence of the default of another(*l*).

He is entitled to recover as damages, on counts properly framed, not only the amount of his deposit, but also interest upon it, and even interest on the residue of the purchase-money, which has been lying ready to be paid without making interest(*m*). It seems that he may also recover the expenses incurred in investigating the title(*n*). And where the vendor

(*b*) *Seaward* v. *Willock*, 5 East, 198. *Lowndes* v. *Bray*, cor. Ld. Ellenborough, Sitt. after Trin. Term, 1810; Sugden's V. & P. 223, 6th edit.

(*c*) *Knight* v. *Crockford*, 1 Esp. C. 189. See the *Duke of St. Alban's* v. *Shore*, 1 H. B. 270.

(*d*) *Collett* v. *Thompson*, 3 B. & P. 246.

(*e*) Ibid.

(*f*) *Squire* v. *Todd*, 1 Camp. 293. *Collett* v. *Thompson*, 3 B. & P. 246. *Todd* v. *Hoggart*, M. & M. 128.

(*g*) *Todd* v. *Hoggart*, 1 M. & M. C. 128. See *Squire* v. *Todd*, 1 Camp. C. 293.

(*h*) *Camfield* v. *Gilbert*, 4 Esp. C. 221.

(*i*) *Hanson* v. *Roberdeau*, Peake's C. 120; and see *Owen* v. *Gooch*, 2 Esp. C. 567, and *supra*, tit. AGENT.

(*k*) *Farquhar* v. *Farley*, 7 Taunt. 492.

(*l*) *Hopkins* v. *Grazebrooke*, 6 B. & C. 31. But note that in this case the vendor was in fault in representing himself to be the owner of the property, when in truth he was not so. See 10 B. & C. 420.

(*m*) *Flureau* v. *Thornhill*, 2 Blackst. 1078. Sugden's V. & P. 221. 504, 7th edit. *De Bernales* v. *Wood*, 3 Camp. 258. *Richards* v. *Barton*, 1 Esp. C. 268. If the purchase-money has been lying ready without interest being made of it, it seems that such interest cannot be recovered. *Sweetland* v. *Smith*, 1 C. & M. 585; 3 Tyr. 491.

(*n*) *Kirtland* v. *Pounsett*, 2 Taunt. 145; *Turner* v. *Beaurain*, cor. Lord Ellenborough, Guildh. 2d June 1806. But see *Camfield* v. *Gilbert*, 4 Esp. C. 221; and *Wilde* v. *Fort*, 4 Taunt. 344, where Mansfield, C. J. held the contrary, and ruled also, that interest on the deposit was not recoverable. Unless the purchaser can establish the contract of sale, he cannot recover the expenses of investigation. *Gosbell* v. *Archer*, 4 N. & M. 485. As to

misrepresents the charges affecting the estate, the purchaser may recover the interest of money procured to complete the purchase, as well as the expenses of investigating the title and completing the conveyance(*o*); as where the intended grantor of an annuity represents that there are no judgments against him, in consequence of which the intended purchaser does not search until the transaction is ready to be completed (*p*). And if the action be brought against an agent who sold without sufficient authority, the plaintiff may also recover the costs of a suit against the principal for a specific performance (*q*). Damages.

The purchaser is not entitled to recover expenses incurred previously to entering into the contract, nor the expense of a survey made before he knows whether the title is good or not, nor the expense of a conveyance drawn under the expectation of making the purchase, nor the extra costs of a suit in equity by the vendor in which he is defeated, nor losses sustained on the resale of stock for the farm (*r*).

Where the vendee relies on a defect in the vendor's title, and no fraud is imputable to the vendor, the plaintiff does not usually recover damages (*s*). Action by vendee.

If on breach of contract by the vendor the vendee elect to disaffirm the contract in respect of the supposed goodness of his bargain (*t*), and to recover the deposit as money had and received to his use, he must prove the circumstances, and show that the contract is wholly unexecuted (*u*) by the vendor's default; but if there has been a part execution of the con- Money had and received.

interest, see ib. and the st. 3 & 4 Will. 4, c. 42, s. 28; and *supra*, tit. INTEREST.

(*o*) *Richards* v. *Barton*, 1 Esp. C. 268; *Turner* v. *Beaurain*, Sugden's V. & P. 221. 504, 7th edit. *Coore* v. *Callaway*, 1 Esp. C. 115. See Lord Kenyon's observations. The expenses of investigation are not recoverable under the count for money payments. *Camfield* v. *Gilbert*, 4 Esp. C. 221.

(*p*) *Coore* v. *Callaway*, 1 Esp. C. 115. *Richards* v. *Burton*, 1 Esp. C. 268.

(*q*) *Jones* v. *Dyke*, Sugden's V. & P. App. No. 8.

(*r*) *Hodges* v. *Earl of Litchfield*, 1 Bing. N. C. 492.

(*s*) See 3 B. & P. 107; *Flureau* v. *Thornhill*, 2 Blackst. 1078; *Brig's Case*, Palm. 364. *Walker* v. *Moore*, 10 B. & C. 416. In the case of *Bratt* v. *Ellis*, (C. B. Mich. & Hil. T. 45 Geo. 3, cited in Mr. Sugden's Treatise, App. No. 7,) where an auctioneer having a lien on property, sold it after the expiration of the authority given him by the owner, who refused to complete the contract, the Court is stated to have held that the purchaser was not entitled to more than the deposit, with interest, the costs of investigating the title, and the costs of the action, as between attorney and client; although the jury, on the execution of a writ of inquiry, after judgment by default, had given a verdict for 350*l.*, allowing 250*l.* as damages for the loss of the bargain. Where the purchaser upon a *bonâ fide* sale of lands, before he had examined the abstract with the original deeds, resold the greater portion, but upon a subsequent discovery of a defect in the title the purchasers refused to complete their contracts; held that the original purchaser having prematurely offered the premises for sale, before he had ascertained whether the abstract was correct or not, he was not entitled to recover by way of damages for loss of the bargain, nor for expenses incurred on such estate, and the costs of the sub-purchasers in examining the title. And *semble*, it is against the policy of the law that a party should offer an estate for sale before he has obtained possession and a conveyance. *Walker* v. *Moore*, 10 B. & C. 416.

(*t*) The vendee may rescind the contract when a material fact affecting the contract is omitted in the conditions of sale. *Waring* v. *Hoggart*, R. & M. 39. *Ballard* v. *Wray*, M. & W. 320. So where from an abstract of title, delivered before the time when the conveyance was to be made, the vendor appears to have no title. *Roper* v. *Coombes*, 6 B. & C. 535. *Waring* v. *Hoggart*, R. & M. 39. *Ballard* v. *Wray*, 1 M. & W. 520.

(*u*) *Hunt* v. *Silk*, 5 East, 449. *Squire* v. *Todd*, 1 Camp. 293; 2 Barr. 1011. *Farrer* v. *Nightingale*, 2 Esp. C. 639. *Levy* v. *Haw*, 1 Taunt. 65. The vendor is bound to make out a good title on the day on which the purchase is to be completed. If he deliver an abstract, setting out a defective title, which the vendee objects to, or does not verify the title according to the abstract delivered, the vendee is entitled to rescind the contract. *Berry* v. *Young*, 2 Esp. C. 640 (*n*). *Cornish* v. *Rowley*. Sel. N. P. 170.

Action by vendee. Money had and received.

tract, such that it cannot be wholly rescinded, so as to place the parties in *statu quo*, the party must resort to his action for breach of the special contract (*v*). But the plaintiff will be entitled to recover his deposit where the agreement has been vacated by the mutual default of the parties, although it contain stipulations for liquidated damages in case of nonperformance (*w*).

The purchaser may recover the deposit as money had and received to his use, though the agreement for sale be unsigned and unstamped (*x*).

This action may be maintained by the principal who has paid the money, although his agent made the purchase, and signed the contract in his own name and was considered to be the principal by the vendor (*y*). But although the principal may sue where the agent has contracted in his name, the converse of the proposition is not true; and where a man describes himself as contracting in the character of an agent, it seems that he cannot shift his situation, and declare himself to be the principal, and the supposed principal to be a mere creature of straw; at all events, to enable himself to sue as principal, it is necessary that he should give previous notice to the defendant of his real situation, otherwise he cannot recover (*z*). But one who has signed the contract as agent for another, may maintain the action against the vendor, where the contract is rescindable, if the principal has denied that he gave authority and has repudiated the contract (*a*).

The plaintiff in this form of action cannot recover more than the money paid, although the estate has risen in value; but it seems that he may recover the money actually paid, although the estate has been diminished in value, but this has been doubted (*b*). He cannot recover the expenses of conveyancers' opinions, and other expenses incurred in investigating the title on the money-counts (*c*).

And where the original contract is void by the Statute of Frauds, for want of an agreement in writing, the plaintiff, it seems, can recover no more than his deposit without interest (*d*).

An auctioneer is considered as a stakeholder (*e*), and should not part with the deposit until the sale has been carried into effect (*f*), and he cannot discharge himself by paying over the amount to the vendor (*g*). At all events he cannot do so after notice.

(*v*) Where *A.* agreed to let *B.* into immediate possession of a house, and to repair it, and execute a lease within ten days, in consideration of which *B.* paid 10*l.* and took possession, and *A.* neglected to execute the lease, and make the repairs beyond the ten days, and *B.* continued in possession after the ten days, it was held that *B.* could not afterwards rescind the contract. *Hunt* v. *Silk*, 5 East, 449.

(*w*) *Clarke* v. *King*, 1 Ry. & M. C. 394.

(*x*) *Adams* v. *Fairbairn*, 2 Starkie's C. 277.

(*y*) *The Duke of Norfolk* v. *Worthy*, 1 Camp. 337. See *Edden* v. *Read*, 3 Camp. 338. The payment of the deposit to the agent who made the contract with the plaintiff on behalf of the owner, is a payment to the vendor.

(*z*) *Bickerton* v. *Burrell*, 5 M. & S. 383. The action will lie against an auctioneer, to recover a deposit on a contract of sale, in which the plaintiff had signed himself "J. Bickerton for C. Richardson." And *semble*, an unnamed principal ought to give the like notice. Ib.

(*a*) *Langstroth* v. *Toulmin*, 3 Starkie's C. 145.

(*b*) See Sugden's Treatise, 212, 6th edit.

(*c*) *Camfield* v. *Gilbert*, 4 Esp. C. 221.

(*d*) *Walker* v. *Constable*, 1 B. & P. 306.

(*e*) An auctioneer is not liable for interest, unless the contract be rescinded, and a demand of the deposit be made. Where the treaty with the auctioneer was kept open, and no demand made, it was held that he was not liable for interest. *Maberly* v. *Robins*, 5 Taunt. 625. *Edwards* v. *Hodding*, 5 Taunt. 515. *Farquhar* v. *Farley*, 7 Taunt. 594. *Lee* v. *Munn*, 8 Taunt. 45. Sug. V. & P. 487. See above tit. INTEREST.

(*f*) *Borrough* v. *Skinner*, 5 Burr. 2639; *Berry* v. *Young*, 2 Esp. C. 640; *Spurrier* v. *Elderton*, 5 Esp. C. 1.

(*g*) *Jones* v. *Edney*, Sudgen's V. & P. 37, cor. Ld. Ellenborough, 1812. *Edwards* v. *Hodding*, 5 Taunt. 515.

Where the auctioneer was also the attorney of the vendor, and paid over the money after he knew that objections had been raised to the title, he was held to be liable to the vendee for his deposit (*h*). Money had and received.

Where there was evidence to show that a party was in rightful possession of a term, which the sheriff had subsequently seized and sold under a *fi. fa.* against him, it was held, that in an action by the vendee to recover possession from him, it was sufficient to produce the writ only, without proving the judgment (*i*). Sale from the sheriff.

The vendor of a personal chattel brings his action either on a *special contract* of sale, or for *goods sold and delivered*, or for *goods bargained and sold.* Vendor of a chattel.

In a special action on the case for not accepting the goods, he must prove, 1st. The contract of sale; 2dly. Performance of conditions precedent on his part; 3dly. The amount of damage.

1st. *The contract of sale.*—It has been seen that a contract for the sale of goods (*k*) of the price of 10*l.* or upwards (*l*) is not binding, under the Statute of Frauds, unless the buyer accept part of the goods and actually receive the same (*m*), or give something in earnest to bind the bargain (*n*), or in part

(*h*) *Edwards* v. *Hodding*, 5 Taunt. 815. Note, that he was held to be liable also on another ground, inasmuch as he had misled the plaintiff as to the facts, and induced him to bring his action as he did. Where an auctioneer signed a contract for the sale of a house in his own name, and received the deposit, his principal being present, and after the purchaser had left the room paid it over to the principal, it was held that an action lay against the auctioneer to recover the deposit. *Wray* v. *Gutteridge*, 3 C. & P. 40.

(*i*) *Doe* v. *Murless*, 6 M. & S. 110.

(*k*) *A.* agrees to sell *B.* timber (the trees being then standing on the land of *A.*) at so much per foot; this is a contract for the sale of goods within the statute. *Smith* v. *Surman*, 9 B. & C. 561; and neither an offer on the part of *B.* to dispose of part to another person, or a letter in answer to one from *A.* demanding payment, in which *B.* refuses payment on the ground that the trees were not such as were contracted for, is sufficient to take the case out of the statute. Ib.

(*l*) *Supra*, 487.

(*m*) *Supra*, 488. *See* the next note.

(*n*) *Supra*, 488. According to the civil law, the marking of goods by the buyer was an ambiguous act, which might or might not amount to a delivery, according to the intention of the parties. *Si dolium signatum sit ab emptore Trebatius ait traditum id videri*; *Labeo contra*; *quod et verum est, magis enim ne summutetur signari solere quam ut tradere tum videatur.* Dig. 18. 6. 1, 2. And it is very possible that cases may occur where the acts of the parties being ambiguous, or the fact of actual delivery being doubtful, it may be a question of mere fact for the jury. But notwithstanding this, it is usually a question of law, as it must necessarily be, whenever the Court can apply the law to the mere facts as found by the jury (*supra*), Vol. I. tit. Law & Fact). It seems to be now fully settled, that so long as the vendor retains his lien for the price, there is no actual receipt within the statute. In the late case of *Baldey* v. *Parker* (2 B. & C. 37; *supra*, 487), where the defendant bought several articles at a shop, and marked some, and assisted in severing others from the bulk, it was held that there was no transfer and actual acceptance within the exception of the statute. It was observed by Holroyd, J. that upon the sale of specific goods for a specific price, by parting with the possession the owner parts with his lien. The statute contemplates a parting with the possession, and therefore as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute.

The doctrine, that there can be no acceptance or actual receipt so long as the vendor's lien for the price subsists, was also laid down in the case of *Carter* v. *Toussaint* (5 B. & A. 855). A horse was sold by oral contract, and no time appointed for payment; the horse was to remain with the vendor for twenty days without charge to the vendee; at the expiration of that time the horse was sent to grass by the direction of the vendee, and by his desire entered as one of the horses of the vendor; and it was held that there was no acceptance of the horse within the statute. And the case was distinguished from that of *Elmore* v. *Stone* (1 Taunt. 458; *supra*, 610), on the ground that in that case there was a change of possession. So in *Tempest* v. *Fitzgerald* (3 B. & A. 680), where a horse was sold, to be taken away at a time specified, and paid for in ready money; and at the expiration of the time the purchaser rode him, but requested that he

Contract of sale.

of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents lawfully authorized.

An auctioneer at a sale of goods by auction, is the agent of both parties, for the purpose of binding them by his signature (*o*); but he may maintain an action against the vendee in his own name, even although the name of the principal be declared at the time of sale (*p*); but if he brings the action his signature will not be sufficient within the Statute of Frauds to bind the purchaser (*q*). Having sold under a supposed executrix, having no title, he cannot recover after the real executor has claimed the amount from the buyer (*r*). A bidder may retract his bidding at any time before the knocking down of the hammer (*s*).

The printed conditions of sale, pasted on the auctioneer's box, are sufficient notice of the terms to a purchaser (*t*).

If *A.* sell goods to *B.* who is unable to pay for them, and they are transferred to *C.* by consent, this is a new contract between *A.* and *C.* and not a mere promise on the part of *C.* to pay the debt of *B.* (*u*).

By broker.

With respect to contracts made through a broker (*x*) it is now perfectly well settled that the bought and sold notes are, if they correspond, evidence to bind the bargain, although the broker has not signed a formal entry in his book (*y*); *secus* if they do not correspond (*z*). Although it be clear that an entry signed by the broker is not essential to the validity of a contract where formal bought and sold notes have been delivered, it is another

might remain for a longer period in the vendor's possession; and the horse died before the time when the purchaser was to take him, and to pay the price; the Court held that the vendor could not recover the price. See also *Howe* v. *Palmer*, 3 B. & A. 321.

(*o*) See above, tit. STATUTE OF FRAUDS.

(*p*) *Williams* v. *Millington*, 1 H. B. 81; *Coppin* v. *Walker*, 7 Taunt. 237; *Coppin* v. *Craig*, 7 Taunt. 243; *Athyns* v. *Batten*, 2 Esp. C. 493. An action may be brought either in the name of the party who actually made the bargain, or in the name of the party really interested. *Skinner* v. *Stocks*, 4 B. & A. 437.

(*q*) *Farebrother* v *Simmonds*, 5 B. & A. 333.

(*r*) *Dickenson* v. *Paul*, 4 B. & Ad. 638.

(*s*) *Payne* v. *Cave*, 3 T. R. 148. And *qu.* whether, as the auctioneer is the agent of the bidder, the latter may not retract where a memorandum is required by the Statute of Frauds at any time before the written entry is actually made by the auctioneer.

(*t*) *Mesnard* v. *Aldridge*, 3 Esp. C. 271. An auctioneer's oral declaration at the time of sale is not admissible in evidence to vary the printed conditions either against a purchaser at the sale, or for the latter, against one who purchases during the sale from him, and whose name is inserted as purchaser in the auctioneer's book. *Shelton* v. *Livius*, 2 Tyr. 420.

(*u*) *Browning* v. *Stallard*, 5 Taunt. 450.

(*x*) Evidence is admissible to show that a broker's authority, by the custom of the trade, expires on the day on which it is given. *Dickenson* v. *Lilwall*, 1 Starkie's C. 128. Where goods are sold in London by a broker, to be paid for by a bill of exchange, it seems that the seller has a right, within a reasonable time, to annul the contract, if he be dissatisfied with the purchaser, and that five days is a reasonable time for this purpose. *Hodgson* v. *Davis*, 2 Camp. 530. *A.* and *B.* being jointly interested in a cargo of oil, *A.* directs the broker to sell it; the sale-note is a sufficient memorandum within the Statute of Frauds, although *B.* does not assent till after the sale. *Soames* v. *Spencer*, 1 D. & R. 32.

(*y*) *Goom* v. *Aflalo*, 6 B. & C. 117. *Thornton* v. *Meux*, 1 M. & M. 143. *Cumming* v. *Roebuck*, 1 Holt's C. 172. *Hinde* v. *Whitehouse*, 7 East, 559. 569. *Rucker* v. *Cammeyer*, 1 Esp. C. 105. *Cooper* v. *Smith*, 15 East, 105, 8. *Blagden* v. *Bradbear*, 12 Ves. 466. 472. *Buckmaster* v. *Harrop*, 13 Ves. 456. *Dickenson* v. *Lilwall*, 1 Starkie's C. 128. It seems that a mere inaccuracy in the description of the names, which occasions no prejudice to the parties, would not vitiate the sale. *Mitchell* v. *Lapage*, Holt's C. 254.

(*z*) *Grant* v. *Fletcher*, 5 B. & C. 436; *Goom* v. *Aflalo*, 6 B. & C. 117. *Thornton* v. *Meux*, 1 M. & M. 43. But a vendee is bound by a note of the contract signed by him and delivered to the vendor by the broker, although it may differ from the note sent to the vendee. *Rowe* v. *Osborn*, 1 Starkie's C. 140.

Contract of sale. By broker.

question whether the broker's entry of the contract, signed by him, would be sufficient in the absence of sufficient bought and sold notes.

In the case of *Heyman* v. *Neale* (*a*), Lord Ellenborough said, that "the entry made and signed by the broker, who is the agent of both parties, is alone the binding contract. What is called the bought and sold note is only the copy of the other, which would be valid and binding although no bought or sold note was ever sent to the vendor or purchaser; the defendant is equally liable in this case as if he had signed the entry in the broker's book with his own hand;" and in that case the plaintiff recovered accordingly. In the later cases on the subject, although it does not appear to have been expressly ruled that the entry in the broker's book, signed by him, would not be in itself sufficient to bind the contract, yet it has been held in strong terms that the copies delivered to the parties were the proper evidence of the contract (*b*).

Where *A.* agreed to buy, and *B.* to sell, a quantity "of St. Petersburgh clean hemp," and the broker delivered a bought-note to *A.*, in which by mistake he inserted "Riga Rhine hemp," instead of "St. Petersburgh clean hemp," and delivered a correct sale-note to *B.*; it was held that the variance was fatal, and that B. could not recover against *A.* for breach of contract (*c*). But where the broker, in both the bought and sold notes, made a mistake in describing the sellers' firm to be *A.*, *B.* and *C.*, which had in fact, without the knowledge of the broker, been changed to *A.*, *D.* and *E.*, it was held that the purchaser could not set up the mistake in answer to an action, without showing that he was excluded from a set-off, or otherwise prejudiced by it (*d*).

A material alteration made in the sale-note by the broker, after the bargain has been made, at the instance of the seller, without the consent of the purchaser, precludes the seller from recovering on the contract (*e*).

Where the invoice is silent as to the terms of sale of goods, parol evidence is admissible to prove the terms. Where an offer is made by letter to sell goods, the contract is complete from the time of acceptance. And where the offer was by *A.* to sell goods to *B.* receiving an answer by return of post, and a letter of acceptance, being mis-directed, arrived two days later than it ought to have done had it been properly directed, it was held that the bargain was complete from the moment that the offer was accepted (*f*).

Where goods are ordered for a club, by *A.* one of the members, every member who either concurs in the order or assents to it, is liable, although

(*a*) 3 Camp. 337. Note, that in this case bought and sold notes had been sent, but the vendee on receiving the copy *objected* to it.

(*b*) In *Cumming* v. *Roebuck*, 1 Holt's C. 172, Gibbs, Ld. C. J. intimated that the entry in the broker's book was not to be regarded as the original contract, and said that the case in which it had been so held had been contradicted. In *Thornton* v. *Meux*, 1 M. & M. C. 43, Abbott, L. C. J. said, "I used to think at one time that the broker's book was the proper evidence of the contract; but I afterwards changed my opinion, and held, conformably to the opinion of the rest of the Court, that the copies delivered to the parties were the evidence of the contract they entered into, still feeling it to be a duty on the part of the broker that the copies should correspond." See also his Lordship's judgment in the case of *Goom* v. *Aflalo*, 6 B. & C. 117.

(*c*) *Thornton* v. *Kempster*, 1 Marsh. 355.

(*d*) *Mitchell* v. *Lapage*, Holt's C. 253.

(*e*) *Powell* v. *Divett*, 15 East, 29. Note, that the alteration was made in the buyer's note; and it was held that this was so vitiated by the interpolation, that it was not evidence even of the original contract. And the Court relied on *Master* v. *Miller*, 4 T. R. 320.

(*f*) *Adams* v. *Lindsell*, 1 B. & A. 681.

Contract. *A.* be made debtor in the plaintiff's books, unless it appear that the plaintiff meant to give credit to *A.* only (*g*).

By agent. An agent who buys or sells for another is always liable where he buys in his own name, or where credit is given to him (*h*); so if he order goods for another, but the seller refuses to deliver to that person's credit, but delivers on the credit of the agent only; so, as is said, if having ordered goods in the name of another, he afterwards refuses to inform the seller who the person is, in order that he may sue him (*i*). But if he declare himself to be merely an agent, he is not liable (*k*). But if a factor here buy or sell goods for a foreign principal, he will be personally liable, for it will be presumed that credit was given to him (*l*); but the contract is, it seems, in all cases with the principal when discovered.

A vendor may sue the principal, when discovered, although the agent bought in his own name; but if, where the name of the principal is known at the time of sale, the vendor elect to give credit to the agent, he cannot, it has been seen, afterwards resort to the principal (*m*). But if the name be not disclosed at the time, the vendor may afterwards sue the principal, although the agent professed to purchase in the character of agent, and the vendor, without asking the names of the principals, debited the agent with the price (*n*). Where the sale is made by a factor known by the purchaser to be such, the vendor may sue for the amount (*o*).

2dly. The performance of conditions precedent (*p*).

(*g*) *Delauney* v. *Strickland*, 2 Starkie's C. 439.

(*h*) Per Ld. Kenyon, in *Owen* v. *Gooch*, 2 Esp. C. 568; *Morgan* v. *Corder*, Paley's P. & A. 250.

(*i*) Ibid.

(*k*) Ibid. Where *L.*, an auctioneer, signed an agreement, as agent for *A.*, and afterwards *A.* signed the agreement in these terms, "I approve of *L.* having signed this on my behalf," it was held that the auctioneer was not personally liable. *Spittle* v. *Lavender*, 2 B. & B. 452. See *Benson* v. *Morris*, 2 Taunt. 374. A broker who declares in his own name against a vendee for not accepting goods, cannot recover on a contract deseribing him as a broker selling for his principal. *Rayner* v. *Linthorne*, 1 Ry. & M. C. 325; for the note shows him to be a broker and not a principal, and if the note were out of the question, there would be nothing to satisfy the Statute of Frauds. Abbott, L. C. J. distinguished the case from that of *Atkyns* v. *Amber*, 2 Esp. C. 493, on the ground that in the latter case there had been a delivery. In that case there was a sale-note of timber sold by the plaintiff on account of Hippins, for a bill at two months; the declaration averred a sale by the plaintiff; the plaintiff in fact had a lien on the goods, and authority to sell; it was held that he was entitled to recover. Cor. Eyre, C. J.

(*l*) *Gonzales* v. *Sladen*, B. N. P. 130. See the observations of Eyre, C. J., in *De Gaillon* v. *Victoire Harel L'Aigle*, 1 B. & P. 368.

(*m*) *Paterson* v. *Gandasequi*, 15 East, 62. *Addison* v. *Gandasequi*, 4 Taunt. 574. *Railton* v. *Hodgson*, and *Peele* v. *Hodgson*, 4 Taunt. 576. After giving credit to one person, the vendor cannot afterwards resort to another; and it is for the jury to say to whom credit was given. *Leggatt* v. *Read*, 1 Carr. C. 16. The plaintiff sold cattle to *M.*, a bailiff of the defendant, employed in purchasing cattle for him, having always money in hand, and never authorized to buy on credit; the cattle were paid for by bills drawn on *M.*, which the plaintiff afterwards renewed; held, that it was properly left to the jury to say whether the cattle were sold upon the credit of *M*, or of the defendant, and that it made no difference that *M.* was a known agent of the defendant's; the jury having found for the defendant, the Court refused to disturb the verdict. *Edwards* v. *Smith*, 12 Moore, 59.

(*n*) *Thompson* v. *Davenport*, 9 B. & C. 78.

(*o*) *Hornby* v. *Lacy*, 6 M. & S. 166. *Morris* v. *Cleasby*, 4 M. & S. 574. Although the factor acted upon a *del credere* commission, and bills had been drawn for the amount, which had never been paid. The giving such commission is in order to obtain an additional security, and not to substitute one for another, nor to vary the rights of third parties. *Hornby* v. *Lacy*, 6 M. & S. 166. And see *Morris* v. *Cleasby*, 4 M. & S. 574. See above, tit. SET-OFF.

(*p*) *Supra*, 67, note (*e*). *Bordenave* v. *Gregory*, 5 East, 107. Though there be mutual promises, yet if one thing be the consideration of the other, a performance is necessary to be averred, unless a special day be appointed for performance. *Callonel*

Goods. Condition precedent.

If the goods were to be delivered at a particular place, a tender there, or that which is equivalent to a tender in point of law, must be proved, as that the defendant dispensed with the necessity of a formal tender, by a refusal to complete his contract (*q*).

The tender of a larger quantity than was agreed for is not sufficient, unless the defendant might have had and the plaintiff was ready to deliver that which the defendant was bound to take (*r*).

It is incumbent on the vendor to show that the goods correspond with the description in the contract. If they be described in the sale-note as of a particular quality, it is not sufficient to show that the quality, though inferior to that described, corresponded with a sample previously delivered (*s*).

In an action for the price of goods sold by sample, it is necessary to prove that they corresponded with the sample at the time of the sale (*t*); it is not sufficient to prove an usage of trade where samples are drawn without fraud, for the buyer to take the goods on receiving a compensation for the difference (*u*).

On an agreement to purchase 300 tons of Campeachy logwood, of real merchantable quality, at 35*l.* per ton, and that such as might be determined to be not of real merchantable quality might be rejected, it was held that the vendee was bound to take so much as was of the sort described, at the contract price, although 16 out of 300 tons were not Campeachy logwood (*x*).

Where a purchaser orders several things at the same time, though at separate prices, he may, it seems, consider the contract as entire, and refuse to accept some of the articles without receiving the rest (*y*), but if he accept

v. *Briggs*, 1 Salk. 112. On a general contract, neither party is bound to do the first act. *Rawson* v. *Johnson*, 2 East, 203.

(*q*) *Glazebrook* v. *Woodrow*, 8 T. R. 366. *Jones* v. *Berkely*, Doug. 687. If there be no stipulation as to the place of delivery, it will be intended that the vendee was to fetch the goods.

(*r*) *Dixon* v. *Fletcher*, 3 M. & W. 146. Where the defendant is to take the goods, it is sufficient to allege and prove a readiness to deliver. *Rawson* v. *Johnson*, 1 East, 203. *Wilkes* v. *Atkinson*, 1 Marsh. 412.

(*s*) *Tye* v. *Fynmore*, 3 Camp. 462. See also *Haydon* v. *Haywards*, 1 Camp. 180; *infra*, tit. WORK AND LABOUR.

(*t*) *Hibbert* v. *Shee*, 1 Camp. 113.

(*u*) Ibid.

(*x*) *Graham* v. *Jackson*, 14 East, 498.

(*y*) *Champion* v. *Short*, 1 Camp. 53; *supra*, 487. Where the purchaser of lands took the growing crops at a valuation, and the purchaser entered, but the vendor could make no title to the land, it was held that the contract being entire, he could not maintain *indebitatus assumpsit* for the crops (*Neale* v. *Viney*, cor. Lord Ellenborough, 1 Camp. 471). So it has been held that a purchaser of two houses in distinct lots at an auction, may refuse to take one, if no title can be made to the other (*Chambers* v. *Griffiths*, 1 Esp. C. 150). But *qu.*; for where different lots are bought at an auction, the agreements are separate, and cannot be declared on as one contract (*James* v. *Shore*, 1 Starkie's C. 426. And see *Poole* v. *Shergold*, 2 Bro. C. C. 118; 1 Cox, 273, S. C.; 6 Ves. 726; Sugden's Treatise, 5th edit. 247). It is a distinct contract on each lot. See *Roots* v. *Ld. Dormer*, 4 B. & Ad. 77. On the other hand, where an agent for the sale of horses sold to *A.* in one lot, and at an entire price, a horse belonging to *A.*, and also a horse belonging to *B.*, warranting both to be sound, it was held that *A.* could not maintain *assumpsit* against *B.* for the unsoundness of the horse belonging to him, declaring as upon a sale of that horse, for the contract is entire. *Symonds* v. *Carr*, 1 Camp. 361. *Hort* v. *Dixon*, Selw. 101.

Where the plaintiff sold 60 coombs of rye to the defendant, at 14*s* per coomb, to be delivered at or before Michaelmas, and the money to be paid on the delivery of the last rye, and the proof was that 50 coombs were delivered before Michaelmas, it was held, that though the agreement was entire for 60 coombs, yet that the parting it in the delivery made it in the nature of several contracts; for the one party sent it in, and the other accepted it, in pursuance of their agreement; and that if no other contract could be proved, it should be understood to be a partial agreement as to the 50 coombs; for the subsequent acts of the parties so expounded their contract, that it should be understood that the rye might be delivered by parts (Gilb. L. Ev. 191, cites

Conditions precedent.

one singly he severs the contract, and cannot object to receiving another of the remaining articles (z).

Where there is an entire contract for the delivery of goods at different times, and part are delivered according to the contract, and the vendor makes default in delivering the remainder, the vendee cannot before the expiration of the time maintain an action for the part delivered; for the purchaser may, if the vendor fail to complete his contract, return the part delivered; but if the vendee retain the part delivered after the vendor has failed to complete the contract, the latter may recover the value of the goods which he has so delivered (*a*).

Stock.

In an action for not accepting stock, the plaintiff, in addition to the contract, must prove that he was possessed of the stock in question (*b*), by the production of the Bank books, or of an examined copy. Also that he either made an actual transfer, or attended at the Bank for the purpose, on the day appointed for the purpose, until the Bank books were closed (*c*); and also (where the stock has not been transferred to the defendant) that it has been transferred to some other person (*d*) within a reasonable time afterwards (*e*).

In an action for not *replacing* stock, the plaintiff must prove the contract, his possession of the stock, his sale of it, and the advance of the product to the defendant; and he will be entitled to estimate his damages either at the current price of such stock on the day appointed for re-payment, or on the day of the trial, for had the defendant kept his promise the plaintiff might have received that price (*f*).

Damage.

The plaintiff, in an action for not accepting goods, should also be prepared with evidence to show the amount of the loss which he has consequently sustained.

Trials per Pais, 400). And where the plaintiff sold to the defendant 100 sacks of flour at 94*s*. 9*d* per sack, and the plaintiff delivered part, but refused to deliver the residue, the Court of K. B. is said to have held (contrary to the decision at Nisi Prius), that the vendor was entitled to recover for the part delivered. *Walker* v. *Dixon*, 2 Starkie's C. 281.

Where the defendant bargained and sold to the plaintiff 100 quarters of barley to be delivered between harvest and Candlemas where the plaintiff should appoint, at 16*s*. per quarter, and 2*s*. 6*d*. was paid at the bargain, and the residue to be paid at the times of delivery, according to the quantity; and upon the delivery of 19 quarters and a half (which were delivered for 20 quarters), the plaintiff paid 10*l*. only, but afterwards paid the other 6*l*. before action brought, it was held by Parker, C. J., that an action was maintainable for non-delivery of the residue; for delivering 19 quarters and a half without full payment was a dispensation by the defendant as to that quantity, and this did not excuse him from a delivery of the rest according to the agreement. *Peenam* v. *Palmer*, Gil. L. E. 194.

(*z*) Ibid. Contract for the sale of trees to be paid for according to certain conditions; the purchaser took away part, but refused to take away the remainder; held that he had thereby abandoned the entirety of the contract, and that the executors of the vendor might recover the value of the trees taken. *Bragg* v. *Cole*, 6 Moore, 114.

(*a*) *Oxendale* v. *Wetherell*, 9 B. & C. 386. Or set off the value. *Shipton* v. *Casson*, 5 B. & C. 378.

(*b*) *Bretton* v. *Cope*, Peake's C. 39. See the stat. 7 G. 2, c. 8.

(*c*) *Bordenave* v. *Gregory*, 5 East, 107. *Heckscher* v. *Gregory*, 4 East, 607. *Callonel* v. *Briggs*, 1 Salk. 112.

(*d*) By the stat. 7 G. 2, c. 8, s. 6.

(*e*) *Bordenave* v. *Gregory*, 5 East, 107. *Callonel* v. *Briggs*, 1 Salk. 112. *Heckscher* v. *Gregory*, 4 East, 607. Some of the Judges in *Bordenave* v. *Gregory* expressed a doubt whether the transfer ought not to be made at the next transfer day after the contract has been broken; but a majority were of opinion that it was sufficient to transfer within a reasonable time afterwards; but that if the stock bore a higher price at any intermediate transfer day, then that higher price should be the measure of damages.

(*f*) *Shepherd* v. *Johnson*, 2 East, 211. But see *M'Arthur* v. *Lord Seaforth*, 2 Taunt. 257. *Qu.* whether he is entitled to recover the price on any intermediate day.

Damage.

Where a person who had contracted for a certain quantity of oil to be delivered to him at a future day, at a certain price, became bankrupt before that day arrived, and obtained his certificate, held that he was nevertheless liable to an action for not accepting and paying for the oil, and that the proper measure of damages was the difference between the price which he had contracted to pay for the oil, and the market-price at the time when the contract was broken (*g*).

The goods, on a refusal to accept them, may it seems be re-sold, and the defendant will be liable to the loss arising from the re-sale of them (*h*). If a vendee omit to remove goods within a reasonable time, the vendor may recover for warehouse room (*i*); or he may recover damages for not removing them, when he is prejudiced by the delay (*k*).

Where the goods were to be paid for by a bill, the vendor is entitled to recover interest from the day on which the bill would have become due (*l*).

Goods bargained and sold.

Indebitatus assumpsit will lie for goods bargained and sold where the vendee refuses to accept them, on a false assertion that the quality does not correspond with that which is specified in the contract (*m*). And in this form of action the plaintiff will be entitled to recover the full price; whilst on a special count for not accepting the goods, he could not recover more than the damages proved to have been sustained (*n*). And it seems that the action for goods bargained and sold may be supported even after a re-sale of the goods by the vendor (*o*), although the plaintiff would be liable as for a wrongful conversion (*p*).

To support this count it is necessary to prove a contract by which the property passed (*q*). The maker of a machine by order cannot recover on this count until there has been an appropriation of the machine assented to by the purchaser (*r*); nor in general is the count available in the absence

(*g*) *Boorman* v. *Nash*, 9 B. & C. 145.

(*h*) 1 Salk. 113; *infra*, 1221, note (*t*).

(*i*) 3 Camp. 426.

(*k*) *Greaves* v. *Ashlin*, 3 Camp. 426. It has been said that he cannot re-sell them. Ibid. Noy's Max. 87, 88. *Alexander* v. *Comber*, 1 H. B. 20. But see *Langfort* v. *Tiler*, Salk. 212.

(*l*) *Boyce* v. *Warburton*, 2 Camp. C. 480.

(*m*) *Hankey* v. *Smith*, Peake's C. 42, n. *Secus*, where there has been an acceptance of the goods. *Elliott* v. *Pybus*, 10 Bing. 512.

(*n*) *Hankey* v. *Smith*, Peake's C. 42, n.

(*o*) *Mertens* v. *Adcock*, 4 Esp. C. 251, *cor.* Ellenborough, C. J.; contrary to *Hore* v. *Milner*, Peake's C. 42, a. *cor.* Lord Kenyon, C. J. But see *Hagedorn* v. *Laing*, 6 Taunt. 162. Such re-sale does not bar an action for non-acceptance of the goods. *Acebal* v. *Levy*, 10 Bing. 384. *Maclean* v. *Dunn*, 4 Bing. 722.

(*p*) Ibid. And *qu.* whether *indebitatus assumpsit* for goods bargained and sold is maintainable where, by the conditions of sale, the vendor is entitled to re-sell them in case the vendee does not remove them before a day certain. *Hagedorn* v. *Laing*, 6 Taunt. 162.

(*q*) See therefore the cases decided under the Statute of Frauds referable to this head, and below, tit. GOODS SOLD AND DELIVERED.

(*r*) *Atkinson* v. *Bell*, 8 B. & C. 277; 2 M. & Ry. 292. There *K.*, a patentee, received orders for machines from the defendant, and employed the plaintiff to make them, which he did, and delivered them on *K.*'s premises; they were subsequently altered to a newer plan, and other machines, intended by *K.* also for the defendant, were by *K.*'s direction altered to correspond, and the whole, after being packed in boxes for the defendant, remained on the plaintiff's premises, and the defendant was subsequently required to take them, but refused so to do; held, that although the goods were intended for the defendant, yet until his assent given, or even actual delivery, no property vested in him, and therefore the action for goods bargained and sold was not maintainable against him by the plaintiff; held also, that as the work and labour was bestowed on articles which had never become the property of defendant, it could not be said to have been done for his benefit to render him liable. *Semble*, a count for refusing to accept the goods might have been supported.

of such a contract and such a dealing with the subject-matter as are sufficient to vest the property in the chattel (*s*).

Goods sold and delivered.

In an action for goods sold and *delivered*, the plaintiff (*t*) must prove, 1st. The contract of sale; 2dly, the delivery of the goods; and 3dly, their value (*u*).

Contract express.

1. The contract of sale. The evidence of a *contract* of sale is either *express*, as where proof is given of an order for the goods, either written or oral, or it is *presumptive*. Where there has been a *delivery*, an agreement in writing is unnecessary, but where there has not been a complete delivery, and the action is brought either on a special contract for not accepting the goods, or generally for goods bargained and sold, it is frequently necessary to prove a contract in writing, or part-payment, or part-acceptance of the goods (*x*).

The evidence to prove a contract for the sale of goods has already been considered (*y*).

A master is not liable for goods ordered by his servant, without some proof of authority given by the master (*z*).

Contract by agent.

Proof that a master has on former occasions empowered his servant to take up goods on credit, will be evidence of the authority of the servant to take up goods on a subsequent occasion, in an action against the master for goods sold and delivered (*a*), although he has in fact supplied the servant with money to pay for them; but the master may rebut the inference as to the authority of the agent, by proof that he has always supplied the servant with money for the purpose (*b*), or that he had previously given notice that he would in future pay ready money; but in such case notice to a man-servant of the tradesman is not sufficient (*c*).

Proof of contract. Implied.

It seems that in general proof that the goods have been delivered to the defendant, and that he has used them, is *primâ facie* evidence of a contract, without proving any order (*d*).

In general, where an agent sells goods for his principal, the contract in point of law is between the principal and the buyer, and the former may maintain the action (*e*); but where the agent sells the goods as his own, concealing the name of his principal, and the principal brings an action against the buyer, the latter has a right to consider the agent as the principal for

(*s*) See the cases above, tit. TROVER. The proof in this respect seems to be the same as in an action for goods sold and delivered, with the exception, of course, of the fact of delivery. Where the plaintiffs sold to the defendants a quantity of butter expected from Sligo, to be paid for by bill at two months from the landing, and the defendants accepted the invoice and bill of lading, it was held that the plaintiffs were entitled to recover on this count, although the butter was lost by shipwreck. *Alexander* v. *Gardner*, 1 Bing. N. C. 671; and *semble*, they were entitled to recover for goods sold and delivered.

(*t*) The action may be maintained by the auctioneer who sold the goods. *Williams* v *Millington*, 1 H. Bl. 81. The right is, of course, subject to that of his principal, who may intervene and claim the value.

(*u*) These particulars are put in issue by the plea of *non assumpsit*. *Cousens* v. *Paddon*, 2 C. M. & R. 566.

(*x*) *Supra*, FRAUDS, STATUTE OF.

(*y*) *Supra*, tit. ASSUMPSIT.—FRAUDS, STATUTE OF.

(*z*) *Maunders* v. *Conyers*, 2 Starkie's C. 281.

(*a*) *Rusby* v. *Scarlett*, 5 Esp. C. 76; 1 Show. 95.

(*b*) Ibid. and 3 Esp. C. 214.

(*c*) *Gratland* v. *Freeman*, 3 Esp. C. 85.

(*d*) *Bennett* v. *Henderson*, 2 Starkie's C. 550, where the plaintiff sent goods to the defendant abroad, on the order of a London merchant, and the defendant received and used the goods. In an action for the price of cloth, a written order by the plaintiff to deliver back the cloth to bearer, being in the defendant's possession, is presumptive proof of the re-delivery. *Shepherd* v. *Currie*, 1 Starkie's C. 454.

(*e*) Cowp. 255; 2 Camp. 24.

all purposes, and may set off any claim which he had against the agent, or rely upon any payment which he has made to him in due course, without notice that he was not the principal (*f*). So where an agent purchases on behalf of a principal, whose name he conceals, the buyer may, on discovering the principal, support an action against him (*g*); and he is not affected by the state of accounts, or by any private agreement between the vendee and his agent (*h*); but if the seller let the day of payment pass without calling on the principal, and the latter is thus induced to suppose that the buyer looks to the broker for payment, and on this supposition pays the price to the agent, the principal is discharged (*i*); and if the seller, knowing that the buyer, who deals in his own name, is the agent of another, elect to give credit to the agent, and debit him with the amount, he cannot afterwards recover from the principal (*k*). Proof of contract. Implied.

Goods having been supplied for the use of the poor of a parish, on orders signed by some of the overseers separately, but all of whom have on different occasions promised to pay, it is evidence of a joint contract, and all, including the assistant overseer who had signed, are liable (*l*). Where a *wife* ordered goods to be delivered to her mother, saying, her husband would pay for them, which he did, and other goods were supplied in like manner, it was held, that there was evidence to go to a jury of the wife's authority as to the latter goods (*m*). The father of an infant is not liable for goods supplied to the latter, except upon an express contract, or where one can be implied from circumstances (*n*). He is not liable even although he desert an infant child, where he had reasonable ground for supposing that the child was provided for (*o*).

It is usually a question of fact for the jury to decide to whom credit was given (*p*).

The plaintiff may in this as in other cases, waive a tort, and in some instances (*q*) treat the defendant, who has fraudulently possessed himself Waiver of tort.

(*f*) *George* v. *Claggett*, 7 T. R. 359. *Rabone* v. *Williams*, Ibid. 360; Str. 1182; B. N. P. 130. And see tit. VENDOR AND VENDEE.

(*g*) *Kymer* v. *Suvereropp*, 1 Camp. 109. *Speering* v. *Degrare*, 2 Vern. 643.

(*h*) *Precious* v. *Abel*, 1 Esp. C. 350. *Rich* v. *Coe*, Cowp. 636. *Waring* v. *Favene*, 1 Camp. 85.

(*i*) *Kymer* v. *Suvereropp*, 1 Camp. 109. *Speering* v. *Degrare*, 2 Vern. 643.

(*k*) *Paterson* v. *Gandasequi*, 15 East, 62. It was observed in argument, in that case, that there were many instances where the principal is not liable, as in the case of building contracts; and Lord Ellenborough cited the case of *Bramah* v. *Lord Abingdon*, as having been lately decided, where the defendant had contracted with a surveyor, who ordered goods from the plaintiff for the use of the defendant's house, and yet he was held not to be liable.

(*l*) *Kirby* v. *Banister*, 5 B. & Ad. 1069.

(*m*) *Fisher* v. *Lynn*, 4 N. & M. 559. See tit. HUSBAND AND WIFE.

(*n*) *Baker* v. *Keen*, 2 Starkie's C. 501. *Rolfe* v. *Abbott*, 6 C. & P. 286.

(*o*) *Urmston* v. *Newcomen*, 4 Ad. & Ell. 899; and see *Law* v. *Wilkin*, 6 Ad. & Ell. 718.

(*p*) *Leggatt* v. *Reed*, 1 Carr. C. 16. But where a tradesman makes out an account for goods sold to a particular person, it is deemed to be conclusive, unless it be shown by unequivocal evidence that credit was given to another. *Storr* v. *Scott*, 6 C. & P. 241. *Thompson* v. *Davenport*, 9 B. & C. 86. See *Eden* v. *Titchmarsh*, 1 A. & E. 691. The plaintiff dealt with Thomas Fox, the defendant; the defendant gave up the business to his son, Thomas Samuel Fox, who carried it on upon different premises, but dealt with the plaintiff under the name of Thomas Fox; he was known by the name of Samuel Fox. Parke, J. held that the defendant was not bound to give notice to the plaintiff of his having given up the business to his son, and that it was incumbent on the plaintiff to show, either that the son acted for the father by his authority, or that the father had done something to authorize that belief. *Beckwith* v. *Fox*, cor. Parke, J., York Summ. Ass. 1832. And see *Edwards* v. *Smith*, 12 Moore, 59.

(*q*) It is not in all cases where the party has converted the goods of another to his own use, that the tort may be waived and

Waiver of tort.

of the goods, as the purchaser. The defendant by fraud procured the plaintiff to sell goods to an insolvent, and took possession of them, and it was held that the defendant, upon an action of *assumpsit* brought to recover the value of the goods, could not set up the sale, because it had been fraudulently procured by him, and that the mere possession unaccounted for raised an *assumpsit* to pay (*r*); so if a father fraudulently and falsely represent that he is about to decline business in favour of his son, a minor, and thereby obtain possession of goods, of which he disposes, he is liable to the vendor as for goods sold to himself (*s*).

The vendor of cyder juice to be made on his premises, in his own vessels, lent to the vendee for the purpose, may recover their value on their being seized through the vendee's default for breach of the excise laws, as goods sold and delivered (*t*). So if goods be lent or be delivered on the terms of sale or return, and they are retained an unreasonable time (*u*). So where the consideration for the goods is not merely money, *e.g.* where it is to consist partly in the delivery of goods, yet if the purchaser refuse to perform his engagement, it seems that a contract to pay in money results (*x*).

But where the owner of property taken away by another waives the tort, and brings *assumpsit* for their value, he must prove a clear title to the property (*y*).

Special contract.

Where there is a special contract as to the time of payment for goods, the plaintiff may recover on the general count, when the time of credit has expired, and use the contract as evidence of the stipulated value (*z*). Where the vendee is to pay in three months, by bill at two months, the credit is for

the transaction changed into a contract for goods sold and delivered; but if the goods be converted into money, the plaintiff may waive the tort and recover the money. *Bennett* v. *Francis*, 2 B. & B. 554.

(*r*) *Hill* v. *Perrott*, 3 Taunt. 274. But see B. N. P. 130, where it is laid down, that if the defendant, by a corrupt agreement with the plaintiff's servant, obtain the plaintiff's goods at half price, which the servant is to have for his own use, no *assumpsit* lies, any more than it would against one who had stolen the goods; *tam. qu.* unless the action has actually merged in the felony. The defendant fraudulently induces the plaintiff to sell goods to *A.* who could not pay for them, and on a nominal re-sale by *A.* obtains the money; the plaintiff may, in an action for money had and received, recover the amount unpaid by *A.* *Abbotts* v. *Barry*, 2 B. & B. 269; and see *Bennett* v. *Francis*, 2 B. & P. 554; 4 Esp. C. 30. *Read* v. *Hutchinson*, 3 Camp, 352.

(*s*) Per Gibbs, C. J., *Biddle* v. *Levy*, 1 Starkie's C. 20.

(*t*) *Studdy* v. *Sanders*, 5 B. & C. 628.

(*u*) *Bianchi* v. *Nash*, 1 M. & W. 545. *Beverley* v. *Lincoln Gas Co.* 6 Ad. & Ell. 831. *Bayley* v. *Gouldsmith*, Peake's C. 56; *Coleman* v. *Gibson*, 1 Mo. & R. 168. And see *Stone* v. *Rogers*, 2 M. & W. 443. So where a musical snuff-box was lent, on the understanding that, if it was damaged, the defendant was to retain and pay for it. *Bianchi* v. *Nash*, 1 M. & W. 545.

(*x*) *Sheldon* v. *Cox*, 3 B. & C. 420. *Forsyth* v. *Jervis*, 1 Starkie's C. 437; *Ingram* v. *Shirley*, 1 Starkie's C. 185; and see *Hands* v. *Burton*, 9 East, 349. But in the case of *Harris* v. *Fowle*, cited 1 H. Bl. 287, on an agreement to pay for goods in money and buttons, Buller, J. held a special count to be necessary. See *Talver* v. *West*, Holt's C. 179.

(*y*) Per Abbott, L. C. J., in *Lee* v. *Shore*, 1 B. & C. 94. The plaintiff proved that certain spar had been removed by the defendant from land occupied 20 years by Bond as tenant from year to year to Hurd; the plaintiff had made an agreement in writing with Hurd for a lease of the spar, which agreement was not produced; the plaintiff proved that he had sold spar to several persons, who took such spar away, but no contract with the defendant was proved; it was left to the jury to say whether the plaintiff had proved any title to the spar, and they found for the defendant, and the Court afterwards held that there was no sufficient proof of title.

(*z*) *Mussen* v. *Price*, 4 East, 147; *Miller* v. *Shaw*, Ibid. 149. *Brooke* v. *White*, 1 N. R. 330. It seems to be now fully settled, that the defendant, under the plea of non-assumpsit, may object that the action has been brought before the expiration of the time of credit. *Broomfield* v. *Smith*, 1 M. & W. 542; *Webb* v. *Fairmaner*, 3 M. & W. 473; *Gardner* v. *Alexander*, 3 Dowl. P. C. 146. Although this has been doubted, and the case of *Edmunds*

five months, and the vendee cannot maintain his action after the expiration of three months, although the vendee has neglected to give the bill (*a*). But the vendor cannot recover in *assumpsit* before the time of credit has expired, although the defendant was guilty of such a fraud as would have entitled the plaintiff to recover in trover (*b*). Special contract. Time of payment

Where a bill given for goods is dishonoured, the vendor may sue immediately (*c*), provided he retain the bill in his own hands (*d*).

Where goods are to be paid for by a bill at two months, and the vendor drawing upon the vendee, the latter refuses to accept, it seems that the vendor cannot bring his action for goods sold and delivered till the expiration of the two months (*e*). Upon the sale of goods at six or nine months' credit, the vendee, by not paying at the end of six months, makes his election to take credit for the nine, and cannot be sued till the nine have expired (*f*). The plaintiff may show by the memorandum upon the record, that the action was commenced after the cause of action accrued.

If from the contract, as compared with the memorandum on the record, it appear that the credit had not expired at the commencement of the suit, as evidenced by the memorandum (*g*), which is general, the plaintiff may, by the production of the writ, show that the action was commenced after the first day of the term to which the memorandum relates; but if the defendant produces the writ to show that the term of credit had not expired at the commencement of the action, the plaintiff may resort to the special memorandum on the record (*h*); for he may consider the filing the declaration as the commencement of the action.

Where there is a contract to deliver different parcels of goods within a specified time, the vendor cannot recover for part delivered before the expiration of the time; for if he do not complete his contract the vendee may return the part delivered; but if the vendee retain the part delivered after failure by the vendor to complete his contract, the latter may recover the value of the part delivered (*i*).

2dly. It is essential to prove either an actual or a constructive delivery (*k*) of the goods; the plaintiff must prove that he has either delivered the goods, or that he has enabled the defendant to remove them (*l*). Delivery.

v. *Harris*, 2 Ad. & Ell. 414, was decided to the contrary. In the case of *Webb* v. *Fairmaner*, it was held, that in calculating the credit, the day of sale must be excluded.

(*a*) *Mussen* v. *Price*, 4 East, 147. *Miller* v. *Shaw*, Ibid. 149. See *Dutton* v. *Solomonson*, 3 B. & P. 582. *Lee* v. *Risdon*, 2 Marsh. 495.

(*b*) *Ferguson* v. *Carrington*, 9 B. & C. 59. And see *De Symmons* v. *Minchwick*, 1 Esp. C. 430. *Read* v. *Hutchinson*, 3 Camp. 352. *Strutt* v. *Smith*, 1 C. M. & R. 312.

(*c*) *Hickling* v. *Hardy*, 7 Taunt. 312. *Mussen* v. *Price*, 4 East, 151. *Goodwin* v. *Coates*, 1 Mo. & R. 221.

(*d*) *Kearslake* v. *Morgan*, 5 T. R. 513. *Burden* v. *Halton*, 4 Bing. 455.

(*e*) *Dutton* v. *Solomonson*, 3 B. & P. 582.

(*f*) *Price* v. *Nixon*, 5 Taunt. 338. *Helps* v. *Winterbottom*, 2 B. & Ad. 431. Here the option was given absolutely to the vendee; but where goods were sold at three months' credit, the vendee agreeing to take the vendee's bill at the end of the three months, if he wished for further time, and at the end of the three months the vendee did not give the bill, it was held that the vendor might proceed immediately. *Nickson* v. *Jepson*, 2 Starkie's C. 227, cor. Lord Ellenborough.

(*g*) *i. e.* in K. B. by bill, where the memorandum is intitled of the term in which the plaintiff declares.

(*h*) *Swancott* v. *Westgarth*, 4 East, 75. And see tit. TIME, and B. N. B. 127, and tit. JUSTICES.

(*i*) *Oxendale* v. *Wetherell*, 9 B. & C. 386; *Walker* v. *Dixon*, 2 Starkie's C. 283; *Shipton* v. *Casson*, 5 B. & C. 383.

(*k*) It seems that this form of action is

(*l*) *Smith* v. *Chance*, 2 B. & A. 753. See the preceeding note.

Proof of delivery.

Proof that the vendor has recovered the value of the goods in an action against the carrier, is conclusive evidence of delivery (*m*).

Where the defendant, who had bought a stack of hay from the plaintiff, was prevented by a third person from removing it on account of an omission on the part of the plaintiff, it was held that the plaintiff could not recover (*n*). And where *A.* agreed to sell goods to *B.*, and earnest was paid, and the goods were packed in cloths belonging to *B.*, but deposited on the premises of *A.* till *B.* should send for them, but *A.* declared that they should not be removed until he was paid, it was held to be no delivery to *B.* (*o*).

A delivery to some person unknown, at a wharf, is not sufficient evidence of a delivery to bind the vendee, without showing a delivery to the wharfinger, or his agent, or that the goods were booked, or receipt taken, or that the goods were delivered in such a way as to render the wharfinger liable in case of loss (*p*).

Where the goods are of a moveable nature it is necessary to prove a delivery or tender previous to the action, or the vendee must have been placed in a situation to take possession of them (*q*). Where the vendee of goods directs them to be sent by a particular carrier, a delivery to the carrier is a delivery to the vendee (*r*). And even where the vendee directs goods to be sent generally, without mentioning any particular mode of conveyance, and the vendor sends them by the best practicable conveyance, it seems that a delivery to the carrier is a delivery to the vendee (*s*). Where the vendee at Aberystwith gave an order for goods to the plaintiff in London, but nothing was said about carriage, it was held that it was to be presumed that they were to be sent in the most usual and convenient way (*t*); and therefore that a delivery to a carrier in London was a delivery to the defendant there. Proof that goods were left in an inn-yard from which the carrier set out is not evidence of a delivery to the carrier (*u*). Where the goods have been delivered to a third person by order of the defendant the buyer, the evidence will support an allegation of delivery to the defendant; for a delivery to his agent or appointee is a delivery to himself (*x*). Where the defendant ordered goods, and directed them to be delivered to Wood, his agent, it was held at *Nisi Prius* that a written

not maintainable unless there has been such a delivery as would constitute an acceptance within the Statute of Frauds. Where goods were made to order, and part were delivered, it was held that an action for goods sold and delivered was not maintainable as to the residue. *Thompson* v. *Maceroni*, 3 B. & C. 1.

(*m*) *Groning* v. *Mendham*, 1 Starkie's C. 299.

(*n*) *Smith* v. *Chance*, 2 B. & A. 753.

(*o*) *Goodall* v. *Skelton*, 2 H. B. 316. See *Simmons* v. *Swift*, 5 B. & C. 857; So in *Boulter* v. *Arnott*, 1 C. & M. 333; where goods had been packed in boxes of the vendee and for him, but remained at his request on the premises of the vendor.

(*p*) *Buckman* v. *Levi*, 3 Camp. 414.

(*q*) Per Holroyd, J., *Smith* v. *Chance*, K. B. Trin. 1819. MS. 2 B. & A. 753. See VENDOR AND VENDEE, and *supra*, FRAUDS, STAT. OF.

(*r*) *Dawes* v. *Peck*, 8 T. R. 330. *Dutton*, v. *Solomonson*, 3 B. & P. 582.

(*s*) *Anderson* v. *Hodgson*, 5 Price, 630. *Paterson* v. *Gandasequi*, 15 East, 62; Gilb. L. E. 189; B. N. P. 130.

(*t*) *Copeland* v. *Lewis*, 2 Starkie's C. 33, cor. Lord Ellenborough.

(*u*) *Selway* v. *Holloway*, Lord Raym. 46. And *qu.* whether a mere delivery to a carrier on an oral contract be sufficient, where the goods have not been received by the vendee. See FRAUDS, STAT. OF, *supra*.

(*x*) *Bull* v. *Sibbs*, 8 T. R. 327. But see *Dutton* v. *Solomonson*, 3 B. & P. 582, where goods having been sold to be paid for by bill at two months, and the vendor drawing on the vendee, the latter refused to accept, it seems to have been held that the vendor could not recover for goods sold and delivered before the expiration of the two months. But it is not unusual to allege specifically a delivery to such third person.

acknowledgment by Wood of the receipt of the goods was evidence of a delivery (*y*). Proof of delivery.

It has already been seen, that entries made in the hand-writing of an agent usually employed in the delivery of goods, and made in the ordinary course of business, of the delivery of particular goods to the defendant, are evidence of the fact after his death, provided it be shown that such entries were contemporary with the supposed deliveries (*z*).

Under a count for goods sold and delivered, the plaintiff cannot recover for the sale of fixtures to a house (*a*), nor for the sale of standing trees (*b*); but the plaintiff may recover for trees which the defendant has purchased, felled, and carried away (*c*). An admission by the defendant that so much was to be paid for the sale of standing trees, made after the trees had been felled and carried away by the defendant, will support the count upon an account stated (*d*).

3. *Value.*—Where goods are sold without any stipulation as to price, the plaintiff must prove their value at the time of delivery (*e*). If the plaintiff prove the delivery of goods, but give no evidence as to value, it will be presumed that the articles were of the lowest price of goods of that description (*f*). Where the plaintiff sold a bowsprit to the defendant, which at the time of the delivery appeared to be good and perfect, and after a voyage to Madeira, upon being cut up was found to be rotten, it was held, that since there was *no fraud*, and the defendant had an opportunity of inspecting the bowsprit, the plaintiff was entitled to recover the apparent value of the article at the time of delivery (*g*). Value.

If a machine be ordered at a stipulated price, and the vendor introduce materials more costly than those contracted for, the purchaser is not bound either to return the article, or pay more than the stipulated price (*h*). Some doubt has occurred on the question, whether the defendant in this action may adduce evidence in reduction of the *stipulated* value of the article sold; where there has been no such stipulation, the parties must be presumed to have contracted upon a *quantum valebant* for goods, or *quantum meruit* for labour, and the plaintiff must prove his case accordingly (*i*).

Where there has been a special contract as to the nature, quality and price of goods, and those which have been delivered do not correspond with the contract, it is clear that the vendee has a right to repudiate goods so

(*y*) *Biggs* v. *Lawrenee*, 3 T. R. 454. But *qu.* and vide *supra*, 57.

(*z*) *Supra*, Vol. I. tit. PRIVATE ENTRIES. *Price* v. *Ld. Torrington*, 1 Salk. 285; 2 Ld. Raym. 875. *Pitman* v. *Maddox*, Ld. Raym. 732; 2 Salk. 690.

(*a*) *Lee* v. *Risdon*, 7 Taunt. 188. *Nutt* v. *Butler*, 5 Esp. C. 176. *Horn* v. *Baker*, 9 East, 215. But it was held in a late case, that a declaration in trespass for goods, chattels and effects, was supported by evidence of taking fixtures under a distress for rent. *Pitt* v. *Adam*, K. B. Hil. Term, 1 Geo. 4.

(*b*) *Knowles* v. *Michel*, 13 East, 249.

(*c*) *Bragg* v. *Cole*, 6 Moore, 114. The value of growing crops may be recovered under a count for crops bargained and sold. *Parker* v. *Staniland*, 11 East, 362. See also *Poulter* v. *Killingbeck*, 1 B. & P. 397, and see *Mayfield* v. *Wadsley*, 3 B. & C. 364, as to crops to be taken by an incoming from an outgoing tenant.

(*d*) Ibid. and *Teale* v. *Auty*, 2 B. & B. 99.

(*e*) And the defendant is of course entitled to dispute the value. *Basten* v. *Butter*, 7 East, 479; *Farnsworth* v. *Garrard*, 1 Camp. 48; and this he may do under the plea of the general issue, since the new rules. *Cousins* v. *Padden*, 2 C. M. & R. 547.

(*f*) *Clunns* v. *Pezzy*, 1 Camp. 8. *Hayden* v. *Hayward*, 1 Camp. 180.

(*g*) *Bluett* v. *Osborne*, 1 Starkie's C. 384, cor. Lord Ellenborough; and afterwards the Court of K. B. refused a rule *nisi* for a new trial.

(*h*) *Wilmot* v. *Smith*, 3 C. & P. 455.

(*i*) See *Basten* v. *Butter*, 7 East, 479; and the observations of Grose and Lawrence, Js.

Value.

delivered *in toto*; for having contracted for one thing, the vendor cannot substitute a contract for something else; and therefore, if he return the goods, or give notice to the vendor to take them back, it is clear that the vendor cannot recover, for he has not done that which is the consideration for the defendant's promise to pay (*j*), and the consideration fails. If, however, the vendee in such case choose to *keep* the goods, he cannot reduce the special contract to a mere *quantum valebant*; he may either wholly adopt, or wholly renounce, the contract, but he cannot, it should seem, adopt it in part, by keeping the goods under the contract, and reject it in part, by refusing to pay the stipulated price (*k*), without giving the vendor an opportunity, which in some instances might still be open to him, of performing his contract by the delivery of other goods within the stipulated time. Besides, the neglect to return them when it was in his power to do so, affords a strong presumption that the goods correspond with the contract.

Where the contract cannot be rescinded.

Another predicament still remains; the goods may have been used before their inferiority has been discovered, or other circumstances may have rendered it impracticable, or at least inconvenient, for the vendor to rescind the contract *in toto* (*l*). In such a case it seems to have been the practice formerly to allow the vendor to recover the stipulated price, and the vendee recovered, by a cross-action, damages for the breach of contract (*m*).

(*j*) See the observations of Lawrence and Le Blanc, Js., 7 East, 484; and *Ellis* v. *Hamlin*, 3 Taunt. 55. *Grimaldi* v. *White*, 4 Esp. C. 95. *Fisher* v. *Samuda*, 1 Camp. 190. *Groning* v. *Mendham*, 1 Starkie's C. 257. *Obell* v. *Smith*, ib. 107. *Pereival* v. *Blake*, 2 C. & P. 514; and *supra*, 137.

(*k*) Where an artist exhibits specimens of his art and skill as a painter, and affixes a certain price to them, and a person is induced to order a picture from an approbation of such specimens, and the execution of it, when delivered, is inferior to the specimen exhibited, he has a right to refuse to receive it, or return it as not being conformable to that performance which the painter undertook to execute; but if he mean to avail himself of that objection, he must return the picture; he must rescind the contract totally. Having received it under a specific contract, he must either abide by it, or rescind it *in toto*, by returning the thing sold; he cannot keep the article received under a specific contract, and for a certain price, and pay for it at a less price than that charged in the contract. Per Lawrence, J., *Grimaldi* v. *White*, 4 Esp. C. 95.

In the case of *Fisher* v. *Samuda* (1 Camp. 190), the seller had supplied the buyer with beer, in the month of July, for the purpose of being exported to Gibraltar; the buyer exposed the casks containing the beer in an open court-yard, and gave no notice to the seller to take it back till the month of December: Lord Ellenborough held that it was the duty of the purchaser of any commodity, immediately on discovering that it was not according to order, and unfit for the purpose for which it was intended, to return it to the vendor, or give him notice to take it back; and that, under the circumstances of the present case, it was to be presumed that the purchaser had acquiesced in the due performance of the contract. And it was held, in consequence, that the purchaser, after having suffered the vendor to recover the price without making any defence, could not maintain a cross-action against him founded on the nonperformance of the contract.

See also *Groning* v. *Mendham* (1 Starkie's C. 257), where, in an action for the amount of a quantity of clover-seed, the defendant insisted that the goods did not answer the order, which was for seeds of the finest quality; but was not permitted to go into such evidence, for want of proof of notice to the plaintiff of his intention to rescind the contract, on discovering the inferiority of the article.

(*l*) The same observations apply to cases of work and labour; as, where a wall or house has been built on the defendant's premises, and the parties cannot be placed in *statu quo* by a return of the subject-matter of the contract.

(*m*) *Broom* v. *Davis*, Taunt. Lent Ass. cor. Buller, J. cited 7 East, 480, in the note. *Assumpsit*, for erecting a booth on Bath race-ground. The booth was to be built of certain dimensions for the sum of twenty guineas, five of which had been paid. The defendant proved that the booth fell down in the middle of the races, owing to bad materials and bad workmanship; Buller, J. ruled that this was no defence to the action, especially as a particular sum was specified, and part of it paid. It does not appear that in the

But according to the later and more convenient practice, the vendee in such a case is allowed, in an action for the price, to give evidence of the inferiority of the goods in reduction of damages, and the plaintiff who has broken his contract is not entitled to recover more than the value of the benefit which the defendant has actually derived from the goods; and where the latter has derived no benefit, the plaintiff cannot recover at all. For in *strictness*, the plaintiff, who has not performed that which he engaged for, is not entitled to recover at all; if he contracts to build a dwelling-house, he is not entitled to recover for building a stable (*n*). But still, if the defendant be benefited to a certain extent, and does not repudiate the contract *in toto*, it seems to be a rule of policy and convenience, as well as of equity and justice, that the plaintiff should be allowed to recover to the extent of the benefit derived by the defendant, and no further; it would be hard upon the plaintiff to preclude him from recovering at all, because he had failed as to part of his entire undertaking (*o*); it would be equally so upon the defendant to compel him to pay the whole sum, when he had received but a partial benefit, and to oblige him to seek his remedy by a cross-action. Where the contract cannot be rescinded.

The general inference seems to be this, that where there is a specific bargain as to price, but no warranty, and goods inferior in value to those contracted for have been delivered, the vendee must, where it is practicable to do so without prejudice, return the goods, and thus rescind the contract *in toto*, and if he does not, must be taken to have acquiesced in the performance of the contract (*p*); but that, if from the nature of the case it be no longer practicable so to rescind the contract by returning the goods, the defendant may either by proper notice renounce the contract altogether, or if he derive any benefit from it, may reduce the plaintiff's claim on the *quantum meruit* for labour, or *quantum valebant* for goods, to the amount of the benefit actually derived (*q*). Where the defendant means to deny the General rule.

above case the defendant had given any notice to the plaintiff of his intention to dispute the value of the work. The case of *Morgan* v. *Richardson* has also been cited in support of the above doctrine, but there a bill of exchange had been given for the amount of the work, and money had been paid into court on the count upon the bill.

(*n*) In *Basten* v. *Butter*, 7 East, 484, Lawrence, J. observed, "if the works stipulated for at a certain price were not properly executed, the plaintiff would not have done that which he engaged to do, the doing of which would be the consideration for the defendant's promise to pay, and the foundation on which his claim to the price stipulated for would rest." And Le Blanc, J. observed, "in either case (*i.e.* whether a specific sum be or be not stipulated for) the plaintiff must be prepared to show that his work was properly done; if a man contracted with another to build him a house for a certain sum, it surely would not be sufficient for the plaintiff to show that he had put together such a quantity of bricks and timber in the shape of a house, if it could be shown that it fell down the next day, but he ought to be prepared to show that he had done the stipulated work according to his contract; and it is open to the defendant to prove that it was executed in such a manner as to be of no value at all to him." In *Allen* v. *Cameron*, 1 C. & M. 832, where the agreement was to pay 200*l.* for young trees for a plantation, to be kept in order, the Court held, that if trees of an inferior quality were sent, or were not kept in order, the purchaser was entitled to a reduction.

(*o*) *Supra*, 137.

(*p*) *Supra*, 876; and *Hunt* v. *Silk*, 5 East, 449. In an action for the price of a threshing-machine, the defence was, that it did not properly answer the purpose, and was of no value, but as the defendant had never returned it nor given notice to the plaintiff to take it away, and it had been kept for several years, it was held that he had thereby waived all objection to its goodness, and was liable to pay for it. *Cash* v. *Giles*, 3 C. & P. 407.

(*q*) In the case of *Farnsworth* v. *Garrard*, 1 Camp. 36, where the plaintiff had built a wall for the defendant, and declared on a *quantum meruit* for work and labour, and *quantum valebant* for materials, the defendant was allowed to prove how ill the work had been executed, and Lord Ellenborough said, "This action is founded on

General rule.

goodness or value of the work or materials, it is usual and proper to give notice of his intention to the plaintiff. Where, however, the plaintiff declares on a *quantum meruit*, and there has been no stipulation as to price, such notice is clearly unnecessary; the defence can be no surprise upon him, since he must come prepared to show the value of the work done (*r*). Where a particular price has been agreed for, the plaintiff may have greater reason to complain of surprise if evidence of this kind be insisted upon, for otherwise he may not be prepared to prove more than the agreement and the work done, and therefore such notice should be given (*s*).

Notice of disputing the value.

In case of warranty.

Where the article of sale is *warranted*, it seems that the vendee is entitled to prove the inferiority, and the breach of the warranty, in diminution of the damages, although a specific price has been agreed for. This is not open to the objection, that the defendant ought to have rescinded the contract *in toto*, for from the very nature of the contract of warranty, he has a right to keep the goods, and recover damages for the breach of warranty (*t*);

a claim for meritorious service; the plaintiff is to recover what he deserves. It is therefore to be considered how much he deserves; or if he deserves anything. If the defendant has derived no benefit from his services, he deserves nothing, and there must be a verdict against him. There was formerly considerable doubt upon this point; the late Mr. J. Buller thought (and I, in deference to so great an authority, have at times ruled the same way) that in cases of this kind a cross-action for the negligence was necessary; and that if the work was done, the plaintiff must recover for it. I have since had a conference with the Judges on the subject, and I now consider this to be the correct rule,—that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived (though not to the extent expected), this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. Here, then, has there been any benefit, and to what amount? If the wall will not stand, and must be taken down, the defendant has derived no benefit from the plaintiff's service, but has suffered an injury. In that case, he might have given him notice to remove the materials; retaining them, he is not likely to be in a better situation than if the plaintiff had never placed them there; but if it will now cost him less to rebuild the wall than it would have done without those materials, he has some benefit, and must pay some damages." And in the subsequent case of *Okell* v. *Smith*, 1 Starkie's C. 107, where the action was brought for the price of pans, to be made for the purpose of the defendant's manufactory, of the best materials, at a stipulated price, Bayley, J. held that if the defendants, after giving them a reasonable trial, found them insufficient for the purposes for which they were intended, and gave notice to that effect to the plaintiff, he was bound to take them away, and they remained at his risk; but that if no notice was given, but the defendants retained the pans, they were liable to pay as much as the materials were worth; and see the observations of the Court in *Street* v. *Blay*, 2 B. & Ad. 463.

(*r*) *Basten* v. *Butter*, 7 East, 479. And that used to be the practice in Mr. J. Buller's time. Per Lord Ellenborough, Ibid.

(*s*) Ibid.

(*t*) *Fielder* v. *Starkin*, 1 H. B. 17. *Dr. Compton's Case*, cited by Buller, J., 1 T. R. 136. *Buchanan* v. *Parnshaw*, 2 T. R. 745. There the horse was warranted sound, and six years old, and by the conditions of sale was to be deemed sound if not returned within two days; the buyer, ten days after the sale, discovered that he was twelve years old, and offered to return him, but the seller refused to take him, and the buyer sold him, and recovered on the warranty. In the case of *Curtis* v. *Hannay*, 3 Esp. C. 83, Lord Eldon said, "I take it to be a clear law, that if a person purchases a horse, which is warranted, and which afterwards turns out to have been unsound at the time of the warranty, the buyer may, if he pleases, keep the horse, and bring an action on the warranty, in which case he will have a right to recover the difference between the value of a sound horse, and one with such defects as existed at the time of the warranty, or he may return the horse, and bring an action to recover the full money paid; but in the latter case, the seller has a right to expect that the horse shall be returned to him in the *same state* as when sold, and not by any means diminished in value; for if a person keeps a warranted article for any length of time after discovering its defects, and when he returns it, it is in a worse state than it would have been if returned immediately after such discovery, I think the party can have no defence to an action for the price of the article, on the ground of non-compliance with the warranty, but must be left to his action on the warranty to recover the dif-

and therefore it is just, as well as convenient, that he should be permitted to prove the breach of warranty in the first instance, in diminution of damages (*z*).

Notice in case of warranty.

But although in the case of an express warranty, proof of notice to the plaintiff of the breach of warranty is unnecessary, yet the omission to give notice will furnish a strong presumption against the buyer, that the horse or other article had not at the time of sale the defect complained of, and will make the proof on his part much more difficult (*a*). Lord Ellenborough observed, that where an objection is made to an article of sale, common justice and honesty require that it should be returned at the earliest period, and before the commodity has been so changed as to render it impossible to ascertain by proper tests whether it is of the quality contracted for (*b*).

ference." See also *Grimaldi* v. *White*, 4 Esp. C. 95, and *Hunt* v. *Silk*, 5 East, 452, where Lord Ellenborough observed, "that where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties placed in *statu quo*." In the late case of *Street* v. *Blay*, K. B. Trin. T. 1831; 2 B. & Ad. 456, the Court of King's Bench held, after great consideration, and contrary to the dictum of Lord Eldon in *Curtis* v. *Hannay*, that the vendee of a warranted horse could not, in the absence of fraud, return the horse for breach of the warranty, and recover the price. *Weston* v. *Downes*, 1 Doug. 23; *Tower* v. *Barret*, 1 T. R. 133; *Payne* v. *Whale*, 7 East, 274. *Gompertz* v. *Denton*, 1 C. & M. 207. *Edwards* v. *Chapman*, 1 M. & W. 231. In the case of an *implied warranty* the defendant may, under the general issue, show a breach of warranty. *Elliott* v. *Thomas*, York Sum. Ass. 1837, cor. Parke, B. An order was sent for two parcels of steel, and it was held to be competent to show that the steel was of too hard a quality for welding, for the purpose of making steel-edged tools. Held also, that it was a question for the jury whether 13 lbs. of this steel, consumed in making experiments as to quality, was more than was necessary for the purpose; it was also left to the jury to say whether the use of more was an acceptance of the whole, or at all events of the part unnecessarily used; the learned Baron saying that he should reserve the question, whether the defendant ought not at all events to have paid into Court the value of the steel used; the jury found more used than was necessary, but also that there was no part acceptance.

(*z*) In *Cormack* v. *Gillis* (cited in *Basten* v. *Butter*, 7 East, 480), in an action for the value of a quantity of seeds sold under a warranty, Buller, J. held that the defendant was not at liberty to show that the seeds were not of the sort agreed for, and that the plaintiff was entitled to recover the whole price agreed for; but upon a cross-action brought, Lord Kenyon intimated that the non-compliance with the warranty ought to have been received in the former action in reduction of damages, or to show that the seeds were of no value. Where the plaintiff sold a horse to the defendant for twelve guineas, which he warranted sound, and paid three guineas, and in fact the horse was unsound, and not worth more than 1*l.* 10*s.*, Lord Kenyon nonsuited the plaintiff. *King* v. *Boston*, Middlesex Sitt. after Easter, 1789. It is competent to a vendor to show that seed does not correspond with a warranty under which they were sold, although on being informed of the fact he uses part and sells the residue. *Poulton* v. *Lattimore*, 9 B. & C. 259. Note, in this case it did not appear that the seeds were of any value, and the defendant had a verdict. And see *Patteshall* v. *Tranter*, 3 Ad. & Ell. 103. Where the plaintiff had, upon the sale of two pictures, represented them as originals of a great master, but they were only fine copies, held that as the defendant had never returned them, the plaintiff was entitled to recover so much as the jury should think them worth. *Lowe* v. *Tucker*, 4 C. & P. 15. Under the new rules of pleading, the defendant having paid money into court, may (the plaintiff having replied damages beyond that sum) show that the articles sent (stores) were defective, and insufficient for the object intended. *Downing* v. *Nott*, cor. Abinger, Liv. Sum. Ass. 1835.

(*a*) See Lord Loughborough's observations in *Fielder* v. *Starkin*, 1 H. B. 19. This was an action on a warranty of a mare; the plaintiff had kept her three months after the discovery of her unsoundness, and physicked her, and then sold her.

(*b*) *Hopkins* v. *Appleby*, 1 Starkie's C. 477; which was an action for a quantity of barilla, warranted to be of the best quality. The defendants after discovering that it wanted half its proper strength, went on to use it till the whole had been consumed in eight successive boilings of soap, without giving any notice. The plaintiffs recovered their whole demand.

The giving a bill of exchange in payment of goods has been held to preclude the defendant from questioning the reasonableness of the demand (*c*).

In case of part delivery.

Where several articles are ordered from a tradesman at the same time, but at distinct prices, the buyer may consider the whole as one entire contract, and refuse to receive part without the rest; but if he receive part, he is precluded from this objection, and must pay for as much as is furnished, according to the contract (*d*).

If a vendee omit to take away goods within a reasonable time, the vendor may recover for warehouse-room (*e*); or may recover damages for not removing them (*f*), where he is prejudiced by the delay.

Trover by vendor on rescinded contract.

After a contract of sale, and delivery to the agent of the vendee, the sale may be rescinded by the assent of both parties (*g*); and therefore, where goods had been bought and delivered, and sent to the vendee's packer, and the vendee wrote to his agent to countermand all orders which had been given, and to re-deliver all goods which had been already delivered, and the vendors notified their assent to take back the goods, it was held that they could not be attached by a third person in the hands of the packer (*h*). But where the vendor proceeded to attach the goods in the hands of the packer, it was considered to be an election by him not to rescind the contract, and the vendee having become a bankrupt, the vendor, it was held, could not recover from the packer in trover (*i*).

Defence by vendee. Fraud.

It is, in general, a good defence by a vendee (*k*), to an action for breach of contract, that the vendor was guilty of fraud in the sale; as, that the plaintiff, without notice, employed puffers at a sale by auction to enhance the price by pretended competition, and that there was no real bidder but the defendant (*l*).

(*c*) *Knox* v. *Wholly*, 1 Esp. C. 159.

(*d*) *Champion* v. *Short*, 1 Camp. 52. Having received part, the delivery of the remainder is not a condition precedent to the payment of another portion which is delivered. *Boon* v. *Eyre*, 1 H. B. 254.

(*e*) 3 Camp. 426.

(*f*) *Greares* v. *Ashlin*, 3 Camp. 426. It has been said that he cannot re-sell them. Ibid. Noy's Max. 87, 88. *Alexander* v. *Comber*, 1 H. B. 20. But see *Langfort* v. *Tiler*, Salk. 212.

(*g*) 5 T. R. 211.

(*h*) *Salte* v. *Field*, 5 T. R. 211.

(*i*) *Smith* v. *Field*, 5 T. R. 402.

(*k*) See in general as to the defence under the general issue, tit. ASSUMPSIT—TROVER and RULES. It seems that in general the failure on the part of the plaintiff to prove accordance with sample and other matters in the nature of conditions precedent, are evidence under the plea of the general issue to an action for goods sold and delivered. See *Cousins* v. *Paddon*, 2 C. M. & R. 547; *Grounsell* v. *Lamb*, 1 M. & W. 352.

(*l*) *Howard* v. *Castle*, 6 T. R. 642. *Bexwell* v. *Christie*, Cowp. 695; 3 Ves. jun. 625. But it seems that the ground of the decision was, that there was no real bidder. (Per Lord Rosslyn, in *Conolly* v. *Parsons*, 3 Ves. jun. 625, n.) And it is said, that if there be real bidders at a sale, it must be supported, although the bidding immediately previous to that of the purchase was fictitious. *Smith* v. *Clarke*, 12 Ves. 477. But it seems to be clear that the employment of a single person to bid, without notice, although he be authorized to bid up to a certain sum only, will vitiate the sale. See *Wheeler* v. *Collier*, 1 M. & M. C. 123. At a sale under an extent, with a bidding reserved by the conditions on the part of the Crown, a puffer appeared to have been employed by the auctioneer, the sale was declared to be vitiated, and held that the purchaser, as against the Crown, seeking to enforce the contract, was entitled to say it was fraudulent, although he appeared to have bid by collusion with the tenant, in order to obtain an abstract of the title. *R.* v. *Marsh*, 3 Y. & J. 331. A clandestine bidding by the vendor's servant on his behalf, was held to be a fraud upon the purchaser which vitiated the sale. *Crowder* v. *Austin*, 11 Moore, 283; 3 Bing. 368. And see *Howard* v. *Castle*, 6 T. R. 634. Upon the sale of a reversionary sum of money, subject to the contingency of the party, a female, on whose death the reversion was expectant, leaving children, she was represented as being of the age of 66, being in fact only 64, it was held to be a fatal mis-

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And although where notice is given that a bidder will be employed on the part of the vendor, or where, even without notice, a bidder is employed, not with a view of enhancing the price generally, but to prevent a sale at an under-value, there is no fraud (*m*), yet if the advertisement of sale stated that the sale was to be *without reserve*, it would be void if any person were to be employed to bid (*n*).

Where the purchaser deterred others from bidding, by stating that he had a claim against the owner, and had been ill used by him, the sale was held to be void (*o*).

Where a bill is given for the price of goods, a total, or even partial, failure, from the fraud of the vendor, is a bar to the action (*p*), provided the vendee has repudiated the contract (*q*).

So, although the general rule of law be "*caveat emptor*," yet if the vendor of property give a false description of it, the vendee may rescind the contract; as, if an estate is stated to be but one mile from a borough town, and it turns out to be between three and four (*r*).

But where it was a condition of sale that a material error should not vitiate the sale, but should be compensated for, it was held that a misde-

description, and the learned judge was clearly of opinion that the question, whether the misrepresentation was wilful or not, was immaterial, the difference of age altering the probability of the further contingency of leaving children, and not being capable of being estimated, or compensated for in respect of the difference in value between the thing described and the thing sold, the purchaser was therefore entitled to rescind the contract. *Sherwood* v. *Robins*, 1 M. & M. 194; and 3 C. & P. 339. Where land sold by assignees was represented as "uncommonly rich water-meadow," whereas it appeared to be but very imperfectly watered, but there was no evidence of fraud or intentional misrepresentation on the part of the vendors; held that it was not sufficient to avoid the sale. *Scott* v. *Hanson*, 1 Russ. & M. 128. Generality and vagueness of description in court rolls, render the correspondence as to quantity immaterial; and it is sufficient for a vendor of copyholds to show that the premises have continually passed and been enjoyed by the description contained in the court rolls. *Long* v. *Collier*, 4 Russ. 267. A contract for the purchase of an estate, as "containing by estimation —— acres," contained a stipulation that any excess or deficiency should not vacate it; held that it could not cover a large deficiency, as construing "statute acres" to mean customary acres, which were much less; and that the purchaser had not precluded himself by entering into possession, and exercising acts of ownership on the faith of the estate being statute acres. *Portman* v. *Mill*, 2 Russ. 570. Where assignees sold a piece of land, to be taken with all faults, and upon being asked by the purchaser whether any rent had been paid, they replied that none had ever been paid by the bankrupt or the person under whom he claimed, the latter representation being untrue; in an action to recover back the purchase-money, it was held that it was properly left to the jury to say whether the concealment was fraudulent, and that the mere non-communication was not sufficient to avoid the contract. *Early* v. *Garrett*, 9 B. & C. 928. Where fen lands, which by a public Act were subject to embanking and draining taxes, were sold, but the particular of sale did not mention those taxes, there being no misrepresentation, a specific performance was decreed without compensation. *Barraud* v. *Archer*, 2 Sim. 433. It is considered as a general rule that the right of tithe is so material to the enjoyment of the land as to have formed an inducement to the purchase, that a party who has contracted for an estate described to be tithe-free, shall not be compelled to complete his contract if the estate turn out not to be so; but there is an exception to the rule, when it is clear that it formed no inducement for the defendant's refusal to complete the bargain. *Head* v. *Diggon*, 3 M. & R. 97.

(*m*) *Smith* v. *Clarke*, 12 Ves. 477.

(*n*) *Meadows* v. *Tanner*, 5 Madd. 34.

(*o*) *Fuller* v. *Abrahams*, 3 B. & B. 116.

(*p*) *Lewis* v. *Cosgrave*, 2 Taunt. 2; *supra*, 388.

(*q*) Ibid. *Secus*, where he affirms it by retaining part of the consideration. *Archer* v. *Bamford*, 3 Starkie's C. 175.

(*r*) *Duke of Norfolk* v. *Worthy*, 1 Camp. 337. *Fenton* v. *Brown*, 14 Ves. jun. 144. *Trower* v. *Newsome*, 3 Mer. 704. And see *Vernon* v. *Keys*, 12 East, 637. In the case of *Flint* v. *Booth*, (5 M. & S. 120; 1 Bing. N. C. 370,) the law with respect to misdescription is summed up. *See* App. 1213.

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scription, obvious on a view of the premises, would not release the vendee, unless it were wilful and designed (*s*).

So where the estate was described to have lately undergone a thorough repair, whereas it was in a complete state of ruin, and ordered to be pulled down by the district surveyor (*t*).

If an annuity be subject to redemption, the purchaser is not bound to complete his contract, if the auctioneer do not describe it as redeemable (*u*).

Where the estate is described to contain a specified number of acres, it seems, in the first place, that this must be understood of statute, and not of customary, measure, unless they be so described (*x*); and that it would be a good defence at law to show that the estate did not contain the stipulated quantity of land. But if the estate be described as containing so many acres *by estimation*, be the same *more or less*, or by words to that effect, it seems that a small variance would not be material in the absence of fraud (*y*).

So it is fraudulent to give such a false description of the goods in the catalogue of sale, as is likely to enhance the price, as by falsely describing them in the catalogue to be "the property of a gentleman deceased, and sold by order of his executor" (*z*).

If a vendor fraudulently conceal that which he ought to communicate, it will render the sale null and void; and there seems, in such cases, to be no distinction between an active and a passive communication (*a*). But to have that effect the concealment must be fraudulent, and whether fraudulent or not is usually a question for the jury (*b*).

(*s*) *Wright* v. *Wilson*. 1 Mo. & R. 207.

(*t*) *Loyes* v. *Rutherford*, K. B. May, 1809; Sugden's Treatise, 273. But see *Belworth* v. *Hassell*, 4 Camp. 140.

(*u*) *Coverley* v. *Burrell*, 5 B. & A. 257. But it seems, that if a public Act authorising the raising of money by annuities made them redeemable, such a notice would be unnecessary. *Coverley* v. *Burrell*, 2 Starkie's C. 295.

(*x*) *Wing* v. *Earle*, Cro. Eliz. 267. *Noble* v. *Durrell*, 3 T. R. 271. *Hockin* v. *Cooke*, 4 T. R. 314. *Master of St. Cross* v. *Lord Howard de Walden*, 6 T. R. 338; *supra*, 387.

(*y*) See *Day* v. *Fynn*, Ow. 33; Sugden's V. & P. 281, and the cases there cited. It seems, that notwithstanding these words, the purchaser will be entitled to an abatement in equity, if the deficiency be considerable (*Hill* v. *Buckley*, 17 Ves. 394). But in the late case of *Winch* v. *Winchester* (1 Ves. & B. 375), where the estate was stated to contain by estimation 41 acres, be the same more or less, and it contained in fact but between 35 and 36, the Master of the Rolls decided against a claim by the purchaser for an abatement. Upon a building lease of 59 feet, *more or less*, the lessee takes 62 feet, but the ground taken agrees with the abuttals in the lease, and the lessor sees the process of the building without objecting. This is evidence of an acquiescence to go to the jury. *Neale* d. *Leroux* v. *Parkin and Lambert*, 1 Esp. C. 229. And see *Attorney-General* v. *Baliol College, Oxford*, 9 Mod. 411; *East India Company* v. *Vincent*, 2 Atk. 83. The agreement of sale stated the numbers and quantities of each close, and there being a deficiency of two acres in one of the closes, it was held that the purchaser was entitled to an abatement, although the agreement stated the estate to consist altogether of about 101 acres 3 roods. *Gell* v. *Watson*, Sugd. V. & P., 529, 10th edit.

(*z*) Per Lord Mansfield, C. J. in *Bexwell* v. *Christie*, 1 Cowp. 395. Where, upon the sale of the fixtures and fittings-up of a public-house, a misrepresentation was made as to the amount of the business, it was held to avoid the sale, although by the agreement the goodwill was expressly excluded. *Hutchinson* v. *Morley*, 7 Sc. 341.

(*a*) Per Bayley, J. in *Early* v. *Garrett*, 9 B. & C. 928.

(*b*) Ibid. The assignees of *A.* proposed to sell to *B.* a piece of land with all faults and defects. Before any conveyance was executed, the latter asked the assignees whether any rent had ever been paid for the land. The former replied, none had been paid by the bankrupt, or by any person under whom he claimed; in fact, rent had been paid by the person who had sold the land to the bankrupt. That person

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Where the plaintiff's agent sold a picture to the defendant as a Claude, refusing to disclose the name of his principal, but knowingly suffered the defendant to buy the picture, under the impression that it was the property of another person, Lord Ellenborough held that the sale was void, through fraud, even though the picture were a real Claude (*c*).

Where a tenant sold his interest in the premises by auction, without informing the vendee that the landlord had, the day before the sale, given notice of re-entry according to the terms of the lease, if the premises were not put in repair within three months, and the vendee was afterwards ejected, it was held to be a fraudulent concealment, and that the vendee was entitled to recover his deposit from the auctioneer (*d*).

And where a lease, containing the usual covenants to repair, is sold by auction, if any of the demised buildings have been pulled down before the sale, the vendee may rescind the contract, although the buildings pulled down be not described in the particulars of sale (*e*).

And although the conditions of sale provide that a mistake in the particular shall not vitiate the contract, the stipulation does not extend to a wilful misdescription calculated to enhance its value (*f*).

But it seems that where a vendee *knows* the description to be false, he cannot take advantage of it either at law or in equity (*g*).

Where there is a *latent* defect in the subject of sale, known to the vendor, and he uses any means or artifice to conceal that defect, this is a fraud which will avoid the contract, even although by the written terms of contract the article is sold with all faults (*h*). But according to the opinion of Lord Ellenborough, in the case of *Baglehole* v. *Walters*, where an article is sold with all faults, it is quite immaterial how many belong to it, with the knowledge of the seller, unless he use some artifice to disguise them, and to prevent their being discovered by the purchaser (*i*).

Hence it seems that in such a case, in order to repel an action on the contract, or to enable a vendee to recover his deposit, proof of the *scienter*, and of actual fraud on the part of the vendee, is essential. And for the purpose of proving fraud, the vendee is not confined to the written contract made at the time of the sale, but may give in evidence previous and contemporary representations made for the purpose of putting the vendee off his guard and preventing him from being vigilant.

Right of inspection.

The purchaser of goods by sample has a right to inspect the whole of the bulk for the purpose of comparison; and if the vendor refuse such inspection, it is a good defence to the action (*k*), although the vendor afterwards

having recovered possession of the land, it was held, in an action brought against the assignees to recover back the purchase-money, that it was properly left to the jury to say whether the assignees, at the time when they represented that no rent had been paid, *bonâ fide* believed that to be true; and the jury having found that they did, it was held that the plaintiff was not entitled to recover back the purchase-money. Ibid.

(*c*) *Hill* v. *Gray*, 1 Starkie's C. 434.

(*d*) *Sterens* v. *Adumson*, 2 Starkie's C. 422.

(*e*) *Granger* v. *Worms*, 4 Camp. 83.

(*f*) *Duke of Norfolk* v. *Worthy*, 1 Camp. 340. And see *Schneider* v. *Heath*, 3 Camp. 506.

(*g*) See *Dyer* v. *Hargrave*, 10 Ves. jun. 505. But he may still sue upon an express warranty.

(*h*) *Baglehole* v. *Walters*, cor. Ld. Ellenborough, 3 Camp. 154. *Schneider* v. *Heath*, cor. Mansfield, C. J., 3 Camp. 506. *Pickering* v. *Dowson*, 4 Taunt. 779. *Jones* v. *Bowden*, ibid. 847.

(*i*) 3 Camp. 154. Lord Kenyon, in the previous case of *Mellish* v. *Motteux*, Peake's C. 85, held mere knowledge on the part of the vendor to be sufficient. *Supra*, tit. DECEIT.

(*k*) *Lorymer* v. *Smyth*, 1 B. & C. 1. Note,

Right of inspection. request the vendee to inspect the bulk, for the contract is wholly rescinded (*l*). And it has been held that a party who sells goods to be delivered on a future day, not having the goods at the time, nor having entered into any contract to buy them, nor any reasonable expectation of receiving them by consignment, but who meant to go into the market to buy the goods which he had contracted to deliver, cannot maintain an action on the contract, for the contract on the part of the vendor amounts to a wager on the price of the commodity (*m*). This case has, however, been since over-ruled.

Payment. Payment in a bill which is dishonoured, and which remains inoperative in the hands of the vendor, does not preclude the vendor from recovering on the original consideration (*n*).

Waiver. The vendor of goods, on the vendee's objecting to their quality, and refusing to accept them, requests the vendee to sell them for him; this is evidence of a waiver of the contract, and the jury cannot take into their consideration whether, in making that request, the vendor mistook the law (*o*).

Negligence. Where a vendor receives an order to forward goods to the vendee, at another sea-port, by a common sea-carrier, who it is notorious has limited his responsibility as to parcels of a certain value, it is his duty to enter the goods and pay for them accordingly, in order to ensure the responsibility of the carrier for the safe delivery; and if the goods be lost in consequence of neglect to do so, the vendor cannot recover the price (*p*).

Illegality. No action lies where the consideration, in respect of which recompense is claimed, is in its nature illegal or immoral (*q*).

the payment was to be made by a banker's bill, and an usage to permit the inspection of the bulk was proved, but the Court intimated that the purchaser had a right, independent of any particular usage, to inspect the bulk.

(*l*) Ibid.

(*m*) *Bryan* v. *Lewis*, 1 Ry. & M. 386. But see App. 1216. An action is not maintainable on a contract arising out of the employment of the defendant by the plaintiff to raise a loan stated to be for the use of the Poyais state, without proof that such a state really existed. *Mac-Gregor* v. *Lowe*, 1 Ry. & M. C. 57.

(*n*) *Fry* v. *Hill*, 7 Taunt. 397. The purchaser paid for the goods by a bill at one month after sight, for a larger sum than the price, the vendor paying the difference; the bill was dishonoured; and held, that the vendor might recover the price of the goods. Ibid. See also *Williams* v. *Smith*, 2 B. & A. 496. The purchaser of goods to be paid for by a bill on his agent, who has no convertible funds in his hands, is not discharged by a renewal of the bill without notice (*Clarke* v. *Neale*, 3 Camp. 411). But where goods were sold, "without recourse on the buyer in case of nonpayment," for a bill which the vendee knew to be worth nothing, it was held that the vendor could not maintain *assumpsit* for the value, but must sue in *tort* (*Read* v. *Hutchinson*, 3 Camp. 352). Where a bill, drawn and accepted by two other persons, was indorsed in blank in payment of a greater amount than the price of the goods, held that the vendor having lost the bill, could not sue the vendee for the goods, or on the bill. *Champion* v. *Terry*, 3 B. & B. 294.

(*o*) *Gomery* v. *Bond*, 3 M. & S. 378. *Bilbie* v. *Lumley*, 2 East, 469. *Brisbane* v. *Dacres*, 5 Taunt. 143; *supra*, 78. Where the plaintiff failed to prove the warranty of the horse sold, but proved that after he had returned him to the defendant, the latter said that he would keep it without prejudice, and not only rode it, but offered it for sale, held that it was properly left to the jury, whether the defendant had not by his own acts rescinded the original contract of sale. *Long* v. *Preston*, 2 M. & P. 262. But a contract of sale cannot be rescinded by the act of the parties where the rights of third parties have intervened. *Smith* v. *Field*, 5 T. R. 402; *supra*, 1212.

(*p*) *Clark* v. *Hutchins*, 14 East, 475.

(*q*) If *A.* agrees to give *B.* money for doing an illegal act, *B.* cannot, although he do the act, recover the money by action. (*Webb* v. *Bishop*, Gloucester Lent Assiz. 1731, cor. Reynolds, C. B., B. N. P. 132.) It is remarkable that Dr. Paley, in his Moral Philosophy, intimates that a person who has promised to reward another for the commission of a crime, is bound to perform his promise after the crime has been committed, because, he says, the sin and mischief are over, and no reason remains why the promise should not be performed; but surely the question is, upon

Defence. Illegality.

The smuggling of prohibited goods into this country cannot be made the foundation of an action for not bringing the goods at all, or not bringing them in a perfect state (*r*); nor will an action lie for the freight of goods in an illegal voyage (*s*); or on a policy of insurance effected on an illegal voyage (*t*); or for goods to be carried to the East Indies, and there disposed of by illegal and clandestine traffic (*u*); or for the price of bricks under the statutable size (*x*); or for the price of libellous, obscene or immoral prints (*y*); or for articles of dress sold for the express purpose of prostitution (*z*), or to be paid for out of the wages of prostitution (*a*); or for drugs sold by a druggist to a brewer, knowing that they were to be used in the brewery (*b*); or for running an illegal race (*c*); or for printing books without the printer's name on the first and last leaves, as required by the statute (*d*); or for printing and publishing a periodical work, part of which is printed on stamped paper, and distributed as newspapers, the printer not having lodged an affidavit at the Stamp-office, or had his name and abode printed on the publication, as required by the statute (*e*).

An innkeeper cannot recover against a candidate at an election for provisions furnished to the voters of a borough, after the *teste* of the writ (*f*).

The owner of a ship employed in the East India Company's service cannot recover on a contract for the sale of the command of the ship, made without the knowledge of the East India Company (*g*); or for the sale of any office which is not saleable by law (*h*).

An agreement for the transfer of a ship which does not recite the certificate of registry is void (*i*).

In the case of *Hodgson* v. *Temple* (*k*), it was held, that a person who sold goods, knowing that the purchaser intended to apply them in an illegal trade, was entitled to recover the price, if he yielded no other aid to the transaction than by selling the goods and obtaining permits for their delivery to the agent of the purchaser.

In the late case of *Brown* v. *Duncan* (*l*), the Court recognized the cases of

the prineiple of general utility, whether the general and universal performance of such contracts does not encourage their frequency; and whether it is not better on the whole for mankind that they should never be performed.

(*r*) P. C. *Wilkinson* v. *Loudonsack*, 3 M. & S. 117.

(*s*) Ibid.

(*t*) *Toulmin* v. *Anderson*, 1 Taunt. 227.

(*u*) *Lightfoot* v. *Tenant*, 1 B. & P. 551.

(*x*) *Law* v. *Hodgson*, 11 East, 300.

(*y*) *Fores* v. *Johnes*, 4 Esp. C. 97.

(*z*) *Bowry* v. *Bennett*, 1 Camp. 348.

(*a*) Ibid. But the mere circumstance of the plaintiff's knowledge that the defendant was a prostitute is not a bar, unless he was to be paid out of the profits of prostitution, or the clothes were furnished with a view to prostitution. Ib.

(*b*) *Langton* v. *Hughes*, 1 M. & S. 593.

(*c*) *Coates* v. *Hatton*, 3 Starkie's C. 61.

(*d*) Ibid. in the note. And see *Bensley* v. *Bignold*, 5 B. & A. 335, and *Marchant* v. *Evans*, 2 Moore, 14. *Poplett* v. *Stockdale*, 1 Ry. & M. C. 337. *Stockdale* v. *Onwhyn*, 5 B. & C. 173. A sale of living pheasants is illegal, and passes no property. *Helps* v. *Glenister*, 8 B. & C. 553.

(*e*) *Marchant* v. *Evans*, 2 Moore, 14.

(*f*) *Ribbans* v. *Crickett*, 1 B. & P. 264.

(*g*) *Blachford* v. *Preston*, 8 T. R. 89. Or for the sale of shares in an East India ship, with a stipulation for the appointment of the commander and continuance of management. *Card* v. *Hope*, 2 B. & C. 261.

(*h*) Ibid. and *Garforth* v. *Fearon*, 1 H. B. 327.

(*i*) *Biddell* v. *Leeder*, 1 B. & C. 327, under the stat. 34 G. 3, c. 68, s. 14.

(*k*) 5 Taunt. 181; 1 Marsh. 5. And see 3 B. & A. 185. But see *Lightfoot* v. *Tenant*, 1 B. & P. 551. It is no defence to an action for goods delivered to a master of a vessel to be sold by him, that they were exported without paying duty, unless the evasion formed part of the contract. *Catlin* v. *Bell*, 4 Camp. 183.

(*l*) 10 B. & C. 93. There the plaintiffs, five in number, carrying on the business of distillers, sued the defendant on a guarantee of the price of spirits supplied to another party, and it appeared that one of the plain-

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Hodgson v. *Temple*, and *Johnson* v. *Hudson*, and distinguished between cases where goods had been sold, or a guarantee entered into, in contravention of mere revenue laws, and those where the contract is in violation of a law designed either for the protection of the public, either solely, or with the additional view of protecting the revenue, and held that the latter only were void.

On an action brought for washing the defendant's clothes, it was held to be no defence that the defendant was a prostitute, and that *some* of the dresses were of an expensive kind, and were used, to the knowledge of the plaintiff, with a view to prostitution; for it was necessary that she should have clean linen, and the Court could not take into consideration which of the articles were used for an improper purpose, and which were not (*m*).

Where the contract is illegal it makes no difference that the parties thought that they were acting legally, for their apprehension does not alter the nature of the contract which the Court is called on to enforce (*n*).

Proof by vendee of goods.

An action by the VENDEE of goods is either on a special contract for not delivering the goods; or of detinue; or of trover (*o*), for a conversion; or of

tiffs, not named in the license as a distiller, carried on the business of a retailer of spirits within the limits prohibited by the Excise Acts; held, that those Acts, having only for their object to protect the revenue, the plaintiffs were not precluded from recovering the value of the spirits sold by reason of their having violated the excise laws. Where quantities of spirits were delivered at one time, in the whole exceeding 20*s.*, but each separately of less amount, held that it was not within 24 Geo. 2, c. 40, s. 12, and that the plaintiff might recover. *Owens* v. *Porter*, 4 C. & P. 367. The stat. 6 Geo. 4, c. 20, ss. 115. 117. 119, requiring a permit for spirits sold out of the stock of a distiller, &c. and precluding the seller from recovering if the permit be not sent, does not preclude the seller from recovering where he has sent an irregular permit, describing spirits at 27 deg. above proof to be 17 below proof, for the sale was legal, although the seller violated the statute, and the 119th sec. applies only where the permit granted by the officer has not been delivered. *Wetherell* v. *Jones*, 2 B. & Ad. 221. In *Lightfoot* v. *Tenant*, 1 B. & P. 551, it was held that a person who sold goods in order that they might be exported to a place to which by law they could not legally be exported, could not recover the price; but there the offence was a violation of the stat. 7 G. 1, c. 21, which avoids all contracts for supplying cargoes to foreign ships. In the case of *Little* v. *Poole*, 9 B. & C. 192, it was held that this Act (47 G. 3, c. 68) made it imperative on the vendor of coals to deliver a vendor's ticket, signed by the meter; and that the Act having been passed to protect the buyer against the frauds of the seller, a vendor of coals who had delivered a vendor's ticket to the purchaser, which was not signed by the meter, could not recover the price of the coals from such purchaser. See further, *Wayman* v. *Reed*, 5 T. R. 599. *Biggs* v. *Lawrence*, 3 T. R. 454. *Clugas* v. *Penelnna*, 4 T. R. 466. *Holman* v. *Johnson*, Cowp. 349. In *Menx* v. *Humphries*, 1 M. & M. C. 132, Lord Tenterden expressed an opinion that a brewer could not maintain an action for beer supplied to one who was not the licensed keeper of the public-house to which the beer was supplied; but a juror was withdrawn. A foreigner who sells and delivers goods abroad to a British subject is entitled to recover the price, although he knows at the time of the sale and delivery that the buyer intended to smuggle them into this country, but took no part in the illegal adventure. *Pelleeatt* v. *Angel*, 2 C. M. & R. 311. A brewer who delivers beer to a non-licensed keeper of a public-house, where it is delivered, may maintain an action for the price. *Brooker* v. *Wood*, 5 B. & Ad. 1052. The Treating Act applies only to candidates and their agents. *Hughes* v. *Marshall*, 5 C. & P. 150.

(*m*) *Lloyd* v. *Johnson*, 1 B. & P. 340. Vide *supra*, 1184. Where a factor sold a piece of manufactured tobacco consigned to him from Guernsey, without having entered himself in the Excise-office as a dealer in tobacco, and having no license as such, it was held that he might maintain an action for the value of the goods, although they were sent to the defendant without a permit; there being no fraud on the revenue, but at most a breach of the revenue laws, protected by penalties. *Johnson* v. *Hudson*, 11 East, 180. But note, that the Court doubted whether the plaintiff could, under the circumstances, be considered to be a *dealer* within the statute.

(*n*) P. C. *Wilkinson* v. *Loudonsack*, 3 M. & S. 126.

(*o*) *Infra*, 1221.

money had and received (*p*) upon a rescinded contract; or upon a warranty (*q*).

The vendee of goods, in an action against the vendor for not delivering the goods according to his contract, must prove, 1st. The contract; 2dly. The performance of conditions precedent; 3dly. The damage sustained. Contract.

The engagement must be mutually binding, or it is null. *A.* gives *B.* till four o'clock to decide whether he will purchase the goods of *A.*, and *B.* within the time signifies his assent, yet *A.* is not bound (*r*). But where *A.* by letter offered to sell *B.* certain goods, receiving an answer by return of post, and the letter being misdirected, the answer, notifying *B.*'s acceptance, did not arrive so soon by two days as it would have done had *A.*'s letter been properly directed, it was held that the contract was complete the moment the offer was accepted, and that *B.* was entitled to recover for breach of contract (*s*). But the party making an offer may retract it at any time before acceptance (*t*). The action may be brought either by the principal or by the agent in whose name it is made (*u*).

If goods be sold by sample, but the sale-note makes no mention of the fact, the remedy is by action of deceit (*v*).

As it is sufficient, in a declaration for not delivering goods on request, to aver a request by the plaintiff, and that he was ready and willing to pay the defendant for the same, and a refusal by the defendant to deliver, without averring an actual tender of the price (*x*), so a demand of the delivery of goods sold is sufficient proof of the averment that the plaintiff was ready and willing (*y*), although the demand was not made by the plaintiff himself but by his foreman (*z*). Condition precedent.

(*p*) *Infra*, 1227.

(*q*) *Infra*, tit WARRANTY.

(*r*) *Cooke* v. *Oxley*, 3 T. R. 653.

(*s*) *Adams* v. *Lindsell*, 1 B. & A. 681. See also *Humphries* v. *Carvalho*, 16 East, 45. A broker on Saturday sold goods of the defendant to the plaintiff at a stipulated price, subject to the plaintiff's approval of the quality on the Monday following, and sent the bought-note to the plaintiff on the Saturday, marked with the words "quality to be approved on Monday," but did not send the bought-note to the defendant then, because he had met him, and informed him of the contract on the same day; the plaintiff not having signified his disapproval of the contract on Monday, the broker sent the sold-note to the defendant on Friday, with the words "quality to be approved of on Monday" struck out, which note the defendant returned in twenty-four hours, which by the custom of the trade signified his disaffirmance of the contract as far as in him lay; held, that at any rate the defendant could no longer disaffirm it after Monday.

(*t*) *Cooke* v. *Oxley*, 3 T. R. 653. *Routledge* v. *Grant*, 4 Bing. 653. The rule applies to a bidder at an auction, who may retract his bidding at any time before the hammer is down. *Payne* v. *Care*, 3 T. R. 148.

(*u*) See above, 869, and tit. SET-OFF. The plaintiffs, brokers, bought goods of the defendant on account of *H.*, and by his authority. The purchase was made in their own names, but the vendor was told that there was an unnamed principal. The plaintiffs afterwards, under a general authority from *H.* contracted to sell the same goods, which the defendant had not yet delivered; *H.* on hearing of the latter contract, informed the plaintiffs that he would have nothing to do with the goods either as buyer or seller, and in this they acquiesced. The defendant then refused to deliver the goods, and the plaintiffs sued him for damages sustained by him in consequence; held that the renunciation of the contract by *H.*, and plaintiff's acquiescence in it, formed no objection to their right to recover. *Short and others* v. *Spackman*, 2 B. & A. 962. Brokers selling hemp by auction at their own rooms, and in their invoice describing the goods as bought of them, cannot show in defence that they sold as agents, and that they had intimated the fact before and at the time of sale, and that the principals being indebted to them, the invoice had been made out in their names, according to a custom of the town where the sale was made. *Jones* v. *Littledale*, 6 Ad. & Ell. 486.

(*v*) *Meyer* v. *Everth*, 4 Camp. 55.

(*x*) *Rawson* v. *Johnson*, 2 East, 203. *Waterhouse* v. *Skinner*, 2 B. & P. 447.

(*y*) *Squier* v. *Hunt*, 3 Price, 68. *Wilkes* v. *Atkinson*, 1 Marsh, 412. *Levy* v. *Ld. Herbert*, 7 Taunt. 318. *Supra*, 69.

(*z*) *Squier* v. *Hunt*, 3 Price, 68.

Condition precedent.

In an action for the non-delivery of goods to be paid for by a bill, the plaintiff must prove the tender of a bill; but no evidence on the part of the defendant is admissible to prove that by bill was meant an *approved* bill (*a*). And even if the contract be to pay by an *approved* bill, it must be taken to mean a bill to which no reasonable objection could be made (*b*).

The parties agreed, in writing, as follows: "Sold to *P.* one bale of sponge, at, &c.; and bought of him yellow ochre, at, &c."; it was held that the delivery of the ochre was a condition precedent to the plaintiff's right of action for non-delivery of the sponge (*c*).

Stock.

In an action for not transferring stock (*d*), the plaintiff must prove, in addition to the contract, that the defendant was possessed of the stock; that the plaintiff paid or tendered the price, and that he attended at the Bank for the purpose of accepting a transfer; or an actual request and refusal to transfer (*e*). And also that he actually bought, and duly accepted, the same quantity of stock from another person at a greater price (*f*).

The measure of damages is the difference between the contract price and that which goods of that description bore about the time appointed for delivery (*g*).

Defence.

It is no defence on the part of the vendor, in an action for not loading goods at Petersburgh before a certain day, that the goods had been seized by the Russian government, and that the vessel had put to sea to avoid an embargo (*h*).

In avoidance of a sale made by a broker, the defendant may prove that by the custom of the trade the authority to sell expires on the day on which it is given (*i*).

Where the defendant insists that he is entitled to retain the deposit as a forfeiture, he must show that he has done every thing which he was bound to do to entitle him to the forfeiture, for forfeitures are *strictí juris*, and if he has done any thing to waive the right he cannot recover (*k*).

In an action for the non-delivery of goods, according to a contract, it

(*a*) *Hodgson* v. *Davies*, 2 Camp. 530.

(*b*) Ibid. And see *Adam* v. *Richards*, 2 H. B. 573. *Thirsby* v. *Helbot*, 3 Mod. 273.

(*c*) *Parker* v. *Rawlings*, 4 Bing. 480.

(*d*) As to *variance* from the contract, see *Wickes* v. *Gardon*, 2 B. & A. 33; Vol. I. tit. VARIANCE.

(*e*) See *Bordenave* v. *Gregory*, 5 East, 107.

(*f*) 7 G. 2, c. 8, s. 7. Note, that a sale of Columbian bonds is not within the provisions of the Act (*Henderson* v. *Bise*, 3 Starkie's C. 158); the statute is limited to the British public funds. (Ibid.) The statute against stock-jobbing does not apply to cases where the party agreeing to transfer is possessed of the stock (*Sanders* v. *Kentish*, 8 T. R. 162. *Tate* v. *Wellings*, 3 T. R. 531). A jobbing in *omnium* is within the statute. *Brown* v. *Turner*, 7 T. R. 630.

(*g*) *Gainsford* v. *Carroll*, 2 B. & C. 624. *Leigh* v. *Paterson*, 2 Moore, 588. *Startup* v. *Cortturzzi*, 2 C. M. & R. 165. *Banerman* v. *Nash*, 9 B. & C. 145. *Brandt* v. *Bowlby*, 3 B. & Ad. 932. As to stock, see above, 873.

(*h*) *Splidt* v. *Heath*, 2 Camp. 54, n.

(*i*) *Dickenson* v. *Lilwall*, 1 Starkie's C. 121; 4 Camp. 279.

(*k*) *Carpenter* v. *Blandford*, 8 B. & C. 575. An appraisement was to be made by two appraisers, one on each side, and possession to be taken and payment to be made on a day specified, and agreed that if the vendee should not perform the contract, he should forfeit his deposit of 30*l.*; and on that day the two appraisers met, and the seller's appraiser was informed that the buyer's appraiser could not conveniently complete the business till the following day; no objection was then made to the delay; on the next day the buyer's appraiser went to the premises to make the valuation, but the vendor refused to permit him, and said that he would not complete the contract; and it was held that it was incumbent on the seller, if he meant to insist that the contract should be completed on the day specified, he ought to have notified such his intention to the buyer.

is a good defence that the plaintiff was insolvent, and unable to pay for them (*l*); for it is a fraud on the vendor.

To enable the vendee to maintain trover or detinue for the goods, it is essential to show not only a valid contract of absolute sale, in writing, where the statute requires it (*m*), but also, either payment of the price or a tender of it, or an agreement for payment at a future day, or the delivery of the goods; for whether the property be (*n*) or be not changed by payment of earnest (*o*), it is clear on all hands that the vendee has no right to the possession until payment be either made or tendered (*p*). Trover.

By the common law, if a man agree with another for goods at a certain price, he may not carry them away before he has paid for them, for it is no sale without payment, unless the contrary be expressly agreed. And therefore if the vendor says the price of a beast is 4*l.*, and the vendee says he will give 4*l.*, the bargain is struck, and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side (*q*).

If a man offer money for goods in a market, and the other agree to take his offer, and while the buyer is telling out his money as fast as he can, the seller sell the goods to another, the buyer may, upon payment, or tender and refusal of the price agreed upon, take the goods (*r*). And if any part of the price has been paid, if it be but a penny, or any portion of the goods delivered, by way of earnest, the property of the goods is transferred to the vendee (*s*), that of the price to the vendor; but the vendee cannot take the goods, or maintain *detinue* for their detention, or trover for their value, until he tenders the price agreed upon (*t*); but if he tenders the money to the vendor, and he refuses it, the vendee may

(*l*) *Reeder* v. *Knatchbull*, 6 T. R. 218.

(*m*) *Supra*, 485.

(*n*) 2 Bl. Comm. 448, aff. But see Lord Holt's judgment in *Langford* v. *Administratrix of Tiler*, Salk. 113; *infra*, note (*t*).

(*o*) Ibid.

(*p*) Noy's Max. 88; 2 Bl. Comm. 447.

(*q*) 2 Comm. 447. But if one agrees to pay so much for a horse, and the owner agrees to take it, and no more passes, this is a mere nude treaty. Lutw. 252; Dyer, fol. 30, pl. 203; 14 H. 8, 22.

(*r*) Sheppard's Touchst. 225.

(*s*) 2 Bl. Comm. 488; Noy, c. 42. And if the chattle were a horse, which died after the bargain, but before actual delivery, the vendor would still be entitled to the money, for by the contract the property was in the vendee (Ibid. and see *Hinde* v. *Whitehouse*, 7 East, 558). So where goods were sold, to be paid for in thirty days, and if not then removed, the buyer to be liable to warehouse rent, the property vests in the purchaser immediately, and remains at his risk. *Phillimore* v. *Barry*, 1 Camp. 513. See *Elmore* v. *Stone*, 1 Taunt. 458; *supra*, 841. *A.* and *B.* agree to exchange horses; *B.* pays 1*d.* as earnest, this vests the property in *B.* Per Buller, J. in *Buck* v. *Owen*, 5 T. R. 409. But note, that the case was decided on another ground. *A.* agrees to sell a stack of hay to *B.* for 145*l.* to be paid on the 4th of February then next, but to be allowed to stand on *A.*'s premises till May 1st, *B.* agreeing that it should not be cut till paid for; held that the property passed immediately, and that the subsequent loss of the property by fire fell on the vendee. *Turling* v. *Baxter*, 6 B. & C. 360. The rule of law is, that where there is an immediate sale, and nothing remains to be done by him as between him and the vendee, the property vests in the vendee. Per Bayley, J. Ibid. An oral bargain having been made for twenty hogsheads of sugar, at a specified rate per cwt., four hogsheads were delivered, and sixteen more were afterwards separated from the bulk, and appropriated, with his consent, to the vendee; held that the property in the sixteen hogsheads was vested in the vendee, subject to the vendor's lien for the price, and that the vendee might recover for goods bargained and sold. *Rhode* v. *Thwaites*, 6 B. & C. 388. See the next note.

(*t*) Hob. 41; 2 Bl. Comm. 448. After earnest given, the vendor cannot sell the goods to another without default in the vendee; and therefore if the vendee do not come and pay for and take away the goods, the vendor ought to go and request him, and then if he do not come and pay for and take away the goods in a convenient time, the agreement is dissolved, and the vendor is at liberty to sell them to any other per-

Trover.

seize the goods, or have an action against the vendor for detaining them (*a*).

So if a day be fixed for the delivery, and a future day be appointed for payment, the property vests in the vendee, and trover may be maintained without any tender of the price (*x*).

If there be neither earnest, part-payment, part-delivery, or agreement in writing, the sale is void by the Statute of Frauds (*y*); as, if one agree to buy sheep, and to take them away at a certain hour, but no money be paid, nor sheep delivered, no property passes, and the owner may resell them (*z*).

Capability of delivery.

The doctrine that an absolute right of property and of possession passes to the vendee, without actual delivery, assumes that the subject of sale is definite and ascertained, so as to be *capable* of immediate delivery.

The property in a chattel when made does not pass by a contract of sale, even although the value be paid, unless it be in existence at the time (*a*) of the contract.

son. Per Holt C. J., in *Langford* v. *Administratrix of Tiler*, Salk. 113.

In Noy's Maxims it is said, "If I sell my horse for money, I may keep him until I am paid; but I cannot have an action of debt until he be delivered; yet the property of the horse is, by the bargain, in the bargainor or buyer. But if he do presently tender me the money, and I do refuse it, he may take the horse, or have an action of detainment. And if the horse die in my stable between the bargain and the delivery, I may have an action of debt for my money, because by the bargain the property was in the buyer." See Lord Ellenborough's observations in *Hinde* v. *Whitehouse*, 7 East, 571.

In Sheppard's Touchstone, 224, it is laid down, "If a man, by word of mouth, sell to me his horse, or any other thing, and I give him or promise him nothing for it, this is void, and will not alter the property of the thing sold; but if one sell me a horse or any other thing, for money or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, or all or any part of the money is paid in hand, or I give earnest-money, albeit it be but a penny, to the seller, or I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment, in all these cases there is a good bargain and sale of the thing to alter the property thereof."

In Buller's N. P. 50, the law is thus stated: "If a man comes to a shop to buy goods, and they agree on the price and the day of payment, and the buyer takes them away, *detinue* will not lie, because the property was changed by a lawful bargain; but if they agree for present money, and the buyer take the goods away without payment, *detinue* lies, because the property is not altered. (Cro. Eliz. 867.) So if a man sell goods on payment of money on a day to come, and the money be paid, and the goods not delivered, *detinue* lies, because the property is in the buyer. (Ca. K. B. 345.) But earnest does not alter the property, but only binds the bargain; and therefore if no other time for payment be appointed, the money must be paid on fetching away the goods. The earnest gives the party a right to demand, but a bare demand without payment is void. Salk. 113." *A.* sells different parcels of hops to *B.*, who engages that they shall remain in *A.*'s hands till paid for: *A.*, after notice that they will be sold at a future day, if not previously paid for, sells part with *B.*'s assent, and after *B.* had become bankrupt, sells the remainder without his assent or that of his assignees: the assignees cannot maintain trover; for until payment or tender of the price, there was no right of possession. *Bloxham* v. *Sanders*, 4 B. & C. 941. And in the case of *Bloxham* v. *Morley*, the Court held that the assignees could not in such case recover, although the engagement were out of the question, and although part of the goods were in the warehouses of third persons, to whom no notice to change the property had been given. Per Bayley, J. *New* v. *Sloman*, 1 Dans. & L. 193, where the owner of goods sells on credit, the buyer has a right to immediate possession, but if he suffers the goods to remain until the period has elapsed, and no payment in fact is made, then the seller has a right to retain them.

(*u*) 2 Bl. Comm. 448.

(*x*) Sheppard's Touchstone, 224; *supra*, note (*t*).

(*y*) *Alexander* v. *Comber*, 1 H. B. 9. *i. e.* where the value is 10*l*. See *Bloxsom* v. *Williams*, 3 B. & C. 234. The property passes on a sale by auction, although the goods are not to be delivered till the purchaser has paid certain duties to the seller. *Hinde* v. *Whitehouse*, 7 East, 558. *Phillimore* v. *Barry*, 1 Camp. 513. See above, tit. FRAUDS, STATUTE OF.

(*z*) *Alexander* v. *Comber*, 1 H. B. 9.

(*a*) *Mucklow* v. *Mangles*, 1 Taunt. 318;

Trover. Capability of delivery.

It is a very general rule, that whenever anything remains to be done on the part of the seller, as between him and the buyer, previous to the delivery, a complete present right of property does not attach (*b*); and therefore, where the vendor agreed to sell all his stock, lying in papers at the warehouse of a third person, at a certain price, and it was agreed that the weight should be afterwards ascertained, after which the vendor gave a note to the vendee, directing the warehousekeeper to weigh and deliver the starch to the vendee, and part was weighed and delivered accordingly, it was held that this did not transfer to the vendee the property in the rest, which had not been weighed and delivered, the weighing of the starch being, by the terms of the contract, a condition which was to precede the absolute vesting of the property (*c*).

And where the goods sold are part of a larger stock, and a separation is necessary previous to delivery, no property passes until the separation is complete (*d*).

Transfer by delivery.

The property in goods may also pass under a contract of sale by delivery, without payment, so as to devest the vendor of his lien for the price (*e*).

And a partial delivery is sufficient to vest the property where there is no intention manifested to separate the one part from the rest. Thus the delivery of part of a cargo of goods, where there appears to be no intention, either previously or at the time of delivery, to separate that part from the rest, is in law a delivery of the whole cargo (*f*).

It is otherwise where such an intention is manifested, as where the vendee asks leave to take part away (*g*).

Noy's Max. c. 42; Hob. 442. *Supra*, tit. SHERIFF; and *Goode* v. *Langley*, 7 B. & C. 26.

(*b*) Per Lord Ellenborough in *Hanson* v. *Meyer*, 6 East, 614. And see *Zagury* v. *Furnell & another*, 2 Camp. 240.

(*c*) *Hanson* v. *Meyer*, 6 East, 614. See also *Withers* v. *Lyss*, 4 Camp. 237. So where a quantity of turpentine in casks was sold in lots at an auction, at a certain price per cwt., each cask, except the two last, being marked at a certain weight, at which they were to be taken by the buyer, the two last lots being reserved to fill up the rest, and being on that account sold at uncertain quantities, and after the sale some of the casks were filled up, but the filling up of the rest was not completed, when the whole was consumed by fire, it was held that the property in those casks which had been filled up was transferred to the buyer, but that those which were not filled up remained the property of the seller (*Rugg* v. *Minett*, 11 East, 210). So where 50 out of 90 tons of Greenland oil were sold, and an order was given by the seller for the delivery of the oil to the buyer, and it was found as a fact, in a case reserved for the opinion of the Court, that before Greenland oil is delivered, it is the constant custom to have the casks searched by a cooper employed by the seller, and for a broker, on behalf of both buyer and seller, to attend and make a minute of the foot-dirt and water in each cask, and that then each cask is filled up at the seller's expense, and delivered in a complete state; and that those things had not been done; the Court held that the property in the oil did not vest in the vendee. *Wallace* v. *Breeds*, 13 East, 522. When goods are sold in bulk at so much per ton, the property does not pass until they are weighed. *Simmons* v. *Swift*, 5 B. & C. 857.

(*d*) By a sale of oil out of a merchant's stock, consisting of large quantities in different cisterns, no property passes without a separation of the part sold from the rest of the stock. *White* v. *Wilkes*, 5 Taunt. 178. And see *Austen* v. *Craven*, 4 Taunt. 644. *Shepley* v. *Davis*, 5 Taunt. 617. *Busk* v. *Davis*, 2 M. & S. 397. These cases seem to overrule that of *Whitehouse* v. *Frost*, 12 East, 614.

(*e*) *Slubey* v. *Hayward*, 2 H. Bl. 504. *Hammond* v. *Anderson*, 1 N. R. 69. *H.* at Bristol sells wool to *J.* for bill at nine months; no bill is drawn, but samples are taken, and several bags are delivered to sub-purchasers; *J.* resells the residue to *G.*, and *G.* transmits the delivery-order from London on the 16th to *H.* at Bristol; on the 21st *J.* becomes insolvent; *H.* not having before then signified his dissent, the property is vested in *G.* *Green* v. *Haythorne*, 1 Starkie's C. 447. The Warehousing Act, 6 Geo. 4, c. 112, s. 19, provides that the sale of bonded goods shall be valid, though they remain in the warehouse of the vendor.

(*f*) *Slubey* v. *Hayward*, 2 H. B. 504.

(*g*) *Bunney* v. *Poyntz*, 4 B. & Ad. 568.

Trover. Transfer by a symbolical delivery.

And where, from the nature of the case, an actual delivery is impossible, a symbolical delivery is sufficient. Thus where an engineer made a symbolical delivery to a canal company, to whom he was indebted, of timber and other materials on their wharf, by the delivery of a halfpenny, it was held that the property was thereby transferred (*h*).

Fixtures, that is, things clearly fixed to the freehold, pass by a conveyance of a house, and giving possession (*i*).

So goods may be transferred by a delivery of the bill of lading (*k*). And where the goods are in the possession of a wharfinger, and after a contract for the sale a written order for the delivery is communicated to the wharfinger, and assented to by him, the property passes to the vendee, although no actual transfer be made in his books (*l*).

And where by a particular custom the vendor of goods is to pay warehouse rent for two months after the sale, but gives the usual order for the delivery to the purchaser within the two months, the property from that time vests in the vendee, and he is liable to any subsequent loss (*m*).

Where goods are lodged with the West India Dock Company, it seems that a delivery of the indorsed dock-warrant and certificate, from the seller to the buyer, operates as a transfer of the goods (*n*).

A conditional delivery is not sufficient to vest the property in the vendee. Where goods are sold, to be paid for on delivery, and a servant delivers them without receiving the money, the property is not altered (*o*).

A vendor has no lien where his agent has taken the vendee's note which is outstanding in indorsees. Ib.

(*h*) *Manton* v. *Moore*, 7 T. R. 67.

(*i*) The owner of a house in which are fixtures, &c. sells it by auction; a conveyance is executed, and possession is given; the fixtures, that is, things clearly fixed to the freehold, and fixtures commonly so called, and which are removable as between landlord and tenant, pass to the vendee. *Colegrave* v. *Dios Santos*, 2 B. & C. 76.

(*k*) *Supra*, 429. *Hibbert* v. *Carter*, 1 T. R. 745. *Lempriere* v. *Pasley*, 2 T. R. 485. If the bill be special to deliver the goods to *A.* for the use of *B.*, the property is vested in *B*; but if it be general to *A.*, and the invoice only shows that it is to the use of *B.*, the property is in *A.*, and *B.* has but a trust. *Evans* v. *Martlett*, 1 Lord Raym. 271; 3 Salk. 200; 12 Mod. 156.

(*l*) *Lucas* v. *Dorrien*, 7 Taunt. 278. But where goods were left in the vaults of a warehouse-keeper by agreement till the vendee could conveniently remove them, and the vendee marked them, and the goods remained in the warehouse a considerable time, but no notice of the sale was given to the warehouse-keeper, it was held that the property passed to the assignees of the vendor, who became bankrupt after the sale. *Knowles* v. *Horsefall*, 5 B. & A. 134. *Secus*, where the goods are left in the vendor's custody until they can be shipped off. *Flinn* v. *Matthews*, 1 Atk. 185. And see *Thistlethwaite* v. *Cock*, 3 Taunt. 487. *A.* sells goods to *B.*, and gives a written order on the wharfinger to weigh, deliver, transfer and release, &c. *B.* sells to *C.*, and delivers to him a written acknowledgment obtained from the wharfinger, that he had transferred the goods to the account of *C.*; *C.* pays for the goods, *B.* having stopped payment; *A.* gives notice to the wharfinger not to deliver the goods to *B.*: the wharfinger cannot, after his acknowledgment, insist that he holds the goods as the agent of *A.* *Hawes* v. *Watson*, 2 B. & C. 540. See also *Harman* v. *Anderson*, 2 Camp. 243. *Storeld* v. *Hughes*, 14 East, 308. *Stonard* v. *Dunkin*, 2 Camp. 344. *Cumming* v. *Brown*, 9 East, 506. *Infra*, 1227 (*z*).

(*m*) *Greaves* v. *Hepke*, 2 B. & A. 131.

(*n*) *Zwingar* v. *Samuda*, 1 Moore, 12; 7 Taunt. 265. *Lucas* v. *Dorrien*, 1 Moore, 29; 7 Taunt. 278. *Spear* v. *Travers*, 4 Camp. 251. Goods being entered in the books of the West India Dock Company, in the name of *A.*, he received the usual cheque for them, which, having sold the goods to *B.*, he indorsed and delivered to him; *B.* sold the goods to *C.*, and delivered to him the cheque or certificate indorsed by *A.*, and *C.* gave *B.* his acceptance in payment, which was afterwards dishonoured; *C.* transferred the cheque to *D.* as a security for a debt which he owed him; and afterwards *A.* obtained possession of the goods by means of a duplicate cheque or certificate obtained from the West India Dock Company, by means of a false representation that the original was lost; *A.* had paid rent for the goods down to that time: it was held that *D.* was entitled to recover in trover against *A.* See *Heyser* v. *Sase*, 1 Gow. 58.

(*o*) Per Bayley, J., in *Bishop* v. *Shillito*,

Trover. Fraud.

And if goods be obtained by false pretences, under colour of purchasing them, the property is not altered by a delivery (*q*).

If the vendee by a false representation obtain possession of goods with a preconceived design not to pay for them, no property passes (*r*); and whether he had in fact formed such a design, is a question for the jury (*s*).

By vendee of a ship.

The vendee of a ship who claims by virtue of a sale by the master, in a foreign country, must not only prove the sale, but also that it was *necessary*, and that it took place under circumstances which would have induced the owner himself to have sold the vessel (*t*).

2 B. & A. 329, n.; *Woods* v. *Russell*, 5 B. & A. 942. Goods are sent by the plaintiff on an order of purchase by *Berkeley*, by a ship chartered by him, of which the defendant is master, with an invoice of wheat bought by order of *Berkeley*, and shipped at his risk to *Harris & Co.* London, and an indorsed bill of lading is transmitted to *Harris & Co.* by *Berkeley*; and by the original terms of the contract, the wheat was to be sent to London, and bills were to be drawn on *Harris & Co.* for the amount; *Berkeley* cancels his orders, and gives notice to *Harris & Co.* not to accept the bills; the acceptance of the bills is a condition precedent to the vesting of the property, and an action is maintainable against the defendant for non-delivery of the cargo according to the plaintiff's orders, and it was held that the plaintiffs were entitled to recover the price of the cargo when it reached the port of discharge, and was delivered according to *Berkeley's* order. *Brandt* v. *Bowlby*, 3 B. & Ad. 932. *A.* buys of *B.* a coach, to be paid for by certain bills, with a license to *B.* to retain possession in case the bills be not paid; such license, it has been held, is merely personal, and not binding against the personal representatives of *A.*, though the bills were not paid. *Hawes* v. *Bull*, 7 B. & C. 481.

(*q*) *Noble* v. *Adams*, 7 Taunt. 59. Gibbs, C. J., in summing up to the jury, said, that if the jury thought that the plaintiff went down to Scotland, having formed a deliberate plan to put off *bad bills* for valuable merchandizes, knowing the same would never be paid for, and intending then to abscond with the goods, or to throw them into an immediate bankruptcy, or to pass them over to a particularly favoured creditor, he was of opinion that the plaintiff had been guilty of a fraud, and that the sale would not change the property. Note, that in the above case the action was against the wharfinger in whose hands they had been deposited by the plaintiff.

In the case of *Parker* v. *Patrick*, 5 T. R. 175, where goods obtained from *A.* by false pretences had been pawned to *B.* for a valuable consideration, and *A.* obtained possession of the goods, it was held that *B.* might maintain trover for them. See *Horwood* v. *Smith*, 2 T. R. 720.

(*r*) *Earl of Bristol* v. *Wilmore*, 1 B. & C. 514. The contract was for ready money; but the vendee obtained possession of the goods from the servant of the vendor, by delivering him a cheque upon a banker, which he represented to be as good as money, but in fact he had then over drawn his account for some months, and payment was refused; held that the question, whether the sale was vitiated by fraud, depended on the fact whether the vendee obtained possession of the goods with a preconceived design not to pay for them. See *Noble* v. *Adams*, 7 Taunt. 59. *Parker* v. *Patrick*, 5 T. R. 175. *Gladstone* v. *Hadwen*, 1 M. & S. 517. *R.* v. *Jackson*, 3 Camp. 370. *R.* v. *Freeth*, *supra*.

If a factor pledge goods consigned to him for sale, as a security for a debt, and afterwards sell them to the creditor at the market price, but no money passes, the sale is void. *Kuckein* v. *Wilson*, 4 B. & A. 443. So if a factor barter the goods. *Guerreiro* v. *Peill*, 3 B. & A. 616. See also *Guichard* v. *Morgan*, 4 Moore, 36. The drawing bills on a factor against a consignment, does not authorize him to raise money by pledging the goods. *Fielding* v. *Kymer*, 2 B. & B. 639. See also *Queiroz* v. *Trueman*, 3 B. & C. 342. When *A.* having sold barley to a trader, and suspecting his solvency, repurchased it by the agency of a third person, it was held to be no fraud upon the bankrupt laws. *Harris* v. *Lunell*, 1 B. & B. 390.

(*s*) 1 B. & C. 514.

(*t*) *Hayman* v. *Molton*, 5 Esp. C. 65. And see Abbott's L. S. 5. So as to the sale of a cargo. *Freeman* v. *East India Company*, 5 B. & A. 617. See also *Morris* v. *Robinson*, 3 B. & C. 196. The vice-admiralty court of a foreign country has no authority to direct the sale of a cargo not perishable, where there was no necessity for the sale; and a recovery against the shipowners to the amount of the value of the ship and freight does not preclude the owner of the cargo from recovering against a purchaser of the goods. Ibid. See also *Cannon* v. *Muilman*, 1 Bing. 243; and the case of the *Gratitudine*, 3 Rob. A. R. 240. *Reid* v. *Darby*, 10 East, 143. *Reed* v. *Bonham*, 3 B. & B. 147.

Trover. Assignees.

Where the assignees of a bankrupt sue in trover for goods which have been sold to the bankrupt, it is incumbent on them, where a stoppage in *transitu* is relied upon, to prove that the *transitus* was determined. Whether the *transitus* be determined or not, seems to be a question of law arising upon the special circumstances of the case. The object of proof in such cases, is an actual or constructive delivery (*u*) of the goods to the vendee or his representative. The general nature of the evidence has already been adverted to (*x*).

Assignees of a bankrupt cannot recover the value of goods sold by the bankrupt to the defendant, after an act of bankruptcy committed by the bankrupt, of which the defendant had no notice, without at least tendering to him the price (*y*).

(*u*) As by the delivery of the key of the warehouse in which they are deposited (*Ellis* v. *Hunt*, 3 T. R. 464. *Copeland* v. *Stein*, 8 T. R. 199); by payment of rent for the warehouse (*Hurry* v. *Mangles*, 1 Camp. 452. *Harman* v. *Anderson*, 2 Camp. 243); the lodgment of a delivery-note with the wharfinger. (Ibid.). By a part delivery, where there is no intention to separate part from the rest (*Slubey* v. *Hayward*, 2 H. B. 504. *Hammond* v. *Anderson*, 1 N. R. 69. *Ex parte Gwynne*, 12 Ves. jun. 379. *Stoveld* v. *Hughes*, 14 East, 308). By delivery at the warehouse of the vendee's agent, where no ulterior or more complete delivery is contemplated (*Leeds* v. *Wright*, 3 B. & P. 320. And see 3 B. & P. 127. *Scott* v. *Pettit*, 3 B. & P. 469); as where they are sent to an agent, who under general orders from the vendor sends them to a packer (Ibid.); or by an act of ownership exercised by the vendee whilst the goods are in the hands of his agent, although they have not reached the place of ultimate destination (*Wright* v. *Lawes*, 4 Esp. C. 82). By delivery on board a ship chartered and fitted out by the vendee (*Fowler* v. *Kymer*, cited 7 T. R. 442; 1 East, 552; 3 East, 396). By reaching an expeditor, who holds them till he receives orders for their further destination (*Dixon* v. *Baldwin*, 5 East, 175). By being sent by the vendor to the ultimate place of destination mentioned by the vendee (*Rowe* v. *Pickford*, 8 Taunt. 83. *Forster* v. *Frampton*, 7 B. & C. 107); or by the act of the vendee's taking possession before they arrive at that place, so as to prevent the delivery there, and terminate the *transitus*. *Foster* v. *Frampton*, 6 B. & C. 107.

But such a delivery as would be sufficient in the absence of insolvency to vest the property in the vendee, is frequently insufficient to divest the right of stoppage in *transitu*. It seems to be a general rule, that so long as the goods are in the possession of one who is a mere agent, to forward them in order to give a more complete possession to the vendee, the *trantitus* continues: as where they are delivered to a wharfinger to be forwarded to the vendee (*Hodgson* v. *Loy*, 7 T. R. 440. *Mills* v. *Ball*, 2 B. & P. 457. *Smith* v. *Goss*, 1 Camp. 282); although the wharfinger be employed by the vendee (*Smith* v. *Goss*, 1 Camp. 282. *Oppenheim* v. *Russel*, 3 B. & P. 42. And see *Snee* v. *Prescott*, 1 Atk. 245. *Lickbarrow* v. *Mason*, 1 H. B. 364. *Hunt* v. *Ward*, cited 3 T. R. 467. *Feize* v. *Wray*, 3 East, 93); or to an agent who purchases for a principal abroad, and informs the vendor at the time of the purchase that the goods are to be sent to Lisbon (*Coates* v. *Railton*, 6 B. & C. 422); or to a packer by order of the vendee (*Hunt* v. *Ward*, 3 T. R. 467); provided the vendee does not use the wharfinger's or packer's warehouse as his own, and that he contemplates an ulterior place of delivery (*Wright* v. *Lawes*, 4 Esp. C. 82. Per Chambre, J., *Richardson* v. *Goss*, 3 B. & P. 119). So a delivery of plate to an engraver employed by the vendor (*Owenson* v. *Morse*, 7 T. R. 64); of goods to a common carrier (*Stokes* v. *La Riviere*, cited 3 T. R. 466. *Hunter* v. *Beal*, Ibid.), so long as the lien of the carrier remains (*Crawshaw* v. *Eades*, 1 B. & C. 181); or on board a general ship (Ibid. and 3 East, 397; 7 T. R. 440. *Mills* v. *Ball*, 2 B. & P. 457), though at the risk and expense, and in the name and by the appointment of the vendee; will not devest the right of stoppage in *transitu*. And see *Ruck* v. *Hatfield*, 5 B. & A. 632.

The right of stoppage in *transitu* cannot be exercised to the disturbance of the right of third persons. If the first vendor do any act by which he sanctions the sale by his vendee, his right of stoppage in *transitu* is devested. See the opinions of the Judges, in *Hawes* v. *Watson*, 2 B. & C. 540. *Stoveld* v. *Hughes*, 14 East, 308. *Harman* v. *Anderson*, 2 Camp. 243. Part payment for the goods does not devest the right to stop in *transitu*, but only reduces the equitable lien *pro tanto*. *Hodgson* v. *Loy*, 7 T. R. 440. *Feize* v. *Wray*, 3 East, 103. And proof under the commission amounts at most to part payment. Ibid.

(*x*) *Supra* tit. BANKRUPT.

(*y*) *Hill* v. *Farnell*, 9 B. & C. 45. For the payment is valid under the stat. 6 G. 4, c. 66, s. 82; and where money had been paid by the vendor in discharge of the

Defence by warehouseman.

A defendant in trover for goods deposited with him by the plaintiff, as his warehouseman, having received notice from *A. B.*, who claims property in the goods, to hold them on his account, is not estopped from setting up the claim of *A. B.* by way of defence to the action (*z*).

But where a warehouseman, at the request of the vendor, gave a written acknowledgment to the vendee that he held the goods for the latter, it was held that he could not refuse to deliver them on the ground that by custom the property does not vest in the vendee till re-measurement (*a*).

Sale in market overt.

If the defendant rely for his defence on a sale of the chattel to him in market overt, it will be necessary to show (*b*) the time (*c*), place (*d*), and circumstances of the sale (*e*).

Money had and received.

The vendee may recover the deposit or price, as money had and received to his use, in all cases where the contract is rescinded, either by the very terms of the original contract, or by consent, or by the act of the defendant; for then the consideration wholly fails (*f*). Or where the contract is wholly void by reason of fraud (*g*).

duties on bonded wine sold to *C.*, who afterwards became a bankrupt, it was held that the assignees could not maintain trover against the vendor or his agent, without tendering the amount of the duties so paid. *Winks* v. *Hassall*, 9 B. & C. 372.

(*z*) *Ogle* v. *Atkinson*, 1 Marsh. 323; 5 Taunt. 759. *Noble* v. *Adams*, 7 Taunt. 59. *Supra*, 1224 (*l*).

(*a*) *Stonard* v. *Dunkin*, 2 Camp. 344. *Supra*, 1224 (*l*).

(*b*) Contrary to the general rule, that a party can transfer no greater interest than he possesses, the law sanctions sales in market overt, although the vendor had no property in the subject of sale, with a view to the general convenience of purchasers who resort to them, and who have no means of knowing the rights of the sellers; but at the same time requires such sales to be made publicly and openly. Such sales, however, are not binding on the King. And by the stat. 1 Jac. 1, c. 21, the sale of goods wrongfully taken, to a pawnbroker, in London or within two miles thereof, does not alter the property. And if the buyer knew the property not to be in the seller, or if there be any fraud in the transaction; if he knew the seller to be an infant, or feme covert not usually trading for herself; or if the sale be not made originally or wholly in the fair or market, or not at the usual hours; the owner's property is not bound by it. So the owner of stolen goods prosecuting the felon to conviction, is entitled to restitution. *Supra*, tit. TROVER. And by the stat. 2 & 3 Ph. & M. c. 7, and 31 Eliz., a purchaser of a stolen horse in a fair or market overt gains no property in the horse, unless he shall be openly exposed in the time of such fair or market, for one whole hour between ten in the morning and sunset, in the public place used for such sale, and not in any private yard or stable, and be afterwards brought by both the vendor and vendee to the book-keeper of such fair or market, and toll be paid, if any be due, and if not, one penny to the book-keeper, who shall enter down the price, colour and marks of the horse, with the names, additions and abodes of the vendee and vendor, the latter being properly attested; nor shall such sale take away the property of the owner if, within six months after the horse is stolen, he put in his claim before some magistrate where the horse shall be found, and within forty days more prove such horse his property by the oaths of two witnesses, and tender to the person in possession such price as he *bonâ fide* paid for him in market overt. If the points above mentioned be not attended to, the sale is void, and the owner shall not lose his property, but at any distance of time may seize his horse, or bring an action for him. 2 Comm. 450; Long on Sales, 104. It seems to be now settled, that if the vendor on such a sale were to enter a wrong name in the book of the market, the sale would be void. *Gibbs's Case*, Owen 27; 1 Leon. 158; overruling *Wilkes* v. *Moorfoots*, Cro. Eliz. 86.

(*c*) See the last note.

(*d*) The sale must be made in an open place, not in a back room or warehouse. The sale of plate in a scrivener's shop would not be valid. In London every shop in which goods are publicly exposed is market overt, except on Sunday. 2 Comm. 449. The strand is not market overt; 12 Mod. 521. A wharf is not a market overt, although goods be usually sold there. *Wilkinson* v. *King*, 2 Camp. 335.

(*e*) *Supra*, note (*b*). The transaction to charge the property must be a sale for a valuable consideration, and not a gift. *Case of Market Overt*, 5 Co. 83, b.; 2 Ins. 713.

(*f*) See *Payne* v. *Whorle*, 7 East, 274.

Street

(*g*) *Campbell* v. *Fleming*, 1 A. & E. 40. *Seems*, if after discovering the fraud he continue

Money had and received.

Where the price of goods has been paid, the vendee cannot recover the price as upon a failure of consideration, although the goods were in a bad condition, or even unfit for use (*h*).

Competency.

A witness who is answerable to a vendee, in case the title turn out to be defective, is not competent to support the title in an action against his vendee, founded on an alleged defect of title (*i*). But one who has sold an inheritance without any covenant for good title or warranty, is competent to prove the title of his vendee (*j*).

The owner of property is competent either to affirm or disaffirm a sale by himself, in an action between other parties; for the verdict would not be evidence, either for him or against him, in any future action. Thus, in an action of trover for a horse, a witness is competent to prove that the plaintiff agreed that the witness should take the horse as a security for 15*l.*, deposited by the witness with the plaintiff, and that the horse should be sold at the next Woodbridge fair, if the money was not paid in the meantime,

Street v. *Blay*, 2 B. & Ad. 462. *Edmonds* v. *Chapman*, 1 M. & W. 231. *Gompertz* v. *Denton*, 1 C. & M. 207. *Infra*, tit. WARRANTY. *Secus*, where the parties cannot be placed in *statu quo*. *Hunt* v. *Silk*, 5 East, 449. The plaintiffs agreed to purchase "about 300 quarters, more or less," of foreign rye, shipped on board the *A. E.* at Hamburgh, at a certain price, subject to the vessel's safe arrival with the goods on board, and being unsold at Hamburgh; the ship brought 350 quarters, and the defendants refused to deliver any part unless the plaintiffs would accept the whole; the plaintiffs abandoned the contract, and brought an action to recover back a sum of money which they had paid for 300 quarters. Held by Lord Tenterden, C. J., and Littledale, J., that by the words "about" and "more or less" the parties could not be taken to have contemplated so large an excess as 50 over 300 quarters; by Parke, J. and Patteson, J., that at all events it lay on the defendants to show that such an excess above the quantity named was in contemplation; and if from the obscurity of the contract they were unable to do so, their defence failed. *Semble* that evidence of mercantile men as to the words "about" and "more or less," in such a contract, is not admissible. *Cross* v. *Eglin*, 2 B. & Ad. 106. Where upon the sale of premises and fixtures to be appraised, and possession given on the 25th March, or the deposit paid to be forfeited, the appraisers of each met on that day, but one informed the other he could not complete it on that, but would do so on the following day, to which no objection was made, but on the following day the seller refused to allow him so to do, or to complete the contract; held that, as it was the duty of his agent to communicate to his principal what had passed on the previous day, it was to be presumed he had done so, and that if he meant to rely on the forfeiture if the contract was not strictly performed, he should have communicated to the other party such intention; which not having been done, the purchaser was entitled to recover back his deposit. *Carpenter* v. *Blandford*, 8 B. & C. 577. Where the vendor was unable to complete his title on the day appointed, and the purchaser was not ready to pay the purchase money on that day, it was held that the contract was entirely vacated, and that the purchaser was entitled to recover his deposit. *Clarke* v. *King*, R. & M. 394.

(*h*) *Fortune* v. *Lingham*, 2 Camp. 416.

(*i*) 2 Roll. Ab. 685; Str. 445. In the case of *Briggs* v. *Crick*, 5 Esp. C. 99, cor. Lord Alvanley, it is stated to have been ruled that the original vendor of a horse, with a warranty of soundness, was a competent witness to prove the soundness at the time of the sale by him, in an action against his vendee on a similar warranty, on the ground that there was no direct interest, and that the horse might have been sound when sold by the witness, yet unsound when sold by the defendant. But the principle of this decision appears to be dubious; for unless the testimony as to the soundness at the time of the former sale *tended* to prove soundness at the time of the latter sale, it would be irrelevant. If, on the other hand, his testimony of the soundness at the time of the first sale tends to proof of soundness at the time of the second, then the witness seeks to establish a fact, in which, if he failed, damages would be recovered, to which he would it seems be liable on negativing the fact which he attempted to prove, viz. the soundness at the time of the first sale. See *Lewis* v. *Peake*, 7 Taunt. 153; *supra*, Vol. I. tit. WITNESS.

(*j*) *Busby* v. *Greenslate*, Str. 445.

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continue to deal with the chattel as his own; and the right of repudiation is not revived by the subsequent discovery of another incident in the same fraud. And see *Easby* v. *Jarratt*, 9 B. & C. 928.

and that the witness sold him to the defendant at that fair, the money not having been paid (*k*).

So in an action between the assignees of Greaves a bankrupt, and a purchaser from a judgment-creditor, who had taken the goods in execution, it was held that a witness was competent to prove, on the part of the defendant, that he being the owner of the goods had contracted with the bankrupt for the sale, and had given him a delivery-order merely to enable him to take home the oil and inspect it in bulk; and that it was expressly stipulated that the bankrupt should not sell the oil until the witness had been paid by a good bill (*l*).

It has been held, that in an action for goods sold to the defendant, and delivered to *A. B.* at his (the defendant's) request, *A. B.* is not a competent witness for the plaintiff to prove this, without a release (*m*).

And one who has purchased goods in his own name, is not, it has been held, a competent witness for the plaintiff to prove that he acted merely as agent to the defendant (*n*).

A witness proved to be a co-partner with the defendant is not competent

(*k*) *Nix* v. *Cutting*, 4 Taunt. 18.

(*l*) *Ward* v. *Wilkinson*, 4 B. & A. 410.

(*m*) *Wright* v. *Wardle*, 2 Camp. 200, cor. Lord Ellenborough. The competency of *A. B.* was contended for on the ground that the plaintiff, after bringing that action, could not resort to *A. B.*; and Lord Ellenborough was at first inclined to admit the testimony; but afterwards, it is stated, deemed a release to be necessary, on the ground that the witness might have misled the plaintiff, and *might* still be liable *in case* of *detection*. But *qu.* whether the first impression of that very learned Judge was not the correct one, and whether, upon general principles, fraud is to be presumed in order to raise an exception to the competency of a witness. See *R.* v. *Newland*, East's P. C. 1001. See *Larbalastier* v. *Clark*, 1 B. & Ad. 899; *supra*, Vol. I. tit. Witness.

(*n*) *M'Brain* v. *Fortune*, 3 Camp. 317. Lord Ellenborough said, "I do not think he can be examined, either on the ground that he is a necessary witness, or that he stands indifferent between the parties. If he was the agent of the defendants, there is no reason why this circumstance should not be proved by other evidence*. Thus he has a clear interest without any counterbalance in the event of this action. If it succeeds, the verdict would be evidence for him in an action against himself, to which he is *primâ facie* liable. The remedy which it is supposed he would have against the defendants if he were to be sued on this contract, cannot be thought to render it a matter of indifference to him whether the plaintiff shall succeed in this action, or be driven to sue him as the real purchaser of the goods; he is not in the situation of a broker, for a broker buys and sells in the name of his principal, and has no personal liability to be discharged by the effect of his evidence."

But in the case of *Evans* v. *Williams* (cited 7 T. R. 481), Lord Kenyon held that the captain of a ship was competent to prove that the money which the plaintiff sought to recover was borrowed for the use of the defendant's ship, and not for his own use, and although he had given a bill of exchange for the amount; and that as the owners would have a remedy over against him, he stood indifferent. And see *Rocher* v. *Busher*, 1 Starkie's C. 27; and *Ilderton* v. *Atkinson*, 7 T. R. 480; and Vol. I. tit. Witness.—Competency.

Where, in an action for fitting up a house, at the request of the owner, the owner was called by the plaintiff to prove an agreement between the owner and the defendant, by which the latter had agreed to execute the work for a certain sum, Lord Kenyon held that he was incompetent (*New* v. *Chidgy*, Peake's C. 98.) Yet if no such agreement in fact existed, the witness would be liable to the defendant for at least the value of the work. It is true, that it might be more difficult for the defendant than for the plaintiff to recover from him. See *Buckland* v. *Tankard* (5 T. R. 578). But the principle of that decision appears to be dubious. See Lord Ellenborough's observations in *Birt* v. *Kershaw* (2 East, 461), where he says, "I know of no other case than *Buckland* v. *Tankard* which goes on the ground of more or less difficulty in the witness in establishing his interest against one or the other of the parties." See the general principles, Vol. I. tit. Witness.

* Yet it seems that an agent is competent to prove his own authority. *Supra*, 80; *Ilderton* v. *Atkinson*, 7 T. R. 480; Paley, Principal and Agent, 162.

Competency.

to defeat the action by evidence that the goods were sold to himself, and that the defendant was merely his servant; for the effect is to discharge himself of a moiety of the costs (*o*); but he may be rendered competent by a release (*p*).

But a co-partner with the defendant is a competent witness for the plaintiff in such an action (*q*); and so is the executor of a deceased partner (*r*).

And where it is objected that *M.* being a partner with the plaintiff ought to have been joined, *M.* is a competent witness for the plaintiff to negative the partnership (*s*).

So a witness for the defendant is competent to prove that the credit was given to himself alone (*t*).

Where, in *assumpsit* for work and labour, the defence was, that a third party had been employed by the defendant, who employed the plaintiff, held that such third party was a competent witness for the defendant, although he had since become bankrupt, was uncertificated, and his assignee had received the amount due for such work (*u*).

VENUE (*x*).

Local action.

THE omission to prove a local cause of action within the county is fatal, under the general issue (*y*). But where there are several facts material to the plaintiff's case, arising in different counties, the plaintiff may lay his venue in either (*z*).

In civil actions.

Where the defendant by cutting a trench in the county of *N.* causes the plaintiff's lands to be overflowed in the county of *W.*, the venue may be laid in the latter county, although the statute, under the authority of which the defendant acted, directs all such actions to be brought and tried in the county where the cause of such action arises (*a*).

Where goods are ordered from a vendor in London, by a vendee who resides in the country, the cause of action arises in London, by the delivery to the carrier there (*b*).

Material evidence.

Where the plaintiff has undertaken to give material evidence in the county

(*o*) *Goodacre* v. *Breame*, Peake's C. 174; *Evans* v. *Yeatherd*, 2 Bing. 133; *Cheyne* v. *Koops*, 4 Esp. C. 112; *Young* v. *Bairner*, 1 Esp. C. 103. To raise the objection, the partnership must either be admitted or proved. *Supra*, Vol. I. tit. WITNESS. *Birt* v. *Hood*, 1 Esp. C. 20.

(*p*) *Young* v. *Bairner*, 1 Esp. C. 103.

(*q*) *Hall* v. *Curzon*, 9 B. & C. 346. *Blackett* v. *Weir*, 5 B. & C. 385; *supra*, Vol. I. tit. WITNESS. *Hudson* v. *Robinson*, 4 M. & S. 475.

(*r*) *Burton* v. *Burchall*, K. B. Hil. 43 Geo. 3; Peake's L. E. 167, 5th edit.

(*s*) *Parsons* v. *Crosby*, 5 Esp. C. 199.

(*t*) *Birt* v. *Hood*, 1 Esp. C. 20; Vol. I. tit. WITNESS.

(*u*) *Wilson* v. *Gallatley*, 2 C. & P. 467.

(*x*) Vide *supra*, CASE, ACTION ON; COUNTY-JUSTICES; LIBEL; NUISANCE; PENAL ACTION; PERJURY; TRESPASS; USE AND OCCUPATION; USURY; VARIANCE.

(*y*) *Doulson* v. *Matthews*, 4 T. R. 503. But where the defect appears on the record, it is cured after verdict by the stat. 16 & 17 Car. 2, c. 8. *Mayor of London* v. *Cole & others*, 7 T. R. 583.

(*z*) *Mayor of London, &c.* v. *Cole*, 7 T. R. 583; *Bulwer's Case*, 7 Co. 57; *Pope* v. *Davis*, 2 Taunt. 252; 2 Camp. 266; *Scott* v. *Brest*, 2 T. R. 238; *supra*, Vol. I. tit. VARIANCE.

(*a*) *Sutton* v. *Clarke*, 6 Taunt. 29.

(*b*) *Copeland* v. *Lewis*, 2 Starkie's C. 33. And therefore, though the goods in such a case ordered in Middlesex, by a defendant living in the Principality of Wales, did not amount to 10*l.*, Lord Ellenborough, upon a trial at Westminster, refused to nonsuit the plaintiff, under the Welsh Judicature Act, 13 Geo. 3, c. 51, s. 2. And where goods under 40*s.* value had been ordered by a vendee in Leicestershire, and delivered to the carrier in London, it was held that an action could not be sustained in the county-court of Leicestershire. *Harwood* v. *Lester*, B. & P. 617.

In civil actions. Material evidence.

where the venue is laid, it is not sufficient to prove that the witnesses to the contract reside in that county (*c*). Nor is it sufficient to give evidence there of collateral matters which are not stated in the declaration (*d*); as where the defendant pleaded a tender, and the plaintiff replied and proved a subsequent demand within the county where the trial was had (*e*).

But it is sufficient to give any evidence in the county which is material to the cause of action; it is not necessary to show that the *whole* cause of action arose there (*f*).

Where the venue is retained in Middlesex by a plaintiff suing as the assignee of a bankrupt, it is sufficient to produce the commission there, tested at Westminster (*g*); or for a party who sues on a patent, to prove the enrolment there (*h*); or to produce a rule of court, obtained by the defendant, for the payment of money into court, though subsequently to the plaintiff's undertaking (*i*). Proof of issuing the writ in Middlesex is material evidence against the sheriff, in an action for an escape (*k*).

Where the plaintiff, on retaining the venue in *A.*, undertakes to give material evidence in *A.* or *C.*, proof of the delivery of the goods to a carrier in *C.*, to be delivered to the defendant in *B.*, is sufficient (*l*).

An undertaking to give material evidence in London, is (it has been held) satisfied by proving an acknowledgment of the debt in a foreign country (*m*).

If the plaintiff retain the venue on the usual undertaking, but the plea and issue joined render the evidence irrelevant, he is discharged from the undertaking (*n*). As where, in an action by the assignee of a bankrupt, the defendant gives no notice of disputing the bankruptcy, so that the trading or petitioning creditor's debt (of which he would otherwise have given material evidence in the county) is proved by the depositions (*o*).

In criminal cases.

The locality of offences, and the consequent necessity of proof in the proper county, have already been adverted to under the appropriate heads (*p*).

Where two facts, essential to the commission of a misdemeanor, are done, one in each of two counties, the venue, *ex necessitate*, may be laid in either (*q*).

(*c*) 2 Bl. R. 1031.

(*d*) *Cockerell* v. *Chamberlayne*, 1 Taunt. 518.

(*e*) Ibid.

(*f*) *Neale* v. *Neville*, and *Savory* v. *Spooner*, 6 Taunt. 565. In an action against a coach proprietor for negligence, it appeared that the plaintiff's leg was broken in the county of *O.*, where she remained some time, but before she was fully recovered she was removed to the county of *W.*, where medical attendance became necessary, and expense was consequently incurred; held that the inconvenience suffered and the expense incurred in the county of *W.*, was material evidence of a matter in issue within the meaning of the undertaking given by the plaintiff in answer to a motion to change the venue. *Curtis and Wife* v. *Drinkwater*, 2 B. & Ad. 169.

(*g*) *Kensington* v. *Chantler*, 2 M. & S. 36. See *Clarke* v. *Reed*, 1 N. R. 310.

(*h*) *Cameron* v. *Gray*, 6 T. R. 363.

(*i*) *Watkins* v. *Towers*, 2 T. R. 275. And see 6 Taunt. 566.

(*k*) 2 Chitty's R. 418.

(*l*) *Powell* v. *Rich*, 2 Marsh. 494.

(*m*) *Gerard* v. *de Robeck*, 1 H. B. 280. And see *M'Clure* v. *M'Keand*, 2 Taunt. 197; *sed qu.*

(*n*) 3 Taunt. 86.

(*o*) *Soulsby* v. *Lee*, 3 Taunt. 86. Note, that there is a distinction between the *cause* of action and the *right* of action. See the observations of Heath, J. in *Clarke* v. *Reed*, 1 N. R. 313. It is sufficient to satisfy the plaintiff's undertaking, if he give material evidence of the *right* of action within the county.

(*p*) *Supra*, tit. FORGERY; LARCINY; LIBEL; PENAL ACTION; PERJURY; TREASON; USURY. See also Starkie's Crim. Plead. cap. 1. Where a felony is committed within 500 yards of the boundary between two counties, the offence may be laid, and the offender tried, in either, by the stat. 59 Geo. 3, c. 96, s. 2.

(*q*) *Scott* v. *Brest*, 2 T. R. 238; *Scurry*

In criminal cases.

Although evidence be insufficient which leaves it wholly indifferent and uncertain whether the offence was or was not committed within the proper county (*r*), yet presumptive evidence that the offence was committed in the particular county is sufficient. Thus, upon an indictment against Sir Manasseh Lopez, for bribery in the county of *D.*, the bribery was proved; and in order to show that it was committed in that county, rather than in any other, evidence was adduced that the defendant, when at his seat in the county of *D.*, said, "*A. B.*" (the party proved to have been bribed) "has been with me;" and the learned Judge (*s*) left it to the jury to consider whether his being there at the time, and that being the county in which the vote was to be given, was not sufficient evidence to warrant the presumption by them that the offence was committed in that county (*t*).

It seems that the crime of conspiracy, in analogy to the case of treason, may be tried in any county in which a distinct overt act has been committed (*u*).

Where several conspired on the high seas to fabricate false vouchers to defraud the Crown, and one of the conspirators transmitted by the post, to the Commissioners of the Navy in Middlesex, false vouchers in pursuance of that conspiracy, and the innocent holder of one of the false vouchers (a bill of exchange) presented it to the Commissioners in Middlesex, it was held that the defendants were properly tried in Middlesex (*v*).

In the case of *The King* v. *Bowes & others* (*w*), where no proof of actual conspiracy was attempted in Middlesex, but all the defendants were proved to have co-operated in forwarding the criminal purpose in different places and counties, the principle of locality was held to be satisfied by evidence of overt acts committed by some of the conspirators in Middlesex, in furtherance of the common design.

On an indictment for sending a threatening letter, which has been sent by the post, the prisoner may be indicted in the county where the letter was received by the prosecutor (*x*).

VESTRY.

Where the Act (for building churches) authorized the Commissioners to appoint twenty-six persons to be a select vestry for the care and management of the church, held that a rate imposed at a vestry where a majority of that number was not present, was bad; wherever a public trust is to be executed by a definite number of persons, it must be executed at a meeting where a majority of that number is present, unless there be a usage or custom to the contrary (*y*).

v. *Freeman*, 2 B. & P. 381. *R.* v. *Burdett*, 4 B. & A. 95. *Secus*, where the first act, though essential, does not constitute the gist of the offence, as in the case of usury; there the action must be brought in the county where the usurious interest is received; so in the case of obtaining money by false pretences. P. C. K. B. Hil. 1825.

(*r*) *Supra*, 460.

(*s*) Mr. J. Holroyd.

(*t*) *R.* v. *Sir Manasseh Lopez*, cited by Holroyd, J., 4 B. & A. 141. The Court of K. B. were of opinion that this was *primâ facie* evidence, and the defendant afterwards received judgment.

(*u*) 4 East, 171.

(*v*) *R.* v. *Brisac & Scott*, 4 East, 164.

(*w*) Cited by Grose, J., 4 East, 171.

(*x*) East's P. C. 1120. Where a prisoner was indicted in Middlesex for uttering forged stamps, and the proof was that he lived in Middlesex, and sent the forged stamps by his servant in a parcel to London, that they might be forwarded to Bath, seven of the Judges were of opinion that he was guilty of uttering in Middlesex, but the other five were of a contrary opinion. *R.* v. *Collicott*, cited by Bayley, J. 4 B. & A. 154. As to the sending a sealed libel by the post, see *R.* v. *Burdett*, 4 B. & A. 95; *supra*, tit. Libel. And see tit. Forgery.

(*y*) *Blacket* v. *Blizard*, 9 B. & C. 851.

See the Act 58 Geo. 3, c. 69. As to its construction, see 1 A. & E. 317; see also the Vestry Act, 1 & 2 W. 4, c. 60. As to notice of a vestry, see *R.* v. *Archdeacon of Chester*, 1 A. & E. 324. As to the power of adjournment and the granting a *mandamus* to grant a poll, see 1 A. & E. 380. As to a *mandamus* to a select vestry, see *R.* v. *Churchwardens of St. Pancras*, 1 A. & E. 80.

Debt on bond in the name of a vestry clerk, the acting as clerk is *primâ facie* evidence of his appointment, on a traverse of the fact (*z*).

VOID AND VOIDABLE.

The distinction (*a*) does not apply where the defect is in the authority of the persons doing the act, not merely in the manner of doing it (*b*).

Acts of Parliament that make void any solemnities do not make them mere nullities, but only voidable by the parties prejudiced (*c*).

WAGER.

In general, it seems that a wager is legal, and may be enforced in a court of law (*d*), if it be not an incitement to a breach of the peace (*e*), or immorality; or affect the feelings or interest of a third person, or expose him to ridicule, or libel him (*f*); or if it be not against sound policy (*g*), or the

When illegal.

And see *R.* v. *Bellringer*, 7 T. R. 810. *R.* v. *Greet*, 8 B. & C. 363.

(*z*) *M'Gaby* v. *Alston*, 2 M. & W. 206. And a director of the vestry is a competent witness; *ib.*

(*a*) See as to this distinction, *Winchcombe* v. *Bishop of Winchester*, Hob. 165.

(*b*) *R.* v. *All Saints, Derby*, 12 East, 143. See tit. Void and Voidable, 7 Bac. Ab. 64.

(*c*) Gil. L. E. 43, 44. See as to cases of sheriffs acting within liberties without a *non omittas* clause, *Fitzpatrick* v. *Kelly*, cited 3 T. R. 740. *Jackson* v. *Hunter*, 6 T. R. 71. *Piggott* v. *Wilkes*, 3 B. & Ad. 502. Leases, &c. by bishops not made according to the stat. to be utterly void, yet they are not void as to the grantor. See the case of *Lincoln College*, 3 Co. 76. As to a grant voidable under stat. of mortmain, see *Doe* v. *Pitcher*, 2 Marsh. 61; 2 Ad. & E. 84.

(*d*) *Good* v. *Elliott*, 3 T. R. 693.

(*e*) *Semble*, that a wager between the proprietors of two carriages for the conveyance of passengers for hire, that a given person should go by one of those carriages, and no other, is illegal. *Eltham* v. *Kingsman*, 1 B. & A. 683. Lord Tenterden, C. J. refused to try an action to recover the deposit of a bet on a wrestling match and discharged the jury, although the match had gone off, and the defendant, the stakeholder, had repaid part and promised to pay the residue. *Kennedy* v. *Gadd*, 1 Moody & M. C. 225, and 3 Car. & P. 376.

(*f*) As where a wager is laid on the sex of a third person. *Dacosta* v. *Jones*, Cowp. 729. 736. *Roebuck* v. *Hammerton*, ibid. 737.

(*g*) Such a wager as to the probable amount of the public revenue (*Atherfold* v. *Beard*, 2 T. R. 610); or hop-duties (*Shirley* v. *Sankey*, 2 B. & P. 130); or a wager on the event of a cause in the House of Lords, or the courts of justice, if laid with a lord of parliament, or Judge (per Lord Mansfield, 1 T. R. 60). So a wager on the life of the first consul of the French republic was held to be illegal, on the ground of immorality and impolicy (*Gilbert* v. *Sykes*, 16 East, 150). Note, the bet arose out of a conversation upon the probability of his coming to a violent death by assassination, &c. So is a wager which may operate in restraint of marriage (*Hartley* v. *Rice*, 10 East, 22); or between two voters with respect to the event of an election of a member to serve in parliament, laid before the poll is begun (*Allen* v. *Hearn*, 1 T. R. 56); or upon the contingency of peace between this country and another with which it is at war (*Lacaussade* v. *White*, 7 T. R. 535; *Foster* v. *Thackery*, 1 T. R. 57; *Aubert* v. *Walsh*, 3 Taunt. 277). In *Andrews* v. *Herne*, (1 Lev. 33), it was held that a wager whether Charles Stuart would be king of England within twelve months next following, was good; but the ground of impolicy was not objected. See Lord Ellenborough's observations on this case, in *Gilbert* v. *Sykes*, 16 East, 150. See also the *Earl of March* v. *Pigott*, (5 Burr. 2802), where a wager on the lives of the respective fathers of the parties was held to be valid,

When illegal.

provisions of a statute (*h*). Thus, a wager that *A.* has purchased a waggon of *B.* is not void, either at common law or under the stat. 14 Geo. 2, c. 48 (*i*). The illegality should be pleaded (*j*).

The Court will not try an action upon a wager on an abstract speculative question of law or judicial practice, not arising out of circumstances in which the parties have a real interest (*k*); and Lord Ellenborough refused to try a wager on a cock-fight, because the discussion of such a question tended to the degradation of courts of justice (*l*).

although the father of one was dead at the time, of which the parties were ignorant. But see the observations of Heath, J. on this case, 3 Camp. 172; and *Blund* v. *Collett*, 4 Camp. 157. A wager as to the event of the trial of a party on a criminal charge is illegal. *Evans* v. *Jones*, 5 M. & W. 77.

(*h*) A wager on a horse-race for less than 50*l.* is illegal, the stat. 13 Geo. 2, c. 19, s. 2, having prohibited such races; so is a wager for more than 50*l.* to run against time (*Ximenes* v. *Jaques*, 6 T. R. 499); so is a wager for 500 guineas, &c. that a single horse shall go from *A.* to *B.* on the high road sooner than one of two others, to be placed at any distance their owner should please; these transactions being prohibited by the stat. 16 Car. 1, c. 7, s. 2, and 9 Ann. c. 14, and not legalized by 13 Geo. 2, c. 19, or 18 Geo. 2, c. 34, which relate to *bonâ fide* horseracing only. *Whaley* v. *Pajot*, 2 B. & P. 51.

But where the race is a legal one for 50*l.* a wager for less than 10*l.* is legal, not being contrary to the stat. 9 Ann. c. 14 (*M'Allester* v. *Haden*, 2 Camp. 438; per Lord Kenyon, in *Good* v. *Elliott*, 3 T. R. 605). And see *Bulling* v. *Frost* (1 Esp. C. 236), where Lord Kenyon held that an action lay to recover the sum of 3*l.* 10*s.* lost at all-fours. *Secus*, where the race is run for less than 50*l.* (*Johnson* v. *Bann*, 4 T. R. 1). See *Simpson* v. *Bloss*, 7 Taunt. 246. A race for 25*l.* a side is a legal race for 50*l.* *Bidmead* v. *Gale*, 4 Burr. 2432; 1 Bl. 671.

By 16 Car. 2, the winner of *any* money or valuable, by *deceit* in playing at cards, dice, tennis, bowls, skittles, shovel-board, or in cock-fighting, horse-races, dog-matches, foot-races, or other games, or by bearing a part in the stakes, or by betting, &c., shall forfeit treble value. The third section avoids all securities for payment of sums exceeding 100*l.* lost at one time, &c.; and this clause extends to a contract which precedes the playing (*Hedgeborrow* v. *Rosender*, 1 Vent. 252), and to an acceptance by a third person to secure the money lost. *Hussey* v. *Jacob*, Salk. 344; Carth. 356; 5 Mod. 176.

By 9 Ann. c. 14, s. 2, the loser by playing or betting to the amount or value of 10*l.* may recover treble the value against the receiver, by action to be commenced within three months; and if the loser do not sue within the time, any person may afterwards sue. This section does not avoid the contract; and therefore it was held, that one who had lost a mare of the value of 25*l.* by tossing up, but did not bring trover till the three months were expired, could not afterwards recover. *Vaughan* v. *Whitcomb*, 2 N. R. 413.

(*i*) Ibid. See also *Micklefield* v. *Hepgin*, 1 Ans. 133; *Pope* v. *St. Ledger*, 1 Salk. 344; *Bulling* v. *Frost*, 1 Esp. C. 235; *M'Allester* v. *Haden*, 2 Camp. 438; *Hussey* v. *Crickett*, 3 Camp. 168; *Jones* v. *Randall*, Cowp. 37.

(*j*) In *assumpsit* for money had and received, to recover a share in a bet on a horse-race, won and received by the defendant, held that the illegality of the wager going to the consideration, could not be set up, on the general issue, as an answer to the action. *Martin* v. *Smith*, 4 Bing. N. C. 436.

(*k*) *Henkin* v. *Guerss*, 12 East, 247. It rests, it is said, with the Judge to decide whether he will try a wager cause (*Thomlow* v. *Thackrey*, 2 Y. & J. 156); and see *Kennedy* v. *Gadd*, 1 Mo. & M. 225, where Lord Tenterden refused to try an action to recover a deposit on a wager on a wrestling match, and discharged the jury, although the match had gone off, and the defendant had paid part, and had promised to pay the remainder.

(*l*) *Squires* v. *Whisken*, 3 Camp. 140. Lord Loughborough refused to try an action on a wager as to the mode of playing hazard (*Brown* v. *Leeson*, 2 H. B. 43); and Gibbs, C. J. pursued the same course where the wager was whether an unmarried woman had had a child. *Ditchburn* v. *Goldsmith*, 4 Camp. 152. But it seems that a Judge is bound to try an action brought to recover a stake deposited in the hands of a stakeholder after his authority has been countermanded (*Bate* v. *Cartwright*, 7 Price, 540).

So no action will lie on a wager respecting the mode of playing an illegal game; and if such a cause be set down for trial, the Judge is justified in ordering it to be struck out of the paper (*Brown* v. *Leeson*, 2 H. B. 43). Buller, J. was inclined to think that the stat. 14 Geo. 3, c. 48, made all wagers void wherein the parties had no interest. *Atherfold* v. *Beard*, 2 T. R. 616.

Illegal wager.

No demand can be enforced which cannot be established but through the medium of an illegal bargain. The plaintiff laid an illegal wager with *B.*; the defendant took part in the bet; the plaintiff won; and at the defendant's request, before the day appointed for payment, advanced to him his share of the winnings; *B.* died insolvent before that day, and the wager was never paid; and it was held, that as the plaintiff could not establish his case but through the medium of the illegal wager, he was not entitled to recover (*m*).

An action will not lie on a promissory note to enforce the payment of an illegal wager (*n*).

And by virtue of the stat. 9 Anne, c. 14, s. 1 (*o*), no one who derives title through the winner can make the loser pay; but the fact, that a bill was accepted for securing money won at play, is no defence in an action by a *bonâ fide* holder against the drawer (*p*).

In the case even of a legal wager, the authority of a stakeholder, like that of an arbitrator, may be rescinded by either party before the event has happened. And if after his authority has been countermanded, and the stake has been demanded, he refuse to deliver it, *trover* or *assumpsit* for money had and received is maintainable (*q*). And where the wager is in its nature illegal, the stake may be recovered even after the event, on demand made before it has been paid over (*r*); as if the wager be on a foot-race (*s*) or boxing match (*t*).

WAIVER.

Of Contract, see Assumpsit (*u*). Of Trespass, *supra*, tit. Trespass (*x*). By delay, see *Watchorne* v. *Cooke* (*y*).

Fraud in a contract is waived by treating the transaction as a contract after discovery (*z*).

(*m*) *Simpson* v. *Bloss*, 7 Taunt. 246. The wager was 25 guineas on a legal race for 50 *l.*

(*n*) *Shirley* v. *Sankey*, 2 B. & P. 130. But a *bonâ fide* holder without notice might recover.

(*o*) By this stat. all notes, bills, bonds, judgments, mortgages, or other securities, given by any person, when the whole or any part of the consideration of such securities shall be for money or other valuable thing won by gaming, or playing at cards, dice, tables, tennis, bowls, or *other games* *, or by betting on the side of such as game at any of the aforesaid games, or for repaying any money knowingly lent for such gaming or betting, or lent at the time and place of such play, to any person that shall play or bet, shall be void.

(*p*) *Edwards* v. *Dick*, 4 B. & A. 212. Vide *Bowyer* v. *Bampton*, Str. 1155; *supra*, 393.

(*q*) *Eltham* v. *Kingsman*, 1 B. & A. 683. But see *Marryatt* v. *Broderick*, 2 M. & W. 369. But it seems that after a race has been run, the stakes cannot be recovered back from the stakeholder, although not paid over, unless demanded previously to the race. Ib.; doubting *Eltham* v. *Kingsman*, 1 B. & Ald. 682.

(*r*) *Smith* v. *Bickmore*, 4 Taunt. 474. *Bate* v. *Cartwright*, 7 Price, 540.

(*s*) 4 Taunt. 474.

(*t*) *Cotton* v. *Thurland*, 5 T. R. 405. *Hastelow* v. *Jackson*, 8 B. & C. 221.

(*u*) *Supra*, and see *Gomery* v. *Bond*, 3 M. & S. 378.

(*x*) *Supra*.

(*y*) 2 M. & S. 348.

(*z*) *Campbell* v. *Fleming*, 1 A. & E. 40. If the plaintiffs, assignees of a bankrupt, could have maintained trover for bills, they may waive the *tort*, and recover for money had and received, without letting in a claim of mutual credit; a lien before payment of the bills and a set-off

* The statute, it seems, applies to all games of chance as well as skill (*Sigel* v. *Jebb*, 3 Starkie's C. 1); to horse-races (*Goodburn* v. *Marley*, Str. 1159); *Blarton* v. *Pye*, 2 Wils. 309; *Clayton* v. *Jennings*, 2 Bl. 786); to foot-races (*Lynall* v. *Longbotham*, 2 Wils. 36; *Brown* v. *Berkeley*, Cowp. 281). *Semble*, to a game at cricket. *Jeffreys* v. *Walter*, 1 Wils. 220.

If goods be obtained on credit by fraud the contract may be waived, but *assumpsit* cannot be maintained till the term of credit has expired (*a*).

WAR.

The proper evidence to prove the relation of peace or war is the official declaration of the State on the subject. A proclamation of peace published in the Gazette is evidence of the fact (*b*); and a proclamation for reprisals so published is evidence of war (*c*). So a recital of the existence of war in an act of parliament is evidence to prove it (*d*).

A recognition in an Order of Council, that particular ports and places are not in the possession, or under the dominion, of the enemy, is evidence of the fact, although the order was made for a collateral purpose (*e*).

Public notoriety is also sufficient to prove the country to be in a state of war (*f*).

A declaration of war by a foreign government, transmitted by the British ambassador to the Secretary of State's office, is evidence to prove the time of the commencement of hostilities between that foreign state and another (*g*). But the notoriety of the existence of war between two foreign states will not be evidence to prove that fact (*h*).

WARRANT. *See* Justices; Sheriff; and Vol. I. tit. Warrant.

WARRANT OF ATTORNEY (*i*).

The defeazance states, that the warrant is given to secure the payment of

after payment, are to be governed by the same rules. (*per* Tenterden, C. J.) *Buchanan* v. *Findlay*, 9 B. & C. 738. See tit. Vendor and Vendee.

(*a*) *Ferguson* v. *Carrington*, 9 B. & C. 59. See further as to the affirmance of a contract by bringing *assumpsit*, *Billon* v. *Hyde*, 1 Atk. 120. *Fair* v. *M'Iror*, 11 East, 130. *Smith* v. *Hodson*, 4 T. R. 211. *Bland* v. *Karr*, 1 East, 575. *Assignees of Leather* v. *Anderton*, Exchr. Michs. 1831.

(*b*) 5 T. R. 436. *Dupay* v. *Shepherd*, R. T. H. 296. *Quelch's Case*, 8 St. Tr. 212.

(*c*) *R.* v. *Sutton*, 4 M. & S. 532. *Van Omeron* v. *Dowick*, 2 Camp. 44.

(*d*) *R.* v. *Sutton*, 4 M. & S. 532.

(*e*) *Blackburn* v. *Thomson*, 3 Camp. 67; S. C. 15 East, 90.

(*f*) Fost. Disc. c. 2, s. 12, p. 219. And see the cases of *Friend*, *Parkyn*, *Cook*, and *Vaughan*, in the State Trials.

(*g*) *Thellusson* v. *Cosling*, 4 Esp. C. 266.

(*h*) *Dolder* v. *Lord Huntingfield*, 11 Ves. jun. 292.

(*i*) By a general rule of Hil. T. 2 W. 4, no warrant of attorney to confess judgment or cognovit *actionem*, by any person in custody on mesne process, shall be of force unless an attorney for him be present and subscribe the same. Where the affidavit of the attesting witness to a warrant of attorney, and filed at the time of filing that instrument, only stated that it was dated on, &c., and that he saw the party execute it, without specifying the day on which it was executed, held, that not being conformable to the directions of the 3 Geo. 4, c. 39, the judgment and execution thereon were fraudulent and void against assignees, and they might recover back, for the use of the creditors, all the monies levied or effects seized under them. *Dillon* v. *Edwards*, 2 M. & P. 550. Where the warrant authorized the plaintiff only to enter up judgment, although by a memorandum it was stated to be, to secure the payment to the plaintiff, "his heirs, executors and assigns;" held, that upon his death judgment could not be entered up by his executor. *Henshall* v. *Matthew*, 7 Bing. 337; and 5 M. & P. 157. The provisions of 3 Geo. 4, c. 39, s. 4, requiring the defeasance to a warrant of attorney to be written on the same paper or parchment, apply only to such warrants of attorney as were required by the Act to be filed within twenty-one days after the execution, and which otherwise are declared void, as against creditors and the assignees of bankrupts, and do not extend to avoid all warrants of attorney as between the parties, (*dub.* Parke, J.) *Bennett* v. *Daniel*, 10 B. & C. 500; supporting *Morris* v. *Mellin*, 6 B & C. 446. A warrant of attorney given by a beneficed clergyman to secure

a sum payable *on demand*; an actual demand must be made (*e*). A creditor need not show the deed to secure an annuity in a proceeding under the Interpleader Act, where the warrant of attorney is on the face of it regular (*f*).

WARRANT *of Distress*, Indorsement of. *See* stat. 33 Geo. 3, c. 55.

A constable ought to keep a distress warrant of a justice of the peace, although a return is to be made to it, for his own security (*g*).

WARRANTY.

Proof of the contract.

THE general rule of law is *caveat emptor*; and the buyer, whatever may be the defects of the article purchased, cannot recover but upon a warranty (*h*), or upon the ground that fraud and deceit have been practised (*i*). The plaintiff, in an action for breach of warranty, whether the form of action be *assumpsit* (*k*) or *tort*, must if the matter be put in issue (*l*), prove the warranty as alleged (*m*), the breach of such warranty, and the resulting damage. It is unnecessary to prove any return or tender of the subject of warranty (*n*).

Express.

A receipt on a receipt-stamp is evidence of a warranty on the sale of goods (*o*), if it contain the terms. So is the description of the goods in the invoice (*p*).

The printed conditions of sale pasted up under the auctioneer's box, are notice of those conditions to purchasers (*q*).

Every affirmation at the *time of sale* of personal chattels (*r*) is a warranty,

an annuity, is not void unless expressed to be a charge on the benefice. *Gibbons* v. *Hooper*, 2 B. & Ad. 734. And see *Shaw* v. *Pritchard*, 10 B. & C. 241; *Doe* v. *Carter*, 8 T. R. 300; *Monys* v. *Leake*, 8 T. R. 411; *Kerrison* v. *Cole*, 8 East, 231; *Flight* v. *Salter*, 1 B. & Ad. 673. The stat. 3 Geo. 4, c. 39, s. 2, as to filing warrants of attorney, in order to render judgments in Chancery effectual after subsequent commissions of bankruptcy, is not repealed by the stat. 6 Geo. 4, c. 16, s. 81.

(*e*) A proposal to settle does not amount to a demand, Ib. See 1 & 2 Vic. c. 110, s. 9; and see *Barnes* v. *Pendry*, Jurist, June, 1839. *Wilson* v. *Gardner*, 4 B. & Ad. 371.

(*f*) *Johnson* v. *Brazier*, 1 Ad. & Ell. 624.

(*g*) 2 Lord Ray. 1196.

(*h*) See the case of *Parkinson* v. *Lee*, 2 East, 314; *infra*, 1239.

(*i*) Vide *supra*, tit. DECEIT. As where the goods are not the vendor's property, or where he sells unwholesome provisions. And see *Hughes* v. *Gordon*, 1 Bligh, 287.

(*k*) *Supra*, tit. ASSUMPSIT.

(*l*) By the rule of Hil. T. 4 Will. 4, the plea of *non-assumpsit* operates only as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach. Not guilty, in an action for deceit in the warranty of a horse, puts in issue the warranty and the unsoundness, the whole declaration except the bargain and sale, which is matter of inducement. *Spencer* v. *Dawson*, Mo. & R. 552. In an action on the warranty of a horse sold, alleging that it was unsound, to which the defendant pleaded only that it was sound, held that the plaintiff was entitled to begin. *Osborne* v. *Thompson*, 9 C. & P. 337; and 2 M. & R. 255.

(*m*) It is usually laid in *assumpsit*, for the sake of adding the money counts. *Stuart* v. *Wilkins*, Dougl. 18.

(*n*) *Infra*, 1241.

(*o*) *Skrine* v. *Elmore*, 2 Camp. 407.

(*p*) *Bridge* v. *Wain*, 1 Starkie's C. 504.

(*q*) Per Lord Kenyon, C. J., in *Mesnard* v. *Aldridge*, 3 Esp. C. 271.

(*r*) The law implies no warranty upon the sale of a real estate; (see *Roswell* v. *Vaughan*, 2 Cro. 196; *Goodtitle* d. *Norris* v. *Morgan*, 1 T. R. 755. *Hitchcock* v. *Giddings*, 4 Price, 135). The ordinary remedy is by an action on the express covenants (see tit. COVENANT). The usual covenants entered into by a vendor who is seised in fee are, 1st. That he is seised in fee; 2dly, That he has power to convey; 3dly, For quiet enjoyment; 4thly, That the estate is free from incumbrances; lastly, For further assurances. The word *dedi* in a feoffment imports a warranty of title (Co. Litt. 384, a.); but the word *concessi* does not.

Express.

provided it appear in evidence to have been so intended (*s*); so, if previous to the time of sale the vendor says he will warrant the goods, and having named his price, gives the vendee two or three days to consider of it, and the vendee then agrees to purchase (*t*). But a warranty after sale is void for want of consideration (*u*).

An affirmation at the time of sale by one in possession of property, that it is his, amounts to a warranty (*x*). So if the vendor declare at the time of the sale of turnip-seed that he *could* warrant it to be good white round turnip-seed (*y*). But no oral representation previously to a sale by written contract, will operate as a warranty (*z*); for the writing is the only legiti-

(*s*) Per Buller, J., 3 Tr. 57. *Helyar* v. *Hawke*, 5 Esp. C. 72. Where a vendor sold a horse as of the age stated in a written pedigree, but declared at the time that he knew nothing of the age but what appeared in thewritten pedigree; it was held that he was not liable on the warranty. *Dunlop* v. *Waugh*, Peake's C. 123. Where the warranty was in the written form following; viz. "To be sold, a black gelding, 5 years old, has been constantly driven in the plough; warranted;" it was held that the warranty applied to soundness only. *Richardon* v. *Brown*, 1 Bing. 344. Where a horse was sold under a warranty of soundness, but under a misrepresentation of the place from which he was brought, it was held that the misrepresentation as to place did not vitiate the contract. *Geddes* v. *Pennington*, 5 Dow, 164. Whatever a party represents at the time of sale is a warranty. Where the party on the sale of a horse refused to warrant, but on being asked if sound, replied, to the best of his knowledge; held, that he was nevertheless liable if the horse turned out unsound, and that he knew of it. *Wood* v. *Smith*, 4 C. & P. 45. So of a verbal representation by the seller that the buyer might depend upon the horse being perfectly quiet and free from vice. *Care* v. *Colman*, 3 M. & Ry. 2. A race-horse, which had broken down in training, was a crib-biter, and had a splint, and but for these defects would have been worth 500*l.* was sold, after discussing those defects, for 90*l.*, with a warranty that it was sound wind and limb at the time of the sale; it afterwards again broke down in training, upon which the action was brought; held, that the proper direction to the jury was, whether the horse was at the time of the bargain sound wind and limb, saving those manifest defects contemplated by the parties. *Margetson* v. *Wright*, 7 Bing. 603. Where the defendant, on the sale of a horse, stated that he was sound to the best of his knowledge, and added, "but I will not warrant," held that such representation was equivalent to a promise that the horse was sound to the best of his knowledge, and that the action was properly laid in *assumpsit*. *Wood* v. *Smith*, 1 Mo. & M. 534. The defendant supplied copper sheathing for a vessel, which turned out after four months to be wholly defective, and the jury found that the decay was occasioned by some intrinsic defect in the quality of the copper; held, that the plaintiff was entitled to recover damages for the insufficiency, though fraud was negatived; and that upon the original conversation for the article, the plaintiffs saying to the defendant's friend, "We will supply him well," amounted to a warranty: a party selling an article for a particular purpose must be understood to warrant it reasonably fit and proper for that purpose. *Jones* v. *Bright*, 5 Bing. 533. It has been held, that the putting down the name of an old artist in a catalogue, as the painter of a particular picture, is not such a warranty as will subject the vendor to an action. *Jendwine* v. *Slade*, 2 Esp. C. 572. But see *Hill* v. *Gray*, 1 Starkie's C. 434. But where the seller gave at the time of sale the following bill of parcels, "Four pictures, views in Venice, Canaletti, 160*l.*," the Judge left it to the jury on this and other evidence to say, whether the defendant had contracted that the pictures were those of the artist named, or whether his name was used merely as matter of description, or intimation of opinion. And the Court of K. B. refused to disturb a verdict for the plaintiff. *Power* v. *Barham*, 4 Ad. & Ell. 483; 1 Mo. & R. 570.

(*t*) Per Holt, C. J. in *Lysney* v. *Selby*, Lord Raym. 1120.

(*u*) 3 Bl. C. 166.

(*x*) Per Holt, C. J., in *Medina* v. *Stoughton*, 1 Salk. 210. *Secus*, according to Lord Holt, where the vendor is not in possession, for then there is room to question the seller's title. But this distinction is doubted by Buller, J. (3 T. R. 57, 8), and the distinction is not mentioned in another report of the same case. Lord Raym. 593.

(*y*) *Button* v. *Corder*, 7 Taunt. 405.

(*z*) *Pickering* v. *Dowsing*, 4 Taunt. 779. *Supra*, 759. *Meyer* v. *Everth*, 4 Camp. C. 22; see *Kain* v. *Old*, 2 B. & C. 634. But in *Bywater* v. *Richardson*, 1 Ad. & Ell. 508, it was held that upon a written warranty of the soundness of a horse, the buyer was bound by a notice at a repository where the sale took place that the warranty would remain in force no

mate evidence to prove the terms of the contract. In such and in all cases, where there is no warranty, express or implied, but where the vendor has by artifice or misrepresentation circumvented the purchaser, the remedy of the latter is by an action for the deceit (*a*). Proof of contract.

A warranty, although express, if made after the time of sale, is void for want of consideration (*b*). But a prospective warranty, as that a horse shall be sound at a future time, is valid (*c*).

In some instances the law will imply a warranty. Implied warranty.

On proof of a general custom in a particular branch of trade, it will be presumed that the parties contracted accordingly (*d*). The custom in the pimento trade is to declare at the time of sale whether the pimento is sea-damaged; and hence, in the absence of such a declaration, a warranty will be implied that the article was not sea-damaged (*e*).

In every contract to supply a manufactured article for a particular purpose, there is an implied warranty that it will answer the purpose to which it is to be applied (*f*); but in such a case the plaintiff must declare upon the limited warranty that the article is fit for the particular purpose, and not on a general warranty (*g*).

In every contract to furnish manufactured goods there is an implied contract on the part of the manufacturer that they shall be of a merchantable quality (*h*.) And upon a written contract for goods of a particular denomination, which the purchaser has no opportunity of inspecting, the law will imply a warranty of a saleable article corresponding with the contract (*i*).

longer than till 12 the next day. This evidence it is observable, was adduced to prove a general condition applicable to all sales at that place, and not the terms of the sale of the particular article.

(*a*) *Supra*, tit. DECEIT.

(*b*) Finch's L. 189.

(*c*) *Liddard* v. *Kain*, 2 Bing. 183; per Lord Mansfield. *Eden* v. *Parkinson*, Doug. 705.

(*d*) *Jones* v. *Bowden*, 4 Taunt. 847.

(*e*) Ibid. And the plaintiff was held to be entitled to recover, although the declaration alleged a sale by sample, and the samples showed that the article was of inferior quality. But in the absence of such a custom, a written contract for sale by sample excludes evidence of a warranty.

(*f*) The defendant, a manufacturer of copper, supplied the plaintiff with copper for sheathing a ship; and knowing the purpose for which the copper was wanted, said, "I will supply you well:" the copper, in consequence of some intrinsic defect, the cause of which was not found, lasted but four months instead of four years. The Court held that whether under the circumstances this was or was not to be considered as an express warranty, the plaintiff was entitled to recover, there being in all cases where goods *are ordered* for a particular purpose, an *implied warranty* that *they are fit* for the purpose. *Jones* v. *Bright*, 5 Bing. 533. And see *Ohell* v. *Smith*, 1 Starkie's C. 108.

(*g*) *Gray* v. *Cox*, 4 B. & C. 108. The plaintiffs bought a quantity of copper sheathing, for which they paid a fair market price to the defendants, who were copper merchants, not manufacturers. On the return of the vessel to which the sheathing had been applied, it was so defective that new plates were necessary. The plaintiff declared on a warranty that the sheathing copper should be good, sound, substantial and serviceable copper; and it was held that an action alleging such a general warranty was not sustainable. Lord Tenterden, C. J., intimated his opinion, that if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for that purpose; but his Lordship intimated that the Court entertained some difference of opinion on that point, though that was his own opinion.

(*h*) *Laing* v. *Fidgeon*, 6 Taunt. 108; 4 Camp. 169. Where a publican agrees with a brewer to take all his beer of him, the brewer is bound to supply beer of a fair merchantable quality. *Holcombe* v. *Hewson*, 2 Camp. 391. *Cooper* v. *Twibill*, 3 Camp. 286.

(*i*) *Gardiner* v. *Gray*, 4 Camp. 144. Lord Ellenborough observed, "The purchaser has a right to expect a saleable article answering the description in the contract, without any particular warranty; there is an implied term in every such contract, where there is no opportunity to inspect the commodity; the maxim *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be saleable in the market." See also *Bridge* v. *Wain*, 1 Starkie's C.

Implied warranty.

But no warranty will be implied that the goods shall correspond with a sample shown to the buyer, but not mentioned in the contract (*k*).

A stipulation that the chattel shall be taken with "all faults," is to be limited to such as are consistent with the article being that which it is described to be (*l*).

Where a ship was described in the advertisement to be "a copper-fastened vessel," and it turned out that she was not copper-fastened, the plaintiff, it was held, was entitled to recover, notwithstanding a clause in the advertisement that she was to be taken with all faults, and without deduction for any defects whatsoever (*m*).

The law will in no case imply any warranty where the parties have contracted as to the nature and quality of the thing sold. Thus, upon a sale of goods by sample, the law will not imply a contract that they shall be merchantable (*n*), although a merchantable price be given (*o*). Nor will the law imply a warranty against a latent defect, from the price given, whether it be known or unknown to the seller (*p*), nor on an exchange of goods (*q*).

If goods be sold by sample, it will be sufficient if the bulk corresponds with the sample (*r*).

If there be a latent defect in the thing sold, and there be no warranty, express or implied, the buyer cannot recover but by action on the case for deceit, on proof that the seller knew of the defect, and practised some artifice to conceal it (*s*).

Warranty by an agent.

A servant employed to sell a horse has an implied authority to warrant that it is sound (*t*); and his declaration, made at the time, is evidence to prove such warranty (*u*). But a declaration made by such an agent at

504. But where the plaintiff bought saffron of an inferior quality, and after keeping it for six months, and selling part, objected that the article was not saffron, it was held that it might be presumed from the inferiority of price, and length of time which elapsed without objection made, that the article was such as the plaintiff intended to purchase. *Prosser* v. *Hooker*, 1 Moore, 106.

(*k*) Ibid. *Hope* v. *Atkins*, 1 Price, 143. *Mayer* v. *Everth*, 4 Camp. 22. *Pickering* v. *Dawson*, 4 Taunt. 779. *Kain* v. *Old*, 2 B. & C. 634.

(*l*) 5 B. & A. 240.

(*m*) *Shepherd* v. *Kain*, 5 B. & A. 240.

(*n*) *Parkinson* v. *Lee*, 2 East, 314.

(*o*) Ibid.

(*p*) *Baglehole* v. *Walters*, 3 Camp 154; 2 East, 314. The notion of presuming a warranty from the extent of the price given, has long been exploded. Ib. and see *Parkinson* v. *Lee*, 2 East, 322.

(*q*) *La Neuville* v. *Nourse*, 3 Camp. 351. To support an action in such case, direct fraud must be proved.

(*r*) *Parkinson* v. *Lee*, 2 East, 314.

(*s*) Ibid. and *supra*, tit. DECEIT. *Pickering* v. *Dawson*, 4 Taunt. 779. *A.* purchased of *B.* ten dozen of Burgundy, and a year afterwards *A.* applied to *B.* to exchange Champagne for the Burgundy, which *B* accordingly did; the Burgundy at the time of the sale was of excellent quality, but at the time of the exchange was sour. On action brought by *B.* to recover the value of the Champagne, or a compensation for the bad condition of the Burgundy, Lord Ellenborough held, that in the absence of any evidence, either of an express warranty or of fraud, the action could not be supported. *La Neuville* v. *Nourse*, 2 Camp. 5.

(*t*) *Alexander* v. *Gibson*, 2 Camp. 556. *Pickering* v. *Busk*, 15 East, 38. 45. *Helyar* v. *Hawkes*, 5 Esp. C. 72. And warranty by the servant in such case is binding, although he had received instructions to the contrary. Ib. This, however, is contrary to the general rule as to the authority of agents. *Supra*, 45. *Truswell* v. *Middleton*, 2 Roll. 269. *Bank of Scotland* v. *Watson*, 1 Dow, 45. *Strode* v. *Dyson*, 1 Smith, 400.

(*u*) *Helyar* v. *Hawke*, 5 Esq. C. 72. *Alexander* v. *Gibson*, 2 Camp. 555. And the agent need not be called. Ibid. But there is a distinction between a general and a special agent. A principal will be bound by the act of a general agent, although he act contrary to express orders. *Secus*, in the case of a special agent. See 3 T. R. 760, 761; and the distinction taken by Lord Kenyon, in *The East India Company* v. *Hensley*, 1 Esp. C. 112. See also Ambler, 497, 8. Where the agent warrants beyond the scope of his authority, he is personally liable. In the case

another time is not admissible to prove a warranty; the agent himself must be called (*x*).

Variance.

Proof that the parties agreed that a chattel should be given and taken in part payment, is no variance from an allegation of sale at a specific price in money, for it is a mere mode of payment (*y*).

And where the receipt expresses the sale for a specific money-price, there is no variance, although it appear that the vendor took a chattel in part payment, and the rest in money; for the receipt admits that the chattel was taken as money (*z*).

In an action on a warranty of soundness of a horse the contract stated was for a specific sum, 63*l.*, the bargain was for the price of 63*l.*, and if the horse was lucky the plaintiff would give "5*l.* more or the buying of another horse;" held that the letter was of too vague a meaning to be deemed to be any substantial part of the contract, and could only be regarded as an honorary engagement, and therefore that there was no variance (*a*).

Notice.

The plaintiff is entitled to recover without proving that he has returned the article (*b*). But where the warranty on the sale of a pair of coach-horses was accompanied by an undertaking on the part of the vendor to take back the horses "if on trial they should have any of the before-mentioned faults," it was held that the purchaser could not, after a reasonable time for trial had elapsed, and not having been induced to prolong the time by any subsequent misrepresentation on the part of the seller, recover on the warranty (*c*), although one of the horses was defective within the terms of the warranty at the time of sale (*d*). Neither is notice of the unsoundness to the seller essential (*e*); but the omission to give notice may operate unfavourably to the buyer, and render the proof on his part more difficult (*f*).

The keeping a warranted article for a length of time without objection, and selling part, is evidence tending to prove that it corresponded with the warranty (*g*).

of *Scotland (Bank)* v. *Watson*, 1 Dow. 45, it was held that a horse-dealer was bound by the warranty of his servant, though given contrary to his orders; *secus*, where the master is not a horse-dealer. Where, after a general warranty of soundness by the master, his servant sent with the receipt to the agent of the purchaser, inserted words which altered the effect of the warranty, it was held that the master was not bound by the alteration. *Strode* v. *Dyson*, 1 Smith, 400.

(*x*) Ibid.

(*y*) *Hands* v. *Burton*, 9 East, 349. The declaration alleged a warranty in consideration of the plaintiff's purchasing the defendant's horse for 31*l.* 10*s.* and alleged the purchase and the payment of that sum. The proof was, that the defendant agreed to dispose of his horse, which he warranted sound, to the plaintiff for 30 guineas; but agreed at the same time, that if the plaintiff would take the horse at that value, he (the defendant) would purchase of the plaintiff's brother another horse for 14 guineas, and that the difference only should be paid to the defendant. The witness described it as *one deal* between the parties, and that but for the latter consideration he did not believe that the bargain would have been made. But the Court overruled the objection.

(*z*) *Brown* v. *Fry*, Devon Sum. Ass. 1808, Sel. N. P. 630.

(*a*) *Guthing* v. *Lynn*, 2 B. & Ad. 232.

(*b*) *Supra*. *Fielder* v. *Starkin*, 1 H. B. 17; *Buchanan* v. *Parnshaw*, 2 T. R. 745. A horse at a public auction was warranted sound, and six years old; and one of the conditions was, that he should be deemed sound unless returned within two days; held that the plaintiff might recover for breach of warranty, on discovering that the horse was twelve years old, ten days after the sale. Ib. See also *Curtis* v. *Hannay*, 3 Esp. C. 83.

(*c*) *Adam* v. *Richards*, 2 H. B. 573.

(*d*) Ibid.

(*e*) *Adam* v. *Richards*, 2 H. B. 573. *Buchanan* v. *Parnshaw*, 2 T. R. 745.

(*f*) *Fielder* v. *Starkin*, 1 H. B. 19 *Groning* v. *Mendham*, 1 Starkie's C. 257. *Adam* v. *Richards*, 2 H. B. 573.

(*g*) *Prosser* v. *Hooper*, 1 Moore, 106. Especially where the price was low. Ibid. Vide *supra*, 1210.

A *scienter*, though alleged, need not be proved (*h*).

Breach. The breach of warranty must be proved according to the allegations in the declaration. Upon the question, what constitutes unsoundness in a horse, there are many and conflicting authorities (*i*). It has been said that a general warranty will not extend to defects which are plain and obvious to the senses; as, if a horse be warranted perfect, and wants either a tail or an ear, unless the buyer in such case be blind; but that if cloth be warranted to be of such a length, when it is not, an action lies, for that cannot be discovered by sight, but only by collateral proof by measuring it (*k*). It may, however, well be doubted whether the circumstance of the defect being known or perfectly obvious can avail otherwise than as evidence, in a doubtful case, to repel the inference of an intention to warrant; and on this ground the case of *Butterfield* v. *Burrows* (*l*) seems to have been decided.

Upon a warranty of a horse, that he is a good drawer, and would pull quietly in harness, proof that he is a good drawer merely is not sufficient (*m*).

Damages. The plaintiff is, in general, entitled to recover in respect of all losses which have resulted immediately from the breach of warranty. In an action

(*h*) *Williamson* v. *Allison*, 2 East, 246.

(*i*) Eyre, C. J. held that a temporary lameness was not to be considered an unsoundness (*Garment* v. *Barrs*, 2 Esp. C. 673). In the case of *Bassett* v. *Collis* (2 Camp. 523), it was held to be insufficient to show merely that a horse warranted sound is a *roarer*, inasmuch as roaring may be merely from a bad habit; and that to prove a breach of warranty, it must be shown to be symptomatic of disease or infirmity. But in *Elton* v. *Brogden* (4 Camp. 281, 1 Starkie's C. 127), Lord Ellenborough held that any infirmity which rendered the horse less fit for present use or convenience, though not of a permanent nature, and although removed after action brought, was an unsoundness. In *Shillito* v. *Claridge* (2 Ch. 425), it was held that a cough not of a temporary nature was an unsoundness. And see *King* v. *Price*, 2 Ch. 416. And in the case of *Onslow* v. *Eames* (2 Starkie's C. 81), where it was proved by an experienced veterinary surgeon, that roaring is occasioned by a constriction of the neck of the windpipe, which renders it too narrow for accelerated respiration; and that the disorder is frequently produced by soreness of the throat, or some other topical inflammation; and that the disorder itself was of such a nature as greatly to incommode a horse when pressed to his speed; Lord Ellenborough held that this was an unsoundness. Crib-biting, it is said, is not indicative of unsoundness (*Brennenburgh* v. *Haycock*, Holt's C. 630). With respect to *thrushes*, *splints*, and *quidding*, a diversity of opinion prevails. 2 Camp. 524, n. An organic defect, such as the loss of a nerve, will constitute unsoundness. *Best* v. *Osborne*, 1 Ry. & M. 290. Crib-biting, where no disease or alteration of structure is occasioned by it, is not an unsoundness, but it is a vice within a warranty of "free from vice." *Scholefield* v. *Robb*, 2 M. & R. 210. A horse labouring under a cough which renders it unfit for immediate use, although the disease be not permanent, is not sound within a warranty. *Coates* v. *Stephens*, 2 M. & R. 157.

(*k*) 3 Comm. 165. Finch's L. 189.

(*l*) 1 Salk. 211. The plaintiff declared on the defendant's warranty of a horse to be sound wind and limb; plea *non warranti sacit*; verdict for the plaintiff. The defendant moved in arrest of judgment that the want of an eye was a visible thing, but that the warranty extends only to secret infirmities; but the Court held that this might be so, and must be intended to be so, since the jury had found that the defendant did warrant. Whether the defect were known or not to the buyer, must always depend on circumstances and collateral proof: to a man who bought a horse without seeing him, the want of eyes or tail would be a secret defect; and there seems to be no reason why he should not protect himself, either by an express stipulation for a horse with two eyes, two ears, and a tail, or by general warranty that the animal is sound or perfect. In *Liddard* v. *Kain*, 2 Bing. 181, the defendant, after informing the plaintiff that one of two horses which he was about to sell had a cold, agreed to deliver both in a fortnight sound and free from blemish; he delivered, at the end of the fortnight, one with a cough, the other with a swelled leg: the plaintiff having brought an action for the fine, the defendant insisted on a breach of warranty, and obtained a verdict, which the Court refused to set aside.

(*m*) *Coltherd* v. *Puncheon*, 2 D. & R. 10.

upon a warranty of a chain-cable, it was held that the plaintiff might recover the value of an anchor which was lost through the insufficiency of the cable; proof being given that the ship would have been lost if the anchor had not been slipped (*n*). Damages.

Where goods do not answer the description under which they have been sold, the purchaser is entitled to recover what the goods would have been worth to him had the contract been faithfully performed (*o*), where the goods have been returned; or the difference between that value and their real value, where they have not been returned.

If a warranted horse has been returned, the measure of damages is the price paid (*p*). If he has not been returned, the measure of damages is the difference between his real value and the price paid (*q*). If he has been sold, the buyer may recover the difference between the price given and the price received on the re-sale, and also the cost of keeping him for a reasonable time for the purpose of selling him (*r*). If he has not been tendered, the plaintiff cannot recover the expenses of his keep (*s*).

Where *A.* sold and warranted a horse to *B.*, and *B.* sold him to *C.*, and *C.* recovered the price from *B.* in an action, of which *A.* had notice, it was held that *B.* was entitled to recover from *A.* not only the price of the horse, but the costs of the action brought by *C.* (*t*).

But where the buyer of a warranted horse resells it, and improvidently defends an action by a party to whom he sells the horse on a like warranty, the unsoundness being discoverable on reasonable examination, he cannot recover the costs of such defence against the first warrantor (*u*).

In an action for goods warranted, which do not answer the warranty, but which have not been returned, the vendor cannot recover more than the real value (*x*).

Where the contract of warranty remains still open, or, in other words, where the breach of warranty remains to be tried, the plaintiff cannot recover as for money had and received to his use; but where, either by the terms of the contract, or by the assent of the vendor, it is rescinded, the action for money had and received is maintainable (*y*). Money had and received.

Where a horse was warranted sound, and the vendor, in a subsequent conversation, promised, if the horse were unsound, he would take it back and

(*n*) *Borradaile* v. *Brunton*, 2 Moore, 582.

(*o*) *Bridge* v. *Wain*, 1 Starkie, C. 504.

(*p*) *Caswell* v. *Coare*, 1 Taunt. 566.

(*q*) Ibid. and *Curtis* v. *Hannay*, 3 Esp. C. 82.

(*r*) *M'Kenzie* v. *Hancock*, 1 Ry. & M. C. 436. It is at the buyer's option to sell him; and if he chooses to keep him, the use may be presumed to be an equivalent for the keep.

(*s*) 1 Taunt. 366. Where the vendor rescinds the contract, he is liable to the vendee for the keep. *King* v. *Price*, 2 Chitt. 416.

(*t*) *Lewis* v. *Peake*, 7 Taunt. 153; 2 Marsh. 431. See *Green* v. *Greenbank*, 2 Marsh. 485. Lord Alvanley (in the case of *Briggs* v. *Crick*, 5 Esp. C. 99; *supra*, 1227) is stated to have ruled that a former vendor with a warranty was a competent witness for a subsequent vendor, on an action on a warranty by the latter.

(*u*) *Wrightup* v. *Chamberlain*, 7 Sc. 598.

(*x*) *Supra*, 883. As, where the goods sold by sample do not correspond with the sample. *Germaine* v. *Burton*, cor. Bayley, J., York Spring Assiz. 1821. And see *Basten* v. *Butter*, 7 East, 479. Where the plaintiff warranted a horse to be sound, knowing him to be unsound, and the buyer gave a bill of exchange for the price, and afterwards discovering the unsoundness, tendered him to the plaintiff, who refused to take him, it was held that he was precluded by his fraud from recovering on the bill. *Lewis* v. *Cosgrave*, 2 Taunt. 2.

(*y*) *Towers* v. *Barrett*, 1 T. R. 133; *Power* v. *Wells*, Cowp. 818; *Weston* v. *Downs*, Doug. 23. So one who exchanges a watch for goods falsely warranted to be silver, cannot maintain trover without showing fraud. *Emanuel* v. *Dane*, 3 Camp. 299; *supra*, 1227. And see *Cook* v. *Munstone*, 1 N. R. 251.

Money had and received.

return the money; it was held, that though the horse turned out to be unsound, the vendor could not maintain *assumpsit* for the price; for the subsequent promise did not discharge the original warranty (*z*). Any fraud in the sale will avoid a warranty, though it does not amount to a breach of the warranty (*a*).

As to the COMPETENCY OF WITNESSES, see Vol. I.

WASTE.

Proof in action of.

IN an action on the case, in the nature of waste (*b*), the plaintiff must prove, 1st. His interest, and the holding by the defendant, as alleged; 2dly. The waste complained of; and 3dly. The amount of the damage.

Plaintiff's title.

1st. Although it be unnecessary to state the plaintiff's title, yet if the plaintiff state it a variance will be fatal. The declaration alleged that the plaintiff was tenant for life, the remainder thereof belonging to the plaintiff *in tail*, to wit, *to him and the heirs of his body*. From the deed it appeared that the plaintiff was entitled to the remainder in tail-male and not in tail-general, and the variance was held to be fatal.

One of two tenants in common, who has demised his moiety to the other, cannot maintain an action on the case, in the nature of waste, against the latter, for cutting down trees fit for cutting (*c*).

An agreement for three years and a quarter, stamped as such, but not signed by the parties, is evidence to support a declaration alleging an undertaking during the defendant's tenancy, (it being generally alleged that he was tenant) to keep the premises in tenantable repair (*d*).

(*z*) *Payne* v. *Whale*, 1 East, 274.

(*a*) *Steward* v. *Coesvelt*, 1 Carr. & P. C. 23.

(*b*) By the common law, no action for waste, either voluntary or premissive, lay against lessee for life or years; for the lessee had an interest in the land by the act of the lessor, and it was his folly to make such a lease and not restrain him by covenant, condition, or otherwise, that he should not do waste. *Countess of Shrewsbury's Case*, 5 Co. 13. So a tenant at will was not punishable for permissive waste, but trespass lay for voluntary waste; for the will and possession are determined, and the lessor shall have trepass without entry. Ib. So if a bailee of a horse kill him. Ib. But where *confidence* is reposed, case lies for negligence, although the defendant come to the possession by the act of the plaintiff. As where a shepherd is trusted with the care of sheep, and by his negligence they perish. Ib. 2 H. 7. 11. But in the case of a mere lessee at will of a house no confidence is reposed; and therefore it was held that an action does not lie for negligence, whereby the house was burnt. Ib. *Supra*, tit. NEGLIGENCE.

By the statute of Gloucester, 6 E. 1, 5, waste lies against a lessee for life or years. 2 Ins. 301; and he shall forfeit and make amends of treble the value at which the waste shall be taxed. In later times, the ordinary remedy to recover damages is by an action on the case, in the nature of waste. For although it was at first objected (see *Jefferson* v. *Jefferson*, 3 Lev. 130) that waste, according to the Countess of Salisbury's case, 5 Co., was not maintainable at common law, of which opinion were Windham and Charlton, Judges; yet Pemberton, C. J., and Levinz, J., were of opinion that Lord Coke must be understood, according to the subject matter, as speaking of the *action of waste*; and they were of opinion that the action of waste, properly so called, might be waived, and an action on the case maintained. It is obvious that the common-law objection, if available as a general principle, would apply as well to one form of action as another; and it is remarkable that the very case in which Lord Coke's doctrine was expounded was an action on the case. Such researches, however, are of little importance; for it was fully settled in the case of *Kenlyside* v. *Thornton*, 2 Bl. 1111, that case lies, notwithstanding an express covenant by the lessee. *Hardwicke* v. *Thompson*, cor. Thompson, B., Gloucester Sum. Ass. 1799; 2 Will. Saund. 252, d.

(*c*) *Martin* v. *Knowllys*, 8 T. R. 145. But he may recover half the proceeds in another form of action.

(*d*) *Richardson* v. *Gifford*, 1 Ad. & Ell. 52. But it was held to be insufficient to support counts alleging demises for the term, the agreement as to that being void.

2dly. The plaintiff cannot give evidence of a different kind of waste from that which is stated in the declaration (*e*). If he charge permissive waste, he cannot give evidence of voluntary waste (*f*); if he complain that the defendant has unroofed a dwelling-house, he cannot give evidence of the removal of fixtures (*g*); if he allege spoil, waste, and destruction, he cannot give evidence of any act which does not amount to waste in its legal sense (*h*); but if he prove but part only of the waste alleged, he is entitled to a verdict for damages *pro tanto*. Waste.

It has been held that an action on the case does not lie for permissive waste only (*i*).

3dly. The amount of the damage done by the removal of fixtures, or other tortious acts (*k*). Damage.

The defendant was tenant at will during the first year, subject to the terms of the agreement on his own part, and afterwards tenant from year to year, subject still to that agreement. Ib.

(*e*) It seems to be necessary, in an action on the case, as well as in an action of waste, to specify the kind of waste. 2 Will. Saund. 252.

(*f*) Ibid.

(*g*) 2 Will. Saund. 252.

(*h*) Ibid. and *Harris* v. *Mantle*, 3 T. R. 307.

(*i*) *Gibson* v. *Wells*, 1 N. I. 290. The defendant there was mere tenant at will; but the Court repelled the action on the broad ground that no action on the case lay for mere permissive waste, and that it was an attempt at innovation. In *Herne* v. *Benbow*, 4 Taunt. 764, Mansfield, C. J., laid down the same position. In *Jones* v. *Hill* (7 Taunt. 392), the same question arose upon the second and third counts of the declaration; but from the language of the Court they seem to have decided upon the first count only, which did not raise the general question.

In the case of *Ferguson* v. —— (2 Esp. C. 590), Lord Kenyon held that a landlord could not recover such damages from his former tenant as would put the house into complete and tenantable repair. He said, "A tenant from year to year is bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises; but in the present case the plaintiff has claimed a sum for putting a new roof on an old worn-out house; this I think the tenant is not bound to do." A tenant from year to year is only bound to keep the house wind and water tight; a tenant who covenants to repair is bound to sustain and uphold the premises, but that is not the case with a tenant from year to year, per Lord Tenterden in *Anworth* v. *Johnson*, 5 C. & P. 239. In *Horsefall* v. *Mather*, Gibbs, C. J., held that a tenant from year to year is bound to use the premises in a husband-like manner, but is not liable for general repairs. The incumbent of a rectory is bound to maintain the parsonage and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; and he is not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to preserve exposed timber from decay) and whitewashing and repairing belong. Substantial repairs are sufficient where the tenant covenants to repair. *Harris* v. *Jones*, 1 M. & M. 173. Lease of old house, covenant to deliver it up in good and substantial repair, sufficient to keep up the house as an old house in good and substantial repair. See *Hubbard* v. *Bagshaw*, 4 Sim. 326; *Rufford* v. *Bishop*, 5 Russ. 346.

See Co. Litt. 53, b. 57, a; 1 Will. Saund. 323, note (7); 2 Will. Saund. 252, note (7); 2 Roll. Ab. 816, Waste, pl. 36, 37.

(*k*) By the strict rule of common law, if a stranger through fraud or ignorance annexed a personal chattel to the freehold, the annexation became part of the freehold, and the property of the owner of the soil. Britton, c. 33; and see Bract. c. 3, s. 4. 6; Fleta, lib. 3, c. 2, s. 12. Questions respecting the right to fixtures principally arise between three classes of persons:—1st. Between different descriptions of representatives of the same owner of the inheritance, viz. between his heir and executor; and in this case, *i. e.* as between the heir and executor, the rule obtains with the utmost rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel, anything which has been affixed thereto (per Lord Ellenborough, in *Elwes* v. *Maw*, 3 East, 50); and that rule is, that where a lessee, having annexed anything to the freehold during his term, afterwards takes it away, it is waste (Year Book, 17 Edw. 2. 518; *Herlakenden's Case*, 4 Co. 64; Co. Litt. 53. *Cooke* v. *Humphrey*, Moore, 177. *Lord Derby* v. *Asquith*, Hob. 234). But this rule, it appears, was relaxed in early times in favour of trade. (See 42 Edw. 3; 20 Hen. 7, 13, a & b.) Where it was held that a dyer might remove vats and vessels

Damage. It is no defence to show that the defendant has covenanted to yield up

made for his occupation during the term; he might remove them during the term; but that if he suffered them to remain after the term, they belonged to the lessor.

2dly. As between the executor of tenant for life or in tail and the remainder-man, in which case the right to fixtures is considered more favourably for executors than in the preceding case of heir and executor. A fire-engine erected by tenant for life to work a colliery, was considered to be removable (*Lawton* v. *Lawton*, 3 Atk. 13. *Lord Dudley* v. *Lord Ward*, Amb. 113), as being accessory to the carrying on trade; and the right to remove a cider-mill was decided on the same principle. But saltpans were held by Lord Mansfield to be accessories to the enjoyment of the inheritance, viz. the salt-spring (*Lawton* v. *Salmon*, 1 H. B. 259), so that the executor could not maintain trover for them against the tenant of the heir at law.

The third case, and that in which the greatest latitude and indulgence has been allowed, in favour of the claim to have particular articles considered as personal chattels, as against the claim in respect of the freehold or inheritance, is the case between landlord and tenant.

In the case of *Elwes* v. *Maw* (3 East, 38), in which many of the previous authorities were cited and considered, a distinction was established between annexations by a tenant to the freehold made for the purposes of trade, and those made for the purposes of agriculture, and the better enjoyment of the land: those of the former class, where the building was erected as a mere accessory to a chattel, were held to be removable; but those of the latter class, which were accessory to the freehold itself, were considered to be irremovable.

In the case of *Dean* v. *Allaly*, (3 Esp. C. 11), Lord Kenyon seems to have considered erections for the purposes of farming to be on the same footing with those made for the purposes of *trade*; but this was much doubted by Lord Ellenborough, in the subsequent case of *Elwes* v. *Maw*, 3 East, 57.

In *Fitzherbert* v. *Shaw* (1 H. B. 258), Gould J. expressed an opinion at the trial that a tenant from year to year might, during the term, remove a wooden stable placed on blocks or rollers, or a shed or brick-work which he had erected; but ultimately the question turned upon an agreement entered into between the parties.

In *Penton* v. *Robart* (2 East, 88), it was held that the tenant was justified in removing a building constructed of wood, and erected on a foundation of brick, for the purposes of *trade*, after the expiration of the term. And a barn put upon pattens, or blocks of timber lying upon the ground, but not fixed in or to the ground, may be removed by the tenant; for they are not fixtures. Per Lord Ellenborough, 3 East, 56. *Culling* v. *Tuffnel*, B. N. P. 34.

In *Horn* v. *Baker*, 9 East, 215, it was held that the stills of a distiller, which were fixed to the freehold, were not *goods and chattels*, within the stat. 21 Jac. 1, c. 19, s. 10 & 11; but that vats and utensils, which were not so fixed, were within the statute. Parts of a machine put up by a tenant during the term, *i. e.* certain jibs which were placed in cases and steps affixed to a warehouse, but which jibs were fastened by pins above and below, and capable of being removed without injury either to the cases and steps, or the building, and which were articles usually valued between out-going and in-coming tenants, were held to be the chattels of the out-going tenant, for which he might maintain trover. *Davis* v. *Jones*, 2 B. & A. 165. Vide *supra*, 155.

It seems, that wherever fixtures are capable of removal without injury to the freehold as between landlord and tenant, they are to be deemed as within the order and disposition of the bankrupt. *Austin, ex parte*, 1 D. & Ch. 207.

A tenant may during his term remove matters of ornament, such as ornamental marble chimney-pieces, pier-glasses, hangings, wainscots fixed only by screws, and the like (*Beck* v. *Rebow*, 1 P. Wms. 94. *Ex parte Quincey*, 1 Atk. 477. *Lawton* v. *Lawton*, 3 Atk. 13). And see *Wise* v. *Metcalf*, 10 B. & C. 299. Looking-glasses standing on chimney-pieces, and nailed to a wall, are within the description of fixtures and fixed furniture. *Birch* v. *Dawson*, 2 Ad. & Ell. 37. See *Levi* v. *Rogers*, 1 C. M. & R. 52. *Allen* v. *Allen*, Moseley, 112. Cupboards, &c., which serve in place of chests, not parcel of house for general purposes. Fost. c. 1, 109; Amos. 137. But although a tenant occupy a house for the purpose of trade, and may, according to the general rule, remove vats set up in relation to trade, (per Lord Holt, *Poole's Case*, Salk. 368,) yet he cannot remove that which is affixed to complete his house, as hearths and chimney-pieces. Per Holt, C. J. ibid., and per Lord Ellenborough, in *Elwes* v. *Maw*, 3 East, 53. An ordinary tenant cannot remove a border of box planted in the garden. *Empson* v. *Soden*, 4 B. & Ad. 655. Nor flowers, per Littledale, ib. See *Wyndham* v. *Way*, 4 Taunt. 316. A tenant on the expiration of his term may remove a wooden house resting simply by its own weight, on foundations let into the ground. *Wainsborough* v. *Matson*, 4 Ad. & Ell. 884. Or an ornamental chimney-piece put up by him during the tenancy. *Leach* v. *Thomas*, 7 C. & P. 327. But an out-going tenant cannot remove pillars of brick and mortar, built on a dairy floor to hold

the premises in repair (*l*). If a tenant, whilst he remained in possession, though after the expiration of his term, remove fixtures which he might

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pans, although they be not let into the ground. *Leach* v. *Thomas*, 7 C. & P. 327. In the case of *Buckland* v. *Butterfield*, 2 B. & B. 58, Dallas, C. J., observed, "The general rule is, that where a lessee having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste. In progress of time this rule has been relaxed, and many exceptions have been grafted upon it. One has been in favour of matters of ornament, as ornamental chimney-pieces, pier-glasses, hangings, wainscot, fixed only by screws, and the like; of all these it is to be observed, that they are exceptions only, and therefore to be considered not to be extended; and with respect to one subject in particular, namely, wainscot, Lord Hardwicke puts it as a very strong case." In the same case it was held, that where a conservatory was built on a foundation of brick communicating with the dwelling-house, the windows of which opened into it, it was waste in a tenant for life who removed it. Where a pump was erected by the tenant, being slightly affixed, held that as an article of domestic convenience, and which could be removed entire, it was within the principle of moveable fixtures. *Grymes* v. *Boweren*, 6 Bing. 437. Lime-kilns, though erected for the purposes of trade, are not removable under a lease to repair, and, as it seems, not at all. *Thresher* v. *The East London Waterworks Company*, 2 B. & C. 608. Where the usage does not decide whether fixtures and other things used in a colliery are the property of the landlord or of the tenant, that must depend on the agreement between the parties. *Ryall* v. *Rolle*, 1 Atk. 165; *Horn* v. *Baker*, 9 East, 215. *Stone* v. *Hunter*, 3 B. & C. 36. Set pots, ovens and ranges, are fixtures which go to the heir, not the executor, and are not liable to be taken as goods under an execution. *Winn* v. *Ingleby*, 5 B. & A. 625. But it seems that whatever the tenant, as between himself and the landlord, might remove, the sheriff may seize. *Poole's case*, 1 Salk. 368. Where a tenant wrongfully severed machinery from a mill, and the sheriff sold the severed machinery under an execution against the tenant, it was held that the vendee was liable in trover even during the term. *Farrant* v. *Thompson*, 5 B. & Ad. 324. Where a wooden windmill was fixed on a brick foundation, and the owner mortgaged the land, the deed containing a bill of sale of the mill; it was held that the sheriff could not take the mill under an execution against the mortgagee, although he continued in possession. *Steward* v. *Lombe*, 1 B. & B. 106. For the mill would have descended to the heir of the owner of the inheritance; and it was consistent with the whole nature of the transaction that the mortgagor should continue in possession. Ib. Under the mortgage of a mill, held that the stones, although moveable, passed without delivery, and as against the owner of the freehold, could not be taken in execution as tenant's fixtures. *Place* v. *Fagg*, 4 M. & Ry. 277. Where certain machinery, being fixtures, were demised with a paper-mill, and used by the tenant in manufacturing paper, held not to be "utensils" in the custody of the tenant within the meaning of the 34 G. 3, c. 20, s. 27, liable to be seized for duties. *Att. Gen.* v. *Gibbs*, 3 Y. & J. 333. Where the occupation was of a cottage, garden and windmill, at a rent of 30*l.*, but the cottage and garden were of less value than 10*l.* and the mill merely rested on a brick foundation, but was in no way affixed or connected with the freehold, held that it was insufficient to confer a settlement. *R.* v *Otley*, 1 B. & Ad. 161. And see *R.* v. *Londonthorpe*, 6 T. R. 377. If a sheriff sell machinery the property of the tenant, fixed to the mill demised, but on which machinery a power of distress is retained by the covenant, he is liable to pay the year's rent, if due, to the landlord. *Ducke* v. *Braddyll*, 13 Price, 455. Parts of a machine put up by a tenant during the term, and capable of being removed without injury to the machine or building, and usually valued between the incoming and outgoing tenant, are the goods of the outgoing tenant, for which trover is maintainable. *Davis* v. *Jones*, 2 B. & Ad. 165. By a general conveyance of a freehold house, of which the purchaser after payment of the price takes possession, the fixtures pass. *Colegreave* v. *Dios Santos*, 2 B. & C. 76. Upon the plea *nul waste*, the defendant cannot show that acts, such as ploughing up old meadow, and cutting timber to sell for the purpose of procuring other better calculated for repairs, were according to the custom of the country, and not in fact injurious; nor the latter even in mitigation of damages; matters in justification or excuse must be pleaded specially. *Simmons* v. *Norton*, 7 Bing. 640. And see *Barrett* v. *Barrett*, Hetl. 35. Where a party on assigning the lease of a house then out of repair, stipulated that all outgoings were to be paid by him up to the 23d April; and by the assignment indorsed and executed by him, but not by the assignee, the residue of the term was assigned subject to the covenants, &c. from the 22d April, in an action on the

(*l*) *Kenlyside* v. *Thornton*, 2 Bl. R. 1111; 2 Will. Saund. 252, c.

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have removed during the term, he may still justify *de bonis asportatis*, although he be guilty of a trespass in entering (*m*). But if the tenant give up the possession with the fixtures attached, and without valuation, he cannot afterwards remove them (*n*).

If a party entitled to remove fixtures make a new agreement, he cannot afterwards remove them (*o*).

Whether particular articles have become part of the freehold by annexation, so as to be no longer separable, is usually a question of law, arising either on an express contract between the parties, and the mode and circumstances of such annexation, or on evidence of custom. In the absence of any express agreement or rule of law applicable to the particular case, recourse must usually be had to the custom, if any such exist, as applicable to the circumstances (*p*).

WATCH RATES.

See the St. 2 & 3 Vict. c. 28; 5 & 6 W. 4. c. 76.

WATERCOURSE.

Nature of the right.

THE right of a land-owner to use and apply the water of a stream (*q*)

case against the assignee by the assignor, who had been called upon, and paid dilapidations to the lessor up to the time of the assignment; held, 1st, that the assignment though not executed by the defendant, might be read to show that the plaintiff had performed his part of the agreement; and 2dly, that the Court could add nothing to the terms of the instruments of lease and assignment, so as to make the defendants liable in that action for dilapidation before that time. *Semble*, the defendant having taken possession under the assignment, the action should have been covenant, although he never executed the deed. *Hawkins* v. *Sherman*, 2 C. & P. 461. And see Co. Litt. 230 b. n. 1.

(*m*) *Penton* v. *Robarts*, 2 East, 88.

(*n*) *Lyde* v. *Russell*, 1 B. & Ad. 394; and see the observations of Gibbs, C. J., in *Lee* v. *Risdon*, 7 Taunt. 108.

(*o*) *Fitzherbert* v. *Shaw*, 1 H. B. 258.

(*p*) *Storer* v. *Hunter*, 3 B. & C. 368; *supra*, 154.

(*q*) See now as to the time of prescription, the stat. 2 & 3 W. 4, c. 71, and tit. PRESCRIPTION. Flowing water is originally *publici juries*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it. Subject to that right, all the rest of the water remains *publici juries*. The party who obtains the right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public. Per Bayley, J. in the case of *Williams* v. *Morland*, 2 B. & C. 914.

Running water is not in its nature private property; at least it is private property no longer than it remains on the soil of the person claiming it. Before it came there it clearly was not his property. It may perhaps become *quasi* the property of another, before it comes on his premises, by reason of his having appropriated to himself the use of the water accustomed to flow through his lands, before any other person had acquired a right to it. Per Holroyd, J., ib.

Water is of that peculiar nature, that it is not sufficient to allege in a declaration that the defendant prevented the water from flowing to the plaintiff's premises. The plaintiff must state an actual damage accruing from the want of water. The mere right to use the water does not give a party such a property in the new water constantly coming, as to make the diversion or obstruction of the water *per se* give him any right of action. All the King's subjects have a right to the use of flowing water, provided that in using it they do no injury to the rights already vested in another by the appropriation of the water. Per Littledale, J., ib. See also *Bealey* v. *Shaw*, 6 East, 214. *Sanders* v. *Newman*, 1 B. & A. 258.

The following is extracted from an opinion by Mr. Holroyd, in 1807: "The proprietor of land over which a stream of water flows is, I think, warranted in using the water for the purposes of his business, though it may be polluted thereby, or in entirely diverting it, if such usage or diversion be not prejudicial to the owner of any of the estates below, in the manner in which they have been previously accustomed to use the same. Any supposed intended use to which the owner of any such estate may or may not hereafter apply the water, is not, I think,

which runs through the lands of various proprietors, depends, partly on the peculiar nature of the subject-matter, partly on principles already noticed.

Principle of appropriation.

The water of a running stream is *publici juris*, which each successive proprietor has a right to use in passing, but which is the property of no one; but if one of such owners appropriates the water by applying it to a particular purpose, he has a right to do so, provided he does not thereby prejudice any other owner in his previous use and appropriation of the water to other purposes (*r*). But he cannot do this to the prejudice of a lower proprietor, who has already appropriated the stream, or a portion of it, to some particular use (*s*).

Thus, if *A.* erect a weir, of the height of three feet, and four years afterwards add another foot to the height of the weir, *B.* having in the meantime appropriated the surplus water flowing over the first weir, *B.* may maintain an action against *A.* for thus heightening the weir (*t*).

Upon the same principle, after a right has been acquired to use water for one purpose, the owner has a right to use the same extent of water to a

sufficient to deprive any other person of the right such person has of applying and appropriating the water to a beneficial purpose. Every person has, I conceive, that right, provided that by such application or appropriation he does not prevent or disturb any other person from using the same or enjoying the benefit thereof, in as full, ample, and advantageous a manner as that other has done before."

Where a plaintiff had enjoyed a spring and stream of water issuing out of his own grounds for twenty years, and the defendant, by opening a quarry in his own adjoining lands, intercepted the spring, it was held to be no answer to the action that a grant could not be presumed, inasmuch as the existence of the watercourse through the defendant's land had been but recently discovered; and Lord Ellenborough held that the enjoyment for twenty years afforded conclusive evidence of right. *Balston* v. *Benstead*, 1 Camp. 463. If, however, such a right really depended upon the presumption of a grant, the evidence of twenty years' enjoyment could scarcely be considered to be conclusive. There had been an appropriation of the water to a particular purpose, and therefore it was unnecessary to resort to the presumption of a grant. The doctrine of presumptive evidence of right derived from user, cannot properly have any operation except as to such use as the claimant had no right to except the presumed one, and which is inconsistent with the rights of others, and is in itself open and notorious. Mutual benefit is evidence of an agreement. If two men have property near a river, and they cut through each other's ground for water, and this continues for twenty years, an agreement is to be presumed. Per Ld. Cowper, 12 Vin. Ab. Q. a. fol. 8.

(*r*) So according to the civil law: "Plerosque scio prorsus flumina avertisse alveosque mutasse dum prædiis suis consulunt; oportet enim in hujusmodi rebus utilitatem et tutelam facientis spectari *sine injuriâ accolarum*." Dig. tit. *Ne quid in flumine.*

(*s*) Neither, according to the law as laid down in *Mason* v. *Hill*, 3 B. & Ad. 304, and *Wright* v. *Howard*, 1 Sim. & Stu. 190, can he do this to the prevention of the lower proprietor from applying the water to a particular purpose, although at the time when the higher proprietor so applied the water the lower one had not begun so to apply it. *Secus* after an enjoyment for 20 years.

(*t*) *Bealey* v. *Shaw*, 6 East, 214. The persons under whom the defendants claimed had 80 years since erected a mill, and made a weir to divert the water from the river Irwell, which weir had at various times before 1787 been enlarged. In 1787 the plaintiff built a mill lower down the stream, which was supplied by the water not then taken by the defendant's weir, and continued to enjoy the surplus water till 1791, when the defendants so enlarged their weir, and extended their works, as to take all the water from the plaintiff's mill. The Court held the action to be maintainable. Lord Ellenborough said, that 20 years exclusive enjoyment of water in any particular manner affords a conclusive presumption of right in the party so enjoying it; but less than 20 years may or may not afford such a presumption, according as it is attended with circumstances to support or rebut the right. And in the same case Le Blanc, J. said, "The true rule is, that if after the erection of works, and the appropriation by the owner of land of a certain quantity of water flowing over it, the proprietor of other lands takes what remains of the water before unappropriated, the first-mentioned owner, however he might before such second appropriation have taken to himself so much more, cannot do so afterwards."

Appropriation.

different purpose, provided he does no prejudice to any other owner in his use of the water (*u*).

Where the plaintiff had a right to use water for irrigation and had done so by placing loose stones, and occasionally a board across the stream, but had upon the particular occasion fastened the board with stakes, and the defendant had removed both, held, that he could not justify so doing on the ground of the stakes giving a character of permanency to the former easement (*x*).

And as the individual right must be founded on the appropriation of the water to a beneficial purpose, the plaintiff, in support of an action for prejudicing such a right, must allege and prove such appropriation and use, otherwise he is not entitled to recover (*y*).

But in the late case of *Mason* v. *Hill* (*z*), the Court, after great consideration,

(*u*) In *Saunders* v. *Newman*, 1 B. & A. 258, the plaintiff had 40 years ago built a mill on the site of an ancient mill, and had within 20 years built a new mill with a wheel of the same dimensions; and afterwards substituted a wheel of different dimensions, but requiring less water; the alteration was held to be no defence to an action for forcing the water back, and injuring the mill. Per Abbot, J.: "The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that would stop all improvements in machinery. If indeed the alterations made from time to time prejudice the right of the lower mill, the case would be different." And see the observations of Holroyd, J., ibid.; and see *Greenslade* v. *Halliday*, 6 Bing. 379.

(*x*) *Greenslade* v. *Halliday*, 6 Bing. 379.

(*y*) *Williams* v. *Morland*, 2 B. & C. 910. Where the jury found that the defendant had made a dam higher up the stream, but the banks and premises of the plaintiff were not injured by the increased violence of the stream, as alleged by the plaintiff, but that the defendant had by his dam wrongfully stopped the water; it was held that the plaintiff was not entitled to recover. Where, however, the plaintiff had used the water for cattle, and the defendant diverted the water under an assertion of right, and of his intention that the diversion should be permanent, it was held that the plaintiff was entitled to recover damages, although the stoppage was in fact but temporary; for if no action were brought, a stoppage with that assertion would afterwards be evidence of right. *Greaves* v. *Burbery*, cor. Bayley, J., York Ass.: and by the Court of K. B. Mich. 1828. *Sed quære*, whether the mere assertion can make any difference. In a case before Wood, B. at Carlisle, where the water having been used for the purpose of irrigation, was afterwards returned into the ordinary channel, the learned judge nonsuited the plaintiff; but as it appeared that by so doing a portion was lost in consequence of absorbtion and irrigation, the Court of K. B., as I am informed, afterwards set aside the nonsuit. In the case *Mason* v. *Hill*, 5 B. & Ad. 1, it seems to have been doubted whether the owner of land, without having used the stream for some special purpose and without some damage sustained, can support an action.

If a mill-head pens back the water upon the adjoining lands, and injures them, but in consequence of defective construction, and want of repair in the wheels and waste-gates, the mill-pond is, by the working of the mill at seasons wholly selected by the miller, without the control of the landowner, so soon and so frequently exhausted that the adjoining lands are frequently relieved from the stagnant water, and suffer but small damage, the miller (*it seems*) is justified in repairing and improving the construction of his mill, and thereby penning the water back on his neighbour's lands, on the same level, for longer periods, although he thereby occasions greater damage to him. *Alder* v. *Savill*, 5 Taunt. 454.

(*z*) The plaintiff and defendant had lands contiguous to the stream, the land of the defendant being situated above the land of the plaintiff. The defendant in 1818 erected a weir across the stream at a part contiguous to his own land, and by means of channels and reservoirs conveyed and used great part of the water for the purpose of supplying a steam-engine. The plaintiff, 10 years after this diversion, made a channel in his land contiguous to the stream, by which he conveyed the water to some buildings of his, at a little distance from the stream, for the purpose of a manufactory not previously carried on there. The Court of King's Bench, after a verdict for the defendant, under the direction of the learned judge, set aside the verdict, principally, it seems, on the authority of a decision by the Master of the Rolls, in the case of *Wright* v. *Howard*, 1 Sim. & Stu. 190. The Master of the Rolls, in his judgment in that case observed, "Every proprietor who claims a right, either to

held, that an appropriation of less than 20 years duration was not sufficient to give a right to the appropriator against a lower proprietor. Appropriation.

And now the law on this subject depends much on the provisions of the late stat. 2 & 3 W. 4, c. 1, s. 2 (*z*), which in effect makes an uninterrupted enjoyment of a watercourse for the period of twenty years to give a valid title, unless it be answered by such evidence as, before the Act, would have rebutted the presumption of a grant.

In case for the diversion of water from the plaintiff's mills, it appeared that certain mining adventurers had obtained a lease from the proprietors of a mine, lying near and benefited by a drain or sough constructed by them them (under what right did not appear, but presumed to be either under the custom of mining, or by licence from the owner of the soil), and that afterwards the father of the plaintiff had obtained a lease from the lord of the manor, also owner of the soil through which the sough flowed, on which he erected cotton-mills; subsequently, another company of adventurers began to construct on a lower level another sough, which, under an agreement with the proprietors of the first sough, and of other mines drained by it, they proceeded to extend, thereby reducing the quantity of water which would have passed along the first sough to the plaintiff's mills; it was held, that as the origin of the watercourse, as well as its continuance, were referable to the convenience of the mine owners; and that, from the nature of the case, it was of a temporary character, no inference could be made of any intention to grant the use of the water in perpetuity, and that no such right was therefore acquired by the user, either by the presumption of a grant, or by force of the 2 & 3 Will. 4, c. 71 (*a*).

B. having diverted water from the mill of *A.*, for which *A.* recovered damages, took a lease of the water from *A.* for ninety-nine years; though *A.* suffer his mill to fall into decay, yet the owner of his land is entitled to the water as it formerly flowed, at the end of the term (*b*).

An action for obstructing a watercourse is local in its nature (*c*), but a local description is unnecessary (*d*).

The right to have a drain or passage for water through the lands of

throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or licence from the proprietors affected by his operations, or must prove an uninterrupted possession of 20 years, which term of 20 years is now adopted upon a principle of general convenience, as affording conclusive presumption of a grant." And he adds, "an action will lie at any time within 20 years, when injury happens to arise in consequence of a *new purpose* of the party to avail himself of his common right." In a subsequent action, afterwards pending between the same parties, *Mason* v. *Hill*, in the Court of King's Bench, after much discussion and consideration, the Chief Justice pronounced a very learned and elaborate judgment, supporting the former decision.—Where the owner of a mill stream had kept an ancient opening into a ditch closed for above 20 years; held, that the owner of the land adjoining the ditch could not justify the reopening the communication; and that where the mill-owner, after having altered his wheel to one requiring a greater head of water, had subsequently discontinued it for 20 years, and resumed the use of his former wheel, he could not resume his right to the higher head of water. *Drewett* v. *Sheard*, 7 C. & P. 465. Where the plaintiff enjoyed a watercourse above 20 years ago, and about 22 years since some alteration was made in it, but about 19 years ago it was restored to its ancient course, held that the right was not destroyed by such interruption. *Hall* v. *Swift*, 4 Bing. N. C. 381.

(*z*) See tit. PRESCRIPTION, p. 919.

(*a*) *Arkwright* v. *Gell*, 5 M. & W. 203. Trespass, plea justifying a right to enter to remove hatches obstructing a watercourse to the defendant's mill, evidence of a former occupier of the mill having asked permission to use the water, is admissible, as of the exercise of a right by one and acquiescence by the other. *Wakeman* v. *West*, 8 C. & P. 105.

(*b*) *Davis* v. *Morgan*, 4 B. & C. 8.

(*c*) *Mersey & Irwell Navigation* v. *Douglas*, 2 East, 497.

(*d*) Ibid.

Right of passage.

another, may either be direct or presumptive. Direct evidence of such a right must be by means of a grant under seal, in the case of a freehold (*e*); and as it seems also in the case of a chattel interest (*f*).

There is no distinction between the obstruction of the ordinary course of water, which cannot be changed to the injury of another, and the extraordinary course for carrying off the superabundant quantity at particular seasons (*g*).

An allegation that the plaintiff, by reason of his possession of a mill with the appurtenances, was entitled to the use of water running in a certain tunnel to the mill, is not supported by proof that the tunnel was made on the defendant's land on an agreement by the latter to convey the right, and no conveyance having in fact been made, and the defendant's assent having been refused; for the plaintiff had not the right by reason of possession, but under a parol licence revocable in its nature, and in fact revoked (*h*).

It has been laid down by authority, that every one of common right has a right of way for servants or horses, on the banks of a navigable river, for towing barges; and if the water of the river impairs the banks, then in the nearest part of the field next adjoining (*i*).

It is no defence to an action by a reversioner, for an injury to the reversion, in not repairing a gutter for the conveyance of water through the plaintiff's land to the defendant's mill, whereby the water oozed through the gutter, and carried away the soil of the close, that the defect in the gutter was occasioned by the plaintiff's tenant (*k*).

Ferry.

In an action for the disturbance of a ferry (*l*), it is sufficient to prove possession and enjoyment, without producing documentary evidence, such as court rolls, where the ferry is within a manor, and has passed by surrender and admission (*m*). And it is unnecessary either to allege or prove the payment of any specific sum for passage-money (*n*), or to show that the plaintiff is owner of the soil on either side (*o*), provided he have the right of embarking and disembarking his passengers. And although the Crown may for neglect of duty repeal the grant by *scire facias* or *quo warranto*, such neglect is no answer to an action for disturbance of the ferry (*p*).

In an action by a canal company for a nuisance in digging clay-pits, by

(*e*) *Hewlins* v. *Shippam*, 5 B. & C. 221; 2 Roll. Ab. 62; Gilb. L. E. 96, 6th edit. *Bolton* v. *Bishop of Carlisle*, 2 H. B. 259; Shep. Touch. 231. *Ramsey* v. *Rowson*, 1 Vent. 18. 25. *Hoskins* v. *Robinson*, 2 Vent. 12; 2 Saund. 327. *Fentiman* v. *Smith*, 6 East, 154.

(*f*) Ibid.

(*g*) *R.* v. *Trafford*, 1 B. & Ad. 874. If several by several acts cause a joint destruction to the public nuisance all may be joined in the same indictment. Ib.

(*h*) *Fentiman* v. *Smith*, 4 East, 107. And see *Hewlins* v. *Shippam*, 5 B. & C. 221.

(*i*) *Young's Case*, per Holt, C. J., 1 Ld. Raym. 725. And see *Cocker* v. *Cooper*, 4 C. M. & R. 410.

(*k*) *Lord Egremont* v. *Pulman*, 1 Moo. & Mal. C. 404.

(*l*) A ferry is a liberty by prescription, or the King's grant, to have a boat for passage on a great stream, for the carriage of horses and men, for reasonable toll. *Termes de la Ley*, 338. There is no difference between a claim to an ancient ferry and other cases of prescription; and though its commencement can only be by royal grant or licence from the Crown, the word *ancient* does not impose the necessity of producing such grant, but it is satisfied by proof of the ferry having existed for such a time as will raise the presumption of its being originally founded by right: and a variation in the toll will not affect the franchise, nor will contradictory evidence of the usage, which is matter for the consideration of the jury. *Trotter* v. *Harris*, 2 Y. & J. 285.

(*m*) *Peter* v. *Kendall*, 6 B. & C. 703. *Blissett* v. *Hart*, Willes' Rep. 508.

(*n*) *Peter* v. *Kendall*, 6 B. & C. 703.

(*o*) Ib. Saville, 11, pl. 29, contra.

(*p*) 6 B. & C. 703. Where a grant has been made on condition, the non-user by the grantees will preclude them availing themselves of the grant against the Crown, on an indictment for a nuisance. *Attorney-general* v. *Richards*, 3 Austr. 753. *Painter* v. *Attorney-general*, 1 Dow, 316. The

which the banks of the canal were injured, it is incumbent on the plaintiffs to show that the banks were at the time of the damage in such a state as the Act of Parliament requires (*q*).

Although an adverse enjoyment for the space of twenty years is, as against a private individual, evidence of a grant by him, yet it is otherwise in the case of a public river navigable by all the King's subjects; no obstruction for twenty years will bar a public right (*r*).

Ownership of the soil is *primâ facie* evidence of a right of fishery.

Where a river is not navigable, the presumption is that the soil is the property of the owners on each side, to the middle of the river (*s*). But in the case of a navigable river, the presumption is that the soil is vested in the Crown (*t*). Yet, a subject may claim a prescriptive right to a several fishery in an arm of the sea even against the Crown (*u*).

Crown had been in possession for 150 years, and therefore a presumption arose against the grant of the Crown. But an enjoyment for 60 years would be sufficient evidence of title in such case against the Crown. 1 Dow, 316, per Lord Eldon. On an avowry for taking goods under a distress for port duties, it is not necessary to show that the port is in repair, the consideration being the obligation to repair for the benefit of the public. 1 Ld. Raym. 385.

(*q*) *Stafford Canal Co.* v. *Hallen*, 6 B. & C. 317; but see *R.* v. *Trafford*, 1 B. & Ad. 874.

(*r*) *Vooght* v. *Winch*, 2 B. & A. 662. *Weld* v. *Hornby*, 7 East, 195. Whether a river be navigable or not is of course a question of fact for the jury (*Vooght* v. *Winch*, 2 B. & A. 662.) The flux or reflux of the tide is evidence of a navigable river (*Miles* v. *Rose*, 5 Taunt. 705), but not conclusive. (Ibid.) It was held in that case that the cutting of rushes in the creek by strangers, and without interruption, was a strong circumstance to show that the river was public. The fact that pleasure-boats were accustomed to sail up the creek was also relied upon by Gibbs, C. J.

The public are not entitled of common right to tow on the banks of ancient navigable rivers (*Ball* v. *Herbert*, 3 T. R. 253); or to use the sea-shore for bathing; or to cross the sea-shore on foot, or with machines for that purpose. *Blundell* v. *Catterall*, 5 B. & A. 268, Best, J. *dissent.*

A public right of navigation may be extinguished either by an Act of Parliament, a writ of ad quod damnum and inquisition, or under certain circumstances by commissioners of sewers, or by natural causes, such as the recess of the sea, accumulation of silt or mud. And where a public road, obstructing a channel once navigable, has existed for so long a time that the state of the channel when the road was made cannot be proved, it is to be presumed that the right of navigation was legally extinguished. *R.* v. *Montague*, 4 B. & C. 598. The right of the public in a public navigable river extends to every part of the space between the banks; and a grant by the Crown to erect a weir over part of it not then necessary to the navigation, must be taken to be subject to the necessities of the public when they may arise; the Crown had no common-law right to interfere with the channels of public rivers before, nor has any since the passing of Magna Charta, or any other right than that of preserving the right and restraining nuisances in derogation of it; the effect of the st. 25 Edw. 3, st. 4, c. 4, was impliedly to legalize all weirs which had been set up before the time of Edw. 1, and evidence is proper to show the antiquity of a disputed weir. *Williams* v. *Wilcox*, 3 Nev. & P. 606.

(*s*) *Carter* v. *Murcot*, 4 Burr. 2162.

(*t*) The Crown is not entitled to land recovered from the sea by gradual alluvion, but only to such as has become derelict. Upon inquisition a jury found that particular land had formerly been covered by the sea, but had for many years been derelict; that the land had since been unoccupied, but that the herbage had been eaten by the cattle and sheep belonging to different tenants and occupiers of land situate within the sea marsh. Upon petition by Lord Gwydir to traverse the inquisition, on affidavit that the lands in question were parcel of his manor, and that the tenants of the manor had for a long time enjoyed rights of common on the lands, the Vice-Chancellor held that this was not only *primâ facie* evidence of title, but a title not negatived by the finding of the jury. *Ex parte Lord Gwydir*, 4 Madd. 281. Where a grant of wreck was made by H. 2, and confirmed by H. 8, to the proprietor of land on the coast, who within forty years had constructed an embankment across a small bay to reclaim sea-mud, and had since exerted an exclusive right to the soil without opposition, it was held, that from such usage, anterior usage might be presumed; and that the usage coupled with the terms of the grant, served to elucidate it, and to establish the right so asserted. *Chad* v. *Tilsed*, 2 B. & B. 403.

(*u*) *Mayor of Orford* v. *Richardson*, 4 T. R. 439. The general rule is that the public have a right of fishing in a navi-

The soil of the sea-shore belongs to the Crown, but it may be in a subject (*x*).

Proof of the very act of fishing in the *locus in quo*, is evidence of the right, although it be not proved that fish were actually caught (*y*).

Former verdict.

It has been seen that a verdict for the defendant in a former action, for diverting water from his mill, is evidence, but not conclusive, for the defendant in a second action (*z*).

So a verdict for the plaintiff, in an action for obstructing his barges in a *navigable* river, is strong, but not conclusive, evidence, in an action for a similar obstruction (*a*).

As to the liability of one having frontage land to face against the sea, see Callis on Sewers (*b*).

Competency.

Where issue is joined on a traverse, that a stream of water has from time immemorial been accustomed to flow in a specified course, one who claims a right of water, which depends upon the prescription alleged, is it seems incompetent as a witness, upon the same principle that a commoner cannot by his evidence support a custom beneficial to himself; but it is otherwise where a right of water is claimed by prescription as appurtenant to a particular messuage (*c*).

Defence.

Where the plaintiff's father had given a parol licence to the defendants to erect certain weirs, and to lower the bank of a river, whereby less quantities of water ran down to the plaintiff's mill, which proving injurious, the father had after a lapse of five years represented it to the defendants, and required them to restore the banks to the former level, which the latter

gable river, where the tide flows and reflows; and according to Lord Hale, "If any one will appropriate a privilege to himself, the proof lieth on his side." *Lord Fitzwalter's Case*, 1 Mod. 105. A man may prescribe for a several fishery in a navigable river without showing a grant from the Crown (*Rogers* v. *Allen*, 1 Camp. 312); and a several fishery in a navigable river is divisible; it may be abandoned to the public as to the taking of floating fish, and preserved as to the dredging for oysters. Ibid. An user of the banks of a river by fishermen for more than twenty years, with evidence of their having levelled and improved the landing place, affords presumptive evidence of a grant to the lessees of the fishery in a public navigable river. *Gray* v. *Bond*, 2 B. & B. 667. Although both the fishery and landing place once belonged to the same person, ib.; and although there was no evidence to show that the former owner, or those who claimed under him, knew that the shore had been so used.

(*x*) See the judgment of Holroyd, J. in *Blundell* v. *Catterall*, 5 B. & A. 29. The shore is that which is contained between high and low water marks, at ordinary tides, that is to say, between the ordinary flux and reflux of the sea. *Seeus*, by the civil law. Per Lord Hale, as cited by Holroyd, J. in *Blundell* v. *Catterall*, 5 B. & A. 291. An appropriation by any subject of any part of the sea-shore, even below low-water, though it be but temporary, and no nuisance, without the King's grant or licence, is a purprestnre and intrusion on the King's soil, which he may demolish or seize at his pleasure. Per Hale, C. B. See 5 B. & A. 291. The above definition of the extent of the sea-shore is not very clear, the proper limit between the shore and the land, seems on principle to be the average limit of spring tides.

(*y*) *Patrick* v. *Greenway*, 1 Will. Saund. 346, b. Hence it has been said that the very act of fishing is sufficient damage to support an action for disturbance of the plaintiff's right (Ibid.) For wherever an act injures another's right, and would be evidence in favour of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific injury. Ibid. And see *Wells* v. *Watling*, 2 Bl. R. 1283; *Hobson* v. *Todd*, 4 T. R. 71; and the above case of *Patrick* v. *Greenway*. Note, that in the last case the action was in *trespass*.

(*z*) *Vooght* v. *Winch*, 2 B. & A. 662; *supra*, 959; and Vol. I. tit. JUDGMENT.

(*a*) P. C. *Miles* v. *Rose*, 5 Taunt. 705.

(*b*) Frontage is where the grounds of any man do join with the brow or front thereof to the sea, or to great and rapid streams, and it seems that the frontages are bound to the repairs, Callis, 115, whether in possession or not. *Payne* v. *Rogers*, 2 H. B. 349. And see *Chawley* v. *Winstanley*, 5 East, 266; *Perreau* v. *Bevan*, 5 B. & C. 284.

(*c*) *Jebb* v. *Povey*, 2 Esp. C. 679; *supra*, 319.

however refused to do; held, that such licence being only a relinquishment of the use of the quantities of water which he had formerly enjoyed, and not a transfer of any right or interest, and in consequence of which the defendants had incurred expense in doing the act to which the consent was given, it could not be retracted, and that no action was maintainable for the refusal to reinstate the premises, or for continuance of the works (*c*). In an action by the reversioner for not repairing a watercourse, it was held to be no defence that the injury was occasioned by the wrongful act of the defendant's own tenant, for which the defendant might have maintained an action against him (*d*).

WAY (*e*).

In an action for an injury by obstructing the plaintiff's enjoyment of a right of way, it is incumbent on him to prove (*f*) the right of way claimed (*g*), and 2dly, the obstruction.

A right of way exists either by prescription or grant, or other agreement, or license, or from necessity (*h*). And the evidence is either direct, by proof of an existing grant (*i*), or presumptive.

(*c*) *Liggins* v. *Inge*, 7 Bing. 682.

(*d*) *Egremont* v. *Pulman*, 1 Mood. & M. 404.

(*e*) Where by a local Act parties were empowered to lay roads across and along any roads mentioned in the Act, subject to the keeping in repair such roads for 20 yards on each side of the railway, it was held, that it did not extend to cases where there were not 20 yards of road on each side, and (*semble*) only to cases of crossing roads directly or in a slanting course, and not to a continuous course, by the side of a public turnpike road, and that the supposed greater convenience to the public by the use of the railroad, upon payment of the authorized tolls, did not render it less an indictable nuisance in the case of an actual obstruction of the old turnpike road, supposing such railway legally made under the Act. *R.* v. *Morris*, 1 B. & Ad. 441. *Qu.* if upon the expiration of the Act it could have been legally continued? By a private Act of Parliament a water company is empowered to break up the soil and pavement of roads, highways, footways, common streets, lanes, alleys and public places. The word footway is explained by the context, and gives no authority to enter a private field of the plaintiff, over which there is a public footway. *Scales* v. *Pickering*, 4 Bing. 448.

(*f*) That is in case of a denial on the part of the defendant according to the new rules. See tit. Rules.

(*g*) The onus of proof lies of course on the claimant. *Jackson* v. *Hesketh*, 2 Starkie's C. 518. *Ballard* v. *Dyson*, 1 Taunt. 279. *Jackson* v. *Stacy*, Holt's C. 455. In case for obstructing the plaintiff's right of way, claimed under a lease of the premises from the defendant, held that it was for the jury to find the state of the premises at the time of granting the lease, and for the Court then to put a construction on the terms of the lease in respect of the way granted, and declarations of the parties before and after are inadmissible; where it is uncertain which of two ways is meant, parol evidence is admissible. Where the way granted lies over the land of third persons, and there is no other, the lessee is entitled to pass across the grantor's land by the shortest way to the public highway, as a way of necessity; and where it is a private way, the grantor is bound to make it. *Osborn* v. *Wise*, 7 C. & P. 761.

(*h*) *Infra*, 1256.

(*i*) A lease of a house and land adjoining, with all ways, with the said premises, or any *part* thereof, used or enjoyed before, entitles the lessee to a right of way which a tenant of the whole of the yard, before and at the time of the lease, used and enjoyed to every part of the yard. *Kooystra* v. *Lucas*, 5 B. & A. 830.

If a man seised of Blackacre and Whiteacre, uses a way through Whiteacre to Blackacre, and then afterwards grants Blackacre with all ways, &c., the way through Whiteacre will pass to the lessee (Com. Dig. tit. Chemin, D. 3). So if he be seised of two acres, to which a way is appurtenant, and grants one acre with all ways, &c. the way will be granted (*Clarke* v. *Cogge*, Cro. Jac. 121, 122. 170; 6 Mod. 3). So if a lessor having used convenient ways over adjoining land during his own occupation, demise premises with all ways appurtenant, unless it be shown in evidence that there was some way appurtenant in *alieno solo* to satisfy the words of the grant, the ways shall pass although they be miscalled appurtenant, the easement having been destroyed by unity of possession. *Morris* v. *Egginton*, 3 Taunt. 24. But where one seised in fee of the adjoining closes *A.* and *B.*, over the former of which a way had been immemorially used to the latter, devised *B.* with the appurtenances, it was held that the devisee could not claim the

Proof of title.

The nature of the presumptive evidence requisite to prove a right of way by prescription (*k*) or grant (*l*), over the lands of another, has already been considered. The general rule, it has been seen, is, that an uninterrupted enjoyment of such an easement for the space of twenty years, unanswered and unexplained, affords presumptive evidence of title (*m*); a presumption which may be repelled by evidence which accounts for the possession, without resorting to a title by grant or otherwise.

Long user, even during the occupation of tenants, is a ground for presuming the knowledge and acquiescence of the owner (*n*).

Where there is conflicting evidence as to enjoyment for twenty years, circumstances being shown which are inconsistent with the existence of a deed, it is a question for the jury to decide whether in fact such a grant was ever made (*o*).

right of way over *A.*, for the old way was extinguished by unity of possession, and no new way was created. *Whalley* v. *Thomson*, 3 B. & P. 371.

A grant of a free and convenient way for the purpose of carrying coals, gives a right to lay a framed waggon-way (*Senhouse* v. *Christian*, 1 T. R. 560). But a grant of a way from *A.* to *B.* in, through, and *along* a particular way, does not justify the grantee in making a *transverse* road. (Ibid.) A right to repair is incident to a grant of a way. 1 Saund. 323. *Gerrard* v. *Cooke*, 2 N. R. 109.

Where a private Act of Parliament for inclosing the waste lands of a manor reserved to the lord all mines, together with all convenient *and* necessary ways then already made, or thereafter to be made, with liberty of making waggon-ways at his free will and pleasure, and to do such other acts as might be necessary for the full and complete enjoyment thereof, in as full, ample and beneficial a manner as if that Act had not been made, in an action of trespass against an assignee of the lord, for making a way, it was held, that the question for the jury was not whether the road had been made in the direction and in the manner least injurious to the owner of an allotment, or in that direction or by that mode which a strict necessity would have pointed out; but whether the direction chosen has been such as a person of reasonable and ordinary skill and experience would have selected beforehand, and whether the mode adopted has been such as a prudent and rational person would have adopted if he had been making a road over his own land, and not over the land of another. *Abson* v. *Fenton*, 1 B. & C. 195. A lease of premises describes them as abutting on an intended way, thirty feet wide, not then set out, the soil of which was the property of the lessor; the lessee grants an under-lease, describing the premises as abutting on an intended way, without specifying the breadth; the sub-lessee is entitled to a *convenient* way only. *Harding* v. *Wilson*, 2 B. & C. 96. *A.* granted to *B.* land of unequal breadth, described as abutting on a road on his own soil. It abutted on the broadest part of the road, but in the narrowest part of it a narrow strip of the grantor's land intervened between the road and the premises granted; and it was held that the grantor, and those claiming under him, were concluded from preventing the grantee from coming out into the road over this slip of land. *Roberts* v. *Kar*, 1 Taunt. 495. In *Barlow* v. *Rhodes*, 1 C. & M. 449, Bayley, J. held that the case of *Morris* v. *Egginton* depended wholly on the principle of necessity. And see *Plant* v. *James*, 5 B. & Ad. 791. The latter case went on the principle that the grantee of the soil could not be grantee of a way over part of the land granted. It seems that a map indorsed on the particulars of sale, is not evidence, after a conveyance of land sold by deed, to show that the road was intended to pass under the terms of all ways appurtenant, the way not being appurtenant in the strict legal sense of the term. *Barlow* v. *Rhodes*, 1 C. & M. 449.

(*k*) *Supra*, tit. PRESCRIPTION. A verdict finding a prescriptive right of way may be supported, although the close to which it is claimed was within thirty years parcel of a common enclosed by Act of Parliament; for the lord might have had such a way for himself and his tenants. *Codling* v. *Johnson*, 9 B. & C. 933.

(*l*) *Supra*, 526. A right claimed by reason of the possession of a close, from that close along a watercourse to a navigable river, is not supported by evidence of the user of a way by the occupier of an inn and yard, held as one entire subject, from which yard the plaintiff's close had recently been taken off. *Bower* v. *Hill*, 2 Scott, 535. And *qu.* whether the right as alleged for plaintiff and his servants to pass and repass in boats, &c. is supported by evidence of goods brought along the watercourse, but not in boats belonging to the occupier, or navigated by his servants?

(*m*) *Supra*, 526; *Campbell* v. *Wilson*, 3 East, 294. *Supra*, 913, note (*z*).

(*n*) *Davies* v. *Stephens*, 7 C. & P. 570.

(*o*) *Liett* v. *Wilson*, 3 Bing. 115; where the usage had during the twenty years been interrupted.

Proof of title.

The effect of enjoyment as evidence of title is now subject to the important alterations made on this branch of the law by the stat. 2 & 3 W. 4, c. 71 (*p*).

Where the right is claimed *ex necessitate*, it is of course essential to prove the particular facts and circumstances which in point of law support such a right, as that the claimant purchased land to which there is no access but over the land of the vendor, for then the law implies a grant of a right of way *ex necessitate* (*q*).

So also, where one having three closes sells the two extremes, a road to the middle one is reserved by operation of law (*r*).

If a man having a right of way over the close *A.*, for the occupation of his close *B.*, purchase an adjoining close *C.*, he cannot use the way for the occupation of the latter close (*s*).

Evidence of the user of a road tends only to proof of a right commensurate with the usage (*t*).

A right to use the way for carts and horses only, will not justify the use of the way as a drift-road for cattle (*u*), although proof of usage of the way for carts and horses may, coupled with circumstances, afford evidence of a drift-way (*x*).

So a right of way for agricultural purposes will not justify the party in using it for a lime quarry newly opened (*y*).

The grantee of a private way over the lands of another may maintain an action on the case for obstructing the way, although the public have used it for the last thirteen years (*z*).

In trespass *quare clausum fregit*, on issue taken on a right of way in the occupiers of a close enjoyed for twenty years, for horses, carts, waggons, and carriages (under the stat. 2 & 3 W. 4, c. 71), the plaintiff may, without a new assignment, show that the right was limited to the use of the way

(*p*) See tit. PRESCRIPTION, 919. In support of a plea of right of way, under the stat. 2 & 3 Will. 4, c. 71, s. 2, evidence of a user more than forty years back is admissible. *Lawson* v. *Langley*, 4 Ad. & Ell. 890.

(*q*) *Howton* v. *Frearson*, 8 T. R. 50. Even although the vendor was but a trustee. Ib.; and see *Roberts* v. *Kar*, 1 Taunt. 495.

(*r*) Per cur. *Clarke* v. *Cogge*, Cro. J. 270; 2 Roll. Ab. pl. 60, pl. 17. *Howton* v. *Frearson*, 8 T. R. 50. A person having a private way cannot justify going over the land adjoining. *Taylor* v. *Whitehead*, Doug. 744. *Bullard* v. *Harrison*, 4 M. & S. 387.

A way of necessity exists after an unity of possession, which would otherwise have extinguished the way, and a subsequent severance. *Buckby* v. *Coles*, 5 Taunt. 311. Where the right is pleaded *ex necessitate*, the circumstances ought to be pleaded. *Pomfret* v. *Ricroft*, 1 Saund. 323 (*o*). But such a way is limited by the necessity which created it. Where, at a subsequent period, a party formerly entitled to a way of necessity, could approach the place to which it led by as direct a course over his own land, it was held that the way by reason of necessity ceased. *Holmes* v. *Goring*, 9 Moore, 166; 2 Bing. 76. Where there is a private road through a farm, a parson may use it for carrying away his tithe, though there is a public road equally convenient. *Cole* v. *Selby*, 6 Esp. C. 303.

(*s*) *Laughton* v. *Wards*, Lutw. 111. If a person has a way through a close in a particular direction, and he afterwards purchase other closes adjoining, he cannot extend the way to those closes; 1 Roll. 391; 1 Mod. 190.

(*t*) See *Ballard* v. *Dyson*, 1 Taunt. 279. *Laughton* v. *Wards*, Lutw. 111; and see *R.* v. *Lyon*, 1 R. & M. 151. The user of a road with horses, carts and carriages, for certain purposes, does not prove a right for all purposes; but the extent of the right is a question for the jury under all the circumstances. *Cowling* v. *Higginson*, 4 M. & W. 245.

(*u*) 1 Taunt. 279.

(*x*) *Ballard* v. *Dyson*, 1 Taunt. 279.

(*y*) *Jackson* v. *Stacey*, Holt's C. 455; cor. Wood, B. So a right of way to a particular close, will not enable a party to use it for the occupation of another newly purchased close. *Laughton* v. *Wards*, Lutw. 111. And see *Howell* v. *King*, 1 Mod. 190; 1 Roll. 391. *Cowling* v. *Higginson*, 4 M. & W. 245.

(*z*) *Allen* v. *Ormond*, 8 East, 4.

Proof of title.

for certain purposes only (*a*). In all such cases the extent of the right is for the consideration of the jury (*b*).

But no action will lie against the inhabitants of a parish or county in respect of an injury sustained from the non-repair of a road or bridge (*c*).

Variance.

As in pleading a right of private way, the nature of the way (*d*), and also the *termini* (*e*), must be described; a variance in these respects, on issue taken on the right, will be fatal (*f*).

An allegation that a cottage, to which a right of way is claimed as appurtenant, is in the possession and occupation of the plaintiff, is satisfied by evidence that one part is occupied by his servant, although he receives less wages on account of his occupation, and although other part is let to a tenant (*g*).

So an averment, that the defendant being seised of a copyhold, used the way, includes an using of the way as landlord, and in order to assert his right in that character, although the copyhold was in the occupation of a tenant; for it comprehends all purposes for which a landlord seised of the tenement may lawfully use the way, to view waste, demand rent, or to remove an obstruction (*h*).

Where issue is taken on a prescriptive right, claimed as appurtenant to an ancient messuage, the defendant is not bound to prove his occupation of the messuage, but is entitled to a verdict, on proof of the prescription as claimed, although the messuage is in the occupation of a tenant, and although the defendant is the occupier of a new house, and has used the road for the purposes of such occupation (*i*); for by traversing the prescription, the seisin of the defendant, as alleged, is admitted, and the right only is put in issue (*k*).

If the plaintiff intended to deny the seisin, he ought to have traversed it; if he meant to insist that the occupation was in another, he ought to have replied the fact, admitting the seisin (*l*); if he intended to contest the right

(*a*) *Cowling* v. *Higginson*, 4 M. & W. 245.

(*b*) Ibid.

(*c*) *Russel* v. *Men of Devon*, 2 T. R. 667. Where a Dock Company was authorised by an Act of Parliament to make a swing-bridge across a public highway, by the opening of which the public were delayed, it was held that a party seeking damages for such delay must show that it was unnecessary; and that if the company had done all that was reasonable, availing themselves of such means as they ought, they were not liable. *Wiggins* v. *Boddington*, 3 C. & P. 544.

(*d*) *Allan* v. *Brownsall*, Yel. 163. For being granted for particular purposes the justification must show that they were used for those purposes. Per Wilson, J. in *Rouse* v. *Bardin*, 1 H. B. 351. *Secus*, in case of a public way. *Browne* v. *Aspinwall*, 3 T. R. 265. A plea of a highway for all the King's subjects, &c. to pass, &c. at pleasure, paying a certain toll, is not inconsistent or contradictory. *Sutcliffe* v. *Greenwood*, 8 Price, 535. And see *Bolt* v. *Stennett*, 8 T. R. 606; 2 Will. Saund. 158, note (4). Where in an indictment the way was stated to be "for all the liege subjects, &c., with their horses, coaches, carts and carriages;" and it appeared that *some* carts loaded in a particular manner could not pass, it was held to be no variance. *R.* v. *Lyon*, B. & M. 151. A plea of a public footway over plaintiff's close, has been held to be supported by evidence tending to establish a carriage-way, and the existence of a gate across is not inconsistent with the reservation of keeping it to prevent cattle straying. *Davies* v. *Stephens*, 7 C. & P. 570.

(*e*) *Rouse* v. *Bardin*, 1 H. B. 351; 2 Leon. 10; 10 Hob. 190. *Secus*, in the case of a public highway, 1 H. B. 351.

(*f*) *Supra*, 521; and see Append. 1258. In pleading a prescriptive right of way, it is not necessary to describe all the closes intervening between the two *termini*. *Simpson* v. *Lewthwaite*, 3 B. & Ad. 226.

(*g*) *Bertie* v. *Beaumont*, 16 East, 33. See *R.* v. *Stock*, 2 Taunt. 339.

(*h*) *Proud* v. *Hollis*, 1 B. & C. 8.

(*i*) *Stott* v. *Stott*, 16 East, 343.

(*k*) Ibid.

(*l*) The Court held in the same case, on motion in arrest of judgment, that the allegation of *seisin, primâ facie* implied occupation, unless the contrary were shown in pleading.

of the defendant to use the road as a way to the new house, he ought to have admitted the claim, and pleaded that the trespass complained of was committed *extra viam* (*m*). Variance.

Where it appeared that both of two defendants were present at the time of opening a communication (complained of), and claiming to do so as of right, and one of them afterwards committed an act of diversion, it was held to be a question for the jury, whether the other did not concur, although he was not present (*n*).

Unity of possession of the land to which the way is claimed as appurtenant, with the land over which the way lies, extinguishes the way; for it is an answer to the prescription, and the way is against common right (*o*). The cutting down of trees by the side of a way, is evidence to prove a right of soil in the way (*p*). Defence.

By the rules of Hilary Term, 4 W. 4, in an action on the case for obstructing a right of way, the plea of the general issue will operate as a denial of the obstruction only, and not of the plaintiff's right of way.

Trespass *qu. cl. freg.*, plea, a right of way, replication that the defendant used the way under the plaintiff's leave and licence, the plaintiff is bound to show a licence co-extensive with the right claimed by the plea, and admitted by the replication; the replication is not sustained by evidence of a limited one (*q*).

As to evidence of a public highway, see tit. HIGHWAY (*r*).

A surveyor is not justified in removing a fence in front of a house to widen a road (not more than twenty-four feet in breadth) which is not *on* the highway (*s*).

(*m*) 16 East, 343.

(*n*) *Drewett* v. *Sheard*, 7 C. & P. 465.

(*o*) 1 Roll. Ab. 935; 3 T. R. 157; 5 East, 295. *Whalley* v. *Thomson*, 1 B. & P. 371. *Buckby* v. *Coles*, 5 Taunt. 311. Claim of preseriptive right of way from the close *A.* over the defendant's close *D.* unto the village of *Annesley*; it appeared in evidence that the way claimed was from *A.* over the defendant's close *B.*, and from thence over the defendant's close *C.*, and from thence over the close *D.*, and from thence into *Annesley*; and that the owner of the close *A.* had about eighteen years, being also owner of the close *D.*, conveyed it to a stranger in fee, without reserving any right of way; and it was held that the right of way over *D.* was thereby extinguished, and consequently that an action did not lie against the defendant for obstructing the plaintiff's passage by putting up a gate on one of his own closes. *Wright* v. *Rattray*, 1 East, 377.

In *Sloman* v. *West*, Palm. 387; 1 Roll. R. 397, Doderidge, J. said, that if a man had a right of way from his house to church, and the close next his house over which the way leads is his own, he cannot prescribe for a right of way *from* his house to the church, because he cannot prescribe for a right of way over his own land. Ley, C. J. and Chamberlayne, J. differed from him; but Lord Kenyon, in *Wright* v. *Rattray*, approved of Mr. J. Doderidge's opinion, saying that he was a whole host in himself.

In *Jackson* v. *Shillito*, Trin. 32 Geo. 3, K. B. cited in *Wright* v. *Rattray*, 1 East, 377, the defendant in trespass *quare clausum fregit, prescribed* for an occupation-way from his own close, into, through and over the *locus in quo* to and unto a certain highway, &c. and it appeared that one of the several intervening closes was in the possession of the defendant himself; it was held by the Court of C. B. (contrary to the opinion of Lord Kenyon at the trial), that it was sufficient. But there (per Lord Kenyon, 1 East, 381) the defendant had in fact a right to go the whole line of road; whereas in *Wright* v. *Rattray*, he had no right to go part of the road claimed. And in *Wright* v. *Rattray* Lord Kenyon seems to have been of opinion that it would have been sufficient if the plaintiff had merely claimed a right of way over the defendant's close *towards* Annesley. See Append. Vol. ii. 916.

See further as to extinguishment of a way, *R.* v. *Tippet*, 3 B. & A. 193; *supra*, tit. PRESCRIPTION.

(*p*) *Doe* v. *Pearsay*, 7 B. & C. 304; and see above, tit. TRESPASS.

(*q*) *Colchester* v. *Roberts*, 4 M. & W. 769.

(*r*) Where the public had used an unpaved and unfinished street for four or five years, it was held that the jury were warranted in presuming a dedication to the public. *Jarvis* v. *Dean*, 3 Bing. 447.

(*s*) *Lowen* v. *Kaye*, 4 B. & C. 3; under the stat. 13 Geo. 3, c. 78, ss. 6 & 64.

Defence.

Toll cannot be claimed for passage along a public highway or canal, unless the right to demand it be given in clear and unambiguous terms (*t*).

The defendant may show that the plaintiff has abandoned the right of way, by acquiescing in an obstruction for the space of twenty years (*u*).

WEIGHTS AND MEASURES.

See 4 & 5 W. 4, c. 49; 5 & 6 W. 4, c. 63.

WILLS (*x*).

Statute of Frauds.

As the important alterations on the law of devises and bequests do not supersede the existing law, in respect of such as have been made before 1st January 1838, it has been deemed advisable to treat, in the first place, of the law as it stood before the statute, and then to notice the alterations which have been made.

By the enactment of the Statute of Frauds, 29 C. 2, c. 3, s. 5, all devises and bequests of any lands or tenements, devisable either by the Statute of Wills (*y*), or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and *signed* by the party so devising the same, or by some other person in his presence, and by his express direction, and shall be *attested* and subscribed in the presence of the said devisor, by three or four credible witnesses; or else they shall be utterly void, and of none effect.

Production of the will.

In order, therefore, to prove a devise of lands according to the forms prescribed by the statute, it is necessary in the first place to produce the will itself, or to prove its former existence and destruction, or that it is withheld by the adversary after notice to produce it, according to the ordinary course of proving a written document (*z*).

(*t*) Where a canal is made pursuant to Act of Parliament, the right of the proprietors to toll is derived entirely from the Act, and is to be considered as if there was a bargain between them and the public, the terms of which are expressed by the statute; and the rule of construction is, that any ambiguity in the terms of the contract must operate against the company of the adventurers, and in favour of the public. The proprietors therefore can claim nothing which is not clearly given to them by the Act. *The Proprietors of of the Stourbridge Canal* v. *Wheeley and others*, 2 B. & Ad. 792. By a turnpike Act a certain toll was to be taken at every turnpike on the road from *W.* to *O.*, for four horses drawing any carriage, &c.; a subsequent section provided that no person should pay toll more than once in the same day for passing and repassing with the same horses or carriages through any of the turnpikes, but that every person, after having paid toll once, and produeing a ticket, should pass with the same horses and carriages toll-free during each day. Held, that a second toll was payable for passing on the same day two toll-gates on the road, with the same carriage, but drawn by different horses; for that the clause imposing the toll was clear, and the exempting clause either meant that the horses should be the same, or was too ambiguous to control the previous enactment. *Hopkins* v. *Thorogood*, 2 B. & Ad. 916. See above, 85.

(*u*) *Bower* v. *Hill*, 1 Bing. N. C. 553. But where the plaintiff had a right to pass along a drain to a river, it was held that the circumstance of the drain having been in one part impassable for the space of sixteen years, afforded no defence to the erection of a permanent obstruction lower down in the drain, in the defendant's land.

(*x*) As to proof of a will of personalty, vide *supra*, tit. EXECUTOR; for proof of a will of copyhold, vide *supra*, tit. COPYHOLD. Where a feme covert and her husband surrender to the use of her will, she must be examined separately. *Driver* v. *Thomson*, 4 Taunt. 295; and no special custom to that effect is necessary. *Doe* v. *Clifford*, York Sum. Ass. 1821, cor. Bayley, J. She ought to be examined before the steward of the Court. 4 Taunt. 294. *Erish* v. *Rivers*, Cro. Eliz. 717. But an examination before two tenants of the manor is good by custom. Ibid.

(*y*) 32 Hen. 8, c. 1, explained by stat. 34 Hen. 8, c. 5.

(*z*) *Supra*, Vol. I. tit. PRIVATE ENTRIES.

When the will has been lost, the probate of the will in the Spiritual Court is not admissible, even as secondary evidence of the contents (*a*), without proof *aliunde* that it is a true copy. For the Spiritual Court has no authority to authenticate a will of lands, and the seal of the Court does not prove it to be a true copy, except so far as relates to personal property (*b*); it must be proved by one at least of the attesting witnesses (*c*), if any be living, that the will was *signed* by the devisor, or by some one in his presence, and by his express directions. Production of the will.

It has been doubted whether it be sufficient that the testator should seal the will (*d*). But according to the later authorities, mere sealing without writing is insufficient; for the evidence arising from the hand-writing affords greater security and certainty than that arising from sealing (*e*). Signature.

As evidence of the actual hand-writing of the party affords a more effectual guard against fraud than the mere impression of a seal, the identity of which may be in itself doubtful (*f*), or which, if the identity be proved, may have been made by another without authority, it is impossible to suppose that the Legislature did not mean to require an actual signature.

It is sufficient if the testator sign his name at the beginning or side of a will, for the statute does not require him to *subscribe* it (*g*), as where he writes the will himself, beginning, I, *A. B.* (*h*). But where the will consisted of several sheets, and the testator signed two of them, but from weakness could not sign the rest, the Court of King's Bench was of opinion that the will was incomplete (*i*).

But where the will, which was written on three sides of a sheet of paper, concluded by stating that the testator had signed his name to the first two sides, and had put his hand and seal to the last, and in fact he had put his name and seal to the last, but had omitted to sign the other sides, it was held that the will was good, the signing the last sheet showed that the former intention had been abandoned (*k*).

It was held to be unnecessary, even where the testator was blind, that the will should be read over in the presence of the attesting witnesses (*l*). But it was then said, that stronger evidence would be required in the case of a

(*a*) 1 Lord Raym. 731, 2; Skinn. 174; *supra*, Vol. I. Neither is an exemplification under the great seal evidence of a will. Comb. 46.

(*b*) B. N. P. 246. But in an anonymous case, R. T. Holt, 298, where a defendant in replevin avowed for a rent-charge, but could not produce the will under which he claimed, and which belonged to the devisee in fee, the Ordinary's register of the will, and *proof of former payments*, were held to be sufficient evidence against the devisee.

(*c*) *Infra*, 1264.

(*d*) See *Lemayne* v. *Stanley*, 3 Lev. 1. By three of the Judges a sealing was held to be sufficient; so by Lord Raymond, at Nisi Prius. *Warneford* v. *Warneford*, 2 Str. 764. And see Lord Holt's *dictum*, *Lee* v. *Libb*, 1 Show. 68; and *Gryle* v. *Gryle*, 2 Atk. 79; Bac. Ab. tit. *Wills*, D. 2.

(*e*) Lord Hardwicke, in *Grayson* v. *Atkinson*, 2 Ves. 459, observed, "The statute, by requiring the will to be signed, undoubtedly required some evidence to arise from the hand-writing. Then how can it be said that putting a seal to it would be a sufficient signing? For any one may put a seal; no particular evidence arises from sealing. Common seals are alike; no certainty or guard arises from them." And see *Smith* v. *Evans*, 1 Wils. 313. *Ellis* v. *Smith*, 1 Ves. jun. 11; 17 Ves. 458; 18 Ves. 175.

In *Lemayne* v. *Stanley*, 3 Lev. 1, it was held that it was not necessary to write, for some cannot write, and their mark is then sufficient signing; others have their name on a stamp, and that is good enough.

(*f*) See *Grayson* v. *Atkinson*, 2 Ves. 459; 17 Ves. 458; 18 Ves. 175.

(*g*) *Hilton* v. *King*, 3 Lev. 86; 9 Ves. 248. *Townsend* v. *Pearce*, Vin. Ab. tit. *Devise*, R. 4, pl. 3, p. 142; 1 P. W. 343.

(*h*) *Lemayne* v. *Stanley*, 3 Lev. 1; 3 Mod. 219.

(*i*) *Right* d. *Cator* v. *Price*, Doug. 241.

(*k*) *Winsor* v. *Pratt*, 2 B. & B. 650.

(*l*) *Longchamp* v. *Fish*, 2 N. R. 415.

blind man than the mere attestation of signature, which stronger evidence had been supplied by the circumstances of that case (*m*).

Attestation.

That it was *attested and subscribed*, &c.—Although proof be essential that the will was attested by the witnesses in the presence of the testator, it is not necessary that such attestation should be stated on the face of the will (*n*). The attestation of an illiterate witness, by making his mark, is a sufficient subscription (*o*).

And although the witnesses must attest and subscribe the will in the presence of the devisor, it is not necessary that they should do so in the presence of each other (*p*); neither is it necessary that the witnesses should see the devisor sign the will, provided he acknowledged his signature in their presence (*q*). Where the devisor, having executed his will in the presence of two witnesses, afterwards showed it to a third, and showed him his name, and told him it was his hand-writing, and desired him to witness it, which he did, it was held that the will was well executed (*r*).

Manner of attestation.

In the case of *Peate* v. *Ougly* (*s*), the testator wrote the will himself, and signed his name, and put a seal at the bottom, and added, in his own hand-writing, "signed, sealed and published as my last will and testament, in the presence of ——." Two of the witnesses were dead, and the third swore, that about twenty-eight years before, being servant to the testator, he and the other witnesses were called up in the night and ordered into the testator's chamber, who produced a paper folded up, and directed him and the others to set their hands to it as witnesses, which they did, in his presence; but the witnesses did not see any of the writing, nor did the testator say it was his will, or what it was, but he believed this to be the paper, because he never witnessed any other paper for the testator; and added, that though the testator did not set his name or seal to the will in their presence, yet he had often seen him write, and believed the whole will and codicil to be of his hand-writing. Lord Chief Justice Trevor thought the evidence sufficient for the jury to find the will well executed, and they found accordingly.

(*m*) The terms of the will had been dictated by the testator to Davis (who was afterwards one of the attesting witnesses), and was made in favour of a step-daughter, who lived with the testator, to the disinherison of his son. After the will had been written, it was read over, by the desire of the testator, in the presence of the step-daughter and several other persons present. A copy was made, and two months after, the testator made an alteration in it, and perfectly understood what he was doing.

(*n*) *Croft* d. *Dalby* v. *Pawlet*, Vin. Ab. tit. *Devise*, N. 9; Bac. Ab. tit. *Wills*, D. 2. *Price* v. *Smith*, Willes, R. 1; 4 Taunt. 217. And per Ld. Eldon, *Rancliffe* v. *Parkyns*, 6 Dow, 202.

(*o*) *Harrison* v. *Harrison*, 8 Ves. jun. 185; *Addy* v. *Grix*, Ibid. 504.

(*p*) *Smith* v. *Codron*, cited 2 Ves. 455; *Grayson* v. *Atkinson*, 2 Ves. 454; *Jones* v. *Lake*, cited 2 Atk. 177. See *Stonehouse* v. *Evelyn*, 3 P. Wms. 253. *Westbroke* v. *Kennedy*, 1 Ves. & B. 362. *Ellis* v. *Smith*, 1 Ves. jun. 11.

(*q*) *Smith* v. *Codron*, cited 2 Ves. 455. *Stonehouse & Ux.* v. *Evelyn*, 3 P. Wms. 253. *Grayson* v. *Atkinson*, 2 Ves. 454; Bac. Ab. tit. *Wills*, D. 2; 3 Mod. 218; 1 Show. 8, 69. It is not necessary that the witnesses should know the contents of the will, or that they should *see* the testator sign it. *White* v. *Trustees of British Museum*, 6 Bing. 310. See *Ellis* v. *Smith*, 1 Ves. jun. 11. Two of the attesting witnesses did not see the testator's signature, and only one knew what the paper was; held nevertheless to be a sufficient attestation. *Wright* v. *Wright*, 7 Bing. 457. Where, upon the facts stated in the special verdict, it appeared that the attesting witnesses signed the will in the testator's presence, but two of them without knowing the nature of the instrument, and neither of them saw the testator sign; held nevertheless that it was sufficiently attested within the statute. *White* v. *British Museum Trustees, &c.*, 6 Bing. 310.

(*r*) Ibid.

(*s*) Comyns, 197.

Manner of attestation.

According to this case, it is not necessary either that the testator should acknowledge his signature in the presence of subscribing witnesses, or even that direct proof should be given that the testator's signature existed upon the will at the time of attestation, although in that case, the whole being in the hand-writing of the devisor, it was probable that the whole was written previous to the attestation. But it is to be observed, that where a testator, having signed in the presence of two witnesses, and afterwards in the presence of a third, said, This is my will, but did not put his seal, or acknowledge the hand-writing, Lord Hardwicke inclined to the opinion that the execution was imperfect. Yet in this case it was clear that the attestation of all the witnesses was subsequent to the signature by the devisor; whereas in the case of *Peate* v. *Ougly* it was possible that part might have been added after the attestation (*t*).

The execution of a codicil referring to a will is sufficient (*u*).

In presence of the testator.

In the presence of the Testator.—It is not necessary that the testator should actually see the witnesses sign the will; it is sufficient to show that he was so situated that he *might* have seen them do so (*x*). Where the testator desired the witnesses to go into another room, seven yards distant, to attest his will, and there was a window broken through which he might see them, the attestation was held to be sufficient (*y*). So where the testator is sick, or in bed, with his curtain drawn (*z*). So where the testatrix could see the witnesses through the window of her carriage, and of the attorney's office (*a*).

It is otherwise if the testator was so situated that he could not have seen the witnesses attest the will; as where they go down stairs into another room out of the testator's presence, and attest the will there (*b*).

Where the attesting witnesses retired from the room where the testator had signed, and subscribed their names in an adjoining room, and the jury found that from one part of the testator's room a person by inclining himself forward with his head out of the door, might have seen the witnesses, but that the testator was not in such a situation in the room that he might by so inclining his head have seen them, it was held that the will was not duly attested (*c*). So if the testator was in a state of insensibility at the time (*d*).

Attestation.

Where all the witnesses were dead, and the attestation stated that the will had been signed by the testator in the presence of the witnesses, without stating that they had subscribed the will in his presence, it was held that it might still be left to the jury to presume that fact (*e*).

Time. Identity.

It is of course essential that the formalities of the statute should apply to the *same* instrument. If different instruments be written on the *same paper*, and it appear to be the intention of the testator that all should constitute

(*t*) See *Stonehouse* v. *Evelyn*, 3 P. Wms. 253; where the reporter says, that on mentioning the case of *Peate* v. *Ougly* to Mr. Justice Fortescue Aland, he said that it was sufficient if one of the three witnesses swore that the testator acknowledged the signature to be his hand; and hence Mr. Powell concludes it to be a necessary inference that such an acknowledgment at least is necessary to support the attestation. Powell's L. D. 80.

(*u*) *Utturton* v. *Robins*, 1 A. & E. 423.

(*x*) See *Doe* v. *Manifold*, 1 M. & S. 294. *Todd* v. *Earl of Winchelsea*, 1 Mal. & M. C. 12; 1 Salk. 688; Carth. 881.

(*y*) *Shires* v. *Glasscock*, 1 Salk. 668. See also the case of *Sir G. Sheers*, cited Carth. 81.

(*z*) Bac. Ab. tit. *Wills*, D. 1.

(*a*) *Casson* v. *Dale*, 1 Bro. Ch. R. 99. *Davy* v. *Smith*, 3 Salk. 395.

(*b*) *Broderick* v. *Broderick*, 1 P. Wms. 239.

(*c*) *Doe* d. *Wright* v. *Manifold*, 1 M. & S. 294. See further, *Eccleston* v. *Speke*, Carth. 79; Comb. 156; 1 Sho. 89; Holt, 222. *Machell* v. *Temple*, 2 Sho. 288; *Longford* v. *Eyre*, 1 P. Wms. 740.

(*d*) *Cater* v. *Price*, Doug. 241.

(*e*) *Croft* v. *Pawlett*, 2 Str. 1109.

Time. Identity.

one instrument, the execution of the last will may be considered as an execution of the whole (*f*), even although the testator term the prior instrument a will, and the latter a codicil (*g*). And whether the subscription belonged to both instruments would be a question of fact for the jury, under all the circumstances (*h*).

The testator wrote a will of lands, dated May 2, 1752, and signed it, but it was not sealed or attested; and afterwards wrote upon the same sheet of paper a memorandum, dated January 5, 1754, wherein, after disposing of some personalty, he added, "This is not to dissannul any of the *former part* made by me 2d of May 1752, except," &c. and subscribed the latter memorandum, and published the whole in the presence of three witnesses; the Court held that this was a good attestation of the whole (*i*).

If the will be written at one time on separate pieces of paper, and signed by the testator, and all are produced at the time of execution, it is sufficient if the last sheet be attested by the witnesses (*k*); but if the last sheet only be attested, and none of the witnesses ever saw the first, it is insufficient (*l*); but it may be presumed from circumstances that the whole were present. Where a testator made his will on two sheets of paper, and signed each, and also wrote a codicil on a single sheet, and showed the whole of the will and codicil to one witness, who attested both in his presence, and two other witnesses immediately afterwards came into the same room and attested the last sheet of the will and the codicil, but never saw the first sheet, and it was not on the table at the time; and both the sheets, and also the codicil, were found wrapped in the same paper, in the testator's bureau, after his death; the Court held that the jury ought to have been directed to presume that the first sheet was in the room (*m*).

Publication.

Publication, &c.—The statute is silent as to any delivery, publication, or any other formal act by which the testator is to signify his adoption of the instrument. Hence it seems that the very act of signing the will, and causing it to be attested by witnesses, in the manner pointed out by the statute, is sufficient.

Where the testator told the witnesses to take notice, and then signed the paper, and told them where to sign their names as witnesses, without saying what the instrument was, Denison, J. held it to be a sufficient execution. And the same point was decided by Trevor, C. J. (*n*). So a delivery of a will as a deed has been held to be a sufficient publication (*o*), even where the testator represented it to the witnesses to be a deed, and the form of attestation was "sealed and delivered" (*p*).

Credible witness.

Credible Witnesses.—It seems to have been held in general that an *incompetent* witness was not a *credible* witness. And in the case of *Pendock* v. *Mackender* (*q*), it was decided that one who had been convicted of petit larciny was an incompetent witness to a will; and in consequence the stat. 31 G. 2, c. 35, was passed, which made a witness competent notwithstanding such conviction.

(*f*) *Carleton* d. *Griffin* v. *Griffin*, 1 Burr. 549.
(*g*) Powell's L. D.; Peake's L. E. 388, 5th ed.
(*h*) See Lord Mansfield's observations, 1 Burr. 549.
(*i*) *Carleton* d. *Griffin* v. *Griffin*, 1 Burr. 549.
(*k*) *Bond* v. *Seawell*, 3 Burr. 1773; 1 Bl. R. 407.
(*l*) *Lea* v. *Libb*, 3 Mod. 262.
(*m*) *Bond* v. *Seawell*, 3 Burr. 1773; S. C. Bl. 407.
(*n*) In *Peate* v. *Ougly*, Comyns, 197.
(*o*) 8 Vin. Ab. 125, pl. 13.
(*p*) *Trimmer* v. *Jackson*, 4 Burn's Ecc. L. 117.
(*q*) 2 Wils. 18. The distinction between grand and petit larciny is now abolished. See Vol. I. tit. WITNESS.

Credible witness.

In general, a devisee or legatee under a will was incompetent (*r*); although a mere executor or trustee who took no beneficial interest under a will was held to be competent (*s*).

But a doubt prevailed whether the term credible related to the time of attestation, or to the time of proof.

In the case of *Holdfast* d. *Austey* v. *Dowsing* (*t*), Lee, C. J., in delivering the judgment of the Court, observed, that the time for ascertaining the credibility of the witness was the time of attestation.

In the case of *Wyndham* v. *Chetwynd* (*u*), it was held, that an attestation by a witness who was interested at the time of attestation, but whose interest was discharged before his testimony was required to establish the will, was valid. And it was held, that payment or a release, made an attesting witness *credible* within the meaning of the statute (*x*). The same doctrine was afterwards maintained by three of the Judges of the Common Pleas against the opinion of Pratt, C. J., in the case of *Doe* d. *Hindson* v. *Kersey* (*y*).

By the stat. 25 G. 2, c. 6, sec. 1, it is enacted, that if any person shall attest the execution of any will or codicil (*z*), to whom any beneficial devise, legacy, &c., except charges on lands, &c., for payment of any debt, shall be given or made, such devise, legacy, &c., shall be void, and such person shall be admitted as a witness to prove the execution of such will or codicil.

By sec. 2, it is provided, that a creditor whose debt is charged on lands, shall, notwithstanding such charge, be a competent witness.

By sec. 3, a witness whose legacy has been paid or accepted, and released, or who shall have refused to accept such legacy on tender made (*a*), shall be admitted as a witness, &c.

By sec. 5, a legatee dying in the lifetime of the testator, or before he shall have received, or released, or refused to receive his legacy, shall be a competent witness.

By sec. 6, it is provided, that the credit of every such witness shall

(*r*) *Hilyard* v. *Jennings*, Carth. 514. *Holdfast* d. *Austey* v. *Dowsing*, Str. 1253; Hardr. 331; 2 Salk. 691. An executor who took nothing under the will was always held to be competent. *Bettison* v. *Sir R. Bromley*, 12 East, 250. *Phipps* v. *Pitcher*, 6 Taunt. 220. S. C. 1 Madd. 144.

(*s*) *Bettison* v. *Bromley*, 12 East, 250, where the wife of an acting executor, taking no beneficial interest under the will, was held to be a competent witness to prove sanity. So in *Lowe* v. *Jolliffe*, 1 Bl. R. 365, an executor in trust, who had acted under the will, was permitted to prove the testator's sanity. In *Holt* v. *Tyrrell*, 1 Barnard, K. B. 12, a trustee was holden to be a good witness without releasing. See also *Goss* v. *Tracy*, 1 P. W. s. 290, where a grantee, taking no beneficial interest under the will, was held to be competent to prove the execution of the deed to himself.

(*t*) 2 Str. 1253.

(*u*) 1 Burr. 417.

(*x*) Ibid.

(*y*) 4 Burn's Eccles. L. 88; Bac. Ab. tit. *Wills*, &c., D. 3. *Infra*, 1268.

(*z*) These words mean any *such* will or codicil, and do not extend to wills of personal estate; and therefore a legacy in a will of personal estate only, is not void because the legatee is attesting witness to the will. *Emanuel* v. *Constable*, 3 Russ. 436. *Foster* v. *Barkins*, 3 Sim. 40; and see *Brett* v. *Brett*, 3 Add. Ecc. Rep. 210; contra, *Lees* v. *Summersgill*, 17 Ves. 508.

(*a*) By sec. 4, such refusal shall bar his claim to such legacy; and after such acceptance the party shall retain the legacy, notwithstanding any defect in the will, &c.

Credible witness.

be subject to the consideration of the Court and jury, &c., as in all other cases.

But the statute does not extend to all interests created by a will. And it has lately been decided that one who is interested at the time of the execution of the will, but who discharges that interest previous to the time of his examination, is not a good witness (*b*).

One to whose wife the will gives an estate in fee after the determination of a life-estate, is not a good witness within the statute (*c*), although the wife dies after the death of the testator, before the determination of the life estate, and the witness survives the wife (*d*).

A witness who takes a pecuniary interest under a will is competent to prove the sanity of the testator, where the effect of the verdict would be to establish the will as to the real property only (*e*).

Where an attesting witness would take the same interest, either under a former will to which he was not a witness, or under a latter will, he stands indifferent in point of interest, and is a good witness to prove the latter will (*f*).

It is sufficient, in strictness of law, to call any one of the subscribing witnesses who on production of the will can swear to the execution of the will by the testator, and the subscription by the witnesses, in his presence, to that will (*g*). But whenever the will is disputed, all the attesting witnesses ought to be called; and upon an issue out of Chancery, on a bill filed by a devisee against the heir, that Court requires that they shall be called (*h*).

In the case of *Doe* d. *Tatham* v. *Wright* (*i*), one of the attesting witnesses

(*b*) *Hatfield* v. *Thorp*, 5 B. & A. 589.

(*c*) Ibid. In *Doe* d. *Hindeson* v. *Kersey*, 4 Burn's Ecc. L. 97, where lands were devised to trustees for the benefit of the poor, and two of the trustees, who were attesting witnesses, before the day of trial conveyed the tenements to other persons, a majority of the Court were of opinion that the will was sufficiently attested; but Lord Camden differed from the rest.

(*d*) 5 B. & A. 589.

(*e*) *Doe* v. *Teage*, 5 B. & C. 335.

(*f*) *Lord Ailesbury's Case*, 1 Burr. 427.

(*g*) *Longford* v. *Eyre*, 1 P. Wms. 741; B. N. P. 264. *Loxee* v. *Jolliffe*, 1 Bl. 365. *Goodtitle* d. *Alexander* v. *Clayton*, 1 Burr, 2224.

(*h*) *Bootle* v. *Blundell*, 1 Cooper C. R. 136. In a suit for establishing a will in the Exchequer, proof of the attestation of one of the witnesses only, without proof that the others are dead or abroad, is insufficient. *Wood* v. *Stane*, 8 Price, 613. And where on a bill filed by the heir-at-law against the devisee, an issue is directed by a Court of Equity to try the validity of the will, the defendant claiming as devisee is not bound to call all the witnesses. *Wright* v. *Tatham*.

(*i*) *Wright* v. *Doe* d. *Tatham*, 1 Ad. & El. 3. The Court, in coming to this conclusion, held, in the first place, that the evidence given by the deceased witness on the former trial was admissible, both on the general principle that the trial was substantially between the same parties, and also because a rule of Court had been entered into containing an agreement between the parties, that the short-hand writer's notes and the Judge's notes of the evidence upon the former trial should be read in evidence on the subsequent trial, as to such witnesses as should be dead or beyond sea, and that it was not open to the plaintiff to dispute the reading of the evidence of a deceased witness on the former trial: the Court further held, that such evidence being direct and immediate evidence in the cause, was evidence producible for the same purpose, and to the same extent, as if the witness himself had been alive and sworn, and given the same evidence. The learned Judge, Tindal, C. J., then proceeded to give judgment as follows; "It is objected on the part of the plaintiff below, first, that the admitting of this evidence is in contravention of the rule of law, by which the best evidence is required to be given in every case; for it is contended, that the *vivâ voce* evidence of Proctor, the surviving witness, is better evidence than the examination of

having been examined on the part of the defendant, to prove the execution of a will upon the trial of an issue of *devisavit vel non*, directed by the Court of Chancery, in a suit by the lessor of the plaintiff against the defendant and others; and the witness, as well as another witness to the will, being since dead, it was held that the testimony given by the witness was admissible, and was sufficient to establish the will, although a third witness still survived. Credible witness.

The rule dispensing with the proof of deeds above thirty years old, applies equally to the case of wills, although an attesting witness be proved to be alive (*k*).

Where the hand-writing of two of the subscribing witnesses was proved and no account could be given of the third, and the will was thirty years old, the testator himself having died above twenty years before, the proof was held to be sufficient (*l*).

Although an attesting witness swear against his own attestation, he may nevertheless be contradicted, and the will may be established by means of Secondary evidence.

Bleasdale, who is dead. But we think this argument assumes the very point in dispute. If the evidence which had been offered of the execution of the will had consisted simply in proving the hand-writing of Bleasdale, one of the attesting witnesses, which would have been the legitimate mode of proving the attestation by him after his death, it might indeed have been objected, with some ground of reason, that such evidence could not be the best whilst another of the attesting witnesses was still alive, and within the jurisdiction of the Court; for in that case the proof of the hand-writing only would have done no more than raise the presumption that he witnessed all that the law requires for the due execution of a will; whereas the surviving witness would have been able to give direct proof whether all the requisites of the statute had been observed or not: such direct testimony, therefore, might fairly be considered as evidence of a better and higher nature than mere presumption arising from the proof of the witness's hand-writing, *stabitur præsumptioni donec probetur in contrarium*. The effect, however, of Bleasdale's examination is not merely to raise a presumption; it is evidence as direct to the point in issue, and as precise in its nature and quality, as that of Proctor when called in person; it is direct evidence of the complete execution of the will, by the statement upon oath of the observance of every requisite made necessary by the Statute of Frauds. If Proctor had been examined in the present action for the plaintiff below, there can be no doubt but that the examination of Bleasdale on the last trial might have been put in to contradict him; but on what principle could such contradiction have been admissible, unless the evidence obtained by means of the examination was of as high a character and degree as that of the *viva voce* examination of the surviving witness? If the parol examination of Proctor was the better evidence, as contended for, how could it be opposed by the inferior evidence of Bleasdale's examination?" The defendant in error proceeded to trial upon the *venire facias de novo*, awarded by the Court, declining to enter into a rule similar to that on which the Court of Error had deemed the testimony of the deceased witness to be receivable; but in the course of the subsequent proceedings in the cause, it was considered, that not having appealed against the judgment of the Court of Error, by removing the cause into the House of Lords, he was precluded from again questioning the sufficiency of the evidence of the deceased witness to support the will. A verdict upon the *venire facias de novo* passed for the defendant below, which was set aside in the King's Bench, upon objection made to the reception of certain letters in evidence offered on the part of the defendant; and on the new trial the plaintiff obtained a verdict, subject to a bill of exceptions, and afterwards obtained judgment in the House of Lords.

(*k*) *Doe* d. *Oldham* v. *Wolley*, 8 B. & C. 22. A will dated thirty years since proves itself, although the testator may have died within that period, and it is immaterial that the witnesses are still living; it was held also, that in cases of pedigree it is not to be presumed that deceased parties married and left issue. *Doe* v. *Deakin*, 2 M. & Ry. 195.

(*l*) *M'Kenzie* v. *Fraser*, 9 Ves. 5; cor. the Master of the Rolls, who cited *Cunliffe* v. *Sefton*, 2 East, 183.

Secondary Evidence.

other testimony (*m*). And even if all the attesting witnesses should swear that the will was not duly executed, it would be competent to the devisee to establish the will by circumstantial evidence (*n*). Where one of the witnesses to a will is dead, witnesses may be called to his character (*o*). Where a surviving witness charges deceased witnesses as accomplices in an attempt to establish a fraudulent will, evidence of the good characters of the deceased witnesses is admissible in answer (*p*). It has been seen that the dying declaration of a deceased witness is admissible in evidence to impeach a will (*q*).

If all the witnesses be dead, proof should be given of their hand-writing, and also of that of the testator, and from such evidence the jury may presume the due execution of the will; although it does not appear from the written form of attestation that the witnesses subscribed the will in the presence of the testator (*r*). Where one of the attesting witnesses is abroad, it seems to be sufficient, as in other instances of instrumentary proof, to give evidence of his hand-writing. And this seems to be allowed by the practice of courts of equity, as well as in courts of law (*s*).

It seems that, in analogy to the case of a deed, if it be shown that diligent inquiry has been made after an attesting witness, at the place where the devisor lived, and elsewhere, where it was likely that he might be found, and that no intelligence of him can be obtained, and the other witnesses be dead, or have become interested subsequently to their attestation, evidence of the hand-writing of the latter will be receivable to support the will (*t*). As in the case of a deed, it seems that proof by witnesses is not necessary where a will is thirty years old. It has indeed been questioned whether the thirty years are to be reckoned from the execution of the will, or from the time of the decease of the devisor. But as the rule is founded upon the probability that after the lapse of thirty years the usual judiciary means of proof are unattainable, it should seem in principle that the time ought to be

(*m*) *Lowe* v. *Jolliffe*, 1 Bl. R. 365; *Hudson's Case*, Skinn. 79. *Pike* v. *Badmering*, 2 Stra. 1096. *Goodtitle* v. *Clayton*, 4 Burr. 2214. *Austin* v. *Blades*, B. N. P. 24. A will of personalty may be established against the evidence of all the subscribing witnesses, but such a case would require to be supported by the whole *res gestæ*, by strong probability, from the conduct of all parties, and the improbability of the practice of any fraud, circumvention or exercise of undue influence. *Maekenzie* v. *Handysyde*, 2 Hagg. 219. See also *Le Breton* v. *Fletcher*, 2 Hagg. 558.

(*n*) Ibid.

(*o*) *Provis* v. *Read*, 5 Bing. 435. His character having been impeached by an imputation of his having committed a forgery, declarations by the testator to show that the will he had executed was not valid, were rejected.

(*p*) 1 Camp. 210. *Doe* d. *Walker* v. *Stephenson*, 3 Esp. C. 284; 4 Esp. C. 50. *Supra*, tit. CHARACTER.

(*q*) *Supra*, 261. *Wright* v. *Littler*, 3 Burr. 1244; 1 Bl. 346.

(*r*) *Hands* v. *James*, Comyns, 531. *Craft* v. *Paulet*, 2 Stra. 1109. *Price* v. *Smith*, Willes, R. 1. *Lord Rancliffe* v. *Parkins*, 6 Dow, 202.

(*s*) See *Powell* v. *Cleaver*, Brown's C. C. 504. *Lord Carrington* v. *Payne*, 5 Ves. 411. *Grayson* v. *Atkinson*, 2 Ves. 460.

(*t*) *M'Kenzie* v. *Fraser*, 9 Ves. 5. Note, that the will in that case was thirty years old, and the testator had been dead for twenty years; the hand-writing of two of the subscribing witnesses was proved, but no account could be given of the third. An objection being taken to the proof, the Master of the Rolls observed, that he could see no distinction in this respect between a will and a deed, except that a will having no operation till the death of the testator, wanted a kind of authentication which the other possessed; but he cited the case of *Cunliffe* v. *Sefton*, 2 East, 183; and held that the will had been sufficiently proved.

computed from the execution of the will (*u*). And this has lately been so decided (*x*), even where it was proved that one of the witnesses was still living. Secondary evidence.

In the late case of *Lord Rancliffe* v. *Parkyns* (*y*), the Lord Chancellor observed, that "in a court of law a will thirty years old, if the possession has gone under it, proves itself, and sometimes without the possession, but always with the possession, if the signing is sufficiently recorded (*z*). But if the signing is not sufficiently recorded, it would be a question whether the age proves its validity; and then possession under the will, and claiming and dealing with the property as if it had passed under the will, would be cogent evidence to prove the duly signing, though it should not be recorded."

A book in the testator's hand-writing, though referred to by a will, and proved in the Ecclesiastical Court, but not attested so as to pass a real estate, is not admissible in explanation or aid of the will (*a*).

Next, as to the admissibility of evidence to remove ambiguities in respect of wills. These arise either, 1st, on the application of terms which on the face of the will are clear and definite; or, 2dly, appear on the face of the instrument itself, previous to any application of its terms. In the first place, where the intention of the testator is expressed on the face of the will in clear and definite terms, evidence is always not only admissible, but essential, in order to apply the terms to the proper subject-matter (*b*). Latent ambiguities.

Extrinsic evidence is also admissible, as has been seen, to remove ambiguities which arise upon the application of the terms of the will to the persons and subject-matter to which they relate (*c*).

In addition to the cases there cited, that of *Goodtitle* v. *Southern* (*d*), may

(*u*) See *Calthorpe* v. *Gough*, at the Rolls, cited 4 T. R. 707, where the will was not proved by witnesses, and it was said at the bar that it need not be proved by witnesses, being above thirty years old; and the case of *Machery* v. *Newbolt*, was cited, where Sir Lloyd Kenyon, Master of the Rolls, decided that a will above thirty years old should be read without proof, although the testator had died very recently. But in the case of *Calthorpe* v. *Gough*, the plaintiff, who was heir-at-law, admitted the will.

(*x*) *Doe* v. *Wolley*, 8 B. & C. 22. *Doe* v. *Deakin*, 2 M. & Ry. 195. Where it was proved that a will of lands had been lost, parol evidence of its contents was received from a person who had heard it read over in the presence of the testator's family on the day of his funeral. *Anon.* 2 Camp. 390. (*Cor.* Wood, B., Worcester, 1809.)

(*y*) 6 Dow, 202.

(*z*) In that case the attestation stated that the testator signed in the presence of the witnesses, but did not state that they signed in his presence.

(*a*) *Adam* v. *Wilkinson*, 12 Price, 471.

(*b*) *Supra*, PAROL EVIDENCE, 768–771. *Lord Cheney's Case*, 5 Rep. 68. *Shede* v. *Berrier*, 2 Freem. 292; 1 P. Wms. 674; 2 P. Wms. 137. 142; 1 Ves. 231; 1 Atk. 411; 2 Ves. 216; Amb. 175; 3 Ves. 148. Declarations of a testator in subversion of a will are inadmissible, although both parties claim under him. *Provis* v. *Reed*, 5 Bing. 435.

(*c*) *Supra*, 768.

(*d*) *Goodtitle* d. *Radford* v. *Southern*, 1 M. & S. 299. So where the testator bequeathed his stock in a particular fund, and it appeared that he had not, when he made his will, any stock in that fund, having lately sold out and purchased into another fund, evidence was admitted to explain the mistake, and the legacy was satisfied out of the new fund. *Selwood* v. *Mildmay*, 3 Ves. 306. Where the testator at the time of his death having money at his private banker's, was also entitled to a sum received for him by his brother, and placed with his own money at the bankers of the latter, held that a bequest of "all his money at any bankers," would pass both, and that evidence was admissible to show that he treated the money at his brother's bankers as his own. *Hemming* v. *Whittam*, 2 Sim. 493.

Latent ambiguities.

be referred to, where, under a devise of "all my farm and lands, called Trogues Farm, *now in the occupation of A. B.*," it was held that two closes, part of Trogues Farm, but in the occupation of *L. M.*, passed under the devise, and that evidence had been properly admitted of a notice from the devisor to *L. M.* to show that he considered these closes as parcel of Trogues Farm.

Where an interest was given by the express terms of the will to Stokeham Huthwaite, the *second* son of *T. H.*, and Stokeham Huthwaite was in fact the *third*, and John Huthwaite the second son of *T. H.*, the Court of King's Bench held that evidence of the state of the testator's family, and other circumstances, was admissible, and that on such evidence the jury might find whether the testator had made a mistake in the name of the devisee or not; that if no such evidence were given on the trial, it would be a mere question of law as to the intention of the testator, to be collected only from the will itself, upon which the Judge must direct the jury, and it would be open to neither party to tender a bill of exceptions (*e*).

And where the terms of a will are clear and definite, and capable of application in their strict and primary sense (*f*), they cannot be applied to any other subject-matter. Thus, where the testatrix gave 4,000*l.* to her heir, the legacy was decreed by the Master of the Rolls to the heir-at-law, though evidence was tendered to prove that the person intended by the testatrix was one whom she had promised to make her heir, and whom she used to call her heir (*g*).

So if the testator leaves property corresponding with the description in the will, evidence is never admissible to show that he intended other property to pass (*h*).

(*e*) *Doe* v. *Huthwaite*, 3 B. & A. 632.

(*f*) *Supra*, 771.

(*g*) *Mounsey* v. *Blamire*, 4 Russ. 384. *Doe* d. *Tyrrell* v. *Lyford*, 4 M. & S. 550.

(*h*) *Supra*, 771. *Doe* v. *Tyrrell* v. *Lyford*, 4 M & S. 550. *Doe* d. *Brown* v. *Brown*, 11 East, 441. *Tytler* v. *Dalrymple*, 2 Meriv. 419. 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. At the time of making his will he had no real estate in the county of Limerick; he had a small estate in the city of Limerick, and he had a considerable real estate in the county of Clare. The plaintiff contended that he was at liberty to show by parol evidence that the testator intended his estates in Clare to pass under this devise. He proposed to show that the estate in the city of Limerick was so small, and so disproportioned to the nature of the charges laid upon it, as to make it manifest that there must have been some mistake; and in order to show what the mistake was, it was proposed to show that in the copy of the will which had been submitted to the testator, and had been approved of 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;" that afterwards the conveyancer by mistake altered the words to the form used in the executed will, which was altered by the testator without adverting to the alteration; but it was held by the Lord Chancellor, assisted by the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer, that admitting that it might be shown from the description of the property in the city of Limerick that some mistake might have arisen, yet still as the devise in question had a certain operation and effect, viz., of passing the estates in the city of Limerick, and as the intention of the testator to devise any estate in the county of Clare could not be collected from the will itself, nor without altering or adding to the words of the will, such intention could not be supplied by the evidence given. *Miller* v. *Travers*, 8 Bing. 244. But where extrinsic facts leave no doubt that the testator intended particular property to pass by his will, although it cannot pass unless that meaning can be collected from the terms of the will itself, yet if the terms of the will are such as permit a construction which agrees with the intention so mani-

Latent ambiguities.

Where, however, words in their primary sense are, under the circumstances, incapable of any sensible or definite application, they may, if capable of such application, be applied in a popular or secondary sense (*i*). Thus, though the word child, in its strict legal sense, must be understood of a legitimate child, yet if a testator, having no legitimate child, devise an estate to his child, then, as the description in its strict and primary sense is inapplicable, evidence is admissible to show it to be applicable in the popular sense of the word (*j*). Where the terms are incapable of such application, either in their strictly technical or popular sense, the devise is void, and evidence is not admissible to show an intention on the part of the testator, not expressed in the will; to allow this, would obviously be not to construe or apply, but to make a will.

Apparent ambiguities.

2dly. Where a doubt arises on the face of the will itself, previous to any application of its terms, either from the difficulty in decyphering the writing, or interpreting the meaning of words written in a foreign language, or which have a peculiar and technical meaning; or where a doubt arises on the face of the instrument as to the meaning of the testator.

Where a difficulty arises from the writing or characters used, or from the use of foreign expressions or technical terms of art, they are always capable of ascertainment or explanation by aid of extrinsic evidence. In the late case of *Goblet* v. *Beachey* (*k*), the testator, a celebrated sculptor, executed a codicil as follows: "Memorandum, that in case of my death all the marble in the yard, the tools in the shop, bankers, *mod* (*l*), tools for carving, the rasp in the draw, with (*nevre* or *nepre*), and the draw in the parlour, shall be the property of *A. G.*" The plaintiff contended that the word mod. meant models; the defendant, that it was a contraction for *modelling*, and that it was to be joined in construction with the following words, "tools for carving." It was referred to the Master (*m*) to inquire and state to the Court what the testator meant by the word "mod." and also by the word between the words *with* and *and*; and that he should be at liberty to call to his assistance persons skilled in the art of writing, and persons who had a competent knowledge of tools and articles used in statuary. The Master, after receiving evidence on the subject, and after inquiry into the collateral facts of the case, reported that the word mod. was intended by the testator to mean "models;" and that by the words between the two words *draw* and *and*, the testator intended "with the apron;" and after exception taken, the Master's report was confirmed (*n*).

fested, the Court will so construe the will. *Doe* v. *Langton*, 2 B. & Ad. 680. See also *Doe* v. *Hathwaite*, 3 B. & A. 632. But it is an universal rule that where words are used which have acquired a precise and technical meaning, no other meaning can be applied to them; for that, in the language of the courts, would be to remove landmarks. Per Ld. Kenyon, 6 T. R. 352. See the observations of the Lord Chancellor, in *Baylis* v. *The Attorney General*, 2 Atk. 239. *Castleton* v. *Turner*, 3 Atk. 257.

(*i*) *Supra*, 771.

(*j*) *Wilkinson* v. *Adam*, 1 Ves. & B. 422. *Woodhouselee* v. *Dalrymple*, 2 Mer. 419. Wigram's Obs. 38. *Cartwright* v. *Vaudry*, 5 Ves. 530. *Godfrey* v. *Davies*, 6 Ves. 43.

(*k*) Hil. 1829, reported by Mr. Wigram, in his Observations on that case, to whom the profession is indebted for much valuable information on this subject.

(*l*) *Mod* was written at the end of a line, followed by a small mark, the purport of which was equivocal.

(*m*) By Sir John Leach, V. C.

(*n*) See also *Masters* v. *Masters*, 1 P. Wms. 421. *Norman* v. *Norman*, 4 Ves. 769. *Attorney General* v. *Plate Glass*

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If on the face of the will its terms be so ambiguous as to be incapable of any certain application, it is void in point of law; for in such a case to admit evidence to give it one meaning rather than another, when it was equally capable of both, or incapable of expressing either, would be not to construe or apply, but to make a will. Thus if the testator give an estate to one of the three sons of *J. S.*, without saying which, it is void, for no evidence of facts or circumstances could show with certainty which was meant; and therefore to admit evidence for the purpose of showing that one rather than the other was meant, would be to make the extrinsic evidence, and not the terms of the will, operate. Whether a will be void for apparent uncertainty is of course a question of law, to discuss which would exceed as well the limits as the design of the present work (*o*).

It is not every degree of uncertainty appearing on the face of a will, will avoid it; such a rule would be far too extensive for practical use; and where the ambiguity is not such as to avoid the instrument, but which cannot be removed merely by judicial construction of the will alone (*p*), the uncertainty must necessarily be removed by evidence to ascertain what is ambiguous, by means of the context of extrinsic circumstances, and thus to confine expressions in themselves capable of different applications according to the subject-matter to which they are to be applied, to a certain and definite application to the particular circumstances. In such instances the evidence is usually admitted, not for the purpose of enabling the Court to construe the terms of a will, but to apply a general description, capable of different special applications to different states of circumstances, to that state of facts which really exists. To this extent the effect is, not to give an arbitrary application to uncertain words, but to apply the terms themselves, in the sense which properly belongs to them, to the special circumstances.

If a party bequeaths his stock (*q*), although the term stock is general, and is capable of signifying a great number of different subject-matters, and according to the trade or occupation of the testator, may mean either cattle, as part of a farmer's stock; goods in a shop, as part of a grocer's stock; or timber in a yard or warehouse, as part of a merchant's stock; yet the will is

Company, 1 Ans. 39. The Ecclesiastical Court, where there is no ambiguity on the face of the instrument, and there are means of obtaining clear and indisputable proof of the testator's intention, will admit parol evidence to show a mistake. *Harrison* v. *Stone*, 2 Hagg. 537. But the Court refused to allow mere parol declarations, after a considerable lapse of time, to show that words had been incautiously and erroneously struck out. Ib.

(*o*) See above, p. 755. Where it appeared plainly from the context of the will not only that the name used was not intended by the testator, but that another name was necessarily intended, the Court corrected it, and substituted the one for the other. *Dent* v. *Pepys*, 6 Mad. 350.

(*p*) The Courts, in construing wills, will correct apparent mistakes. Where it clearly appeared from the context of the will, not only that the name used was not intended by the testator, but that another name was necessarily intended, the Court corrected it, and substituted the one for the other. *Dent* v. *Pepys*, 6 Madd. 350. Where the testator recited that a legatee was indebted to him in a certain sum, which he made the basis of calculating the bequest intended for him, it was held that the recital bound the legatee, and that he could not go into evidence to repel that statement; but it seems that he might have had relief if it had appeared to have been a mere mistake of figures. *Robinson* v. *Beansby*, 6 Madd. 348.

(*q*) Where a testator bequeaths stock, jewels or household furniture, here different subjects may pass, according to circumstances, and as the party who uses them is a merchant, nobleman or jeweller. *Colpoys* v. *Colpoys*, 1 Jac. 461. *Kelly* v. *Powlett*, Ambl. 605.

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not void for this uncertainty, because it is capable of being removed by extrinsic proof of the testator's trade and circumstances, and confined to the stock which he possessed in the particular instance. So it may happen that on the face of a will, the terms of devise may be such that they would operate differently, and would give a different estate, according to extrinsic circumstances, such as the relation in which the devisee and the testator stood to each other. Thus, if the testator devise an estate to *A.* after the death of *B.*, the effect would be different according to an extrinsic fact, viz. the relation in which *A.* and the testator stand to each other: if *A.* be the heir-at-law of the testator, *B.* will take a life estate; but if *A.* be not heir-at-law to the testator, *B.* will take nothing (*r*). Here, on the face of the will, is an uncertainty, for no one, on merely reading the will, can tell whether *B.* will take a life estate or not; but the doubt is capable of being entirely removed by extrinsic evidence of the fact.

The general proposition has been frequently asserted by great authority (*s*), that courts of law will look at extrinsic circumstances in aid of the construction of a will. This proposition assumes that the instrument is not void for apparent uncertainty, which is, of course, a mere question of law; and it also assumes that what is uncertain on reading the instrument, is capable of being ascertained by the admission of extrinsic evidence. In all such cases, the effect of the extrinsic evidence is to apply the terms of the instrument to the circumstances of the particular case. It would be difficult, in point of principle, to carry the doctrine further than this, that such evidence of circumstances is admissible for the purpose of aiding the construction of a will; to admit it in support of a will which standing alone is equally capable of several different constructions, would clearly be inconsistent with the general principle so often adverted to (*t*).

In the case of *Fonnereau* v. *Poyntz* (*u*), where the testatrix having bequeathed to Mary Poyntz the sum of 500 *l.* in Long Annuities, and other sums to other legatees by the same description to the amount of 1,300 *l.*, Lord Thurlow admitted evidence that the testatrix had only 120 *l. per annum* Long Annuities, in order to explain whether the testatrix meant to give legacies to the amount of 1,300 *l. per annum*, or only a gross sum of

(*r*) *Horton* v. *Horton*, Cro. J. 74. So in the construction of a devise to *A.* and his heirs, and if he shall die without heirs then to *B.*, where *B.* is capable of being collateral heir to *A.*, in that case the word heirs will be construed heirs of the body. Fearne, 466.

(*s*) Per Ld. Hardw., in *Goodinge* v. *Goodinge*, 1 Ves. sen. 231. Per Ld. Thurlow, in *Jeacock* v. *Falkner*, 1 Bro. C. C. 295. Per Ld. Loughborough, in *Gaskill* v. *Winter*, 3 Ves. J. 540, 1. Per Ld. Manners, C. in *Crone* v. *Odell*, 1 Ball & B. 480. Per Sir T. Plumer, V. C., in *Beachcroft* v. *Beachcroft*, 1 Madd. 430; and by the same Judge, M. R., in *Colpoys* v. *Colpoys*, 1 Jac. 451. Per Ld. Eldon, in *Oakden* v. *Clifden*; Lin. Inn Hall, 1826, MS. See also *Lane* v. *Lord Stanhope*, 6 T. R. 345. *Doe* d. *Le Chevalier* v. *Hathwaite*, 3 B. & A. 632. *Gibson* v. *Gell*, 2 B. & C. 680. *Pocock* v. *Bishop of Lincoln*, 3 B. & B. 27. *Alford* v. *Green*, 5 Madd. 95. *Goodwright* v. *Downshire*, 3 Bos. & P. 600; 1 New Rep. 344. *Wilde's Case*, 6 Rep. 16. And see in general the cases cited in Mr. Wigram's Observations, p. 49, *et sequent.*

(*t*) Lord C. Cowper, in *Strode* v. *Russell*, 8 Vin. Ab. 194, pl. 23, was of opinion, that where the words of a will stood in *equilibrio*, and were so doubtful that they might be taken one way or the other, evidence might be received to explain them. See 2 Vern. 623; 2 Atk. 374. See also the declaration of Sir J. Strange, M. R., in *Hampshire* v. *Pierce*, 2 Ves. sen. 216. But Lord Hardwicke dissented from Lord Cowper's rule. *Ulrish* v. *Litchfield*, 2 Atk. 374. And it is observable that Tracey, J., did not assent to the reception of such evidence; and that Lord Cowper himself made a distinction between reading such evidence in a court of equity, and carrying it before a jury. See Mr. Wigram's remarks, Obs. 67.

(*u*) 1 Bro. C. C. 472.

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1,300*l.* And he admitted the evidence, on the ground that upon the face of the will itself it was doubtful whether she meant the annual sum or the gross sum, and that the state of her fortune showed that she must have meant the latter. In the case of *Masters* v. *Masters* (*v*), already referred to, where a bequest was made "*to all and every the hospitals*," evidence was admitted that the testator resided in Canterbury, in order to show his intention to apply his bequest to the hospitals in *Canterbury*. If a man grant an estate for life, without expressing whether for his own life or for that of the grantee; if the grantor had an estate in fee, the grantee will take an estate for his own life; but if the grantor had but an estate for life or in tail, then the grantee will take an estate for the life of the grantor only (*x*).

(*v*) 1 P. Wms. 420. *Supra*, p. 554, note (*u*).

(*x*) 1 Prest. Shep. T. 88; 2 B. & B. 551. Although this has been relied on as an authority for the position, that the construction of a will may be aided by extrinsic evidence of the estate which the testator or devisor had when he made the will, yet it seems scarcely to warrant it; for there the evidence is given, not for the purpose of putting one construction rather than another upon the deed itself, but in order to apply that which is the true and certain construction of law, according to the nature of the subject-matter and the necessity of the case. As the words of the grantor are to be taken most strongly against himself, a grant of an estate for life is construed by the law to mean for the life of the grantee, as being more beneficial to himself than one for the life of another man; here is no uncertainty until that construction is applied to the estate itself; and then, although it turn out that the estate of the grantor was not sufficient to enable him to grant for the life of the grantee, yet still the law applies the grant so far as the subject-matter admits, and gives an estate for the life of the grantor. The case of *Selwood* v. *Mildmay*, 3 Ves. 410, which has been cited for the same purpose, is also open to similar remarks. It was there held, that if a testator bequeath so much money in a particular stock, it is a specific legacy, if the testator has so much money in that stock; but that it will not be a specific legacy if the testator has no money in that stock. Here the extrinsic evidence to show what estate the testator had is not admitted for the purpose of giving a preference to one particular construction of a will doubtful in its terms; the language and meaning of the terms of the will are clear; the doubt arises upon their application only; and then, as the subject-matter does not admit of the application which the law would have made had such specific stock existed, the law still applies the intention so manifested, as far as circumstances will permit.

In the late case of *Smith* v. *Doe* d. *Lord Jersey*, 2 B. & B. 473, the admissibility of extrinsic evidence for the purpose of construing the terms of a power to grant leases, was incidentally much discussed; and the opinions of the learned Judges, which were delivered *seriatim*, differed much upon that point. A settlement-deed contained a power to grant leases, &c., so as there were contained in every such lease a power of re-entry for non-payment of the rent thereby reserved. A lease executed by virtue of this power contained a proviso for re-entry if the rent of 2*l.* &c. should remain unpaid for fifteen days after it became due, and no sufficient distress could or might be taken on the premises. Upon the trial of an ejectment against the lessee, evidence was admitted that the usual and accustomed form of leases of the estate, as well prior as subsequent to the settlement, contained a conditional power of re-entry similar to that contained in the lease in question. The original power referred to the accustomed rents, services, &c. Judgment was given for the defendant in the Court of King's Bench, but reversed, on error, in the Exchequer Chamber, and the latter judgment again was reversed in the House of Lords. The Lord Chancellor, Lord Redesdale, Abbott, C. J., Richards, C. B., Graham and Wood, Barons, and Best, J., were of opinion that the expressions contained in the power were to be considered as merely general, and that they were to be executed with reasonable qualifications, according to the practice of courts of equity and of conveyancers. And the Lord Chancellor, Lord Redesdale, and Richards, C. B., held, that inasmuch as the instrument which gave the power referred to the former leases, the power was to be construed by the aid of such former leases, which explained what was meant by the proviso for re-entry. But Dallas, C. J., Park, Holroyd, Burrough, and Richardson, Judges, were of opinion that the terms of the power were express and unambiguous, and required an absolute and immediate right of re-entry on non-payment of rent, and consequently that no constructive aid could be derived from extrinsic evidence. Bayley, J., was of opinion that the terms of the power were ambiguous, and that therefore the extrinsic

A case (*y*) was sent by the Vice-Chancellor for the opinion of the Judges of the King's Bench, on the construction of a will, and afterwards the same case was again sent by order of the Lord Chancellor, with a statement of collateral facts relating to the family and circumstances of the testator at the time of his making the will, for their opinion whether the facts so introduced were admissible as evidence in the case; and if so, whether the Judges were of the same opinion before certified; and the Judges certified that the facts were admissible, and that they were of the same opinion as before. In the case of *Pocock* v. *The Bishop of Lincoln*, upon the question whether a devise to the testator's son *R.*, of a perpetual advowson, gave an estate in fee or for life only, the collateral fact that the son was incumbent of the living at the time, was commented on both in argument and by the Court in their decision. Construction.

In the case of *Lane* v. *The Earl of Stanhope* (*z*), the testator devised all his manors, messuages, houses, *farms*, woodlands, hereditaments, and real estates whatever to *B.*, and all the rest and residue of his ready money, &c. and personal estate whatsoever, to *C.*: the question was, on a case sent for the opinion of the Judges of the King's Bench, whether the term *farms* would include a leasehold estate. Lord Kenyon, in giving his opinion on the construction of the will, observed that the extrinsic circumstances also weighed strongly to show that the leasehold interest passed by the devise.

The competency of an attesting witness to the will has already been considered (*a*). Although one who takes a beneficial interest under a will is not competent to establish it by his testimony, yet executors and trustees who take no beneficial interest are competent witnesses (*b*). Competency.

If the obligee devise a debt to the obligor, and the executor, in satisfaction of the legacy, delivers up the bond to the obligor, he is a competent witness to prove the sanity of the testator; for the obligation being cancelled, he cannot be charged at law (*c*). But it is otherwise in the case of a mortgage; for though the mortgage be cancelled, the right being transferred does not revest upon cancelling the deed (*d*).

Primâ facie evidence of a will may be rebutted by proof of fraud; as that the supposed will is a mere fabrication, or that it was obtained by fraud, as Fraud.

evidence was properly admissible to show what the intention of the settler really was.

Notwithstanding the case of *Cooke* v. *Booth*, Cowp. 819; *supra*, 778, note (*g*), it seems to be now settled that the terms of a deed cannot be construed or interpreted by the acts of the parties. In the case of *Iggulden* v. *May*, 7 East, 237, the Court of K. B. held that a covenant in an indenture of lease, to grant a new lease with all covenants, grants and articles, as in the said indenture contained, did not bind the lessor to insert a covenant of renewal in the renewed lease; and that the fact, that other leases containing such renewals had been made by the owners of the inheritance, could not be called in aid to construe the meaning of the indenture. The judgment of the Court was afterwards affirmed in the Exchequer; and in giving judgment, Mansfield, C. J., observed upon the case of *Cooke* v. *Booth*, "We think that was the first time that the acts of the parties to a deed were ever made use of in a court of law to assist the construction of that deed. Suppose the original lessor to have declared in the presence of fifty witnesses, that he intended to bind himself by that deed to a perpetual renewal, his declaration could not have been allowed to alter the construction of the deed itself. If so, why should the subsequent renewals, which are not evidence either so strong or so unequivocal as the declaration of the lessor, be allowed to alter the construction?" And see *Baynham* v. *Guy's Hospital*, 3 Ves. jun. 298. *Tritton* v. *Foote*, 2 Bro. C. C. 636. *Eaton* v. *Lyon*, 3 Ves. 694.

(*y*) *Lowe* v. *Manners*, 5 B. & A. 917; 2 B. & B. 27.

(*z*) 6 T. R. 345.

(*a*) *Supra*, tit. WILL, *Credible Witness*.

(*b*) Ib. Vol. I. tit. WITNESS, *Interest*.

(*c*) Gil. Ev. by Lofft, 230.

(*d*) Ibid.

Fraud.

by the substitution of a false instrument for the one which the party really intended to execute (*e*); or that it was obtained by duress; or by proof of the incompetency of the party to make a will by reason of coverture (*f*) or infancy (*g*); or by proof of the want of sound memory and understanding.

Capacity.

In the first place, the law presumes every one to be sane till the contrary appear; the burthen, therefore, of proof is cast upon those who impeach the understanding of a testator (*h*), by evidence applicable to the time of the transaction sought to be affected. On the other hand, it is to be presumed that a man's mind remains unchanged till the contrary appear: when, therefore, lunacy has been once established, it is incumbent on him who alleges the validity of the act, to prove that it was done at a lucid interval, during which the party was sane and competent (*i*).

Non compos, who.

The authorities on the subject state, that no person who is *non compos* (*k*) can make a will; and the term comprehends not only idiots and lunatics, but all other persons who from natural imbecility, disease, old age, or any

(*e*) *Doe* v. *Allen*, 8 T. R. 147.

(*f*) See the stat. 34 & 35 H. 8, c. 5, s. 14. But a feme covert may dispose of property by will which she holds in *auter droit* as executrix; *Scammel* v. *Wilkinson*, 2 East, 552; or under a power contained in the marriage settlement. *Drirer* v. *Thomson*, 4 Taunt. 294. And courts of equity have gone so far as to say, that a married woman who has a separate estate may make a will without a power. Per Mansfield, C. J., 4 Taunt. 297.

(*g*) See the stat. 34 & 35 H. 8, c. 5, s. 14.

(*h*) *White* v. *Wilson*, 13 Ves. jun. 89; 6 Cruise, 15. But in the case of *Wallis* v. *Hodgson*, Ch. R. 300, it was said that it is incumbent on a devisee who sets up a will, to prove not only the formal requisites under the Statute of Frauds, but he must also show the devisor to have been of a sound and disposing mind. That is, it seems, where the sanity of the testator is the question in dispute; in others, the will itself, where its provisions are sensible and reasonable, would afford ample *primâ facie* evidence to throw the burthen of proof upon the heir. *Adseverationi tuæ eum compotem fuisse neganti fidem adesse probari convenit.* L. 5, Cod. de Codicill. On the other hand, insanity apparent on the face of the will threw the burthen of proof on the testamentary heir. L. 27. ff. de Condit.

(*i*) The maxim is, *semel furibundus semper furibundus præsumitur.* It is not enough to show that the act was *actus sapienti conveniens*, for that may happen many ways; but it must be proved to be *actus sapientis*, and to proceed from judgment and deliberation, or else the presumption continues. Lord Nottingham's MS. Co. Litt. by Butler, note 185.

Lord Thurlow, in the *Attorney-general* v. *Parnther*, 3 Bro. C. C. 443, observed, "If, however, derangement be alleged, it is clearly incumbent on the party alleging it to prove the same; but if the derangement be proved, or be admitted to have at any time existed, and a lucid interval be alleged to have taken place, the burthen of proof attaches to the party alleging such lucid interval, who must show sanity and competency at the particular period when the act was done to which the lucid interval refers. And it certainly is of equal importance, when any derangement at any period has been established, that the evidence in support of a lucid interval should be as strong and demonstrative as where the object of proof is to establish derangement itself.

In Swinburn, 78, it is observed, "So every man is presumed to have the right use of his reason until the contrary be proved; which being proved, then he is presumed to continue still void of it, unless he were so for a short time, and in some particular actions only, and not continually for a long space, as for a month or more, or unless he fell into some phrenzy upon some accidental cause, which is afterwards removed, or unless it be a long time since he was assailed by the malady; for in all these cases he is not presumed to continue in his former furor or malady."

Where insanity has been once established, and continuing evidence of derangement is shown previous to and after the execution of the will, evidence of calmness, and the power of doing formal acts of business, was held to be insufficient to rebut the presumption arising against capacity. *Green* v. *Thomas*, 2 Hagg. 433. Where the testator is proved to have frequently laboured under incapacity to make a will, his capacity at the time of making the will, that he gave the instructions, and that he executed the will in the presence of unexceptionable witnesses, must be distinctly proved. *Dodge* v. *Meech*, 1 Hagg. 612.

(*k*) A *non compos* is excepted out of the stat. 32 Hen. 8, c. 1.

other such causes, are incapable of managing their own affairs (*l*). The words mean the same with the English words, "of unsound mind (*m*)." An old man become childish, or so forgetful as not to remember his own name, cannot make a will, neither can a drunkard, who by excessive intoxication is deprived of the use of his understanding and reason (*n*). And according to Lord Coke (*o*), to make a will valid it is not enough for the

Non compos, who.

(*l*) *Ex parte Cranmer*, 12 Ves. jun. 445; *Ex parte Gilham*, 2 Ves. jun. 587.

(*m*) See *Ex parte Barnsley*, 2 Atk. 167; 1 Bl. Comm. 304. *Ridgway* v. *Darwin*, 8 Ves, jun. 67.

(*n*) 2 Co. 6, 23.

(*o*) *Marquis of Winchester's Case*, 6 R. 23, a. See also Swinburn, 77. Although a man be incapable of conducting his own affairs, he is still answerable for his criminal acts, if he possesses a mind capable of distinguishing right from wrong. In the late case of *The King* v. *Bellingham*, the prisoner, in his defence to a charge of having murdered Mr. Perceival, avowed that he was justified in what he had done, because his Majesty's government had refused to redress certain grievances of which he complained. Mansfield, C. J., in summing up to the jury, observed, "In another part of the prisoner's defence, it was urged, not however by himself, that at the time of the commission of the crime he was insane —with respect to this the law is extremely clear. If a man were deprived of all power of reasoning, so as not to be able to distinguish whether it was right or wrong to commit the most wicked transaction, he could not certainly do an act against the law; such a man, so destitute of all power of judgment, could have no intention at all. In order to support this defence, however, it ought to be proved by the most distinct and unquestionable evidence, that the criminal was incapable of judging between right and wrong. It must in fact be proved beyond all doubt, that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature. There is no other proof of insanity which will excuse murder or any other crime.

"There are various species of insanity. Some human beings are void of all power of reasoning from their birth; such cannot be guilty of any crime. There is another species of madness, in which persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance; this is called lunacy. If these persons were to commit a crime when they were not affected with the malady, they would be, to all intents and purposes, amenable to justice; so long as they could distinguish good from evil, so long would they be answerable for their conduct. There is a third species of insanity, in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act. If such a person were capable, in other respects, of distinguishing right from wrong, there is no excuse for any act of atrocity which he may commit under this description of derangement. The witnesses who have been called to support this extraordinary defence have given a very singular account, in order to show that at the time of the commission of the crime the prisoner was insane. What may have been the state of his mind some time ago is perfectly immaterial; the single question is, whether, when he committed the offence charged upon him, he had sufficient understanding to distinguish good from evil, right from wrong, and that murder was a crime not only against the law of God, but against the laws of the country."

Thomas Bowler was tried at the Old Bailey, on the 2d July 1812, for wilfully and maliciously discharging a blunderbuss loaded with bullets at William Burrowes, and wounding him with the contents in the neck and back, under circumstances, as they were disclosed by the evidence, which manifested considerable ill-will towards the prosecutor, and design in the execution of his purpose. The defence set up was insanity occasioned by epilepsy.

Elizabeth Haden, the housekeeper of the prisoner, deposed, that he was seized with an epileptic fit on the 9th July 1811, and was brought home apparently lifeless, since which time she had perceived a great alteration in his conduct and demeanour. He would frequently dine at nine o'clock in the morning, eat his meat almost raw, and lie on the grass exposed to rain; his spirits were so dejected, that it was necessary to watch him lest he should destroy himself.

Mr. Warburton, the keeper of a lunatic asylum, deposed, that it was characteristic of insanity, occasioned by epilepsy, for the patient to imbibe violent antipathies against particular individuals, even his dearest friends, and a desire of taking vengeance upon them, from causes wholly imaginary, which no persuasion could remove; and yet the patient might be rational and collected upon every other subject. He had no doubt of the insanity of the prisoner, and said he could not be deceived by assumed appearances.

A commission of lunacy was produced, dated the 17th of June 1812, and an inquisition taken upon it, whereby the prisoner was found insane, and to have been so from the 30th of March then last.

Non compos, who.

testator to have had memory sufficient to answer familiar and usual questions, but he must have had a disposing mind, so as to have been able to make a disposition of his estate with understanding and reason.

Sir Simon Le Blanc, before whom the trial took place, after summing up the evidence, concluded by observing to the jury, that it was for them to determine whether the prisoner, when he committed the offence with which he stood charged, was or was not incapable of distinguishing right from wrong, or under the influence of any illusion in respect of the prosecutor, which rendered his mind at the moment insensible of the nature of the act he was about to commit, since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion, that when he committed the offence he was capable of distinguishing right from wrong, and was not under the influence of such an illusion as disabled him from discerning that he was doing a wrong act, he would be amenable to the justice of his country, and guilty in the eye of the law.

The jury, after considerable deliberation, pronounced the prisoner guilty.

According to the report of Oxford's case, Alderson, B. strongly expressed his disapprobation of the execution of Bowler.

So, according to the text writers, these defects, whether permanent or temporary, must be unequivocal and plain, not an idle frantic humour, or unaccountable mode of action, but an absolute dispossession of the free and natural agency of the human mind. 1 Hale's P. C. c. 4. According to Lord Hale, the best criterion he could think of for distinguishing between total and partial insanity, was this: "If a person labouring under melancholy distempers, hath yet as great understanding as ordinarily a child of fourteen years hath, such a person may be guilty of treason or felony." Hale's P. C. 30.

In *Arnold's Case*, 8 St. Tr. 290, the prisoner was indicted for maliciously shooting at Lord Onslow. No doubt could exist of his being to a certain extent deranged, and that he had greatly misconceived the conduct of Lord Onslow. From the evidence, however, it appeared that he had formed a regular design, and prepared the proper means for carrying it into effect. It was stated by the Court to the jury, that he could not be guilty if he did not know what he was doing; but that partial insanity would not excuse him, but he must have laboured under such a deprivation of reason as rendered him as senseless as a brute or an infant.

In the case of the *Earl of Ferrers* (State Trials), although it was proved that his lordship was occasionally insane, and incapable from his insanity of knowing what he did, or judging of the consequences of his actions, yet as it appeared that when he committed the offence he had capacity sufficient to form a design, and know its consequences, he was found guilty and executed.

William White having paid his addresses to Maria Bally, a young schoolmistress, who subsequently forbade his visits, he shot her with a pistol, in the presence of her scholars. The fact being proved, three witnesses were brought forward to prove his insanity; but as they merely deposed to dejection of spirits manifested previous to the murder, he was found guilty and executed. Collinson on Lunacy, vol. 1, p. 474.

In *Hadfield's Case*, 1800, Ib. 480, the prisoner was tried for high treason, and the overt act laid was the firing at the King at Drury-lane theatre; previous insanity was proved, manifested by acts which were continued nearly up to the time of the imputed offence. Lord Kenyon stated, that as the prisoner was deranged immediately before the offence was committed, it was improbable that he had recovered his senses in the interim; and although, were they to run into a nicety, proof might be demanded of his insanity at the precise moment when the act was committed, yet there being no reason for believing him to have been at that moment a reasonable and accountable being, he ought to be acquitted.

In the case of Edward Oxford, 9 C. & P. 525, before Lord Denman, C. J., Mr. Baron Alderson, and Mr. Justice Patteson, for a treasonable attempt on the life of Her present Majesty, the Lord Chief Justice, in summing up to the jury, is reported to have observed (*inter alia*), as follows: "Then the very important question comes, whether the prisoner was of unsound mind when the act was done. Persons *primâ facie* must be taken to be of sound mind till the contrary is shown. But a person may commit a criminal act, and yet not be responsible. It is not more important than difficult to lay down the rule by which you are to be governed. Many cases have been referred to upon the subject. But it is a sort of matter in which you cannot expect any precedent to be found. It is the duty of the Court to lay down the English law on the subject; and even that is difficult, because the Court would not wish to lay down more than is necessary in the particular case. As to Hadfield's case, Mr. Erskine would lose nothing by laying down the rule most widely. It must not, therefore, be said that the admission of counsel is to decide the matter. On the part of the defence, it is contended that the prisoner at the bar was *non compos mentis*, that is (as it has been said), unable

Swinburn observes (*p*), that "the sane memory for making a will is not at all times when the party can speak yea or no, and hath life in him, but he ought to have judgment to discern, and be of perfect memory, otherwise the will is void; and therefore the evidence ought to go to this extent." Non compos.

According to the ecclesiastical law, importunity, in its legal acceptation, to avoid a will, must be such as the testator is too weak to resist, and in such a degree as to take away his free agency (*q*).

The question of sanity is so peculiarly a question of fact for the decision of a jury, that a will of a real estate cannot be set aside in equity, without being first tried at law on an issue of *devisavit vel non* (*r*). Question of fact.

The nature of the evidence requisite to prove the insanity of the testator on the one hand, or to establish his sanity on the other, is too obvious to require comment. Evidence for the first of these purposes consists principally in the proof of such acts done and declarations made by the party as are inconsistent with sanity (*s*).

to distinguish right from wrong, or, in other words, that from the effect of a diseased mind he did not know at the time that the act he did was wrong. As to the grandfather, two points will arise whether his conduct was evidence of insanity or only of violence of disposition; and if of insanity, whether the insanity was or was not hereditary? (His Lordship read the evidence of the medical and other witnesses on the subject of the insanity, and said): "It may be that medical men may be more in the habit of observing cases of this kind, and there may be cases in which medical testimony may be essential; but I cannot agree with the notion, that moral insanity can be better judged of by medical men than by others. As to the father of the prisoner, the question will be, whether there was a real absence of the power of reason—the power of controlling himself, or whether it was only a violent or even cruel disposition; and then, upon the whole, the question will be, whether all that has been proved about the prisoner at the bar shows that he was insane at the time when the act was done,—whether the evidence given proves a disease in the mind as of a person quite incapable of distinguishing right from wrong. Something has been said about the power to contract and to make a will. But I think that those things do not supply any test. The question is, whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing; or, in other words, whether he was under the influence of a deceased mind, and was really unconscious at the time he was committing the act that it was a crime. With respect to the letters and papers, they may be brought forward on either side of the question."

Per Parke, B. (on the authority of a case said to have been decided by Gurney, B.) witnesses for a prisoner on a charge of murder may be examined as to the insanity of other members of prisoner's family. *R.* v. *Walsh*, Lancaster Spring Assizes, 1835. Similar evidence was given in *Oxford's Case*. To establish the insanity of a prisoner, papers found at his lodgings, and proved to have been written by him, before the commission of the offence, were offered to be read, but were rejected on the ground that what a party has written may be evidence against him, but not for him. *R.* v. *Casaur*, cor. Garrow, B., Old Bailey, May 1818.

"A drunkard," saith Lord Coke, "who is *voluntarius dæmon*, hath no privilege thereby, but whatsoever hurt or ill he doth is aggravated by his drunkenness. *Nam omne crimen ebrietas et incendit et detegit.*" 1 Inst. 247. See above, 396.

(*p*) 72.

(*q*) P. C. in *Kinleside* v. *Harrison*, 2 Phill. 449. The law (ecclesiastical) presumes against the validity of a will made by the solicitor of the deceased in his own favour, to the exclusion of an only son, but such a will may be established by clear proof that the act was the voluntary act of a party of competent capacity, having full knowledge of what he did. *Butlin* v. *Barry*, 1 Curt. 614; and the judgment was affirmed in the Privy Council. Ib. 637.

(*r*) *Bransby* v. *Herridge*, Eq. C. Ab. 406.

(*s*) Swinburn observes, that it is a hard and difficult point to prove a man not to have the use of his understanding or reason; and therefore it is not sufficient for a witness to depose that the testator was mad, or beside his wits, unless a sufficient reason can be given to prove this deposition, as that he saw him do such acts, or heard him speak such words, as a person having reason would not have done or spoken. Swinburn, 72. The declaration of a testator that he had attempted to destroy his will, is, it seems, evidence as to the state of his mind, although not for the purpose of proving revocation. *Doe* v. *Harris*, 7 C. & P. 330.

Non compos.

Letters written by third persons, since deceased, to a party whose will is disputed, and found among his papers, are not admissible as evidence of his competency, without some proof that he himself acted upon them. And the facts of such a letter having been so found with the seal broken, being a letter on legal business concerning the party's affairs, and bearing the indorsement of his attorney, since deceased, "20th May 1786; letter from Mr. M. to Mr. M.," are not evidence of the party's having acted upon the letter sufficient to warrant its reception as evidence (*t*).

(*t*) *Wright* v. *Tatham*, in Error, 5 Cl. & F. 670. See 1 Ad. & Ell. 3; 3 N. & M. 260; 7 Ad. & Ell. 313; 6 N. & M. 132. It was proved that after the death of *J. M.*, whose competency was disputed by the plaintiff in error, many letters addressed to him by various persons were found, with other papers, in a cupboard under his book-case in his private room. Amongst the letters so found, was one addressed by Charles Tatham, a cousin of *J. M.*, dated Alexandria, October 1784, relating principally to his own situation and adventures. The letter was post-marked as a ship letter, and was in the handwriting of Charles Tatham, who had been personally acquainted with *J. M.*, and had been dead many years; and a draft or copy of a letter was given in evidence by the defendant below, in the handwriting of *J. M.*, addressed to the said C. Tatham, dated June 1st, 1787, which recognised the receipt of a former letter "some time ago." Another of the letters so found purported to be a letter of business, addressed by Oliver Martin, the vicar of Lancaster, to *J. M.*, recommending a case to be prepared and laid before counsel, for the settlement of some matter in difference between *J. M.* and the parish. It was proved that James Barrow was at the time of the date of this letter the attorney of *J. M.*, and had been dead 35 years ago, and that an indorsement on the back of the letter, "20th May, 1786, letter from Mr. Martin to Mr. Marsden," was in his handwriting. These letters, and a third also, addressed to *J. M.* by Mr. Ellershaw, formerly curate of the chapel of Hornby, to which he had been presented by *J. M.* and addressed by him to *J. M.* on relinquishing the cure, having been rejected upon a trial at Lancaster, in 1833, before Gurney, B., and a bill of exceptions having been tendered, a difference of opinion existed amongst the Judges in the Court of Error in the Exchequer Chamber, whether these letters ought to have been received; but a *venire facias de novo* was awarded on another ground. See *Wright* v. *Tatham*, 1 Ad. & Ell. 3; 3 N. & M. 260. Upon another trial before Gurney, B., at the Lancaster Sum. Ass. 1834, the letters were received in evidence, and the jury found a verdict for the defendant below. A motion having been made for a new trial, Lord Denman, after time taken to consider, delivered the judgment of the Court, declaring the letters to be inadmissible. Upon the trial of the same cause at the Lancaster Sum. Ass. 1836, before Mr. Justice Coleridge, the letters were rejected; the jury found for the plaintiff, and bills of exceptions were tendered on both sides. The case was twice argued in the Exchequer Chamber before the Judges in error, and upon the last argument before L. C. J. Tindal, Js. Parke, Bosanquet, and Coltman, and Barons Parke and Gurney. The learned Judges being equally divided in opinion, the case was carried into the House of Lords, where, after argument, six of the learned Judges were of opinion that none of the letters in question was admissible; three thought that all the letters were admissible, and three were of opinion that the letter indorsed by Barrow was distinguishable from the other two. On the 7th of June 1838 judgment was given for the defendant in error, affirming the rejection of the letters. Lord Brougham, in giving judgment, observed as follows: My Lords, I am now prepared to move the affirmance of the judgment of the Court below. I am perfectly satisfied that all the letters set forth in the bill of exceptions, and the admissibility of which formed the question on this appeal, were properly rejected at the trial, as not admissible in evidence, according to the rules which govern the reception of evidence in our courts of common law. I stated to your Lordships, on a former day, that that was my opinion, and that the only doubt I entertained arose in consequence of the difference of opinion among the learned Judges who assisted your Lordships with their advice. Six of those learned Judges gave their opinions that all the letters were properly rejected, the six others giving a different opinion, but also differing among themselves, three of them being of opinion that all the letters were admissible, and three that one only was admissible. I then stated that it appeared to me there was no ground for any distinction between Oliver Martin's letter and the other two; that if the two letters were properly rejected, as nine of the learned judges agreed they were, I did not see any ground of distinction between them and the third letter. But three of the learned Judges thought Mr. Martin's letter was distinguished from the other two by reason of the indorsement on it, by

The widow of Mr. Bennett claimed the whole of her husband's property under his will. Bennett had been greatly debilitated in mind and body by

Proof of capacity.

Mr. Barrow, who had been Mr. Marsden's attorney at the time of its date. That indorsement, which was proved to be in the hand-writing of Mr. Barrow, did not appear to me to form any ground of distinction, it rather tended to prove that Mr. Marsden had not seen that letter. The indorsement in the hand of a third person could not prove that Mr. Marsden acted on the letter, and without some act done by him in respect of it, all the Judges admitted that it could not be evidence of his competency, which was the matter in issue. In the next place, it was quite clear that Mr. Barrow read that letter; he was Mr. Marsden's solicitor, and his indorsement on it did not prove that Mr. Marsden transmitted it to him, or read it, or ever saw it; and to infer from the indorsement that he communicated it to his attorney, was assuming the very fact that was required to be proved. Then there is a failure of proof of his having done any act in respect of that letter, showing his competency to make his will; and the three letters were alike inadmissible for that purpose; and even on the showing of the learned Judges in favour of this letter (Mr. Martin's), there is no ground for holding it more entitled to be admitted than the other two letters. I never saw a clearer case, or one calling for a more unhesitating expression of opinion, and I move accordingly that the judgment of the Court of Exchequer Chamber be affirmed.

My noble and learned friend, Lord Lyndhurst, not having heard the arguments at your Lordships' bar, declines to deliver any opinion on them, but having read the opinions of the learned Judges, he authorizes me to say, that he agrees with me that the judgment of the Court below ought to be affirmed, as in accordance with the great principle of the rule of evidence in question.

Lord Denman.—I have not the advantage of having heard the arguments in this case at your Lordships' bar, nor the opinions delivered to your Lordships by the learned Judges. But I heard the question of the admissibility of these letters argued in the Court of King's Bench two years ago. It would not be proper for me to enter into the case at any length, but I wish to state to your Lordships the opinion which I formed, when the case was before the Court in which I have the honour to sit, and having carefully considered the judgment given by the Judges in the Exchequer Chamber since, I still adhere to the judgment of the Court of King's Bench. Supposing these letters were found and produced under circumstances free from all suspicion, and that they expressed the genuine opinions of the writers of them respecting the person to whom they were addressed, I continue to hold that that expression of opinion could not be admitted to prove the fact of his competency; and therefore, as declarations of opinion, they could not have the smallest influence on the question in issue. To infer from the circumstances under which these letters were found, that the testator acted on them, we must first assume his competency, which is the matter to be proved. The tendering of the letters under these circumstances, would rather make me jealous of extending the rules which guard the reception of evidence. The only question admitting of doubt, is, whether the letter of Mr. Martin is in a different situation from the other two. I could not see, after the most careful consideration, why a different rule of evidence should be applied to that letter. Had the testator himself indorsed it, that act might have proved the fact, for proof of which it was offered. But when I consider that the indorsement was not written by the testator, but by Mr. Barrow, his attorney, I do not understand how that indorsement could distinguish that letter from the others, so as to make it admissible to prove the testator's competency. There is no proof that he did any rational act in respect of that letter, unless we assume that his was the hand that wrote the indorsement, which is contrary to the evidence. I agree therefore with the opinion expressed by my noble and learned friend, that the judgment ought to be affirmed.

The Lord Chancellor.—It was my duty to attend to the arguments in this case at the bar, and also to the opinions delivered by the learned Judges, to whom I listened with the utmost attention, and their statements, although not binding on your Lordships, are entitled to the greatest weight and respect. They all seemed to agree in one point, that the letters, taken as the mere declarations of the opinions of the writers of them, could not be evidence of the competency of the person to whom they were addressed. Some of the learned Judges say all the letters ought to have been received in evidence because there was sufficient proof, as they conceived, that the testator acted on them. There is no doubt that if he had acted on them they would be receivable at all events, whatever might be the effect of them on the jury. But the question is, whether he did or did not act on them. They were found, together with other letters, open in a cupboard under a bookcase in the testator's private room, and one of them had an indorsement in the hand-writing of Mr. Barrow, who was then the testator's solicitor. Three of the learned Judges were of opinion that this indorsement distinguished that letter from the

Proof of capacity.

habits of debauchery, and the woman effected the marriage by getting into lodgings opposite to him at Bath, and no sooner were they married than she discharged all his servants. Lord Thurlow was much against the will, and two issues were directed as to its validity, in both of which it was established. L. C. J. Eyre, before whom it was tried, stated to the jury, that the point was, *whether he perfectly knew what he was doing*, and that they were not to enter too minutely into considerations of influence (*u*).

other two, so as to render it admissible; three more thought all the letters admissible, while the other six thought none of them was receivable, because there was no proof that the testator acted on any of them; and with this conclusion I entirely concur, being, like them, of opinion that the testator did not act on any of the letters in such a way as would prove his competency to make his will. In order to introduce the letters there must be some accompanying proof that he was engaged in the matters to which they referred. There was no such proof, nor was there any of the person by whom the seals were broken or the letters were placed in the cupboard, but it was desired to be inferred that they were placed there by the testator. If he had placed them there after opening and reading them, these acts would be valuable to a certain extent as proof of his competency; but as there is no proof of his having so acted with regard to any of those letters, no inference can be drawn either in favour of his competency or against it. To infer these acts without proof would be assuming his competency, which is the very question in issue. One of the letters was indorsed by the testator's attorney; had it been indorsed by himself it would have been receivable; but from that act done by the attorney, no inference can be drawn as to the testator's competency; it is an act not more consistent with his competency than it was with his incompetency. To infer without proof that he dealt with the letters, is to assume his competency, which is the whole question. From the appearance of the letters no inference can be drawn whether he or another person had dealt with them. Mr. Barrow, whose indorsement was on the third letter, was as likely as the testator to be the person who opened it and gave directions on it. You cannot assume that the testator dealt with these letters. It is allowed by all that two of the letters are inadmissible; I think the third also inadmissible, and I agree that the judgment of the Court below ought to be affirmed.

Affirmed accordingly.

(*u*) *Bennett's Case*, 9 Ves. jun. 189. In the case of *Doe* v. *Wright*, Lancaster Summer Assizes, 1836, Coleridge, J., in summing up to the jury, stated (*inter alia*) as questions for their consideration,—Had he a mind sound, free from delusion? Did he know the state of his family and property, his own situation, and the act he was doing, if expressed to him in plain and familiar language? In ejectment to try the title to lands, the sole question being as to the validity of a deed, upon the mental capacity of a party to execute it, the Judge directed the jury that the question for them to try was, "whether the person was of sound mind or not," but went on to explain that to constitute such unsoundness of mind as would avoid a deed at law, the party must be incapable of understanding and acting in the ordinary affairs of life; and that the jury were at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when its general import was explained to him; it was held, that taking the whole direction together, it was right; and also, that if the question had been more vague and ambiguous, unless the objection had been brought distinctly to the notice of the Judge at the time, the plaintiff in error could not avail himself of it afterwards; if brought in that manner under his notice, and he had refused to clear it up, it might have been the subject of exception as well as any other matter of law. *Ball* v. *Mannin*, 1 Dow, N. S. 380. Where the wife, of advanced age, eight months after marriage, executed a will under a power, varying only from her former disposition of her fortune, in making a reasonable provision for her husband and his eldest son, and notwithstanding continued and severe bodily infirmity from paralytic attack, having never expressed any dissatisfaction or wish to vary such disposition, but on the contrary referred to it with anxiety to secure her intended benefit to the family of one of the objects who had become bankrupt, after the lapse of nine years, and shortly before her death, executed another will, giving the whole to her husband; the Court, regarding the total improbability of such a change of disposition, the previous anxiety of the husband to acquire possession of the former will, and the control of her affairs, and the facts of her being at the time of executing such second will in a state of very weakened and doubtful capacity, and the *factum* of the will originating with and carried on entirely by his means and interference, and by contrivance to prevent the access of other persons at the time in her confidence, pronounced against its being the real mind and wish of a capable and free testatrix, and condemned the husband in costs. *Marsh* v. *Tyrrell*, 2

Proof of capacity.

The heir at law is not estopped from impeaching a will on the grounds of the testator's insanity, although he has himself proved the will in the Ecclesiastical Court, and retained the legacies (*v*).

The manner in which a will has been written and executed, and the contents of the will itself, coupled with the situation of the testator, and the circumstances under which it was made, afford important evidence as to his capacity (*w*). And it seems that from such evidence alone, where the terms of the supposed will are such as tend to exclude the supposition of the maker's sanity, the jury may decide against the validity of a will (*x*). But it is clear, on the other hand, that it is not sufficient to show that the dispositions of the will are imprudent and unaccountable (*y*).

The capability of the testator to discharge the duties of a public situation affords a strong presumption of his capacity to make a will (*z*).

Proof of lucid interval.

It has already been observed, that when confirmed insanity at any period of time antecedent to the making of the will has been established, it lies on the devisee to prove the competency of the testator (*a*) when he made the will.

Lord Thurlow (*b*) observed, that if the derangement be proved, or be admitted to have at any time existed, and a lucid interval be alleged to have taken place, the burthen of proof attaches to the party alleging such lucid interval, who must show sanity and competency at the particular period when the act was done to which the lucid interval refers. And it is certainly of equal importance, when derangement at any period has been established, that the evidence in support of a lucid interval should be as strong and demonstrative as where the object of proof is to establish derangement itself.

It is, however, to be recollected, that a lucid interval, from its very nature, does not admit of that full measure of proof which positive insanity affords by symptoms and indications of a decisive nature (*c*). This doctrine,

Hagg. 84; S. P. *Mynn* v. *Robinson*, 2 Hagg. 179.

(*v*) *Lord Montague's Case*, 9 Mod. 90.

(*w*) 9 Ves. jun. 610.

(*x*) *Burr* v. *Daval*, 8 Mod. 59.

(*y*) Ib. Sir T. Daval had two sons, and being taken ill on the 15th of April 1719, made his will, devising an estate of 1,600*l.* a year to his eldest son and the heirs of his body, and another of 1,700*l.* to his youngest, and the heirs of his body. If either of his sons should die *without* issue, the estate of him so dying was to go to the survivor; but if both his sons should die *with* issue, the two estates were devised to Daniel Burr. The sons died without issue, and it appeared that a jointure of 600*l.* had been charged on the estate devised to the *elder* brother; but the verdict was in favour of the will.

(*z*) See *Greenwood's Case*, 3 Bro. C. C. 444; 13 Ves. jun. 89. See also *White* v. *Wilson*, 12 Ves. 87. Apparent sanity on some subjects is not conclusive proof that delusion on particular subjects, and showing itself on particular occasions, does not exist. And it seems that in civil cases this partial insanity, if existing at the time of an act done, invalidates that act, although it be not directly connected with it. It has been said that where there is delusion of mind there is insanity; as where persons believe things to exist which exist only, or at least in that degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them, and which no rational person could have believed. This delusion may sometimes exist on one or two particular subjects, though generally there are other concomitant circumstances, such as eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptoms which may tend to confirm the existence of delusion and to establish its insane character. Judgment of Sir J. Nicholl in *Dew* v. *Clarke*, Haggard's R. 1826.

(*a*) *Supra*, 1276, note (*i*).

(*b*) *Attorney General* v. *Parnther*, 3 Bro. C. C. 443.

(*c*) See the observations of Sir J. Nicholl, in giving judgment in the case of *White* v. *Driver*, 1 Phill. R. 88. He says, "It is scarcely possible indeed to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval;

Proof of lucid interval.

therefore, cannot be extended farther than to require, that where insanity at an antecedent period has been satisfactorily established, its continuance shall be presumed until that presumption be satisfactorily rebutted.

The fact that the will itself is a sensible one, provided it can be completely proved that the party who made it, framed it without assistance, affords a presumption that it was made during a lucid interval (*d*). But although the wisdom and prudence of a will, when fully established to be the work of the testator, affords a reasonable, nay, even a strong presumption of his sanity, the more especially where it is made under circumstances which required the judgment and foresight of a rational mind, and em-

but the law recognizes acts done during such an interval as valid, and the law must not be defeated by any overstrained demands of the proof of the fact."

Lord Thurlow, in the case of the *Attorney General* v. *Parnther*, also observed, "There is an infinite, nay, an almost insurmountable, difficulty in laying down abstract propositions on a subject which depends on such a variety of circumstances as the establishment of lucid intervals. General rules are easily framed, but the application of them creates considerable difficulty, where they are not sufficiently comprehensive to meet every circumstance which may enter into and materially affect each particular case. There can be no difficulty in asserting, that wherever the mind acts, it ought to act efficiently, and to be in possession of itself; but it is not easy to lay down with tolerable precision the rules by which the state of a person's mind can be tried."

He further observed, that "evidence applying to lucid intervals ought to go to the state and habit of the person, and not to the accidental interviews of any individuals, or to the degree of self-possession when performing particular acts; for it would be extremely dangerous from particular acts to draw a conclusion so general, as that a person who had confessedly before laboured under mental derangement, was capable of doing that which should be binding upon himself and others, and from such acts to try the state of the mind in those cases in which the disorder is, as it is most frequently, *insanity quoad hoc*. At the same time, though partial insanity frequently prevails, yet it must always be watched with infinite care; and it seems scarcely possible to extract from any particular case that which will apply to any other."

(*d*) Godolph. 25. Swinburn observes, "If a lunatic person, or one that is beside himself at times but not continually, makes his testament, and it is not known whether the same were made while he was of sound mind and memory or not, then in case the testament be so conceived as thereby no argument of frenzy or of folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermission, and so the testament shall be adjudged good; yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet nevertheless, I suppose that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament."

Sir W. Wynne, in the case of *Cartwright* v. *Cartwright* (1 Phill. R. 90), observes, "I think the strongest and best proof that can arise as to the lucid interval, is that which arises from the act itself; that I look upon as the thing to be first examined; and if it can be proved and established that it is a rational act rationally done, the whole case is proved. In my apprehension, where you are able completely to establish that, the law does not require you to go further; and the citation from Swinburn states it to be so. The manner in which he has laid it down is, 'If a lunatic person, or one that is beside himself at times but not continually, makes his testament, and it is not known whether the same were made while he was of sound mind and memory or not, then in case the testament be so conceived as thereby no argument of frenzy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermission, and so the testament shall be adjudged good; yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet nevertheless, I suppose that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament.' Unquestionably there must be complete and absolute proof that the party who had so framed it, did it without any assistance. If the fact be so, that he has done without assistance as rational an act as can be, what then is more to be proved? I do not know, unless it can be shown by any authority or law what the length of the lucid interval is to be, whether an hour, a day, or a month. I know no such law as that; all that is wanting is, that it should be of sufficient length to do the rational act intended. I look upon it, that if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from disorder at the time, that is completely sufficient."

braces numerous and complicated provisions, it is still but a natural presumption, which admits of absolute proof to the contrary (*e*). Proof of lucid interval.

But it seems that a slight indication of folly in the instrument itself, would be sufficient to rebut such a presumption (*f*).

These however, it is to be recollected, are not presumptions of law, but, upon the trial which involves the capacity of a testator to make a will, are mere natural presumptions for the consideration of the jury under all the circumstances of the case.

It is by no means necessary to show that a testator who has once been deranged had, at the time of making the will, regained all the powers of mind which distinguished him before the malady; all that is essential is, that he should be restored to a disposing mind, capable of doing an act of thought and judgment (*g*).

If a testator be proved to have been *non compos* at the time of making his will, it is absolutely void, although it be proved that he afterwards recovered his senses (*h*).

Primâ facie evidence of a will may in the next place be rebutted by proof of revocation. The Stat. of Frauds (29 Car. 2, c. 3, sect. 6,) enacts, that no devise of lands, tenements or hereditaments, nor any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same, by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn or obliterated by the testator or his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same. Revocation.

In the first place, then, a will may be revoked by *some other will or codicil in writing*.—A second will does not revoke the first, unless its execution be perfect as an original will, even although it contain a clause of express revocation; for as it does not appear to have been the intention of the testator to revoke the former will without making another disposition of his property, and as the latter branch of the antecedent cannot be carried into effect, the law considers the act to be a nullity; as where the second will is attested by three witnesses, but they do not sign their names in the testator's presence (*i*). Second will.

The mere fact of making a second will does not operate as a revocation of the first will. If a man by a second will revoke a former will, yet if he keep the first will undestroyed, and then cancel the second, the first will is revived (*k*). And where the jury found that the testator had made a second

(*e*) It must be agreed, that the wisdom of a testament is, without doubt, a very strong presumption of the sanity of the testator. It was upon the authority of this presumption that the senate of Rome formally confirmed a testament made by a person in a state of insanity; because there was nothing unreasonable in his disposition they fairly presumed that it was made in a lucid interval, and they forgot the certain madness of the testator in contemplating the good sense of the testament. It was upon a similar colour that the Emperor Leo the philosopher decided, in his 39th Novel, that the testament of an interdicted prodigal ought to be executed, provided it contained nothing unworthy of the character of a man of prudence. Pleading of D'Aguesseau, 2 Ev. Pothier, 525.

(*f*) Godolph. 25.

(*g*) See Lord Eldon's observations, *ex parte Holyland*, 11 Ves. 11.

(*h*) 11 Mod. 157.

(*i*) *Onyons* v. *Tyrer*, 1 P. Wms. 343. *Edleston* v. *Speke*, 1 Show. 89; Carth. 80. *Limberg* v. *Mason*, Com. 454.

(*k*) Per Lord Mansfield, in *Harwood* v. *Goodright*, Cowp. 91. *Glazier* v. *Gla-*

will *different* from the former, but added, "in what particulars is unknown to the said jurors," it was held that there was in point of law no revocation of the former will (*l*).

Other writing.

Or other writing signed in the presence of three or four witnesses.—The terms of this clause import that the testator shall sign the writing in the *presence* of the witnesses; but they do not require, as in the case of a will, that the witnesses shall sign in the presence of the testator (*m*). The latter words of the clause relate to the words *other writing*, and not to the word *will*; and therefore a will does not operate as a revocation, unless it be a complete will under the fifth section, subscribed by the witnesses in the testator's presence. On the other hand, a complete will operates as a revocation, although the testator does not sign it in the presence of the witnesses (*n*).

Cancellation.

Or by burning, cancelling, tearing, &c.—To prove a revocation of this nature it must appear that an act of cancellation was done with the intent to cancel the will. As far as concerns the act, which is the mere symbol of intention, it is unnecessary to show a complete destruction or obliteration (*o*). If a testator having made two parts of a will, destroy one of them *animo revocandi*, it annuls both. So where a testator having frequently declared himself to be dissatisfied with a will, ordered a person to fetch it (being in bed near the fire), and when it was brought, gave it a rent and threw it into the fire, where it would have been burnt had not the person who fetched it taken it off undiscovered by the testator (*p*).

No violence to the instrument will operate as a revocation, where the party was of unsound mind at the time of the act (*q*).

Intention.

The question of revocation may either be one of fact or of law; but where it turns on the intention of the devisor, it seems to be a question of fact for the jury. In the case of *Titner* v. *Titner*, where there were interlineations in a will, the question of revocation was left to the jury (*r*); yet in the late case of *Winsor* v. *Pratt* (*s*), where the testator after the execution of his will made interlineations and obliterations, and afterwards made a fair copy, which was never signed, published or attested, and both the interlined will and the copy were found locked up in a drawer at his residence, the Court seem to have decided upon the fact of intention, and upon a special case being reserved, held that the will had not been revoked (*t*).

Declarations of the testator.

Declarations by the testator which are cotemporary with the act, are not only admissible, but most important evidence to prove his intention, and the legal quality of the act (*u*). If a will proved to have been executed,

zier, 4 Burr. 2512, cited by Buller, J. Doug. 40.

(*l*) *Harwood* v. *Goodright*, Cowp. 87, in K. B. in error, in affirmance of the judgment of the C. P., and afterwards in the House of Lords.

(*m*) 1 P. Wms. 345.

(*n*) *Hoil* v. *Clarke*, 3 Mod. 218. *Ellis* v. *Smith*, cor. Lord Hardwicke, Ibid. 220, in not. Leach's edit.; 4 Burn's Ecc. L. 199.

(*o*) *Winsor* v. *Pratt*, 2 B. & B. 650. *Doe* d. *Perkes* v. *Perkes*, 3 B. & A. 489. *Bibb* v. *Thomas*, 2 Bl. R. 1043.

(*p*) *Sir Edward Symon's Case*, cited Com. 453. See *Titner* v. *Titner*, 3 Wils. 508.

(*q*) Where the will of a person who had become insane was found smeared and gnawed, and no evidence was given of the state of his mind when it was done, it was held in the Prerogative Court, that according to the general rule, the rationality or irrationality of the agent was to be judged of from the nature of the act; and therefore, under the circumstances, the party being of unsound mind at the time of such cancelling, the will was established. *Scruby* v. *Fordham*, 1 Phill. Add. 74; and see below.

(*r*) By Wilmot, L. C. J., as cited by Gould, J. 3 Wils. 508.

(*s*) 2 B. & B. 650.

(*t*) *Winsor* v. *Pratt*, 2 B. & B. 650.

(*u*) *Burtenshaw* v. *Gilbert*, Cowp. 53. The delivery of the will to the executor by

and which after execution remained in the custody of the testator, cannot be found after his death, a presumption (according to the practice of the Ecclesiastical Courts) arises that he has cancelled the will, and the burthen of proving the contrary is thrown on the party alleging the contrary (*x*).

Revocation by implication of law.

In the next place it seems to be now established, that a will may not only be revoked by the means pointed out by the plain letter of the Statute of Frauds, but even by an implication arising out of collateral circumstances. Thus it has been held that the subsequent marriage of the testator, and the birth of a child, afford a presumption of revocation (*y*) of a will which would otherwise entirely exclude them.

Implied revocation.

But upon the nature and grounds of this presumption a difference of opinion has existed. In the case of *Brady* v. *Cubitt* (*z*), Lord Mansfield, C. J., and Ashurst and Buller, Js., were of opinion that such a presumption was a mere *præsumptio juris*, which might be rebutted even by parol evidence to the contrary, the doctrine being founded on a mere presumption of intention on the part of the testator to revoke his will under the circumstances (*a*). But Lord Kenyon, in the case of *Doe* d. *Lancashire* v. *Lancashire* (*b*), intimated an opinion that the foundation of the principle was not so much an intention to alter the will, implied from those circumstances happening afterwards, as a tacit condition annexed to the will itself, at the time of making it, that the party does not then intend that it should take effect if there should be a total change in the situation of his family. And his lordship observed, that if the decisions on the subject were referrible to a subsequent intention, the principle would be considerably disturbed by the argument of Baron Perrot, in *Christopher* v. *Christopher*; and the circumstance of a conception not communicated to the husband, or of a miscarriage subsequent to his death; the latter of which might have some influence on the intention of the devisor, and yet would not operate as a

the party, become a widow, with other recognitions, was held to be sufficient evidence of republication of the will made whilst under coverture, and was declared entitled to general probate. *Miller* v. *Brown*, 2 Hagg. 209.

(*x*) *Loxley* v. *Jackson*, 3 Phill. 128. The deceased executed his will in India, in duplicate, one part of which was sent to him after his return to this country, and was never traced out of his possession, and not found at his death, it was held that the presumption was, that he had destroyed that part; and that unless that fact were repelled by evidence, the legal consequence was, the intention to revoke thereby the duplicate not in his possession. *Colvin* v. *Frazer*, 2 Hagg. 266. Such a presumption may be repelled by strong circumstances, as well as by direct positive evidence.

(*y*) *Brady* v. *Cubitt*, Doug. 30. *Speke's Case*, Carth. 81. *Earl of Lincoln* v. *Rolls*, in Dom. P. 1695, 1 Eq. C. 412. *Tickner* v. *Tickner*, cited 3 Atk. 742. *Wellington* v. *Wellington*, 4 Burr. 2165. *Christopher* v. *Christopher*, 4 Burr. 2182. A will in favour of the issue of a former marriage, is not revoked by a subsequent marriage and birth of issue, where the latter are provided for under a settlement; and *semble*, it does not vary the case, whether the provision is out of the husband's or the wife's property. *Talbot* v. *Talbot*, 1 Hagg. 705. Marriage and issue not being an absolute revocation of a will, but presumptive only, and capable of being repelled by circumstances; held, that where the second wife and her issue were provided for, and the testator was shown to have been fully aware of the existence of the former will, providing for the issue of a former marriage, the will was not by implication revoked. *Johnson* v. *Wells*, 2 Hagg. 561. *T.* having devised land to *A.* for life, with remainder to his sons and daughters in tail upon the death of *A.*, and a son of *A.* known to *T.*, a posthumous daughter of *A.* surviving unknown to *T.*, by a codicil reciting that *A.* had died without leaving any issue, devised the premises to *H.*, it was held to be but a conditional revocation; it was also held that *T.*'s subsequent knowledge of the daughter two years before her death, did not establish the codicil. *Doe* v. *Evans*, 2 P. & D. 378.

(*z*) Doug. 30.

(*a*) Ibid. And see the cases of *Emmerson* v. *Boville*, 1 Phill. R. 342. *Holloway* v. *Clarke*, Ibid. 339. *Johnston* v. *Johnston*, Ibid. 468.

(*b*) 5 T. R. 58.

Implied revocation.

revocation; and the former would have that effect, though it could not influence his intention.

The doctrine of implied revocations, which is borrowed from the civil law, did not prevail after the express enactments contained in the Statute of Frauds, without hesitation and reluctance; even in the case of *Christopher* v. *Christopher*, where the doctrine was finally sanctioned, a very able Judge dissented from it, lest the Statute of Frauds should be repealed (*c*).

The admisibility of parol evidence of the testator's declarations to rebut the presumption of revocation, although borrowed from the same source with the doctrine itself, seems to be still subject to great doubt, founded not only on the loose and uncertain nature of such evidence, but upon the very principles on which the presumption itself rests (*d*).

In the case of *Kennebel* v. *Scrafton* (*e*), the Court, upon the ground of preceding authorities, held that the marriage and subsequent birth of a child (*f*), without provision made for the objects of those relations, of themselves operated as a revocation of a will of lands, and that the rule applied in those cases only where there was an entire disposition of the *whole estate* (*g*) to their exclusion and prejudice. And the Court left the question, how far the presumption of revocation might be rebutted by the parol declarations of the testator, untouched.

On what lands a will operates.

As a will of lands can operate on such lands only as the devisor had when he executed the will, the operation of a will as to particular property may be defeated, by showing that it was purchased after the execution of the will (*h*), or that subsequently to the execution he levied a fine (*i*), or suffered a recovery of lands (*j*) which he had at the time of the execution of the will, for he thereby takes a new estate. And if a testator, having made his will, levy a fine to such uses as he shall by deed or will appoint, and die without making a new will, the will made prior to the fine is revoked (*k*).

(*c*) See the observations of Lord Ellenborough, 2 East, 538; and of Lord Kenyon, C. J. in *Doe* d. *Lancashire* v. *Lancashire*, 5 T. R. 37; and of Sir J. Nicholl, in *Johnston* v. *Johnston*, 1 Phill. 468.

(*d*) See Lord Kenyon's observations, in *Doe* d. *Lancashire* v. *Lancashire*, 5 T. R. 49; and of Lord Alvanley, in *Gibbon* v. *Caunt*, 4 Ves. 848; and of the Lord Chancellor, in the case of *Kennebel* v. *Scrafton*, 5 Ves. jun. 664, in opposition to such evidence. On the other hand, the opinion of Eyre, C. J., in *Goddtitle* v. *Otway*, 2 H. B. 522; the case of *Lugg* v. *Lugg*, Lord Raym. 441; of *Brady* v. *Cubitt*, Doug. 31. Such evidence is admitted in the Ecclesiastical Courts. Phill. R. vol. 1, 341. 460. 469. The presumptive revocation of a will by marriage or the birth of children, may be rebutted by strong evidence of intention; but the Court must be satisfied unequivocally. A codicil made after the birth of a child, not directly pointing to the particular will, contrasted with the testator's expressions and other evidence, was held to be insufficient to repel the presumption. *Gibbons* v. *Cross*, 1 Add. 455.

(*e*) 2 East, 530.

(*f*) Both must concur; 4 M. & S. 10. Where there is a family by a former wife, there will be a revocation of a will of personalty only. *Skeath* v. *Yorke*, 1 Ves. & B. 390.

(*g*) The rule applies in those cases only where the wife and children are wholly unprovided for. 1 Will. Saund. 278. d.

(*h*) The testator, after a devise of certain lands to his wife, afterwards also devised to her the whole residue of his leasehold, copyhold, and freehold estate; by a codicil, reciting his former devises to his wife, he devised, in case of certain events, all *said* estates so devised to his wife to trustees upon certain trusts; held, that it did not amount to a republication so as to pass after acquired lands. *Smith* v. *Dearmer*, 3 Y. & J. 278.

(*i*) *Parker* v. *Biscoe*, 3 Moore, 24. And see 1 Will. Saund. 277, note (4).

(*j*) Where a devisor, after he had made a will, suffered a recovery, in which, as well as in the deed to make a tenant to the *præcipe*, the tenant was called Edward, his real name being Edmund; in ejectment by the heir at law, it was held that the devisor and those who claimed under him were concluded by the estoppel, and that the will was thereby revoked. *Doe* d. *Lushington* v. *Bishop of Landaff*, 2 N. R. 491.

(*k*) *Doe* d. *Dilnot* v. *Dilnot*, 2 N. R. 491.

On what lands a will operates.

If a testator bequeath a lease, and afterwards renews it, the new lease will not pass (*l*), unless from the will it can be collected that the testator intended that the legatee should take the lease then subsisting, or any which he should afterwards make (*m*).

Where a party having surrendered copyhold lands to the use of his will, afterwards surrenders the same lands to the uses of his marriage settlement, the latter surrender does not revoke the former (*n*).

A will may be republished by re-execution of the will. And a codicil attested by three witnesses, and to be taken as part of the will, amounts to a republication of the will (*o*). And lands will pass conveyed between the date of the will and that of the codicil (*p*).

Where the lessee of the plaintiff claims under a will, and the defendant under a codicil, the defendant admitting the will is entitled to begin and reply (*q*).

Where a party married and afterwards made his will, and devised to his wife, and afterwards died, leaving his wife *enceint* of a daughter, her pregnancy being unknown to him, it was held that the birth of the daughter was no revocation (*r*).

In ejectment by an heir, the plaintiff having proved a title as heir, upon which the defendant set up title under a will, held that the plaintiff was entitled to prove in reply a subsequent will, revoking the former devise as in contradiction of the defendant's case, and not as part of his own case in chief (*s*).

Great alterations have been made on this important subject by the stat. 7 W. 4, and 1 Viet. c. 26, which does not, however, extend to any will made before the 1st day of January 1838 (*t*).

By sec. 3, all real and personal estate, comprising customary freeholds and copyholds without surrender, and before admittance, although not devisable before the statute, estates *pur autre vie*, contingent interests, rights of entry, and property acquired after the execution of the will, are devisable.

Sec. 4. Provision is made as to fees and fines payable by devisees of customary and copyhold estates.

Sec. 5. Wills or extracts of wills of customary freeholds and copyholds are to be entered on the court rolls, without setting forth any trusts; the same fine, dues, &c. are payable as would have been as against the customary heir in the case of a descent.

Sec. 6. Makes provision for estates *pur autre vie*, of a freehold nature; they are chargeable in the hands of the heir (by reason of special occupancy) as assets by descent, as in the case of freehold land in fee simple; and where

(*l*) *Colcby* v. *Manley*, 6 Madd. 84. And see *James* v. *Dean*, 15 Ves. 238. *Marwood* v. *Turner*, 3 P. Wms. 103.

(*m*) Ibid.

(*n*) *Vawser* v. *Jeffery*, 3 B. & A. 462.

(*o*) *Goodtitle v. Meredith*, 2 M. & S. 5. See also 1 Wm. Saund. 277, f. *Hulme* v. *Heygate*, 6 Mer. 285. *Rowley* v. *Eylon*, 2 Mer. 128.

(*p*) *Goodtitle* v. *Meredith*, 4 M. & S. 5.

(*q*) *Doe* v. *Corbett*, 3 Camp. C. 368.

(*r*) *Doe* v. *Barford*, 4 M. & S. 10.

(*s*) *Doe* v. *Gosley*, 2 M. & R. 243; and 9 C. & P. 46.

(*t*) Sect. 34. The clause also provides that every will re-executed or republished, or revived by any codicil, shall, for the purpose of the Act, be deemed to have been made at the time at which the same shall be so re-executed or revived; and that the Act shall not extend to any estate *pur autre vie* of any person who shall die before the 1st of January 1838. Wills executed previously are not exempt from the operation of the statute, as to any acts done after the passing of the statute. *Hobbs* v. *Knight*, 1 Curt. 768. It is observable that the clause applies to the time of making the will, not to the death of the testator. The date apparent on the will would be presumed to be true in the absence of evidence to the contrary.

there is no special occupant of *any* estate *pur autre vie*, it shall go to the personal representatives, and be assets in his hands applicable and distributable as personal estate.

Sec. 7. A will by one under the age of 21, is invalid.

Sec. 8. So if made by a married woman, unless such will would have been valid before the Act.

Sec. 9. No will shall be valid unless it shall be in writing and executed in the manner hereinafter mentioned, that is to say, it shall be signed at the foot (*x*), or end (*y*) thereof, by the testator or some other person in his presence, and by his direction, and such signature shall be made or acknowledged (*z*) by the testator in the presence (*a*) of two or more witnesses present at the same time; and such witnesses shall attest (*b*), and shall subscribe (*c*) the will in the presence of the testator (*d*), but no form (*e*) of attestation shall be necessary.

Sec. 10. No appointment made by a will in execution of any power, shall be valid unless the same be executed as thereinbefore required; and every will executed in the manner thereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in execution of such power should be executed with some additional or other form of execution or solemnity.

Sec. 11. Any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as before the Act.

(*x*) Although for greater certainty, if the will consists of several sheets, each should be signed at the foot, (see *Right* v. *Price*, 1 Doug. 241; *Winsor* v. *Pratt*, 2 B. & B. 650;) it is unnecessary to sign or to acknowledge the signing of any other than the last sheet.

(*y*) The testator signed the bottom of the first side, which was duly attested, but the will concluded on the other side without signature, the testament was held to be invalid. *Milward, in the goods of*, 1 Curt. 982.

(*z*) A constructive acknowledgment would not, as it seems, be sufficient, See *Ross* v. *Ewer*, 3 Atk. 156. *Doe* v. *Burdett*, 6 N. & M. 259. *Mackinley* v. *Sison*, 8 Sim. 561. A disclosure of the character of the instrument is not essential to the validity of a will; it was not so even when a publication was necessary. *British Museum* v. *White*, 6 Bing. 310; 3 Mo. & P. 609. *Wright* v. *Wright*, 5 Mo. & P. 316. But it seems that although the silence of the testator is not material, it was otherwise when silence was deceptive. *Trimmer* v. *Jackson*, 4 Burn. Ecc. L. 130, 6th edition.

(*a*) The witnesses must all be present when the signature of the testator or his acknowledgment is made, and the witnesses should be within sight and hearing of each other. *In the goods of Bligh*, Pre. Ct. of Cant. 1839.

(*b*) A party who signs the will by the testator's direction is a good attesting witness. *Bailey, in the goods of*, 1 Curt. 914.

(*c*) A mark would be a sufficient subscription either by the testator or a witness, see *Harrison* v. *Harrison*, 8 Ves. 186. *Addy* v. *Guix*, ib. 504. Where a mark is required, a seal is not sufficient. *Smith* v. *Evans*, 1 Wills. 313. *Wright* v. *Wakeford*, 17 Ves. 459.

(*d*) A will, whether signed by the testator, or by another for him, and afterwards acknowledged by him in the presence of attesting witnesses, is sufficient. *Regan, in the goods of*, 1 Curt. 908. *Secus*, where the testator having signed a codicil in the presence of the witnesses, they withdrew, and subscribed their names as such. *Newman, in the goods of*, 1 Curt. 914.

(*e*) *i. e.* as it seems no attestation *clause* is necessary. The terms of the statute are, however, somewhat obscure on this point. The addition of a formal memorandum is advisable in order to facilitate probate, which would not, it seems, be granted otherwise, without a special affidavit; also to afford evidence of title to the property devised; for a purchaser would otherwise require a statutory declaration (see 5 & 6 W. 4, c. 62,) by the witnesses; and lastly, to fix the attention of the witnessess upon the facts which it is expedient they should certify, and which, having certified, they could not afterwards so effectually deny. See Forms of Wills and Practical Notes, by Hayes & Jarman, 24.

Sec. 12. The Act is not to affect any of the provisions of the st. 11 G. 4, and 1 W. 4, c. 20, as to the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines and mariners, so far as relates to wages, pay, prize-money, bounty-money, or other monies payable in respect of services in the royal navy.

Sec. 13. No publication is requisite.

Sec. 14. If any person who shall attest the execution of a will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

Sec. 15. Any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) to any attesting witness or the husband or wife of any attesting witness, shall be void, and such witness competent.

Sec. 16. In case any real or personal estate shall be charged with any debt or debts, and any creditor, or wife or husband of any creditor, shall attest the execution of such will, such creditor (*f*), notwithstanding such charge, shall be admitted a witness as to the validity or invalidity of such will.

Sec. 17. No executor is incompetent.

Sec. 18. Every will made by a man or woman shall be revoked by his or her marriage except a will made in exercise of a power of appointment where the estate appointed would not on default of appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the statute of distributions.

Sec. 19. No will is to be revoked by any presumption of intention, on the ground of an alteration in circumstances.

Sec 20. No will shall be revoked otherwise than as aforesaid, or by another will or codicil executed as before required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is before required to be executed, or by the burning, tearing, or otherwise destroying (*g*) the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same (*h*).

Sec. 21. No obliteration, interlineation, or any alteration (*i*) made in any will after the execution thereof shall be valid or have any effect except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as before is required for the execution of the will, but the will with such explanation as part thereof, shall be deemed to be duly executed if the signature of the tes-

(*f*) This clause in terms makes the creditor only competent, but the principle extends to the wife or husband of a creditor.

(*g*) The erasure of the testator's signature, *animo revocandi*, is a revocation of a will, and, as it seems, also a destruction of a will within the statute. *Hobbs* v. *Knight*, 1 Curt. 768. The statute in such case applies to a will made in 1835, the act being done after January 1st, 1838. Ib.

(*h*) The tearing of a will by a testator in a fit of delirium, for which he afterwards expressed his regret, wishing that it should operate, is not a revocation. *Shaw, in the goods of*, 1 Curt. 905.

(*i*) Where the testator executed a will prior to the statute, and after the statute erased the word either *three* or *five*, and inserted the word *one*, without attestation, it was held that probate must be granted in blank as to that word. *Livock, in the goods of*, 1 Curt. 906. A will, therefore, notwithstanding any mere defacing of the writing, would remain in force so far as its contents were discernible, unless the cancellation were attended with the requisites essential to the making of a will.

tator and the subscription of the witnesses be made in the margin or some other part of the will opposite or near to such alteration, or at the foot or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

Sec. 22. No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and shewing an intention to revive the same; and when any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

Sec. 23. No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate, or interest in such real or personal estate, as the testator shall have power to dispose of by will at the time of his death (*k*).

Sec. 24. Every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

Sec. 25. Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will (*l*).

Sec. 26. A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will or otherwise described in a general manner, and any other general devise which would describe a customary copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary copyhold and leasehold estates of the testator, or his customary copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

Sec. 27. A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate or any real estate to which such description

(*k*) The constructive revocation of devises by the execution of conveyances designed only to create a charge on the estate, or to effect some other limited purpose, but stretched by technical reasoning far beyond the intention, often produced injustice. See *Butlin* v. *Fletcher*, 2 Mylne & C. 432. Hayes & Jarman's Practical View, &c. 31.

(*l*) Independently of this clause, if Whiteacre be devised to *A.* in fee and the residue of the real estate to *B.*, and *A.* die before the testator, Whiteacre does not fall into the residue but descends to the heir. And so, generally, the property or interest comprised in every devise expiring or incapable of effect from any cause whatever, falls into the realty. See *Page* v. *Page*, 2 P. Wms. 489. *Williams* v. *Goodtitle*, 10 B. & C. 895. *Jones* v. *Mitchell*, 1 Sim. & Stu. 293. The result of this alteration taken in connexion with the extension of the disposing power to after-acquired lands is that a testator whose will contains a complete and operative general or residuary devise in fee, cannot die intestate in respect of any portion of his real estate. See Practical View, &c. of the New Statute of Wills, by Hayes & Jarman, 35.

shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will, and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention appear by the will.

Sec. 28. Where any real estate shall be devised to any person, without any words of limitation, such devise shall be construed to pas the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

Sec. 29. In any devise or bequest of real or personal estate, the words, "die without issue," or, "die without leaving issue," or, "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by means of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise. Provided, that this Act shall not extend to cases where such words as aforesaid import, if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue (*m*).

Sect. 30. Where any real estate (other than and not being a presentation to a church,) shall be devised to any trustee or executor, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold shall thereby be given to him, expressly or by implication.

Sec. 31. Where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents or profits thereof, shall not be given to any person for life, or such beneficial interest in such real estate, or in the surplus rents or profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such per-

(*m*) Although enactments annexing a rigid technical meaning to any popular form of words are attended with risk of defeating the real intention of the parties using them; yet, on the other hand, such a rigid construction has great advantages over a fluctuating technical construction, which is so frequent a source of fruitless litigation. A rigid legislative construction may defeat the testator's intention, but the less frequently if the legislative sense be that which is the most usually coincident with the popular sense of the words, and at all events doubt is excluded as to the sense in which the words will be construed; but whilst a loose, fluctuating, but technical, construction very often defeats the intention, it is also productive of uncertainty and useless litigation. One of the latest cases on the construction of such words is that of *Doe* v. *Simpson*, 4 Bing. N. C. 333, in which many of the conflicting authorities on the subject are cited. It is remarkable, that there the Court, in a doubtful case, construed the words (applying to a *copyhold* estate) in a sense different from that imposed by the above clause.

son, such devise shall be construed to vest in such trustee the fee-simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

Sec. 32. Where any person to whom any real estate shall be devised for an estate tail, or an estate in *quasi* entail, shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such (*n*) issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention should appear in the will (*o*).

Sec. 33. Where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, for any estate or interest not determinable on or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*p*).

WINDOWS.

Case for obstructing lights.

THE nature of the evidence to support an action for obstructing lights has already been adverted to (*q*). It is unnecessary either to allege or prove the messuage to be ancient (*r*), and twenty years adverse possession affords presumptive evidence of a grant (*s*), but subject to explanation. And now, by the stat. 2 & 3 Will. 4, c. 71, the uninterrupted access and use of lights to and for the use of any dwelling-house, workshop, or other building (*t*), for the period of twenty years, gives an absolute indefeasible right, unless it appear that the enjoyment was by agreement or consent, expressed by deed or in writing (*u*).

If one having land, build on it and sell the remainder, neither he nor one

(*n*) It seems to be clear that the word "such" is not to be construed as meaning the *identical* issue left by the devisee in tail at *his* death, but that the clause was intended to take effect if *any* issue in tail be living at the testator's death. The effect of this and the next following enactment is to place the persons claiming under the intended devisee or legatee in the same situation as if such devisee or legatee, instead of dying *before* had died immediately after the testator.

(*o*) If by a will antecedent to the statute, Blackacre was devised to *A.* (who died before the testator) in tail, and on failure of his issue to *B.*, the devise to *B.* took effect immediately, although *A.* left issue surviving the testator. *Brett* v. *Rigden*, Plowd. 343. *Hodgson* v. *Ambrose*, 1 Doug. 337; 3 Bro. P. C. by Toml. 416. *Doe* v. *Kett*, 4 T. R. 601. Hayes & Jarman's Practical View, &c. 34.

(*p*) See the observations on sec. 32. Neither of these provisions is applicable where the fact of surviving the testator is involved in the very description of the objects, and where nothing can *lapse* by the death of an individual in his lifetime, as in the case of a gift to sons, daughters, children, or grandchildren, as a class; according to the ordinary rules of construction, such as died before the testator would be considered as not originally within the contemplation of the gift. See Hayes & Jarman's Practical View, &c. 1 Jarman on Dev. 307. *Doe* v. *Sheffield*, 13 East, 526. *Barber* v. *Barber*, 3 Mylne & C. 697. *Vince* v. *Francis*, 2 Cox, 190.

(*q*) *Supra*, tit. NUISANCE.

(*r*) *Cox* v. *Matthews*, 1 Vent. 137.

(*s*) *Supra*, 912. The uninterrupted enjoyment of lights for twenty years is not evidence of a grant by a rector; for he had no power to make such a grant. *Barker* v. *Richardson*, 4 B. & A. 579.

(*t*) The enjoyment of a sawpit and timber-yard for twenty years will not prevent a neighbour from interrupting the light and air. *Roberts* v. *Macord*, 1 Mo. & R. 230.

(*u*) *Supra*, tit. PRESCRIPTION, 921.

claiming under him, can obstruct the lights in derogation of his grant (*v*). And upon the same principle, where several adjoining portions of land on which the building of houses had been commenced were sold, and by the conditions of sale the houses were to be finished according to a particular plan within the space of two years, it was held that a purchaser of one of the lots could not, by erecting an additional building at the back of his house, obstruct the light from the windows of another purchaser who had built his house according to the plan (*x*); for the lots were sold under an implied condition that nothing should be done by which the windows for which spaces were then left might be obstructed (*y*), Case of obstructing light.

And where the owner of two adjoining houses occupied one, in which he had lately constructed a window, and let the other without condition, it was held that the tenant could not legally obstruct the owner (*z*).

An action does not lie for opening a window to the disturbance of the plaintiff's privacy; his only remedy is by building up against it (*a*).

It has been seen that in order to rebut the presumption of a grant from twenty years enjoyment, it may be shown that the acquiescence was not by the owner but by a mere tenant (*b*). But where windows had been enjoyed uninterruptedly for the space of thirty-eight years, the defendant, who had purchased the adjoining premises, on which he had built an addition to the house at the distance of four feet from the extremity of his premises, was held to be liable, although the family from whom he purchased lived at a distance, were not proved to have seen them, and they had been occupied by a tenant for twenty years (*c*).

As user affords evidence of right, non-user affords evidence of relinquishment. Where a party had in place of ancient windows erected a blank wall, which remained for seventeen years, and in the meantime the defendant, whose lands were contiguous, had erected a building next to the blank wall, and the plaintiff then opened a window in the place of the ancient window, it was held that he could not maintain an action (*d*). A defendant cannot justify an obstruction of ancient lights under the custom of London, allowing a party to build to any height upon ancient foundations, unless he be

(*v*) *Palmer* v. *Fletcher*, 1 Lev. 122. A party demised one of two adjoining houses for twenty-one years, and afterwards demised the other, at which time there existed certain windows then lately altered; the first lessee afterwards surrendered his former and took a new lease; held, that he could not alter his own premises so as to obstruct the windows existing at the time of the lease to the plaintiff of the other house, although such altered windows were not shown to be of twenty years standing, the new lease to the defendant being derived out of the landlord's reversion, which was subject to the plaintiff's existing rights. *Coutts* v. *Gorham*, 1 M. & M. 396. A party sells a house, and also adjacent lands on which an erection of one story high had formerly stood, the purchaser of the latter cannot build to a greater height, although the house is described in the conveyance as bounded by building-ground belonging to the seller. *Swansborough* v. *Coventry*, 9 Bing. 305. And see *Rosewell* v. *Pryor*, 6 Mod. 116. Where the defendant justified the erection of a skylight, whereby the plaintiff's ancient window was darkened, under the custom of London allowing a party to build to any height upon ancient foundations, held that the custom must be confined to building on ancient foundations where all the four walls belong to the party; and *semble*, in order to support the custom, the walls which are raised must be as ancient at least as the lights they obstruct. *Shadwell* v. *Hutchinson*, 3 C. & P. 617. See as to the time of prescription, 2 & 3 Will. 4, c. 71. *Supra*, tit. PRESCRIPTION.

(*x*) *Compton* v. *Richards*, 1 Price, 27.

(*y*) Ibid.

(*z*) *Riviere* v. *Brown*, 1 Ry. & M. C. 24.

(*a*) *Chandler* v. *Thompson*, 3 Camp 80. And it has been held that the mere diminution of light, not so great as to render the house uncomfortable, or prevent a business from being carried on there as conveniently as before, will not support an action. *Burke* v. *Stacey*, 2 C. & P. 465.

(*b*) *Supra*, 670. 912.

(*c*) *Cross* v. *Lewis*, 2 B. & C. 686.

(*d*) *Moore* v. *Rawson*, 3 B. & C. 332.

Case for obstructing lights.

the owner of all the four walls (*e*). Evidence is admissible in defence, showing that the enjoyment of the lights has been essentially altered by the plaintiff himself, in a manner prejudicial to the defendant; he may have so altered the mode of enjoyment as to have lost the right altogether (*f*).

WORK AND LABOUR (*g*).

Special contract.

In an action to recover for work and labour done under a special contract, the proofs are,

1st. *Of the Contract* (*h*);
2dly. *The performance of the work*;
3dly. *Where the plaintiff proceeds on a* quantum meruit, *the value.*
4thly. *Proofs in defence.*

Contract.

1st. *The Contract.*—The rule, that where the parties have made an express contract, none can be implied, has prevailed so long that it has become a legal axiom (*i*). The rule applies, although the plaintiff seeks to recover for extras, and the defendant has admitted one item to be an extra (*k*). Where partial deviations have been made by consent (*l*), after part execution, the contract is binding as far as it can be traced, and the plaintiff is to recover on a *quantum meruit* as to the additional work (*m*).

A lessor contracted to pay his tenant at a valuation for certain erections, pursuant to a plan to be agreed upon, provided they were completed in two months, no plan was agreed upon, and after the condition had been broken the lessor encouraged the lessee to proceed with the work, and it was held that the lessee might recover for work and labour, on an implied promise arising out of such part of the former agreement as was applicable to the work (*n*).

Indebitatus assumpsit.

Where a specific contract is entered into as to the nature of the service and the terms of payment, and the work has been executed, the plaintiff may

(*e*) *Shadwell* v. *Hutchinson*, 3 C. & P. 317. And *semble*, not unless the building the walls of which are raised, be as ancient as the window obstructed. Ib.

(*f*) *Garritt* v. *Sharp*, 3 Ad. & Ell. 325.

(*g*) See as to disputes between masters and workmen, the stat. 5 G. 4, c. 96. In the case of *Lancaster* v. *Greaves*, April 24, 1828, the Court of K. B. held that the 4 G. 4, c. 34, as to labourers and servants, did not apply to a person who had entered into a contract to do certain work on a road within a certain time, for a certain sum, he not being a servant working for *wage*. See Burn's J., tit. *Servant*.

(*h*) *Supra*, 55. As to the stamp, *supra*, 78, 1362. As to the necessity of a contract in writing, see the Stat. of Frauds, sec. 4; *supra*, 476. 486.

(*i*) Per Ld. Kenyon, in *Cutter* v. *Powell*, 6 T. R. 324. Where the defendant had made former payments for his child's schooling from quarter to quarter, and in a new quarter begun, the child falling ill, had been sent home by the plaintiff, without either party signifying an intention to put an end to the contract, or fault attributable to the plaintiff, it was held that the jury might imply a quarterly contract, and give the whole amount. *Collins* v. *Price*, 5 Bing. 132; and 2 M. & P. 243. Where a party originally entered as second mate, but during the voyage, and on the desertion of the first mate, performed his duties, it was held, that he was entitled, *pro ratâ*, to the same wages as his predecessor, although no new agreement had been entered into. *Gondolier*, 3 Hagg. 190.

(*k*) *Vincent* v. *Cole*, M. & M. 257. *Secus*, where an *oral* order is given for *other* work during the continuance of the first employment. *Reid* v. *Bates*, M. & M. 413.

(*l*) A workman is not entitled to recover in respect of alterations, unless the employer is expressly informed, or must necessarily be aware, from the nature of the work, that the expense will be decreased by such alterations. *Lovelock* v. *King*, 1 Mo. & R. 60.

(*m*) *Robson* v. *Godfrey*, 1 Starkie's C. 275. *Pepper* v. *Burland*, Peake's C. 103. *Burn* v. *Miller*, 4 Taunt. 745.

(*n*) *Burn* v. *Miller*, 4 Taunt. 745. So where the plaintiff, having engaged to complete cottages on the 14th of October, they were not completed, but the defendant had accepted them. *Queen* v. *Goodwin*, 3 Bing. N. C. 737. *Secus*, where a condition precedent is not waived, see below.

recover for work and labour generally (*o*), unless the terms of the agreement be of such a nature as to preclude a recovery except upon the contract itself; as where there are particular stipulations as to the times and mode of payment, and the whole time has not elapsed. But where the work has been executed, the plaintiff may recover on the general *indebitatus* count; for where the terms of an agreement have been performed, a duty is raised for which a general *indebitatus assumpsit* will lie (*p*). And it is settled that the plaintiff is entitled to recover on the general count, where the work has been performed, although he has also declared on a special agreement, and failed in the proof (*q*). Indebitatus assumpsit.

Where an entire contract has been entered into for work and labour, and for materials to be supplied, the plaintiff may recover the whole on the several general counts, for work and labour and materials found (*r*), which are applicable to the several parts of the contract: but where the contract is to build a house, he cannot recover for materials supplied, on a count for goods sold and delivered (*s*).

Under the *indebitatus* count, in the absence of a special contract, the plaintiff must prove, as alleged, that he performed the work upon the defendant's *request*, either by proof of a contract, or by direct (*t*) or presumptive evidence of a request.

It is expressly enacted that no seaman shall fail in any suit or process for the recovery of wages, for want of the production of the written contract (*u*).

(*o*) *Leeds* v. *Burrows*, 12 East, 1. *Poulter* v. *Killingbecke*, 3 B. & P. 197. Where the contract appeared, from what passed at the time of hiring, to be a contract for a year, determinable at a month's notice, it was held that the plaintiff could not recover on a count as on a contract for a year absolute; and that on the count for wages he could only recover for the actual time of service, and not for a month's wages extra. *Archard* v. *Horner*, 3 C. & P. 349.

(*p*) *Gordon* v. *Martin*, Fitzg. 302; B. N. P. 139. It seems that generally, where the payment of money is a duty on a consideration executed, the proper mode of declaring is in *indebitatus assumpsit*. See the observations of Parke, B. *Streeter* v. *Horlock*, 1 Bing. 37. And see *Robson* v. *Godfrey*, 1 Starkie's C. 275; *Studdy* v. *Saunders*, 5 B. & C. 638.

(*q*) *Harris* v. *Oke*, Winch. Summ. Ass. 1750, cor. Lord Mansfield, B. N. P. 139. *Weaver* v. *Burrows*, Str. 648; B. N. P. 139, *contra*. It has been said, that if the plaintiff prove a special agreement and the work done, but not pursuant to such agreement, he shall recover on the *quantum meruit*, for otherwise he would not be able to recover at all. B. N. P. 139. *Mr. Keck's Case*, Oxon. 1744. Ibid. But this, it seems, must be understood of cases where the defendant, notwithstanding the defect of performance, has not rescinded the contract in toto; for performance is a condition precedent to the claim for payment. Vide *infra*, 1298; and see *Ellis* v. *Hamlin*, 3 Taunt. 52.

(*r*) *Cottrell* v. *Apsey*, 6 Taunt. 322.

(*s*) Ibid. Gibbs, C. J. observed that the objection was a captious one.

(*t*) *A.* contracted with *B.* for a machine to be made by *B.*; *B.* after part performance of the work assigned it to *C.*, and *A.* on being informed of the fact by *C.*, directed him to complete it: *A.* is liable, on such request to *C.* for completing the machine. *Oldfield* v. *Lowe*, 9 B. & C. 73. But where *A.* (a patentee) received an order from *B.* to make a machine, and employed *C.* to make it, and informed *B.* that he had done so, and after the machine was complete *A.* ordered an alteration, which *B.* made accordingly, but *A.* refused to accept it; it was held that *C.* could not recover from *B.* either for goods bargained and sold, or for work, labour, and materials. For the property in the machine did not pass to the defendant, and the work and labour were bestowed and materials found for the purpose of ultimately effecting a sale; and that purpose not having been completed the contract was not executed, and an action for work and labour will not lie; but the Court held that an action for not accepting the machine might have been supported. *Atkinson* v. *Bell*, 8 B. & C. 277.

(*u*) 2 G. 2; 31 G. 3. And the plaintiff need not give notice to the defendant to produce the articles at the trial. The defendant, to take advantage of them, must produce them. *Bowman* v. *Manzelman*, 2 Camp. 315. The st. 2 G. 2, c. 36, does not apply to a British seaman who enters

Indebitatus assumpsit.

In general, the *request* may be inferred from the defendant's acquiescence in the work which is carrying on upon his own premises, or from his voluntarily availing himself of the benefit of the plaintiff's services (*x*).

Request.

A request to a tradesman to show the house of the defendant, who intimated that he would make him a handsome present, is evidence of a contract to pay a reasonable compensation for the services of the plaintiff (*y*).

An action is not maintainable where the business is no more than the performance of the plaintiff's duty as a public officer (*z*).

A foreign consul resident in England, who receives a salary from his own government, cannot maintain an action for transacting business between merchants here, in which he acted as the officer of his own government, and under their express instructions (*a*).

But trustees and commissioners for executing public works, are liable to those whom they employ (*b*); and one who joins with others in directing work to be done, is jointly liable, although he may have no interest in the executed work (*c*).

A bailiff selected by an attorney to execute writs, may maintain an action against him for the fees usually paid on such occasions, and such as the Court is in the habit of allowing; and although the plaintiff would not, under the statute, have been able to recover such fees; for the attorney, by employing a particular bailiff, makes him in effect his servant, and gives him to understand that he will pay him so much as the Court is in the habit of allowing (*d*).

Where services are rendered upon an understanding that the remuneration is to be at the entire discretion of the employer, no action is maintainable. Thus, where a committee of persons resolved "that the services to be rendered by *W.* should be taken into consideration, and such remuneration made as should be deemed right," it was held that *W.* could not recover (*e*).

But it seems that one who fraudulently procures services to be rendered,

on board a foreign ship in a British port. *Dickman* v. *Benson*, 3 Camp. 290.

(*x*) *A.* and *B.* entered into an agreement with the defendant to make certain machinery for him; part of the work was performed, and part of the money paid; *A.* and *B.*, being unable to complete the work, assigned the work and machinery to the plaintiff, and the defendant being acquainted with the assignment, directed the plaintiff to go on with the work and he would see him paid; held, that the legal effect was to make a contract with the plaintiff for all the work that remained to be done, and that the plaintiff was entitled to recover for the work, labour and materials. *Oldfield* v. *Lowe*, 9 B. & C. 73.

(*y*) *Jewry* v. *Busk*, 5 Taunt. 302. And see *Lamb* v. *Bunce*, 4 M. & S. 275.

(*z*) *Roberts* v. *Havelock*; see above, tit. TRUSTEE.—AGENT.

(*a*) *De Lema* v. *Haldimand*, 1 Ry. & M. 45.

(*b*) *Supra.* Tit. TRUSTEE.—AGENT.

(*c*) As where one contributes to the funds of a building society, and is party to a resolution that particular houses shall be built. *Braithwaite* v. *Schofield*, 9 B. & C. 401. And see *Burls* v. *Smith*, 7 Bing. 705; *supra*.

(*d*) *Foster* v. *Blakelock*, 5 B. & C. 328.

(*e*) *Taylor* v. *Brewer*, 1 M. & S. 290. So if a man do work in expectation of a legacy. *Osborne* v. *Governors of Guy's Hospital*, 2 Str. 728. See *Jewry* v. *Busk*, 5 Taunt. 302. It has been said that there is no implied *assumpsit* to pay an arbitrator for his trouble. *Verany* v. *Warne*, 4 Esp. C. 47. But see 1 Gow, 8. This, as it seems, is a question of fact depending on the circumstances of the particular case. Where a party was received on board a ship by the captain (a friend of the father's), on a trial voyage, and enjoyed certain indulgences amounting to a valuable consideration for the services performed, and was entered in the articles as second mate, but no rate of wages was affixed to his name, it was held that parol evidence of an agreement that he was not to have wages was admissible; and there having always been a denial of obligation of payment, the Court dismissed the suit for wages. *Harvey*, 2 Hagg. 70.

under the delusive expectation of a beneficial contract, is liable to the party who renders them (*f*). Indebitatus assumpsit. Request.

It has been seen that the plaintiff may recover on an express promise founded on a legal and moral obligation (*g*).

Where a pauper during his confinement in another parish, suffering under a fracture of his leg, was attended by the parish surgeon of that parish, with the knowledge of the overseer of his own parish, who attended him during his confinement, it was held that the overseer's not repudiating the services of the surgeon was equivalent to a request (*h*).

An action for salvage lies at common law, on a legal obligation by the owner of goods which he has abandoned in distress at sea, or is unable to protect and secure (*i*), to make a reasonable compensation to a party who has saved them, for his trouble (*j*).

(*f*) *Infra*, 1301.

(*g*) *Supra*, 70; and *Wing* v. *Mill*, 1 B. & A. 104. Although a master is not bound to call in medical assistance for a menial servant, yet, if he does so, he cannot retain the charge out of the wages, unless there be a special contract that he shall do so. *Sellen* v. *Norman*, 4 C. & P. 87.

(*h*) *Lamb* v. *Bunce*, 4 M. & S. 275; *supra*, 69, 70. See 5 & 6 W. 4, c. 19, as to hurt sailors.

(*i*) Where vessels sail in consort and under a special agreement to give mutual protection, no claim can be supported for salvage for services rendered by the one to the other. *Zephyr*, 2 Hagg. 43.

But the Court will be cautious in encouraging vague pretensions of a custom of such a nature in a trade. *Margaret*, 2 Hagg. 48, n.

A revenue officer permitting his boats to assist in salvage service, but not himself actually engaged in effecting it, is not entitled to salvage remuneration. *Vine*, 2 Hagg. 1.

So of a mere passenger on board contributing his assistance. *Branston*, Ib. 3.

Where it appeared to be a common practice to leave barges exposed on a sandbank, it was held that no claim of salvage could be supported. *Upnor*, 2 Hagg. 3.

A vessel being in danger, the master and mariners agreed for a certain sum to render assistance; held, that being a case of *mere contract*, the Court could not entertain it as a question of salvage. *Mulgrave*, 2 Hagg. 77.

Where it appeared to have been clearly intended and understood that the service should be entrusted to a party, in the character of an agent, and the claim for salvage in some degree limited thereby, it was held that the character of agent did not necessarily supersede that of salvor, so as to exclude the jurisdiction of the Court of Admiralty, and salvage was accordingly decreed with costs. *Happy Return*, 1 Hagg. 198.

Where in the first instance the ship, a derelict, was taken possession of and worked by eight smacks, but others in the course of the day came and co-operated, it was held that the eight had a primary interest, and had a right to choose their own jurisdiction and proceed before the magistrates, before whom the others ought to have made their claim. The Court dismissed the appeal against the award by the owners, and the action by the other salvors, no case being made by them of necessity for their interference, or consent by the first set to accept their services. *Eugene*, 3 Hagg. 157.

So, unless a case of necessity is made out, no other than the first in possession has a right to interfere. *Queen Mab*, Ib. 242.

Where the crew of one ship were in possession of a derelict, it was held that they had a right to refuse assistance if they themselves were competent to effect the service. *Effort*, 3 Hagg. 135.

Where the amount of salvage was, by a bond of reference between the master of a ship and a pilot and crew, submitted to the sub-commissioners of pilots, who, on a value of 2,000*l.*, and in a case of special risk, awarded 120 guineas, which the owner refused to pay, the amount was decreed in an action with costs. *Industry*, 3 Hagg. 203.

(*j*) For an interesting statement of the principles of the law on this subject, and the provisions made by the legislators of different countries in relation to it, see Abbott's Law of Shipping, 397. If the salvaage has been performed at sea or between high and low water-mark, the Court of Admiralty has jurisdiction. 1 & 2 G. 4, c. 75, s. 51. The ingredients of salvage service are, enterprise in the salvors, the degree of danger from which the ship is rescued, and the value; where each of these was trivial, and a tender of 50*l.* confirmed and refused, it was held that the subsequent costs ought to be paid by the party improperly refusing it; and the Court having condemned them in the amount paid in, directed it to be paid out in part discharge of the costs. 3 Hagg. 117. The pilot having informed the captain that a second anchor was necessary, a lugger with five sailors put off with one at eleven at night,

Indebitatus assumpsit. Request.

In other cases there must be some privity between the plaintiff and defendant, to enable the former to maintain the action. If *A.* employ *B.* to perform certain services, and *B.* without the privacy of *A.* employs *C.* to perform them, *C.* cannot recover from *A.* (*k*). So one who is nominated and elected to serve in Parliament, but who neither proposes himself as a candidate, nor in any way interferes in the election, is not liable for the expenses of the hustings, although he afterwards takes his seat in Parliament (*l*).

But notwithstanding an agreement between *A.* and *B.* that *B.* shall remunerate *A.*, an agreement by *C.*, a third person, to pay him, may be implied from the circumstances.

A master of a ship contracts by the bill of lading with the shippers to deliver goods to their assigns, he or they paying freight for the same; if the purchaser of the goods take them, this is evidence of a new agreement by him, as the ultimate appointee of the shippers, for the purpose of delivery, to pay the freight due for the carriage (*m*).

The shipowner may maintain *indebitatus assumpsit* against the consignee, although by the bill of lading the goods are to be delivered to the consignees paying freight, and goods are delivered without payment (*n*).

and during a heavy sea, but from the darkness of the night, and the ship having changed her anchorage, the anchor was not put on board until the following day. The Commissioners of the Cinque Ports had awarded 60 *l.* by way of salvage, the ship and freight being of the value of 16,000 *l.* The Court confirmed the award with costs. In cases of salvage the value is always an ingredient in awarding the remuneration, *Hector*, 3 Hagg. 90. In case of assistance given to steamboats, with passengers, the ship and cargo of no great value, held that the reward must be beyond a mere proportion of value in ordinary cases, and 350 *l.* awarded out of 1,265 *l.*, where the assistance was with great enterprise and alacrity. *Ardincaple*, 3 Hagg. 151. Where on application by a merchantman for the assistance of a Government steamer, it was expressly stipulated by the Admiral that the owners should be answerable for the stores of the steamer damaged, or expenses, it was held that the claim for salvage by the officers and men engaged was not barred. *Lustre*, 3 Hagg. 554. *Ewell Grove*, Ib. 225.

(*k*) *Schmaling* v. *Tomlinson*, 6 Taunt. 147, 148, n.

(*l*) *Morris* v. *Burdett*, 2 M. & S. 212.

(*m*) *Cock* v. *Taylor*, 13 East, 399, overruling the case of *Artaza* v. *Smallpiece*, 1 Esp. C. 23; and that of the *Theresa Bonita*, 4 Rob. Ad. R. 236.

(*n*) *Dommett* v. *Beckford*, 5 B. & Ad. 521. Although in the absence of a bill of lading, the consignee may not be liable for freight, yet where goods had always been delivered to the defendant on payment of the freight, it was held to be reasonable evidence of an agreement to pay it. *Coleman* v. *Lambert*, 5 M. & W. 502. Where it was proved that Spanish bills of lading to consignees were often without the words "or their assigns," but were nevertheless treated as assignable by indorsement, it was held that the indorsee was liable for the freight. *Renteria* v. *Ruding*, 1 M. & M. 511. And see Abbott on Shipping, 286, 5th ed. Where the bill of lading directed the goods to be delivered to *E. G.* "he paying freight," and they were delivered without receiving it, held that the shipper, there being no charter-party, was not liable for the freight; and that having in answer to an application for the freight replied, that "if *E. G.* did not pay, he would," it was for the jury to consider, whether they could infer from the state of the account between the defendant and *E. G.*, that as between them it was the defendant's duty to take the payment of the freight upon himself, which would furnish a good consideration for his undertaking to pay it, otherwise the promise would not be binding. *Drew* v. *Bird*, 1 Mo. & M. 156. The captain, if entitled to *primage*, may maintain *assumpsit* for it, although the freight may have been separately adjusted; where the consignee indorsed the bill of lading, containing the terms "paying freight with primage and average accustomed," it was held, that he must be taken to have received the goods on the terms of that bill, and was liable for primage, although the agreement between the owner and the shipper was at so much per ton freight, and was silent as to primage; and the agreement between the owner and the captain was for a fixed sum, "in lieu of cabin, and all other allowances, to commence from the day of victualling the ship, and for which he was to mess the officers," the former agreement not excluding primage, and the latter referring to allowances of a different kind. *Best* v. *Saunders*, 1 Mo. & M. 208. *Semble*, the usage

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The assignee of a ship is entitled to freight, although he must sue in name of the assignor (*o*).

Where one illegally avails himself of the labour of another's servant, the latter may waive the tort, and maintain an *assumpsit* for the services; as where a man harbours and employs the apprentice of another, after his desertion (*p*).

And where a father sent his son to the defendant, who promised after a certain time to take him as an apprentice, but before the expiration of that time dismissed him without sufficient cause, it was held that his conduct being evasive, the son was entitled to recover for services (*q*).

It is usually a question of fact for the jury to decide, in a doubtful case, on whose credit the work was done (*r*).

The master is always liable on a contract for repairs, made by himself, unless in express terms the credit is confined to the shipowners (*s*); but where the contract is made by the owners themselves (*t*), or under circumstances which show that credit was given to them alone (*u*), the master is not liable.

In general, the character and situation of the master furnish presumptive evidence of his authority to act for them in all matters relating to the usual management of the ship; a presumption liable to be rebutted by circumstances, as by proof that the creditor knew or ought to have known that the master was not the agent of the owners in the particular instance (*x*).

is where primage is not to be paid, to strike out those words in the bill of lading. Where the plaintiff had contracted with *G.* by charter-party, to convey corn at so much per quarter, and the latter had by a subcontract agreed to convey at an advanced rate, held that the bill of lading to the defendants at such rate, without reference to the charter-party, did not entitle the plaintiff to sue for the freight at that increased rate, but only for such as had been stipulated for in the charter-party. *Michenson* v. *Begbie*, 6 Bing. 190, and 3 M. & P. 442. Where the plaintiff, a ship-broker, acted in endeavouring to procure a charter-party for the defendant's vessel, held that as in ordinary cases he would not be entitled even to recover incidental expenses, unless the charter-party were actually signed, he could only recover a compensation under a special agreement, or in case unusual expense had been occasioned by the owners. *Dalton* v. *Irvin*, 4 C. & P. 289.

(*o*) *Morrison* v. *Parsons*, 2 Taunt. 407; *Case* v. *Davidson*, 5 M. & S. 79; 2 B. & B. 379.

(*p*) *Foster* v. *Stewart*, 3 M. & S. 191; *Lightly* v. *Claustan*, 1 Taunt. 112.

(*q*) *Phillips* v. *Jones*, 1 A. & E. 333.

(*r*) As whether business done by an attorney was done on the credit of another attorney, or on the credit of his principal. *Scrace* v. *Whittington*, 2 B. & C. 11. See *Burrell* v. *Jones*, 3 B. & A. 47; *Ireson* v. *Connington*, 1 B. & C. 160; *Hartop* v. *Juckes*, 2 M. & S. 438; *Hart* v. *White*, Holt's C. 376. As to the liability of one who sits in a public capacity, vide *supra*, 849. Where an Act of Parliament for rebuilding a bridge empowered justices of the peace to contract for its erection, and also directed that all actions, &c. to be prosecuted or defended in pursuance of the Act should be brought by and against the clerk of the peace, and the justices at sessions covenanted with the builder that the justices or treasurer of the county would pay him specified sums by instalments, it was held the justices were not individually liable, and that the remedy was by action against the clerk of the peace. *Allen* v. *Waldegrave*, 2 Moore, 621; and see *Mackbeath* v. *Haldimand*, 1 T. R. 172. *Unwin* v. *Wolseley*, Ibid. 674.

(*s*) *Rich* v. *Coe*, Cowp. 636. Abbott on S. 100.

(*t*) *Farmer* v. *Davis*, 1 T. R. 108.

(*u*) *Hoskins* v. *Slayton*, Cas. T. Hardwicke, 376. Note, that by owners are meant those whose agent the master is. Abbott on S. 100. The owners of a packet employed by the Government to carry the mail, are answerable for stores ordered by the captain, although he is nominated by the Postmaster-general. *Stokes* v. *Carne*, 2 Camp. C. 339.

(*x*) Abbott on S. 101. *Bland ex parte*, 2 Rose, 91. A mere mortgagee of the acting owner of a share, who neither takes possession nor interferes at all in the management, is not liable. *Briggs* v. *Wilkinson*, 7 B. & C. 30. For he would not be liable at common law, and the Register Acts make no difference. And see *Dawson* v. *Leake*, Dow. & Ry. C. 52. *Frazer* v. *Marsh*, 13 East, 238. *Cox* v. *Reid*, 1 Ry. & M. 199. *Jennings* v. *Griffith*, 1 Ry. & M. 42. *Young* v. *Brander*, 8 East,

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And therefore the owners are liable for mariners' wages (*y*), and for all necessary repairs (*z*) done to the ship; and even although they have paid the amount to their agent (*a*).

Under the general count for work and labour (and materials found, if requisite), the plaintiff may give in evidence any particular species of work and labour; as of attendance as a farrier, and for medicines administered (*b*), or as an attorney (*c*).

But a plaintiff seeking to recover for building a house, and furnishing the timber, cannot recover as to the latter under a count for work and labour, and for goods sold and delivered, without one for materials found (*d*). Nor can one who manufactures a chattel for another out of his own materials recover on the count for work and labour (*e*).

10. And see the provisions of the Registry Acts, 4 G. 4, c. 41, s. 43; 6 G. 4, c. 110, s. 45; *supra*, tit. POLICY OF INSURANCE. So, on the other hand, one who is not duly registered as owner, may be liable, if he has held himself out as owner, and thus obtained credit. *Haugton* v. *Fry*, 2 Bing. 179. But the registered owner is not liable, but the charterer; where the work is done for his benefit, he is the owner so far as liability goes. *Reeve* v. *Davis*, 1 Ad. & Ell. 312. The true question in such cases is on whose credit the work was done. Per Abbott, C. J., *Jennings* v. *Griffiths*, Ry. & M. 43. A *part-owner* not being a *partner*, may sue the others separately for fittings out by him as ship's husband. *Helme* v. *Smith*, 7 Bing. 709.

(*y*) *The Nelson*, 6 Rob. A. R. 227. Foreigners were hired at a foreign port under a stipulation by the master that they should continue on board, or that he would procure them a passage back with wages; held that the ship was liable for wages and costs, and that the circumstance of her having changed owners did not vary the liability. *Margaret*, 3 Hagg. 238. And, in the absence of the ship, and claims admitted, a warrant of arrest was decreed against the freight and master. Where by the terms of the charter-party the charterer was to pay disbursements and seamen's wages, but the owners were to appoint the crew, held that they must *be considered as their servants*. *Fenton* v. *Dublin Steam Packet Company*, 1 P. & D. 103. And the owners are liable for an injury occasioned by the unskilful navigation of the vessel whilst so under the control of their servants. Ibid.

(*z*) So in general for all necessary supplies, if fit and proper, and such as a prudent owner would himself have ordered; and even for money advanced for such necessary purposes. *Webster* v. *Seekamp*, 4 B. & A. 352. Where the defendant was sued as a joint-owner for repairs to the vessel ordered by the ship's husband, held that he was liable, unless he could show that the dealing was that the party ordering the repairs was to be looked to exclusively. *Thompson* v. *Finden*, 4 C. & P. 159. And a judgment recovered for the same demand against another owner, held inoperative, unless satisfaction also shown. *Thompson* v. *Finden*, 4 C. & P. 159. The master is at liberty to procure another ship to transport the goods to their destination, and will be entitled to the full consideration for which the original contract was entered into; and *semble*, if circumstances render it necessary that another ship be procured, and it can only be obtained at a higher rate of freight, the owner would be bound by the act of his agent, and liable for the increased freight; the jury being the proper tribunal to decide as to the propriety of the measure, the Court would not disturb their finding. *Shepton* v. *Thornton*, 1 P. & D. 216.

(*a*) *Speering* v. *Degrave*, 2 Vern. 643. But the repairers, at their election, may sue the master. *Gounam* v. *Bennett*, 2 Str. 816. Where the party took a bill of exchange from the ship's agent at Calcutta, instead of cash tendered, held that he could not afterwards sue the ship upon the bankruptcy of the owners. *W. Money*, 2 Hagg. 136.

(*b*) *Clarke* v. *Mumford*, 3 Camp. 57.

(*c*) *Meek* v. *Oxlade and others*, 1 N. R. 289.

(*d*) *Cotterill* v. *Apsey*, 6 Taunt. 322. *Heath* v. *Freeland*, 1 M. & W. 543.

(*e*) *Athinson* v. *Bell*, 8 B. & C. 283. *Secus*, where the plaintiff works up the materials of the employer; for then the claim is simply for work and labour on materials which could not be otherwise appropriated; in the former case the party applies his labour to his own materials, which he is not bound to appropriate to the employer; the labour is for himself, and not for his employer; he has no right of action till the chattel is complete, and has been accepted by the employer, and he may then sue either for goods sold and delivered or on the special contract. See the observations of Bayley, J., 8 B. & C. 283.

A broker had by deed effected insurances with a company of which he was a member, for the defendants, and covenanted to pay

Performance.

2dly. Unless there be some express stipulation to the contrary, whenever a specific sum is to be paid for specific work (*f*), the performance or service is a condition precedent; there being one consideration, and one debt, they cannot be divided (*g*).

the premiums, but this he had not in fact done; in an action brought by his assignees for premiums and for brokerage, held, that although the count for money paid could not be supported, yet that they were entitled to recover for the latter, under the count for work, &c. as a broker, although the claim was stated in the particulars as for "insurance claim," which might include every possible claim a broker might have in respect of effecting policies; that they were also entitled to recover the premiums on the count for premiums, in respect of the bankrupts "having before then underwritten and subscribed, and *caused* and *procured* to be underwritten and subscribed," upon the latter part of the count, not being bound to prove the entire count. *Power* v. *Butcher*, 10 B. & C. 329.

(*f*) Where a shipwright had undertaken to repair a ship which had put into port in a damaged state, and during the progress of the work required payment in respect of the work already done, and without payment refused to proceed, and the ship lost her voyage; it was held that the plaintiff was entitled to recover for the work done, there being no contract to do specific work for a specific sum. *Roberts* v. *Havelocke*, 3 B. & Ad. 304.

(*g*) Per Lawrence, J. in *Cutter* v. *Powell*, 6 T. R. 326. And see the observations of Lawrence and Le Blanc, Js., in *Basten* v. *Butter*, 7 East, 484; *supra*, 1207.

Where *A.* undertook for 10*l.* to repair and render perfect a chandelier in a damaged state, and repaired it in part, but did not make it perfect, it was held that he could not recover for work done and materials found, although the defendant had been benefited to the amount of 5*l.*, and had not returned the icicles added by the plaintiff. *Sinclair* v. *Bowles*, 9 B. & C. 92. Note, that there had been no demand of the icicles.

In *Ellis* v. *Hamlin*, 3 Taunt. 52, it was held that a builder who undertook a work of specified dimensions and materials, and deviated from the specification, could not recover on a *quantum calebant* for the work, labour and materials.

So in *Rees* v. *Lines*, 8 C. & P. 126, it was held that where the plaintiff cannot recover on a special contract to build a house at a specific price, he cannot (having failed to prove, as alleged in a special count, that the defendant prevented him from completing the work, or abandoned the contract), under the general counts, for anything except extras not in the contract; the contract being to perform a specific work for a specific sum. Note, that in that case there was, in addition to the special count, a general count for goods sold and delivered, and the particulars were for work and labour.

The defendant empowered the plaintiff, a surveyor, to negociate with commissioners for the *sale* of her reversionary interest in freehold premises, and undertook to pay him two per cent. on the sum *obtained*, either by private treaty, arbitration, or verdict of a jury, for his trouble and exertions; the plaintiff not agreeing with the commissioners, a sum was afterwards awarded by a jury, and upon the plaintiff being called on to execute the conveyance, the execution by an incumbrancer was also required, which the defendant declining to obtain, the money was paid into the Bank, and remained there at the time of the action being brought: held, that the receipt of the money not being delayed by any wilful act of the defendant, the action was commenced too soon; until the incumbrancer had been paid, the sum to be received by the defendant could not be ascertained. *Bull* v. *Price*, 7 Bing. 237; and 5 M. & P. 2.

In the case of *Cutter* v. *Powell*, 6 T. R., 326, where the employer engaged in writing to pay a sailor the sum of thirty guineas, provided he proceeded and continued and did his duty on board for the voyage, and before the end of the voyage the sailor died, it was held that the contract was entire, and that as the service, which was a condition precedent, had not been performed, nothing could be recovered.

In the *Countess of Plymouth* v. *Throgmorton*, in error, 1 Salk. 65, (which was cited by Lawrence, J. in the preceding case), the defendant's testator had appointed the plaintiff to receive his rents, and promised to pay 100*l.* a year for the service, and the testator died after the plaintiff had served him for three quarters of a year, and the Court held that the contract being entire, could not be divided.

The Court, in the case of *Cutter* v. *Powell*, seem to have been of opinion, that if a mercantile custom to that effect could have been shown, the contract might have been treated as divisible. In that case also, Lawrence, J. said that a common servant, although hired in a general way, was to be considered as hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he served, though he do not continue in the service for a year.

In *R.* v. *Whittlebury*, 6 T. R. 467, Lawrence, J. observed that nothing could be due to the servant (who was, it seems, a servant in husbandry) till the completion of the year, or the end of the service.

Performance.

In an action for making a coat, which has been returned, the plaintiff must show that it was made according to the order given (*h*).

A herald, in an action for making out the defendant's pedigree, must adduce general evidence to show that it was made out according to the laws of heraldry (*i*).

In an action by one who has contracted to serve for a stipulated time as a clerk, or servant, it is sufficient to show that he was ready to render his services, if called upon, although during part of the time he was not actually employed (*k*).

Where a clerk (*l*), employed at a certain salary, payable quarterly, was discharged in the middle of a quarter, but was ready and tendered himself to serve for the remainder of the quarter, it was held that he was entitled to recover for the whole quarter (*m*).

Upon an *indebitatus assumpsit* to recover for the board and schooling of the defendant's son, at his request, the plaintiff is entitled to recover in

In Dalton, c. 58, Com. Dig. *Justices of the Peace*, B. 63, it is laid down, that if a servant shall of his own accord depart from his master before his time expire, he shall not have his wages; but if he depart with the consent of his master, he shall have wages for the time he served. Com. Dig. *Justices of the Peace*, B. 63; 5 Burn's J. 183.

In *Spain* v. *Arnott*, 2 Starkie's C. 256, where a servant in husbandry refused to obey his master's reasonable orders, and the master told him to go about his business, and the servant left the service without offering submission, or to obey the orders, Lord Ellenborough held that the servant was not entitled to recover, and said that the year must be completed before the servant was entitled to be paid.

According to the usual practice and understanding as to the hiring of domestic servants, it seems that either master or servant may put an end to the contract by a month's notice; and therefore if the servant give such notice, and serve for the subsequent month, he would probably be considered as entitled to wages up to that time. But it seems to be clear, that if a servant were to depart the service without notice he would not be entitled to any wages, for he would not have performed the contract, either by actual service, or by giving the usual notice for dissolving the contract; and the same principle applies where the master dismisses the servant immediately for refusing to obey his reasonable orders, or for conduct so immoral as to warrant the discharge.

A servant leaving without notice in the middle of year for indecent conduct, cannot recover for any part of the year. Per Lord Tenterden, 4 C. & P. 203. *Turner* v. *Robinson*, 5 B. & Ad. 789.

Where articles had been signed as required by the 5 & 6 Will. 4, c. 19, and a seaman had quitted the vessel after the voyage and return into port, but before the cargo had been discharged, it was held that he did not thereby forfeit his whole wages within sec. 9, but a month only within sec. 7. *M'Donald* v. *Topling*, 4 M. & W. 285.

A master can only dismiss a servant hired by the year at any intermediate period, for moral misconduct, wilful disobedience, or habitual neglect of duty. *Cailo* v. *Brouncker*, 4 C. & P. 518.

Where the plaintiff was a traveller hired by the year, and he had been guilty of assaulting with intent, &c. the defendant's maid servant; held that it was a good ground of dismissal, and that the defendant was not compellable to pay wages even for the time he had served, at all events not beyond. *Atkin* v. *Acton*, 4 C. & P. 208.

Where the clothes furnished by the master were to become the servant's at the end of the year, it was held, that having been dismissed before the end of the year, he could not maintain trover for them; in case of his being prevented from becoming entitled to them by a wrongful dismissal, his action should be framed accordingly. *Crocker* v. *Molyneux*, 3 C. & P. 472.

(*h*) *Hayden* v. *Hayward*, 1 Camp. 180.

(*i*) *Townsend and another* v. *Neale*, 2 Camp. 191.

(*k*) 2 Starkie's C. 198.

(*l*) A general hiring of a clerk is a hiring for a year. *Beeston* v. *Collyer*, 4 Bing. 309.

(*m*) *Gandall* v. *Pontigny*, 1 Starkie's C. 198. Where seamen's wages were by the contract subject to forfeiture for disobedience, and disobedience was proved, but appeared to have resulted from previous misconduct on the part of the owners, it was held that the plaintiff was entitled to recover. *Train* v. *Bennett*, 1 Malk. & M. C. 92. See *Neave* v. *Pratt*, 2 N. R. 408. *Spain* v. *Arnott*, 2 Starkie's C. 256. *Eardley* v. *Price*, 2 N. R. 333. *Robinson* v. *Hardman*, 3 Esp. C. 235. *Chandler* v. *Greaves*, 2 H. B. 606. *Hulle* v. *Heightman*, 2 East, 145.

respect of a quarter which has elapsed after the son was removed from the school; a quarter's notice being requisite by the terms of the contract, and no notice having been given (*n*). Performance.

And a servant is entitled to recover for wages, although during part of the time for which he contracted to serve he was incapacitated from actual service by sickness (*o*).

But in this, as well as in all other cases, unless the contract has been actually performed, or unless that has been done which is equivalent to performance, and the contract has not been wholly rescinded, the plaintiff is not entitled to recover on the general counts, but must declare for breach of the special contract (*p*). Upon a special plea in an action for dismissing the plaintiff under a contract for service, justifying the dismissal, the defendant was held to have the right to begin (*q*).

In an action by a seaman for wages, the plaintiff is not bound to show that the ship earned freight; the defendant must prove the negative, if such proof will supply a defence (*r*). So the defendant is bound to prove any special ground of forfeiture alleged.

(*n*) *Eardley* v. *Price*, 2 N. R. 333. The Court observed, that the moment the son was removed without notice, the quarter's payment became due, which showed that it was due in respect of the things previously furnished.

(*o*) *R.* v. *Wintersett*, Cald. 298; 4 Burn's J. 332. *R.* v. *Sutton*, 5 T. R. 657.

(*p*) *Hulle* v. *Heightman*, 2 East, 145. *Weston* v. *Downes*, Doug. 23.

(*q*) *Harnett* v. *Johnson*, 9 C. & P. 206.

(*r*) *Brown* v. *Milner*, 7 Taunt. 319. But the earning of freight is not in all cases necessary to entitle seamen to their wages: as exception, a ship goes out in search of a cargo, and not being able to procure one, returns empty, will the seamen be entitled to their wages, unless there be an agreement to the contrary. See the judgment of Lord Stowell, in the case of *The Neptune*, Clarke, A. R. 227. Abbott on S. 485. Where upon an entire voyage out and home, the ship and cargo were totally lost on her return, it was held, that the seaman was not entitled to recover wages, from the circumstance of the ship and cargo having been insured; the lien for wages is only on the ship and freight appurtenant thereto; if the seaman could look to the insurance as a security for his wages, it would be a substitution for his own private insurance, and defeat the policy of the law, which does not allow him to insure his wages. *Lady Durham*, 3 Hagg. 196.

The condemnation of the vessel for having been engaged in illegal trading, to which the mariners are not parties, and consequent interruption and loss of the voyage, does not work a forfeiture of wages, nor bar the right of action against the owner. 2 Hagg. 3.

A mariner upon a dispute with the mate, and order by him to leave the vessel, did so; being afterwards met by the captain, he was ordered to return, which he promised to do, but never did, and entered on board another ship; it was held to amount to desertion and forfeiture of wages. *Jupiter*, 1 Hagg. 221.

The plaintiff, a seaman, entered into a contract, stipulating for a forfeiture of his share of the proceeds in case of deserting, or of not faithfully serving during the voyage; having been left ashore in consequence of having gone away after being forbidden by the captain, although he subsequently obtained leave from an inferior officer, it was held, that although his conduct did not amount to desertion, yet having failed in performance of the articles through his own fault, he could not recover; and that although such defence was put in issue on all the pleas as upon the fact of desertion, yet that the plaintiff having averred that he had been left ashore without reasonable cause, which on the plea *nil debet* he must prove, the defendant was not confined by the pleas to the fact of desertion. *Sherman* v. *Bennett*, 1 M. & M. 489.

Where drunkenness is allowed to be a cause of forfeiture, it means *habitual*, and not merely *occasional*. Ib.

Occasional intoxication, where more frequent and partly accounted for by a disorder producing great debility, and giving undue force to the use of strong liquors even moderately used, was held not to amount to forfeiture of wages. *Lady Campbell*, 2 Hagg. 5.

Where temporary absence, the result of intoxication, had been treated as desertion, and the party imprisoned abroad seventy five days, and brought home to England as a prisoner without being permitted to do any duty on board, although willing, the Court pronounced him to be entitled to wages, with costs. *Ealing Grove*, 2 Hagg. 15.

Where the deviation was in no way connected with the general object of the voy-

Performance.

Where a sailor contracted to serve on a voyage from Altona to London and back again, but it was stipulated that he should not be entitled to his wages till the end of the voyage, and upon the arrival of the ship in London the captain dismissed the plaintiff, but in a few days afterwards required him to go on board again, which he refused to do, the Court held that he was not entitled to recover *pro ratâ*, on the ground that the contract had not been rescinded by the defendant, but remained still open (*s*).

Where by the contract, the surveyor's certificate in case of any alterations was required, it was held that such certificate was a condition precedent to the right to recover in respect of alterations (*t*).

An averment in the plaintiff's declaration that the defendant prevented him from completing the execution of specific works (to be executed for a specific), and had abandoned the contract, is not proved by evidence that when the plaintiff asked for money, the defendant said he would never pay a farthing, the defendant not being then liable to pay anything (*u*).

The defendant cannot object that the plaintiff has omitted to do an act where such omission was at the defendant's own request (*x*).

In an action for a reward, offered to "whomsoever should give information whereby the property taken on a robbery might be traced, on conviction of the parties," it was held, that the party entitled was he who first gave such information, although it was not communicated immediately to the party robbed, but to a party authorised to receive it and act in the apprehension, as a constable (*y*).

In *assumpsit* for work and labour, and materials, the defendants having employed the plaintiff to survey a parish and furnish a map, to be laid be-

age, nor growing out of accident or overruling authority, which would not have amounted to a breach of the mariner's contract, and the refusal to work in the delivery of the original cargo was attributable to misapprehension and uncertainty of circumstances in which the crew were placed, and a want of proper communication to them by the master, the Court pronounced for the whole wages. *Cambridge*, 1 Hagg. 243.

A regulation in the ship's articles "that every seaman committed to custody for the preservation of good order, should forfeit his wages, together with everything belonging to him on board," was held proper, though not directly authorised by 2 Geo. 2, c. 35. *Rice* v. *Haylett*, 3 C. & P. 534.

Upon a divided voyage, the ship earning freight at the several intermediate ports of delivery, held that the seamen's wages were due on arrival at each port; and the Court refused to sanction a covenant inserted in the articles that the mariners should not be entitled to any part until the actual arrival at the last place. *The Juliana*, 2 Dods. 504.

Where the sale abroad of a British ship appeared to be merely colourable, the Court held that it had clearly authority to enforce the claims of a British mariner for wages, under a contract entered into in this country. *The Batavia*, 2 Dods. 500.

A pilot is not, under 52 Geo. 3, c. 3, s. 42, entitled to claim wages for the time he remains under quarantine as lay days. *Bee*, 2 Dods. 498.

Although by the general rule a master can only discharge seamen in a foreign land with their consent, "*pur cause available*," yet there may be cases, as of *semi. naufragium*, in which, upon proper conditions against their being damnified, he may, by discharging them, relieve his owners from the burthen of the expense of maintenance and wages from which they can derive no benefit; viz. by providing them with a means of returning home, and paying their wages up to their arrival. *Elizabeth*, 2 Dods. 403.

(*s*) *Hulle* v. *Heightman*, 2 East, 145.

(*t*) *Morgan* v. *Birnie*, 9 Bing 672. The approval of a contracting party has been held not to constitute a condition precedent. See *Dallman* v. *King*, 4 Bing, N. C. 106.

(*u*) *Rees* v. *Lines*, 8 C. & P. 126. *Secus*, where there is no specific price agreed on for specific work. *Roberts* v. *Havelock*, 3 B. & Ad. 464.

(*x*) Action for demurrage against the charterer by the owner; the latter had omitted to procure the necessary papers previous to discharging the cargo, but had been prevented doing so at the defendant's own request; held that the plaintiff's omission to procure such papers was no answer to the action. *Furnell* v. *Thomas*, 5 Bing. 188; and 2 M. & P. 206.

(*y*) *Lancaster* v. *Walsh*, 4 M. & W. 16.

fore commissioners of enclosure; it was held, that the jury having found the work to have been done, and satisfactorily, and the defendants having had reasonable time for ascertaining its correctness, in the absence of any contract for a specific price for the work, the plaintiff was not precluded from recovering what the jury might consider a reasonable remuneration, on the ground of his having refused the map, &c., except on payment of his own demand (*z*). Performance.

3dly. Where the plaintiff sues upon a *quantum meruit*, no specific remuneration having been agreed on, the amount is of course a question for the jury (*a*). In the case of an architect or surveyor it is a question for the jury, whether the usual commission of five per cent. be, under the circumstances, a reasonable charge (*b*). Value.

Where upon a specified event, the amount of remuneration is subject to diminution, the burthen of proof lies of course upon the defendant (*c*).

Although a certain price has been agreed for, yet it is incumbent on the plaintiff to show that his work was properly done according to the contract, if that be disputed, in order to prove that he is entitled to his reward; otherwise he has not performed that which he undertook to do, and the consideration fails (*d*), even as it seems, although no notice has been given that his performance of the contract will be disputed (*e*).

Where the work has been defectively performed (*f*), it seems to be now (*g*) settled that he cannot recover beyond the amount of the benefit actually derived by the defendant from the work and materials; and it seems, that where the work is so ill executed as to be wholly inadequate to the purposes for which it was intended, the plaintiff is not entitled to recover at all (*h*).

If the artist vary from the specification he is entitled only to the price agreed on, reduced by such a sum as would be necessary for completing the contract (*i*).

And where the services of an attorney, auctioneer, or other agent, turn

(*z*) *Hughes* v. *Lanny*, 5 M. & W. 183.

(*a*) It will be presumed, that the parties meant to contract for the accustomed remuneration where any custom exists as to the amount. In *Brown* v. *Nairne*, 9 C. & P. 204, the jury found the practice to be for the broker to receive five per cent. commission for obtaining freight, where there is no special agreement, or unless the ship chartered on a tender.

(*b*) *Chapman* v. *De Tastet*, 2 Starkie's C. 294. See *Upsdell* v. *Stewart*. Peake's C. 293. *Maltby* v. *Christie*, 1 Esp. C. 340.

(*c*) Where the ship's articles contained the clause usual in the Baltic trade, that in case of the vessel wintering abroad on account of ice, the seamen should receive only half wages during the detention, and the ship being engaged as a "general" ship, "went out seeking," and not being able to get a cargo on account of the ice, remained in the river for safety until the ice broke up, held, that although not prevented by ice from returning without a cargo, yet, that as the want of one was a reasonable cause of detention, and of the ship wintering abroad, and that within the meaning of the articles, the men could only claim half wages. *Hooghton*, 3 Hagg. 100.

(*d*) Per Le Blanc J. in *Basten* v. *Butter*, 7 East, 484. *Ellis* v. *Hamlin*, 3 Taunt. 52, where a builder undertook a work of specified dimensions and materials, and deviated from the specification. *Supra*, 1306.

(*e*) *Basten* v. *Butter*, 7 East, 479.

(*f*) Where the defendant ordered a machine, of which the plaintiff was a patentee, to be put up in his brewhouse, and the plaintiff made the machine, but it was found that it did not answer the purpose of a brewhouse; in the absence of fraud or warranty, it was held that the plaintiff was entitled to recover. *Chanter* v. *Hopkins*, 4 M. & W. 399.

(*g*) It was formerly the course to allow the plaintiff to recover the stipulated price, and to drive the defendant to a cross-action. See *Brown* v. *Davis*, cited by Lawrence, J. in *Basten* v. *Butter*, 7 East, 484; *supra*, 1297; and *Denew* v. *Daverell*, 3 Camp. 451.

(*h*) See *Farnsworth* v. *Garrard*, 1 Camp. 36; *supra*, 1207.

(*i*) *Thornton* v. *Place*, 1 M. & R. 218. See *Chapel* v. *Hicks*, 2 C. & M. 214.

Value.

out to have been wholly abortive in consequence of negligence, he is not entitled to any compensation (*j*).

But notwithstanding the universality of the position, that performance, when it is the consideration for the payment of the stipulated price, is a condition precedent, yet the conduct of the employer in adopting the contract, when, if he disputed the performance, he had it in his power to rescind it in *toto* by placing the parties in *statu quo*, affords, as against him, a conclusive presumption that the work has been properly executed, or at all events excludes the party acquiescing from taking the objection.

Instances to this effect have already been cited (*k*). The principle extends to all cases of executory contracts for works of art to be delivered in a complete state. The party receiving the work under a specific contract must abide by it, or rescind it in *toto*.

Where such a complete return and rescinding of the contract is from the nature of the case impracticable, as where the contract is to build a wall, or a house, on the premises of the employer, and the contract cannot be rescinded in *toto*, then, although the defendant has partially availed himself of the plaintiff's labour, and the materials supplied by him, and has not rescinded the contract in *toto*, yet it seems now to be settled, that if the work has been defectively performed, the plaintiff cannot recover but on a *quantum meruit* for the labour, and *quantum valebant* for the materials, to the amount of the benefit actually derived.

Where the defendant had ordered a number of pans to be made by the plaintiff for the manufacture of vitriol, and upon trial they were found to be wholly inadequate to the purpose for which they had been ordered, it was held, that after the defendant had found, after a reasonable trial, that the pans were wholly ineffectual, he should have given notice to the defendant to take them away, who would then have been bound to take them away; but that as the defendant had retained the pans without giving notice, he would be liable to pay as much as the pans were worth (*l*).

Defence.

If a party who has contracted for a specific work for a stipulated price fail to execute it according to the contract, or execute it improperly, as the performance is the consideration for the payment of the price, the consideration fails; and it is competent to the employer to rescind the contract in *toto*, as far as lies in his power. But if he does not rescind it as soon as he discovers the defect, he is, it seems, liable to the whole price, if he might

(*j*) *Denew* v. *Daverell*, 3 Camp. C. 451, cor. Lord Ellenborough. *Basten* v. *Butter*, 7 East, 479. And see *Farnsworth* v. *Garrard*, 1 Camp. 36. *Duncan* v. *Blundell*, 3 Starkie's C. 6. *Montrion* v. *Jeffreys*, R. & M. 317. Where one retained under a special agreement declares (*inter alia*), on a *quantum meruit* for services, the defendant may show the worthlessness of the service under the plea of the general issues to that count. *Baillie* v. *Kell*, 4 Bing. N. C. 638.

(*k*) *Grimaldi* v. *White*, 4 Esp. C. 95; *supra*, 878. *Fisher* v. *Samuda*, 1 Camp. 190; *supra*, 878. *Groning* v. *Mendham*, 1 Starkie's C. 257; *supra*, 1208.

(*l*) *Okell* v. *Smith*, 1 Starkie's C. 107. See also *Fisher* v. *Samuda*, 1 Camp. 190, where, in an action for furnishing the plaintiff with unsound beer, Lord Ellenborough said that it was the duty of the purchaser of any commodity, immediately upon discovering that it was not according to order, and unfit for the purpose for which it was intended, to return it to the vendor, or give him notice to take it back. The plaintiff having contracted to repair the defendant's chandeliers for 10*l*. returned them incompletely repaired. In an action for work and labour, it was held, that as the plaintiff had not performed his part of the contract, he could not recover anything, although the jury found that the repairs were worth 5*l*. The plaintiff contracted to build cottages by 10th October; they are not finished till the 15th; the defendant accepts the cottages: the plaintiff may recover for work and labour and materials. *Lucas* v. *Godwin*, 3 Bing. N. C. 737.

upon discovering the defect have returned the articles, and in other cases is liable to the amount of the benefit derived. Where, however, he seeks to reduce the plaintiff's claim to recover the stipulated price, on the ground of mal-performance, it is advisable, although perhaps not strictly necessary, to apprize the plaintiff of his intention, in order that he may not be taken by surprise (*m*). Defence.

The plaintiff may recover for work done under a special contract, *e. g.* for the building of cottages, although he fails in a point which does not go to the whole consideration, as the finishing them by a particular time, if the defendant takes the benefit of the work (*n*).

A defendant having contracted to pay a specific price is not liable in respect of alterations consented to by him unless he be informed, or must necessarily be aware from the nature of the alterations that the price will be increased (*o*).

A defendant having paid money into Court, may under the plea of *nunquam indebitatus* to the residue in an action of *indebitatus assumpsit* on an attorney's bill, prove that the plaintiff agreed to do the work for the costs out of pocket, which did not exceed the sum paid in (*p*).

In an action for not retaining the plaintiff in the defendant's service, according to an agreement, with a count on a *quantum meruit* for services, to the first of which, amongst others, the defendant pleaded various acts of misconduct on the part of the plaintiff as justifying his dismissal, it was held, that it was sufficient to establish one good ground of discharge, and that the jury were justified in ascribing the discharge to the general nature of the plaintiff's conduct, and not to the formal reason assigned at the time; and that as to the second count, that the defendant might, under the general issue, show the worthlessness of the services, and the jury might take his conduct in such service into consideration in estimating the value of the service (*q*).

In an action upon an attorney's bill, negligence cannot be set up as a defence, unless it has been so gross as to deprive the defendant of all possible benefit from the service (*r*), if it can even then (*s*).

It was held to be no defence to an action on an attorney's bill for prosecuting a suit for the defendant, that no benefit had been derived by the defendant, where the failure did not result wholly from the plaintiff's negligence, but partly from accident (*t*).

Where a person is employed in a work of skill, the employer buys both the judgment and labour of the other, and if the attempt fail for want of skill, the plaintiff cannot recover (*u*). It is otherwise where the employer substitutes his own judgment (*x*).

(*m*) Vide *supra*, 1209.

(*n*) *Lucas* v. *Godwin*, 3 Bing. N. C. 737.

(*o*) *Lovelock* v. *King*, 1 Mo. & R. 60.

(*p*) *Jones* v. *Read*, 5 Ad. & Ell. 529.

(*q*) *Baillie* v. *Kell*, 4 Bing. N. C. 638; and 6 Sc. 379. And see *Chappell* v. *Hicks*, 2 C. & M. 214.

(*r*) *Templer* v. *M'Lachlan*, 2 N. R. 136. This determination was previous to that of *Basten* v. *Butter*, 7 East, 484.

(*s*) Negligence is a defence under the general issue. *Fowler* v. *Macreth*, cor. Parke, B. York Sum. Ass. 1836. In that case, where two who well knew the plaintiff as a land-surveyor employed him to value moieties of an estate belonging to them, Parke, B. said that he at first doubted whether it was competent to the defendant to set up the want of sufficient and competent skill, but that after conferring with Coleridge J. he thought the defence admissible.

(*t*) *Dax* v. *Ward*, 1 Starkie's C. 409. See also *Passmore* v. *Birnie*, 2 Starkie's C. 59.

(*u*) Per Bayley J. in *Duncan* v. *Blundell*, 3 Starkie's C. 6, where the plaintiff

(*x*) *Duncan* v. *Blundell*, 3 Starkie's C. 6.

Negligence.

Where the demand is compounded of skill and things administered, if from want of skill no benefit is derived, the plaintiff cannot recover. Thus, to an action by an apothecary for work and labour, and medicines administered, it is a good defence to show that the plaintiff treated his patient ignorantly, and improperly (*y*). But it would be otherwise if the medicines had been supplied according to a physician's prescriptions (*z*).

It is a good defence to prove that the plaintiff induced the defendant to employ him by false and fraudulent professions of his skill. An empiric who pretends to cure by sovereign medicines, and who by false representations induces the defendant to employ him, cannot recover for medicines and attendance (*a*).

Where a considerable interval has elapsed between the time of a servant's quitting the service, and his making a claim for wages, it is presumable that they have been paid (*b*).

A plaintiff cannot recover for his labour in committing an illegal act (*c*); as for running an illegal race, or printing an illegal book.

An action for the breach of a contract of hiring for a year, by wrongful dismissal, was brought before the end of the year, and the declaration was for wages generally, and also specially for damages in respect of such dismissal, and all matters in difference were referred; it was found, upon a reference of a second action brought for wages accruing subsequently to the commencement of the first action, that no claim was made upon the first reference in respect thereof, except so far as the declaration and the evidence of the employment and dismissal might amount to a claim: held, that as the second claim was within the scope of the former reference, he could not make it the subject-matter of a second action (*d*).

WRIT.

As to the proof of a writ and its effect in evidence, see Vol. I. tit. WRIT.

See as to the construction of the stat. 1 Will. 4, c. 3, s. 2, as to returns, 4 B. & Ad. 355. When the rule to return a writ (which expires in four days after service in London and Middlesex, and in six days elsewhere) expires in vacation, the sheriff shall file it at the expiration of the rule, or as soon after as the office shall be open; and the day and hour of filing shall be indorsed by the officer with whom it is filed (*e*).

had, by the defendant's order, erected a stove in the shop of the latter, and laid a tube under the floor to carry off the smoke, but the plan had entirely failed. And Bayley, J. said, that as this was a work of skill, the party who undertook it was bound to know whether it would succeed or not.

(*y*) *Kannen* v. *M'Muller*, Peake's C. 59, cor. Lord Kenyon.

(*z*) Per Lord Kenyon, Ibid.

(*a*) *Hupe* v. *Phelps*, 2 Starkie's C. 480. And see *Kannen* v. *M'Muller*, Peake's C. 59. *Duffit* v. *James*, cited 7 East, 480. The plaintiff, in an action on a promissory note, given in consideration of "care and medical attendance bestowed on the maker," must, the consideration being disputed, show himself to be properly qualified according to the stat. 55 Geo. 3, c. 194. *Blogg* v. *Pinkers*, 1 R. & M. 125. A defendant who objects that the plaintiff was not qualified to practise as a surgeon for want of the examination and license required by the stat. 3 H. 8, c. 11, s. 1, must prove the fact. *Gremaire* v. *Le Clerck Valois*, 2 Camp. C. 143. But as the stat. contains no prohibitory clause, it seems that the plaintiff, though he may be liable to a penalty for practising, is still entitled to recover. A surgeon who practises as a physician without a diploma, cannot maintain an action for fees. *Lipscombe* v. *Holmes*, 2 Camp. C. 441; and see *Tuson* v. *Batting*, 3 Esq. C. 192.

(*b*) *Sellen* v. *Norman*, 4 C. & P. 87. This is of course a mere presumption, in fact, for the consideration of the jury.

(*c*) *Coates* v. *Hatton*, 3 Starkie's C. 61. Vide *supra*, VENDOR AND VENDEE.

(*d*) *Dunn* v. *Murray*, 9 B. & C. 780.

(*e*) R. G., Hil. T., 2 W. 4.

Every writ must contain the names of all the defendants (*e*), the name of the attorney in the country, as well as of the agent (*f*). The day of service must be indorsed on the writ served, and the day of examination on the capias (*g*); without the indorsements specified in the stat. 2 W. 4, c. 39, s. 12, a writ is irregular, but not void (*h*).

WRIT OF INQUIRY. (*i*)

What to be proof.

THE only question upon the execution of a writ of inquiry is as to the amount of the damages; the plaintiff, therefore, need adduce no proof to establish his claim to damages, but only as to the quantum (*j*). If he sue on a bill of exchange or promissory note, proof of signatures is unnecessary; the only use of producing the instrument is to show whether the payment of any interest is indorsed upon it (*k*). And the plaintiff is entitled to recover nominal damages though the bills be not produced (*l*).

If the plaintiff give no evidence on one or more of the counts, he may afterwards sue for the causes of action contained in those counts. Where the plaintiff declared on a promissory note, and also for goods sold, but gave no evidence on the latter count, it was held that the judgment was no bar to a subsequent action for the goods sold (*m*).

The defendant can give no evidence, except in reduction of damages. Where judgment had been given against the defendant on demurrer, and proof was given that she had acknowledged the debt to a certain amount, it was held that she could not give evidence to show that she was acting merely as agent for her husband, who was abroad (*n*).

If one party appear by counsel where no intimation has been given of his intention, and the other party is desirous of appearing by counsel, the proper course is to apply to the sheriff to put off the inquiry (*o*).

A writ of inquiry does not supply the omission to find damages on the trial of a traverse of a return to a mandamus (*p*).

(*e*) R. G., Michaelmas 1832.

(*f*) Ib.

(*g*) Ib.

(*h*) Ib.

(*i*) Writs of inquiry, their returns, and judgment thereon, are regulated by 1 W. 4, c. 7.

(*j*) *Tripp* v. *Thomas*, 3 B. & C. 429, in an action for words.

(*k*) *Bevis* v. *Lindsell*, Str. 1149; 3 Wils. 155. *Shepherd* v. *Charter*, 4 T. R. 275. *Green* v. *Hearne*, 3 T. R. 301.

(*l*) *Marshal* v. *Griffin*, 1 R. & M 41.

(*m*) *Seddon* v. *Tutop*, 6 T. R. 607.

(*n*) *De Gaillon* v. *Victoire Harel L'Aigle*, 1 B. & P. 368.

(*o*) *Elliott* v. *Nicklin*, 5 Price, 641.

(*p*) *Kynaston* v. *Mayor, &c. of Shrewsbury*, Str. 1051.

APPENDIX TO VOLS. II. & III.

[*Note, that the same alphabetical arrangement is observed in the Appendix as in the Text, to the pages of which reference is made.*]

ABATEMENT, p. 1.

By the Stat. 3 & 4 W. 4, c. 42, s. 8, no plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea.

Sec. 11. That no plea in abatement for a misnomer shall be allowed in any personal action, but that in all cases in which a misnomer would, but for this act, have been by law pleadable in abatement, in such actions the defendant shall be at liberty to cause the declaration to be amended at the costs of the plaintiff, by inserting the right name, upon a Judge's summons, founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the Judge shall think fit.

And see sec. 12, cited below, tit. Bill of Exchange, as to written instruments in which parties are designated by the initial letter or letters, or some contraction of the Christian or first name or names.

One only of two joint tenants brings an action of detinue for goods, the objection can only be taken by plea in abatement; the rule as to non-joinder of plaintiffs is confined to actions of contract. *Broadbent* v. *Ledward*, P. & D. 45.

To an action of assumpsit, the defendant pleaded in abatement that he was liable on the promises alleged only jointly with other persons; the plaintiff proved a separate debt due from the defendant as well as a joint debt due from him and another; it was held that the plaintiff was entitled to recover the amount of both debts, and that the defendant might have pleaded in abatement to part of the count, and in bar to the residue. *Hill* v. *White and another*, 6 Bing. N. C. 23; and 8 Dowl. 63.

Where the action was not brought until the statute had nearly run, and a plea of non-joinder of parties was put in, the Court refused to amend. *Roberts* v. *Ball*, 6 Ad. & Ell. 778.

ACCESSORY, p. 4.

All those who assemble themselves together with an intent even to commit a trespass, the execution whereof causes a felony to be committed, and continue together abetting one another till they have actually put their design into execution, and also all those who are present when a felony is committed, and abet the doing of it, are principals in the felony. *R.* v. *Howell*, 9 C. & P. 437.

Where persons combine to stand by one another in a breach of the peace,

with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals in the murder, though at the time of the fact some of them were at such a distance as to be out of view. *R.* v. *Howell*, 9 C. & P. 437.

But where the prisoner set out originally with the mob, and proceeded to a police office, using menacing words, and after some mischief there, the mob left and proceeded to a private house, which they set on fire, but the prisoner was not seen there, and the original purpose was not clear, held, that he could not be convicted as abetting the latter, in demolishing, &c. *Ibid.*

Where the prisoners went to the ground with parties about to fight a duel, although neither acted as a second, and were present when the shot was fired, and returned with the principals; held, that if the jury were satisfied that the prisoners were there for the purpose of giving countenance and assistance, they were liable as principals in the second degree. *R.* v. *Young*, 8 C. & P. 644.

Parties charged as accessories to murder, the principal being insane, cannot be convicted on that count; but if, aware of the malignant purpose of such insane party, they share in that purpose with him, and are present aiding and abetting, and assisting him in the commission of acts fatal to life, they are guilty as principals for what is done by his hand. *R.* v. *Tyler and others*, 8 C. & P. 616.

A., *B.* and *C.* were indicted, *A.* as accessory before the robbery by a person not named, and *C.* and *D.* as accessories after, in receiving the stolen goods; held that the charge of larceny by an evil-disposed person not named, was too vague to support the charge against the accessory before the fact, but that the accessories after the fact were sufficiently charged with a substantive felony, and properly convicted. *R.* v. *Caspar and others*, 2 Moody 101; and 9 C. & P. 289.

Counts in an indictment charging a party as accessory, both before and after the fact committed by other prisoners, are not improperly joined, and the prosecutor cannot be put to elect. *R.* v. *Blackson*, 8 C. & P. 43.

Where three were charged together, one with stealing and the others with receiving, with counts against the latter separately as receivers, it was held that they might be convicted on those counts, although the principal was acquitted. *R.* v. *Pulham and others*, 9 C. & P. 280.

In order to establish the charge against accessories, by harbouring the felon, it must appear that some acts were done personally by the prisoners in assisting him. *R.* v. *Chapple and others*, 9 C. & P. 355.

Where a party is indicted as an accessory after the fact, with the principal, in a case of murder, if the latter be found guilty of manslaughter only, the former may be found guilty as accessory to the lesser offence; the question for the jury in such cases is, whether the prisoner, knowing the offence to have been committed, was assisting in concealing the offence, or in any way aiding the offender to escape justice. *R.* v. *Greenacre*, 8 C. & P. 35.

It is sufficient to make a party liable as an accessory after the fact, if he employ another to receive and assist in the escape of the principal. *R.* v. *Jarvis*, 2 M. & Rob. 40.

As to things accessory to a principal, see *Woods* v. *Russell*, 5 B. & A. 948 *e. g.* a rudder and cordage to a ship, although not actually annexed. *Ib.*

ACCOMPLICE, p. 10.

The rule is well established that the accomplice ought to be confirmed by evidence as to the prisoner's identity, and tending to connect him personally with the transaction.

The statement of an accomplice in sheep-stealing was corroborated by the fact of great quantities of mutton being found in the prisoner's father's house, where he lived, and as stated by the accomplice, is a sufficient corroboration. *R.* v. *Birkett*, 8 C. & P. 732.

And see Kelsey's Case, 2 Lewin's C. C. 45; *R.* v. *Addis*, 6 C. & P. 388; *R.* v. *Webb*, 6 C. & P. 595; *R.* v. *Wilkes*, 7 C. & P. 272; *R.* v. *Farlar*, 8 C. & P. 107; *R.* v. *Dyke*, 8 C. & P. 261.

Confirmation by the wife of an accomplice is not to be deemed confirmation at all for this purpose, they are to be taken as one person. *R.* v. *Neal*, 7 C. & P. 168.

The jury may, if they please, act upon the evidence of an accomplice, though there be no confirmation. *R.* v. *Hastings*, 7 C. & P. 152.

The evidence of an accomplice requires corroboration, notwithstanding his having been summarily convicted of the offence. *R.* v. *Farlar*, 8 C. & P. 107.

On a charge by a wife of an unnatural offence by her husband, unless by violent resistance the inference of consent is excluded, being otherwise an accomplice, she must be confirmed, or the jury are bound to acquit. *R.* v. *Jellyman*, 8 C. & P. 604.

Where a prisoner and another (a child) were charged in the same indictment, the latter with stealing, and the former with inciting him to commit the felony, the judge, with a view to admit the child as a witness, after pleading, allowed him to withdraw his plea, and plead guilty, and after a nominal sentence to be examined. *R.* v. *Lyons*, 9 C. & P. 555.

Where one of two prisoners charged with sheep-stealing had been convicted at the sessions, it was held, that his wife might be examined on the trial of the other. *R.* v. *Williams*, 8 C. & P. 284.

An accomplice ought to be examined before the witness who is to confirm him. *Cragg's Case*, 2 Lewin's C. C. 35.

ACCORD AND SATISFACTION, p. 16.

The defendant pleads payment of a sum, and acceptance in full satisfaction; the plaintiff replies that he did not accept the said sum in full satisfaction; the payment as well as the acceptance is in issue. *Ridley* v. *Tindall*, 7 Ad. & Ell. 134.

(*With one of several Plaintiffs.*)

Action by three plaintiffs for a joint demand, the plea of an accord and satisfaction with one of the plaintiffs, by a part payment in cash and a set-off of a debt due from that one to the defendant, is good, without alleging any authority from the other two plaintiffs to make the settlement. *Wallace* v. *Kelsall*, 7 M. & W. 264.

(*With a Third Person.*)

In an action for a trespass committed by the defendant as the servant, and by the command of *P. B.*, the acceptance of satisfaction by the plaintiff from *P. B.* is a defence. Where the defendant introduces an immaterial

averment in his plea, the plaintiff cannot in his replication so traverse the matters of the plea as to include such immaterial averment in the issue: therefore where the defendant in trespass pleaded that the trespass was committed by command of *P. B.*, and then stated an executed accord between the plaintiff and *P. B.* with the consent of defendant, and acceptance thereof by plaintiff in satisfaction of the trespasses; held, that a replication traversing the accord and execution thereof with the consent of defendant was had on special demurrer; for that, as no rights of the defendant appeared to be compromised by the accord, his consent was unnecessary. *Thurman* v. *Wild*, 11 A. & E. 453; 3 P. & D. 289.

See further, as to accord without satisfaction, *Allies* v. *Probyn*, 2 Cr. M. & R. 408; and 4 Dowl. 153.

ACCOUNT, p. 18.

To satisfy the plea of *plene computavit* the defendant should show a balance ascertained and agreed upon. *Baxter* v. *Hozier*, 5 Bing. N. C. 288.

ACQUIESCENCE.

Admission by, see *R.* v. *Holdsworth*, 1 G. & D. 442.

A dispute arising as to the dividing line between mines held by the plaintiffs and defendants, their respective lessors agreed to refer the matter to a surveyor. The plaintiffs and defendants were no parties to this agreement; but it appeared that the latter had communications with the surveyor upon the subject, were present when the boundary was staked out by him, and applied to the plaintiffs' lessors for a lease of the disputed spot, in the event of the referee's decision establishing the boundary against their landlord; held, that this amounted to an acquiescence by them in the reference, so as to make the agreement admissible in evidence in an action against them. *Taylor* v. *Parry*, 1 Scott, N. S. 576.

A written contract was entered into for the purchase of "200 or 300" tons of coals, to be sent by the "Navigator or other vessel." The vendor, residing at Stockton-on-Tees, on the 31st December 1838, shipped 127 tons of coals by the George and Henry, and on that day wrote to the vendee at Southampton to state what he had done, and that he should draw on him for the amount. The George and Henry was sunk at sea on the 6th January 1839, which fact the vendor on the 10th January communicated to the vendee. The vendor's bill was not presented to the vendee until after he knew of the loss, and he then refused to accept it, but he did not by any other act repudiate the contract as performed by the vendor; held, that his silence after receiving the vendor's statement of the mode in which he had performed the contract operated either as an admission by him that the contract was duly performed, or as evidence of acceptance of the substituted performance for that originally contracted for. *Richardson* v. *Dunn*, 1 G. & D. 417.

Upon an agreement for the sale of goods upon a valuation by *A.*, a valuation by *A.*'s clerk is not binding unless it be shown that it was agreed to substitute such valuation; and proof of seeing the clerk making such valuation, without objecting, is not evidence to support such agreement. *Ess* v. *Truscott*, 2 M. & W. 385.

ADMISSION, p. 18.

Where the issue was upon the exercise of a power given by a will, under which a lease had been granted, proof that the defendant had executed a counterpart, the lease reciting the will, amounts to an admission of the due execution of the will, and is sufficient proof, in the absence of any evidence to raise a doubt of the fact. *Bringloe* v. *Goodson*, 5 Bing. N. C. 738; and 8 Sc. 71.

A prisoner was taken into custody at the house of his brother on a charge of abduction. When he was taken a letter was found in a writing-desk, in the room in which he and his brother were. The letter was directed to a person in the neighbourhood of the prisoner's late residence. The police-officer was going to open it, when the prisoner told him it had nothing to do with the business that he had come about; held, that the letter was receivable in evidence on the trial of the prisoner for the abduction. *R.* v. *Barratt*, 9 C. & P. 387.

(*Construction of.*)

A party was arrested, and subsequently promised the attorney to pay the debt if no farther proceedings were taken, and by letter he informed him that he had found a friend to assist him "in paying the debt you sued me for;" held, that it was for the jury to say whether he meant to recognise a debt or the particular debt indorsed on the writ. *Rainbow* v. *Bishop*, 7 C. & P. 591.

An I O U, signed by the defendant, but not addressed to the plaintiff, is *primâ facie* evidence of having been given to the plaintiff, and it lies on the defendant to show it given to any other. *Curtis* v. *Richards*, 1 Man. & Gr. 46; and 1 Sc. N. S. 155.

(*Identity.*)

Where declarations were sought to be given as of the plaintiff, and it was only shown that they were made by a person at the plaintiff's house, without any evidence of identity; held, that the admissibility was wholly a question for the Judge, and that he properly rejected them. *Corfield* v. *Parsons*, 1 Cr. & M. 730; and 3 Tyrw. 806.

(*Admission on former Trial*, p. 19.)

Where admissions were made previously to the former trial, held that they were receivable on a new trial, notwithstanding a notice by the opposite party that no admissions would be made. *Doe* d. *Wetherell* v. *Bird*, 7 C. & P. 6.

(*With a view to Trial.*)

Where the term was imposed of admitting the hand-writing of the attesting witness, and after a verdict and new trial obtained, the plaintiff was allowed to amend the oyer, by setting out the condition, whereupon the defendant pleaded specially that the bond had been altered since the execution; held, that it did not affect the admission, whether used on the first or second trial. *Langley* v. *Lord Oxford*, 1 M. & W. 508; and 1 T. & G. 808.

Where the notice to admit the note declared on, in setting out the document produced before the Judge mis-stated the date, the defendant, after first refusing, consented to admit it; held, that he could not afterwards

object to the admission being read on account of the variance. *Field* v. *Hemming*, 7 C. & P. 619.

(*By a Party*, p. 19.)

A parol admission by a party to a suit is always receivable in evidence against him, although it relate to the contents of a deed or other written instrument; and even though its contents be directly in issue in the cause. *Slatterie* v. *Pooley*, 6 M. & W. 664.

In an action for goods sold and delivered, and on an account stated, a parol admission of the debt by the defendant is evidence under the account stated, though it appears that there was a written agreement relating to the goods.

And (per *Parke*, B.) the defendant's own admission is always evidence against him, though it refers to the matter of a written agreement. *Newhall* v. *Holt*, 6 M. & W. 662; and see *Doe* v. *Watson*, *supra*, vol. ii. 25.

Where the defendant, who had become guarantee for the due accounting of a party employed by the plaintiff as agent, upon having sent to him, by the plaintiff's attorney, a letter enclosing a copy of the account for which he was liable, in his reply, promised to obtain the share of his co-surety and remit it with his own to the plaintiff, and having notice to produce, at the trial, the account; held, that a duplicate copy might be proved, with the admission that the defendant said it was correct, without calling the agent. *Ward* v. *Suffield*, 5 Bing. N. C. 381.

(*Admission on Record*, p. 19.)

An admission on record in any issue is only admissible as evidence on that issue, and not to prove or disprove another plea; but where a fact is admitted by the parties in the whole course of the cause, the jury may apply it to all the issues, although on the record it be admitted as to one only. *Stracy* v. *Blake*, 3 Cr. M. & R. 168.

The admission in one plea cannot be called in aid of the issue in another; *semble*, therefore the plea of tender and payment into Court admits only the contract as single and entire. *Jones* v. *Flint*, 2 P. & D. 594.

(*By a Party to the Record*, p. 28.)

Declarations by a party to the record, although suing in a representative capacity, and made before he became such, are admissible. *Smith* v. *Morgan*, 2 Mo. & R. 257.

(*By a Party in Interest*, p. 29.)

In ejectment on two demises, in the names of a trustee in fee and *cestui que trust* for life, and at the trial, the question being one of parcel or no parcel, the lessor of plaintiff elected to abandon the latter demise; held, that a deed executed by the *cestui que trust*, not clearly and unambiguously against her interest, although an advantage was obtained under it, was inadmissible as a declaration; and *quære* whether in an action brought by a trustee in respect of the trust property, the admission of a *cestui que trust*, whose interest is not commensurate with his, can be evidence against him? *Doe* v. *Wainwright*, 3 Nev. & P. 598.

In trespass against the sheriff, for taking goods of plaintiff under an execution against another; held that, if the execution creditor has indemnified the sheriff, his statements are evidence. *Proctor* v. *Lainson*, 7 C. & P. 629.

(*In the case of Claimants* eodem jure.)

The written statements of a former vicar, where the plaintiff claimed in right of the vicarage, are admissible. *Doe* d. *Coyle* v. *Cole*, 6 C. & P. 359.

(*By an Agent*, p. 29.)

Where the defendants (trustees under an assignment of the stock in trade of *A.*) directed the plaintiff to proceed to *B.* to effect the liberation of *A.*, and arranged that *L.* should remit funds for that purpose to the plaintiff there; held, that the letter of *L.* was inadmissible as proof of the facts stated in it; held also, that the acts of a party put into the shop of *A.* to conduct the business, might bind the defendants in what concerned the business, but not to employ a person to take stock. *Lawrence* v. *Thatcher*, 6 C. & P. 669.

Where the defendant had used the affidavit of a party, stating the seizure of goods by him as officer of the defendant, upon a motion of interpleader; held, that such affidavit was admissible in evidence against the defendant to connect the party with him, although the latter was in court at the trial and might have been himself called. *Brickell* v. *Hulse*, 7 Ad. & Ell. 454.

(*Against a Representative*, p. 33.)

Where in trover, upon the issue of no property in the plaintiff, the defendant having shown himself in possession for four years after a gift by a party to whom he was administrator; held that, having put in the letters of administration, evidence of declarations by his deceased testator were admissible against him. *Smith* v. *Smith*, 3 Bing. N. C. 29; and 3 Sc. 352.

(*Under a Judge's Order*, p. 35.)

Where, by a Judge's order, a copy of a letter sent by *R.* to *M.*, dated December 10th, 1830, is ordered to be admitted, it is not enough to put in the notice to admit, and the Judge's order, and to put in a copy of a letter from *R.* to *M.* of that date; but if a witness also prove that he was at the Judge's chambers when the order was made, and that he produced to the clerk of the opposite attorney the copy of the letter proposed to be given in evidence, that is sufficient. *Clay* v. *Thackrah*, 9 C. & P. 47.

(*Confession in Criminal Cases*, p. 36.)

The Court will not allow the formal proofs in a criminal case to be admitted, unless made at the time by the prisoner or his counsel. *R.* v. *Thornhill*, 8 C. & P. 575.

(*Examination.*)

Where the magistrate's clerk had mistakenly headed the examination of the prisoner as "The information and complaint, &c.," the Judge (Gurney, B.) rejected the statement. *R.* v. *Bentley*, 6 C. & P. 148.

But where nothing appeared on the examination to show that it was taken on a charge of felony, or that the magistrates who signed it were acting as such, the clerk was allowed to prove what was said, and refresh his memory by the paper. *R.* v. *Tarrant*, 6 C. & P. 182.

(*Confession, Oral.*)

Where the prisoner gave a blow, which terminated mortally, but for which the prisoner was summarily convicted and fined for the assault before a magistrate, but no part of the examinations, either of the deceased or pri-

soner, was taken down; held that the magistrate might be asked as to what was said by the deceased in the presence of the prisoner, not as evidence of the facts stated, but only as producing an answer from him. (*Per* Taunton, J.) *R.* v. *Edmunds*, 6 C. & P. 164.

The statement made before the magistrate at the first hearing, was taken down, but not read over to the prisoner, or signed by him, and on the final one, when the depositions were formally taken, the prisoner declined saying anything, the statement was held to be receivable in evidence, although not returned by the magistrate. *R.* v. *Wilkinson*, 8 C. & P. 663.

(*Voluntary*, p. 37.)

Where, after promises held out by persons not examined, the magistrate told the prisoner that his confession would do him no good, and he afterwards made a statement which was taken down; held that it was not to be considered as made under the former influence, and was admissible. *R.* v. *Howes*, 6 C. & P. 404.

The prosecutor said to the prisoner, "If you will not tell us what you know about it, we of course can do nothing;" held to amount to a promise, that if he would tell, the prosecutor would do something for him, and to render the confession inadmissible. *R.* v. *Partridge*, 7 C. & P. 552.

Confession obtained from the prisoner, a girl fifteen years old, through the promises and threats of *relatives* and *servants* of the *prosecutor*, is not admissible. *R.* v. *Simpson*, 1 Ry. & M. 411.

So, where obtained by the promises and threats of the prosecutor's wife, *R.* v. *Upchurch*, 1 Ry. & M. 465.

Where the prisoner made a statement induced by a person without authority, but in the presence of her mistress, and who expressed no dissent, held not receivable, as the inducement must be taken as if it had been held out by her mistress, who was a person in authority over her: to exclude confessions by prisoners the inducement must be made or sanctioned by a party having some authority. *R.* v. *Taylor*, 8 C. & P. 733.

A confession, made after being told by the constable, "It is of no use for you to deny it, for there are *A.* and *B.* who will swear they saw you do it;" held to be made under an inducement, which rendered it inadmissible. *R.* v. *Mills*, 6 C. & P. 146.

Aliter, where the prisoner was told that there was a serious oath against her by *B.*, who had sworn that she had, &c., and a subsequent statement made by her received. (*Per* Gurney, B.) *R.* v. *Long*, 6 C. & P. 179.

Where the witness had said to one prisoner, "You had better split, than suffer for all," the confession was rejected. (*Per* Patteson, J.) *R.* v. *Thomas*, 6 C. & P. 353.

But where a constable had only said, "If you will tell where the property is, you shall see your wife, and I hope you will tell, as Mrs. *G.* (the prosecutrix) can ill afford to lose the money," admitted. *R.* v. *Lloyd*, 6 C. & P. 393.

Where the constable had said to the prisoner, "You had better not add a lie to the crime of theft," and then desired him to go with another constable and show where he had put the things, a confession afterwards made to such constable rejected. *R.* v. *Shepherd*, 7 C. & P. 579.

Where a confession was obtained under promises held out by a party without authority, but in the *hearing* of the officer having the prisoner in custody, held not receivable. *R.* v. *Pountney*, 7 C. & P. 302.

Constables are not justified in putting questions to parties in their cus-

tody, without cautioning them that their answers may be given in evidence. *R.* v. *Kerr*, 8 C. & P. 176.

Where, whilst the party was in custody, another prisoner said to him, "Pray split; I wish you would tell me how, &c.," upon which, at the prisoner's request, he took an oath not to disclose what he should say; held that the confession was admissible. *R.* v. *Shaw*, 6 C. & P. 372.

Some difference of opinion has existed, as to receiving evidence of confessions where an inducement has been held out by persons having no authority. *R.* v. *Spencer*, 7 C. & P. 776.

Where before the prisoner's examination was taken, he was told not to say anything to prejudice himself, as it would be used for or against him; held (per Coleridge, J.) that the examination was inadmissible. *R.* v. *Drew*, 8 C. & P. 140.

The prisoner asked the witness if he had better confess, to which the witness replied, that it would be better for him not to confess, but that he might say what he had to say to him, for it should go no further, the confession was received. *R.* v. *Thomas*, 7 C. & P. 345.

"It would have been better if you had told at first;" held (*per* Gurney, B.) to be an inducement, and sufficient to exclude the statement made in consequence. *R.* v. *Walkeley*, 6 C. & P. 175.

Where a confession to a prosecutor is not admissible by reason of promises, held that a second confession, afterwards made to another prosecutor, is also excluded. *Meynell's Case*, 2 Lewin's C. C. 122; *Sherrington's Case*, Ib. 123.

(*Fact discovered in consequence of an Admission*, p. 37.)

Where what the prisoner has stated is shut out, on account of the manner in which it has been obtained, it does not prevent the admissibility of facts discovered in consequence of the statement. *R.* v. *Gould*, 9 C. & P. 364.

(*On Oath*, p. 38.)

Where parties in custody at the time of the inquest, in a case of rape and murder, were examined by the coroner on oath, without inducement, and expressing their wish to be examined, their depositions were received as statements, by Williams, J., upon an indictment for the rape, with an intimation that he would reserve the point if it should become necessary. The parties were, however, acquitted; but being subsequently indicted for the murder, the same depositions were rejected by Gurney, B. *R.* v. *Owen & others*, 9 C. & P. 83 & 238.

Where a party charged with murder made a statement before the coroner, which purported to have been taken on oath, held not receivable against him, and that parol evidence was inadmissible to show that it was not made on oath. *R.* v. *Wheeley*, 8 C. & P. 250.

Where the prisoner was examined on oath before commissioners of bankruptcy, having been cautioned to elect what questions he would answer, held that such depositions were admissible against him on a charge of forgery. *R.* v. *Wheater*, 2 Moody, C. C. 45.

Where the prisoner, whilst unsuspected, had been examined as a witness on oath, and in his examination referred to a letter then produced; held, that as the examination, not being perfectly voluntary, could not be pro-

dueed against the prisoner when charged with the offenee, nothing said as to such letter before the magistrate could be reeeived; neither would the Judge (Gurney, B.) reeeive evidence of what was said, but not taken down, nor parol evidence of the eontents of such examination. *R.* v. *Lewis*, 6 C. & P. 161; S. P. *R.* v. *Davis*, Ib. 178.

(*Proof of Examination*, p. 39.)

To make the examination of a prisoner taken before justiees admissible, it is sufficient to prove the faets by a party present, without calling either the justice or his clerk. *Rex* v. *Hopes*, 7 C. & P. 136; S. P. *Rex* v. *Forster*, Ib. 148. And see *R.* v. *Rees*, 7 C. & P. 568; *R.* v. *Reading*, Ib. 649.

(*The whole to be read*, p. 40.)

The rule is for the whole statement of a prisoner to be heard, without suppressing it as to the names of other parties charged. *R.* v. *Walkeley*, 6 C. & P. 175.

Where the magistrate's clerk, in taking down the statements of several parties charged, left the names of each other mentioned by them in blank, the Judge refused to have it supplied by supplementary evidence. *R.* v. *Morse & others*, 8 C. & P. 605.

(*Effect of.*)

A statement by the prisoner, that he should never have written the letter but for *W. G.*, does not amount to sufficient evidence of sending it. *Rex* v. *Howe*, 7 C. & P. 268.

AFFIDAVIT.

Title of, in case of *certiorari*. *R.* v. *Jones*, 8 Dowl. 80. *Ejectment*, *Doe* v. *Roe*, Ib. 40.

AGENT.

(*From relative Situation*, p. 42.)

A servant acting in the course of his master's serviee, and for his benefit, the master is liable for his acts, although no express command or privity be shown. *Huzzey* v. *Field*, 2 C. M. & R. 432.

Where the defendant's son was alleged to have warranted a horse, as agent to the defendant, and, to prove the authority, evidence was offered of the son's declaration to a stranger, held inadmissible, as not made in the course of any bargain and sale for the horse. *Allen* v. *Denstone*, 8 C. & P. 760.

The resident agent, appointed by the directors of a mining company to manage the mine, has not an implied authority from the shareholders of the company to borrow money upon their credit, in order to pay the arrears of wages due to the labourers in the mine, who have obtained warrants of distress upon the materials belonging to the mine, for the satisfaction of such arrears; nor in any other case of necessity, however pressing. *Hawtayne* v. *Bourne*, 7 M. & W. 595.

Upon an indietment for putting away forged notes of the Royal Bank of Scotland, it is not necessary to show an express authority to draw and issue such notes, the power being recognized by 48 Geo. 3, c. 149, and 55 Geo. 3, c. 184. *M'Kcay's Case*, 1 Ry. & M. C. C. 130.

(*Recognition of Authority*, p. 44.)

The defendant, a merchant residing at St. Petersburgh, carried on business in London through *H.*, who had himself no capital or credit, and was universally known to represent the defendant, though *H.*'s name was always used. Defendant gave notice to *H.* that he purposed to cease employing him; after which *H.* contracted with the plaintiff to sell him tallow (of more than 10*l.* value); and *H.*'s name was used as before. *H.* intended to make the contract on his own account; but the plaintiff did not know this, and believed that *H.* represented the defendant as usual. The contract was made by a broker, *W.*, acting for both parties. He signed bought and sold notes; the former beginning, "Bought for *T.*" (the plaintiff); and the latter, "sold for *H.* to my principals;" no buyer or seller being further named. It was held, that the defendant was liable for the non-delivery of the tallow, the plaintiff having no notice that the name of *H.* ceased to mean the defendant; that the bought and that the sold notes constituted a sufficient note in writing to charge the defendant within stat. 29 Car. 2, c. 3, s. 17; and that no objection lay to the admission of parol evidence of the above facts, as varying the written instrument.

Evidence offered by the defendant, of a custom in the tallow trade, that, on such contracts as the above, "a party might reject the undisclosed principal, and look to the broker for the completion of the contract;" this was held to be inadmissible, as varying a written instrument.

And *semble*, that, if such evidence were admissible, the custom would not apply here; the principals being in fact disclosed to the broker, who acted for both parties. *Trueman* v. *Loder*, 11 A. & E. 589.

A party employing a broker on the Stock Exchange is bound by their rules, whether such employer is cognizant of them or not; and a broker having paid differences on shares sold through his employer's mistake, which the latter was not possessed of, is entitled to recover such payments, as also his commission on the sale. *Sutton* v. *Tatham*, 2 P. & D. 308; and 10 Ad. & Ell. 27.

(*Acts of*, p. 44.)

It was proved that before the bringing of the action Mr. *L.*, who was the plaintiff's attorney on the record, had written to the defendant for payment of the debt for which the action was brought, and it was proposed on the part of the defendant to give evidence of what Mr. *L.* had said after he had so written, and before the action; it was held, that this evidence was not receivable without further proof of the agency of Mr. *L.* *Pope* v. *Andrews*, 9 C. & P. 564.

A collector of the customs, appointed under 3 & 4 Will. 4, c. 51, s. 2, and whose duty it was, upon receipt of the duties, to sign a bill of entry as a receipt, being a warrant for delivery of the goods, is a ministerial and independent officer, and not a mere agent of the commissioners appointing him, and is liable to an action for damages for improperly refusing to give such bill of entry on tender of the duty payable. *Bury* v. *Arnaud*, 2 P. & D. 633.

(*Claim by*, p. 46.)

The defendant, a corn merchant in Ireland, sent written instructions to the plaintiff, a corn factor and del credere agent of the defendant in Lon-

don, to sell oats of a certain quality, at a certain price, on his (defendant's) account. The plaintiff sold them, as described by the defendant, in his own name. The oats proved to be of inferior quality, and the plaintiff was obliged to pay to the vendee the difference in value. In an action to recover the difference, it was objected by the defendant that the plaintiff had no right to sell in his own name, and thereby to incur liability; held, that evidence was admissible for the plaintiff to show that, by the custom of the London corn trade, a factor was warranted by such instructions in selling in his own name. *Johnston* v. *Usborne*, 11 A. & E. 549.

A plea is bad which shows no consideration for an agreement which deprives the principal of his right to make an authority to sell. *Raleigh* v. *Atkinson*, 6 M. & W. 670.

(*Defence by an Agent*, p. 46.)

Where the plaintiff's broker agreed with the defendants (being share brokers) for the purchase of shares, notes of which were made and sent in their own names, but immediately afterwards the entry in the books was altered to the name of the real seller, and a second contract note sent to the plaintiff, but the former note was neither demanded nor sent back; held, that evidence of a custom in *L.* to send in brokers' notes without disclosing the principal's name was properly rejected, and that the defendants having signed the contract in their own names, were liable, although known to be agents. *Magee* v. *Atkinson*, 2 M. & W. 441.

In an action for seizing the plaintiff's vessel, and converting, &c., the defendants pleaded the sentence of a foreign court of competent jurisdiction, condemning the plaintiff's vessel as prize, for breach of blockade; replication, that the employment of the defendants in such foreign service was, by statute 59 Geo. 3, c. 69, (Foreign Enlistment Act,) illegal; held, that the act of the principal being lawful in the country where done, and the authority of the servant complete and binding, the latter could not be made responsible in the courts of this country for the consequences of such employment, merely by reason of a general disability imposed upon the servant contracting such engagement; and that the action was therefore not maintainable. *Dobree* v. *Napier*, 2 Bing. N. C. 781.

ALIEN AMY.

An alien amy, though he has never been in this country, may maintain an action for a libel published in this country. *Pisani* v. *Lawson*, 8 Scott, 182.

AMENDMENT.

See Vol. I. tit. VARIANCE, and the statutes 9 Geo. 4, c. 15, and 3 & 4 Will. 4, c. 42, and the cases cited in the Appendix, Vol. I. p. 496.

AMERCIAMENT.

Semble, it may be by a jury without other affeerment. Per Holt, C. J., *Matthews* v. *Cary*, Show. 61; Com. Dig. *Leet* (O. 2).

ANIMALS, CRUELTY TO.

See 5 & 6 Will. 4, c. 59.

APOTHECARY, p. 47.

A chemist and druggist practising as an apothecary, in attending the sick and giving them medicines for reward, is liable to penalties under the statute 54 Geo. 3, c. 194. *Apothecaries' Company* v. *Greenough*, 1 G. & D. 378.

The plaintiff must prove his qualification under the general issue. *Wagstaffe* v. *Sharpe*, 3 M. & W. 521, supra, Vol. II. p. 102. *Shearwood* v. *Hay*, 5 Ad. & Ell. 383. *Morgan* v. *Ruddock*, 4 Dowl. 311.

A plea of tender as to part and non-assumpsit as to the residue does not admit that the plaintiff was entitled to recover under the Act. *Wills* v. *Langridge*, Ib.

By the st. 6 Geo. 4, c. 133, s. 4, surgeons and assistant-surgeons in the Army, or Navy, or East India Company's service, are not, in order to recover, obliged to give the proof required by the statute 55 Geo. 3, c. 194.

See *Steavenson* v. *Oliver*, 8 M. & W. 234.

The right to charge for visits as well as medicine, is not a question of law, but it is for a jury to say whether, under all the circumstances, a contract for reasonable compensation for attendance can be implied. *Morgan* v. *Hallen*, 3 N. & P. 498.

APPORTIONMENT, p. 48.

The stat. 4 & 5 Will. 4, c. 22, s. 2, enacts that "all rents, &c. payable at fixed periods shall be apportioned in such manner that on the death of any person interested in such rents, &c., or on the determination by any other means whatsoever of the interest of such person, he shall be entitled to a portion of such rents, &c., according to the time which shall have elapsed from the commencement or last period of payment thereof respectively, including the day of the death of such person, or of the determination of his interest, all just deductions being made; and every such person shall have the same remedies for recovering such apportioned parts of the said rents, &c. when the entire portion of which such apportioned parts shall form part shall become due, and not before, as he would have had for recovering such entire rents, &c., if entitled thereto, but so that the person liable to pay such rents, &c. reserved by any lease, &c., and the lands, &c., comprised therein, shall not be resorted to for such apportioned parts specifically, but the entire rents, &c. of which such portions shall form a part shall be received by the person who, if this Act had not been passed, would have been entitled to such entire rents, and such portions shall be recoverable from such person by the parties entitled to the same under this Act." See also the stat. 11 Geo. 2, c. 19.

A., in 1836, let certain land to *B.*, under a building agreement; the rent was to commence at Christmas 1838, and *A.* to have a right of re-entry in case of non-performance on the part of *B.* *A.* availed himself of this right of re-entry, and brought an ejectment, laying the demise on the 1st of January 1839. In September 1838, he had re-let the land to *C.*, at a rent to commence in 1840, which was equivalent in amount to that provided for by the first agreement. In an action by *A.* for breaking the first agreement, held, first, that the demise in the ejectment was to be taken as the date of the re-entry by *A.*, and that he was not entitled to that portion of the rent

between the previous Christmas and that day, under the provisions of the statute 4 & 5 Will. 4, c. 22.

The Act does not apply where a party himself determines the right to receive the rent by bringing ejectment for a forfeiture, no rent having accrued at the day of the re-entry. *Oldershaw* v. *Holt*, 11 Ad. & Ell. 307.

Where a lunatic's real estate was let from year to year, and the rent not reserved by any writing, held that the 4 & 5 Will. 4, c. 22, did not apply to such a case, and that there could be no apportionment between the heir and the personal representative. *Markby, in re*, 4 Myl. & Cr. 484.

Where the conveyance of the reversion of premises on lease released all the parties' interest, held that parol evidence as to apportionment of the current quarter's rent was inadmissible. *Flinn* v. *Calow*, 1 Man. & Gr. 589.

The owner in fee died pending several yearly tenancies at Lady-day and May-day, not having given notice to determine the tenancies, and the devisee for life also died after the current years had expired, but within the first half year accruing in his own time; held that both the tenancies being created by the devisor, and not determining with his life, the administrator of the devisee is not entitled to recover an apportioned part of the rent for the time elapsed after Lady-day and May-day in that year. *Botheroyd* v. *Woolley*, 5 Tyrw. 522.

Apportionment of a chattel in progress. See *Woods* v. *Russell*, 5 B. & A. 948.

APPROPRIATION, p. 48.

Where the defendants, as commission agents to foreign houses, in which they were partners, but the foreign houses were not partners in the commission business, received a letter from *H.* and *I.*, authorising them to pay a sum of money to *R.* & Co., but which being unsatisfactory was revoked, and a second letter was written, which was desired to be acted upon, and the defendants thereupon gave an undertaking to *R.* & Co. to comply with it on being guaranteed by *R.* & Co., which was given; held, that taken altogether, it amounted to an appropriation of the sum to *R.* & Co., or else to an equitable assignment of it, and was not in either case revoked by the bankruptcy of *H.* and *I.*, and notice given by the assignees before the proceeds received out of which the payment was to be made. *Hutchieson* v. *Heyworth*, 1 Perr. & Dav. 266.

Where in an action to recover the balance of a banker's account, the defendant disputed a payment above six years since, as made without any authority, but which the jury expressly found; held, that the plaintiffs were entitled to appropriate subsequent payments by the defendant in discharge of that item. *Williams* v. *Griffith*, 5 M .&W. 300.

See further, *Waller* v. *Lacy*, 8 Dowl. 563.

ARSON.

(P. 49.)

In a case of arson it was proved that "the floor near the hearth was scorched. It was charred in a trifling way. It had been at a red heat, but not in a blaze:" held that this would be a sufficient burning to support an indictment for arson. *R.* v. *Parker*, 9 C. & P. 45.

A. and *B.* were charged under the stat. 7 & 8 Geo. 4, c. 30, s. 17, with setting fire to a wood. It appeared that they set fire to a summer-house which was in the wood, and that from the summer-house the fire was com-

municated to the wood: held that *A.* and *B.* might be properly convicted on this indictment. *R.* v. *Price*, 9 C. & P. 729.

Under the 7 & 8 Geo. 4, c. 30, s. 17, the indictment for setting fire to, &c., with intent to injure the owner, was held to be sufficient, although the jury found the intent to be to injure another, and a count would be good although no intent laid. *R.* v. *Newill*, 1 Ry & M. 458.

A covering of wood and straw, set on upright posts and cross timbers, in a farm-yard, held to be an outhouse within the 7 & 8 Geo. 4, c. 30, s. 2, and that placing fire among the straw, producing smoke and burnt ashes in the straw, was a setting on fire, although there was no appearance of fire itself *R.* v. *Stallion*, 1 Ry. & M. 398.

Where, on a charge of arson, it was opened, that expressions of ill-will, made by the prisoner, would be proved, held that the prosecutor might be asked on cross-examination, if others had not used similar expressions of ill-will towards him. *R.* v. *Stallard*, 7 C. & P. 263.

ASSAULT.

(P. 52.)

A party struck at may strike again, to prevent a repetition of the blow, but not with greater violence than is necessary. *Per* Parke, B., 2 Lewin, C. C. 48.

The declaration stated that the defendant assaulted the plaintiff, "and also then presented a certain pistol loaded with gunpowder, ball, and shot, at the plaintiff, and threatened and offered therewith to shoot the plaintiff, and blow out his brains." To this the defendant pleaded not guilty, and it was proved that the parties being on board a ship, the defendant (who was the captain) went into his cabin and brought out a pistol and cocked it, and presented it at the plaintiff's head, saying that if the plaintiff was not quiet, he would blow his brains out: held, that if the defendant, at the time he presented the pistol, used words showing that it was not his intention to shoot the plaintiff, this would be no assault: held, also, that it was incumbent on the plaintiff to substantiate the allegation in the declaration, that the pistol was loaded with gunpowder, ball, and shot, and that unless the jury were satisfied that the pistol was loaded, they ought o find for the defendant. *Blake* v. *Barnard*, 9 C. & P. 626. But see *R.* v. *St. George*, 9 C. & P. 483.

If, on a trial of an indictment for a rape, it appear that the prisoner was under 14 years of age at the time he committed the offence, he must be acquitted of the rape, but the jury may convict him of an assault under the stat. 1 Vict. c. 85, s. 11. *R.* v. *Brimilow*, 9 C. & P. 366.

On an indictment for attempting to carnally know and abuse a girl under ten years of age, with a count for a common assault; the attempt was proved, but it could not be shown that the child was under ten years of age, and it also appeared that no violence was used by the prisoner, and no actual resistance made by the girl: held, that although *consent* on the part of the girl would put an end to the charge of assault, yet there was a great difference between *consent* and *submission*, and that although, in the case of an adult, submitting quietly to an outrage of this kind would go far to show consent, yet, that in the case of a child, the jury should consider whether the submission of the child was voluntary on her part, or was the result of fear under the circumstances in which she was placed. *R.* v. *Day*, 9 C. & P. 722.

If a person present a pistol, at another, and so near as to have been dangerous to life, if the pistol being loaded had gone off, *semble*, that this is an assault, even though the pistol is, in fact, not loaded, if the person so presenting it thought it to be so. *R.* v. *St. George*, 9 C. & P. 483.

On an indictment for a felony, which includes an assault, the prisoner ought not to be convicted of an assault which is quite distinct from the felony charged; and on such an indictment the prisoner ought only to be convicted of an assault which is *involved* in the felony itself. *R.* v. *Gutteridges and others*, 9 C. & P. 471. *R.* v. *St. George*, 9 C. & P. 483.

A. presented a loaded pistol at *B.*, but was prevented from pulling the trigger: held, that *A.* might be convicted of this assault, on an indictment for feloniously attempting to discharge loaded arms at *B.* *R.* v. *St. George*, 9 C. & P. 483.

A prisoner who is tried for manslaughter, on the coroner's inquisition, may be convicted of an assault under the 11th sect. of the stat. 1 Vict. c. 85. *R.* v. *Pool*, 9 C. & P. 728.

The statute does not apply to unnatural attempts upon the person. *R.* v. *Eaton*, 8 C. & P. 417; but see *R.* v. *Pikesley*, 8 C. & P. 124.

An indictment for assaulting, and indecently exposing the person, with intent to incite a party to commit an unnatural crime; held not to be "a wilful and indecent exposure" within the 7 Geo. 4, c. 64, s. 24, enabling the court to give costs to the prosecutor. *R.* v. ——, 3 Nev. & P. 627.

ASSUMPSIT.

(*Consideration*, p. 55.)

The defendant offered a reward to whoever could give such information as would lead to the conviction of a felon. The plaintiff, who was constable and police officer of the district where the felony was committed, gave such information: held, on demurrer, that plaintiff's having given the information was a good consideration for a promise by defendant to pay the reward. *England* v. *Davidson*, 11 A. & E. 856.

In assumpsit on an undertaking to see acceptances paid, in consideration of the plaintiff giving up a guarantee of the defendant, which was in the terms "In consideration of your being *in advance* to Messrs. *L.* in the sum of £. —— for the purchase of cotton, I hereby give you my guarantee for that amount in their behalf;" held, that the effect of the terms "*being in advance*," and the validity of the instrument were so doubtful, as to make the obtaining back the guarantee an advantage to the defendant, and to make it a sufficient consideration for the subsequent guarantee and promise laid in the declaration. *Haigh* v. *Brooks*, 2 P. & D. 477; affirmed in error, 10 Ad. & Ell. 323.

Where a plaintiff discharges one of two joint debtors, the other has a right to be discharged, and therefore a promise by a third person to pay the debt, in order to obtain the discharge of the defendant in custody, is void for want of consideration. *Herring* v. *Dorell*, 8 Dowl. 604.

Where the declaration stated that in consideration the plaintiff would discharge one *S.* out of the custody of the warden, and take the warrant of attorney of *S.* for the debt and costs, the defendant undertook that *S.* should be forthcoming on a day stated, at the office of *A.*, one day's notice being given to *A.*; breach, that *S.* was not forthcoming on the day and at the place agreed on, nor any notice given to *A.*: held sufficient on motion

in arrest of judgment, and that no averment of the judgment having been entered upon the warrant was necessary. *Page* v. *Jarvis*, 8 M. & W. 136. See further as to consideration, *Morton* v. *Burn*, 2 N. & P. 297; *Cooper* v. *Green*, 7 M. & W. 633; *Lilly* v. *Hays*, 1 N. & P. 326; *Brealey* v. *Andrew*, 2 N. & P. 114; *Tipper* v. *Bicknell*, 3 Bing. N. C. 710; *Shillibeer* v. *Glynn*, 2 M. & W. 143.

(*Written Agreement*, p. 56.)

If the plaintiff close his case without its appearing that the contract is in writing, the defendant must make it evidence if he rely upon it, although the plaintiff has had notice to produce it. *Magnay* v. *Knight*, 2 Scott N. S. 64; and see *Marston* v. *Dean*, 7 C. & P. 13.

Where the evidence in an action for use and occupation does not disclose any written agreement, the non-production of one, by which in fact the premises were held, is no ground of nonsuit. *Fry* v. *Chapman*, 5 Dowl. 265.

Where the terms of hiring were by a third person written down, but never signed by the parties, nor proved to have been read over to them, it was held that parol evidence was admissible. *R.* v. *Wrangle*, 2 Ad. & Ell. 514.

Where there was no express evidence of the original contract on the employment of the plaintiff, as a broker, to procure a charter-party on a full commission, held that evidence of a conversation, in which he agreed to take half commission in consequence of the abandonment of the contract by the shipowner, was properly received to show what was the original contract between the parties. *Broad* v. *M'Calmar*, 5 Nev. & M. 413.

Where in an action by landlord against tenant, the first count set out the written agreement containing the terms of holding, and alleged a particular breach in not repairing, and other counts upon the implied contract for using the premises in a tenant-like manner, proceeded to set out various breaches: held, that there being but one contract of demise, the plaintiff could not recover damages on the latter counts, unless he showed a second contract, applying to different premises. *Holford* v. *Dunnett*, 7 M. & W. 348.

(*Implied*, p. 58.)

A party being let into possession on an agreement for a lease, containing covenants to cultivate, pay rent, &c. is bound by all which are applicable to a tenancy from year to year. *Doe* v. *Amey*, 4 P. & D. 177.

Where persons acting under an Act of Parliament (whether public or private), make an order under the authority of the Act for the payment of money, the law raises an assumpsit. *Rann* v. *Green*, 1 Cowp. 474.

On the 20th of February 1838, the plaintiff entered into a contract with the defendant, through their respective brokers, for the sale of thirty shares in the Bristol and Exeter Railway, at 7*l*. 5*s*. per share, and the usual contract notes passed between the parties, no time being mentioned for the completion of the purchase. On the 3d of March, the defendant wrote to the plaintiff's brokers, requesting them to "dispatch the thirty Bristol and Exeter shares forthwith," and they replied the same day, "we herewith send you the transfer of thirty Bristol and Exeter shares in blank." This was accordingly done, and the purchase-money was paid. Calls were subsequently made on these shares, and they not being registered in the name of the defendant, the plaintiff remaining the apparent owner of them, he was compelled to pay the calls. In an action against the defendant for not indemnifying the plaintiff for the payments and liabilities in respect of the

calls; held, that under the above circumstances, there was no undertaking implied by law to indemnify against all subsequent calls, nor any evidence of such an undertaking in point of fact. *Humble* v. *Langston*, 7 M. & W. 517.

Where the original lessee of premises, with covenants to keep in repair, underlet with similar covenants, and was sued for dilapidations permitted by the under lessee, and having suffered judgment by default, paid the amount proved and costs of the action; held that there being no covenant to indemnify against breaches of covenant, the under lessor could only recover against his lessee the actual amount of the dilapidations, and not the costs of the action. *Penley* v. *Watts*, 7 Mees. & W. 601; and see tit. COVENANT.

The declaration set out an agreement for a demise by the defendant, as vicar of the glebe for 14 years, and a lease to be executed at the expense of the lessor, if required by either party; breach that the defendant neglected and refused to procure a lease to be executed of the premises, and that the defendant resigned the vicarage to *L.*, who ejected the plaintiff from the possession; held, upon special demurrer, 1st, That the effect of the stipulation was that the party who was to pay the expense was also bound to prepare the lease, and the breach therefore well assigned; 2dly, That upon a contract for a demise for a term of years, a breach of contract was committed by the lessor resigning, and no agreement could be implied that the tenancy was to enure only so long as the defendant continued vicar; 3dly, That the declaration need not expressly allege what the agreement amounted to, whether an actual demise or an agreement for one; and lastly, That the demurrer being to the whole declaration, and one breach well assigned, the plaintiff was entitled to judgment. *Price* v. *Williams*, 3 Cr. M. & R. 6; and 1 Tyrw. & Gr. 197.

The defendant undertook in writing, that in consideration of the plaintiff's signing a consent to supersede the defendant's commission, he would, in the event of his recovering certain property, liquidate his claim, although not legally liable; held, that the agreement implied a promise to take some step for the recovery of the property. *Edmunds* v. *Wilkinson*, 7 C. & P. 387.

A. the charterer of a vessel, by the charter-party agreed that on the arrival of the ship at the outward port, he would, through his agent there, supply cash to the master for the disbursements of the vessel, to be repaid by bills to be drawn by the master on the owner; on the arrival of the vessel there, the agent supplied goods for the use of the crew, and paid certain money demands made on the master, but did not advance any actual cash: it was held, that although it was not shown that any bills were drawn by the master for the amount, *A.* might recover it from the owner in an action for goods sold and delivered, and for money paid, the master having authority to obtain supplies of goods and money for the necessary use of the ship on the credit of the owner, independently of the express stipulation of the charter-party. *Weston* v. *Wright*, 7 M. & W. 396.

The defendants were employed to effect an insurance on a vessel; held, that, it being a part of their duty to give notice in case of their failure in effecting it, it was properly alleged as a promise implied by the dealing between the parties. *Callander* v. *Oelrichs*, 5 Bing. N. C. 58; and 6 Sc. 761. See further as to implied contracts, *Seaton* v. *Booth*, 1 N. & P. 528; *Halliwell* v. *Morrell*, 1 Scott, N. S. 309.

(*Parties; Joint Contract*, p. 59.)

A. sued *B. C.* and *D.* in a joint action for an attorney's bill. *B.* pleaded *nunquam indebitatus*, and *C.* and *D.* suffered judgment by default; held, that in order to entitle *A.* to a verdict against *B.* the jury must be satisfied that there was a joint contract with *A.* by *B. C.* and *D.* jointly, and that it was not sufficient to show that there was a separate contract between *A.* and *B.* only, even though the evidence would have been sufficient to have supported an action by *A.* against *B.* alone. *Robeson* v. *Ganderton*, 9 C. & P. 476.

Assumpsit for work, &c., against three, one of whom suffers judgment by default, and the others plead the general issue; if the others succeed in showing that all were not jointly liable, it will prevent the plaintiff from succeeding against any, notwithstanding one has admitted on the record a joint contract. *Elliott* v. *Morgan*, 7 C. & P. 334.

Two of three part-owners of a ship authorized a party to sell the ship, which he did, and paid over to the two their respective shares of the purchase-money, held that the third could not maintain a separate action, it being a joint employment of such agent. *Hatsall* v. *Griffith*, 2 Cr. & M. 679.

Assumpsit against two for money had and received, plea alleging a deposit by the plaintiff with the defendants, whilst partners, as a security for faithful services, and that upon an agreement for a dissolution, one received the deposit and took the plaintiff into his sole employ, of which the plaintiff had notice and assented thereto, and discharged the other defendant, on which issue being taken and a verdict found for the defendants, held that the plaintiff was entitled to judgment *non obst. verd.*, no contract being shown which made the latter defendant solely liable to the plaintiff. *Thomas* v. *Shillibeer and another*, 3 Cr. M. & R. 124; and 1 Tyr. & Gr. 290.

(*Legality*, p. 63.)

An agreement was made between the defendant and the plaintiff, and others, creditors of the defendant, that defendant should pay, and that the plaintiff and the other creditors should accept the amount of their debts by certain instalments secured by the defendant's notes; and it was at the same time, without the knowledge or consent of the other creditors, agreed between the plaintiff and the defendant, that the defendant should indorse to the plaintiff a bill accepted by a third party, in order to give the plaintiff a fraudulent preference, and induce him to become party to the composition. The notes being given and the bill indorsed in pursuance of this agreement; held, that the plaintiff could not sue the defendant even on the notes given for the instalments, although the plaintiff had not enforced or received payment of the bill when due. *Howden* v. *Haigh*, 11 A. & E. 1033.

Where on the retainer by the plaintiff of the defendant in his employment the latter gave a bond conditioned that he should not leave the service of the plaintiff without a month's notice, nor "follow or be employed in the said business for nine months after leaving," it was held to be construed to restrain him from being so employed in the service of another in a similar trade; and that as being in restraint of trade, and unlimited as to distance, it was against the policy of the law, and therefore void. *Ward* v. *Byrne*, 5 M. & W. 548.

On a bond conditioned in restraint of trade, the Court will not presume a good consideration, and the declaration must show a sufficient one on the face of it. *Hutton* v. *Parker*, 7 Dowl. 739.

Where the declaration was for "money lent and on an account stated," and the particulars contained only one item for money lent, and it appeared that the debt arose out of a bet; held that, on the plea *non assumpsit*, the question of illegality did not arise, and that the plaintiff might consistently recover on the latter count. *Stevens* v. *Willingale*, 7 C. & P. 702.

Where the contract on the face of the record appeared to be a bargain for a horse, conditioned for his trotting against time, and within the mischief, and against the stat. 9 Ann, c. 14, it was held, that the action could not be maintained. *Brogden* v. *Marriott*, 3 Bing. N. C. 88.

An agreement with assignees for an administration of the estate, at variance with the bankrupt laws, is void. *Stainer* v. *Wainwright*, 6 Bing. N. C. 174.

The defendant, a peer of Parliament, stipulated with the proprietors of an intended railroad to withdraw his opposition on their paying certain sums as compensation, and using their best endeavours after the passing of the Bill to obtain in the next session another, allowing a deviation from the original line: held that such agreement was illegal, and against public policy. *Simpson* v. *Lord Howden*, 1 Keene, 583.

Where a corporation having threatened opposition to a projected railway, the parties entered into an agreement with the corporation; held that the company having received the benefit of such agreement, were bound by it; and that such agreements are not illegal. *Edwards* v. *Grand Junction Railway Company*, 7 Sim. 337; affirmed, 1 Myl. & Cr. 226. 650.

The declaration stated that, in consideration the plaintiff would publish a certain libellous paper, and also at the defendant's request defend an action brought in respect thereof, the defendant promised to indemnify him against all damages and costs; held, that the promise was illegal, and the action not maintainable, and the extent of the damages was too uncertain and amounting to maintenance. *Shackell* v. *Rosier*, 2 Bing. N. C. 634; and see *Farebrother* v. *Ansley*, 1 Camp. 342; *Martin* v. *Blytheman*, Yelv. 197.

Where the defendant, an attorney, was employed by the plaintiff to recover possession of estates, and while he was so employed, an agreement was entered into between him and his client, that he, the defendant, should have possession of the estates delivered to him upon his giving an indemnity to the plaintiff against the costs of recovering the possession, and that the contract should be complete upon payment to the plaintiff of a certain sum within a stated period after the delivery of possession: held, that such contract was void and contrary to public policy: and an account of the dealings between the attorney and client having been decreed, it was held, that the former was bound to prove the consideration for which certain securities were given. *Jones* v. *Thomas*, 2 Younge & C. 498.

The taking money for suppressing an information under a penal statute, is within 18 Eliz. c. 5, s. 4, although no offence has been committed subjecting the party from whom the money is obtained to a penalty. *R.* v. *Best*, 2 Moody, 124; and 9 C. & P. 368.

An agreement by a servant with a cow-keeper, not within twenty-four months after discharge, &c., to carry on the business of a cow-keeper within five miles of Northampton-square, is not void as in restraint of trade. *Proctor* v. *Sargent*, 2 Scott, N. S. 289.

The law does not authorize a private person to forego a prosecution upon any terms; and even if a promise to do so be given and broken in such a manner as a jury would consider scandalous, yet, in point of law, that will not make any difference. *R.* v. *Daly*, 9 C. & P. 342.

A warrant of attorney, given by an attorney to induce a party to stay proceedings against him, on a rule for striking him off the roll, is illegal and void, and the Court will direct it to be taken off the file and cancelled. *Kirwan* v. *Goodwin*, 9 Dowl. 330. See further *Lewis* v. *Davison*, 4 M. & W. 654.

(*Condition Precedent*, p. 64.)

See further as to a condition when precedent. *Kemble* v. *Mills*, 2 Scott, N. S. 121. *Halliwell* v. *Morrell*, 1 Scott, N. S. 309.

On an agreement by the defendant to retake a public-house, which the plaintiff had previously taken of the defendant, and to pay for the good-will, stock, &c., if the landlord would accept him as tenant, and issue taken whether the defendant had requested or used any effort to cause him to do so, and it appeared that upon application by letter the landlord would not let, except at an increased rent; held that the plaintiff was rightly non-suited. *Jeffries* v. *Clare*, 2 M. & W. 43.

Where in assumpsit by assignees for non-performance of a contract to be performed on the 12th June 1835, the declaration averred that the bankrupt before, &c., and the plaintiffs as assignees, were always ready and willing, &c.: it was held, that the bankruptcy and insufficiency of assets were grounds on which the jury might infer that the plaintiffs had not always been ready, &c., and that the plaintiffs having taken no steps towards enforcing the contract until January 1838, the jury might properly infer that they had abandoned it. *Lawrence* v. *Knowles*, 5 Bing. N. C. 399.

(*Moral Obligation*, p. 70.)

A mere moral consideration to support a promise is sufficient in those cases only in which there is a precedent obligation, founded on good consideration, but which, as in the cases of debts barred by lapse of time, certificates of bankruptcy, &c., is not capable of being enforced; where the declaration disclosed only a benefit voluntarily conferred on another, and a promise by the defendant to pay money to the plaintiff, judgment was arrested. *Eastwood* v. *Kenyon*, 3 P. & D. 276; 11 A. & Ell. 438.

(*Money paid*, p. 74.)

The Court of Chancery having refused to compel the performance of an oral agreement for a lease by the testator with the defendant, part of the consideration being paid, his executors agreed to grant one on the same terms, and a lease was accordingly prepared by the attorney of the plaintiffs (executors), who paid his bill, but the lease was not delivered over, the residue of the consideration not having been paid; the plaintiffs were held to be entitled to recover the money so paid for preparing the lease as for money paid, and that in their personal character. *Grissell* v. *Robinson*, 3 Bing. N. C. 10.

Where after a seizure by the excise of spirits, and several applications made for their restoration, first on giving bonds for securing any penalties which might have been incurred, then on paying the value into the receiver's hands, to abide the event, which requests were refused, the defendants subsequently offered to pay the amount at which the spirits were appraised (a writ of appraisement having been sued out in order to their condemna-

tion), upon their restoration, and "to give up all claim to the seizure," and to hold themselves responsible for such proceedings as might be instituted, upon which, on receipt of the value at which they were appraised, the spirits were given up; a general verdict was afterwards found against the parties and one penalty by consent taken; in an action to recover back the former sum paid, held that the payment having been made upon a compromise, and voluntary settlement upon good consideration, the goods having been rightfully taken, it was final, and the action not maintainable. *Atlee* v. *Backhouse*, 3 M. & W. 633.

The plaintiff at the defendant's request entered into a contract for the purchase of Spanish bonds, which the defendant promised to repay; held, in assumpsit for money paid, that the defendant could not object that the executory contract, on which the money had been paid, was not in writing, as required by the Statute of Frauds. *Pawle* v. *Gunn*, 4 Bing. N. C. 445.

Where the occupier of an hotel, not having obtained a wine licence, and being about to quit and transfer the premises to the defendant, had deposited a sum as an indemnity for the expense of procuring the licence, and duly attended the meeting of the magistrates for that purpose, and which would have been granted but for the non-attendance of the defendant; held, that as a case within the 12 sect. of the 9 Geo. 4, c. 61, it was the duty of the defendant to have given the notices required by the Act, and that he could not take advantage of the non-performance of the condition, occasioned by his own neglect, and that the plaintiff was entitled to recover back the sum deposited. *Bryant* v. *Beattie*, 4 Bing. N. C. 254.

Assumpsit for money paid to the use of defendant, a plea, that the payment was made for certain shares which the plaintiff subsequently received, and tortiously misapplied and converted to his own use, and that the defendant had lost all benefit therefrom was held bad on special demurrer, the plaintiff's contract having been once completed, the subsequent tortions act could only be the subject of a cross action. *Francis* v. *Baker*, 2 P. & D. 569.

The master of a coasting vessel borrowed money on the credit of the owner, in a home port, but where the owner had no agent; held to be within the scope of his authority, and that it was properly left to the jury whether necessary or not for the prosecution of his voyage. *Arthur* v. *Barton*, 6 M. & W. 138.

(*Money lent*, p. 79.)

Money is lent on the security of shares, twenty-one days' notice to be given previously to the calling in any part of the loan, and a proportionate part of the shares to be returned. The plaintiff after twenty-one days' notice has expired, may recover for money lent. *Scott* v. *Parker*, 1 G. & D. 258.

(*Money had and received*, p. 79.)

Money taken from a party charged was detained by a police constable after the trial of the party charged; held, that in order to maintain the action against the Commissioners of Police, it must be distinctly proved that the money reached them. *Green* v. *Rowan*, 7 C. & P. 48.

A., an attorney, caused *B.* to be subpœnaed as a witness in a cause in which *A.* was attorney, and *B.*, before he went to the assizes, asked *A.* who was to pay him? and *A.* said he would do so. After the assizes, at which *B.* attended and was examined, *A.*'s clerk, by the direction of *A.* gave *B.* an I O U for the amount of *B.*'s expenses and loss of time, which amount *A.* received from the opposite party after the costs in the cause had been taxed:

held, that *B.* might recover the amount from *A.* on a declaration containing counts for money had and received, and on an account stated. *Evans* v. *Phillpotts*, 9 C. & P. 270.

The defendants had sued the plaintiff as acceptor of a bill in the name, but without the authority, of a party not entitled to recover, and which the plaintiff had paid; the defendants, having no right to the money, it may be recovered back as had and received to the plaintiff's use. *Carman* v. *Edwards*, 9 C. & P. 596. So where goods were consigned by a foreign house to their own account, with directions to the defendants (consignees), to remit the proceeds to the plaintiffs, and advise them of having done so, and the plaintiffs wrote to know the probable amount, to which the defendants replied that they had received the goods with such directions, but had not then disposed of them; and the consignors afterwards failing, the defendants retained the proceeds in satisfaction of their own balance. *Foukling* v. *Schroder*, 2 Se. 135; and 7 C. & P. 103.

Where the plaintiff delivered a sum to the defendant to take to *L.*, who alleged that he lost it at a brothel, but promised to repay the plaintiff, held that the latter might maintain assumpsit for money had and received, there being only the defendant's admission of the loss, which was no proof of the loss; otherwise the action must have been in case for the gross negligence. *Parry* v. *Roberts*, 3 Ad. & Ell. 118; and 5 Nev. & M. 669.

The plaintiff as the minister of a lay rectory of a parish (in which under local Acts district chapels and burial-grounds were erected, with powers to the select vestries to appoint certain salaries to the ministers and preachers), had before and after passing the Acts always received the surplice fees for burials, as part of the profits of the living, until the last year, when the defendant, by order of the select vestry, received and refused to pay them over to the plaintiff; held, that there being no provision for a burying minister, and no title shown in any other party, the defendants were liable in an action for money had and received to the plaintiff's use. *Spry* v. *Emperor*, 6 M. & W. 639.

Where goods consigned to a factor abroad were, after being discharged, confiscated by the Government, and afterwards compensation awarded, held that the factor was entitled thereout to sums paid by him for freight, &c. as money had and received to his use. *Good, ex parte*, 3 M. & Ayr. 246; and 2 Deac. 389.

A party carrying on the wine and spirit business assigned his premises by way of mortgage, with all licences, &c., to the plaintiff; the licence was shortly afterwards forfeited on account of some irregularities by the occupier; the plaintiff afterwards sold the mortgaged premises, under a power in the mortgage deed, without obtaining a new licence, but which the defendant, the assignee of the mortgagor, afterwards obtained, and sold to a subsequent occupier; held, that the licence so obtained by the defendant was not the licence conveyed to the plaintiff, and that the interest having ceased when the premises were sold in discharge of the mortgage, the sum received by the defendant on the sale of the licence was not money received to the plaintiff's use. *Manifold* v. *Morris*, 5 Bing. N. C. 420.

A. entered into partnership with *B.* & *C.*, who had previously carried on the same trade together, and who shortly afterwards became bankrupt: and by an agreement, to which *A.*, and the assignees of *B.* & *C.* were parties, it was agreed that *A.* should realize the assets and liquidate the debts of the firm, and that the official assignee of the bankrupts should be empowered

by *A.* to collect the outstanding debts, and pay the amount to *S.* & Co. bankers, to the account of *A.*, being allowed the usual per centage: held, that *A.* could not alone sue the official assignee, in an action for money had and received, for monies collected by him under this agreement, and which remained in his hands, and of which he had rendered an account to *A.* *Lewis* v. *Edwards*, 7 M. & W. 300.

Where a party, a chapelwarden on going out of office, having money payable to the plaintiff, who refused to receive it until a suit, then pending, was determined, paid it over to the defendant, his successor, with instructions to retain it in his hands until such suit was determined; held, that pending the suit, it was not money received to the use of the plaintiff. *Sewell* v. *Raby*, 6 M. & W. 22.

The agents of the plaintiff in England were directed by him to pay, through the defendants, money to be placed to his credit in India, which was done, and an entry was made in the defendants' books to the credit of their correspondent, to whom they sent advice to account for it to the plaintiff; before the letter of advice reached their correspondent, the latter had failed, having drawn on the defendants, between the date of such letter and the failure, bills which the defendants had accepted to an amount exceeding the amount paid in by the plaintiff; held, that the defendants having only acted as directed, and the situation in which they stood towards their correspondent being altered, the plaintiff could not maintain assumpsit against them for the money so paid in. *M'Arthy* v. *Colvin*, 1 P. & D. 429.

Stock, the trust property of the wife, was improperly sold out by the authority of the husband and wife; it still remained a trust fund in the hands of the agent receiving it, and the husband cannot maintain an action for money had and received, it never having been his money. *Mileham* v. *Eycke*, 3 M. & W. 407.

Upon an agreement under seal, by three persons, for the purchase of a foreign mine, a sum was deposited conditionally, to be repaid to the purchasers, should the property, upon inspection by an agent to be sent out by them, turn out to have been misrepresented; the deed giving a right to sue for the money in covenant, one of them cannot maintain an action for money had and received, although entitled by agreement, not under seal, between themselves; held also, that the agent to be sent out by the purchasers must be a person independent of the purchasers, and not one of themselves, although such an objection might be waived by some instrument under seal. *English* v. *Blundell*, 8 C. & P. 332.

The defendant, an attorney for *A.*, who was really entitled, brought an action in the name of the plaintiff, and recovered, and the jury having found that it was received by him for *A.*; held, that the plaintiff could not maintain an action against the attorney for the money received on the settlement of the claim. *Clark* v. *Dignam*, 3 M. & W. 478.

(*Obtained by Fraud*, p. 83.)

Where a creditor refused to sign a composition deed, unless he received the whole of his claim, and a bill for the remainder was given and afterwards paid; held, a voluntary payment, and not recoverable back as money had and received on an illegal consideration, although the transaction might have been a valid answer to an action on the bill. *Wilson* v. *Ray*, 2 P. & D. 253; and 10 Ad. & Ell. 82.

(*Ignorance of Fact*, p. 86.)

A. had arrested *B.*, who put in bail. A summons was afterwards obtained by the defendant's attorney, for entering an exoneretur on the bail-piece. The clerk to the agent of the plaintiff's attorney gave his consent not knowing that the defendant was at that time a merchant residing abroad; the exoneretur was accordingly entered. The Court having granted a rule *nisi*, calling on the defendant to show cause why the Judge's order should not be rescinded, and the exoneretur entered upon the bail-piece be struck off, made that rule absolute on payment of costs. *Firth* v. *Harris*, 8 Dowl. 437.

But where trustees under an assignment for the benefit of creditors (a *fi. fa.* having on the day of its execution, although before it was executed, been delivered to the agent of the sheriff in town, under which the officer took possession), in order to release the goods, paid the amount, the debtor having previously committed an act of bankruptcy on which a *fiat* issued; held that they could not recover back the money so paid from the sheriff; the delivery of the writ to the town agent was a delivery to the sheriff. *Harris* v. *Lloyd*, 5 M. & W. 432.

(*Account stated*, p. 87.)

Evidence that one of two defendants examined the account, objecting to one item only, and promising to send corn for the balance; that both the defendants were present when the debt was mentioned, without its being objected to, at a meeting of creditors; and that the other defendant had admitted that a debt was due: is sufficient to warrant a jury in finding the amount due on an account stated. *Chisman* v. *Count*, 2 Scott's N. S. 569.

A statement by the defendant in a letter, that he did not know exactly how much was due from him, but that he should think it might be —— *l.*, is not sufficient evidence of an account stated; to constitute it, there must be a statement of some certain amount being due. *Hughes* v. *Thorpe*, 5 M. & W. 656.

Allegation that an indictment had been preferred, a true bill found, and the trial put off to another sessions, and that the defendant had agreed to pay the costs of the day; held, 1st, that the fact of a true bill having been found could only be proved by a record made up, and not by the indictment itself indorsed as a true bill; and, 2dly, that the memorandum indorsed and signed by both counsel on the brief, and the amount of costs afterwards adjusted, was evidence to go to the jury on an account stated. *Porter* v. *Cooper*, 6 C. & P. 354.

At a meeting of the plaintiff and defendant to settle an account, the clerk of the former made the entries in one book, which the defendant copied into another, no admission, however, was made as to the correctness of the items, but the defendant admitted that the balance against him, as stated by the clerk, was correct, yet added, that as he had done many things, there would not be much, if anything, between them; held, that the plaintiff's book would not bind the defendant so as to require its production or its absence to be accounted for; and, that the defendant's admission was evidence of something due on the account stated. *Rigby* v. *Jeffrys*, 7 Dowl. 561.

One surveyor of the highways, being in advance, agreed to deliver up

the books to the other, to enable him to collect the rates, the latter undertaking to reimburse him what was due out of the monies he should collect, and the book was delivered over, but the defendant, having collected, neglected to pay; held that the plaintiff was entitled to maintain the action on an account stated. *Liddard* v. *Holmes*, 2 Cr. M. & R. 586; S. C. 1 Tyr. & Gr. 9.

A party kept an account with the defendant, and afterwards becoming lunatic, the account was continued by the family, and a balance was stated in the pass-book to the credit of the lunatic; in an action by his representative after his death, to recover such balance, there being no evidence of an accounting with him, nor with any one appointed by him, or competent to state it on his part, it was held that the action was not maintainable. *Turbuck* v. *Bipsham*, 2 M. & W. 2.

Where the plaintiff proved that the sum sought to be recovered on the account stated was an admitted item in an account by the defendant, and in respect of which he had paid interest, but the defendant proved that it arose out of a transfer of the debt of a third party to the plaintiff, under a mistaken authority, and which was negatived by such third party, who had since settled with the plaintiff all claims; held that the defendant was entitled to prove those facts, and if believed, it entitled him to a nonsuit. *Pierce* v. *Evans*, 2 Cr. M. & R. 294.

Under *non assumpsit* the defendant may show that the account admitted by him was in fact incorrect. *Thomas* v. *Hawkins*, 8 M. & W. 140.

(*Defence under the New Rules*, p. 101.)

A plaintiff declared specially in *assumpsit*, that in consideration that the plaintiff had sold and delivered twenty tons of best Dutch lead to the defendant, the latter had promised to deliver to the plaintiff prussiate of potash to the same amount; and the plaintiff averred the delivery of the twenty tons of best Dutch lead, and stated as a breach, that the defendant would not deliver the full quantity of potash. The defendant pleaded *non assumpsit*; held, that as the defendant had not pleaded that the plaintiff had not delivered best Dutch lead, he could not go into evidence to show that the lead was of inferior quality. *Pegg* v. *Stead*, 9 C. & P. 636.

In *assumpsit* for timber bargained and sold, held that if there were a false representation of its quality, it must be specially pleaded, and that upon the issue whether the timber was *sound* or not, that word having a technical meaning in the timber trade, evidence of its meaning by the custom of the timber trade was admissible. *Woodhouse* v. *Smith*, 7 C. & P. 310.

In *assumpsit* for goods bought at an auction, held that the defendant might prove under the plea of *non-assumpsit*, that, by a special contract with the plaintiff, the sum at which the goods were knocked down by the defendant might be set off against a legacy payable to him by the plaintiff, and that there was, in fact, no sale between the parties. *Bartlett* v. *Parnell*, 6 Nev. & M. 299; and 4 Ad. & Ell. 792.

In *assumpsit* against the charterer for demurrage, under the plea of the general issue, the defendant cannot object that the plaintiff has not complied with the provisions of 3 & 4 Will. 4, c 52, s. 108, requiring notice to be given to the collector of customs, &c. previously to the unlading; such a defence ought to be specially pleaded. *Alcock* v. *Taylor*, 6 Nev. & M. 296.

In *assumpsit* for money paid on a policy effected for the defendant, plea—that the policy in respect of which the alleged payments were made was so framed as to be utterly useless to him; *semb.* the defence might well form the subject of a special plea, and a demurrer thereto, as amounting to the general issue, was allowed to be withdrawn. *Cole* v. *Le Sœuf*, 3 Sc. 188; and 5 Dowl. 41.

(*Defence, gift*, p. 102.)

Where a claim was made in the action for services on the one hand, and for board and lodging as a set-off on the other, the plaintiff and defendant being brothers, and the plaintiff living with and assisting the defendant in his business; held, that unless the jury were satisfied of a contract, express or implied, no *ex post facto* charges could be made. *Davies* v. *Davies*, 9 C. & P. 87.

(*Performance*, p. 102.)

In *assumpsit* for not delivering possession of premises, agreed to be demised, a part of which consisted of small cottages, occupied by weekly tenants, of which the plaintiff was aware, and made no objection, held that it was sufficient to justify a finding by the jury in favour of a plea stating the circumstances, and that plaintiff agreed to accept the attornment of the tenants instead of an actual delivery of possession. *Palmer* v. *Temple*, 6 Nev. & M. 159.

(*Merger, &c.*, p. 104.)

At the time of the assignment of a lease by defendant to plaintiff, rent was in arrear, which the plaintiff paid under a distress; held, that the defendant having granted, by deed of assignment, the premises, with the usual covenant for quiet enjoyment, *assumpsit* would not lie on the implied contract to indemnify the plaintiff, nor on an express contract to repay without some new consideration. *Baber* v. *Harris*, 1 P. & D. 360.

Where, in *assumpsit* for money, the issues on the pleas *non-assumpsit*, and a bond given and accepted in satisfaction of the debt had been found for the plaintiff, the Court refused a new trial, on the ground that the implied promise had merged in the specialty. *Weston* v. *Foster*, 2 Bing. N. C. 693.

The plaintiff and defendant entered into a deed of agreement for the performance of certain chemical services, and the deed contained a power to determine it by notice in case of the experiments not succeeding before a certain date; they afterwards entered into another agreement not under seal, referring to the former deed, and amounting simply to an extension of the time; held, that the deed not having been determined, the action of *assumpsit* for the latter agreement was not maintainable. *Gwynne* v. *Davy*, 9 Dowl. 1; and 2 Sc. N. S. 29.

(*Performance impossible*, p. 104.)

The defendant signed an agreement to pay a debt for which a third party was in execution, or to surrender him to the sheriff; held, that as the latter alternative could not be by law performed, the agreement operated as an absolute one for payment of the money. *Stevens* v. *Webb*, 7 C. & P. 60.

ATTAINDER, p. 106.

A conviction without attainder not necessarily avoiding a subsequent conveyance, held that a conveyance by a party convicted of bigamy was not

void as against the Crown. *R.* v. *Bridger*, 3 Cr. M. & R. 145; and 1 Tyr. & Gr. 437.

ATTEMPT.

Every attempt (not every intention) to commit a misdemeanor, is a misdemeanor. *R.* v. *Martin*, 9 C. & P. 215; *R.* v. *Roderick*, 7 C. & P. 795.

ATTORNEY, p. 106.

(*Retainer and business done*, p. 107.)

In an action on his bill after an order for taxation and *allocatur* thereon, the defendant having attended the taxation, evidence of the business having been done is not necessary. *Wilson* v. *Knapp*, 2 M. & R. 160.

By the terms of a memorandum for a lease for a term, if lessor should so long live, made by the lessor's attorney, the plaintiff, it was stipulated that the lease was to be prepared by the plaintiff at the expense of the lessee; the lessor dying before the lease was signed, held that the jury were justified in finding a retainer by the defendant for the plaintiff to perform the work. *Webb* v. *Rhodes*, 3 Bing. N. C. 732.

In an action for work and labour for agency business in the Court of Chancery by the two plaintiffs, partners, the objection that one had not been admitted a solicitor of that Court, can only be taken advantage of on being specially pleaded. *Hill* v. *Sydney*, 3 Nev. & P. 161.

The appearing for a prisoner before a judge on summons does not constitute him attorney in the suit. *Spencer* v. *Newton*, 5 Ad. & Ell. 823.

In an action on an attorney's bill and plea *nunquam indebitatus* pleaded, it is competent for the plaintiff to show that a greater amount is due to him than the Master allowed on taxation, pursuant to an order for changing the attorney in the course of the cause in which the costs were incurred. *Beck* v. *Cleaver*, 9 Dowl. 111.

(*Delivery of bill*, p. 108.)

Business is done by an attorney for a person who afterwards becomes an attorney, the former need not deliver a signed bill previously to bringing an action. *Windsor* v. *Herbert*, 9 Dowl. 237; 7 M. & W. 375.

An attorney's bill delivered by his executor before action brought is not taxable. *Doe* d. *Sabin* v. *Sabin*, 8 Dowl. 468.

A bill of charges for business in the Central Criminal Court is taxable by order of a Judge of one of the superior courts. *Curling* v. *Sedger*, 4 Bing. N. C. 743; 6 Sc. 678; and 6 Dowl. 759.

Where above one-sixth has been taken, a Judge at chambers may compel him to pay the costs of taxation. *Sykes* v. *M'Clise*, 8 Dowl. 145.

Charges for taking the acknowledgments of married women since 3 & 4 W. 4, c. 74, being now only statutory conveyances, are not taxable items within the statute for taxing attornies' bills. *Brandon, in re*, 3 Bing N. C. 783; and 5 Dowl. 623.

In an action by an attorney to recover the amount of his bill, with the common counts; held, 1st, that a bill signed, consisting of some items in the aggregate, and others relating to business duly stated, others not, was sufficient to entitle him to recover as to the portion so duly stated; 2dly, and that as to aggregate items, not being for business, he might recover

under the common count; 3dly, that a charge for extra costs, not stating the items, nor enabling the Master to see whether the charges were according to the course of the cause, was insufficient; 4thly, that he could not appropriate a sum received by him without the knowledge of the defendant to any particular part of his demand; and, lastly, the plaintiff having at the foot of his bill given credit for a particular sum received, and "Mr. *L.*'s bill," leaving a blank for the amount, was a sufficient acknowledgment of something being due to take it out of the statute, and which might be supplied by parol evidence. *Waller* v. *Lacy*, 1 M. & G. 54; 1 Sc. N. S. 186; and 8 Dowl. 563.

(*Defence—Negligence*, p. 111.)

Where the attorney, employed to conduct an appeal at the sessions against an order of removal, neglected to enter and respite at the first sessions, and delivered the notice of the grounds of appeal, signed by himself and not by the officers, and the sessions refused to hear it, and the order stood confirmed; held, that having throughout shown a want of professional skill which every attorney is bound to have, and the defendants having derived no benefit from his services, he was not entitled to recover. *Huntley* v. *Bulwer*, 6 Bing. N. C. 111.

(*Action against*, p. 112.)

The plaintiff's attorney on the record has no authority by virtue of his retainer to discharge a defendant in execution out of custody without receiving payment of the sum for which he is detained. In debt by the assignee of *A.*, a bankrupt, against the marshal for an escape after the choice of trustees of a prisoner in execution at the suit of *A.*, before his bankruptcy, it was pleaded that before the marshal had notice of the bankruptcy, the attorney of *A.* the plaintiff in the action did as such attorney require and direct him to discharge the prisoner out of custody, and as such attorney did give licence to the marshal for the discharge, and that the marshal, before notice of the bankruptcy, in pursuance of such requirement and direction, discharged the prisoner: Held on demurrer, that the plea was no answer to the action, as it did not show any sufficient power in the attorney, as such, to authorize the discharge. *Savory* v. *Chapman*, 8 Dowl. 656.

The plea ought to show either that the plaintiff had given express authority for the discharge, or that the amount for which the execution issued had been paid to him or his attorney.

Quære, whether a plea in the latter form would justify the marshal, if the plaintiff suing out execution had become bankrupt between the commitment and the order to discharge, and an action of escape was brought by his assignee. *Savory* v. *Chapman*, 8 Dowl. 656.

The attorney is not liable for refreshments supplied to witnesses attending the trial, unless there be evidence to satisfy the jury that he has sanctioned the supply. *Fendall* v. *Nokes*, 7 Sc. 647.

An attorney who practises in the county court, after having omitted for a year to take out his certificate, is not liable to penalties under the statute 12 Geo. 2, c. 13, s. 7, as a person practising without having been legally admitted according to the st. 2 Geo. 2, c. 23. *Hodkinson* v. *Mayer*, 6 Ad. & Ell. 194.

(*Undue Influence*, p. 115.)

Where a jury had found that a deed had been obtained from the client, not by fraud, but by undue influence, the Court held that the question, whether undue influence is to be inferred from the nature of the transaction, or is against the policy of the law, being one for the Court and not for the jury, and being of opinion that the circumstances, although suspicious, did not show that the deed was obtained by the influence of the party in the character of a solicitor, granted a new trial. *Casborne* v. *Barham*, 2 Beav. 76.

(*Revocation of authority.*)

The death of the client revokes the authority of the attorney, and it is immaterial that he has a lien for his costs. *Showman* v. *Allen*, 1 M. & G. 94.

AWARD, p. 116.

A certificate is not distinguishable from an award, and the parties must abide by the decision of the arbitrator, although he may be mistaken. *Price* v. *Price*, 9 Dowl. 334.

(*Error, &c. on the part of the Arbitrator, p.* 118.)

Although the award be good upon the face of it, yet, if the arbitrator, upon being told that it was intended to have his judgment appealed against, in furtherance of that appeal assigns an erroneous ground for the decision he has pronounced, the Court will interfere. *Jones* v. *Corry*, 5 Bing. N. C. 187; and 7 Dowl. 298.

An order of reference directing the parties and witnesses to be examined, if the arbitrator should think fit, upon oath, to be sworn before a Judge or Commissioner, does not restrain the arbitrator, under 3 & 4 Will. 4, c. 42, s. 41, from himself administering the oath. *Hodson* v. *Wilde*, 7 Dowl. 15; and 4 M. & W. 536.

Where the parties have intentionally allowed the time to expire without enlargement, the Court has no power under 3 & 4 Will. 4, c. 42, to compel the parties to proceed with the reference. *Doe* d. *Jones* v. *Powell*, 7 Dowl. 539.

As to setting aside on the ground that two or three arbitrators acted on the opinion of counsel in a case inaccurately stated, see *in re Milne*, 8 Scott, 367.

A delegation by an arbitrator of an authority to settle a dispute between the parties, is an excess of authority. *Tandy and Tandy, In re*, 9 Dowl. 1044.

(*By an umpire.*)

Where the reference was to two arbitrators and an umpire, and the agreement to perform the award of the said arbitrators and their umpire, and it was made by the arbitrators only, the Court refused an attachment. *Heatherington* v. *Robinson*, 7 Dowl. 19; and 4 M. & W. 608.

The appointment of an umpire by lot consented to by the attornies' clerks, and not by the attornies or their clients, is bad, although the parties, ignorant of the fact, attended before him. *Hodson & Drewry, in re*, 7 Dowl. 569. And see *Greenwood and another, in re*, 1 P. & D. 461.

(*Publication.*)

A cause was referred by a Judge's Order to two arbitrators, with liberty to appoint an umpire, so that he should make and publish his umpirage in writing, ready to be delivered to the parties on or before the 15th July next. On the afternoon of the 12th July, the umpire sent notice to the parties that he was about to declare his award, which was dated the 11th, and desiring them to attend at his office at five o'clock that evening, which they accordingly did. At ten o'clock in the morning of the same day the plaintiff died; held, that there was a publication of the award in the lifetime of the plaintiff. The term "publication" in a subscription to arbitration, means such notice of the award as will enable the parties to obtain knowledge of its contents. By analogy to the 9 & 10 W. 3, a party seeking to set aside an award made by Judge's Order, must apply within the time limited by that statute. *Brooke* v. *Mitchell*, 8 Dowl. 392.

(*Award, defective when*, p. 115.)

An award is good although it does not distinguish what is awarded in respect of the action referred, from what is awarded in respect of matters in difference. *Taylor* v. *Shuttleworth*, 8 Dowl. 281.

To a declaration containing a claim of 200 *l.* for horse keep, and 250 *l.* for goods sold, the defendant pleaded, except as to 150 *l.* 14 *s.* 8 *d.* non-assumpsit, and as to that sum payment. The cause was referred, and the arbitrator awarded that the first issue should be entered for the plaintiff, with 14 *l.* 4 *s.* 9 *d.* damages; that the second issue, so far as related to 150 *l.* should be entered for the defendant and the residue for the plaintiff; held sufficient —the arbitrator was not bound to find the first issue distributively. *Bird* v. *Penrice*, 8 Dowl. 775.

Award, when void for excess in directing costs to be taxed as between attorney and client. *Sechham* v. *Babb*, 6 M. & W. 129; and 8 Dowl. 167. When wholly void for excess. *Bowes* v. *Fernie*, 4 M. & C. 150. And see *Price* v. *Popkin*, 10 Ad. & Ell. 139; and 2 P. & D. 304.

Where a cause in which several issues are raised on the pleadings is referred, the arbitrator is bound to find expressly on each, although he is not requested to do so by the parties. Therefore, where to a declaration a defendant pleaded several pleas, and the arbitrator was not requested to find specifically on each, and he awarded merely that the plaintiff had no cause of action, and directed a verdict to be entered for the defendant, the award was held to be bad. *England* v. *Davison*, 9 Dowl. 1052.

(*Revocation of authority*, p. 118.)

The bankruptcy of the defendant before the making an award, is not a ground for setting aside the award. *Taylor* v. *Shuttleworth*, 8 Dowl. 281. Nor insolvency, *Hobbs* v. *Ferrars*, ib. 779.

An award directs a sum to be paid on a day appointed, the duty is a continuing duty, although no demand be made on the day fixed. *Craike, in re*, 7 Dowl. 603.

By the stat. 3 & 4 W. 4, c. 42, s. 39, a submission to arbitration by rule of Court, is not revocable without leave of Court;

And by sec. 40, the Court, or any Judge of the Court, may, by rule or order, compel the attendance of any witness before an arbitrator or umpire.

Sec. 41. Such arbitrator has power to administer an oath.

The statute does not extend to the reference of criminal but of civil matters only; where, therefore, an indictment for a conspiracy has been referred, the submission may be revoked. *R.* v. *Bardell*, 1 N. & P. 74.

So where an indictment for conspiracy had been referred, and the authority afterwards revoked, and the defendants refused to proceed to the reference; held not a case within the 3 & 4 Will. 4, c. 42, s. 39, requiring the leave of the Court or a Judge to revoke. *R.* v. *Shillibeer and others*, 5 Dowl. 238.

(*Statement of objections to.*)

It is insufficient to state the grounds of objection to an award in a rule for setting it aside in general terms, as, that the award is not final, that the arbitrator has exceeded his authority, that the award is uncertain, or that the arbitrator has not awarded on all the matters referred to him. *Gray* v. *Leaf*, 8 Dowl. 654.

(*Arbitrator, liability of.*)

Money deposited with an arbitrator as a stakeholder is not recoverable by the assignees of the depositor on his becoming bankrupt before the award made. *Taylor* v. *Shuttleworth*, 2 Scott's N. S. 375. *Qu.* Whether bankruptcy operates as a revocation of the arbitrator's authority, under an order of Nisi Prius. *Ib.*

BANKRUPTCY.

(*Proofs by assignees*, p. 122.)

Assignees under an Irish commission may sue for debts contracted here. *Fergusson* v. *Spencer*, 2 Scott's N. S. 229.

(*Fiat—Misnomer*, p. 122.)

The Court refused, on the petition of the bankrupt, to annul the fiat, on the ground that he was described in it as "*John G.*," instead of "*John Christian G.*," his right name, he having been examined before the commissioner, and never mentioned that he was wrongly named in the fiat. *Ex parte Gilligan*, 1 Mon. D. & D. 144.

(*Depositions*, p. 123.)

Where under no circumstances the bankrupt could have brought the action, *semb.* the depositions will not be evidence. *Hare* v. *Waring*, 3 M. & W. 376.

And although they may be conclusive of the facts recited, yet that would not exclude the defendant from showing that although true, the plaintiff could not avail himself of them, as being a party to a concerted act of bankruptcy. *Ib.*

On a petition of the bankrupt to annul, supported by affidavits impeaching the validity of the petitioning creditor's debt and the act of bankruptcy, the depositions on the proceedings are not admissible in evidence against the bankrupt to establish these requisites. *Ex parte Prescott*, 1 Mont. D. & D. 199.

(*Trading*, p. 126.)

Two attornies in partnership lent money on mortgage to a party engaged in a building speculation, and the mortgage being forfeited they took pos-

session of the carcases of the houses, and furnished them at their own expense, for the purpose of selling or letting them; they also purchased a a few other carcases, not in their character of mortgagees, which they employed a builder to finish for the same purpose. Held that this was not a joint trading as *builders*, within the meaning of the bankrupt laws. *Ex parte Edwards*, 1 Mon. D. & D. 3.

A party, having no other visible occupation, was made a bankrupt, as a dealer in yachts. The only evidence of trading was, that upon three several occasions he bought and sold a yacht for profit, realising on such sale a profit of 190 *l.*; and that on some of these occasions he employed a broker, to whom he said, that "he thought it no disgrace thus *to increase his income*;" but there was no direct evidence that he thus dealt, *for the purpose of gaining his livelihood*, or that he was considered as a trader by any person who knew or dealt with him. *Quære*, whether this is sufficient evidence of a trading within the bankrupt laws. *Ex parte Cromwell & Knight*, 1 Mon. D. & D. 158.

By the 6 Geo. 4, c. 16, s. 2, it was intended to include all builders, persons being builders with intent to gain a profit and livelihood thereby, whether they build on their own land or on that of others, on lease or otherwise. *Neirinckx, ex parte*, 2 Mont. & Ayr. 384; and 1 Deac. 78 But see *ex parte Edwards, supra.*

A single act of buying and selling as a farmer, with any evidence of intent to continue it, is a sufficient evidence of trading. *Lavender, ex parte*, 4 D. & Ch. 487.

But the proof of one single act of trading, without evidence of a general intention to trade, was held to be insufficient, and the petitioning creditor is bound to establish the affirmative. *Wilkes, ex parte*, 2 Deac. 1; and 2 M. & Ayr. 667. And where a party exercising the profession of a proctor was made bankrupt as a bill-broker, the evidence being of his having once been employed to get a bill discounted, not naming the parties, or the particulars of any one bill, it was held to be insufficient to support the proof of trading. *Harvey, ex parte*, 1 Deac. 571; and see below, *Brundrett, ex parte.*

Where an auctioneer was shown to be continually in the habit of buying and selling goods, as well as of bidding at auctions, it was held to be a trading within the bankrupt law. *Moore, ex parte*, 3 M. & Ayr. 131.

So where a farmer was in the habit of purchasing more sheep than were required to stock his farm, and selling immediately the excess without shearing or any pasturing on his farm, held to amount to a trading as a sheep salesman within the bankrupt law. *Newall, ex parte*, 3 Deac. 339.

A surgeon and apothecary selling drugs, not merely to patients, but to any who might apply, is a trader within the bankrupt law. *Daubeny, ex parte*, 2 Deac. 72; and 3 M. & Ayr. 16.

Where the bankrupt held shares in a joint-stock banking company, and received dividends for two years, it was held to constitute a sufficient trading as a banker. *Wyndham, ex parte*, 1 Mont. D. & D. 146.

The mere buying of hay and corn by a livery-stable keeper, to be used merely by the horses of particular persons taken in, and not generally, held not a trading within the Act. *Lewis, ex parte*, 3 M. & Ayr. 199; and 2 Deac. 318.

The trade of a scrivener by an attorney is not established by proof of the party having merely negotiated money loans, receiving a procura-

tion fee; nor by his having received money on mortgages called in, and left in his hands, for which he paid interest to his employer down to the time of his bankruptcy. *Lott* v. *Melville*, 9 Dowl. 882. So a mere dealing in accommodation bills, without proof of any place of business or capital, and no proof of any specific bill discounted, was held to be insufficient to establish a trading as a bill-broker. *Phipps, ex parte*, 2 Deac. 487. So a purchase of shares in a banking company, without any intention of following the business of a banker, is insufficient. *Brundrett, ex parte*, 2 Deac. 219; and 3 M. & Ayr. 50. And where the party took a lease of land containing salt pits, on which he expended money in materials for converting the brine produced therefrom into salt, held not to constitute a trading within the bankrupt law; held also, that the holding shares in a salt company for one week, during which he derived no profit therefrom, was not such a seeking his livelihood as constituted a trading. *Athinson, ex parte*, 1 Mont. D. & Y. 300.

Letting furnished lodgings does not constitute a trading, although the furniture is purchased for the purpose of being let. *Bowers, ex parte*, 2 Deac. 99; and 3 M. & Ayr. 33.

Quære, if a coach proprietor be a trader within 6 Geo. 4, c. 16; *semble*, he is not: he contracts to carry, not to let. *Walker, in re*, 2 Mont. & Ayr. 270 *n.*

(*Act of bankruptcy: otherwise absent himself*, p. 134.)

The mere failure in keeping an appointment with a creditor is not sufficient to constitute an act of bankruptcy; and where pending a negotiation for a loan he was arrested in the country and discharged on bail, having promised to meet the creditor on the following morning, and give a security, but he proceeded to London to procure part of the loan, intending to pay the creditor instead of giving the security, and wrote accordingly to the solicitor to that effect, promising to return in day or two, but was delayed by the negotiation; held, that the intent to delay was rebutted. *Lavender, ex parte*, 4 D. & Ch. 484.

Where it appeared, upon the trial of an issue whether an act of bankruptcy had been committed, that on the preceding day the trader had sent a letter from his place of residence to his place of business, stating his inability to meet his engagements, and directing himself to be denied to creditors, and he immediately quitted home, and remained absent during that and the following day, and a witness who saw him stated that he said he was not in a hurry to get home, and should not go early, as he had creditors who would lay hold of him; held an act of bankruptcy, although the jury said that they did not believe he spoke *bonâ fide*; held also, that evidence of his declarations and conduct on the following day were inadmissible to explain his conduct on the day in question. *Johnston* v. *Woolf*, 2 Scott, 372.

(*Denial to a creditor*, p. 136.)

A bankrupt, after being denied to a creditor, acknowledged in the course of the same day to a third person, that he had given orders for that purpose, as he knew the creditor wanted money. This acknowledgment is evidence against the bankrupt, on his petition to annul the fiat. *Ex parte Prescott* 1 Mon. D. & D. 199.

On such petition the depositions on the proceedings are not admissible against the bankrupt in support of those facts. *Ib.*

An order to deny, not followed by a shutting up the house, or withdrawing from it, *semble*, would not amount to an act of bankruptcy. *Hare* v. *Waring*, 3 M. & W. 376.

And see *Fisher* v. *Boucher*, 10 B. & C. 705.

(*Fraudulent conveyance*, p. 138.)

A trader in solvent circumstances being pressed to execute an assignment of his property for the benefit of his creditors, declines to do so, and offers a composition instead. Next day, his solicitor concurs in calling a meeting of the trader's creditors at the place where he carried on business, for the purpose of having a statement made to them of his affairs. The trader's non-attendance at this meeting is an act of bankruptcy, although personally he might have made no promise to attend, and although his solicitor attended to explain the state of his affairs. *Ex parte Beer*, 1 Mon. D. & D. 390.

(*Fraudulent preference*, p. 140.)

In trover by the assignees of bankrupt to recover the value of goods, alleged to have been delivered to the defendant in contemplation of bankruptcy, evidence that the goods were delivered in payment and satisfaction of a debt due from the bankrupt to the defendant, does not support a plea alleging that the goods were *bonâ fide* sold and delivered to the defendant by the bankrupt before the issuing of a fiat, and without notice of an act of bankruptcy, and that the defendant *bonâ fide* paid for them. *Backhouse* v. *Jones*, 8 Scott, 148; 6 Bing. N. C. 65.

In an action by assignees, upon a question of fraudulent preference, before any evidence given of the bankruptcy or insolvency, declarations of the party, showing a consciousness of his being in insolvent circumstances, are admissible, the fact of insolvency being afterwards proved *aliunde*, although *semble* the latter fact should, strictly, be first proved. *Thomas* v. *Connell*, 4 M. & W. 267.

Where a voluntary payment is made by a party to a creditor at the time his circumstances are such as must end in bankruptcy, and the belief of which must be operating on his mind at the time of payment, it is void as a fraudulent preference; *aliter*, if he has a reasonable and *bonâ fide* expectation that he may still be extricated from the impending bankruptcy: this being a question peculiarly for the jury, the Court will reluctantly interfere with their finding, and *semb.* only where the preponderance of evidence is strong, and it is clear that injustice has or may be done. *Gibson* v. *Boutts*, 3 Sc. 229.

Where the deposit was only a few days before the bankruptcy, and no pressure shown, satisfactory evidence is required that it was not made in contemplation of the bankruptcy. *Morgan ex parte*, 1 Mont. D. & D. 116.

Where the defendant acted as the agent in the sale of a bankrupt's goods, with the fraudulent purpose of benefiting himself, but the purchaser acted *bonâ fide* and in ignorance of the purpose of the bankrupt; held, that there being no delivery at all to the defendant, and no fraud on the part of the buyer, it did not constitute an act of bankruptcy. *Harwood* v. *Bartlett*, 6 Bing. N. C. 61; and 8 Sc. 171.

The 6 Geo. 4, c. 16, s. 120, applies only to parties assisting the bankrupt in the concealment of his goods, and not to a case of debtor and creditor;

semb., a creditor might, however, come within the Act, although a fraudulent preference is intended: but a separate penalty cannot be recovered for each distinct act of concealment. *Brooks* v. *Glencross*, 2 M. & R. 62.

Where a party conveyed a portion of landed estate to his creditors, and nothing was done for five years, nor bankruptcy in that time, held that there was no ground for saying that in executing the deed a fraudulent preference was intended, or that it was in contemplation of bankruptcy. *Cattell* v. *Corrall*, 4 Younge & C. 228.

(*One privy, &c.*, p. 144.)

Where a fiat issued on a concerted act of bankruptcy, and four months elapsed before a creditor petitioned to annul it, and it appeared that the bankrupt had committed another act of bankruptcy, which was not concerted, and the assignees were not privy to the concert, and wished the fiat to proceed; the Court refused to annul it. *Ex parte Bostock and others*, 1 Mon. D. & D. 344.

The bankrupt, previous to the fiat, having called a meeting of his creditors at Manchester, *H. & Co.*, creditors at Halifax, wrote to *G.*, an attorney at Manchester, to attend the meeting on their behalf, saying, "we will leave our interests in your hands." In pursuance of the resolutions passed at the meeting, which were communicated to *H. & Co.*, a trust-deed was prepared by *G.*, and executed by the bankrupt and many of the creditors, but not by *H. & Co.* A dividend was afterwards declared by the trustees, of which *H. & Co.* were also informed, without any objection to the arrangement. They cannot afterwards set up this deed as an act of bankruptcy. *Ex parte Teald*, 1 Mon. D. & D. 210.

Where at a meeting of creditors the bankrupt signed a declaration of insolvency, upon an understanding that it should not be gazetted unless necessary; held, that it was discretionary with the creditors, and that he could not, in the absence of bad faith, afterwards object. *Rowe, ex parte*, 1 Mont. & Ch. 334; and 4 Deac. 68.

(*Petitioning Creditor's Debt*, p. 146.)

An order made by the Lord Chancellor under stat. 6 Geo. 4, c. 16, s. 18, must show on the face of it whatever is necessary to give jurisdiction; *e. g.* that the creditor applying to have his debt substituted for that of the petitioning creditor had proved a sufficient debt before making the application.

And this is not shown sufficiently by stating that the application was made by persons who were creditors of the bankrupt, "and that their debt" proved under the fiat, "or so much thereof as was sufficient to support such fiat," was incurred not anterior to the debt of the petitioning creditor.

Where the order stated such application made by *B.*, and that the debt of *C.*, the petitioning creditor, was insufficient to support the fiat, and that the debt of *B.*, proved under the fiat, was incurred not anterior to the said debt *of B.* (instead of "*C.*"): held, that the words "of *B.*" might be rejected as surplusage, and that the order sufficiently showed *B.*'s debt to be not anterior to that of the petitioning creditor. *Christie* v. *Unwin*, 11 A. & E. 373.

In an action by assignees of a bankrupt, for money had and received by the defendant to their use, the defendant pleaded non-assumpsit, and that the plaintiffs were not assignees *modo et formâ*, and gave notice to dispute *the bankruptcy*. One act of bankruptcy was proved, none other being suggested: held, that the plaintiffs were not bound to prove the existence of a good petitioning creditor's debt at the date of the act of bankruptcy. *Porter* v. *Walker*, 4 Scott, N. S. 568; 1 Mann. & G. 686.

One of two partners gives an acceptance, in the name of the firm, for a pre-existing debt of his own, without the authority of the other partner. This acceptance is not a good petitioning creditor's debt, to support a joint fiat against the two partners. *Ex parte Austen*, 1 Mon. D. & D. 247.

Where a creditor proceeds against his debtor, under the 1 & 2 Vict. c. 110, s. 8, and is privy to the suspension of the payment of the debt until after the expiration of the twenty-one days limited by the statute, he cannot support a fiat as petitioning creditor against the debtor, on the ground that he has not paid or secured the debt within the twenty-one days. *Semble* that an examination of a party before the commissioners cannot be read even against himself, unless notice has been given of the intention to read it; but an affidavit may be made of the contents of such examination. *Ex parte Budd*, 1 Mon. D. & D. 436.

A. owed *B.* 277*l.*, and, to secure the amount, deposited with him bills to the amount of 1,518*l.* drawn by *A.* and accepted by *C.* *A.* and *C.* both became bankrupt. Held that *B.* might prove the full amount of the bills under the fiat against *C.*, but not receive dividends beyond the sum of 277*l.* *Ex parte Phillips*, 1 Mon. D. & D. 232.

A. being a *bonâ fide* holder of two bills accepted by the bankrupt, for the payment of which he also held a security,, transfers the security to *B.*, who proves for the amount under the fiat; held that such proof did not prevent the right of *A.* to prove also on the bills, though it might be a question for future consideration whether he would be entitled to receive dividends on such proof. *In the matter of Barham*, 1 Mon. D. & D. 179.

The insertion of a debt in the schedule of an insolvent does not extinguish the debt for all purposes; it may be made a good petitioning creditor's debt. *Barrington, ex parte*, 2 Mont. & Ayr. 255; and 1 Deac. 3.

A note given to a creditor for the remainder of the debt released under a deed of composition, being *nudum pactum* and void, is an insufficient petitioning creditor's debt. *Hall, ex parte*, 1 Deac. 171.

Quære, whether a mortgagee in trust can issue a *fiat* on the mortgage debt. He may, after he has established it by an action at law. Where a partner treated the debt as mixed up with the partnership, held that he could not afterwards sustain a *fiat* thereon. *Gray, ex parte*, 2 Mont. & Ayr. 283.

Where part only of the debt, but insufficient to support the *fiat*, was contracted during the trading, and the residue after the trading had ceased, it was held that the *fiat* could not be supported; *secus* if part had been contracted before, and the residue during the trading. *Dolby, ex parte*, 1 Mont. & C. 636.

A debt made up of a sum paid in part of a bill, and the remainder unpaid, but the bill in the hands of an adverse holder, held bad. *Caldecott, ex parte*, 1 Mont. & Ch. 600. Where part of the debt was a bill of costs, held that in ascertaining the amount, the Court could not enter into any question as to neglect or misconduct in the business done. *Southall, ex parte*, 1 Mont. & Ch. 346; and 4 Deac. 91. But upon a reference, by consent, to

the registrar, to tax the bill, having regard to the charge of negligence, and to state special circumstances, it being alleged that there was a contract to take only costs out of pocket; held, that the registrar should have taxed accordingly, and it was referred back to him to revise his certificate. *Southall, ex parte*, 1 Mont. & Ch. 656; and 4 Deac. 91. 99.

Where the *fiat* issued as on a petitioning creditor's debt due to two partners, being to three, it was held to be a nullity. *James, ex parte*, 1 Mont. D. & D. 2.

(*Joint and separate Property.*)

A. and *B.* agree to dissolve their partnership from a particular day, and publish a notice to that effect in the Gazette, stating that the debts due to and by the firm would be received and paid by *A.* No assignment was executed of the partnership effects, but they were left in the possession of *A.*, who continued to carry on the business in the partnership firm. Four months after the dissolution a joint fiat issues against *A.* and *B.* Held, that the partnership property was not converted into the separate property of *A.*, but was distributable among the joint creditors of *A.* and *B.* *Ex parte Cooper and others*, 1 Mon. D. & D. 358.

A. and *B.*, as joint executors, carry on their testator's trade in co-partnership, for the benefit of his family, and it is arranged between them that *A.* should alone draw and accept bills, and manage the cash transactions. *A.* having refused to accept any more bills drawn by *H.* and *D.*, *B.*, unknown to *A.*, authorizes her son to accept them, and *A.* and *B.* afterwards become bankrupt. Held, that the holders of these bills could not prove them against the joint estate.

It was also held that the examination of a party before the commissioners may be read to counteract an affidavit subsequently made by him, if he is neither a petitioner nor respondent in the matter of the petition, without any previous notice of reading the examination, or giving the opposite party a copy of it. *Ex parte Holdsworth and others*, 1 Mon. D. & D. 475.

Where a father associated his son with him in the business, not with a share of profits, but at a fixed sum, and the former received the rents of the premises in which the trade was carried on as his own separate property, held that it was not to be deemed joint property, and distributable amongst the joint creditors. *Murton, ex parte*, 1 Mont. D. & D. 252.

Where two partners having money in the hands of a banker, on the death of one, the other drew out part for the purpose of effecting a particular partnership purpose, and deposited it with a trustee, to be returned if the purpose failed; it was held that it continued partnership property, and not that of the survivor, and that it was applicable to the joint debts of the firm. *Leaf, ex parte*, 1 Mont. & Ch. 662.

(*What passes, &c.*, p. 150.)

Where bills were sent to the bankrupt, an agent, before, but received after his bankruptcy, with instructions to apply the proceeds to a particular creditor, who has notice thereof, held that the assignees could not retain them. *Cotterell, ex parte*, 3 Mont. & Ayr. 376.

Where foreign merchants remitted bills to their London agents, and there was nothing from the correspondence to show that the latter were authorized to deal with them as their own, but that the only obligation of the foreign house was to keep the agents in cash to meet the bills when due;

held, that the bills not having been discounted nor disposed of, there was nothing to displace the title of the remitters, and that they did not pass to the assignees of the agent. *Jombart* v. *Woollett*, 2 Myl. & Cr. 389.

Where a married woman, being entitled to stock and money, part of a residue, the husband wrote to one of the executors, requesting the stock to be transferred to trustees for her sole and separate use, and the cash to be paid to himself, which was complied with, and he applied part of the money in increasing the stock, and afterwards became bankrupt and died; held, that the assignees were only entitled to the increased stock made by him. *Ryland* v. *Smith*, 1 M. & Cr. 53.

The assignees, either of a bankrupt or insolvent, can recover only such things as he has a right in, both legal and equitable; and where that equitable interest exists, the effect of an assignment would not be to convert it into a legal one. Where there had been an agreement by a bankrupt to mortgage specific articles ascertained, held to prevent them passing to the assignees; *aliter*, if it were only an agreement to mortgage goods subsequently to be acquired, or to give a bill of sale at a future day. *Moss* v. *Baker*, 3 M. & W. 195.

Where by the settlement the trustees were to receive the rents and profits, and apply the same for the maintenance of the bankrupt and his wife and children, or permit the same to be received by him, held that the clear intention being for the wife and children to be supported out of the property, the assignees took subject to what was proper to be allowed for their maintenance. *Page* v. *Way*, 3 Beav. 20.

(*Trover by Assignees*, p. 153.)

A builder entered into a contract with the defendants for preparing and fixing certain works, for which he was to be paid on being fixed and approved of by the surveyor, and the contract contained a stipulation that if the builder should become bankrupt, the defendants might take possession of the work then already done, and avoid and put an end to the agreement, and should pay so much as should be adjudged the fair worth of the work actually done and fixed; and certain sashes having been made and approved of, and taken to the premises, where pullies, the property of the defendants, were added, but before being fixed the builder became bankrupt, having received advances beyond the amount of the work certified to have been done; held, that the property in the sashes remained in the bankrupt, notwithstanding the approval, and addition made of the pullies thereto, and that the assignees, after demand and unqualified refusal, might maintain trover for the sashes. *Tripp* v. *Armitage*, 4 M. & W. 687.

Where judgment was signed on a warrant of attorney, and the *fi. fa.* in the hands of the sheriff, and execution levied before the act of bankruptcy committed; held, that there being no wrongful conversion before the bankruptcy, and the 3 Geo. 4, c. 39, giving a special action on the case to recover the proceeds when the execution is to be deemed fraudulent and void, the action of trover could not be maintained. *Brooke* v. *Mitchell*, 6 Bing. N. C. 349; 8 Sc. 739.

The 6 Geo. 4, c. 16, s. 90, requiring notice of the matter to be disputed on the trial, does not apply to the trial of an issue on an interpleading rule in general terms, whether the assignees were entitled to the goods seized in execution by the sheriff. *Lott* v. *Melville*, 9 Dowl. 882.

(*Order and disposition*, p. 154.)

Where the plaintiff sent goods to a dyer, and informed him that a party would call and give instructions, which he did, and becoming afterwards bankrupt, the goods were claimed by his assignees; held, that in trover against them the directions of the bankrupt were admissible evidence for the assignees, as *some* evidence of the bankrupt's dealing with the goods as his own, although unavailable, unless with the consent of the true owner. *Sharpe* v. *Newsholme*, 5 Bing. N. C. 713; and 8 Sc. 21.

Quære, whether the ordinary fixtures of a dwelling-house, namely, such as are removable as between landlord and tenant, are to be considered as goods and chattels, within the meaning of the clause of reputed ownership, 6 Geo. 4, c. 16, s. 72, so as to pass to the assignees of the bankrupt tenant, in preference to the lien of an equitable mortgagee, or to that of a vendor for his unpaid purchase money. *Ex parte King*, 1 Mon. D. & D. 119.

Assignees of a bankrupt cannot recover in trover a policy of insurance on a life, effected by the bankrupt, and deposited by him, before his bankruptcy, with the defendants, as a security for money then and previously advanced by them to him. *Gibson* v. *Overbury*, 7 M. & W. 555.

Where a gas company possessed copyholds, and by the deed the shares were made personalty; held, that a shareholder having deposited shares as a security, without notice to the company, before his bankruptcy, was still to be deemed the apparent owner, and that they passed to his assignee. *Vallance, ex parte*, 3 M. & Ayr. 224; and 2 Deac. 354.

But where the owner of shares in an insurance company assigned them, and gave notice to the company, but, from informality in the assignment, the company could not recognise the assignee's title, and they remained in the bankrupt's name; held not to be within his reputed ownership. *Masterman, ex parte*, 2 Mont. & Ayr. 209.

Where by the constitution of a joint-stock company only principals could become subscribers, the petitioner having purchased shares in the name of the bankrupt, as a trustee for him, kept the certificates in his own possession; no notice was given to the company, nor was any written declaration of trust made until seven days before the *fiat* issued; held that the shares passed to the assignees as within the reputed ownership of the bankrupt. *Ord, ex parte*, 1 Deac. 167.

Where the deposit is of deeds conveying an equity of redemption of premises in fee, of which the party making the deposit subsequently paid off the mortgage, the creditor is entitled to the full benefit of the security so exonerated; so of shares in estates at the time of the deposit, undivided, but for equality of partition of which the bankrupt has subsequently paid a consideration, and acquired the entirety of a portion. *Bisdee, ex parte*, 1 Mont. D. & D. 633.

A party with whom a trader has deposited a policy of insurance, sends an agent to the office to inquire whether the premium has been paid, the agent tells a clerk in the office that the policy has been so deposited; *semble*, that this is not sufficient of itself to take the policy out of the order and disposition of the trader, the practice of the office requiring a written notice, but it is a circumstance to be left with others to a jury. *Edwards* v. *Scott*, 2 Scott's N. S. 266.

The bankrupt on being pressed for payment, assigned the freight becoming due to him, under a charter-party of a ship belonging to him, and

gave notice to the party to whom the freight by the charter-party was made payable; held sufficient to take the debt out of the order and disposition of the bankrupt, and that no notice was necessary to be given to the party by whom the freight was to be paid. (Affirming the decree of the Vice-Chancellor), *Gardner* v. *Lachlan*, 4 M. & C. 129; 6 Sim. 407; and 8 Sim. 123.

Where the captain of a vessel, engaged on a voyage, had taken the cabin accommodation for passengers, contracting to pay the owner a certain sum, and fitted them with furniture, &c.; but having in the course of the voyage thrown up the command, and confirmed the appointment of the owner of the chief mate in his room, and before the return of the ship, written to the owner to desire him to keep possession of the furniture, and place it to the credit of his account with him; held, that the goods were to be deemed in the possession of the mate as agent of the owner, and that the direction to keep them amounted to an equitable mortgage; and that the assignees of the captain, who afterwards became bankrupt, were not entitled to recover until the debt to the captain was satisfied. *Belcher* v. *Oldfield*, 6 Bing. N. C. 102.

Where the petitioners sent goods to the bankrupt, as a broker, for sale, and he effected a sale with others in which he was to be a partner; held, that the owners were entitled to have specifically restored such as were in the bankrupt's possession; that the contract of sale being void for fraud, the goods continued in the possession of the bankrupt as agent. *Huth, ex parte*, 1 Mont. & Ch. 667.

Furniture, the separate property of the wife, was held not to pass to the assignees, although in the possession and use of the husband at the time of his bankruptcy. *Elliston, ex parte*, 2 Mont. & Ayr. 365.

Furniture, the separate property of one partner, used by him in the house of business, held not to be within the reputed ownership of the firm; but where it had been treated as partnership property, a petition to deliver it to the assignees of the separate creditors was dismissed. *Hare, ex parte*, 2 Mont. & Ayr. 478; and 1 Deac. 16.

Where the plaintiff let the goods to a hotel-keeper, to furnish the hotel, which the defendants had seized as assignees, as goods within the order, &c. of the bankrupt, and it was shown, to a considerable extent, to be the custom of upholsterers to let out furniture to such persons; held, that the plaintiff being the undoubted owner, the issue lay on the defendants to show their title as assignees; and that the question for the jury was, whether the custom was so general that persons must be supposed to have known that the goods, although in the possession, were not the property of the bankrupt. The jury found for the plaintiff. *Mullett* v. *Green*, 8 C. & P. 382.

Where by the custom of the country fixtures or machinery were demised with the premises, which had been mortgaged by one of two bankrupt partners who was seised of the freehold, held that the assignees were not entitled to such fixtures, but that the property passed by the mortgage. *Scarth, ex parte*, 1 Mont. D. & D. 240.

Note, that in *Trappes* v. *Harter*, 3 Tyr. 602, *supra*, Vol. II. 155, the Court held that the mortgage deed did not convey the machinery to the plaintiff, the mortgagee. See the observations and cases collected in Smith's Leading Cases, vol. ii. p. 145.

(*Stoppage in Transitu*, p. 162.)

Where the defendants having sold wheat to the plaintiffs, to be paid for by a draft, which not being remitted, the defendants took back the wheat from the carmen to whom they had delivered it for the plaintiffs, held, that the plaintiffs could not maintain trover for the wheat. *Wilmshurst* v. *Bowker*, 5 Bing. N. C. 541.

Where, in the absence of the consignee, his clerk recommended the captain, who was anxious to relieve himself, to land the goods at a wharf, which was done, and they were entered in the wharfinger's books in blank, with freight and charges set against them; held, that the wharf was to be deemed only a place of deposit *in transitu*, and not of reception, and that the right of stoppage continued; held also, that by an acceptance of bills, the vendor's right was not taken away. *Edwards* v. *Brewer*, 2 M. & W. 375; and see *Feise* v. *Wray*, 3 East, 93.

Where goods were shipped, deliverable to the vendee at *L.*, in the river, and on their arrival, he, knowing his embarrassment, upon the pressure of the captain, directed his son to have them landed, saying that he would not have them; held, that the question for the jury was whether he took possession of them as owner, or for the benefit of the vendors, and that his instructions to his son were material, and admissible to show that intention. *James* v. *Griffin*, 1 M. & W. 20; and 1 Tyrw. & Gr. 449.

Where, upon sale of goods, delivery orders were given and part of the goods removed, but the residue remained in the warehouses of the vendor, held, first, that the right to stop *in transitu*, upon the bankruptcy of the vendee, was not divested by such delivery orders; and, secondly, that the goods were in the possession of the bankrupt as the true owner, subject to the rights of the vendor. *Townley* v. *Crump*, 5 Nev. & M. 606.

The purchaser of lead, no place of delivery being stated, after a time directed it to be forwarded to him at *L.*, and the vendor gave the purchaser's agent an order on his servant for its delivery, and the order being indorsed by the agent. it was put on board a lighter for *L.*, where it arrived on the 21st of June, on which day the purchaser became bankrupt. He afterwards demanded the lead of the captain of the vessel, and tendered the freight, but the captain refused to deliver it, alleging that he stopped it on account of the purchaser being a bankrupt, and a letter dated 28th afterwards arrived from the vendor, directing the lead to be stopped *in transitu*; held, that the lead being at the time on board the defendant's vessel, the *transitus* was not at an end. *Jackson* v. *Nichol*, 5 Bing. N. C. 508.

The vendors directed the defendants (wharfingers) to deliver 1,028 bushels of oats, Bin. 40, to the purchaser, and "to weigh and charge the expense" to them; the oats comprised the whole in the bin, and were transferred in the defendants' books, and the price paid, but no weighing ever took place; held, that this being only for the purpose of satisfaction, and not with the view of ascertaining the quantity or price, the right of stoppage was at an end. *Swanwick* v *Sothern*, P. & D. 648: and 10 Ad. & Ell. 815.

(*Property in Bankers*, p. 164.)

A. deposited India bills with her bankers, specially indorsed by her, to receive the amount when due; the balance of the petitioner's banking account, exclusive of the amount of the bills, being in her favour, and continuing so up to the bankruptcy of the bankers. The bankers charged

discount on the bills in their account with *A.*, who might have drawn on them for the amount; it being the custom of the bankers to consider ordinary bills so deposited, as cash. The bankers paid the bills away to a creditor with whom the assignees afterwards settled an account, charging him with the amount of the bills, and receiving from him a balance due to the estate; held, that *A.* was entitled to be reimbursed the whole amount of the bills from the assignees. *Ex parte Elizabeth Bond*, 1 Mon. D. & D. 10.

The bankrupt being entitled to two-thirds of an estate, one by devise from his father, and the other as heir at law to his brother, deposited the deeds with his bankers to secure advances; he had also taken out administration to his brother, but the personal estate proved insufficient, and his creditors claimed the third as assets for the payment of debts as a trader under 11 Geo. 4, and 1 Will. 4, c. 47, s. 9; held, that the lien of the bankers on his share had preference over the claim of the creditors. *Baine, ex parte*, 1 Mont. D. & D. 492.

Under the statute simple-contract creditors can only charge the heir in respect of the land, and not the party to whom it has been *bonâ fide* aliened. *Ib.*

(*Note* (*n*), p. 170.)

Section 108 of the 6 Geo. 4, c. 16, is not repealed by 1 W. 4, c. 7, s. 7, as to warrants of attorney. *Crossfield* v. *Stanley*, 4 B. & Ad. 87.

(6 *Geo.* 4, *c.* 16, *s.* 81. p. 171.)

R. a trader, after a secret act of bankruptcy, and within two months before the issuing of a fiat against him, deposited goods with the defendant, in consideration of a present advance of money; held, that the assignees of *R.* might maintain trover for the goods, the transaction, though *bonâ fide*, and without notice of an act of bankruptcy, not being protected by the 6 Geo. 4, c. 16, s. 82. *Fearnley* v. *Wright*, 1 Scott, N. S. 657.

(*Notice of Bankruptcy*, p. 171.)

Where the defendant, the bankrupt's agent in trade, *bonâ fide* sold goods to a purchaser, after an act of bankruptcy committed by his principal, but of which the defendant was ignorant, and the sale took place two months before the commission issued; held, in trover, that having sold under a general authority only, it was a sufficient dealing with the goods to constitute a conversion, unless justified in what he did by any facts, and which should have been specially pleaded; and that, in the absence of any evidence to show that the purchaser was ignorant of the bankruptcy, on a mere traverse of the assignee's possession, the plaintiffs were entitled to recover; the 6 Geo. 4, c. 16, ss. 81, 82, protecting only the transfer where the dealing is without notice, and the onus of establishing that lying on the party establishing the sale. *Pearson* v. *Graham*, 6 Ad. & Ell. 800.

(*St.* 2 *&* 3 *Vic. c.* 29, *s.* 1. p. 173.)

Enacts that all contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, *bonâ fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit, or on whose account such execution or attachment shall have issued,

had not, at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also that nothing therein contained shall be deemed or taken to give validity to any payment made by any bankrupt, being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a warrant of attorney or cognovit given by any bankrupt by way of such fraudulent preference.

The protection given by the stat. 2 & 3 Vict. c. 29, s. 1, is not available in evidence in an action of trover by the assignee against an execution creditor, either under the plea of not guilty, or a plea that the plaintiffs were not lawfully possessed of the goods as assignees at the time of the alleged conversion. *Byers* v. *Southwell*, 9 C. & P. 320.

Semble, also, that the latter plea does not render it necessary for the plaintiffs to prove the petitioning creditor's debt. *Ibid.*

A docket was struck, and a fiat bespoke and paid for before twelve o'clock. About two the bankrupt's goods were seized under a *fieri facias*. On the same day, but after the seizure, the fiat was called for, and obtained from the Bankrupt-office. It did not appear whether it had been at any previous time delivered out to the petitioning creditor, or any person on his behalf; held that the execution was protected by 2 & 3 Vict. c. 29. *Pewtress and others* v. *Annan*, 9 Dowl. 828.

The stat. has a retrospective operation, so as to protect the sheriff from liability in respect of a *bonâ fide* execution levied on the goods of a bankrupt, without notice of the act of bankruptcy, where the seizure and sale took place, and the *fiat* issued, before the passing of the Act, but the assignees were not appointed until afterwards. *Nelstrop* v. *Scarisbrick*, 6 M. & W. 684; 8 Dowl. 746.

The statute does not apply to a case where the assignees in bankruptcy were appointed before its passing. *Moore* v. *Phillipps*, 7 M. & W. 536.

And see *Luchin* v. *Simpson*, 8 Scott, 676. *Varnish, ex parte*, 4 Mont. D. & D. 514.

A trader commits an act of bankruptcy by procuring his goods to be taken in execution with intent to defeat or delay creditors, the execution, although levied *bonâ fide* by the judgment creditor, is not protected by the stat. 2 & 3 Vict. c. 29. *Hall* v. *Wallace*, 7 M. & W. 353.

On the 6th July an execution was levied on the goods of *A.*, on the 19th of the same month the 2 & 3 Vict. c. 29, came into operation, and a few days afterwards a fiat of bankruptcy issued against *A.* upon an act of bankruptcy committed before the levy, but of which the judgment creditor had no notice at the time; held, that the Act rendered the execution valid, and that the assignees were not entitled to the property. *Edwards and another, Assignees, &c.* v. *Lawley*, 8 Dowl. 234. 6 M. & W. 285.

(*Issuing of Fiat*, p. 173.)

The date of the *fiat* is *primâ facie* evidence of its *issuing*, within the 6 Geo. 4, c. 16, s. 6, without reference to its being delivered out; and the issuing is, it seems, synonymous with "suing forth" and "applying for." *Rowe, ex parte* 1 Mont. & Ch. 334.

(*Proofs in Defence against Assignees*, p. 175.)

Where, in an action by assignees for goods sold, &c., the defendant offered in evidence an account stated and settled, showing a balance to the defendant, and which was dated prior to the bankruptcy; held, that it was to be pre-

sumed to have been written at the time it bore date, and that it was properly received in evidence; if the fact were otherwise, or the paper a fraudulent contrivance, it was open for the plaintiff to show it. *Sinclair* v. *Baggaley*, 4 M. & W. 312.

(*Concerted*, p. 175.)

Notwithstanding the provisions of the 1 & 2 Will. 4, c. 56, s. 42, which declares that no fiat shall be annulled, by reason only that it has been concerted between the petitioning creditor and the bankrupt, yet where it appears to be, in fact, the fiat of the bankrupt, and not issued *bonâ fide* for the benefit of the creditors, the Court will order it to be annulled. *Ex parte Lewis*, *Ex parte Davies*, 1 Mon. D. & D. 365.

(*Set-off*, p. 177.)

One of two assignees cannot set off his own debt against the amount of a dividend payable to a creditor under the fiat, although he swear that the creditor had agreed to allow such set-off. *Ex parte Bailey*, 1 Mon. D. & D. 263.

Although an agreement of the bankrupt to submit to arbitration is not binding on his assignees, yet when a Judge's order, made (by consent) in a cause in which the bankrupt was plaintiff, recognized a pending reference between the parties, and ordered that in the event of any sum being found by the arbitrator to be due from the bankrupt to the defendant, such sum might be set off against the debt and costs in the action; it was held that this order amounted to an agreement on the part of the bankrupt to allow a right of set-off to the defendant of the sum to be ascertained, by which the assignees were equitably bound; and, the sum not having been ascertained before the bankruptcy, it was referred to the registrar to do so, and the assignees were in the mean time restrained from proceeding in an action for the recovery of the debt. *Ex parte Michie*, 1 Mon. D. & D. 181.

(*Mutual Credit*, p. 177.)

Where in an action by assignees for goods sold, the defendant pleaded a set-off in respect of a bill drawn by *H.* on the bankrupt, and accepted by him and indorsed by *H.* to the defendant; replication, that it was indorsed by *H.* after dishonour, and without consideration, for the purpose of being given for the price of the goods to be bought and handed over to *H.*, and set off against it; held, that the transaction did not create a debt within 6 Geo. 4, c. 16, s. 50, which intended *bonâ fide* debts, and that the replication was, therefore, an answer to the plea. *Lackington* v. *Combes*, 6 Bing. N. C. 71.

A party lends his name to a bill, by which a debt may eventually arise, held, that it is a subject of mutual credit, within 6 Geo. 4, c. 16, s. 50; and where the defendant in *assumpsit*, by assignees, for money received to the use of the bankrupt, with a count for money received to the use of the assignees, pleaded the circumstances constituting a mutual credit, held, that the plaintiffs could not, by their replication, put in issue the legality of the debt. *Hulme* v. *Mugleston*, 6 Dowl. 112; and 3 M. & W. 28.

A mere contract to indemnify against contingent damages does not constitute a subject of mutual credit within the 6 Geo. 4, c. 16, s. 50. *Abbott* v. *Hicks*, 5 Bing. N. C. 578; and 7 Sc. 715.

(*Discharge*, p. 179.)

In case against the sheriff by assignees for seizing the bankrupt's goods, held that he was entitled, without pleading specially, to prove payments out of the proceeds, necessarily made, in reduction of the damages. *Goldsmid* v. *Raphael*, 3 Sc. 385.

(*Actions against Assignees*, p. 179.)

Where after forfeiture the landlord entered, and the assignees of the tenant (become bankrupt) continuing in possession, but, as expressly found, not within a reasonable time after the landlord's entry, removed and sold fixtures; held, that as the removal was after they had any right to consider themselves tenants, the landlord was entitled to recover from them in trover. *Wecton* v. *Woodcock*, 7 Mees. & W. 14.

(*Action against a Bankrupt*, p. 182.)

Where one of two partners becomes bankrupt, and a joint creditor proves the amount of his debt under the fiat, and afterwards brings an action against the solvent partner for recovery of the same debt, joining the bankrupt as a defendant in the action for conformity; the bankrupt is entitled to a full indemnity from the creditor against the consequences of the action. *Ex parte Stanton*, 1 Mon. D. & D. 273.

Plea in *assumpsit*, that the plaintiff had been twice bankrupt, and had not paid 15 *s.* in the pound under the second commission, held, on special demurrer, a good bar to the action, the 6 Geo. 4. c. 16, s. 127, acting retrospectively, and vesting all the after-acquired property of the bankrupt in his assignee. *Young* v. *Rishworth*, 3 N. & P. 585; and see *Mackay* v. *Wood*, 7 M. & W. 420.

An action does not lie on a promise by the bankrupt, that if the plaintiff would prove a debt of 200 *l.* under the commission, the defendant would pay him that sum in a few months; for it is a promise without legal consideration: the Court will not presume that the plaintiff, in proving for money had and received, had waived a tort. *Brealey* v. *Andrew*, 2 Nev. & P. 114.

Where the bankrupt was tenant from year to year, at a rent payable on the 9th October and 6th April, and became bankrupt during a current half-year, and the assignees having declined, the bankrupt, on the 5th April, delivered up the possession, under 6 Geo. 4, c. 16, s. 75; held, that a tenancy by parol was within the statute, and the rent not accruing due until the 6th April, he was not liable in use and occupation for the time he occupied *pro ratâ*. *Slack* v. *Sharp*, 3 N. & P. 390.

Plea in *assumpsit* for goods sold, that after the debt contracted the defendant became bankrupt, and the *fiat* sued out on the petition of the plaintiff, and that before adjudication, by agreement between the plaintiff and defendant, the latter gave a bill as a security for the full amount of the debt; held, that the plea not showing a benefit to the plaintiff over the other creditors, or that the defendant's estate was insufficient to pay all his creditors, or that the *fiat* had been proceeded with, the debt was not forfeited within the meaning of s. 8 of 6 Geo. 4, c. 16, the Act clearly contemplating the case of the proceedings in bankruptcy being prosecuted. *Davis* v. *Holding*, 3 P. & D. 413; S. C. 1 M. & W. 159.

The bankrupt is entitled under s. 132 to be furnished with copies of the assignees' accounts, and not merely to inspection of them, and he may petition for that purpose without a previous application to the commissioners. *Emerson, ex parte*, 2 Deac. 156; and 3 M. & Ayr. 133.

(*Certificate*, p. 182.)

An agreement by *A.* that in consideration of *B.*'s discharging *C.*, his debtor, out of custody on a *ca. sa.*, *C.* shall pay the debt, is, in effect an original undertaking to pay the debt by the hand of *C.*, and is provable under the commission, and bound by the certificate as to instalments, payable after the bankruptcy. *Lane* v. *Burghart* 1 G. & D. 311.

The st. 6 Geo. 4, c. 16, s. 125, makes void a guarantee given by a third person to a creditor to induce him to sign a bankrupt's certificate. *Hankey* v. *Cobb*, 1 G. & D. 47. And the defence is admissible under the general issue. *Ib.*

The statute 6 Geo. 4, c. 16, s. 127, does not extend to the case where a trader has twice become bankrupt and obtained certificates, not paying 15*s.* in the pound under the last commission, both bankruptcies and certificates being prior to the statute. In that case the after-acquired effects do not vest in the assignees under the second commission; and the Act does not prevent the assignees under a third commission from claiming property of which the bankrupt has had the reputed ownership within sect. 72, since the second commission.

But if the second certificate were subsequent to 2d May 1825, when the Act took effect as to certificates, sect. 127 applies.

Quære, whether in that case a third commission would be absolutely void. *Benjamin* v. *Belcher*, 11 A. & E. 350.

(*Compounding with Creditors*, p. 188.)

Under the stat. 6 Geo. 4, c. 16, s. 8, which enacts that a petitioning creditor illegally compounding with the bankrupt shall forfeit his debt, such forfeiture takes effect for the benefit of the creditors, under the commission, and cannot be enforced if there is no longer a commission subsisting.

Bills of exchange given to the petitioning creditor, by way of such illegal composition, cannot be enforced by him; but if, since the agreement was executed, no further proceedings have been taken in the bankruptcy, he may sue the bankrupt on the original consideration. *Davis* v. *Holding*, 11 A. & E. 710.

(*Competency*, p. 190.)

In an action by assignees for money received to their use by a party from the bankrupt, who had not obtained his certificate, but had released the assignees; held, that the wife of the bankrupt was not a competent witness to prove the payment by the bankrupt to the defendant after the bankruptcy, the bankrupt, the definite surplus not being ascertained, having no releasable interest, and the verdict, if the assignees succeeded, going to increase his interest in the surplus: held also, that the verdict in the action could not be used in an action by the creditor against the bankrupt, as *res inter alios acta*, and so that there was no countervailing interest to render the witness indifferent. *Williams* v. *Williams*, 6 M. & W. 170; and 8 Dowl. 220.

A certificate under an Irish commission, bars debts contracted here, and therefore the bankrupt releasing the surplus is a competent witness in an action for such a debt. *Fergusson* v. *Spencer*, 2 Scott's N. S. 229.

Where the witness, a certificated bankrupt, not having paid 15*s.* in the pound, and who had released the surplus of his estate, upon the *voire dire*, admitted that he had, prior to his bankruptcy, entered into a composition with his principal creditors, and paid other small creditors in full, held that he was not disqualified under 6 Geo. 4, c. 16, s. 127, and was therefore a competent witness for his assignees. *Roberts* v. *Harris*, 2 Cr. M. & R. 292.

Where upon the retirement of one partner, *A.*, the continuing one, *B.*, admitted another, *C.*, and upon the latter partnership being dissolved, *B.* became bankrupt; held, that *B.* was not a competent witness to prove an agreement by *B.* and *C.*, to indemnify *A.* against the partnership debts of *A.* and *B.*, as tending to exonerate himself. *Warren* v. *Taylor*, 8 Sim. 599; and 1 Coop. 174. And such agreement, founded on a purchase of an interest in the concern, is not a mere guarantee within the Statute of Frauds.

In an action brought by a bankrupt against his assignees to try the validity of the *fiat*, the petitioning creditor is not a competent witness to prove the debt due to him, although he has assigned it over to a third person. *Carruthers* v. *Graham*, 2 M. & R. 368.

(BASTARDY, p. 196.)

(*Non-access.*)

Husband and wife, after living together for ten years, and having one child, agreed to separate. They accordingly afterwards lived apart, but within such distance as afforded them opportunities of sexual intercourse, the husband not being impotent. Held, that the presumption of law in favour of the legitimacy of a child begotten and born of the wife during the separation, may be rebutted, not only by evidence to show that the husband had not sexual intercourse with her, but also by evidence of their conduct; such as that the wife was living in adultery; that she concealed the birth of the child from the husband, and declared to him that she never had such child; that the husband disclaimed all knowledge of the child, and acted up to his death as if no such child was in existence; and also, that the wife's paramour aided in concealing the child, reared and educated it as his own, and left it all his property by his will. *Morris* v. *Davis*, 5 Clark & F. 163.

Non-access is not presumable from the fact of the wife living in adultery with another; to establish illegitimacy, there must be evidence from which a jury can find non-access. *R.* v. *Mansfield*, 1 G. & D. 7.

(*Of Person born in Scotland, &c.*)

A person born in Scotland, of parents domiciled there, but not married till after his birth, though legitimate by the law of Scotland, and capable of succeeding to heritable property in that country, cannot succeed to a real estate in England. *Doe* d. *Birtwhistle* v. *Vardill*, 1 Scott's N. S. 828.

(4 & 5 *W.* 4, *c.* 76.)

By the 4 & 5 Will. 4, c. 76, s. 72, it is enacted, that when any child shall thereafter be born a bastard, and shall by reason of the inability of the

mother of such child to provide for its maintenance, become chargeable to any parish, the overseers or guardians of such parish, or the guardians of any union in which such parish may be situate, may, if they think proper, after diligent inquiry as to the father of such child, apply to the next general quarter sessions of the peace within the jurisdiction of which such parish or union shall be situate (but since the passing of the 2 & 3 Vict. c. 85, such application must now be made under the provisions of that Act to the justices of the peace holding any special or petty session in and for the division or borough within which such union or parish, or any part thereof shall be situated, and not to the general quarter sessions), for an order upon the person whom they shall charge with being the putative father of such child, to reimburse such parish or union for its maintenance and support; and the Court to which such application shall be made, shall proceed to hear evidence thereon; and if it shall be satisfied, after hearing both parties, that the person so charged is really and in truth the father of such child, it shall make such order upon such person in that respect as to such Court shall appear to be just and reasonable under all the circumstances of the case. And the Act then provides that no such order shall be made unless the evidence of the mother of such bastard child shall be corroborated in some material particular by other testimony, to the satisfaction of such Court.

An order of filiation at sessions upon the evidence of the mother, and corroboration thereof, not stating it to be in some material particular, is bad. *R.* v. *Read*, 1 P. & Dav. 413.

The application for an order on the putative father, under 4 & 5 Will. 4, c. 76, s. 72, must, it seems, be made to the first sessions after the child becomes chargeable; where no explanation was given for not doing so, it was held to be afterwards too late. *R.* v. *Heath*, 6 N. & M. 345.

The 4 & 5 Will. 4, c. 76, s. 57, making a bastard part of the family of the mother's after-taken husband, held to be construed with reference to the purpose of maintenance only, and not of settlement, and that where the bastard resided apart from the mother, it was removable to the place of birth, and not to the residence of the mother. *R.* v. *Wendson*, 3 Nev. & P. 62.

Since the 4 & 5 Will. 4, c. 76, s. 57, the liability of the putative father of a bastard, upon the marriage of the mother, is transferred to the husband; held therefore that he was no longer liable to pay the sums directed to be paid by an order of affiliation made before the marriage of the mother. *Lang* v. *Spicer*, 3 Cr. M. & R. 129; and 1 Tyrw. & Gr. 358.

The responsibility of the obligor of a bastardy bond being in respect of charges incurred by reason of the birth of such *child*; held, that it did not apply to a case of chargeability after he attained 21. *Wandley* v. *Smith*, 2 Cr. M. & R. 716; and 1 Tyrw. & Gr. 194.

The notice under 4 & 5 Will. 4, c. 76, s. 73, of an application for an order of maintenance of a bastard child, signed by overseers of a township, but not by its own church officers (chapelwardens), is sufficient. *R.* v. *Yorkshire Justices of North Riding*, 2 Nev. & P. 103.

The notice of application to the sessions for an order of maintenance on the putative father of a bastard child signed only by the overseers and not by either churchwarden, is bad. *R.* v. *Cambridgeshire Justices*, 1 Perr. & Dav. 249.

Where the putative father of a bastard paid a sum to the defendants, being then parish officers, in exoneration of all claim, and the child dying

before the year expired, they paid over the balance not expended to their successors; held, that the money paid being on a transaction originally illegal and void, was, from the first, money in the hands of the defendants had and received to the use of the plaintiff, and that he was entitled to recover it back from them. *Chappell* v. *Poles*, 2 M. & W. 867. And see *Townson* v. *Wilson*, 1 Camp. 396.

Where the defendant, the father of an illegitimate child, had paid the plaintiff for its maintenance up to a particular time, when he directed it to be given up to another or the parish, for he would pay no longer; held, that as he could only be liable on a contract, if not shown, the action could not be maintained. *Seaborne* v. *Maddy*, 9 C. & P. 497.

BILLS OF EXCHANGE, p. 201.

Debt may be maintained on a promissory note, by the payee against the maker, though the instrument do not express that it is for value received, or for any consideration. So on a bill of exchange, by the drawer, being also payee, against the acceptor. *Hutch* v. *Trayes*, 11 A. & E. 720; and see below, *Watkins* v. *Wake*, 9 Dowl. 244. It does not lie by an indorser against an acceptor. *Powell* v. *Ansell*, 9 Dowl. 893.

An instrument in the form: "At twelve months after date, I promise to pay Messrs. *R.* & Co. 500 *l.*, to be held by them as collateral security for any monies now owing to them by *I. M.*, which they may be unable to recover on realizing the securities they now hold, and others which may be placed in their hands by him," is not a promissory note, and cannot be declared on as such. *Robins* v. *May*, 11 Ad. & Ell. 213.

But where the plaintiff as steward of the defendant advanced a sum on a letter from him in the terms: "If you will remit it, I can give you a note for it when you come to L.;" it was held to amount to a note, and interest payable thereon, although no note ever signed. *Rhoades* v. *Lord Selsey*, 2 Beav. 359.

One in the following terms: "I undertake to pay to *R. I.* the sum of 6 *l.* 4 *s.* for a suit of ——, ordered by *D. P.*," is not a promissory note, but is good as a guarantee, as the consideration can be collected by necessary inference from the instrument itself. *Jarvis* v. *Wilkins*, 7 M. & W. 410.

Where the instrument contained an absolute promise to pay the amount, and was properly stamped as a note; the terms added, "and I have deposited title deeds as a collateral security for the same," do not make it less a note assignable within the statute. *Wise* v. *Charlton*, 6 Nev. & M. 364; and 4 Ad. & Ell. 786.

(*Right to begin*, p. 202.)

Action by an indorsee against the acceptor, plea, that it was an accommodation bill, and that a blank acceptance had been given in discharge of that and other bills; replication, that the defendant broke his promise without such cause, &c.; the defendant is entitled to begin; the plaintiff, in his reply, having, in his address to the jury, read a letter, proved on cross-examination of the defendant's witnesses, but not read in evidence, the defendant is entitled to have it put in evidence, and to reply. *Faith* v. *M'Intyre*, 7 C. & P. 44.

In *assumpsit* on a cheque by the holder against the drawer, pleas, 1st, that it was given to a third party for losses at gaming, and notice to the

plaintiff before he received the cheque; 2dly, that the plaintiff gave no value for it; and issues on the notice and value given; it was held that the plaintiff was entitled to begin. *Bingham* v. *Stanley*, 9 C. & P. 374.

The admitting the acceptance and indorsement do not entitle the defendant to begin. *Pontifex* v. *Jolly*, 9 C. & P. 202; and see below, 1367.

(*Production of Note*, p. 202.)

In an action for a cheque, plea, that it was given for money lost in gaming, and issue thereon; the plea admits the giving the cheque, and it is not necessary to produce it in the plaintiff's case, nor for the purpose of aiding that of the defendant, notice to produce not having been given. *Read* v. *Gamble*, 10 Ad. & Ell. 597; 5 N. & M. 433.

(*Acceptance*, p. 204.)

A plea by one of three defendants, partners, that the bill was accepted by the other two without his knowledge or assent, for a debt due from them before he became a member of the firm, is not proved by evidence that it was accepted for a debt which arose partly before and partly after he had become a member of the firm. *Wilson* v. *Lewis*, 2 Scott, N. S. 115.

The effect of acceptance after dishonour is to make the bill payable on request; where, therefore, the declaration by the indorsee against an acceptor alleged the presentment and non-payment, and that, afterwards, the defendant promised to pay according to the tenor of his acceptance, it was held, on general demurrer, to amount to a promise to pay on request. *Christie* v. *Peart*, 7 M. & W. 491.

(*Identity of Payee*, p. 210.)

The plaintiff sued as the payee of a note made payable on demand to "The manager of the National Provincial Bank of England," but did not sue as a public officer; held, that upon proof that he was in fact the manager, and that a demand had been duly made on behalf of the bank, the plaintiff was entitled to recover; and that, in the absence of a plea that the bank was established under the provisions of the 7 Geo. 4, c. 46, and that the plaintiff was not the public officer, it was not necessary for the plaintiff to show that he *was*, nor competent to the defendant to show that he *was not* such public officer. *Robertson* v. *Sheward*, 1 Scott, N. S. 419.

(*Alteration*, p. 211.)

Where the making of the bill is admitted on the record, and the only issues raised are as to the indorsements, presentment, notice of dishonour, and consideration, it is not incumbent on the party producing the bill to explain an alteration which appears to have been made in the date. *Sibley* v. *Fisher*, 2 Nev. & P. 430.

In an action of *assumpsit*, the defendant pleaded that the plaintiff drew and he (the defendant) accepted a bill for 60*l.* in satisfaction of the plaintiff's demand; the plea is not supported by evidence of his having transmitted to the plaintiff a blank acceptance for 60*l.*, which it appeared was subsequently filled up by the plaintiff for 46*l.* only. *Baker* v. *Jubber*, 8 Dowl. 538.

(*Variance.*)

By 3 & 4 W. 4, c. 42, s. 12, it is enacted, that in all actions upon bills of exchange or promissory notes, or other written instruments, any of the

parties to which are designated by the initial letter or letters, or some contraction of the christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such persons by the same initial letter or letters, or contraction of the first name or names, instead of stating the christian or first name or names in full.

Where the declaration on bills set out the name of the plaintiff only by the initial of one christian name, as it appeared on the instruments; held to be cured by the 3 & 4 Will. 4, c. 42, s. 12. *Lindsay* v. *Wells*, 5 Dowl. 618.

(*Indorsement*, p. 215.)

In an action against the acceptor of a bill of exchange purporting to be drawn and indorsed by *A. B.*, proof that the bill was indorsed by the same person who drew it is sufficient, though that person is shown not to be *A. B. Smith* v. *Moneypenny*, 2 M. & R. 317.

(*Presentment*, p. 222.)

The holder of a banker's cheque ought to present it for payment within a reasonable time, and it is a question for the jury on an issue of due presentment, whether this rule has been complied with; where a cheque drawn on a country banker dated 19th March was not presented until 6th April, and no cause was assigned for the delay, but the drawer had not sustained loss by its non-presentment at an earlier period, the drawer was held liable to be sued on the cheque. *Serle* v. *Norton*, 2 Mo. & R. 401.

Presentment to acceptors for honour may be made on the day after the bill becomes due, by 6 & 7 Will. 4, c. 58.

(*Notice of Dishonour*, p. 225.)

A bill of exchange having been drawn upon *A. B.*, was accepted by him, and was afterwards indorsed by the drawer to the plaintiffs, who indorsed it to the Birmingham and Midland Counties' Bank, who indorsed it to one *W.* The bill having been dishonoured when due, *W.* gave notice of it to the bank, who gave notice to the plaintiffs, one of whom wrote the following letter to the drawer: "Dear Sir, To my surprise I have received an intimation from the Birmingham and Midland Counties' Bank, that your draft on *A. B.* is dishonoured, and I have requested them to proceed on the same;" it was held, that if there was more than one bill to which the letter could apply, it lay upon the defendant to prove that fact, in order to show its uncertainty, and that the letter was a good notice of dishonour. *Shelton* v. *Braithwaite*, 7 M. & W. 436.

H., the holder, gave notice by letter in the terms: "Messrs. *H.* are surprised that *G.*'s bill was returned to the holder unpaid," followed by a personal communication from the indorsee, expressing his regret, and promising to write to the other parties, by whom or by himself the bill should be paid; the notice was held to be sufficient. *Houlditch* v. *Cauty*, 4 Bing. N. C. 411.

So where the drawer, being applied to if he was aware of the bill having been dishonoured, replied: "Yes, I have had a civil letter from *G.* on the subject, and will call and arrange it," it was held to be sufficient. *Norris* v. *Salomonson*, 4 Sc. 257.

Verbal notice of the dishonour given to the wife, was held sufficient. *Housego* v. *Cowne*, 2 Mees. & W. 348.

Upon a plea that the defendant had not "notice *from the* plaintiff of the

non-payment," notice proved from another party, the indorser's clerk, is sufficient. *Newen* v. *Gill*, 8 C. & P. 367.

Notice sent to a wrong address, from the indistinctness of the drawer's name on the bill, was held to be sufficient. *Hewitt* v. *Thomson*, *Ib.* 543.

A party being entitled to notice of dishonour of a bill of exchange on the 28th of April, and all the parties living in town, a witness stated that he put a letter containing the notice of dishonour into the post at one o'clock p. m. on the 28th. The post mark on the letter was the 29th. If the jury are satisfied that the letter was put into the post sufficiently early for the party in the ordinary course of the post to have received it on the 28th, it is sufficient, and its having been delayed in the post-office makes no difference. *Stocken* v. *Collins*, 9 C. & P. 653. The post-office mark is not conclusive of the time when the letter was posted. S. C. 7 M. & W. 515.

(*Form of Notice*, p. 227.)

A notice of dishonour, which states that a bill of exchange "has been dishonoured," is sufficient, although it does not state that the bill has been presented. *Stocken* v. *Collins*, 9 C. & P. 653.

But a notice in the following terms: "This is to inform you that the bill I took of you, 15*l.* 2*s.* 6*d.*, is not took up, and the 4*s.* 6*d.* expense I must pay immediately. My son will be in London on Friday morning," was held to be insufficient. *Messenger* v. *Southey*, 8 Dowl. 594.

(*Excuse for Want of Notice*, p. 229.)

A count on a banker's check alleged that it had been drawn by the defendant upon a banking firm; that it had been presented for payment, and had not been paid; that the bankers had no effects of the defendant; and that the defendant had sustained no damage by reason of his having received no notice of dishonour of the check; held, on general demurrer, that the declaration disclosed a sufficient excuse for the want of notice of dishonour. *Kemble* v. *Mills*, 9 Dowl. 446.

(*Indorsee* v. *Indorser*, p. 233.)

Debt lies upon a bill of exchange by an indorsee against his immediate indorser. *Watkins* v. *Wake*, 9 Dowl. 242.

(*Presumptive Evidence*, p. 237.)

Plea in *assumpsit* against the drawer and indorser of a bill of exchange, denying the drawing and indorsement; an offer of compromise after action brought is evidence for a jury, as recognizing the handwriting, although that is contradicted by three witnesses, and the Court refused to interfere with the finding. *Harding* v. *Jones*, 1 Tyrw. & Gr. 135.

(*Collateral Liability*, p. 239.)

The borrower of an accommodation acceptance impliedly undertakes to indemnify the lender against being called upon to pay the bill at maturity. *Reynolds* v. *Doyle*, 2 Scott, N. S. 45.

(*Damages*, p. 240.)

In an action by bankers, on an acceptance by a customer, the latter pleaded to the *whole declaration* a set-off of a balance of less amount in the bankers' hands; held, that although the latter were entitled to the ver-

dict on that issue, the jury might in the damages allow the amount of such balance in their hands. *Barnes* v. *Butcher*, 9 C. & P. 725.

(*Verdict*, p. 241.)

Where there are counts on the consideration of the bill as well as on the bill, the plaintiff will be entitled to enter his verdict on such as apply to the consideration, if the subject be stated in the particulars; and may recall a witness to prove such part of the consideration after he has closed his case. *Ryder* v. *Ellis*, 8 C. & P. 357.

(*Defence*, p. 241.)

In debt by the holder against the acceptor; plea as to part, *actio non*, because he received no consideration, but had delivered it to a third person to get it discounted, from whom the plaintiff detained it for his own debt and only advanced the part admitted, and issue joined that the defendant was indebted beyond that sum, which was found for the defendant; held, that although such plea was bad, yet the plaintiff having chosen to go to trial, he let the defendant into any defence which he might have to the action. *Finleyson* v. *Mackenzie*, 3 Bing. N. C. 824.

In an action against the drawer, upon a plea that he did not make the note, evidence of imbecility of mind cannot be gone into. *Harrison* v. *Richardson*, 1 M. & Rob. 504.

Plea to a declaration on a note payable absolutely with interest, that it had been substituted for a note given on an agreement for a share in a partnership, and that it had been thereby stipulated that the principal was to be paid out of the defendant's yearly share of the profits, and that unless the defendant failed in his part of the agreement, the plaintiff would not call suddenly for the payment of the balance on the note; the original note also contained a similar statement as to the mode of liquidation, and the jury found that the note for which the action was brought was substituted for and given on the same conditions; held that, although the replication limited the issue to the question whether the plaintiff had given reasonable notice of enforcing the note, it was competent to the defendant to show the whole circumstances of the transaction, and of the substitution of the note for the original one; but that, although the plaintiff might not be entitled to recover the balance of the principal due, he was entitled to a verdict for the interest. *Baylis* v. *Ringer*, 7 C. & P. 691.

In an action on a note by the payee against the maker, the defendant pleaded an agreement for renewal on certain discount, the plaintiff having taken issue thereon, although seeking to vary the written instrument, the Judge allowed the defendant to go into evidence in support of the plea, and held, that the agent of the defendant was competent to prove the agreement as to the original loan, and that the plaintiff was a mere trustee for the lender. *Holt* v. *Miers*, 9 C. & P. 191.

Assumpsit by the indorsee against the acceptor, plea that the plaintiff had been twice bankrupt, and had not paid 15*s.* in the pound under the second commission, and the bill vested in his assignees, was held an issuable plea and allowed. *Mackay* v. *Wood*, 7 M. & W. 420; and 7 Dowl. 278.

(*Want of Consideration*, p. 242.)

The plaintiff having persuaded *G.*, the defendant's son-in-law, to become bail for *H.*, on an undertaking to indemnify him against all consequences,

and *G.* having been sued on the bail-bond, the plaintiff obtained a stay of proceedings, on payment of debt and costs, and the defendant accepted a bill to enable the money to be raised by discounting; the plaintiff having brought an action on the bill, to which the defendant pleaded that it was accepted for the plaintiff's accommodation, and the jury having found that issue for the defendant, it was held that it might be sustained, although the plaintiff might not have been liable on his verbal undertaking to indemnify. *Creswell* v. *Wood*, 10 Ad. & Ell. 460.

In *assumpsit* by an indorsee against the acceptor, it is competent to the defendant to show that the acceptance was for the accommodation of the plaintiff, and that all parties had put their names without consideration, and that it was agreed that it should be taken up when due, by the plaintiff, but that such agreement was collateral, and not part of the original contract. *Thompson* v. *Clubley*, 3 Cr. M. & R. 212.

A note in the terms, "I promise for myself and executors to pay *H.* or her executors the sum of 100 *l.* one year after my death, with legal interest;" held, that in the absence of particular proof, the note would be presumed to have been given for value, and that interest was due from the date. *Roffey* v. *Greenwell*, 2 P. & D. 365.

Assumpsit by a second indorsee against the acceptor of a bill for 98 *l.*, &c., pleas alleging that no consideration was ever given for the acceptance, or any subsequent indorsement, to which the plaintiff replied that he gave consideration to *C.*, his immediate indorser, and on the trial proved that *C.* at the time of the indorsement was indebted to him to the amount of 20 *l.*, and proved also a debt due to him from the first indorser to the amount of 5 *l.*; held that upon the issue joined he was entitled to recover only to the former amount: and it seems that the rule is, that wherever the defendant has established want of consideration between the original parties, the holder is called upon to prove consideration given by himself. *Simpson* v. *Clarke*, 2 Cr. M. & R. 342.

The defendant, indebted to the plaintiff and others, gave the plaintiff a note for the entire amount, and the plaintiff promised to pay the amount to such creditors when the note was paid by the defendant, this was held to be a good consideration. *Cole* v. *Cresswell*, 3 P. & D. 404; and 11 Ad. & Ell. 661.

Action against three partners on a bill, two suffered judgment by default, the third pleaded that the bill had been accepted by the others without his knowledge, for a debt which accrued before the partnership; it appeared that a small part of the demand accrued after his becoming a partner, for partnership purposes: held, that there being a consideration for the bill *pro tanto*, the plaintiff was entitled to a verdict for that amount on the issue raised by the special plea. *Wilson* v. *Bailey*, 9 Dowl. 18.

Plea that the note was made on certain terms, and indorsed to the plaintiff without consideration; replication that 20 *l.* was given for it; the issue is on the defendant, and he calling no witness, the plaintiff is entitled to recover that sum. *Edwards* v. *Jones*, 7 C. & P. 633.

Indorsee v. *Acceptor*.—Plea, that the bill was accepted for the accommodation of the drawer, and by him indorsed to *A. B.*, in order to raise money, and by him fraudulently indorsed to *C. D.*, and by him to the plaintiff without consideration; replication *de injuriâ*, &c.; the defendant must prove the want of consideration to *C. D.* *Brown* v. *Philpot*, 2 Mo. & R. 285; and see *Mills* v. *Barber*, 1 M. & W. 425; *Jacob* v. *Hungate*, 1 Mo. & R. 445.

The declaration by a holder against the acceptor stated that the drawer indorsed to the plaintiff, the plea stated it to have been drawn and accepted by the defendant, and handed to the drawer to obtain it to be discounted, who indorsed in blank, and against good faith delivered it to the plaintiff for a purpose unknown to the defendant, of which the plaintiff had notice; it was held, that the defendant was entitled to begin. *Lees* v. *Hoffstadt*, 9 C. & P. 599.

At the time of the indorsement of a note not overdue, the indorsee had notice that the maker had a cross demand of greater amount on the payee, the indorsee cannot recover for advances on the note made subsequently to such notice. *Goodall* v. *Ray*, 4 Dowl. 76.

Plea to a declaration by a second indorsee against the acceptor, that the bill was an accommodation bill given to *R.*, and that the indorsement was made after the bill became due; it appearing that at the time of accepting the bill *R.* and the defendant were friends, but subsequently quarrelled, and the bill was not put in suit until five years after it became due, and neither party called *R.*; held to amount to *primâ facie* evidence on the part of the defendant to go to a jury. *Bounsall* v. *Harrison*, 1 M. & W. 611; and 1 Tyr. & Gr. 925.

The plea in *assumpsit* by an indorsee against the acceptor merely alleged that the payee received the bill for the purpose of paying the proceeds to the defendant, and had failed to do so, without averring any fraud in the transaction, the holder is not called upon to prove consideration. *Jacob* v. *Hungate*, 1 M. & Rob. 445; questioning *Thomas* v. *Newton*, 2 C. & P. 606; and *Heath* v. *Sansom*, 2 B. & Ad. 291.

Where the bill was accepted upon an undertaking to give up a guarantee, it was held, that the latter might be given in evidence although not stamped. *Haigh* v. *Brooks*, 3 P. & D. 452; and 11 Ad. & Ell. 800.

In *assumpsit* by an indorsee against acceptor, the defendant pleaded special facts, amounting to fraud, between the drawer and subsequent indorser, and that the plaintiff took the bill with knowledge, concluding with an averment that the plaintiff was not a holder for *bonâ fide* consideration; replication, that he was such; there being sufficient to warrant the finding of the jury for the defendant, a new trial was refused; (*dub.* Parke, B. and Bolland, B., whether the jury might not have been misled as to the extent of the admission on the record, the facts stated in the plea not being denied by the replication); *semble*, a plaintiff is not to be precluded by admissions made merely for the purposes of pleading. *Noel* v. *Boyd*, 1 Tyrw. & Gr. 211; and 4 Dowl. 415.

Upon a plea in an action by holder against the drawer of a bill, that it was obtained and indorsed by fraud, and that no consideration passed from the prior indorsee; held, that letters of the latter, acknowledging the fraud, are not admissible, no evidence having been given to connect the plaintiff with him, or to show that the bill had been indorsed to the plaintiff when overdue. *Phillips* v. *Cole*, 2 P. & D. 288; and 10 Ad. & Ell. 106.

A. having been in partnership with *B.*, on the dissolution, undertakes to collect and pay the partnership debts: *A.* and *B.* during the partnership had kept a joint account with a certain branch bank; but after the dissolution there was only a single account of *A.* kept there. *A.* having greatly overdrawn that account, obtained a promissory note for 500*l.* from *B.*, his former partner, which he indorsed to the bank as a security for his debt, just previously to a quarterly inspection of the accounts of the branch, the clerk

who managed the branch promising that it should not be presented. He however kept it, and it was found among the securities of the bank, in his portfolio, when he was discharged from his situation; the directors of the bank may recover the amount from *B.* *Bosanquet* v. *Forster*, 9 C. & P. 659; and 8 M. & W. 142.

So a party lending his cheque to the customer, and paid in under like circumstances, and receiving a counter cheque, is liable to the bank. *Bosanquet* v. *Corser*, 9 C. & P. 664; and 8 M. & W. 142.

Plea to an action against the drawer of a cheque, that it was drawn and delivered to a third person to secure a gaming debt, and by him delivered to the plaintiff without consideration; a replication that it was delivered for a good consideration admits the illegal drawing, and throws it on the plaintiff to prove the consideration. *Bingham* v. *Stanley*, 1 G. & D. 237.

The maker may show that there was no consideration for a promissory note, although he cannot by parol vary the contract on the face of the note. *Abbot* v. *Hendrickes*, 2 Scott, N. S. 183.

(*Illegality; Indorsee*, p. 245.)

Where a bill for a gaming debt was in the hands of an innocent indorsee for valuable consideration, and before issue joined, the 5 & 6 Will. 4, c. 41, passed, making such bills voidable only; held, that the Act was prospective only, and that the plaintiff could not avail himself of the Act. *Hitchcock* v. *Way*, 2 Nev. & P. 72.

(*Satisfaction*, p. 248.)

The drawer of a bill of exchange, before it became due, agreed with the acceptor, that on his giving a certain mortgage security for the amount, he, the drawer, should deliver up to him the bill of exchange as discharged and fully satisfied. The acceptor accordingly executed the mortgage, and received back the bill, uncancelled: it was held, that the drawer was liable on the bill to a party to whom the acceptor afterwards indorsed it for value, before it became due.

A plea, in such action, that the bill was *paid* by the acceptor before it became due, and afterwards reissued by him without any new stamp, can be supported only by proof of actual payment in cash, and not by evidence of any arrangement between the drawer and acceptor, whereby the bill was treated as being satisfied. *Morley* v. *Culverwell*, 7 M. & W. 174.

To *assumpsit* on a bill of exchange for 150*l.* by the executors of the indorsee against the acceptors, the defendants pleaded, that, on the day when the bill became due, they duly paid and honoured it when presented, according to the tenor and effect of it and of their promise, and then paid the said sum, to wit, 150*l.*, the amount made payable by the said bill. It appeared, that, before the bill became due, the indorsee, not having any banker of his own, handed the bill to a friend, in order that he might present it at the bank of Messrs. W. & Co., where it was made payable. This friend indorsed the bill, and got it discounted at the Bank of England; but afterwards receiving an intimation from the party from whom he received it that it was not to be noted, sent the amount of the bill to the banking-house at which it was payable, on the understanding that he was to have the bill delivered up to him. The acceptors kept cash at that banking-house, and when the bill had been paid, the transaction was entered in their account as if the money to meet the bill had been paid by them; but

the bill was delivered up to the party who, in fact, paid in that money. The jury having on this issue found a verdict for the defendants, the Court of Common Pleas set it aside, on the ground that this payment could not, under the circumstances, be considered as a payment by or on the behalf of the acceptors, but must be taken to have been a payment for the honour of the indorser. *Deacon* v. *Stodhart*, 9 C. & P. 685; 2 Scott, N. S. 557.

The defendants also pleaded that the acceptance was an accommodation acceptance for the drawer, with the knowledge of the indorsee; and that the drawer became insolvent, and the indorsee, the defendants, and two other creditors, agreed among themselves, as his friends, to release their several debts and liabilities. The plea averred that the defendants and the two other creditors *did discharge and release their several debts, &c.;* and then went on to state that the indorsee, in consideration of the premises, and that certain other creditors would release, abandon, and never enforce payment of their debts, agreed with the defendants that he would never ask for, sue for, demand, or enforce payment of the said bill of exchange. There was then an averment that the other creditors had released their debts. The replication to this plea stated that the indorsee did not agree in manner and form as in the plea mentioned. The evidence was, that the indorsee at first promised to sign the account, if some more signatures were obtained to it; but, after they were obtained, he refused to sign it, but said, on one occasion, that he knew the bill was an accommodation bill, and he should not call on the defendants to pay it; and on another, that the bill should not come against any of the parties, but that he himself would come in as the rest of the creditors. The agreement, signed by the creditors, contained these words: "We, the undersigned, do hereby agree to accept of a release from the said *E. A.* (the drawer) of the equity of redemption, &c.; and we agree, upon the execution of such deed, to execute releases," &c. The indorsee died, and the action on the bill was brought by his executors; held, that the allegations in the plea were not sustained by the evidence. *Deacon* v. *Stodhart*, 9 C. & P. 685; 2 Scott, N. S. 557.

The drawers of the bill kept an account with the plaintiffs as bankers, and indorsed the bill to them, and upon its being returned dishonoured, it was entered on the debit side of the account, which at the time was considerably against the drawers, and remained so at the commencement of the action; the bankers had, on former occasions, allowed the drawers to overdraw their accounts, but they were under no obligation to do so; held, that such entry was no evidence in support of a plea that the bankers had received that sum in satisfaction of the bill. *Ryder* v. *Wylett*, 7 C. & P. 608.

The holder of joint and several notes, upon one becoming due, agreed with one of the sureties to accept a sum in full satisfaction of the note due, and of the moiety for which the surety was liable on those not due, which was paid, and the name of the surety erased from the notes; held, that it discharged also the other parties. *Nicholson* v. *Revell*, 6 Nev. & M. 193; and 4 Ad. & Ell. 675; questioning *ex parte Gifford*, 6 Ves. jun. 805.

(*Giving Time*, p. 250.)

Assumpsit against the defendant as joint maker of a note; a plea, that the defendant joined in it merely as surety, of which the plaintiff had notice, and that although it had been due for six months, the defendant had no notice of its not having been paid until the commencement of the action.

and that the plaintiff gave time to the party without the defendant's knowledge or consent, was held ill on general demurrer. *Clarke* v. *Wilson*, 3 M. & W. 208.

(*Alteration*, p. 254.)

Plea that the bill had been altered after acceptance, the defendant has the right to begin, and the bill ought to be produced without notice. *Barker* v. *Malcolm*, 7 C. & P. 101.

The bill having been altered after acceptance, the defendant may take advantage of it, under a plea that he did not accept the bill declared on. *Cock* v. *Coxwell*, 2 Cr. M. & R. 291 ; and 4 Dowl. 187.

It is no objection to the validity of a bill that it was accepted and indorsed in blank, and afterwards filled up by a stranger ; and where the drawer signed his name only as *T. W.*, his real name being *T. W. R.*, held that it was not a forgery, unless it was shown that the omission of his surname was for the purpose of fraud. *Schultz* v. *Astley*, 2 Bing. N. C. 554 ; 7 C. & P. 99 ; and 2 Sc. 815.

In *assumpsit* on a bill, the plaintiff fails in consequence of an alteration in a material part ; he may still recover under the common counts on the original consideration. *Atkinson* v. *Hawdon*, 2 Ad. & Ell. 628.

The defendant gave the plaintiff a promissory note, without the words "or order ;" six months afterwards the plaintiff mentioned the omission to the defendant, who answered that the omission was his (the defendant's) own, and consented that the words should be inserted, which was done accordingly. The bill was not restamped. The bill having been declared on as altered, and issue joined on a plea denying the making of the note ; it was held that, on the above evidence, the jury were justified in finding for the plaintiff, as it appeared that the alteration was made only in furtherance of the original intention of the parties, and to correct a mistake, in which case no new stamp was requisite. *Byrom* v. *Thompson*, 11 A. & E. 31.

(*Effect of in Payment*, p. 264.)

A promissory note, not payable to order, was indorsed and given for the price of goods supplied by the plaintiff ; held, that having no security of which he could avail himself, he was remitted to his original right, and entitled to recover on the count on the original consideration of the debt, although no notice had been given to the defendant of the note being dishonoured. *Plimley* v. *Westley*, 2 Bing. N. C. 249 ; and 2 Sc. 423.

Assumpsit for goods, &c., plea, that defendant signed a bill for 20 *l.* in blank as to the drawer's name, at two months, which he accepted, in part as satisfaction for the debt and for the plaintiff's accommodation for the residue, and which was received by the plaintiff as satisfaction for the debt, and which acceptance was not yet due ; replication, that it remained in the plaintiff's hands unnegotiated, and not filled up and unpaid ; held, on demurrer, that the right of action for the goods was suspended until the bill became due and dishonoured, and the action not maintainable. *Simon* v. *Lloyd*, 2 Cr. M. & R. 187.

(*Competency.*)

In an action by the payee against one of three makers of a joint and several promissory note, another of the makers was called as a witness for the plaintiff, and stated on his examination on the *voire dire*, that the note

had been given by the defendant as principal, and that it was signed by himself and the other makers as sureties; held, that the witness was competent. *Page* v. *Thomas*, 6 M. & W. 733.

In *assumpsit* on a bill by indorsee against acceptor, and plea of payment, a prior indorsee was held to be a competent witness for the defendant, although on the *voire dire* he acknowledged that he received money from the defendant to pay the plaintiff the amount of the bill. *Reay* v. *Packwood*, 7 Ad. & Ell. 917.

BILL OF LADING, p. 267.

Assumpsit by the consignee against the owner for non-delivery of goods shipped; upon plea that the plaintiff did not cause the goods to be shipped, the bill of lading when produced showing the shipment to have been by a third party (who in fact was the agent of the plaintiff), is not conclusive on the defendant; he may show that no goods were actually shipped. *Berkley* v. *Watling*, 2 Nev. & P. 178. See further as to the effect of a bill of lading, *Mitchell* v. *Ede*, 3 P. & D. 513.

BOND, p. 268.

In debt on a bond of indemnity given by the defendant, one of the bearers of the virges of the Palace Court, to the Knight Marshal, for taking sufficient bail from all persons arrested, and also for obeying the rules and orders of the Court it was held that the action was properly brought against the defendant in the name of the marshal for taking insufficient bail in a certain action, and for breach of obedience to an order requiring him to pay the amount of debt and costs in such action, and that the marshal was entitled as a trustee for the party damnified to recover the full amount of the debt and costs incurred. *Lamb* v. *Vice*, 8 Dowl. 360; and 6 M. & W. 467.

(*Validity of.*)

On a bond to pay any balances due to bankers in Scotland, it was held, that where the drafts were in fact drawn beyond the statutory distance, or wrongly dated as to time or place, and made void by the 55 Geo. 3, c. 184, s. 13, such mode of drawing being known to the bankers, no debt arose upon the bond. *Swan* v. *Bank of Scotland*, 10 Bli. N. S. 627, (reversing the judgment below); S. C. *Swan, ex parte*, 1 Deac. 746; 2 M. & Ayr. 656.

A bond executed by a corporation to reimburse one of its members for costs of defending himself and other corporate officers against certain *quo warranto* informations, is a valid debt within s. 92 of (the Municipal Corp. Act) 5 & 6 W. 4, c. 76. *Holdsworth* v. *Dartmouth Corp.* 3 P. & D. 308; and 11 Ad. & Ell. 490.

Plea to debt on bond, that it was given on a corrupt agreement for articles of apprenticeship to the plaintiff, as an apothecary and surgeon, for two years, but that the deed should be ante-dated, to enable the defendant to be admitted as an apothecary at the end of two instead of five years, contrary to the 55 Geo. 3, c. 19, s. 15; after a verdict for the defendant, the Court refused judgment for the plaintiff, *non obst. vered.* *Prole* v. *Wiggins*, 3 Bing. N. C. 230; and 3 Sc. 601.

(*Construction of.*)

Where money was advanced by bankers in London to a partner in a banking firm in Ireland, and bonds executed in Dublin for the amount in

sums of *l.* sterling, "with legal interest," and warrants of attorney for entering judgments in the *K. B.* in Ireland recited the sums in the same terms as in the bonds; credit was given in the books of the English banking house for the full sum, and bills accepted by them drawn by the banking company in Ireland; it was held, that the debt was payable in English currency and with English interest. *Noel* v. *Rochfort*, 10 Bli. N. S. 483; reversing the judgment below, 2 Younge & J. 330.

(*Proof of Breach*, p. 268.)

Debt on bond to the guardians of an union, on a contract for the supply of bread, in loaves of 4 lbs. weight, conditioned for performance of the contract, and, *inter alia*, that the defendant would deliver such bread in loaves, and of which a bill of particulars should be sent with such articles at the time of delivery thereof, or within one month from such delivery, provided that if such articles were not duly served, or should be deficient in the weight stated, or if delivered without such bill of particulars, that the board might return them, or give notice to the defendant to fetch them away; the defendant pleaded performance generally; and the replication assigned for breaches, first, a delivery of loaves deficient in weight; secondly, a delivery without any bill of particulars, whereupon the plaintiffs returned them, and incurred great charges in obtaining a supply; it was held, that evidence of the loaves being brought to the house, and part handed out, and, on being weighed and found deficient, returned and refused to be taken, was a sufficient delivery to support the issue on the first breach; and, secondly, that the board having a right to return the articles unless a bill were delivered with them, an issue whether it was dispensed with at the time was not an immaterial issue, although, *semble*, it might have been, if found for the defendant, as there could be no dispensation by parol of an instrument under seal. *Elliott* v. *Martin*, 2 M. & W. 13.

Where the condition plainly referred to a sum in the then Four per cent. Bank Annuities, it was held that it was satisfied by the express terms of 5 Geo. 4, c. 11, by a transfer of so much 3½ per cent. Bank Annuities, into which the former stock was by that Act reduced. *Sheffield* v. *Coventry, Earl of*, 2 Russ. & M. 317.

A bond executed by defendant as a surety, was conditioned for the payment of interest on 1,000 *l.*, on the 1st March of the first year, the like at the end of the second year, and the principal and like sum of interest at the end of the third; the first interest not being paid until the 30th March, it was held, that the bond was thereby forfeited, and the forfeiture was not waived by the acceptance of the interest; and, on the defendant's bankruptcy, was provable under his commission, and the debt therefore barred by his certificate. *Skinners' Company* v. *Jones*, 3 Bing. N. C. 481; and 4 Sc. 271.

(*Surety.*)

Debt on bond conditioned for securing the payment of 1,400 *l.* on a day named; plea, as to 800 *l.*, parcel, &c., payment after the day, and, as to the residue, a release to the executor of a joint obligor deceased; held, as to the first, that the penal sum being forfeited, and the payment only as to part of the sum mentioned in the condition, the plea was bad; that nothing appearing to show the defendants to be only *sureties*, the release was no discharge of the surviving obligor; held also, that it was not necessary to aver a breach in the non-payment of the sum, if enough appeared on the decla-

ration to show that the money was due. *Ashbee* v. *Pidduch*, 1 Mees. & W. 364; and 1 Tyr. & Gr. 1016.

Where the respondent signed a bond as surety for a party, trustee to a bankrupt's estate, for faithfully accounting, and by the practice in Scotland, the creditors appointed commissioners to superintend the proceedings of the trustee; held, in suit on the bond, that the default of the trustee in so accounting was not by the default, concealment, or connivance of the commissioners, and that the surety was not discharged. *M'Taggart* v. *Watson*, 13 Bli. N. S. 618.

(*Plea of Satisfaction*, p. 270.)

The obligee had sued one of two obligors on a joint and several indemnity bond, and received a sum in discharge of the debt and costs; he afterwards sued the other, who pleaded the acceptance of the sum so paid in satisfaction; it was held, that the *onus* lay on the defendant to show that it was taken as a settlement of the entire cause of action, and the Court refused to set aside the verdict found for the plaintiff. *Field* v. *Robins*, 3 Nev. & P. 226.

BOTTOMRY BOND.

The Master, before he resorts to a bottomry bond, is bound to ascertain whether the supplies can be obtained on the personal credit of the owners; and, where a party is bound to know a fact, he must show that he has exercised due diligence to ascertain such fact. *Heathorn* v *Darling*, 1 Moore, 5. And see case of the *Hervey*, 3 Hagg. 404.

BRIBERY, p. 271.

(2 *Geo.* 2, *c.* 24, *s.* 7.)

If *A.* give money to *B.* to induce him to vote for a candidate at an election for a member of parliament, and *B.* agrees to do so in consideration of the gift, *A.* although *B.* never gives the vote, is liable to the penalty of 500 *l.* for corrupting *B.* to vote, within the st. 2 Geo. 2, c. 74, s. 7, which inflicts that penalty upon any person who, by himself or any person employed by him, "shall by any gift or reward, &c. corrupt or procure any person or persons to give his or their vote or votes, or to forbear to give his or their vote or votes, in any such election, &c." And the jury may infer the fact of the agreement from circumstances, although *B.*, who is a witness, does not state that he ever intended to vote. *Henslow* v. *Fawcett*, 3 Ad. & Ell. 51.

Proof that the defendant effected the bribery by giving a card to the voter in an outer room, which the voter presented to another person in an inner room, who thereupon gave him money, satisfies the allegation in the declaration that the defendant gave the money within the meaning of the 2 Geo. 2, c. 24, s. 7. *Webb* v. *Smith*, 4 Bing. N. C. 73.

In the same case it was also held, that in an action for bribery at an election of a member to serve in parliament for a borough, an examined copy of the precept to the returning officer taken from the original at the Crown Office is sufficient evidence of the precept.

Payment by a candidate at an election for a member of parliament of the expenses of taking up the freedom of his voters is illegal; and *semble*, it is illegal for a candidate to pay the travelling expenses of a voter. Per Alderson, J., *Bayntun* v. *Cattle*, York Spring Ass. 1833, Mo. & R. 265.

In *Brembridge* v. *Campbell*, 5 C. & P. 186, Tindal, C. J., left it for the jury to say whether money paid to voters for travelling expenses was really and *bonâ fide* paid for such expenses, or to induce them to give their votes; the payments to each voter had been the same; this he thought was evidence that such payments were not limited to travelling expenses; as, if the payments were for such expenses only, it was somewhat singular that all the voters should be paid alike.

By the 4 & 5 Vict. c. 57, it is enacted, "that whenever any charge of bribery shall be brought before any Select Committee of the House of Commons, appointed to try and determine the merits of any return or election of a member or members to serve in parliament, the Committee shall receive evidence upon the whole matters whereon it is alleged that bribery has been committed; neither shall it be necessary to prove agency, in the first instance, before giving evidence of those facts whereby the charge of bribery is to be sustained; and the Committee, in their Report to the House of Commons, shall separately and distinctly report upon the fact or facts of bribery which shall have been proved before them, and also whether or not it shall have been proved that such bribery was committed with the knowledge and consent of any sitting member or candidate at the election."

(5 & 6 *Will.* 4, *c.* 76, *s.* 54.)

An *employment* is a *reward* within the latter as well as the former branch of the 54th section of the Municipal Corporation Act (5 & 6 Will. 4, c. 76), which enacts, "that if any person, who shall have or claim to have a right to vote in the election of mayor, &c., shall ask or take any money or other reward, by way of gift, loan, or other device, or agree or contract for any money, gift, office, *employment, or other reward* whatsoever, to give or forbear to give his vote in any such election; or if any person, by himself or any person employed by him, shall, by any gift or reward, or by any promise, agreement, or security for any *gift or reward*, corrupt or procure, &c., any person to give or forbear to give his vote, &c., such person shall for every such offence forfeit the sum of 50*l.*, &c." Whether the employment in the particular case was given by way of corrupt bargain is a question for the jury. The Court, however, will assume that such was the case, if a corrupt agreement be sufficiently alleged in the declaration. *Harding* v. *Stokes*, 1 M. & W. 354.

The declaration alleging that an election took place under the Act, and that the defendant not regarding, &c., corruptly promised, &c., sufficiently shows the offence to have been committed after the Act. *Ib.*

BRIDGE.

A company liable to repair a bridge may be indicted, but as they cannot appear in person, but by attorney only, the proper course is to remove the judgment into the Court of Queen's Bench, and if they do not appear by attorney, to proceed by distress *ad infinitum*. *R.* v. *Birmingham and Gloucester Railway Company*, 9 C. & P. 469.

A prescriptive liability to the repair of a public bridge, in the absence of any evidence to the contrary, and by itself, includes a liability to repair the highways at the ends of it within the distance of 300 feet. *R.* v. *Lincoln Mayor, &c.*, 3 N. & P. 273.

By their act of incorporation (41 Geo. 3, c. 31), the proprietors of the Surrey Canal were required to erect and maintain bridges over the canal

where it intersected any public highway, bridle-way, or footpath, and also for the use of the owners and occupiers of lands, &c., adjoining to the canal. In 1804, the company erected a swivel bridge, of sufficient dimensions to allow a carriage to traverse it, across the canal, at a spot where there had formerly been a public way, which at the most was only a bridle-way. This bridge was originally intended for the exclusive accommodation, as a carriage-way, of the tenants of an estate adjoining, called the Rolls estate. The neighbourhood having become extremely populous, and a district church having been built near the bridge, the public, from 1822 to 1832, freely and without interruption used it as a carriage-way. In 1832, the company for the first time imposed a toll upon all carriages traversing the bridge, with the exception of those belonging to the tenants of the Rolls estate; and, in 1834, they removed the old swivel bridge, and erected a convenient stone bridge in the place of it. In an action of trespass against the defendant for passing over the bridge without paying toll, the Judge told the jury, that, supposing the bridge in question to have been originally erected for the exclusive accommodation of the tenants of the Rolls estate, still, if, in consequence of the acts of the company, an idea grew up in the minds of the public that the company had dedicated the way to the public use, they might find such dedication; held that this was not a misdirection, and that the evidence warranted the jury in finding a dedication. *Grand Surrey Canal Company* v. *Hall*, 1 Scott, N. S. 264.

BURGLARY, p. 276.

(*Breaking*, p. 276.)

The raising a window shut down, but at the time not fastened with the hasp, which it usually was, held a sufficient breaking. *R.* v. *Hyams*, 7 C. & P. 441.

The removal of part of a pane of glass, which, though entirely cut above a month, had remained in its place, was a sufficient breaking. *R.* v. *Bird*, 9 C. & P. 44.

(*Property.*)

Where the prosecutor was put into the premises to take care of them by a party who was builder to a public company, to whom the premises belonged, held that it was not rightly laid as the dwelling-house of the prosecutor. *R.* v. *Rawlins*, 7 C. & P. 150.

Where the prosecutor conducted a business for his brother-in-law, and exercised a power of disposing of any part of the stock for his benefit, but had no share in the profits or salary, held, that as a bailee, the articles might be laid as his property. *R.* v. *Bird*, 9 C. & P. 44.

Indictment for breaking the house of *A.*, and stealing therein the goods belonging to a party convicted of felony still undergoing his sentence, his wife continuing in possession of them; there was also a count laying the goods to be the property of the Queen; held that the first count could not be sustained, but that the latter was good, although no office found. *R.* v. *Whitehead*, 9 C. & P. 429.

(*Burglary and Striking.*)

An indictment under 7 Will. 4, & 1 Vict. c. 86, s. 2, must allege both the burglary and striking, and the proof must correspond therewith; where the party struck was misnamed, held that the prisoner could only be guilty of burglary. *R.* v. *Parfitt*, 8 C. & P. 288.

(*Autrefoits Acquit.*)

Where a prisoner had been acquitted of the charge of murder, and afterwards indicted for the burglary committed at the time of the murder, held, that if the burglary were laid with violence, the former acquittal would have been an answer to the violence. *R.* v. *Gould*, 9 C. & P. 364.

BURIAL FEES.

See *Spry* v. *Emperor*, 6 M. & W. 639.

CARRIER, p. 282.

In a declaration against a common carrier for refusing to carry goods, it is not necessary to aver a tender of money for the carriage; it is sufficient to allege a readiness and willingness and offer to pay. *Pickford* v. *The Grand Junction Railway Company*, 9 Dowl. 766.

(*Privity of Contract*, p. 284.)

Though, generally speaking, where there is a delivery to a carrier to deliver to a consignee, the latter is the proper person to bring the action against the carrier, yet if the consignor make a special contract with the carrier, such contract supersedes the necessity of showing the ownership in the goods, and the consignor may maintain the action though the goods may be the property of the consignee.

The question whether the goods were delivered to the carrier at the risk of the consignor or consignee, is a question for the jury. The delivery of the goods to a carrier by a consignor does not necessarily vest the property in them in the consignee. *Dunlop and others* v. *Lambert and others*, 6 Cl. & Finn. 600.

Goods were forwarded from *A.* to *B.* to the care of the defendant, and on arrival at *B.* notice was given to the defendant, and he signed the carrier's book, acknowledging the delivery to him, and he caused them to be entered in the clearance and manifest of a steam-vessel proceeding to *M.*, the plaintiff's residence, but who never sent for the goods until six days after arrival, when they were not to be found, and it was shown that it was the course of dealing between the carrier and defendant that goods for him were left until sent for; held, that there was evidence for the jury of a delivery to and acceptance by him, in an action on the case for negligence. *Quiggin* v. *Duff*, 1 M. & W. 174.

(*Defence*, p. 287.)

An objection under the 11 Geo. 4, and 1 Will. 4, c. 68, that the value was not declared at the time of booking, must now be specially pleaded. *Syms* v. *Chaplin*, 1 N. & P. 129.

Case against carriers for the loss of a parcel; to the plea of no notice pursuant to 11 Geo. 4, and 1 Will. 4, c. 68, the plaintiff replied that the loss was occasioned by the felonious act of the defendant's porter, on which issue was joined; the evidence showing only circumstances of suspicion against the porter, he was not called by the defendant, and the jury having found for the plaintiff, the Court refused a new trial. *Boyce* v. *Chapman*, 2 Bing. N. C. 222; 2 Sc. 365.

CASE, p. 296.

Where the declaration alleged a retainer of and undertaking by the defendant to print a work, and to proceed therein with diligence and dispatch, and that large quantities of paper had been delivered to him for that purpose, but that he had negligently conducted himself, and wrongfully pawned the paper, whereby, &c., averring loss, &c.; it was held to be properly framed in *tort*. *Smith* v. *White*, 6 Bing. N. C. 218; 8 Dowl. 255.

(*Variance.*)

In an action on the case by the plaintiff, an infant, for damages by unskilful treatment as a surgeon, the defendant pleaded that the plaintiff did not employ him; held, that being an action *ex delicto*, and the declaration framed as on a breach of duty, which the defendant had undertaken, it was immaterial by whom he was employed. *Gladwell* v. *Steggall*, 5 Bing. N. C. 733; and 8 Sc. 60.

CERTIFICATE.

The Court will presume that the Speaker, giving a certificate pursuant to the stat. 9 Geo. 4, c. 22, s. 63, has availed himself of the proper sources of information to enable him to grant the certificate, without his stating on the face of it what those sources are. *Stockdale* v. *Hansard*, 8 Dowl. 669.

It is in the election of the party entitled to his costs under the Speaker's certificate to demand and bring his action against any one of the persons made liable by the certificate; and the power of the Speaker, being created not for the purpose of imposing, but of ascertaining, the amount of the costs by taxation of certain officers, is to receive a favourable construction, and a fair intendment is to be made in support of his jurisdiction: the certificate is conclusive as to the amount of costs specified in it. *Fector* v. *Beacon*, 5 Bing. N. C. 302; and 7 Dowl. 285.

CHARACTER, p. 303.

(*Witness.*)

In ejectment by the heir against the devisee, the attorney who drew the will being called as a witness, his character was sought to be impeached on cross-examination; held that evidence to prove his good character was not receivable. *Doe* v. *Harris*, 7 C. & P. 330.

CHARTER-PARTY.

See as to pleas and evidence, in action on, *Benson* v. *Blunt*, 1 G. & D. 449.

CHURCHWARDENS, p. 309.

Parish land remains vested in the churchwardens and overseers, although the parish be part of an union, notwithstanding the 4 & 5 Will. 4, c. 76, s. 23, and 5 & 6 Will. 4, c. 69, s. 3. *Doe* v. *Webster*, 4 P. & D. 270.

Where lands had been leased prior to the 39 Geo. 3, c. 12, s. 17, by the churchwardens, and rent had been paid since the statute to the succeeding officers, it was held to be *primâ facie* evidence that the lands were parish property, and the lease passing no legal interest, the churchwardens were entitled to treat the lessees as yearly tenants; held also, that a parishioner

was a competent witness in the absence of any evidence to show that the parish funds could be affected by the result of the action. *Doe* d. *Hobbs* v. *Cockell*, 4 Ad. & Ell. 478; and 6 Nev. & M. 179. And *Doe* d. *Higgs* v. *Terry*, 5 N. & M. 556.

Churchwardens and overseers taking a distress for poor's rates, are within the protection of the statute 24 Geo. 2, c. 44, s. 6. B. N. P. 24. *Harper* v. *Carr*, 7 T. R. 271. See further, tit. JUSTICES.

In an action against overseers for an excessive distress under a poor's rate, no demand is necessary. *Sturch* v. *Clarke*, 4 B. & Ad. 113.

The closing the vestry doors at an election of churchwardens, under 59 Geo. 3, c. 69, so as to exclude voters, would be illegal; yet where in fact no voter was excluded from voting, a *mandamus* for a fresh election was refused. *R.* v. *St. Mary, Lambeth, Rector, &c.*, 3 Nev. & P. 416.

The archdeacon cannot refuse to swear in a churchwarden when he applies for that purpose, on the ground of its being customary only to swear in at the first visitation after election; and where two parties apply, each having a colourable title, both sets must be sworn in. *R.* v. *Middlesex Archdeacon, &c.*, 5 N. & M. 494; S. C. 3 Ad. & Ell. 615.

COIN, p. 309.

The giving a counterfeit piece of money in charity, nothing being received in exchange, is not an uttering within the statute, no intention to defraud any one appearing. *R.* v. *Page*, 8 C. & P. 122.

Where two are jointly charged with uttering, one only being present at the time of uttering, the question for the jury is whether the one was so near to the other as to help him to get rid of the counterfeit coin. *R.* v. *Jones*, 9 C. & P. 761.

Where husband and wife were jointly indicted for a misdemeanor in uttering counterfeit money, it was held that she was entitled to acquittal, as it appeared that she uttered the money in the presence of her husband; and *semb.* there is no distinction, as to coercion, between felonies and misdemeanors committed by her in his presence. *R.* v. *Price & Ux.*, 8 C. & P. 19. But see *R.* v. *Conolly*, MS. Durham Sp. Ass. 1829, cited 8 C. & P. 21, note (*b*); and *R.* v. *Cruse*, *ib.*, p. 541, *et seq.*

The personal possession of counterfeit money by one of two prisoners is a possession by the other, if the former has the money with the knowledge of the latter, for the common purpose of uttering. *R.* v. *Rogers*, 2 Lewin's C. C. 119.

The fact of five counterfeit shillings having been found in the possession of the prisoner five days after he had uttered another, is evidence to show a guilty knowledge. *R.* v. *Harrison*, 2 Lewin's C. C. 118.

On an indictment upon 2 Will. 4, c. 34, s. 10, for having moulds in his possession, the jury must believe that the moulds had, at the time of the prisoner's possession, the entire of the obverse or reverse part of the coin impressed, and not merely a part. *R.* v. *Foster*, 7 C. & P. 494.

On an indictment for separate utterings, an entire judgment of two years' imprisonment under 2 Will. 4, c. 34, s. 7, was held to be bad; it should have been of consecutive judgments of one year's imprisonment on each count. *R.* v. *Robinson*, 1 Ry. & M. 413.

An indictment, alleging the uttering to *E. H.*, *knowing*, &c., is sufficient, as it must be taken to refer to the prisoner, and not to *E. H.*; an averment that the prisoner, with one *T. P.* before, &c. *was* in due form, &c. con-

victed, &c.; the record of conviction, showing that *T. P.* was acquitted, is sufficient, the allegation in the indictment not necessarily importing that *T. P.* had been convicted. *R.* v. *Page*, 9 C. & P. 756.

COMMON, p. 314.

(*Right of.*)

A party cannot support a claim of common *pur cause de vicinage*, over open downs adjoining his own common, which are the exclusive property of the owner, although there is no boundary fence separating the lands. *Heath* v. *Elliott*, 4 Bing. N. C. 388.

Case for disturbing plaintiff's right of common, plea; justifying as for defendant's own commonable cattle; replication, that *all* were not the defendant's cattle, *levant* and *couchant*, &c.; the action being in substance for *surcharging*, it ought to have been newly assigned, and the Judge properly rejected evidence respecting it. *Bowen* v. *Jenkins*, 2 N. & P. 87.

Where the defendant claimed as appurtenant to his farm the exclusive right of pasturage for sheep and lambs over a certain common; held that his grant as alleged, being limited to those cattle, it would not entitle him to depasture the sheep of others there "on tack," as being injurious to the lord's right as to what was not granted; and although evidence of the commoner having so depastured on tack was admissible, it was not evidence in derogation of the lord's right, as it tended to show a usurpation only. *Jones* v. *Richards*, 1 Nev. & P. 747; and 5 Ad. & Ell. 529.

A plea of enjoyment of common right for 30 years before the commencement of the suit, is sufficient, although not alleged *next* before, &c; the 2 & 3 Will. 4. c. 71, s. 4, being nothing more than an exposition of the proof requisite to support the right. *Jones* v. *Price*, 3 Bing. N. S. 52; and 3 Sc. 376.

(*Levant and Couchant*, p. 315, (*t*).)

So many as the winter eatage and summer produce are capable of maintaining. *Whitelocke* v. *Hutchinson*, 2 Mo. & R. 205.

In case for a disturbance of right of common, the declaration alleged that the mayor, aldermen, and burgesses of the town and borough of Stamford, had the right in question for every resident freeman paying scot and lot. It appeared in evidence that the right relied upon was an ancient right. By 2 & 3 Will. 4, c. 64, and 5 & 6 Will. 4, c. 76, part of an additional parish is thrown within the borough of Stamford. It was held that the declaration was not supported, as the right claimed was larger than that proved. *Beadsworth* v. *Torkington*, 1 G. & D. 482.

CONFIDENTIAL COMMUNICATIONS, p. 320.

In an action against the sheriff for an escape on a *ca. sa.*, and for the purpose of letting in secondary evidence, the attorney for the defendant may be asked by the plaintiff's counsel whether he has possession of the warrant on which the arrest took place, although he received it from his client in reference to communications concerning the cause. *Coates* v. *Birch*, MS. Q. B. Mich. 1841. See *Bevan* v. *Waters*, M. & M. 235. *Robson* v. *Kemp*, 5 Esp. C. 53.

Where the same attorney acted for the prisoner (the mortgagor), and also for the mortgagee, and received from the prisoner, as part of his title deeds,

a forged will; it was held not to be a privileged communication, and that the attorney was bound to produce the will on the trial of an indictment for the forgery. *R.* v. *Avery*, 8 C. & P. 596; denying the case of *R.* v. *Smith*, 1 Phillipps's Ev. 182.

In trover, by assignees, to recover a lease, alleged to have been brought to the witness, an attorney, for the purpose of raising money; held, that the employment being so connected with the character of an attorney as to raise a presumption that it formed the ground of the communication, it was privileged. *Turquand* v. *Knight*, 2 Mees. & W. 98; and see *Greenough* v. *Gaskell*, 1 Myl. & K. 98; and *ex parte Aitken*, 4 B. & Ald. 49.

An attorney is not privileged from disclosing, as a witness, a statement made by his client relative to the subject-matter of a suit, if such statement was not necessary for the purpose of the proceeding on which the attorney was employed; where the agent of the plaintiff, an attorney, was called and asked, whether the plaintiff did not at the time say he was employed in the business by another, it was held not to be a privileged communication. *Gillard* v. *Bates*, 6 M. & W. 547; S. C. 8 Dowl. 774.

The communications of a client with his solicitor through an unprofessional agent are privileged, but not if they are mixed up with matters not of a confidential nature; but a case submitted to the opinion of counsel in a foreign country, and his opinion thereon, were held privileged. *Banbury* v. *Banbury*, 2 Beav. 173.

Where the statement is wholly collateral to the subject on which the attorney was employed, it is not a privileged communication. *Gillard* v. *Bates*, 8 Dowl. 774.

Where a deceased party, the grantee of an annuity, anticipating that the validity of it might be questioned, through his solicitor submitted a case to counsel, and the papers afterwards came into the possession of his son, the defendant and assignee of the annuity, they were held not to be privileged communications, nor were letters, &c., written by the defendant to his father's former solicitor, acting as his agent and friend, and not as his solicitor; the privilege of the client, as to discovery, is not co-extensive with that of his solicitor. *Greenlaw* v. *King*, 1 Beav. 137.

Where the prisoner requested a party to ask *G.*, or any other attorney, as to there being any difference in the punishment whether the forgery was of a real or fictitious person, it was held not to be a privileged communication. *R.* v. *Brewer*, 6 C. & P. 363.

Where the party's solicitor became a trustee under a deed for the benefit of the client's creditors, it was held that communications subsequent thereto were privileged. *Pritchard* v. *Foulkes*, 1 Coop. 14.

On a bill by the *A.* Insurance Company, against the directors, actuary, and solicitor of the *E.* Insurance Company, to have a policy on the life of *C.* cancelled, the solicitor having been present when an agent of the *E.* Company communicated an unfavourable medical report upon the life; the communication was held not to be privileged, and being made, the defendants were not protected from discovery. *Desborough* v. *Rawlins*, 3 Myl. & Cr. 515.

CONSPIRACY, p. 324.

A. and others were indicted for feloniously demolishing the house of *B.* It was proved that *A.* and a mob of persons assembled at *H.*; *A.* there addressed the mob in violent language, and led them in a direction towards

a police-office about a mile from *H.*, some of the mob from time to time leaving and others joining. At the police-office the mob broke the windows, and then went and attacked the house of *B.*, and set it on fire, *A.* not being present at the attack on the house or at the fire; it was held, that on this state of facts *A.* ought not to be convicted of the demolition, as it did not sufficiently appear what the original design of the mob at *H.* was, nor whether any of the mob who were at *H.* were the persons who demolished *B.*'s house. *R.* v. *Howell*, 9 C. & P. 437.

A. was charged with having conspired with *W. J.* and others unknown, to raise insurrection and obstruct the laws. It was proved that *A.* and *W. J.* were members of a Chartist lodge, and that *A.* and *W. J.* were at the house of the latter, on a certain day, on the evening of which *A.* directed people assembled at the house of *W. J.* to go to the race-course at *P.*, whither *W. J.* and other persons had gone: held, that on the trial of *A.* evidence was receivable that *W. J.* had, at an earlier part of the same day, directed other persons to go to the race-course; and it being proved that *W. J.* and an armed party of the persons assembled went from the race-course to the New Inn, it was held that evidence might be given of what *J. W.* said at the New Inn, it being all one transaction. *R.* v. *Shellard*, 9 C. & P. 277.

On an indictment for a conspiracy to resist the payment of church rates, held, that a witness might be asked, on cross-examination, as to any appeals having been made against the rates, but not as to what the trustees had done in reference thereto, their proceedings being required by the local Act to be entered, and allowed to be read in evidence in all cases; 2dly, that acts of distinct individuals may be first proved, and then it may be shown that those acts prove a conspiracy between them; 3dly, that there is no distinction between civil and criminal cases, as to the examination in chief of a witness by leading questions; in both cases it is in the discretion of the Judge how far he will allow it to assume the form of a cross-examination: upon a charge of conspiracy, the jury must be satisfied that the acts were done with common concert and design between the parties, but for that purpose it is not necessary to show that they came together to concert them; and it is sufficient, if by their acts they pursue the same object by the same means, though each may perform separate parts of an act. *R.* v. *Murphy*, 8 C. & P. 297.

A conspiracy may be proved by antecedent acts of parties, and that the party charged adopted those acts. *R.* v. *Frost*, 9 C. & P. 150.

On an indictment for conspiring to excite seditious meetings, and for the purpose of exciting alarm amongst the Queen's subjects; it was held, that the evidence of a constable of complaints being made to him by persons of their alarm, was receivable, without calling those persons. *R.* v. *Vincent, Frost, and Edwards*, 9 C. & P. 275.

Where an indictment charged a conspiring to defraud divers of Her Majesty's liege subjects, who *should* deal, &c. with the defendants; and in a second count, alleged an overt act by a fraudulent bill of sale, with intent to defraud existing creditors; held, that it was no objection that particular liege subjects were not mentioned, but that the omission, in the first count, to state the means by which the fraud was to be effected, and in the second count how the deed alleged was fraudulent, were fatal objections, and judgment was reversed on error. *Peck* v. *Regina*, 1 P. & D. 508; and 9 Ad. & Ell. 686.

CONSTABLE.

As to the appointment of a high constable, see *R.* v. *Watkinson*, 2 P. & D. 625. As to county and district constables, see 3 & 4 Vict. c. 88.

Where a party occupied a warehouse for which he was rated, and slept in a lodging four or five nights in the week within the constablewick for which he was appointed at the court leet; held, that he was liable to serve as a resiant, although he might also be liable to be chosen in another constablewick; but held also, that when no higher fine than 100*l.* had ever been imposed for not serving, the imposition of a fine of 300*l.* was excessive, and bad. *R.* v. *Moseley*, 5 Nev. & M. 261; and 3 Ad. & Ell. 488.

Where a special constable had been appointed, under 1 & 2 W. 4, c. 41, for an indefinite time, it was held that his authority continued until specially determined or suspended, under s. 9, with all the powers of an ordinary constable. *R.* v. *Porter*, 9 C. & P. 778.

CONSTRUCTION. See STAT.

As to the construction of agreements, see *Atwood* v. *Taylor*, 1 Scott, N. S. 611.

Of a charter party. *Crozier* v. *Smith*, 1 Scott, N. S. 338.

CONTRIBUTION.

(*Tort-feasors.*)

Where a custom was found for ships engaged in the timber trade to carry timber on deck, it was held, that such having been thrown overboard for the preservation of the ship and cargo, the owner was entitled to contribution against the shipowner. *Gould* v. *Oliver*, 4 Bing. N. C. 134.

The rule, that there is no contribution amongst tort-feasors, does not, it seems, apply when they are so by mere inference of law, but is confined to cases where they must be presumed to be cognizant of the wrongful act. *Pearson* v. *Shelton*, 1 M. & W. 504; and 1 Tyr. & Gr. 848. And see *Adamson* v. *Jarvis*, 4 Bing. 66; and *Woolley* v. *Bate*, 2 C. & P. 417.

CONVICTION, FORMER.

In an indictment for an offence punishable with transportation for life, a former conviction ought not to be charged. *Glidstone's Case*, 2 Lew. Cr. Cases, 190.

A previous conviction of the prisoner is not to be inquired into until after a conviction of the felony charged, by 6 & 7 W. 4, c. 112.

Where the prisoner's counsel attempts to elicit, on cross-examination, evidence as to character, evidence of a previous conviction may be given in the first instance. *R.* v. *Gadburn*, 8 C. & P. 676.

(*Identity.*)

In order to prove the identity of a prisoner who is named in a certificate of a previous conviction, it is not necessary to call a witness who was present at the trial to which the certificate relates; it is sufficient to prove that the prisoner is the person who underwent the sentence mentioned in the certificate. *R.* v. *Crofts*, 9 C. & P. 219.

COPYHOLD, p. 332.

Copyhold passes by the devise of an heir, although he had not been admitted nor surrendered to the use of his will; extending 55 Geo. 3, c. 192. *Doe* v. *Wilson*, 5 Ad. & Ell. 321.

Where a person filling the office of clerk of the castle of *F.*, stated it to be usual for him, as well as the steward, to take surrenders; it was held to be a valid custom, and evidence of its existence for a jury. *Doe* v. *Mellersh*, 5 Ad. & Ell. 541; and 1 Nev. & P. 30.

An immemorial custom in a manor to surrender lands in trust, is valid. *Snook* v. *Southwood*, 5 Ad. & Ell. 239. See further as to custom, *Bush* v. *Locke*, 9 Bli. N. S. 1.

Where the record book of a manor of an admittance to a copyhold recited the surrender to the uses of the will, but the surrender could not be found, the originals being kept loose and irregularly, and there was no record of the surrender on the rolls; held that it was admissible evidence of such surrender. *R.* v. *Thurcross*, 1 Ad. & Ell. 126; and 3 N. & M. 284.

The court rolls containing an entry of a presentment by the homage of a surrender out of court, and of the admittance of the surrenderee, are evidence of title against the surrenderor. *Doe* v. *Olley*, 4 P. & D. 275.

Where an issue was directed to try whether by the custom the youngest sister of the deceased, or the youngest son of the settlor's youngest nephew, was the customary heir, and the jury, by finding for the defendant, had negatived the plaintiff's title as customary heir, and the effect of the verdict was to establish, within an extensive district, a rule of inheritance of which there was no distinct precedent in evidence; the Court, unwilling to bind the rights by a single trial, and where the Judge had stated the issue to be between a common-law heir and a customary heir, and that the former must prevail unless the custom was established by positive evidence, a second trial was allowed. *Locke* v. *Colman*, 2 Myl. & Cr. 42.

Lands held by copy of court roll according to the custom of the manor are to be deemed copyhold within the 55 Geo. 3, c. 192, although not held at the will of the lord; and although it was specially found that previous to the Act there did not appear on the court roll any entry of surrender to the uses of the will of the party making surrender, held that the lands were nevertheless within the statute; held also, that a general devise of all the rest and residue of his estate whatsoever and wheresoever, and of what nature or kind soever, was sufficient to pass copyhold estate. *Doe* d. *Edmund* v. *Llewellyn*, 2 Cr. M. & R. 503.

CORPORATION, p. 338.

The Crown may delegate to an individual the power of appointing the first members of a corporation, or at all events appoint a person to ascertain the individuals who compose the class to which the charter is granted. *Rutter* v. *Chapman*, 8 M. & W. 1. In the Exchequer Chamber, Lord Denman, C. J., and Williams, J., *dissent.*

The Municipal Reform Act does not, it seems, create a new corporation. (*Per* Patteson, J.) *Ludlow Corporation* v. *Tyler*, 7 C. & P. 537.

The insertion of a place in the Municipal Reform Act is *primâ facie* evidence of a municipal corporation there; but where it appeared by affidavits

that there never had been an incorporation, but that the borough-holders were grantees of certain freehold burgages for purposes of trade, the Court refused a *mandamus* to compel the delivery of the documents and surrender of the property. *R.* v. *Greene*, 1 N. & P. 631.

(*Actions by*, p. 338.)

Assumpsit is maintainable by a corporation on an executory contract for the supply of gas, the object for which the company was incorporated, and although made by parol: the Court is bound to take notice that the plaintiffs were a corporation, having been so created by statute, and the action brought in that character. *Church* v. *Imperial Gas Company*, 3 N. & P. 35; S. C. 6 Ad. & Ell. 846; overruling the distinction in *East London Waterworks Company* v. *Bailey*, 4 Bing. 283.

In a suit to which a corporation were parties, and a corporator who had been disfranchised before the trial was tendered as a witness, the charter requiring all corporate acts to be executed at a meeting whereat the two bailiffs and twelve assistants should be present; held, that a resignation at a meeting where a less number were present was not a valid resignation, and that he was not therefore a competent witness, and that a release by him to the body of which he still constituted a part did not render him competent; held also, that the 2 & 3 Will. 4, c. 42, did not apply to such a case. *Godmanchester Bailiffs, &c.* v. *Phillips*, 6 Nev. & M. 211; and 4 Ad. & Ell. 550.

In an action brought by the new corporation, it appeared that the defendant had presented a petition to the Vice-Chancellor to allow the production of these books on the present trial, which petition was opposed by the present plaintiffs, and dismissed with costs; it was held, that under these circumstances the defendant was entitled to give parol evidence of the contents of the books. *Corporation of Ludlow* v. *Charlton*, 9 C. & P. 242.

An old corporation, before the Municipal Reform Act, were trustees of a charity, and a tenant of the charity had paid rent to the secretary to the old corporation up to Lady-day 1836; held, that this was a good payment, and might be taken advantage of in an action brought by the new corporation for the rent. *Corporation of Ludlow* v. *Charlton*, 9 C. & P. 242.

(*Actions, &c. against*, p. 339.)

A corporation aggregate, or a railway company, is liable to be indicted for breaches of duty, such as the non-repair of bridges, which it is their duty to repair. If they are indicted in Q. B., they can appear by attorney, but if they are indicted at the assizes, *semble*, that they cannot appear there by attorney, but should apply for a writ of *certiorari*, and appear by attorney in Q. B.; and if they do not, there may be a distress, *ad infinitum*, against them. *R.* v. *The Birmingham and Gloucester Railway Co.*, 9 C. & P. 469.

The notice of appeal against a rate under the Municipal Corporation Act must state a grievance, or facts from which it must necessarily be inferred. *R.* v. *Poole Recorder, &c.*, 1 N. & P. 756.

A mere entry of a resolution by a corporation in council, that a mortgage of corporate property should be executed, as a security for money before advanced by the corporation, is not a contract binding on the corporation, not being under their seal; and there being no consideration for the further

security given, no equity can be raised to compel an execution of the mortgage. *Wilmot* v. *Coventry Corporation*, 1 Younge, 518; *Henley* v. *Lyme Regis Mayor, &c.*, affirmed in D. P., 2 Cl. & Fi. 331.

A municipal corporation cannot enter into a contract to pay a sum of money out of the corporate funds for the making of improvements within the borough, except under the common seal. *Mayor, &c. of Ludlow* v. *Charlton*, 6 M. & W. 815.

(*Books of, &c.*)

Primâ facie, it must be presumed that the books of a corporation, which existed before the Municipal Reform Act, are in the possession of the new corporation which succeeded them under that Act; but if it be shown that the old corporation, before their dissolution, deposited them with a banker, and that from his hands they passed into the Master's office of the Court of Chancery, this rebuts the presumption. *Corporation of Ludlow* v. *Charlton*, 9 C. & P. 242.

It being strictly necessary, under 5 & 6 Will. 4, c. 76, s. 69, that the minutes of proceedings by the council should be signed by the chairman at the time of the meeting, and not afterwards, the Court refused a *mandamus* commanding the mayor and town-clerk to enter a resolution passed at a meeting, in the minute book. *Reg.* v. *Evesham Mayor, &c.*, 3 N. & P. 351.

(*Rate.*)

The provision of the Municipal Corporation Act for raising rates, being prospective only, it was held, that without reference to the general rule a rate made retrospectively for the payment of expenses which had been incurred, could not be supported. *Woods* v. *Reed*, 2 M. & W. 777.

(*Election.*)

Where votes were given for a candidate rendered ineligible, but of whose disqualification no express notice was given to the voters; it was held, that a party having a minority of votes, was not duly elected, and having accepted the office, a *quo warranto* was directed to issue. *R.* v. *Hiorns*, 3 N. & P. 149.

Where the declaration for penalties under 5 & 6 Will. 4, c. 76, (Municipal Corporation Act) charged the offence as a corrupting the voter, and the evidence established only an offering to corrupt; held, that it was for the jury to say whether it was an offer accepted or not, as in the former case the offence would have been committed, but that if not, and the voter had not made up his mind, then the offence would be a mere offer to corrupt within sect. 3 of the Act. *Harding* v. *Stokes*, 9 M. & W. 283.

(*Costs.*)

Parties having duties cast upon them in the administration of a fund, are entitled to reimburse themselves out of such fund the expenses incurred in performing those duties. *Attorney-general* v. *Mayor, &c. of Norwich*, 2 M. & Cr. 400.

CORRESPONDENCE.

Where letters in correspondence between the plaintiff and the defendant were offered, it was held, that the latter might read his answer to the plaintiff's last letter, dated the day previous. *Roe* v. *Day*, 7 C. & P. 705.

COSTS.

The rule of Hil. T., 4 W. 4, as to the expenses of witnesses producing documents, does not apply to a party who produces antient records from the Chapter House, Westminster, and who is required not merely to take care of, but to translate and explain them. *Bastard* v. *Smith*, 2 P. & D. 453.

COVENANT, p. 342.

345 (*o*), Note, that the case of *Morgan* v. *Slaughter*, 1 Esp. c. 8, was overruled in *Church* v. *Brown*, 15 Ves. 258; and see further, *Henderson* v. *Hay*, 3 Bro. Ch. C. 632. *Folkingham* v. *Croft*, 3 Anst. 700.

As to construction of, see *Pontet* v. *Bsingstoke Canal Co.*, 3 Bing. N. C. 433; *Lloyd* v. *Lloyd*, 2 M. & Cr. 192.—Independent, when in marriage contracts, see *Lloyd* v. *Lloyd*, 2 M. & Cr. 192. See further as to Independ. Covenants, *Stavers* v. *Curling*, 3 Bing. N.C. 355; *Ritchie* v. *Atkinson*, 10 East, 295.

Upon a lease of premises to *L.*, reciting that the defendant agreed to enter into the covenant for securing the payment of the rent, and the lease then stated the agreement to demise to be in consideration of the covenants by *L.*, and of the covenant entered into by the defendant, and then followed the usual covenant; held, to amount to a joint covenant that both should pay the rent, and that *L.* should keep the premises in repair, and that the defendant was jointly liable with *L.* to repair as well as to pay rent. *Copeland* v. *Laporte*, 3 Ad. & Ell. 517.

A covenant, "forthwith" to put premises into complete repair, must receive a reasonable construction, and is not to be limited to any specific time; and therefore it will be for the jury to say upon the evidence, whether the defendant has done what he reasonably ought in the performance of it. *Doe* v. *Sutton*, 9 C. & P. 706.

Covenant lies for rent reserved on a lease, accruing before entry for a forfeiture, although the lessor was thereby to have the premises again, as if the indenture had never been made. *Hartshorne* v. *Watson*, 4 Bing. N. C. 178; and 6 Dowl. 404.

(*Covenant in Law.*)

In covenant on a deed poll, dated 21st October, for the sale of a ship, then on a foreign voyage, it appeared that on the previous 12th the ship had got on shore, and was left by the crew on the sands, but that they afterwards had access to her, and if there had been facilities she might have been repaired; held, that the simple bargain and sale did not imply that the vessel was then seaworthy, and being still a ship, though, from circumstances, not capable of being employed as such beneficially, the covenant by the defendant that he had power to transfer her as a ship at the time of executing the deed was not broken. *Barr* v. *Gibson*, 3 M. & W. 390.

An equitable depositary of a lease was held to be responsible to the owner of the reversion for rent and covenants, although he had not taken possession of the premises. *Flight* v. *Bentley*, 7 Sim. 149; and see *Lucas* v. *Comerford*, 1 Ves. jun. 235.

Where the lessee holds over after the expiration of the lease, held that he was not bound by the covenant to yield the premises up at the expiration of the new tenancy in the state they were at the date of the original lease. *Johnson* v. *Hereford Churchwardens, &c.*, 6 Nev. & M. 106.

(*Illegal.*)

Where upon the sale of the business of a carrier, the plaintiff covenanted that he would serve the defendant in such trade, and would not exercise it during his life, except as assisting the defendant, in consideration whereof the defendant covenanted to pay him a weekly salary for life; held, that the covenant to serve for life was not void as in restraint of trade, being made on sufficient consideration, and securing some public benefit. *Wallis* v. *Day*, 2 M. & W. 273; and see 15 Vin. Abr. 323, tit. *Master and Servant*, (N.) 5.

(*Variance*, p. 343.)

An agreement was entered into between the plaintiff on the one part, and the defendant with others on the other part, for the execution of a lease, with the usual covenants, and, for the performance, each of the parties did bind himself in a penalty, to be recovered as liquidated damages; held, that on default, that sum was to be deemed a penalty, and not liquidated damages; and the declaration describing it as an agreement between the plaintiff and defendant, who had alone executed it, the variance, whether fatal or not, was one which the Court, under 3 & 4 Will. 4, c. 42, s. 23, might amend, as it would not vary the substantial defence to the action. *Boys* v. *Ancell*, 5 Bing. N. C. 390.

(*Breach of*, p. 344.)

Covenant lies for a breach in not repairing, although the term is forfeited to the superior landlord by the omission of the defendant to repair. *Clow* v. *Brogden*, 2 Scott's N. S. 303.

A tenant's allowing a footpath to be made across a part of demised premises, is no breach of a covenant to occupy the premises in a proper manner. *Doe* d. *Trustees of Worcester Schools* v. *Rowlands*, 9 C. & P. 734.

Where, by a covenant on a demise for lives, a forfeiture was to take place in case the lessee did not produce one of the lives named (living abroad), or otherwise make it appear by a good and sufficient certificate that he was living; held, that an affidavit, showing by circumstances that he was alive within seven years, was not a sufficient compliance with the terms of the covenant. *Randle* v. *Lory*, 6 Ad. & Ell. 218.

Upon an agreement for the demise of premises, that the tenant should within three months, &c. erect a shop-front and otherwise repair, &c., with a power of re-entry for breach of the agreement: the defendant entered and enlarged the window, but did not erect a shop-front, and the son of the lessor, after the three months, demanded a quarter's rent then due; held that the son having no authority to waive the forfeiture, the demand of rent by him was not such a notice to the lessor as would make the demand amount to a waiver, and that the defendant could not give in evidence a clause in the original lease, prohibiting the carrying on any trade upon the premises, to explain and qualify the term shop-front in the agreement; held also, that the provision for making the lease null and void, rendered it only voidable at the election of the lessor. *Doe* d. *Nash* v. *Birch*, 1 M. & W. 402.

In covenant on a lease to the defendant's testator, for non-repair; plea, that the defendant having declined to take the office of administratrix, she, in order to execute an assignment to the plaintiff of the lease, and in consideration of a promise by the plaintiff not to sue in that capacity, took out

administration, and issue being taken upon such promise, and found for the defendant; held, that being in effect a plea of a parol promise to discharge a legal obligation by deed, and no release shown, the plaintiff was entitled to judgment *non obstante veredicto*, and that the Court could not presume that such promise was by deed. *Harris* v. *Goodwyn*, 9 Dowl. 409.

(*Not to assign, &c.*, p. 345.)

The depositing the lease as a security is no breach. *Doe* v. *Hogg*, 4 D. & R. 225. *Doe* v. *Laming*, 1 R. & M. 36. But Lord Alvanley held it to be sufficient *primâ facie* to show that a stranger was in possession apparently as tenant, and that on inquiry such stranger said that he rented the house. *Doe* v. *Richarby*, 1 Esp. C. 4; and see *Doe* v. *Williams*, 6 B. & C. 41, and *infra*, tit. EJECTMENT.

(*By Assignee of Lessee*, p. 349.)

Covenant by assignee of lessee against lessor, in respect of lands situate in Surrey, the action being brought in Middlesex, but the locality not appearing on the declaration; there being no issue on the locality, it is no ground of nonsuit, and the objection being aided by verdict under 16 & 17 Car. 2, c. 8. *Boyes* v. *Hewetson*, 2 Bing. N. C. 575; 7 C. & P. 127; and 2 Sc. 831. And see *Bailiffs of Lichfield* v. *Slater*, Willes, 431.

(*By Assignee of the Reversion*, p. 349.)

Under 32 Hen. 8, c. 34, the assignee of a reversion is not entitled to arrears of rent due prior to the assignment. *Flight* v. *Bentley*, 7 Sim. 149.

In covenant by the assignee of the reversion against the lessee; plea, not denying that it was the plaintiff's deed, but alleging that the intended lessor had not executed the lease, and that it was not signed by any agent lawfully authorized, in writing; it appeared that *J. H.*, being seised in fee, by deed executed by the defendant, demised the premises for a term of eleven years, under which the defendant entered and was possessed thereof; *J. H.*, by will, devised the estate to his widow for life, remainder to the plaintiff for life; the declaration alleged the death of *J. H.* and of the widow, whereby he became and was seised of the reversion for the term of his life; held, that the covenants being annexed to a mere tenancy at will, (the only interest that passed upon the assent of *J. H.* to the lease), and which tenancy determined on his death, the subsequent occupation for more than a year created a different tenancy, to the reversion expectant upon which the covenants were not annexed, and that the plaintiff could not maintain the action. *Cardwell* v. *Lucas*, 2 M. & W. 111.

A lessor equitably entitled to premises demised part for 99 years, with covenants by the lessee to pay the rent reserved, and having subsequently acquired the legal estate, he by another lease, reciting the former lease, and stipulating for its remaining in force, demised the residue of the premises, but provided that no more rent should be paid for the entire premises than had been paid for the part first demised; held, that the assignee of the reversion could not maintain covenant against the assignee of the lessee for breach of the covenants contained in the former lease. *Whitton* v. *Peacock*, 2 Bing. N. C. 411; and 2 Sc. 630.

(*Damages*, p. 351.)

In an action of covenant for non-repair of premises, held by the defendant under a lease which has several years to run, the proper measure of damages is not the amount that would be required to put the premises into repair, but the amount to which the reversion is injured by the premises being out of repair. *Doe* d. *Trustees of Worcester Schools* v. *Rowland*, 9 C. & P. 734.

The declaration contained breaches on several covenants, the assignments of which would have been bad on demurrer, but the defendant, amongst others, pleaded payment of —— *l.* into court, and that the plaintiff had sustained no greater damages in respect of the causes of action in the declaration mentioned; such plea must be taken to admit some damage upon every part of the breach of covenants in the declaration, and the defects in the allegations are thereby waived. *Wright* v. *Goddard*, 3 N. & P. 361.

A covenant to make a certain allowance for a road does not operate by way of a deduction from the rent, but as a mere covenant, and no defalcation from the rent. *Davies* v. *Stacey*, 4 P. & D. 159; *Mason* v. *Chambers*, Cro. J. 34.

A. leased premises to *B.*, from the 25th of March 1823, for sixteen years wanting ten days, and *B.* covenanted with *A.* to keep the premises in repair, and to paint once in every five years of the term, and to leave the premises in repair. *B.* underleased the premises to *C.* from the 24th of June 1834, for four years and three-quarters wanting eleven days, and *C.* covenanted with *B.* to keep the premises in repair (the covenant so far being in the same terms as in the original lease), and to paint once during the term, and to leave the premises in repair. *A.* sued *B.* for breaches of this covenant, and *B.* let judgment go by default, and upon the writ of inquiry the damages were assessed at 64 *l.* 10 *s.*, being the amount of dilapidations proved by a surveyor, whose estimate had been laid before *B.* previously to the commencement of the action. *B.* afterwards sued *C.* for the amount of the dilapidations, and the costs of the action brought against him. The jury found the amount of the dilapidations to be 57 *l.* 10 *s.*; held that *B.* was not entitled to recover also the amount of the costs in the former action. *Penley* v. *Watts*, 7 M. & W. 601.

(*Defence*, p. 351.)

Although, in covenant for rent, a plea of eviction of part of the premises demised is good, such a defence is no answer to the breach of other covenants, as for not repairing, underletting, &c. *Newton* v. *Allin*, 1 Gale & D. 44.

On a demise for fourteen years of a mill and machinery, valued at a certain sum, with agreements that on the expiration or other determination of the lease, a valuation should be made, and the difference of the increased or diminished value be paid by the parties, as the case might be; held, that on the lessee becoming bankrupt during the term, and the assignees refusing to take the lease, they were not entitled to maintain an action on the covenant for the increased value of the machinery, the covenant being put an end to by the bankruptcy and refusal to take the lease, but that they might maintain trover for the machinery. *Fairburn* v. *Eastwood*, 6 M. & W. 679.

CRIMINAL CONVERSATION, p. 352.

Where the wife died after the action brought, it was held that the plaintiff was still entitled to recover damages for the injury to his feelings, and the loss of society to the time of her death; held also, that letters written by the wife to the husband, after the attempt at adultery committed by the defendant, were inadmissible; but that the draft of an answer by the wife to a letter from a friend, on the subject of rumours, in the defendant's handwriting, was admissible. *Wilton* v. *Webster*, 7 C. & P. 198.

CUSTOM, p. 357.

Where the existence of a custom alleged by the defendant is the substantial question to be tried, he is entitled to begin, although the plaintiff allege that he goes for damages; a custom for the stanners of Devon to divert watercourses into their streams, and for that purpose to dig trenches over private lands, was not sustained. *Bastard* v. *Smith*, 2 Mo. & R. 129.

A custom for the deputy-day-oyster-meters of London to have the exclusive right of shovelling, unloading, and delivering all oysters brought in any vessel along the Thames within the port of London, and to have, as compensation, 8*s.* a score for the first 100 bushels (double measure), and 4*s.* a score for the remainder of the cargo, was held to be reasonable by the jury; held, also, that the meters are liable to do all the labour of shovelling, &c. and are also liable to an action if they do not provide men for the work, and the parties may have it done by other workmen. *Layburn* v. *Crisp*, 8 C. & P. 397.

A custom (pleaded in justification of trespass for entering the plaintiff's house), on occasion of perambulating parish boundaries, to enter a particular house neither on the boundary line nor in any manner required in the course of perambulation, cannot be supported. *Taylor* v. *Devey*, 7 Ad. & Ell. 400; and 2 N. & P. 469.

Semble, entries in parish books, recording the fact that parish perambulations had taken a particular line, would be inadmissible. *Taylor* v. *Devey*, 7 Ad. & Ell. 400; S. C. 2 N. & P. 469.

A custom, proved to have existed from time immemorial till 1689, must be taken to exist still, if there be no further evidence proving or disproving its existence. On an issue bringing into question the existence of the above custom of *London*, evidence being given of its exercise from an early period down to 1689, but no proof of its having been exercised or interfered with at any later time, the jury found "that the custom existed in 1689;" held, that this was a verdict for the defendants, who alleged the custom. And that the Judge did rightly in ordering it to be so entered, and refusing to ask the jury, whether it had existed after 1689. *Scales* v. *Key*, 11 Ad. & Ell. 819.

Plea, in *assumpsit* for money had, a recovery by foreign attachment by a creditor of the plaintiff, and that such creditor had execution thereof; replication, no execution executed, pursuant to the custom, and issue thereon: held, 1st, that an allegation that the plaintiff had no notice of the proceedings in the foreign attachment was no answer to the plea, the custom being found not to require that any notice should be given to the defendant in the attachment; 2dly, that the custom alleged in the plea, that after execution had and executed, the garnishee should be discharged, and it being expressly found that no writs of execution were issued on the

defendant or garnishee, the plaintiff was entitled to judgment on that issue; that the defendant, by taking issue on that replication, was not precluded from proving, and the jury from finding, according to the fact; and that the attorney of the garnishee was not incompetent to prove the custom. *Magrath* v. *Hardy*, 4 Bing. N. C. 782; 6 Sc. 627; and 6 Dowl. 749.

A custom for *all* victuallers to erect booths on a common at a fair, from a certain day to a certain other day, paying 2*d.* to the lord, was held to be good. *Tyson* v. *Smith*, 1 N. & M. 784.

Where the plaintiffs, as outgoing butty colliers, after notice, sued the mine owners for gate roadings, &c., alleging the title to recover by the custom of coal miners, the defendants alleging the custom to be for the outgoing butty colliers to be paid by the new butty colliers, at whatever distance of time the workings should be recommenced, the jury found for the plaintiffs; and *semble*, strict proof would be requisite to establish the custom set up by the defendants. *Bannister* v. *Bannister*, 9 C. & P. 743.

On an indictment for perjury in an affidavit in support of a petition in the Insolvent Court, a paper, purporting to be a printed copy of the rules of the Court, but not authenticated, is not admissible as proof of the practice of the Court. *R.* v. *Roops*, 1 N. & P. 828.

Upon a covenant in a lease of mines to work them not *below the level* of the bottom of the mine at a particular point; held, that evidence of the meaning of the covenant according to the custom and understanding of miners, was admissible, and that it was for the jury to decide on its effect, and to say what was the contract between the parties; and upon a reference as to the meaning of the term *level*, the arbitrator having found it according to the custom, &c. of miners "throughout that district," the Court could not take upon themselves to say that the parties used it in the sense attached to it within the particular district, but it was to be determined by a jury, and a new trial was granted. *Clayton* v. *Gregson*, 6 N. & M. 694.

Note, that the case was afterwards tried, and the meaning of the parties was admitted to be as found by the arbitrator.

DAMAGES, p. 364.

In case where special damage is stated, and is the foundation of the action, being traversable, if not traversed by the plea, it is admitted. *Perring* v. *Harris*, 2 M. & R. 5.

In *assumpsit* for a salary for services, the defendant pleaded payment of a sum into court; held, that he cannot give in evidence, in mitigation, circumstances of misconduct, which might have been pleaded in bar. *Speck* v. *Phillips*, 7 Dowl. 470.

(*Compensation recovered, &c.*, p. 364.)

Where a Railway Act empowered the taking lands, on making compensation, with an exception of mines, and also provided that the latter might be worked by the owners, but that they, in case of damage to the railway works, should repair them at their own expense, or the company, in case of neglect, might repair and recover the amount; held, that the owner of a mine discovered after the lands taken and compensation assessed, and which could not be worked without interfering with the railway, could not sue the company for further compensation for the loss sustained thereby, as such contingent compensation should have been claimed on the original assessment. *R.* v. *Leeds and Selby Railway Company*, 5 N. & M. 246; and 3 Ad. & Ell. 683.

(*Consequential*, p. 364.)

The ship's husband had brought an action against the freighters upon breach of a covenant to supply a full home cargo, and recovered damages, upon which the freighters afterwards brought an action for the breach of covenant by him to take out certain goods to *T.*, which he had failed to do; held that they were not entitled to recover as part of the damages the costs they had paid in defending the former action, although the failure to supply such home cargo arose out of the neglect of the ship's husband to take out such goods to *T.*, as being too remote, and not the immediate consequence. *Walton* v. *Fothergill*, 7 C. & P. 392.

(*Prospective*, p. 364.)

In an action on the case by a master, for an injury done to his apprentice by the dog of the defendant, whereby the master was deprived of the service of his apprentice, the plaintiff may recover for damages that would accrue after the commencement of the action. The defendant had paid into court 10*l.* in respect of damages up to the time of commencing the action; the jury found that to be sufficient for those damages, but awarded a further sum of 20*l.* on account of prospective damages, and the court refused to disturb the verdict. *Hodsoll* v. *Stallebrass*, 8 Dowl. 482; 9 C. & P. 63; 3 P. & D. 482.

A declaration for such injury, stating the servant to have been *permanently* crippled, is supported by evidence that the injured party is still disabled, and likely to remain so, but, with care, will be restored in time. *Hodsoll* v. *Stallebrass*, 11 A. & E. 301.

(*Excessive*, p. 364.)

Upon an application to set aside a verdict on the ground of excessive damages, the Court will not receive the affidavits of the defendant's witnesses, either to explain or add to evidence given by them at the trial. *Phillips* v. *Hatfield*, 8 Dowl. 882.

(P. 364, note (*p*).

And see *Moons* v. *Bernales*, 1 Russ. 307.

The effect of the verdict on costs is to be laid entirely out of the consideration; with this the jury have nothing to do; where, therefore, in slander, the Judge directed the jury that it was not a case for large damages, and that they should give such a verdict as would set the plaintiff's character right, and they found a verdict with 1*s.* damages, the Court refused to interfere. *Mears* v. *Griffin*, 2 Sc. N. S. 15.

As to the amount to be recovered by one who sues as a trustee for the party damnified, see *Lamb* v. *Vice and others*, 8 Dowl. 360.

(*General Damages.*)

The second count of the declaration stated that the plaintiffs were possessed of a vault, and of certain wine therein; that the defendant was about to pull down and remove, and did pull down and remove, certain other vaults and walls next adjoining the plaintiff's vault, and that thereupon it became and was the duty of the defendant, in the event of his not shoring up or protecting the plaintiffs' vault, to give due and reasonable notice to the plaintiffs of his intention to pull down and remove the said vaults and walls

so adjoining the plaintiffs' vault before he pulled down the same, so as to enable the plaintiffs to protect themselves; and also to use due care and skill, and take due, reasonable, and proper precautions in and about the pulling down and removing his vault and walls, so that for want of such care, skill, and precaution, the plaintiffs' vault and its contents might not be damaged or destroyed. General damages having been given upon the whole declaration, held that the allegation as to the want of notice could not be rejected, and the damages be ascribed to the rest of the declaration, even if good. *Chadwick* v. *Trower*, 8 Scott, 1.

DEAF AND DUMB.

One deaf and dumb may plead, to a charge of felony, not guilty, in writing. *Thompson's Case*, 2 Lewin's C. C. 137.

In the case of a prisoner, deaf and dumb, but capable of reading the indictment, and who by signs pleaded not guilty, the Judge directed the jury to consider, 1st, Whether the prisoner was mute of malice or not; 2dly, Whether he could plead; and, lastly, Whether he was of sufficient intellect to comprehend the proceedings, so as to make a proper defence, and to understand the details of the evidence; and told them that it was not enough that he had a general capacity of communicating on ordinary matters. *R.* v. *Pritchard*, 7 C. & P. 303. And see *R.* v. *Dyson*, *ib. notis*; and 1 Hale, 34.

DEATH, p. 364.

In an action of ejectment it will not be presumed that a tenant for life died at the expiration of seven years from the time when he was last heard of. *Doe* v. *Nepean*, 5 B. & Ad. 86.

The production of the will, and proof by a niece, a legatee, of having received a legacy under it, coupled with the copy of an entry in the register of burials, was held to be sufficient evidence of the death. *Doe* v. *Penfold*, 8 C. & P. 536.

Where the pauper contracted a second marriage on 11th April 1831, and it was proved by the father of the former wife that he had received a letter in her handwriting, dated Van Diemen's Land, 17th March 1831; held, upon the question of the validity of the second marriage, that such letter was admissible, and that the justices or a jury would be justified in coming to a conclusion that she was alive at the time of the second marriage. *R.* v. *Harborne*, 4 N. & M. 341.

See further as to the presumption of death, *Rust* v. *Baker*, 8 Sim. 443.

DEATH-BED DECLARATIONS, p. 365.

Where the deceased, after expressing an opinion that she should not recover, asked a person if he thought she would rise again, it was held to be insufficient to make the declaration receivable, but that it was no objection to the declaration that it was made in answer to questions put by the medical attendant. *R.* v. *Fagent*, 7 C. & P. 238.

The deceased said, "I think myself in great danger;" it was held that these words did not necessarily exclude all hope, and therefore that they were not admissible as a dying declaration. *Errington's Case*, 2 Lewin's Crown Cases, 149.

In a case of murder, it appeared that two days before the death of the deceased the surgeon told her that she was in a very precarious state; and that on the day before her death, when she had become much worse, she said to the surgeon that she found herself growing worse, and that she *had been in hopes* she would have got better, but, *as she was getting worse*, she thought it her duty to mention what had taken place. Immediately after this she made a statement; it was held, that this statement was not receivable in evidence as a declaration in *articulo mortis*, as it did not sufficiently appear that, at the time of making of it, the deceased was without hope of recovery. *R.* v. *Megson*, 9 C. & P. 418.

A boy between ten and eleven years of age was mortally wounded, and died the next day. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover. The boy made no reply, but appeared dejected. It appeared from his answers to questions put to him, that he was aware that he would be punished hereafter if he said what was untrue: held, that a declaration made by him at this time was receivable in evidence on the trial of a person for killing him, as being a declaration in *articulo mortis*. *R.* v. *Perkins*, 2 Mood. C. C. 135; 9 C. & P. 395.

Although, where any hope of recovery exists, however slight, dying declarations are inadmissible, yet where, after being assured that he must die, and the magistrate, previously to receiving a declaration, desired the party as a dying man, to speak the truth, to which the deceased replied that he would, the Judge (Tindal, C. J.) held it to be admissible. *R.* v. *Hayward*, 6 C. & P. 158.

Where it was clear the party did not expect to survive, and thought he might die on the day, held that his statements were receivable, although he lingered some days longer. *R.* v. *Bonner*, 6 C. & P. 386.

The deceased said to the surgeon, "Shall I recover?" The surgeon said "No." The patient grew better, but relapsed, and then repeated the question. The surgeon said, "I think you will not recover;" the deceased said, "I think so too." It was held, that the declarations of the deceased were admissible; *R.* v. *Ashton & Thornley*, 2 Lewin's C. C. 147.

Where there was nothing in the conduct of the deceased indicating a consciousness of the approach of death, but merely expressions that he thought he should not recover, held insufficient to make the declarations admissible. *R.* v. *Spilsbury and others*, 7 C. & P. 187.

Declarations in *articulo mortis* having been taken down and signed, a copy cannot be received, nor parol evidence of the contents. *R.* v. *Gay*, 7 C. & P. 230.

Dying declarations may be given in evidence in favour of the accused. *R.* v. *Scarfe*, 2 Lewin's C. C. 150.

(*Effect of*, p. 367.)

Although the legal sanction to a dying declaration is equivalent to that of an examination on oath, yet the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination, per Alderson, B. *Ashton's Case*, 2 Lewin's C. C. 147.

(*In Civil Actions*, p. 368.)

In covenant upon a mortgage, upon plea *non est factum*, and issue whether the deed had been fraudulently altered by *H.*, one of the attesting witnesses, who was dead, the other witness doubting his own signature and that of the defendant, and denying all knowledge of the transaction; it was held, that declarations of the deceased witness as to the supposed fraudulent alteration were inadmissible. *Stobart* v. *Dryden*, 1 M. & W. 615; and 1 Tyr. & G. 899.

DEBT, p. 369.

In debt for work and labour as an attorney, under the plea *nunq. indeb.*, the defendant may show a contract under which he would be liable to a portion of the demand, and he is not precluded by plea of payment into Court of part, from showing a contract different from that alleged in the declaration. *Jones* v. *Reade*, 5 Dowl. 217.

On plea in *debt*, of payment, the defendant not appearing to support his plea, the plaintiff must, it seems, prove the amount of his debt, as well as in *assumpsit*. *Mackintosh* v. *Weiller*, 1 Mo. & R. 505.

Under a plea of *nunq. indeb.*, or set-off in debt, the defendant is not entitled to give in evidence money payments to the plaintiff, which are *primâ facie* to be taken as paid in satisfaction of the debt due from the party paying. *Cooper* v. *Morecraft*, 3 M. & W. 500.

In the action of *debt*, where there is no inquiry of damages, if there be no plea of payment, it cannot be given in evidence in reduction of damages. *Belbin* v. *Butt*, 2 M. & W. 422; and 5 Dowl. 604.

DECEIT, p. 371.

(*In Sale, &c.*)

At an auction, premises were represented as good and substantial, although they were unfinished buildings, being in fact in so ruinous a state as to be only fit to be pulled down; it was held, that the sale was void, and the purchaser entitled to recover back the deposit. *Robinson* v. *Musgrove*, 8 C. & P. 469; and see VENDOR AND VENDEE.

In case for falsely representing the extent of the weekly business, in an advertisement on the sale of the goodwill; held, that the defendant having made his wife his agent in the management of the business, he was bound by her statement, although he made no representations himself as to the state of the trade. *Taylor* v. *Green*, 8 C. & P. 316.

(*False Representation*, p. 373.)

A. authorises his shopman to give the same representation of a customer which he himself had received, this is within the st. 9 Geo. 4, c. 14, s. 6, and not being in writing, an action is not maintainable. *Haslocke* v. *Ferguson*, 2 N. & P. 269.

The plaintiff being about to advance money to *C.*, the representation was, "You may safely lend; I know he has property; the title-deeds are in my possession, and he cannot deal with them without my knowledge;" it was held to amount to a representation of ability within the statute. *Swan* v. *Phillips*, 3 N. & P. 447.

In case for a false and malicious representation that the defendant was entitled to a lien on certain goods agreed to be sold to the plaintiff by a

third party, whereby the seller was induced to believe that the defendant had such lien, and refused to deliver the goods to the plaintiff, whereby plaintiff was prevented using them in his business, and certain works were delayed, &c.; held, that it sufficiently appeared on the declaration that the defendant knowingly made such false claim, and that the special damage was one sufficiently resulting from the non-delivery of the goods, in consequence of such false representation. *Green* v. *Button*, 2 Cr. M. & R. 707; and 1 T. & G. 118.

In an action on the case for deceit, it was alleged in the declaration, that the defendant made certain false representations concerning the character and credit of the firm of *D.* and *L.* (of which he was a member), whereby the plaintiffs were induced to supply goods on trust, and to pay money on account of the said firm; the defendant pleaded that the representations alleged were not made in writing within the 9 Geo. 4, c. 14, s. 6. The Court without determining upon the plaintiff's right to maintain the action, held, that the plea was a good answer to the declaration. *Devaux* v. *Steinkeller*, 8 Dowl. 33; and 6 Bing. N. C. 84.

Case for false representations on the sale of a ship, whereby she was classed lower in Lloyd's books than she would have been, had she been built of the materials described. Although the sale took place under a written contract, minutely setting forth the build and dimensions of the vessel (but omitting all mention of the materials), the plaintiff is at liberty to give in evidence verbal statements and declarations made by the defendant touching the ship pending the negotiations for the purchase, and before the written contract was entered into, amounting to a warranty that her frame was of a particular description of timber. *Wright* v. *Crookes*, 1 Scott, N. S. 685.

Such representations having been made by an agent without any express authority from the defendant, the Judge is warranted in leaving it to the jury to infer from the subsequent conduct of the defendant—*ex. gr.* from his not having repudiated the warranty when apprised of it—that he was privy to, or impliedly assented to the misrepresentations of his agent. *Ib.*

The owner of the wharf known by the name of the *K.* wharf, at which the plaintiff's hoys took in freights, lets part to the defendant by a lease, who by assuming the name obtains freight of goods, alleged by the plaintiff to have been intended for him; in an action of deceit and fraudulent representation, parol evidence is admissible that the defendant was not to use the name of the premises, notwithstanding the division of the wharf by lease, in order to show knowledge on the part of the defendant; and the want of an averment of particular instruction to forward goods by the plaintiff's hoys, or of any specific fraud or false pretence, or loss of freight, is no ground for arresting the judgment. *Hope* v. *West*, 7 Sc. 876.

DEED, p. 376.

(*Recital.*)

A mortgage deed recited a conveyance by *A.*, the tenant in fee, for a term to *C.* and *H.*, subject to redemption, and that the subsequent mortgagee, at the request of *A.*, had paid the first mortgagees, and advanced to *A.* a further sum, and in consideration thereof, *C.* and *H.*, at the request of *A.*, assigned, and *A.* did grant, &c. the premises for the residue of the term, subject to redemption; held, that *A.*, having been proved *aliunde* to have been seised in fee, the latter deed was sufficient evidence of title to the possession in

the representatives of the second mortgagee; the recital, if taken altogether, showing a title to assign in *C.* and *H.*, or, if rejected, *A.* being capable of granting a term, it might be looked at to see what term was intended to pass. *Doe* d. *Rogers* v. *Brooks*, 3 Ad. & Ell. 513.

Although a deed poll may be framed so as to give a right of action against a party executing it, yet, when made between parties, no one can bring an action on it, except a party, or one claiming through him. *Gardner* v. *Lachlan*, 8 Sim. 126.

(*Construction of.*)

See *Blatchford* v. *Mayor, &c. of Plymouth*, 3 Bing. N. C. 691.

DEPOSITIONS, p. 382.

(*Before a Magistrate.*)

The examination of a party, taken in the prisoner's absence, ought not to be returned as one of the depositions: if the prisoner is desirous of making a statement, it is the duty of the magistrate, after a caution that it will be used against him, in order to get rid of any previous impression, to receive it and have it taken down. *R.* v. *Arnold*, 8 C. & P. 621.

It is the duty of the coroner to bind over those witnesses only who make out the case against the party charged, and not those called by him to rebut it. *R.* v. *Taylor*, 9 C. & P. 672.

The magistrate is bound to return all the depositions, and not those merely of such witnesses as he thinks fit to bind over. *R.* v. *Fuller*, 7 C. & P. 269.

Depositions are the best and only proper evidence of the statements made, and the rule applies to them in all proceedings connected therewith, in which it is sought to adduce the statements in evidence. *Leach* v. *Simpson & another*, 7 Dowl. 513.

Where the magistrate returned the depositions, stating the prisoner to have declined saying anything, it was held that statements made by him in the magistrate's presence, could not be given in evidence. *R.* v. *Walter*, 7 C. & P. 267.

The prisoner's examination concluded, "taken and *sworn* before, &c.," held that it could not be permitted to contradict by parol the magistrate's signature, by showing that the examination was not sworn, and that parol evidence of what the prisoner said could not be received. *R.* v. *Rivers*, 7 C. & P. 177.

Where the magistrate's clerk, in taking down the statements of several parties charged, left the names of each other mentioned by such parties in blank, the Judge refused to have them supplied by supplementary evidence. *R.* v. *Morse & others*, 8 C. & P. 605.

Where depositions of a deceased witness before the magistrate were duly taken and signed by the magistrate, but the cross-examination of the witness was taken subsequently; it was held, that the want of signature thereto, excluding the latter, would exclude the depositions altogether. *R.* v. *Frances*, 2 M. & R. 207.

A deposition taken under the st. 7 G. 4, c. 64, s. 32, is not evidence after the death of the deponent, unless it was taken in the presence of the prisoner. *R.* v. *Errington*, 2 Lewin's C. C. 142.

(*Copy, &c.*)

Where the statement is returned with the deposition, the prisoner is not entitled to a copy thereof under 6 & 7 Will. 4, c. 114, but only of the depo-

sition of witnesses. *R.* v. *Aylett*, 8 C. & P. 669. The prisoner is entitled to copies of depositions before a coroner. *R.* v. *Greenacre*, 8 C. & P. 32.

The principal thief having been admitted evidence for the Crown against the receiver, the latter was allowed to see the depositions which had been returned against the former. *R.* v. *Walford*, 8 C. & P. 767.

The deposition of a witness taken before the coroner on any inquiry touching the death of a person killed by a collision between a brig and a barge, is receivable in evidence in an action for the negligent management of the brig, if the witness be shown to be beyond sea. *Sills* v. *Brown*, 9 C. & P. 601. *Qu.*

DETINUE, p. 387.

A count for detinue of the note may be joined with a count in debt for the amount of the bill. *Kirkpatrick* v. *Bank of England*, 8 Dowl. 881.

Upon issue joined on a plea denying property in the plaintiff, it is no defence that there are other persons, co-tenants with the plaintiff, who are not joined in the action. *Broadbent* v. *Ledward*, 11 A. & E. 209.

The plea of *non-detinet* merely puts in issue the simple fact of detainer; and if the defendant relies upon a justifiable detainer, he must plead it specially. *Richardson* v. *Frankum*, 8 Dowl. 346.

On a plea in detinue, that the goods were not the goods of plaintiff, defendant may set up a lien. *Lane* v. *Jewson*, 12 A. & E. 116, note (*a*).

In detinue for papers against an attorney after his bill paid in full, plea *non-detinet*; held, that the plaintiff must prove the defendant's possession, but showing that they were produced by his agent before the Master, on taxing the bill, was held to be sufficient, and that it was no defence that the agent detained the papers on the ground of lien against his client; held also, that the plaintiff must prove the value of each paper, and the jury must find the value separately: the defendant having set up as a defence the delivery of the papers to one *K.*, according to a notice from the plaintiff's attorney, held that *K.* might be called to show the delivery in another right, and that he had a lien thereon, as against the defendant. *Anderson* v. *Pasman*, 7 C. & P. 193.

DIPLOMA.

The witness going to a town, the seat of a university, and being told that a certain building is the college, and a person pointed out there as the librarian, who, on application, produces a seal, which he states to be the seal of the university, and a book, the book of acts, or statute book of the university; the witness compared such seal with that on a diploma, and made a duly examined copy from the entry in the book of an act conferring a degree of M. D.; held, that such diploma was duly authenticated, and the act conferring the degree properly proved. *Collins* v. *Carnegie*, 3 N. & M. 703; and 1 A. & E. 695.

DIRECTORY.

Act *directory*, when as to the mode of making entries in a book by the secretary of a dock company. *Southampton Docks Co.* v. *Richards*, 1 Scott, N. S. 219.

DISTRESS, p. 389.

(*What distrainable*, p. 390.)

Brewers' casks sent to a public-house with beer, and left there until the

beer is consumed, are liable to be distrained for the rent of the house. *Joule* v. *Jackson*, 7 M. & W. 450.

Fixtures cannot be distrained for rent. *Darby* v. *Harris*, 1 G. & D. 234.

An annuity is charged on lands converted into salt-works and a canal for receiving in boats the salt manufactured and sold; the boat of a purchaser is not privileged from distress. *Muspratt* v. *Gregory*, 1 M. & W. 633; 1 T. & G. 1086. Parke, B., *dissentiente*.

(*Proof of the act of distraining, what amounts to*, p. 390-392.)

The agent of the landlord went into a field on the farm where the tenant's cattle were feeding, and, placing his hand upon one of the beasts, said he distrained the whole for the rent due, counted them, and took a note of the particulars, and then went away; on the following morning, he left with the tenant a notice stating that he had distrained the cattle thereunder mentioned, *and had impounded them on the premises*; held, that this constituted an impounding. *Thomas* v. *Harries*, 1 Scott, N. S. 524.

(*Liability of Principal for the act of the Bailiff.*)

If a bailiff distrain goods privileged, yet the landlord is not bound by the acts of his bailiff, if, when coming to the knowledge of them, he disclaim and repudiate them; (Littledale, J.) *Hurry* v. *Rickman*, 1 Mo. & R. 126.

(*Irregular*, p. 390.)

The provisions of 2 W. & M. c. 5, are not repealed by 57 Geo. 3, c. 93, as to distresses under 20*l.*; an appraisement by one broker is therefore insufficient, unless by consent. *Allen* v. *Flicker*, 10 Ad. & Ell. 640.

Case for not leaving the overplus, after sale of a distress, in the hands of the sheriff, under the 2 W. & M. c. 5, s. 2; the overplus is to be taken to mean, after satisfying the rent and the reasonable charges of the distress; and in such action the plaintiff may raise the question of the reasonableness of such charges: whether the tenant's accepting the balance and giving a receipt to the broker is to be taken as a satisfaction, and whether such acts are not an admission that such was the real balance, are questions for the jury. *Lyon* v. *Tomkies*, 1 M. & W. 603; and 1 T. & G. 810.

The landlord was sued for an irregular distress, and obtained a verdict; he is not precluded from double costs under 11 G. 2, c. 19, s. 21, by having pleaded specially. *Gambrell* v. *Earl of Falmouth*, 5 Ad. & Ell. 403.

(*Excessive Distress*, p. 391.)

In case for an excessive distress, a plea, not guilty "by statute," puts in issue as well the inducement, viz. the tenancy and ownership of the goods, as the matter of justification. *Williams* v. *Jones*, 11 A. & E. 643.

The question is whether the goods taken are more than sufficient to satisfy the sum really due, although the warrant may be for a larger sum than is actually due. *Crowder* v. *Self*, 2 Mo. & R. 190.

Case for an excessive distress, plea that the whole sum distrained for was due and in arrear; the defendant is not precluded from taking into the account arrears of rent antecedent to a prior distress, although the notice under such prior distress stated it to be for rent due up to a certain period, and the notice under the latter distress stated it to be for rent accrued since the former distress. *Gambrell* v. *Earl of Falmouth*, 4 Ad. & Ell. 73.

The plaintiff is not entitled to recover as damages the *extra* costs occasioned by the replevin. *Grace* v. *Morgan*, 2 Bing. N. C. 534; and 2 Sc. 790.

An action lies for excess in distraining for more than is due, although there are not goods sufficient to satisfy the rent actually due. *Taylor* v. *Henniker*, 4 P. & D. 242. And the action lies although the first notice be withdrawn, and the sale be under a second notice, claiming no more than is due.—*Ibid.* In *Avenell* v. *Croker*, 1 M. & M. 172, but one thing was taken, and a *stet processus* was afterwards agreed to. In *Wilkinson* v. *Terry*, 1 Mo. & R. 377, Parke, B., doubted whether such an action was maintainable. In the above case of *Taylor* v. *Henniker*, the Court of Q. B. held the action to be maintainable, on the ground that there was a *legal damage*.

Although the landlord in distraining may impound the goods on the premises, and, to secure them, lock them up, yet where he locked up the plaintiff's cottage for the purpose of keeping the possession, it was held that the tenant might maintain trespass for the expulsion, and that a licence by the tenant could only be pleaded specially. *Cox* v. *Painter*, 7 C. & P. 767.

Where the plaintiff, the occupier, although not actually distrained upon for the ground-rent, upon its being demanded, asked for time, at the end of which he paid it; held that it was not to be deemed a voluntary payment, and that the defendant, the immediate landlord, having refused to allow that as well as land-tax, as payment upon the next half-year's rent becoming due, the balance being tendered and refused, and having distrained for the whole rent, the action for an excessive distress was maintainable; held also, that if the whole distress were wrongful, the count in trover was sufficient. *Carter* v. *Carter*, 5 Bing. 406. And see *Sapsford* v. *Fletcher*, 4 T. R. 511; *Taylor* v. *Zamira*, 6 Taunt. 524; and *Branscomb* v. *Brydges*, 1 B. & C. 145.

A party distrained for more than was really due, but took only a single article, and there were no other goods of less value sufficient to cover the rent really due; held that he was not liable for an excessive distress; held also, that where the distress was appraised by a broker sworn before the constable of the adjoining parish, it was irregular, although the officer of the proper parish could not be found, he only having authority under the 2 W. & M. sess. 1, c. 5, s. 2. *Avenell* v. *Croker*, 1 Mo. & M. 172.

(5 & 6 *Will.* 4, *c.* 59.)

It seems that under the 4th section of the stat. 5 & 6 Will. 4, c. 59, the person who is bound to supply food to impounded cattle is the distrainor or person at whose suit they are impounded, and not the pound-keeper; but if the pound-keeper supply the food at the request of the distrainor, or the distrainor join with the pound-keeper in a subsequent sale of the cattle under this Act, the pound-keeper and the distrainor are for this purpose to be considered as one. *Mason* v. *Newland*, 9 C. & P. 575.

Semble, that the 4th section of this statute excludes any right in the owner of the cattle to supply them with food while in the pound. Under the provisions of this statute the distrainor who supplies the food, may either apply to a magistrate to allow any sum not exceeding double the value of the food, or may sell the cattle; but no magistrate ought to allow more than the actual value of the food, if the owner of the cattle was willing to supply the food himself. *Ibid.*

If the cattle be sold under this provision of the stat. 5 & 6 Will. 4, c. 59, the distrainor can only get the single value of the food and not the amount of the damage for which the cattle were distrained, as all the overplus beyond the value of the food, and the expenses of the sale, is to be returned to the owner of the cattle. *Mason* v. *Newland*, 9 C. & P. 575.

The 5th section of the stat. 5 & 6 Will. 4, c. 59, does not give any person a right to any payment; it merely allows charitable persons to supply food to impounded cattle without being liable to an action for doing so. *Ibid.*

(*Tender*, p. 390.)

A tender of rent and costs of a distress after impounding is too late. *Thomas* v. *Harries*, 1 Sc. N. S. 524, and *Ladd* v. *Thomas*, 4 P. & D. 9. Trespass lies for a wrongful continuance in possession after a distress made (*semble*). *Ibid.*

(*Defence*, p. 393.)

Where a party seised in fee granted a lease to *B.* for 61 years, and afterwards granted a lease in reversion, to commence at the expiration of the first lease; held, that he did not thereby part with his reversion, so as to preclude his right of distraining for rent under the first lease. *Smith* v. *Day*, 2 M. & W. 684.

Where the tenancy has ceased by the conveyance of the landlord's reversion, he is not entitled to follow goods removed to avoid distress. *Ashmore* v. *Hardy*, 7 C. & P. 501.

Upon an agreement for a certain rent for a house to be suitably furnished for a school, the furnishing is a condition precedent to the right to demand rent or to distrain, and the due compliance is a question for a jury. *Mechellin* v. *Wallace*, 6 N. & M. 316.

On the expiration of the term, the tenant quitted, and the new tenant entered, but part of the old tenant's stock remained on the premises; the landlord cannot distrain,—the mere fact of leaving the stock, unaccompanied by any claim, not showing a continuance of possession. *Taylerson* v. *Peters*, 7 Ad. & Ell. 110; and 2 Nev. & P. 622.

See further as to privity between the distrainor and the tenant of the land, *Banks* v. *Angell*, 3 N. & P. 94.

(*Executors.*)

By the st. 3 & 4 W. 4, c. 42, s. 37, the executors or administrators of lessor may distrain on any lands demised for any term, or at will, for arrearages due to the lessor in his lifetime.

By sec. 38, the distress may be within six months after the determination of the term during the continuance of the tenant in possession.

(*Distress for Rates, &c.*, p. 393.)

In trespass for seizing goods for highway and poor-rates, but no notice of action given, the defendant being entitled to it under the Highway Acts; held, that the action was maintainable in respect of the goods wrongfully taken for the poor-rate. *Lamont* v. *Southall*, 7 Dowl. 469.

Case for rescuing a barge and goods seized as a distress for tolls due on a navigable river; held, on demurrer, that the first count was bad, for not showing that the goods distrained were those in respect whereof the tolls were due, and that they belonged to the person by whom the tolls were

payable; but that, as there was a count alleging the goods seized to have been impounded, and so in the custody of the law, the defendants in rescuing them were wrong-doers: and on a demurrer to the whole declaration, one count being good the plaintiff was held to be entitled to judgment. *Parrett Nav. Co.* v. *Stower*, 8 M. & W. 564; 8 Dowl. 405.

Where the notice of distress for paving rates stated the amount and cause of distress truly, but misrecited the Local Act under which made, and an action having been brought, was afterwards discontinued; held, that the plaintiff was not precluded from saying that he was really acting under the statute authorizing the distress, and was therefore entitled to treble costs. *Debney* v. *Corbett*, 5 Dowl. 704.

(*Rescue.*)

Cattle stray on a common, a rescue from the hayward whilst taking them to the pound is indictable; but not if he take them damage feasant in the inclosed land of private individuals, as until they are pounded the hayward is to be considered only as the servant of the occupier. *R.* v. *Bradshaw*, 7 C. & P. 233.

Where a Navigation Act authorized the distraining for tolls, goods in respect of which the tolls arose or the barge laden therewith, or any other goods of the owner of the first-mentioned goods; held, in an action on the case for rescuing goods distrained, that it must be shown that the goods distrained were such as might be distrained; but where a distress is once impounded, a declaration for pound-breach need not disclose the right of distress. *Parrett Nav. Co.* v. *Stower*, 8 Dowl. 405.

DISTURBANCE, p. 394.

A lessee under a parol demise of a market recently created by an Act enabling the owner to demise or lease the market or site thereof, and all erections, and the lessee to take and enjoy the rents and tolls, &c., is entitled to maintain an action for the disturbance thereof. Bringing sheep to an inn within forty yards of the market, and taking purchasers from the market to the place where the sheep were, and selling them, is such a fraud in law as amounts to a disturbance of the right of the owner of the market. *Bridgland* v. *Shafter*, 5 M. & W. 374.

DRUNKENNESS, p. 396.

It is not sufficient to make a statement of the prisoner inadmissible that he was drunk at the time, but is merely matter of observation to the jury. *R.* v. *Spilsbury*, 7 C. & P. 187.

The prisoner, whilst drunk, stabbed the prosecutor with a fork; his having been drunk does not alter the nature of the offence; but if, at such time, he used an instrument not in its nature a deadly weapon, his being drunk would be a fact to induce the jury to less strongly infer a malicious intention in him at the time. *R.* v. *Meakin*, 7 C. & P. 297.

DURESS, p. 397.

An agreement on consideration of withdrawing a distress, the distrainor to be at liberty to distrain again, is not void as made under duress of goods. *Skeate* v. *Beale*, 3 P. & D. 597; 11 Ad. & Ell. 983.

In equity, the purchase of a reversionary interest in a copyhold, at an under-value, whilst the plaintiff was in great embarrassment and in prison, was set aside, with costs. *Bawtree* v. *Watson*, 3 Myl. & K. 339.

EJECTMENT, p. 398.

Ejectment lies not for a canonry or for the house of residence allotted to a canon. *Doe* v. *Musgrave*, 1 Scott, N. S. 451. Nor for a *tinbound*, but it lies for a mine under it. *Doe* d. *Earl of Falmouth* v. *Alderson*, 1 M. & W. 210.

Commissioners cannot be said to be in such possession of the highway as to maintain ejectment against a party encroaching on strips by the side of it. *Doe* d. *White* v. *Roe*, 8 Sc. 146.

A party in possession under an intended purchaser, being tenant at will, and in equity the owner of the land, but liable to pay the purchase-money, his cutting timber is consistent with his holding in that character, and not adverse possession. *Doe* v. *Caperton*, 9 C. & P. 112.

See further as to adverse possession, *Doe* v. *Jauncey*, 8 C. & P. 99; *Doe* v. *Wilkins*, 5 N. & M. 434; *Doe* v. *Long*, 9 C. & P. 773.

(*Variance.*)

The omission to insert the year of the demise is no ground of nonsuit, and is not the subject of amendment under the st. 3 & 4 W. 4, c. 42, s. 23. *Doe* v. *Heather*, 8 M. & W. 158.

(*Estoppel*, p. 407.)

A lessor, after having committed an act of bankruptcy, assigned premises demised, and informed the tenant that he had so done, requesting him to give 1 *s.* as an acknowledgment to the assignees, which the tenant did, but he was not informed of the circumstances which rendered the assignment invalid; held, in ejectment, by the assignees, that the tenant was not estopped, nor were the assignees under the commission, defending as landlords, from showing that the lessor of the plaintiff was not his landlord, it being open to a party not guilty of laches, to explain and render inconclusive acts done under mistake or through misrepresentation. *Doe* v. *Brown*, 7 Ad. & Ell. 447; and 2 N. & P. 592.

Where a party built on the waste, and before he had acquired a title, gave up the possession of it to the owner of the adjoining land, which he held on lease granted in 1812, and who let the building to the defendant; held in ejectment, that he was estopped from denying the title of his lessor, who was also estopped from denying that of the landlord; and a receipt of rent due after a notice to quit had, containing a proviso that it should not be a waiver of the notice, does not require an agreement stamp. *Doe* d. *Wheble* v. *Fuller*, 1 Tyrw. & Gr. 17.

Where the defendant gets into possession by a fraud or licence, he cannot dispute the title of the plaintiff until he has placed the latter in the same situation as before obtaining such possession. *Doe* d. *Johnson* v. *Baytrup*, 4 Nev. & M. 387; and 3 Ad. & Ell. 188.

Where a father executed a conveyance, in order to qualify his son, which the attorney of the former prepared, and produced it on behalf of the son before magistrates, but it remained in his custody upon an alleged agreement by the son that he should hold it as a security for the general bill of costs, &c., due from the father; after the death of the father, the son paid

for the costs of the conveyance; in trover for the deed, it was held, that if any interest in the property were intended to pass, the deed belonged to the son, and that the father could not give a lien upon it, and that the attorney was estopped from saying that no interest passed; the jury having given a general verdict for the defendant, the Court granted a new trial, on the ground of misdirection of the Judge, who merely left it to the jury whether the deed was the property of the father or son. *Lord* v. *Wardle*, 3 Bing. N. C. 680; and 4 Sc. 402.

After the bankruptcy and certificate of the lessor of the plaintiff, the defendant purchased the stock in trade, but no assignment of the premises was made, and upon an agreement for partnership it was agreed that the partnership should hold the premises of the lessor of the plaintiff, under which, on their account, rent was paid to him; held, that upon the dissolution of the partnership, the tenancy was at an end, and the defendant could not be allowed to dispute the title of the lessor. *Doe* d. *Colnaghi* v. *Bluck*, 8 C. & P. 464.

A defendant is not estopped from showing that the party under whom the lessor claims had no title, when the conveyance to the lessor was made, although the defendant himself claims from the same party by virtue of a subsequent conveyance. *Doe* v. *Payne*, 1 Ad. & Ell. 538.

(*Coparcener*, p. 408.)

Where the reversion descends to coparceners, one alone cannot maintain ejectment for breach of covenant. *Doe* v. *Lewis*, 5 Ad. & Ell. 277.

(*Copyhold*, p. 409.)

Copyhold lands are leased by the tenant duly admitted, from six years to six years, if certain persons should so long live, the lessee may maintain ejectment, although there be no custom of the manor to lease, and no licence obtained; the lease although void as against the lord, was yet good as between the lessor and lessee, and all others, except the lord. *Doe* v. *Tresidder*, 1 Gale & D. 70. And see *Downingham's Case*, Owen, 17.

The surrenderee of a copyhold being an assignee of a reversion within 32 H. 8, c. 34, and entitled to maintain an action on the covenants contained in a lease made by his predecessor, the lessee cannot avail himself of the lease's being invalid, which would be to allege a defect in the title of the lessor; held also, that after 20 years the lord would be barred from entering for a forfeiture if the lease were invalid. *Whitton* v. *Peacocke*, 3 Myl. & K. 325.

Upon a conditional surrender by way of mortgage in 1826, and a subsequent sale and absolute surrender by the mortgagor to the defendant in 1832, who was soon afterwards admitted, after which the mortgagee was admitted, and brought ejectment, held that the mortgagee was entitled to recover. *Doe* v. *Gibbons*, 7 C. & P. 161.

(*Elegit*, p. 410.)

The execution creditor, under an *elegit*, is not entitled to the rent becoming due between the time of the delivery of the writ to the sheriff and the taking of the inquisition; such rent is a mere *chose in action*. *Sharp* v. *Key*, 9 Dowl. 770.

(*Fine.*)

See as to entry to avoid a fine, *Doe* v. *Pett*, 4 P. & D. 278, and as to waiver of a forfeiture incurred by levying a fine, *ib.*

(*Heir*, p. 411.)

Where the jury found that the father of the lessor of plaintiff, his son and heir, had been in possession for upwards of 20 years before his death, as tenant at will to the grandfather of the lessor of plaintiff; held that no right descended under the 3 & 4 Will. 4, c. 27, s. 27, upon the lessor of plaintiff, to enable him to maintain ejectment, even against a stranger. *Doe* v. *Thompson*, 2 N. & P. 656. S. C. 1 Nev. & P. 215.

Where the husband took under the marriage settlement a moiety of an estate of the wife in fee, and at the death of her brother the other moiety descended upon her as heiress at law, and she dying without issue the husband continued in uninterrupted possession of the entire estate for 23 years, without any acknowledgment of title of any other person; held, that the non-claim of the wife's heir for five years after the passing of the 5 & 6 Will. 4, c. 27, s. 12, was a bar; and that s. 19 applies only to cases of parties resident in Ireland before the passing of the statute, and where the controversy has not arisen until after the passing of it: held, also, that constructive trusts may be barred by long acquiescence. *Hasell, ex parte*, 3 Younge & C. 617.

In ejectment by an heir, the plaintiff having proved a title as heir, upon which the defendant sets up title under a will; the plaintiff is entitled to put in reply a subsequent will, revoking the former devise, as in contradiction of the defendant's case, and not as part of his own case in chief. *Doe* v. *Gosley*, 2 Mo. & R. 243; and 9 C. & P. 46.

(*By Landlord.—Proof of Tenancy*, p. 412.)

The father of the deceased occupier being tenant of a farm, of which the tenancy would expire at Lady-day, the attorney of the landlord, in December, proposed to let that and other farms according to the terms of a printed paper then read, and which the deceased assented to, and agreed to succeed his father at Lady-day, but no writing was signed, and he entered and continued in possession until his death, after which his executors, the defendants, entered and paid the rent; held, that such agreement, followed by entry and payment of rent, created a tenancy upon the terms of the printed paper, and which might be referred to by the attorney to show the terms of the demise. *Lord Bolton* v. *Tomlyn*, 1 Nev. & P. 247.

An agreement in writing for a yearly tenancy is not altered by the tenant agreeing to pay quarterly, and doing so. *Turner* v. *Allday*, 1 T. & G. 819.

The plaintiff being the grantee of an annuity or rent charged on lands, with power of entry in case of the rent being in arrear, and which lands the grantor afterwards demised to the defendant for a term, having distrained for arrears of the annuity, the defendant signed an agreement to attorn to the plaintiff, and paid him rent,—distresses had also been made, and a six months' notice to quit given; held, that it created a tenancy from year to year, as between the defendant and the annuitant, determinable on the payment of the arrears, and upon which the lease for years would revive. *Doe* v. *Boulter*, 1 N. & P. 650.

An agreement of demise for one year certain, and so from year to year, with a proviso that either party might determine the tenancy by three months' notice, creates a tenancy for two years certain. *Doe* v. *Green*, 1 P. & D. 454.

(*Notice to quit*, p. 414.)

A general letting, at a yearly rent, is evidence of a yearly tenancy. *R.* v. *Herstmonceaux*, 7 B. & C. 551. (See as to the presumption to be made from a reservation of weekly wages, *R.* v. *Puckleehurch*, 5 East, 382.) A general letting, without any reservation of annual rent, constitutes a tenancy at will. *Richardson* v. *Langridge*, 4 Taunt. 128.

In the absence of any evidence of usage, it is not an implied term in a contract for a weekly tenancy, that a week's notice is to be given; but, in the absence of such usage, where a new week is entered upon, the tenant is bound to continue until the expiration of that week, or to pay the week's rent. (*Per* Parke, B.) *Huffell* v. *Armitstead*, 7 C. & P. 56.

Where an original lease, under which the defendant was let into possession, became forfeited, and the lessor, the lessee (the defendant), and a party to whom the lessee had mortgaged the lease, agreed that the mortgagee should have a new lease granted, and should make an under-lease to the defendant, who was thereupon put into possession upon a promise that upon payment of the original mortgage sum he should have an under-lease; held, that the defendant did not become tenant from year to year, nor entitled to six months' notice to quit. *Doe* d. *Rogers* v. *Pullen*, 2 Bing. N. C. 749.

A tenant gives notice to quit after a refusal to reduce the rent; the landlord proposes to acquiesce in letting for a year on the reduced terms, if he cannot obtain another tenant: it is an implied condition that the tenant accepting the terms, should permit the house to be looked over, and having refused, the parties stand on their original rights. *Doe* v. *Marquis of Hertford*, 1 M. & W. 690; and 1 T. & G. 1028.

(*By whom given*, p. 417.)

If several lessors be partners in trade, and one signs the notice to quit in the name of himself and partners, it is sufficient; an authority is to be presumed. *Doe* v. *Hulme*, 2 M. & R. 433.

A notice to quit by one of several joint-tenants is sufficient to put an end to a tenancy from year to year as to all, upon a joint demise by such joint-tenants, inasmuch as the character of the tenancy is that the tenant holds the *whole* of all so long as he and *all* shall please. *Doe* d. *Aslin* v. *Summersett*, 1 B. & Ad. 135.

But if an agent employed to receive rents give a notice to quit, having no authority at the time to determine the tenancy, and there is no recognition of the authority of the agent before the day of the demise laid in the ejectment, the mere bringing the action is insufficient. *Doe* v. *Walters*, 10 B. & C. 626. But see *Goodtitle* v. *Woodward*, 3 B. & A. 689.

The widow of a tenant from year to year continues in possession; the landlord is entitled to recover upon notice to quit served on her, although he does not prove her to be the personal representative of the tenant. *Rees* v. *Perrott*, 4 C. & P. 230.

(*Service*, p. 417.)

If a notice to quit is served on the tenant's wife at the house, accompanied by a statement that the paper delivered is "a notice of discharge," it is sufficient. *Smith* v. *Clark*, 9 Dowl. 202.

(*Form of Notice*, p. 418.)

Where the premises were originally taken to hold from May 1832 to February 1833, and thence from year to year, and, on the 22d October 1833, a notice was served to quit "at the expiration of half a year from the delivery of the notice, or at such other time or times at which your *present* year's holding would expire, after the expiration of half a year from the delivery of the notice:" held, that the word "present" might be rejected, and that the notice was sufficient to determine the tenancy on the February 1835. *Doe* d. *Williams* v. *Smith*, 5 Ad. & Ell. 350.

A notice to quit "on Saint Michaelmas Day," is *primâ facie* a notice to quit at New Michaelmas; but if the holding be from Old Michaelmas, it will be a sufficient notice to quit at that time. *Doe* v. *Perrin*, 9 C. & P. 467.

A tenant held a house and land from year to year; the land from the 2d of February, the house, &c. from the 1st of May. On the 16th of February 1838, a notice to quit was served on him, requiring him to quit and deliver up the farm at the end of his *present year*'s holding; this is a good notice to determine the tenancy in the spring of 1839; it not being shown on the part of the tenant that the land was not the principal subject of the holding. A notice to quit, given by a person authorised by one of several lessors, joint-tenants, determines the tenancy as to all. *Doe* v. *Hughes*, 7 M. & W. 139.

Lease for twenty-one years from Michaelmas 1823, with a covenant that, if the tenant should desire to determine the demise at the end of the first fourteen years, and should leave or give six calendar months' notice immediately preceding the expiration of the first fourteen years, the lease should determine; the tenant, six months before the June preceding the expiration of the first fourteen years, gave notice that he should quit on the 24th June 1837, agreeably to the covenants of the lease: held, that this notice did not satisfy the covenant, and that the jury could not be asked whether, from the landlord's conduct as shown in evidence, they believed that he understood the notice to refer to Michaelmas 1837. *Cadby* v. *Martinez*, 11 A. & E. 720.

A misdescription of the parish is immaterial if it appear that the defendant was not misled. *Doe* v. *Wilkinson*, 4 P. & D. 323.

(*Disclaimer*, p. 419.)

Where the defendants, having paid rent to the lessors of the plaintiff (as executors of the original former landlord), before the day laid in the demise, attorned to another; it was held a sufficient disclaimer, and that an admission of such attornment made after the action brought was sufficient evidence of disclaimer, as against them. *Doe* d. *Ince* v. *Letherlin*, 6 N. & M. 313; and 4 Ad. & Ell. 784.

The tenant disclaimed in March, and the landlord distrained in the following November for rent, it was held to amount to a waiver of the disclaimer, and that the 8 Anne, c. 14, ss. 6 & 7, enabling landlords to distrain after the determination of a tenancy, did not apply to cases where it was put an end to by the wrongful act of the tenant. *Doe* v. *Williams*, 7 C. & P. 322.

Where *H.* holding for lives of *K.*, let the premises to the defendant year by year, with an agreement for a lease for seven years or for his own lease, and on the expiration of the seven years having sold his interest to the

plaintiff, the latter demanded first the possession, to which the defendant replied that he held on lives, and should hold as long as they lived; a quarter's rent was then demanded, to which the defendant answered, that he held of *H.*, who had directed him to pay *K.*, and that he should do so; held, that it was properly left to the jury, and that they were justified in finding that there was no disclaimer, the defendant asserting no title in himself, but merely that he insisted on standing by the agreement, and in the absence of any notice to quit the plaintiff was not entitled to recover the premises. *Doe* v. *Cooper*, 1 M. & Gr. 135; and 1 Sc. N. S. 36.

In ejectment against lessee for years for forfeiture by a disclaimer of the lessor's title it was held, that a parol disclaimer was insufficient: also, that a demise laid on the day of the supposed forfeiture accruing, to commence from two days previous, was good. *Doe* v. *Wells*, 2 P. & D. 396.

B. concurred, with other members of his family, in letting land to *C.* as tenant from year to year, and it was agreed that the rent should be paid to *D.* as agent for the family. *B.*, to whom alone the land really belonged, demanded rent of *C.*, who said, "You are not my landlord." *B.* then demanded possession, which *C.* refused to give up:—Held, that if the jury were satisfied that the fair meaning of this was, that *C.* asserted that *B.* and himself were not in the relation of landlord and tenant, this was a disclaimer; and that *C.* was not entitled to notice to quit. *Doe* d. *Bennett* v. *Long*, 9 C. & P. 773.

If in ejectment the lessor of the plaintiff rely on a disclaimer, it will be no objection to his recovering, that the disclaimer was on the day of the demise laid in the declaration. *Ibid.*

(*Tenant at Will*, p. 420.)

Trespass for entering plaintiff's dwelling-house, plea that the plaintiff, an alien, as lessee, was in possession under an agreement of demise, (illegal as against the 32 Hen. 8, c. 16,) and providing for a future lease; held, that whether the instrument amounted to a lease or not, the agreement being unlawful, the plaintiff could acquire no interest under it, and that the defendant was justified in entering to determine the tenancy at will. *Lapierre* v. *M'Intosh*, 1 P. & D. 629; and 10 Ad. & Ell. 857.

A mere tenant by sufferance being turned out of possession by his landlord, having no interest in the land, cannot maintain ejectment, although he may trespass. *Doe* v. *Murrell*, 8 C. & P. 135.

Where upon an agreement for the purchase of premises by defendant, he was let into possession forthwith, paying interest until the payment of the purchase-money and completion of the purchase, and afterwards built on the land, and no conveyance was ever tendered, nor any steps taken by the vendor (the plaintiff) to enforce the performance, but on failure in payment of the interest, he brought ejectment; the interest of the defendant in the premises was held to amount only to a tenancy at will, determinable without any notice to quit. *Doe* v. *Chamberlaine*, 5 M. & W. 14.

Where the lessor of plaintiff had let the defendant into possession in 1817, as tenant at will, and ten years afterwards entered on the land, and without the consent of the tenant dug and carried away stone, but the defendant continued in possession as before, until 1839, when the plaintiff brought his ejectment, the jury found that the defendant, during the whole period, was tenant at will; it was held, that by the entry in 1827, the tenancy

at will being determined, and the defendant having become merely tenant by sufferance, the jury ought to have found whether a new tenancy at will was then created, and a new trial was accordingly granted. *Doe* v. *Turner*, 7 M. & W. 226.

Where the occupation of a house is in consideration of services rendered by the occupier, and is with a view to those services, a notice to quit is unnecessary if the service be put an end to. *Doe* v. *Derry*, 9 C. & P. 494.

Provision is made in a mortgage deed for payment of a yearly *rent* or sum, the mortgagee to have the ordinary remedies of a landlord for rent, provided that the reservation shall not prejudice the mortgagee's right to enter; a distress as for rent does not entitle the mortgagor to a notice to quit as tenant. *Doe* v. *Olley*, 4 P. & D. 275.

(*Forfeiture*, p. 421.)

In ejectment on a forfeiture, the day of the demise is amendable at the trial. *Doe* v. *Leach*, 9 Dowl. P. C. 877.

A lessee covenanted to insure, and the premises were uninsured for a week; in ejectment for a forfeiture for a breach of this covenant, the lessor cannot recover if he, by his conduct, has led the lessee to believe that the premises were properly insured by himself. *Doe* v. *Sutton*, 9 C. & P. 706.

A lease contained a covenant to repair, and that upon notice of defects the lessor might within two months afterwards enter and do repairs, and if the expenses were not paid by the lessee, that the lessor might distrain for them; there was also a power of re-entry upon any breach of covenant: the lessor afterwards gave notice that he should do certain repairs at the end of six months and charge the lessee with the expense, and upon the six months having elapsed, the lessor gave notice to the lessee that if he did not comply with certain terms within three days he should hold him to the covenants; held that upon the lessee not complying, the lessor could not maintain ejectment for the forfeiture; having elected the remedy for non-repair, the general power to re-enter did not revive by the three days' notice. *Doe* d. *Rutzen* v. *Lewis*, 5 Ad. & Ell. 277.

In ejectment for forfeiture for breach of covenants for insuring and repairing, the plaintiff is bound to show that the forfeiture has been committed, and the refusal of the defendant to produce the policy is not of itself evidence that he had not insured, but merely lets in secondary evidence. *Doe* d. *Bridger* v. *Whitehead*, 3 N. & P. 557.

The directors of a company, before they were enabled to sell or demise lands conveyed to them, granted a lease with power of re-entry on breaches of covenant, and afterwards by an Act the company was incorporated, and all contracts previously entered into were declared valid and effectual as if entered into with the incorporated company; they may support ejectment on such clause of re-entry. *Doe* v. *Knebell*, 2 Mo. & R. 66.

During the continuance of a tenancy from year to year, the landlord mortgaged the premises to secure the payment of an annuity; the mortgage deed contained a proviso, that he should remain in receipt of the rent until sixty days after default made in payment of the annuity; held as against the tenant, that before default the mortgagor had a sufficient interest in the premises remaining in him to entitle him to determine the tenancy by a notice to quit. *Doe* d. *Lyster & others* v. *Goldwin*, 1 G. & D. 463.

(*Damages*, p. 424.)

In trespass for mesne profits, a verdict may be found against the defendant though he never actually occupied during the time of the trespass, it being proved that before the trespass the defendant, who then held lawfully, underlet to *H.*, that defendant's and *H.*'s interest became determined and right of possession vested in plaintiff, that *H.* held on, and that the defendant afterwards continued to receive rent of him, and declared him to be his tenant, when the plaintiff demanded possession, the defendant and *H.* both alleging title in the party under whom the defendant formerly held. *Doe* v. *Harlow*, 12 A. & E. 40.

The landlord may give evidence of mesne profits under the 1 G. 4, c. 87, s. 2, although no notice of trial be proved. *Doe* v. *Hodgson*, 4 P. & D. 142; 12 A. & E. 135.

The day on which it was alleged the plaintiff was ejected by the defendant, and that on which possession was recovered by the former, are not material in a declaration in trespass for mesne profits, although such days are not stated under a *videlicet*. *Ive* v. *Scott & another*, 9 Dowl. 993.

(1 & 2 *Vict. c.* 74.)

See as to summary proceedings for recovery of tenements let for not exceeding seven years nor 20 *l.* rent, 1 & 2 Vict. c. 74.

(*By Mortgagee*, p. 427.)

In ejectment by mortgagee, a defendant, not the mortgagor, but defending for his benefit, is not allowed to set up a prior mortgage. *Doe* v. *Clifton*, 4 Ad. & Ell. 813.

In order to found jurisdiction under 7 Geo. 2, c. 20, to relieve the mortgagor on payment of the mortgage debt and interest, it is an essential preliminary that he should make himself defendant. *Ib.*

In ejectment by mortgagee against mortgagor, the lease for a year recited in the release, executed by the latter to the former, is sufficient evidence that the mortgagee was in possession at the time of the execution of the release, without producing the lease. *Doe* v. *Wagstaff*, 7 C. & P. 477.

Where from payments of interest on the mortgage money, the possession of the mortgagee was not adverse within twenty years before the passing of 3 & 4 Will. 4, c. 27, and the jury had found that the mortgage had not been paid; on ejectment by the heir of the mortgagee, brought within five years after the Act, it was held that he was not barred by s. 2. *Doe* d. *Jones* v. *Williams*, 5 Ad. & Ell. 291.

(*Tenant in Common*, p. 429.)

The Court refused to allow the tenant in possession to enter into the consent rule, confessing only lease and entry, without ouster, where he only claimed to hold under a tenant in common. *Doe* d. *Wills* v. *Roe*, 4 Dowl. 628.

The occupation by a company of the site of a railway, was held to be an ouster of the tenant in common. *Doe* v. *Horn*, 5 M. & W. 564.

(*Competency*, p. 433.)

Ejectment by a devisee of an undivided interest under a will, the question being the competency of the testator, held, that a party entitled to another portion, not being immediately interested in the result of the verdict, was not an incompetent witness: *à fortiori* was not another party, who

stated on the *voire dire* that he had transferred his interest to another. *Doe* v. *Pearce*, 5 M. & W. 506.

In ejectment brought by an assignee of a mortgage, made by the defendant, a party who has taken a later mortgage from the defendant is not a competent witness for the defence. *Doe* v. *Bamford*, 11 A. & E. 786.

Where, in ejectment, evidence was received in favour of the plaintiff which was inadmissible, but all objections and exceptions were reserved for the opinion of the Court above, by the consent of both parties; it was held, that the defendant was not entitled to a new trial without payment of costs, on the ground of the reception of this evidence, if the legal evidence admitted showed the title to be in the lessors of the plaintiff; as, upon such a reservation, the Court are called upon to decide whether the lessors of the plaintiff are entitled to recover or not. *Doe* v. *Ross*, 7 M. & W. 102.

In an action by overseers to recover parish lands, held that a rated inhabitant was a competent witness (*per* Alderson, B.) *Doe* v. *Cockell*, 6 C. & P. 526; supporting *Oxenden* v. *Palmer*, 2 B. & Ad. 236; *contrà*, *Heudibourck* v. *Langston*, and *Rex* v. *Hayman*, 1 M. & M. 401; and now see the late st. *supra*, vol. i. p. 159.

In ejectment for a parish house, held, that since the 54 Geo. 3, c. 170, s. 9, a parishioner having valuable property was a competent witness. *Doe* v. *Murrell*, 8 C. & P. 134.

ELECTION, p. 436.

(*Frivolous Petition.*)

Debt for the costs of a frivolous petition against the return under the 9 Geo. 4, c. 22, s. 63; the omission to give notice to the returning officers to attend at the bar of the House on the striking of the committee, is a matter directory only, and not essential to the legal constitution of the committee, the officers having no power of interfering in the choice of the committee; and the petition being silent in its prayer as to any claim of redress against the returning officers on the ground of misconduct, and only incidentally complaining of impartiality and misconduct, they are not to be deemed parties to the petition, and the report therefore is not void by reason of omitting to notice the charge against them: also the recognizance entered into being in the prescribed form, it is sufficient that one of several petitioners entered into it in that form. The Speaker's certificate is conclusive as to the amount of costs for which the verdict is to be entered up. *Ranson* v. *Dundas*, 3 Bing. N. C. 123; 3 Sc. 429; and 5 Dowl. 207. 489.

On application to the Court, under 9 Geo. 4, c. 22, to enforce the payment of the costs of opposing a petition against a return; it was held, as the Speaker's certificate, to which the statute assigns the effect of a warrant of attorney to confess judgment, must be founded on the report of a committee appointed in conformity with the Act, that where the petitioner did not appear at the time fixed for the purpose of appointing the committee, and a committee was nevertheless struck and sworn, instead of being discharged, as directed by s. 3, and proceeded to vote the petition frivolous and vexatious, the Court is warranted in refusing to issue their process, and is bound to institute the inquiry whether the certificate was founded on proceedings in compliance with the Act. *Bruyeres* v. *Halcomb*, 5 Nev. & M. 149; and 3 Ad. & Ell. 381.

And the Court having only a statutory power to enter up judgment, must strictly pursue that power, and can therefore only direct the judgment to

be entered for the sum specified in the Speaker's certificate, and the award of costs of the rule for entering the judgment was struck out. *Ranson* v. *Dundas*, 3 Bing. N. C. 556; 1 Sc. 429; and 5 Dowl. 489.

The Court refused to allow a suggestion of facts to be entered on the record, the Speaker's certificate having the effect of a warrant to enter judgment; after its validity has been established, the Court cannot interfere by any inquiry as to preceding facts. 3 Bing. N. C. 180; and 3 Sc. 497.

(*Expenses of Election.*)

Where the defendant was proved to have acted as chairman of the committee of an election candidate, and a party offering his services to the committee, was afterwards at a meeting of the partizans informed that his duties were to be in regulating the supply of refreshments at the different public-houses, and he was furnished with a list and directions, and the agent arranged with the plaintiff's testatrix and others, but he could not prove that the defendant was present at such meeting, although he afterwards told the agent if he met with any difficulty to come to him; held, that to fix the defendant personally, the plaintiff was bound to prove that such agent was either employed by the defendant alone, or by the defendant and others, to give such orders, and that the defendant was not himself acting as agent for others, or that the agent was a principal jointly with the defendant and others, and that it was immaterial whether the plaintiff considered the agent as making the contract on behalf of the candidate, if he was not in fact so authorized. *Thomas* v. *Edwards*, 2 M. & W. 215; and 1 T. & G. 872.

(*Election by Prosecutor.*)

The application for a prosecutor to elect is an application to the discretion of the Judge; where several houses in a row had been burnt, and the setting each on fire was alleged in distinct counts, being one transaction, the Judge refused the application. *R.* v. *Trueman*, 8 C. & P. 727.

Although receivers are charged with distinct offences, it is too late after verdict to object that they should have been separately indicted; the party ought to have required the Judge to have put the prosecutor to his election whilst the trial was going on. *R.* v. *Hayes*, 2 Mo. & R. 155.

(*Election of an Officer.*)

See R. v. *Brightwell*, 10 Ad. & Ell. 171.

(*Election under a Will, &c.*)

Where the intention to dispose was clearly expressed, and no ambiguity in the expressions used; held that extrinsic evidence to show that the party bequeathed property as her own which did not belong to her, and intended to leave a considerable residue for charitable purposes, which by reason of the mistake turned out much less than she intended, was properly rejected, and that such circumstances would not raise a case of election. *Clementson* v. *Gandy*, 1 K. 309.

ERROR, p. 436.

Where parties were convicted of an offence which subjected them to capital punishment, and the judgment pronounced was of transportation, upon which a writ of error was brought, held that the Judge being *functus officio*, it could not be remitted back, nor could the Court of Error give the proper judgment. *R.* v. *Bourne*, 7 Ad. & Ell. 58.

ESCHEAT.

(3 & 4 *Will.* 4, *c.* 106, *s.* 2.)

Where an illegitimate became the purchaser of lands, which descended to his son, who died without issue and intestate; held, that the heirs of the party last seised *ex parte maternâ* were not entitled, but that, notwithstanding the 3 & 4 Will. 4, c. 106, s. 2, the lands escheated to the Crown. *Doe* v. *Blackburn*, 1 M. & Rob. 547.

ESTOPPEL, p. 437.

According to the practice of the Benchers of Lincoln's-Inn, on admission to chambers, of which the fee is vested in them as trustees, the former tenant by permission surrenders in favour of the party allowed to be admitted; this being only by order of the benchers, without any formal conveyance, the party admitted takes no estate from the party surrendering, and is not therefore a privy in estate, so as to be bound by estoppel as to the acts of the party so surrendering. *Doe* v. *Errington*, 6 Bing. N. C. 79. And *see* Co. Litt. 852, a.

In consequence of the embarrassment of the affairs of a joint stock company, the shareholders by deed empowered a committee to certify what sum would be necessary to satisfy the claims on the company, and the proportion each shareholder should pay, and which the defendant amongst others covenanted to pay; in an action on such deed, alleging that —— *l.* had been so certified, and that —— *l.* was the proportion of the defendant, and a demand and refusal by him; pleas, amongst others, one traversing that the committee had certified, as the fact was; and another, that such sum was not necessary to satisfy the claim, &c., and that the committee had fraudulently signed such certificate; it appeared that, on a similar certificate, the defendant had paid a portion of the sum awarded against him, and that the subsequent certificate had been made for the same amount to avoid confusion amongst the other contributors, and that the defendant had notice that he would be allowed to deduct his former payment out of the subsequent claim; held, 1st, that the defendant was not estopped from showing that by reason of the previous payment, the certificate was erroneous in stating the amount necessary; but, 2dly, that the fact of the second certificate being erroneous, did not under the circumstances necessarily amount to fraud in law. *Wilson* v. *Butler*, 4 Bing. N. C. 748; and 6 Sc. 541.

A party executing a deed is not estopped by recitals contained in other deeds, which go to make up the title. *Doe* d. *Shelton* v. *Shelton*, 4 Nev. & M. 867; and 3 Ad. & Ell. 265.

EXAMINATION, p. 438.

(*Of Prisoner before Magistrate.*)

A prisoner's statement before a magistrate is not an answer to the depositions, but to the charge; and he is not entitled to have the depositions read as a matter of course upon his examination being put in; but if the examination refers to any particular depositions, he is entitled to have them read in explanation. *Dennis's Case*, 2 Lew. Cr. Cases, 261.

EXECUTOR, p. 439.

(*Bonâ Notabilia*, p. 442.)

A plaintiff sued under Irish letters of administration, to which the defendant being under terms to plead issuably, pleaded that the deceased was an inhabitant and commorant of the city of Dublin, and died possessed of *bonâ notabilia* within the diocese of London; the Court held that they ought to assume that the cause of action was *bonum notabile* within the letters of administration, where the contrary was not alleged, and that the plea was not an issuable plea, but allowed an amendment to the effect that the debt was *bonum notabile* in London, that fact being verified by affidavit. *Hathwaite, Administrator, &c.* v. *Phaire*, 8 Dowl. 541.

(*Executor of Executor.*)

An application by the executor of an executor to be permitted to renounce the execution of the former will, and take probate of the latter, was rejected. The executor of an executor becomes, on taking probate of the second will, the executor of the first testator. *In the Goods of John Perry*, 2 Curt. 655.

(*Actions by and against*, p. 443.)

In bringing actions against executors under 2 & 3 Will. 4, c. 42, s. 2, for injury by their testators, it is necessary to show that the action is brought within six months after the executors have taken out probate, and *quære*, if in equity a similar allegation be not necessary in the bill? *Pringle* v. *Crooks*, 3 Younge & C. 666.

Upon a covenant by lessee not to fell timber or cut wood, the executor of the lessor may maintain the action for the breach committed in the life-time of his testator. *Raymond* v. *Fitch*, 2 Cr. M. & R. 588.

An executor is not bound to show a special ground for his testator's effecting a limited insurance on his own life; but where a policy is effected on the life of another by a party having no interest in it, and who pays the premium, and the object is to obtain an assignment of the policy; it is void, as an evasion of 14 Geo. 3, c. 48, s. 1, 2. *Wainwright* v. *Bland*, 1 Mo. & R. 481.

In covenant against two executors for breach of covenant for quiet enjoyment as against all having lawful title from the testator, the allegation that they entered by lawful title is not divisible, but must be proved against both. An admission of lawful title by one, that both entered under a deed of gift is not sufficient, although both entered, for it is not an admission by him *quâ* executor. *Fox* v. *Waters*, 3 P. & D. 1; 12 A. & E. 43. *Secus*, as to an admission in respect of assets. Per Littledale, J., *Ib.* As to the effect of the acts of one executor in binding another, see *Nation* v. *Tozer*, 1 C. M. & R. 172. The Court gave no opinion as to the effect of the admission, had it been made by both.

An executor in trust, who has not proved, is not liable for a *devastavit*, and therefore is a competent witness to increase the estate. *Hall* v. *Laver*, 3 Younge & C. 191.

A contract for the supply of certain quantities of stone of particular dimensions, and any further quantity required monthly, not exceeding 200 tons, the agreement to be in force until a stated time, unless cancelled by mutual consent, was held to be binding on the representative. *Wentworth* v. *Cock*, 2 P. & D. 251; and 10 Ad. & Ell. 42.

A testator directed his widow to carry on his business until the youngest child should attain 21, and for that purpose gave her "the entire use, disposal and management of the capital, stock, and effects in the trade, and authorized his executors to augment or diminish the capital from time to time as they might deem proper;" the executors renounced, and the widow took out administration; held, that the specified property was only liable to the debts incurred by the widow in carrying on the trade. *Cutbush* v. *Cutbush*, 1 Beav. 184.

In debt for rent against an administrator, as assignee of the intestate, the defendant pleaded, in discharge of liability otherwise than as administrator, that the intestate underlet, for an unexpired term, to a tenant who had become insolvent and unable to pay rent; that the premises were of less value than the rent, viz. of the value of a certain sum, part of which defendant had paid to plaintiff, and part towards the expense of a party-wall under the Building Act (14 Geo. 3, c. 78.); that, before the rent became due, defendant offered to surrender all his interest in the premises to plaintiff, who refused to accept them, and that he had fully administered, &c. Replication, that the premises were of more value than the sum mentioned in the plea, viz. of the value of the rent; and that defendant did not offer to surrender, &c. Issue thereon. Held, that the real value of the premises, as against defendant, must be taken to be that which it would have been if he had not himself committed a breach of a covenant to repair in the original lease: held also, that the value, as between plaintiff and defendant, was not affected by the insolvency of the under tenant, whose lease also contained a covenant to repair, with a proviso of re-entry for breach and for nonpayment of rent. *Hornidge* v. *Wilson*, 11 A. & E. 645.

Where, during absence, a special administrator was appointed, it seems that although the acts of the executor were admissible against the administrator, mere declarations are not. *Rush* v. *Peacock*, 2 M. & Ry. 162.

In trover against an executor for a watch, alleging a conversion within six months before the death of the testatrix (27 March 1839), it appearing that the watch came into her possession in March 1838, and that upon a demand made in December 1838, she said "she should consult her solicitor;" it was held sufficient to warrant the jury in finding that it still remained in her possession, and a conversion within six months of her death. *Richmond* v. *Nicholson*, 8 Sc. 134.

In *assumpsit* against an executor, for goods *sold to him* as executor, and for work, &c., performed *for him* at his request, held to be necessarily intended for debts due from him in his own right, and to be misjoined with counts for money paid to his use as executor, and on an account stated and a promise by him as executor: and judgment was arrested. *Corner* v. *Shaw*, 3 Mees. & W. 350.

In *Deeks* v. *Strutt*, 5 T. R. 699, it was held, that an action lay not on a promise to pay a general legacy to be implied from sufficiency of assets. But it was held in *Athins* v. *Hill*, Cowp. 284, *Hawkes* v. *Saunders*, ib. 289, that an action lay upon an express promise in consideration of assets.

An executor having assets wherewith to pay a general legacy of 1,400 *l.* to *A.*, bequeaths to *A.* an annuity, in satisfaction of the debt or sum of 1,200 *l.*; held, that the 1,200 *l.* is money had and received to the use of *A.* *Gorton* v. *Dyson*, 1 B. & B. 219.

A specific legacy vests by the executor's assent, and the observations in

Deeks v. *Strutt* must be confined to the particular facts in question. *Doe* v. *Guy*, 3 East, 120.

In *Jones* v. *Tanner*, 7 B. & C. 542, *supra*, Vol. ii. p. 454, it was held that an action does not lie to recover a distributive share on an express promise; and that Lord Kenyon's observations were applicable to actions against executors for legacies generally.

An action is maintainable for the amount of a legacy allowed to remain in the hands of the executor. *Gregory* v. *Hannan*, 8 M. & P. 209.

The action is maintainable for the amount of a general legacy, stated in the executor's account to be *retained* for the legatee. *Hart* v. *Minors*, 2 C. & M. 700.

(*Action against Executor de son tort*, p. 446.)

The mere ordering the funeral and appropriating a reasonable sum for that purpose, does not make the party an executor *de son tort*; where the defendant had received a debt due to the deceased, and applied it to the purpose of the funeral, held that it was a question for the jury to say if the sum were more than was reasonable for that purpose; if he receives more, he in effect pays it out of the assets. *Camden* v. *Fletcher*, 4 M. & W. 378.

(*Assets*, p. 447.)

In *Foster* v. *Blakelock*, 5 B. & C. 328, Vol. ii. 449, the probate was taken to be evidence of assets to the amount covered by the stamp.

In *Stearn* v. *Mills*, 4 B. & Ad. 657, Littledale, J., does not say that the probate stamp is not evidence of assets, but says that the stamp in such case is the less conclusive, as the Stamp Act requires the whole of the value to be sworn to. Parke, J., says, he cannot assent to the decision, but says nothing as to the question of amount.

In *Mann* v. *Lang*, 3 Ad. & Ell. 699, all the Judges were of opinion, that the probate stamp *was admissible* evidence to prove assets. As to the sufficiency to prove assets, Denman, L. C. J., observed, it may be difficult to draw a line so as to fix a time before which the probate would not, and after which it would constitute sufficient evidence; yet after a certain time acquiescence would be the strongest evidence that the amount had come to the hands of the party acquiescing. It is clear, however, that for some purposes the probate is admissible evidence; it shows one side of the account, even where it might not in itself be *sufficient* evidence.

Littledale, J., expressed his opinion, that the stamp on the probate is admissible, but not *primâ facie* evidence of the amount of assets. He observed that in *Curtis* v. *Hunt*, many years had expired since the probate.

Patteson, J., was of opinion, that the stamp was not any evidence by itself, even after a long time had elapsed, and he disapproved of *Curtis* v. *Hunt*, and *Foster* v. *Blakelock*.

Williams, J., was of opinion, that the evidence was admissible, and that the amount of weight to which such evidence was entitled, was for the Judge and jury.

A party employed successively the plaintiff and others as solicitors in a suit in Chancery, and eventually and after her death, upon revivor, the then attorney obtained a decree, and an order for the Master to settle the costs of all parties, which when settled were to be paid as directed, viz. the costs of the plaintiffs in the suit to their then solicitor, and of the defendants to their several solicitors; the plaintiff, one of the original solicitors, having received a part, and a judgment of assets *quando*, was proceeding to enforce

the judgment, when the executor induced him to stay, undertaking to pay the residue of his bill out of the first assets; under these circumstances, upon a further sum being awarded out of Chancery in the suit in respect of the same costs, it was held, (*per Parke* and *Alderson*, B.B., *contra*, Lord *Abinger*, L. C. B.) that such sum was assets within the meaning of the undertaking. *Smedley* v. *Philpot*, 3 M. & W. 573.

The testator deposited with the party whom he made his executor a policy, as security for a debt, and for a further advance, which the office refused to pay, unless a receipt was given by the holder, "as executor," and which he did; held, that upon the plea *plene adm.*, except, &c. that the executors were only chargeable for the surplus as assets after payment of the debt. *Glaholm* v. *Rowntree*, 6 Ad. & Ell. 710.

Although on many points connected with assets, the admission of one executor will bind the other, yet the admission of one as to the legal effect of a deed, was held not to do so. *Fox* v. *Waters*, 4 Perr. & D. 1.

Where an executor made payments from time to time on account of a legacy and interest, but did not pass the account at the Legacy-office until nine years after the death, when there appeared a considerable surplus; held to amount to such an admission of assets as to enable the legatee to a decree for immediate payment, without previously taking an account of the testator's estate. *Whittle* v. *Henning*, 2 Beav. 396.

Proof of furniture bought within twelve months, and seen in the intestate's house shortly before his death, is *primâ facie* evidence of assets. *Britton* v. *Jones*, 3 Bing. N. C. 676; and 4 Sc. 393.

(*Payments by*, p. 449.)

Where an executor makes payments to simple contract creditors, a bond being in existence, but not then payable, they will be allowed; but not to legatees, although he has no notice of the bond. *Norman* v. *Baldry*, 6 Sim. 621.

(3 & 4 *W.* 4, *c.* 42, *s.* 31.)

The effect of the stat. 3 & 4 Will. 4, c. 42, s. 31, is to throw the onus on the executor, to relieve himself from costs where he fails in the suit; and the Act being made in favour of defendants, the plaintiff must bring a ground for the interference of the Court, by showing some misconduct on the part of the defendant. *Godson* v. *Freeman*, 2 Cr. M. & R. 585; 1 Tyrw. & Gr. 35; and 4 Dowl. 543.

The Court will only interfere to protect him from costs where he has been led into the suit by any misconduct of the defendant; and it is not enough that he merely and *bonâ fide* believes the debt to be due. *Ib.*

The authority of a single Judge is co-ordinate with that of the whole Court, as to exempting an executor (plaintiff) from costs; and the Court refused, therefore, to interfere with a Judge's order. *Maddocks* v. *Phillips*, 5 Nev. & M. 370.

The statute applies to actions brought before the Act, although not tried until after. *Grant* v. *Kemp*, 2 Cr. M. & R. 636.

Where in an action on a bond above twenty years' standing, the jury found for the defendant on a plea of discharge under the Insolvent Act, of which it appeared the plaintiff's intestate had notice; held that there being circumstances which ought to have put the plaintiff on further inquiry, it was not a case to exempt him from the payment of costs. *Engler* v. *Twisden*, 2 Bing. N. C. 263; 2 Sc. 427; and 4 Dowl. 330.

(*Competency.*)

A. B. an executor, and one of the residuary legatees under a will on the 20th of November, renounces probate of the will (but the proxy of renunciation is not recorded until the 2d of December) and on the 22d of November, by deed of gift, conveys his interest in the personal estate of the deceased to *C. D.* (who was also an executor), in order to render himself a competent witness to support the will: held, first, that the proxy of renunciation took effect from its date; secondly, supposing the renunciation to be invalid, that as the interest under the will was conveyed by the deed of gift, the party was a competent witness under the stat. 1 Vict. c. 26, s. 17. *Munday and another* v. *Slaughter*, 2 Curt. 72.

A party produced as a witness for executors propounding a will, admitting that he retained and was personally liable to the proctor for his bill of costs, is incompetent. *Handley* v *Edwards*, 1 Curt. 722.

Where a legatee sued the executor for the recovery of a specific legacy, viz. a bond debt; held, that the obligor having a direct interest in preventing its being enforced, was not a competent witness to prove that the circumstances under which the bond was executed were such as to show that it was irrecoverable. *Davies* v. *Morgan*, 1 Beav. 405.

EXTINGUISHMENT, p. 455.

Where an easement has become extinct by unity of ownership, and the owner wishes to grant the easement with the premises to which it was formerly appurtenant, he must use language to show that he intended to create the easement *de novo*. See *Barlow* v. *Rhodes*, 1 Cr. & M. 439; *infra*, tit. WAY; *Clements* v. *Lambert*, 1 Taunt. 205; *supra*. tit. COMMON.

Where vacant land had been let on a building lease, which expired in 1824, and the plaintiff had become possessed of a house erected thereon, from an under lessee, and had enjoyed therewith a right of using a passage adjoining for shooting coals into his cellar, and laying waterpipes thereto, and the original lessor had, pending the lease, granted a reversionary lease of the plaintiff's house to him, with all and singular the appurtenances, to hold from the day, &c. at which the original lease would end and determine; held, that the right of passage, and of using it for such purposes, passed under the reversionary lease as a necessary incident to the subject-matter demised, although not specially named in it, and that upon the expiration of the original lease, the lessor never having for a moment a right of possession, such easement was not extinguished by any unity of possession. *Hinchcliffe* v. *Earl of Kinnoul*, 5 Bing. N. C. 2; and 6 Sc. 650.

A party has an estate in fee in land, over which an easement exists, and an estate for years in land in respect of which the easement exists; the easement is suspended only, not extinguished. *Thomas* v. *Thomas*, 2 C. M. & R. 34; 5 Tyr. 804.

FACTOR.

To prove a factor a party *intrusted* with a dock-warrant, within the meaning of the 2d section of the 6 Geo. 4, c. 94, it must be shown that the owner of the goods *intended* that the factor should be possessed of it at the time of the pledge, or should exercise the power which the possession of the bill gives him of obtaining the dock-warrants whenever he in his discretion might think fit. *Phillips* v. *Huth*, 6 M. & W. 572.

FALSE PRETENCES, p. 455.

Where the false pretences alleged were, that the prisoner stated that he was a captain in the East India Company's service, and that a note was a good and valuable security for the sum of 21 *l.*; held, that it not appearing that the note was his own, or that he knew it to be worthless, the latter false pretence was insufficient, and the two being to be taken together as the means of defrauding, the indictment was bad: and judgment was reversed. *Wickham* v. *R.*, 2 P. & D. 333; and 10 Ad. & Ell. 34.

An attorney, who appeared for a party summarily convicted and fined 2 *l.*, represented to the wife that he had before prevailed in compromising a similar case for 1 *l.*, and that if she would give him a sovereign he would go and do the same for her, it appearing that he had never made any such application, but that both the fines were paid in full, held to be an obtaining money by false pretences. *R.* v. *Asterley*, 7 C. & P. 191.

A count alleging the pretence to have been made to *A.* for obtaining an order on *B.*, a third party, to deliver goods, does not charge any offence within the statute. *R.* v. *Tully*, 9 C. & P. 227.

The obtaining goods on a cheque drawn by the prisoner on bankers where he had no account, representing that he had an account there, and that it would be paid, is within 7 & 8 Geo. 4, c. 29, s. 53, and the indictment alleging the pretence that it was a good and genuine order for the payment, and of the value of the sum stated, is sufficient. *R.* v. *Parker*, 2 Moody, 1.

So where the prisoner, having accepted a bill drawn by the prosecutor, had stated that he could raise all the amount for taking it up except 300*l.*, which the prosecutor consented to advance, but the prisoner applied it to his own use, and suffered the bill to be dishonoured; the Act embraces every mode of obtaining money by false pretences, by loan as well as by transfer; and if the jury in such case be satisfied that he was stating a deliberate falsehood to obtain the money, and that he knew at the time he had not the funds to take it up, and meant all the time to apply the 300 *l.* to his own use, the offence was complete. *R.* v. *Crossley*, 2 Mo. & R. 17.

So where the prisoner went into a shop, wearing the academic dress, and stated that he belonged to M. College, and obtained goods; it was held to be a false pretence, and would have been so although no words had been used. *R.* v. *Barnard*, 7 C. & P. 784.

Where the party obtained money by a pretence which he knew at the time to be false, it is immaterial that the party from whom he obtained it laid a plan to entrap him into the offence. *R.* v. *Ady*, 7 C. & P. 140.

Where the prisoner had represented himself to be a gentleman's servant living at *B.*, and that he had bought twenty other horses at the same fair, which he had at an inn, and that if the prosecutor would take down his filly there he would pay him the price agreed; but the prosecutor stated that he parted with his filly, not on account of his believing any of the pretences charged, but because he expected the prisoner would call at the inn and pay him; it was held, that if the jury believed that he parted with his property only on such expectation, the prisoner was entitled to be acquitted. *R.* v. *Dale*, 7 C. & P. 352.

Where goods received were obtained by false pretences, it was held that the indictment, alleging only that the prisoner received the goods knowing

them to have been "unlawfully obtained, taken, and carried away," was insufficient; it ought to appear that the knowledge was of their having been obtained under false pretences, to bring the case within 7 & 8 Geo. 4, c. 29, s. 55. *R.* v. *Wilson*, 2 Moody, 52.

(*False Qualification.*)

Upon an indictment under the 2 Will. 4, c. 45 (Reform Act), for giving a false answer at the poll as to having the same qualification as registered; held, the voter having given up the key of the premises to the landlord's agent before the election, who had delivered it to another occupant, but whose rent commenced after the election, that, in the absence of evidence showing the determination of the tenancy, the indictment could not be supported. *R.* v. *Harris*, 7 C. & P. 253.

FEOFFMENT, p. 457.

A mother and daughter being seised of land, by deed of settlement on the marriage of the latter, in consideration of the marriage, granted, bargained, sold, aliened, enfeoffed, and confirmed, and undertook and agreed to convey and assure unto trustees, to the use of the marriage, certain freeholds; livery of seisin was indorsed on the deed, but no names were subscribed: held, that the deed operated as a covenant to stand seised, and that a good use passed to the husband, but that possession for less than twenty-five years was not sufficient to raise the presumption of livery having been made. *Doe* v. *Davies*, 2 M. & W. 503.

FINE, p. 457.

An examined copy of the record of a fine, levied with proclamations, is as good evidence of the fine as the chirograph itself certified by the officer. A fine was proved to have been levied of the estate in question, in 1790, and the lessors of the plaintiff gave in evidence a deed of conveyance of part of the property in 1802, by the conusor of the fine to a purchaser, which stated that the fine was levied to the use of himself in fee; this deed was received without objection on the part of the defendant; held, that it was good evidence as a declaration of the uses of the fine, although it was not proved that the defendant derived title under the conusor. *Doe* v. *Ross*, 7 M. & W. 102.

M., after a devise of his property real and personal to *P.*, purchased lands in fee, and procured an assignment of an outstanding term of years to *P.* as his trustee. On the death of *M.* without republishing his will, a moiety of the fee descended to *P.*'s wife as coparcener with others; but *P.*, thinking himself entitled under the will, entered into, and took the profits of the whole to his own use, and afterwards joined his wife in a feoffment, and fine *sur cognizance de droit come ceo*, with proclamations: held, that the term was not merged by the seisin of *P.* in right of his wife; that the feoffment and fine were not void, but operated as a disseisin and forfeiture of the term, of which advantage might be taken by entry within five years, either after forfeiture or after the expiration of the term; that, in the meantime, the term might be treated as still subsisting for the purpose of entitling a plaintiff in ejectment to recover on a demise by *P.*'s personal representative. A joint demise in ejectment cannot be supported as the several

demise of one or more of the lessors whose title is proved at the trial; therefore, where the demise is by one parcener jointly with another parcener and her husband, whose title, *jure uxoris*, is barred by fine and nonclaim, there cannot be a verdict for the plaintiff. *Per* Patteson, J.: An entry to avoid a fine with proclamations, though not authorised by the party in whose behalf it was made, is sufficiently ratified by an action of ejectment founded on it. *Doe* v. *Pett*, 11 A. & E. 842.

By the stat. 3 & 4 Will. 4, c. 74, s. 7, it is enacted, that if it shall be apparent, from the deed declaring the uses of any fine, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case, the fine, without any amendment of the indentures, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission. And see s. 8, as to recoveries, where it shall be apparent from the deed making the tenant to the writ of entry, &c.

(*Fines, Copyhold.*)

Where a corporation, sole or aggregate, become possessed of lands which, in the hands of a tenant, are liable to seignorial rights, as fines and forfeitures on conviction of crimes, &c.; held, that they were liable to indemnify the lord in respect of such loss. *Thornton* v. *Robin*, 1 Moore, 438. Affirming the judgment of the Court of Jersey.

Where upon a devise of copyhold lands to trustees, with direction that there should always be three, and one having died, and another declined acting, the third surrendered and took a new grant to himself and two others; held that it was to be deemed an admission of all three to a new estate, and the fine to be calculated as on an admission of the three *de novo*, and that a fine, according to the custom, of two years' improved value for the first life, half of that for the second, and half of the last sum for the third, was a proper mode of calculating the fine. *Sheppard* v. *Woodford*, 5 M. & W. 608.

So, where the jury found that an arbitrary fine was payable on a grant by the custom of the manor, but that the fine claimed on the addition of lives was unreasonable; held, that an arbitrary meant a reasonable fine, and that the principle of calculating the fine on addition of several lives by taking two years' improved value on the first, and halving it for the second, and halving the half for the third, and so on in geometrical progression, was a reasonable fine. *Wilson* v. *Hoare*, 2 P. & D. 659.

(*Commutation.*)

See the provisions as to the commutation of fines, &c. in copyhold and customary tenures, and for the enfranchisement of such tenures, 4 Vict. c. 35.

FORCIBLE ENTRY, p. 459.

Where a tenant remains in apartments after the expiration of his term, the landlord is not justified in *forcibly* asserting his right to the possession by expelling him. *Newton* v. *Harland*, 1 Scott, N. S. 474.

FOREIGN CONSUL.

Under the 6 Geo. 4, c. 87, s. 20, a British consul at a foreign port being empowered to do all notarial acts which any notary public may do, that of certifying the handwriting and authority of the party taking the affidavit of acknowledgment of a married woman was held to be included. *Barber, in re*, 2 Bing. N. C. 268; 2 Sc. 436; and 4 Dowl. 640.

FOREIGN LAW, p. 459.

In a suit in a foreign court for the distribution of the personal estate of a party domiciled out of the country, it is bound to adopt, in the interpretation of testamentary instruments, the rules of construction which would prevail in the country where the party was domiciled, but it is not bound to adopt foreign rules of evidence, every court being governed by its own rules of procedure. *Yates* v. *Thompson*, 3 Cl. & Fi. 545.

A party domiciled in England, but possessed of a real estate in Scotland, died intestate, being indebted on bonds which were payable by the heir out of the proceeds of the real estate in Scotland; held, that the right which the heir in Scotland paying moveable debts has there against the personal estate, may be made available in England, where the personal estate is primarily liable for the payment of all debts. *Winchelsea, Earl of*, v. *Garatty*, 2 Keene, 293.

Assumpsit upon a decree in Scotland, plea, alleging that the defendant was absent and had no notice of proceedings there, so that he might by himself or his proctor appear and answer, and that the decree was made in his absence, and thereby was contrary to natural justice and wholly void; held that the plea was a mere conclusion of law and not traversable, and was no answer to the action, it not being denied that he was domiciled and resident there at the time the debt accrued, or that he had heritable property there; the allegation of want of notice, *so that, &c.*, also held too indistinct a denial of his having had none. *Cowan* v. *Braidwood*, 2 Sc. N. S. 138; and 9 Dowl. 20.

A foreign judgment is impeachable here for fraud; where, therefore, to a bill for an account by a customer against the defendants (foreign bankers) and for an injunction to restrain them from suing on a foreign judgment, it appeared that, notwithstanding the judgment, the balance was still greatly in favour of the plaintiff, the demurrer was overruled. *Bowles* v. *Orr*, 1 Younge & C. 464.

A foreign judgment may be given in evidence and made the subject of proceedings in another country, but the subject-matter of such judgment is liable to be inquired into; where, therefore, a decree in the Court of Chancery in England was made the ground of suit in the Irish Court of Chancery, and had been dismissed on a supposed want of jurisdiction, the decree of the latter Court was reversed, and sent back, with a declaration that the propriety of the English decree might be examined, and, if sustainable in part, it might to that extent be executed by the aid of the Irish court, although other parts might be deemed erroneous. *Houlditch* v. *Marquis of Donegal*, 8 Bli. 301; and 2 Cl. & Fi. 470.

And see the cases there collected. *Ibid.* 350.

Where a contract made in France was for the payment of money in England, held that the breach being in the latter, and where the suit was, payment of interest was to be governed by the law of England. *Cooper* v. *Earl of Waldegrave*, 2 Beav. 282.

Assumpsit for freight on a charter-party executed at Java. By the law of Holland such contracts are made by a notary, and entered in his book, and a copy is given to each party, which may be done at any time, signed, sealed, and attested by him; in the courts of Holland, these copies are received in evidence without further proof, but in Java the notary's book must be produced, and the signature of the notary be proved; held, that such copy could not be considered as the original binding document, nor admitted as evidence of it until proved to be an examined copy according to the law of evidence in this country. *Brown* v. *Thornton*, 1 N. & P. 339.

Although a general stoppage of payments by a foreign trader necessarily amounts to a refusal at the time of such stoppage, yet where the suspension arose from the stoppage of the house of agency in this country, the Judicial Committee held that it established only the *ouverture de la faillite* from the time of actual stoppage abroad; a mere refusal, not followed by a cessation of payment, was held not to establish such *ouverture de la faillite* within the Art. 441 of the Code de Commerce of France. *D'Epinay* v. *Saunders*, 1 Moore, 103.

FOREIGN STATES.

Where this country has introduced its own municipal law into a conquered or ceded country, not in all its branches, but only *sub modo*; held, that it does not draw with it the law incapacitating aliens from holding and transmitting real estate; and *semb.*, the Mortmain Act does not extend to the East India British possessions. *Lyons, Mayor, &c.* v. *East India Co.*, 1 Moore, 288.

FORGERY, p. 460.

An indictment for forging and uttering a deed, stating it as purporting to be made on, &c., (stating the date) between, &c., (stating the parties) and purporting to be an underlease by the one to the other of certain premises therein mentioned, subject to the rent of, &c., (stating it) and purporting to contain a covenant for the payment of the yearly rent, is sufficient under the 2 & 3 W. 4, c. 123, s. 2. *R.* v. *Davies*, 9 C. & P. 427.

A charge of uttering a forged bill of exchange is not supported by proof of the acceptance only being forged, which is a distinct offence. *R.* v. *Horwell*, 1 Ry. & M. 405.

A forged paper, in the following form: "Please let the lad have a hat, and I will answer for the money.—E. B.," is a forged request for the delivery of goods, and it is not the less so because it may also be a forged undertaking for the payment of money. *R.* v. *White*, 9 C. & P. 282.

(*Joint.*)

Three prisoners (foreigners) were indicted for feloniously engraving and making two parts of a promissory note of the Emperor of Russia. The indictment was framed upon the stat. 11 Geo. 4 & 1 W. 4, c. 66, s. 19. The plates were engraved by an Englishman, who was an innocent agent in the transaction. It appeared that two of the prisoners only were present at the time when the order was given for the engraving of the plates, but they said they were employed to get it done by a third person, and there was some evidence to connect the third prisoner with the other two in subse-

quent parts of the transaction. The questions left to the jury were, 1st, whether the two who gave the order for the engraving knew the nature of the instrument; and, 2dly, whether all three concurred in the order given. The Judge told the jury that in order to find all three guilty, they must be satisfied that they jointly employed the engraver, but that it was not necessary that they should all have been present when the order was given, as it would be sufficient if one first communicated with the other two, and all three concurred in the employment of the engraver. His Lordship also said, that he was inclined to think that if the prisoners, by means of the engraver, caused the plates to be engraved, they would be within the provisions of the statute, whether they knew the nature of the instrument engraved or not; but intimated that, if it became necessary, that matter might be made the subject of further consideration. The jury found the two guilty who gave the order, and added that they considered they knew the nature of the instrument. The third prisoner was acquitted. *R.* v. *Mazeau*, 9 C. & P. 676.

(*Uttering*, p. 468.)

The prisoner deposited a forged acceptance with bankers, saying that he hoped it would be accepted as a security for what he owed, to which the manager of the bank replied that it would depend on the result of inquiries as to the acceptor; this was held to be a sufficient uttering. *R.* v. *Cooke*, 8 C. & P. 582.

(*Intent*, p. 468.)

If a person know the acceptance of a bill of exchange to be forged, and utter it as true, and believe that his bankers, to whom he utters it, will advance money on it, which they would not otherwise do, that is evidence of an intent to defraud, upon which a jury ought to act; and a person is not the less guilty of forgery because he may intend ultimately to take up the forged bill, and may suppose that the party whose name is forged will be no loser: and the fact that the bill has been since paid by the prisoner will make no difference, if the offence has once been complete at the time of the uttering, *R.* v. *Geach*, 9 C. & P. 499.

Where a party utters what he knows to be a forged instrument, it is a consequence that he intends to defraud the party to whom he utters it; *semble*, also, that if a party write an acceptance on a blank stamp, which is afterwards filled up by another who is in league with him, this does not amount to a forgery by such party of the acceptance of a bill. *R.* v. *Cooke*, 8 C. & P. 582.

Semble, where the prisoner is himself a partner in a bank, and knowingly utters a forged acceptance to that bank, counts laying an intent to defraud "*A.*" (another of the partners) "and others" cannot be supported. *R.* v. *Cooke*, 8 C. & P. 586.

Where the prisoner gave his employer a bill, subscribed with a receipt for the price of goods, and the jury found that it was uttered for the purpose of deceiving his employer into a belief that money which he had given the prisoner had been applied to the purpose for which it had been obtained, and that it was a mere pretence and fraud; it was held, that he was properly convicted of uttering the forged receipt, with intent to defraud. *R.* v. *Martin*, 1 Ry. & M. 483; and 7 C. & P. 549.

If the jury find that the prisoner uttered a bill as true, meaning it to be taken as such, and that at the time of such uttering he knew it to be forged,

they ought to find, as a necessary consequence, an intent to defraud. *R.* v. *Hill*, 8 C. & P. 274.

Whether the prisoner by the forgery intended to defraud bankers with whom he had deposited guarantees to a large amount, is a question for the jury. *R.* v. *James*, 7 C. & P. 557.

Where from previous dealings a party has used the name of another on bills, under a *bonâ fide* belief that he had authority to do so, and without intention to defraud, the jury ought to acquit him. *R.* v. *Parish*, 8 C. & P. 94; and see *R.* v. *Forbes*, 7 C. & P. 224.

Where the witness for the prosecution had sworn that he received a forged bill from the prisoner, and on cross-examination stated that he and the prisoner took a blank stamp to the prosecutor, who returned it to the prisoner with his name upon it, the Judge would not allow the prosecutor to cross-examine the witness, nor to show the latter statement to be untrue, and that the witness had made different statements to other persons. *R.* v. *Farr*, 8 C. & P. 768.

(*Forged Request.*)

On an indictment for uttering a forged request for the delivery of goods, it appeared that the forged instrument was a letter requesting the prosecutor to let the prisoner have such things as he wanted, and went on to allege a previous statement of the prisoner that the person whose letter it purported to be had money in her hands to which the prisoner would be entitled; it was held, that such letter was a forged request within the 11 Geo. 4, and 1 Will. 4, c. 66, s. 10. *R.* v. *Thomas*, 2 Moody, 16.

The punishment of death is now abolished in all cases of forgery, by 1 Vict. c. 84.

FRAUD, p. 471.

A son, on his father's behalf, entered into an executory contract, and before its completion stated that his father was going to receive money, and referred to an advertisement in a provincial paper, announcing facts in reference to his father's supposed title to receive it; held, that in the absence of any other advertisement, an advertisement, containing a statement of all those facts, was admissible in evidence to show a fraudulent compact between the father and the son, although after the contract entered into, inducing the plaintiff to go on with the contract. *Lucas* v. *Godwin*, 3 Bing. N. C. 737.

A Frenchman who has, in the Admiralty Court, set up a Portuguese as the owner of goods, and by that means obtained a decree that they are neutral, cannot be allowed to recover them from that Portuguese as his own. *De Metton* v. *De Mellon*, 2 Camp. C. 420.

In consequence of the embarrassment of the affairs of a joint-stock company, the shareholders by deed empowered a committee to certify what sum would be necessary to satisfy the claims on the company, and the proportion each shareholder should pay, and which the defendant amongst others covenanted to pay; in an action thereon, alleging that —*l.* had been so certified, and that —*l.* was the proportion of the defendant, and a demand on and refusal by him; pleas, amongst others, one traversing that the committee had certified, as the fact was; and another that such sum was not necessary to satisfy the claim, &c., and that the committee had fraudulently signed such certificate; and it appeared that, on a similar certificate, the defendant had paid a portion of the sum awarded against

him, and that the subsequent certificate had been made for the same amount to avoid confusion amongst the other contributors, and that the defendant had notice that he would be allowed to deduct his former payment out of the subsequent claim: held, that the second certificate being erroneous in fact, did not, under the circumstances, necessarily amount to fraud in law. *Wilson* v. *Butler*, 4 Bing. N. C. 748; and 6 Sc. 541.

Where, in case by the owner of goods against a shipowner, for loss by the unskilful loading of them, and also for contribution, it appeared that it had been agreed merely to try the question as to a particular custom of loading such goods, and the defendant having, by pleading a set-off, endeavoured to snap a verdict, the Court set aside the plea, on payment into court of the amount claimed by it. *Gould* v. *Oliver*, 4 Bing. N. C. 676; and 6 Sc. 884.

Where it is once shown that a party executing a deed is aware of its contents, evidence that he was induced to execute it by previous fraudulent misrepresentations is inadmissible under a plea that it was obtained by fraud and covin. *Mason* v. *Ditchbourne*, 1 Mo. & R. 460.

(*Composition with Creditors.*)

Where a creditor, holding a policy as a security for his debt, refused to sign the composition deed, unless the policy were assigned to him, which was done, it was held to be a fraud on the other creditors, and that, the party assigning the policy having become bankrupt, his assignees were entitled to recover the amount received on the policy, although the composition had never been paid. *Alsager* v. *Spalding*, 4 Bing. N. C. 407.

A party before executing a composition deed may stipulate for retaining the value of a security, but he cannot by executing it secure to himself any separate advantage not stipulated for in the deed: where a party had so stipulated before signing the deed, and afterwards received dividends, but took no steps to make the further advantage secured to him known to the creditors, some of whom held back until he had signed; it was held that he was liable to bring in the amount of the security. *Cullingworth* v. *Lloyd*, 2 Beav. 385.

Where on a composition deed the plaintiff, before executing it, obtained a bill to be indorsed to him for a further sum than that secured by the bill to be given under the deed, held that the whole agreement was void, as a fraud on the other creditors, and that he could not recover even for the amount of the composition, although nothing had been received on the bill so indorsed. *Howden* v. *Haigh*, 3 P. & D. 661.

See further, *Pendlebury* v. *Walker*, 4 Y. & C. 424.

Where an hotel-keeper, at the time of his licence expiring, being in difficulties, assigned all his stock in trust to continue the trade, and out of the profits to pay a dividend to such creditors as would execute the deed of assignment, and a licence was afterwards taken out and assigned to the trustee; it was held, first, that the assignment of the trade, &c. at the time when there was no licence, did not render it illegal, it not being certain nor intended that anything illegal should be done; but secondly, that as by sharing the profits, the creditors executing the deed of assignment, might become partners, (a liability they were not bound to submit to,) the assignment was not valid. *Owen* v. *Bode*, 6 Nev. & M. 448; and 5 Ad. & Ell. 28.

(*Laches.*)

Case against the Bank of England for not transferring stock of a testatrix to the plaintiff, the executor; pleas, first, not guilty; secondly, that the deceased was not possessed of the stock: it was proved at the trial that the testatrix, a very aged person, had, with her nephew, a clerk in the Bank, up to a late period, always received the dividends, but she had also been personated at the Transfer-office by a female taken by the nephew, and which female forged the signature of the testatrix to the transfer of several portions of the stock, and the jury having found that the testatrix had the means of knowing that such transfer had been made, although she did not appear to have actually known thereof, and was guilty of gross negligence in leading the defendants to believe that she sanctioned those transfers, and that there was no negligence in the Bank in transferring without ascertaining the identity of the testatrix, it was held, that the facts constituted an answer to the action. *Coles* v. *Bank of England*, 2 P. & D. 521.

(*Acquiescence.*)

Where it was alleged that the agent of the former owner of estates devised to the plaintiff, had, under an assertion that he had a secret by which the plaintiff's title might be impeached, within a few days after the decease of such former owner, obtained a conveyance of part of those estates in discharge of a settled balance, alleged to be due to him, and the plaintiff had, under legal advice, acquiesced and confirmed the transaction, but after a lapse of above fifteen years, sought to open the accounts on the ground of fraud, the House of Lords affirmed the judgment below, dismissing the bill. *De Montmorency* v. *Devereux*. 1 West. 64.

FRAUDS, STATUTE OF.

(*Surrender by operation of Law*, p. 474.)

Where a party being yearly tenant, in the course of a current half year entered into an agreement with his lessor, the one to let, and the other to take, a fourteen years' lease, determinable at the option of either at the end of seven years, at a rent payable half yearly, it was held to amount to a lease, although the parties might not contemplate the legal consequences of the surrender of the previous term and the merger of the accruing rent. *Doe* v. *Benjamin*, 1 P. & D. 440.

Where two parties, tenants of different premises, verbally agreed to exchange holdings, and to pay the respective rents, and each took possession of the other's land on the same day, and the transaction was communicated the day after to the common agent of both landlords, who expressed his concurrence; held to be evidence for a jury of a new demise, and to be sufficient to constitute a surrender by operation of law. *Bees* v. *Williams*, 2 Cr. M. & R. 581; and 1 T. & G. 23.

An insufficient notice to leave the premises given by the tenant, and accepted by the landlord, does not amount to a surrender by operation of law; there cannot be a surrender to operate *in futuro*. *Doe* v. *Milward*, 3 Mees. & W. 328.

(*Original Consideration*, p. 478.)

The defendant was appointed surveyor of works to be done by *H.*, and the plaintiff agreed to supply materials for *H.*, upon the defendant's undertaking to pay the plaintiff for them out of monies to be received by him on

account of *H.*, the latter giving an order for that purpose; held, that it was an original and not a collateral promise on the part of the defendant; and that, having received monies, and the order of *H.*, he was liable on such special promise, although not in writing. *Andrews* v. *Smith*, 2 Cr. M. & R. 627; and 1 T. & G. 173.

So where the defendant had taken the stock of a party, and undertaken to satisfy the creditors, the plaintiff agreeing to withdraw his execution which he had issued. *Bird* v. *Gammon*, 3 Bing. N. C. 883.

Where two debtors were taken on a joint execution, and one was discharged by the plaintiff upon terms, it was held to discharge the co-debtor, and a promise by a third party to pay the debt in order to procure the release of the latter, was held to be without sufficient consideration. *Herring* v. *Dobell*, 8 Dowl. 604.

(*Within One Year*, *&c.*, p. 477.)

A party agreed with the plaintiff to work for him at a particular trade for twelve months, and so on from twelve months to twelve months, and to give twelve months' notice if he should quit; but he afterwards quitted and went to work for the defendant: in an action against the latter for harbouring and detaining his servant, it was held that the agreement being signed only and binding on one side, without any reciprocal benefit on the other, was void, as *nudum pactum*, and that it was competent to the defendant to raise the objection. *Sykes* v. *Dixon*, 1 P. & D. 403.

(*Interest in Land*, p. 479.)

Where an Act contained a clause expressly declaring that the shares of a railway company should be personal property to all intents and purposes, it was held, that a sale of such shares was not within the Statute of Frauds, as being of an interest in land, and therefore might be by verbal contract; and it appears that this would have been so, even if the Act had contained no such clause. *Bradley* v. *Holdsworth*, 3 M. & W. 422.

(*Section* 17, *Goods, Wares*, *&c.*, p. 487.)

Shares in a joint-stock banking company are not goods, wares, or merchandizes, within this clause. In *assumpsit* for refusing to complete a transfer of such shares sold by defendant to plaintiff, the defendant pleaded that the contract was for the sale of an interest in land belonging to the company, and that there was no memorandum in writing, &c., according to the form of the statute. Held, upon a traverse of the plea, that it was not enough for defendant to show by parol evidence that the company was in the actual possession of real estate, without further proof of the title of the company, and the interest of the shareholders therein. *Quære*, whether, supposing the company to be proprietors of land, such shares are an interest in land within sect. 4 of the Statute of Frauds? *Humble* v. *Mitchell*, 11 A. & E. 205.

(*Acceptance*, p. 489.)

In *assumpsit* for goods sold and delivered, where the price is above 10 *l.*, and nothing paid as earnest to bind the bargain, nor any memorandum in writing signed by the agent or his party: two things must be proved to entitle the plaintiff to recover; first, that the order for the goods was in fact given by the defendant; and secondly, that there was an acceptance by him with intent to take to them as owner. *Smith* v. *Roll*, 9 C. & P. 696.

In debt for goods (a fire-engine), upon the question whether the defendant

had accepted it within the meaning of the Statute of Frauds, it appeared that he had once brought a person to the plaintiff's yard to look at the engine, and being asked what he meant to do with it, he mentioned two or three parties who were likely to want it, and at another time he said he had a concern in the engine; it was held, under these circumstances, that if the jury were satisfied that the defendant treated and dealt with it as his own, the plaintiff was entitled to recover. *Baines* v. *Jevons*, 7 C. & P. 288.

(*Alteration, Waiver, &c.*, p. 491.)

Where an agreement for a lease contained a stipulation for a mode of valuation, it was held, that it was to be taken to be and continue entire, and that such stipulation could not be waived by parol. *Harrey* v. *Grabham*, 5 Ad. & Ell. 73.

In *assumpsit* for not completing an agreement to assign a lease of premises, it was held that the day stated in the contract for completing the purchase of an interest in land, could not be varied by parol, as being a contravention of the Statute of Frauds; but that the failure to procure a licence to assign, or to register previous assignments before the day stipulated for such completion of the contract, being imperfections capable of being removed, were not breaches of the agreement. *Stowell* v. *Robinson*, 3 Bing. N. C. 928.

After a written contract for the purchase of several lots of land to which a good title was to be made, it was found that a good title could not be made as to one lot, but the defendant agreed by parol to waive the condition as to that; held, in an action to enforce the performance of the contract, that the Statute of Frauds excluding all oral evidence as to contracts for the sale of lands, the contract sought to be enforced could be proved by writing only. *Goss* v. *Lord Nugent*, 5 B. & Ad. 58; and 2 Nev. & M. 28.

FRAUDULENT CONVEYANCE, p. 494.

If a person expecting a *fieri facias* to be sued out against him, make an assignment by deed of his goods to trustees for the benefit of his creditors, and the goods be afterwards taken under the *fieri facias*, and an action of trover for them be brought against the sheriff by the assignees, it is a question for the jury, under all the circumstances, whether the deed was fraudulent or not, that is, whether it was *bonâ fide* meant to convey the goods to the trustees for the benefit of the creditors generally, or whether it was a pretext only, and the goods were, notwithstanding the deed, really to belong to the assignor: and this is a question of fact, and not a question of law. *Riches* v. *Evans*, 9 C. & P. 640.

The fact that a deed of this kind was executed with intent to avoid a particular execution, does not in point of law make it void, neither will the fact of the assignor remaining in possession, according to the terms of the deed, set it up if the jury think that the deed was a fraud. *Ibid.*

Goods in the possession of *M. W.* having been distrained, the amount was paid by the plaintiff as for rent due from *S. W.*, who afterwards executed an assignment of them to the plaintiff; and upon the bankruptcy of *M. W.*, although still in possession of the goods, no claim was ever made upon him by *M. W.*'s assignees: it was held, that in the absence of any evidence of fraud, the title of the plaintiff was sufficiently made out. *Burling* v. *Patterson*, 9 C. & P. 570.

Where a party, being at the time insolvent, alienated an annuity, it was held, that (although only a chose in action) by the 13 Eliz. c. 5, in connexion

with the Insolvent Act, 7 Geo. 4, c. 57, such alienation was fraudulent and void. *Norcutt* v. *Dodd*, 1 Cr. & Ph. 100.

A bond does not come under the notion of goods or chattels, within the st. 13 Eliz. c. 5, as to fraudulent alienations. *Sims* v. *Thomas*, 4 P. & D. 233. See further as to fraudulent conveyances, *Ward* v. *Audland*, 8 Sim. 571; 1 Coop. Ch. C. 176. *Doe* d. *Barnes* v. *Rowe*, 4 Bing. N. C. 737.

FRIENDLY SOCIETY.

Authority of, to make resolutions. *Tyrrell* v. *Woolley*, 2 Scott, N. S. 171.

GAME.

(*Gamekeeper*, p. 501.)

In trover for a gun, the defendant justified the seizing of it under 1 & 2 Will. 4, c. 32, s. 13; it appeared that his deputation as gamekeeper had been granted and enrolled with the clerk of the peace prior to the Act taking effect, but not under the Act; held that he was not entitled to the privilege conferred by it, of notice of action, and of giving all matters in evidence under the general issue. *Bush* v. *Green*, 4 Bing. N. C. 41; and 3 Sc. 289.

(*Right of Sporting*, p. 504.)

By a deed, *A.* and *B.* conveyed to *D.* and his heirs certain lands, *excepting and reserving* to *A. B.* & *C.*, their heirs and assigns, liberty to come into and upon the lands, and there to hawk, hunt, fish, and fowl: held, that this was not in law a *reservation* properly so called, but a *new grant* by *D.* (who executed the deed), of the liberty therein mentioned; and therefore that it might enure in favour of *C.* and his heirs, although he was not a party to the deed. *Wickham* v. *Hawker*, 7 M. & W. 63.

(9 *Geo.* 4, *c.* 69.)

An indictment under 9 Geo. 4, c. 69, s. 9, was held to be sufficient, although not charging whether the land entered on was inclosed or not; held also, that where some of the party were in the lands stated, and others in the adjoining land co-operating in the same purpose, all were guilty of the offence. *R.* v. *Andrews*, 2 M. & R. 37.

But where one of several went by himself to poach in a distinct field, it was held not to be an entry by the others into that field, to support the indictment; so where they remained out in the road, and sent their dogs into an adjoining field to drive the game into nets set by them. *R.* v. *Neckless and others*, 8 C. & P. 757.

If nets be hung on the twigs of a hedge within the close, it is an entry, though the parties be in a lane outside the hedge. *Athea's Case*, 2 Lew. Cr. Cases, 191.

If several act together for the common purpose of poaching, one may be convicted, although never bodily within the wood where the others entered. *R.* v. *Passey*, 7 C. & P. 282; S. P. *R.* v. *Lockett*, ib. 300.

Where gamekeepers find poachers in a wood, they need not give any intimation by words that they are gamekeepers or that they are going to apprehend them; but if the parties are not on the ground, or within the manor of the gamekeepers' employer, the gamekeepers would not be justified in apprehending them. *R.* v. *Davis*, 7 C. & P. 785.

Large stones brought to the spot, and used in assailing gamekeepers, are "offensive weapons" within the statute 9 Geo. 4, c. 69, s. 9. *R.* v. *Grice*, 7 C. & P. 803.

Where the only weapon found on the prisoner was a common walking-stick, it was held that if there were circumstances showing an intention to use it for purposes of offence, it might be an offensive weapon within the statute; *secus*, if the jury find that it was in his possession in the ordinary way, and that upon an unexpected attack or collision only, he used it offensively. *R.* v. *Fry*, 2 M. & R. 42.

A constructive arming is not sufficient within the statute to make the arming by one an arming of all, and satisfy the averment that all were armed. *R.* v. *Davis and another*, 8 C. & P. 759.

It is necessary to show that the parties were in the place charged, with the intent to kill game there. *R.* v. *Gainer*, 7 C. & P. 231.

A party, not a regular gamekeeper, but employed as a night watcher, is a person authorized to apprehend persons found poaching, although having no written authority; and where the prisoner, found poaching on the manor, was pursued off, and then on again, when he snapped his gun at the prosecutor, he was held guilty of the capital offence, under 9 Geo. 4, c. 31, ss. 11, 12. *R.* v. *Price*, 7 C. & P. 178.

Gamekeepers hearing guns fired between twelve and one at night in a wood, and seeing the prisoner there, although without guns or game, are justified in endeavouring to apprehend him, without previously notifying their authority, or requiring him to surrender. *R.* v. *Taylor and another*, 7 C. & P. 266.

Under sect. 31 of 1 & 2 Will. 4, c. 32, in order to justify the apprehension of a party found on land in the unlawful pursuit of game, he must be first required to quit the land, *and* to tell his name; and "the wilfully continuing or returning upon the land" must be upon *the same* land, and for the purpose of pursuing game there. *R.* v. *Long*, 7 C. & P. 314.

GAMING, p. 507.

In an action on a cheque, plea, that it was given for a gambling debt; held, on general demurrer, that the replication *de injuria*, was good. *Curtis* v. *Marquis Headfort*, 6 Dowl. 496.

The statutes against gaming, 16 Car. 2, c. 7, s. 3, and 9 Ann. c. 14, s. 1, avoid judgments obtained from the loser by the winner as a security for money lost, but not judgments which the winner, or a third party claiming through him, may have recovered against the loser by action. *Lane* v. *Chapman*, 11 A. & E. 966. And now see the statute 5 & 6 Will. 4, c. 41.

GENERAL ISSUE, p. 508.

The new rules of pleading have not abolished the plea of the general issue, but only circumscribed the species of evidence which may be given under it. *Gough* v. *Bryan*, 2 M. & W. 770; and 5 Dowl. 765.

See as to the effect of these rules on the plea of the general issue, under the different heads of *Assumpsit*, *Debt*, &c.

GRANT.

Where, at the date of letters patent, mines were granted within the province of *N. S.*, they were held to pass all mines in *B.*, which, before that date, had become a part of the province of *N. S.* *Taylor* v. *Attorney-general*, 8 Sim. 113.

GUARANTY.

Where the sureties to a Government contractor for certain works, gave to the plaintiff a guarantee for the supply of materials in these terms, "Please to deliver to *S.*, &c., at, &c., and we do consent, that the officer who may have the payment of the contract when finished, shall stop the amount of the account of such materials delivered, and we do hereby agree to become guarantees for the payment of the same to you, when the amount of the contract is paid;" the works having been in part performed, and *S.*, with the plaintiff's consent, having received certain sums from Government in advance, was afterwards dismissed for neglect, and the works finished by other parties; an arrangement was then entered into between the Crown and one of the defendants, on behalf of himself and his co-surety, with the consent of *S.*, and thereupon, after debiting *S.* with the advances, and for extra works, and for the sums paid for completing the works, a balance was paid to him in full for all claims; held that the latter sums were not to be deemed paid to *S.* or his agents, and the whole amount of the contract not having been paid him, the defendants were not liable under the guarantee: and if it were not so, yet that the plaintiff having consented to the sums paid in advance, had no claim in respect thereof, and that if the final balance paid was composed of sums due, partly on the contract and partly for *extra* works, the proportions not being ascertainable, the plaintiff would be only entitled to nominal damages. *Hemming* v. *Trenery and another*, 2 Cr. M. & R. 385.

In an action for goods sold the defendant pleaded that the defendant and *M.* had agreed with the plaintiffs that *M.* should give a guarantee for payment of the debt by instalments, and that the guarantee was given and was accepted by the plaintiffs in satisfaction.—Replication—denying the agreement, and denying that the plaintiffs had accepted the guarantee in satisfaction. It was proved by Mr. *L.*, the plaintiffs' attorney on the record, that *M.* had asked him to propose to the plaintiff to accept his guarantee, and that Mr. *L.* having consented to do so, *M.* signed a guarantee, which was on the next day sent by Mr. *L.* to the plaintiffs, who kept it three weeks, and then returned it. It was held that if the plaintiffs did not return the guarantee within a reasonable time, they must be taken to have accepted it, and that unexplained—three weeks was an unreasonable time: held, also, that if *M.* was worth nothing, and was a mere man of straw, that fact would make no difference on these pleadings, as the plaintiffs had not replied fraud, but had denied that they had accepted the guarantee. *Pope* v. *Andrews*, 9 C. & P. 564.

The plaintiff, a tailor, furnished goods for a party, on a memorandum given by the defendant in the terms, "I undertake to pay Mr. *J.* the sum of £. —— for a suit of —— ordered by *P.*," it was held to be a guarantee, and not a promissory note. *Jarvis* v. *Wilkins*, 7 M. & W. 410.

The defendant, as attorney of the landlord, employed the plaintiff, a broker, to levy a distress, and some of the goods seized being claimed as privileged, the plaintiff required an indemnity, which the defendant gave on the behalf of his employer, and he afterwards urged on the sale, promising to give a further guarantee; it was held, that although, as a general proposition, a broker cannot throw the consequences of his own wrongful

act or want of caution from himself upon his employer, yet that the jury were warranted by the circumstances and conduct of the defendant in inferring a promise to indemnify, and that he was liable to make good the loss sustained by the plaintiff, who had been sued by the owners of the privileged goods. *Toplis* v. *Grane*, 5 Bing. N. C. 636; and 7 Sc. 620.

Where the defendant undertook, if a distress were withdrawn, to pay the sum due for rent "out of the produce of the sale," held, that upon proof of the goods producing a sufficient amount, the defendant was liable, although there were prior claims on the proceeds. *Stephens* v. *Pell*, 2 Cr. & M. 710.

The defendants, upon an employment to manage the sale of a library, in their proposal as to terms, stated that they would be responsible with the auctioneers for the proceeds of the sales; and in a subsequent letter said that the plaintiff had "of course the double security of ourselves and the auctioneers;" held, that their employment of an auctioneer recommended by the plaintiff did not prevent their being liable for him, and that the plaintiff's attorney having received, with the consent of the defendants, notes from the auctioneer for part of the proceeds, was not an acceptance of them as payment, nor a giving time so as to vary the liability of the defendants. *Cholmondeley* v. *Payne*, 8 C. & P. 482.

The plaintiff writes two letters to *A*, the plaintiff's brother, by the one, pressing *A.* to join, and to induce his brother to join in a security for money to be advanced to the defendant to enable him to carry on a suit; and by the other, urging the same request, and adding, "I should consider it as a matter of favour to myself if your brothers will join, and I will see that they come to no harm." The letters amount to an actual guarantee. *Jones* v. *Williams*, 7 M. & W. 493.

A bond is subject to a condition for repayment of the sum secured, with interest, "at or before the expiration of six months' notice" to be given to pay the same: the plaintiff (the obligor of the bond) is entitled to recover on a guarantee to indemnify, although he did not prove such notice to have been given, if he show that the defendant had received notice of an action commenced on the bond (which was stayed by a judge's order on payment of debt and costs), and did not come in to defend it. *Ib.*

A guarantee given by the defendant to the plaintiff to induce him to sign the certificate of the principal, who had become bankrupt, is void, and the objection may be taken in evidence under the general issue "by statute." *Hankey* v. *West*, 1 G. & D. 47.

Where a legatee assigned his interest in certain premises devised to be sold, and the assignee gave a guarantee to the plaintiffs, the executors, and also to their attorney who managed the sale and paid over the money: the legatee being bankrupt, and the share claimed by his assignees, held, that the action upon the *guarantee* might be properly brought by the executors without joining the attorney, they having a separate interest. *Place* v. *Delegal*, 4 Bing. N. C. 426.

(*When continuing.*)

The defendant, with two others, entered into a joint and several bond to secure advances to one by the plaintiffs (bankers), conditioned for the payment of all sums which the plaintiffs or any future partners should advance, not exceeding a certain sum; this was held to be a continuing guarantee:

but held, also, that an averment that a sum was *due*, whereof notice was given to the defendant, was bad, on general demurrer, as not showing an express breach of the condition. *Batson* v. *Shearman*, 5 P. & D. 77.

"In consideration of your supplying my nephew *V.* with china and earthenware, I guarantee the payment of any bills you may draw on him on account thereof, to the amount of 200 *l.*" This is a continuing guarantee, and the defendant is liable upon it, although, after it was given, goods to a greater amount than 200 *l.* have been supplied to and paid for by *V.* *Mayer* v. *Isaac*, 6 M. & W. 605.

"I beg that you will continue to advance 2 *l.* per week to Mr. R. B., and I hereby engage to repay you all monies you may advance to him in addition to the 24 *l.* you have already let him have at my request to this date." The guarantee is limited to the 24 *l.* and the 2 *l.* per week. *Smith* v. *Brandram*, 2 Scott's N. S. 539.

Debt against a surety on a bond, reciting the employment of *A.*, *B.* and *C.*, partners, as agents for the plaintiffs, and conditioned "that if the said *A.*, *B.* and *C.*, and the survivors or survivor of them, and such other persons as should in partnership with them act as agents for the plaintiffs, did and should duly account," it appeared that one of the original parties retired, and the others continued to act; held, that upon the retiring of such partner the liability of the surety was discharged as to default made by the continuing partners. *Cambridge University* v. *Baldwin & others*, 5 M. & W. 580; and 9 Ad. & Ell. 298.

HANDWRITING.

In an action against the acceptor of a bill of exchange, the only proof of the handwriting of the defendant was that of a banker's clerk, who stated, that two years before, he saw a person calling himself by the defendant's name, sign a book, that he had never seen him since, but that he thought the handwriting was the same, and had since seen cheques bearing the same signature; held, that this was evidence to go to the jury. *Warren* v. *Anderson*, 8 Scott, 384.

A. swears that a signature is not that of *B.*, the alleged witness to a bond, and he swears that a second signature produced is not *B.*'s;—it is not competent to show that in fact the latter is *B.*'s signature. *Hughes* v. *Rogers*, 8 M. & W. 123; and see *Doe* v. *Newton*, 5 Ad. & Ell. 514, 1 N. & P. 1; *Griffits* v. *Ivory*, 3 P. & D. 179; 11 Ad. & Ell. 322.

Where a witness, called to prove the defendant's handwriting to a libel, deposed to having seen the defendant write in a book which was proposed to be shown to the jury for the purpose of comparing the handwritings, it was held that this could not be done, but that a letter written to the plaintiff, referring to some of the subjects in the libel, if admissible in its own nature, could not be withdrawn from the consideration of the jury. *Waddington* v. *Cousins*, 7 C. & P. 595.

HEIR.

An heir at law is not estopped from questioning the validity of a deed of his ancestors alleged to be void as a fraud against the stat. of Charitable Uses, 9 G. 2, c. 36. *Doe* v. *Lloyd*, 8 Scott, 93.

HIGHWAY, p. 521.

By an act of incorporation, 41 Geo. 3, c. xxxi, the proprietors of the Surrey Canal were required to erect and maintain bridges over the canal where it intersected any public highway, bridleway, or footpath, and also for the use of the owners and occupiers of lands, &c., adjoining to the canal. In 1804, the company erected a swivel bridge (of sufficient dimensions to allow a carriage to traverse it) across the canal at a spot where there had formerly been a public way which at the most was only a bridle-way. This bridge was originally intended for the exclusive accommodation (as a carriage-way) of the tenants of an estate adjoining, called the Rolls estate. The neighbourhood having become extremely populous, and a district church having been built near the bridge, the public from 1822 to 1832 freely and without interruption used it as a carriage way. In 1832, the company for the first time imposed a toll upon all carriages traversing the bridge, with the exception of those belonging to the tenants of the Rolls estate: and in 1834 they removed the old swivel bridge, and erected a convenient new stone bridge in the place of it. In an action of trespass against the defendant for passing over the bridge without paying toll, the judge told the jury, that supposing the bridge in question to have been originally erected for the exclusive accommodation of the tenants of the Rolls estate, still, if in consequence of the acts of the company, an idea grew up in the minds of the public that the company had dedicated the way to the public use, they might find such dedication: held, that this was not a misdirection; and that the evidence warranted the jury in finding a dedication. *Grand Surrey Canal Co.* v. *Hall*, 1 Scott N. S. 264.

A diversion of a foot-path under the st. 5 & 6 W. 4, c. 50, s. 85, is not legal unless the way be *nearer* as well as more commodious than the old one. *R.* v. *Shiles*, 1 G. & D. 304. Where both the old and new footpaths lead into a public highway, the term *nearer* is to be measured, not by the distance along the new foot-path and old highway to a particular place, but by the distance between the points of diversity and the point of union with the old highway. *Ib.*

It is essential to the validity of an order for stopping up a highway, that the view of the justices should be taken by them together, and that the finding should be the result of such view; but it is sufficient that the order was in the terms "having upon view found;" the order will also be sufficient if it direct the sale to the adjoining owner if, &c. "for the full value thereof" at the conclusion, as such words override the whole of that part of the order; nor need there be any certificate of the sale written under the order: also the justices have jurisdiction, although the owner have previously stopped up the road *de facto*, it being sufficient that the public still have the right of passing; and lastly, that it is no objection that the owner and purchaser is at the time a surveyor, no fraud being suggested. *R.* v. *Cambridgeshire Justices*, 5 N. & M. 440.

Where the road stopped up was, as to part, wholly situate in one parish, and as to another part, running between two parishes, partly in one and partly in another parish, an order stopping up so much as lay in one parish is invalid; and one order cannot be made for stopping up separate and distinct roads,—there must be a separate order for each. *R.* v. *Milverton*, 1 Nev. & P. 179.

And see *Davison* v. *Gill*, 1 East, 64; and *R.* v. *Kent Justices*, 10 B. & Cr. 477.

The period of six months given for removing an order for stopping up a public footway, confirmed by an order of sessions, is to be calculated from the latter order; held also, that two separate orders are requisite, for diverting and stopping up. *R.* v. *Middlesex Justices*, 1 Nev. & P. 92.

Where on an indictment against the inhabitants of a township for non-repair, the defendants relied on an agreement, in 1591, between the owners of the soil of that and another township, that the latter should repair the roads in the former township, with a clause that a competent lawyer should prepare and make all necessary assurances, and the same had been so repaired by them up to a short time before the indictment; held, that a judge was not bound on such evidence to direct the jury to presume such assurances in the absence of any vestige that they ever existed. *R.* v. *Scarisbrick, Inhabitants of*, 1 Nev. & P. 582.

An exemption in a charter from highway rate (in the original, *chimagium*), does not operate to exempt from the statute duty imposed by the Highway Acts. *R.* v. *Siviter*, 5 Nev. & M. 125.

Where by a local Act trustees were authorized to make a certain line of road, and they completed only a part of it, which was used by the public above thirty years, and the line had been by subsequent Acts varied, and distinct enactments made as to tolls on the part completed; held, that the object of the powers given to the trustees being to make a line of road between the specified *termini*, the inhabitants of the district through which the completed part lay were not liable to repair such part. *R.* v. *Edge Lane*, 6 Nev. & M. 81. See *R.* v. *Cumberworth*, 3 B. & Ad. 108.

(*Ratione tenuræ*, p. 527.)

Evidence of reputation is not admissible to show a liability in the occupiers of land to repair a road *ratione tenuræ*. *R.* v. *Wavertree, Inhab. of*, 2 Mo. & R. 353.

(*Rate, &c.*)

Where the defendant made cognizance under a distress warrant for a highway rate, under 13 Geo. 3, c. 78, it was held that such rate must be expressly alleged to be an equal assessment of 9*d.* in the pound, *on the yearly value of the lands*; where it only stated it to be upon all occupiers of lands, &c. within the parish, it was held bad. *Morell* v. *Harvey*, 6 Nev. & M. 35.

The stat. 4 Geo. 4, c. 95, s. 68, which provides for apportioning the liability to repair turnpike roads that have been diverted, is not confined to bodies politic or corporate and individuals, but applies also to parishes. *R.* v. *Barton*, 11 A. & E. 343.

Churchwardens and overseers, although entitled under the Highway Acts to the custody of the books, &c. of the waywarden, yet, unless they were furnished and paid for by them, they have no property in them, so as to maintain trover against a party detaining them. *Addison* v. *Round*, 6 Nev. & M. 422; and 4 Ad. & Ell. 799.

A demand of a highway rate by one of two surveyors acting under the 5 & 6 Will. 4, c. 50, is a valid demand. *Morrell* v. *Martin*, 8 Scott, 688.

(*Turnpike.*)

Under 2 & 3 Vict. c. 81, s. 1, a special sessions have jurisdiction to make an order on the parish surveyor of the highway to pay a *certain* sum to the

trustees of a turnpike road, although all the funds of the turnpike trustees are not exhausted. *R.* v. *Justices of Berks*, 8 Dowl. 726.

(*Competency*, p. 529.)

A rated inhabitant of the district or parish for which a highway rate is made, is a competent witness to support it. *Morrell* v. *Martin*, 8 Scott, 688.

(*Action for Calls.*)

Evidence of a proposal to subscribe for the repair of a turnpike road, under the 9 Geo. 4, c. 77, will not support an action for calls. *Meigh* v. *Clinton*, 3 P. & D. 211.

HOUSEHOLDER.

Who is, under the stat. 5 & 6 Will. 4, c. 76, s. 9. See *R.* v. *Mayor of Eye*. 9 Ad. & Ell. 670.

HUNDRED, p. 530.

If rioters attack a house, and have begun to demolish it, but leave off of their own accord after having gone a certain length, and before the act of demolition is completed, this is evidence from which a jury may infer that they did not intend to demolish the house; but if the mob were prevented from going on by the interference of the police or any other force, that would be evidence to show that they were compelled to desist from that which they had designed, and it would be for the jury to infer that they had begun to demolish within the stat. 7 & 8 Geo. 4, c. 30. s. 8. *R.* v. *Howell and others*, 9 C. & P. 437.

Destroying moveable shop-shutters is not a beginning to demolish within that statute, as they are not part of the freehold. *Ibid.*

If rioters destroy a house by fire, that is as much a demolition within the stat. 7 & 8 Geo. 4, c. 30, s. 8, as if any other mode of destruction were used. *Ibid.*

If a part of the object of rioters be to demolish a house, it makes no difference that they also acted with another object, such as to injure a person who had taken refuge there. *Ibid.*

HUSBAND AND WIFE, p. 534.

Where the wife whilst living apart, and in adultery, acquired and invested money in trust for herself and her illegitimate issue, was afterwards convicted of murder, and executed, and the trustees expended a considerable part of the fund in her defence; held, that the husband was entitled to such fund, and that the trustees could not retain out of the fund the sums so expended, and must bear their costs occasioned by the interpleading rule to try the right. *Agar* v. *Blethyn*, 2 Cr. M. & R. 699; and 1 Tyrw. & Gr. 160.

The property in wearing apparel bought for herself by a wife living with her husband, out of money settled to her separate use before marriage, and paid to her by the trustees of the settlement, vests by law in the husband, and is liable to be taken in execution for his debts. *Carne* v. *Brice*, 7 M. & W. 183.

Where a husband, having received a legacy bequeathed to his wife, disposed of part, and gave the rest to her to take care of, and she deposited it

with the defendants (bankers) in the name of her son, an infant, and took a receipt in his name, the defendants are liable to the husband as for money received to his use, and cannot set up an unlawful title in answer. *Calland* v. *Lloyd*, 6 M. & W. 27.

(*Wife's Survivorship.*)

The interest in a promissory note given to a wife during coverture, the consideration for which was money advanced by her during the coverture, survives to the wife after the death of her husband, unless he reduces it into possession in his lifetime. *Gaters* v. *Madeley*, 6 M. & W. 423.

(*Payment to the Wife.*)

A payment to the wife for services rendered by her is bad, unless she had authority from the husband to receive it. *Offly* v. *Clay*, 2 Scott, N. S. 372.

Where the wife, devisee of a rent-charge for life in reversion, without the intervention of trustees, joined with her husband in assigning it for valuable consideration; it was held that she was bound, after his death, by such assignment. *Major* v. *Langley*, 2 R. & M. 355.

(*Right of Husband to Restrain, &c.*)

Where a wife absents herself from her husband on account of no misconduct on his part, and he afterwards, by stratagem, obtains possession of her person, and she declares her intention of leaving him again whenever she can, he has a right to restrain her of her liberty until she is willing to return to a performance of her conjugal duties. In the matter of *Cochrane*, 8 Dowl. 630.

(*Action against both*, p. 538.)

To a declaration in *assumpsit* for work and labour against several defendants, charging the promise to have been made by the defendants generally, the defendants pleaded in abatement the non-joinder of two others. The Court refused to arrest the judgment, on the ground that one of the defendants was a feme-covert sued jointly with her husband, and that the declaration did not state that the promise was made by her before the marriage,—the ambiguity in the declaration being aided by the plea. *France* v. *White*, 1 Scott, N. S. 604.

In an action against husband and wife, for the debt of the wife before marriage, strict evidence of the marriage is not necessary, and evidence of his having spoken of her as his wife, held sufficient for a jury to decide on. *Tracy* v. *M'Arlton*, 7 Dowl. 532.

A plea of her discharge by the Insolvent Act before coverture in such a case is held good. *Storr* v. *Lee & Wife*, 1 Perr. & D. 633; and 10 Ad. & Ell. 868.

(*Against the Husband*, p. 538.)

The general rule is, that a wife cannot bind her husband by her contract except as his agent; but in cases of orders given by the wife in those departments of her husband's household which she has under her control, or of orders for articles which are necessary for the wife, such as clothes, the jury (if the wife be living with the husband) ought to infer agency, if nothing appear to the contrary; but if the order be excessive in point of extent, and such as the husband never would have authorized, that will alone be sufficient to repel the inference of agency. *Freestone* v. *Butcher*, 9 C. & P. 643.

If it be proved that the wife has a separate income, that of itself goes to repel the inference of agency; and evidence that the plaintiff has made out

the invoices to the wife, and has drawn bills of exchange on her for part of the amount, which she has accepted in her own name, payable at her own bankers from her separate funds, also goes to prove that the wife was not acting as the agent of the husband; and the fact that the husband sold some of the goods which were supplied to the wife and received the money for them, will not of itself make the husband liable in point of law to pay for them; but it is a fact for the consideration of the jury in determining whether the goods were supplied on the credit of the husband, and whether the wife was the agent of her husband. *Freestone* v. *Butcher*, 9 C. & P. 643.

In an action for beer and spirituous liquors supplied to the defendant's wife, he being generally absent, a stranger having cautioned the plaintiff that the defendant would not pay for such articles, and more than sufficient had been paid to cover the amount of the beer supplied; it was held, that it was for the plaintiff to show that the wife contracted the debt by the authority of her husband, and not for the latter to prove having given notice to the plaintiff not to supply the goods to his wife. *Spreadbury* v. *Chapman*, 8 C. & P. 371.

Where upon a separation, a counterpart of the deed of separation was prepared for the wife's trustees, it was held that it was not to be considered a necessary for the wife, so as to enable the wife's trustees to recover for the expense of preparing it. *Ladd* v. *Lynn*, 2 M. & W. 265.

The defendant, having become bankrupt in 1824, did not surrender, and the business was carried on by his wife until 1833, during which period goods, in the way of trade, were supplied to her. It was shown that the husband had been seen a few times at the place, and was arrested in the shop; this was held to be insufficient evidence to show that she acted as his agent in carrying on the trade, to charge him. *Smallpiece* v. *Dawes*, 7 C. & P. 40.

(*Coverture*, p. 547.)

On a plea of coverture, a letter written by the husband (being abroad), in answer to one shortly before addressed to him, held admissible to prove his being alive at that time, and sufficient to entitle the defendant to a verdict. *Reed* v. *Norman*, 8 C. & P. 65.

In an action for goods sold, defendant pleaded coverture; replication, that the husband was an alien and never within the kingdom, and that the promises were made and cause of action accrued whilst the defendant was living separate, and that she contracted and promised as a *feme sole*; rejoinder, traversing each of these facts; held, that on such issues the plaintiff was bound to prove that the defendant represented herself to be a *feme sole* to the plaintiff, or that he dealt with her believing her to be such; and that her dealings with other persons, and representations that she was a *feme sole*, were inadmissible, unless so made as to come to the plaintiff's knowledge. *Barden* v. *De Keverberg*, 2 M. & W. 61.

(*Joint offences by*, p. 548.)

A wife went from house to house uttering base coin; her husband accompanied her, but remained outside; held that the wife acted under the husband's coercion. *Sarah Conolly's Case*, 2 Lew. Cr. Cases, 229.

The law, out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption *primâ facie*, but *primâ facie* only, that it was done under his coercion. *R.* v. *Hughes*, 2 Lew. Cr. Cases, 230.

(*Murder*, p. 548.)

Where the prisoner, a married woman, was charged with the murder of her illegitimate child by neglecting to supply it with food, held, that being the servant of the husband, she was not chargeable for omissions, unless she omitted to give such food as had been provided for it by the husband. *R.* v. *Saunders*, 7 C. & P. 277.

Where the husband was indicted for personal violence on his wife, it was held, that although a competent witness, it was not indispensable that she should be called; the defence set up by his counsel being that of insanity, which he repudiated, the Court allowed him to call witnesses, and through questions put by the Court, at his suggestion, to examine them, but would not permit his case to be conducted by counsel, and then by the prisoner himself. *R.* v. *Pearce*, 9 C. & P. 667.

Qu. Whether a woman who has gone through the ceremony of marriage with a man can be allowed to prove the invalidity of the marriage, and that she is not his wife. *Semble*, that she may be examined on the *voire dire*. Peat's Case, 2 Lew. Cr. Cases, 288.

(*Separation of.*)

Where the wife resided in the parish where her husband was confined in gaol, but she had access to him, held, that an order of removal of her and her children was bad, as a separation of man and wife. *R.* v. *Stogumber*, 1 P. & D. 409.

INCLOSURE.

An Act expressly reserving the right of the plaintiff to ingress and egress to and from a certain watercourse, and of cleaning it, is not extinguished by the defendant having made a more circuitous road to the watercourse, according to the direction of the commissioners, and extinction thereafter of all public roads: a tenant of the plaintiff's land affected by the watercourse is a competent witness in an action brought by his landlord for injury to his reversion by obstructing the way. *Adeane* v. *Mortloch*, 5 Bing. N. C. 236.

An Act provides that lands awarded and allotted and exchanged should immediately after such allotment and exchanges made, be and remain and enure to the several allottees to the same uses, estates, &c., as the lands, in respect of which the allotments were made, were held by; an allottee becomes seised immediately after the allotment in point of fact was made, and not when the award was completed. *Doe* v. *Saunders*, 1 N. & P. 119.

The lessor of the plaintiff claimed under a conveyance from a commissioner of enclosure (not executed according to the power) and never took possession, but the defendant on a proposal of exchange, had fenced the land and occupied it for thirty years; held that the plaintiff could not recover, but that he was not bound to prove that the commissioner had duly qualified and complied with the requisites of the Act before executing the conveyance. *Doe* d. *Nanney* v. *Gore*, 2 M. & W. 320.

Where a mortgage in fee takes no notice of rights of common, in respect of which allotments are afterwards made, *semble*, they belong to the mortgagee. *Lloyd* v. *Douglas*, 4 Younge & C. 448.

Commissioners are empowered to exchange new allotments and old inclosures, so as such exchanges should be ascertained in the award, or some

deed executed by the commissioners, and with the consent in writing of the proprietors; the commissioners award certain allotments to *A.* in respect of certain lands, and the lands late *A.*'s to *B.*, but omit to say that they were in exchange, but in the conclusion of the award express their approbation of the exchange between *A.* and *B.*, and there was no consent in writing of *A.* and *B.* thereto; the parties remain respectively in possession from the date of the award in 1798, until the sale of the lands of *A.* in 1813; parties cannot, under the Act and the award, make a good title. *Cox* v. *King*, 3 Bing. N. C. 795.

INDEMNITY. *See* OATH.

As to the effect of incapacitation, see *R.* v. *Parry*, 14 East, 549.

INFANT.

(*Liability of*, p. 555.)

An infant, although he has a sufficient income to pay ready money, is not incapable of contracting for articles, necessary or suitable to his station, on credit. *Burghart* v. *Hall*, 4 M. & W. 727.

In an action for goods, alleged to be necessaries, to an infant, that being the simple question for the jury, inquiry as to the defendant's circumstances is not a condition precedent to the right of recovery. *Brayshaw* v. *Eaton*, 5 Bing. N. C. 231.

(*Ratification*, p. 556.)

Debt for goods sold and delivered: plea, infancy; replication, that the defendant ratified the contract, in writing, after coming of age. Issue thereon.

The plaintiff produced the following paper, signed by the defendant: "I am sorry to give you so much trouble in calling; but I am not prepared for you; but will without neglect remit you in a short time." The paper contained no address, and specified no sum: but it was proved orally that the defendant delivered it to the plaintiff's agent, on being pressed for the debt, the amount of which was also proved by oral evidence: held, that this was sufficient to satisfy stat. 9 G. 4, c. 14, s. 5.

No evidence was given to show whether the defendant was of age or not when he delivered the paper: held, that the plaintiff was entitled to recover, the defendant, if he relied on his infancy at the time, being bound to prove it. *Hartley* v. *Wharton*, 11 A. & E. 934.

(*Necessaries*, p. 557.)

To a declaration for goods sold, &c., the defendant pleads his infancy, to which the plaintiff replies that the goods were necessaries suitable to the degree, estate, and condition of the defendant; held, that the term necessaries includes such things as were useful and suitable to the state and condition in life of the party, and not merely such as are requisite for bare subsistence.

It is a question for the jury, whether the articles are such as a reasonable person, of the age and station of the infant, would require for real use. *Peters* v. *Fleming*, 6 M. & W. 42.

In an action against an infant, an Oxford student, for the hire of horses, &c., the jury having, contrary to the opinion of the judge, found for the plaintiff, upon an issue whether they were necessaries or not, the Court granted a new trial without costs. *Harrison* v. *Fane*, 1 Scott, N. S. 287.

(*Father's liability*, p. 557.)

A parent is not under any legal obligation to pay his son's debts; a mere moral obligation cannot alone create a legal one; where the defendant on being applied to for a bill for the board and for supplies to his son, who was living separate from his father, and working on his own account, unequivocally referred the plaintiff to the son for payment, adding that he would become entitled to a sum on attaining full age, the Court directed a nonsuit. *Mortimore* v. *Wright*, 6 M. & W. 482.

A schoolmaster cannot recover for wearing apparel supplied to a pupil without the sanction, express or implied, of the parents or guardian. *Clements* v. *Williams*, 8 C. & P. 58.

Where a fit allowance was made by the guardians to the infant, held, in a suit for administration of his estate, that tradesmen's bills not clearly shown to be for necessaries, were not to be allowed. *Mortara* v. *Hall*, 6 Sim. 465.

Where the mother was present at the time of the defendant ordering the goods, held that inquiry as to her sanctioning the purchase was unnecessary. *Dalton* v. *Gib*, 5 Bing. N. C. 199.

No one is bound to pay another for maintaining his children, either legitimate or illegitimate, unless he has entered into some contract to do so. *Seaborne* v. *Maddy*, 9 C. & P. 497.

Every man is to maintain his own children as he himself shall think proper, and it requires a contract to enable another person to do so, and charge him for it in an action. *Ibid.*

Where the son was in need of clothes, and the father had seen him wearing those furnished by the plaintiff; held, that it was some evidence to leave to the jury, and calling upon the father to show that his son was supplied with necessaries. *Law* v. *Wilkins*, 1 N. & P. 697.

Where the father was induced to give up to the plaintiff the custody of his legitimate child (born after the elopement of its mother, and about to be placed by the defendant in a foundling hospital), and he entirely relinquished all care of it, it was held to negative an implied contract with the plaintiff to pay for the maintenance. *Urmston* v. *Newcomen*, 6 Nev. & M. 454; and 4 Ad. & Ell. 899. *Semb.*, a parent is not bound by the common law to maintain his illegitimate child, not being part of his family.

The children of a former marriage not within the age of nurture, and left chargeable to the parish in which they are residing by the step-father, who had absconded, are removeable to the place of settlement of their own father, notwithstanding the obligation of the step-father to maintain them until the age of 16, under the 4 & 5 Will. 4, c. 76, s. 57. *R.* v. *Stafford*, 1 P. & D. 414.

(*Abduction.*)

Where the evidence was clear as to the party being entitled to personal property, and that the prisoner took her away by force, and against her will, with the intention of marrying, but the evidence of the motive being for lucre was slight and unsatisfactory, held that the prisoner was entitled to be acquitted of the statutory offence, but might be convicted of the assault. *R.* v. *Barratt*, 9 C. & P. 387.

INHABITANT.

Where by charter of Edw. 4, the steward of a manor of ancient demesne, and one other inhabitant, were to be justices of the peace within the manor, to be chosen by the tenants and *inhabitants*; and a party claiming to have a majority of those entitled to vote, applied for an information in the nature of *quo warranto* against another who had a majority of votes, unless certain votes for the relator had been legally rejected: held, that he was bound to show clearly who were the class entitled to vote, and that not having given any construction to the meaning of the term "inhabitant," he had not made even a *primâ facie* case to entitle himself to the writ. *R.* v. *Mashiter*, 1 N. & P. 314.

The term "inhabitant," *semble*, is to be construed according to the subject-matter in which it is found, and has not any definite legal meaning. *Ibid.*

See *Russell* v. *Men of Devon*, 2 T. R. 667.

Where the appointment of a chaplain was, by charter of Edw. 6, to be made by governors, "with the assent of the majority of the *inhabitants*," and the usage had been to confine the meaning of that term to inhabitant rate-payers, and for the governors first to nominate, and afterwards to give notice to the inhabitants to meet at a future day, and to assent or dissent from such appointment; it was held to be a compliance with the charter. *R.* v. *Sandford Governors*, 1 N. & P. 328.

INNKEEPER, p. 559.

Where goods were left in an inn, to be taken up by a carrier, and lost, held that, however the innkeeper might be liable for negligence, trover could not be maintained. *Williams* v. *Gesse*, 3 Bing N. C. 849; and 7 C. & P. 777.

The refusing to receive a guest after the innkeeper had retired to rest with his family, having room in his inn, was held to be indictable; the innkeeper has no right to insist on knowing the name and quality of the party applying; nor need the latter tender the price of his entertainment, if the refusal be not on that ground. *Rex* v. *Ivens*, 7 C. & P. 213.

And *see* 1 Hawkins, 714.

Where, in consequence of the plaintiff's refusing to pay the amount of the defendant's bill, as an innkeeper, horses which had been ordered and brought out by the side of the plaintiff's carriage, were put back, and the plaintiff thereby detained and prevented from proceeding on his journey, held, in trespass, upon the replication *de injuriâ*, and plea justifying on the ground of the refusal of the plaintiff to pay his bill, that the jury could not question the reasonableness of the bill, and that the detainer did not amount to assault or imprisonment. *Gordon* v. *Cox*, 7 C. & P. 172.

INSOLVENT.

(*Who is*, p. 561.)

In a contract for the sale of all the salt manufactured in certain works for fourteen years, it was stipulated that bankruptcy or insolvency should determine the contract; held, that the latter term was not confined to the being

discharged under the Insolvent Act, but meant an inability to pay his just debts. *Parker* v. *Gossage*, 2 Cr. M. & R. 617; and 1 T. & G. 105.

A party so crippled in his means of payment, that he is unable to proceed with and carry on his business in the usual course of trade, is to be deemed insolvent, without regard to the consideration whether his whole property, if converted, would be sufficient or not to satisfy all his debts, and held, that notice of such a state was notice of insolvency, and that an assignment was, under such circumstances, invalid. *De Tastet* v. *Le Tavernier*, 1 K. 161.

(*Action by Assignees*, p. 561.)

The insolvent, whilst in prison, being under a covenant by a marriage settlement to pay money when required to the trustees, gave to his son and the trustees an authority to sell and apply the proceeds to the use of the settlement, which proceeds remained in their hands; held, that his assignee, under the compulsory clauses of the Lord's Act, was entitled to recover it as money received to the plaintiff's use, if the jury believed that it was in substance held at the disposal of the insolvent, otherwise if they believed it to have been a *bonâ fide* payment of an equitable debt; held also, that the plea of *non assumpsit* put in issue all the facts necessary to show that the receipt was to the use of the plaintiff. *Moore* v. *Eddowes*, 7 C. & P. 203.

Goods of the insolvent were seized under an execution, and the proceeds paid over after the imprisonment, the assignees are entitled to recover the amount as money had and received to their use. *Guy* v. *Hitchcock*, 5 N. & M. 660.

(*Assignment of Insolvent's Estate*, p. 561.)

Although certified copies of assignments to and from the provisional assignee are made evidence by 7 Geo. 4, c. 57, s. 76, yet where the insolvent petitioned, and his effects were assigned under 53 Geo. 3, c. 102, it was held that such copies were not sufficient. *Doe* d. *Threlfall* v. *Sellers*, 6 Ad. & Ell. 328.

But where the petition and assignment were made under 1 Geo. 4, c. 119; held, that they might be proved after 7 Geo. 4, c. 57, according to the directions of sect. 76, although it did not appear that the proceedings had gone on to the discharge of the party, and final assignment of his effects. *Doe* d. *Ellis* v. *Hardy*, 6 Ad. & Ell. 335.

An order of the Insolvent Debtors' Court under 1 & 2 Vict. c. 110, s. 36, 37, vesting the estate of an insolvent in the provisional assignee, is sufficiently proved by a copy on paper, sealed with the seal of the Court, and certified by the provisional assignee. It is not necessary to show more particularly that such assignee is the officer in whose custody the order is; or to prove the creditor's petition on which it was granted. *Hounsfield* v. *Drury*, 11 A. & E. 98.

In ejectment by the plaintiff, as assignee of an insolvent, an assignment by the provisional assignee to the creditors' assignee, in the form prescribed for the assignment by the insolvent to the provisional assignee, is valid: *quær.* whether on an assignment, reciting it to have been made by an order of the Court (pursuant to 11 Geo. 4 & 1 Will. 4, c. 38), the Court would intend that an order had been made without production of it. (*Dub. Denman*, L. C. J., *Littledale* and *Williams*, J. J., *contra Coleridge*, J.) *Doe* v. *Story*, 3 N. & P. 107.

(*Assignment, Proof of*, p. 561.)

The insolvent executed, on being brought up under the compulsory clauses of the Lords' Act, an assignment: in ejectment by the assignee, held, 1st, that on production of the assignment it was unnecessary to prove the service of the requisite notices preliminary to the assignment; 2dly, that it was not affected by the declaration of trust being in larger terms than the Act requires, as it might be rejected as surplusage, or the Court would mould the trust so as to effect the objects of the assignment; and lastly, that the words "all and singular the real and personal estates which are mentioned in my said schedule," were sufficient to pass all the prisoner's lands. *Doe* d. *Milburn* v. *Edgar*, 2 Bing. N. C. 391; 2 Scott, 581.

In debt for rent of a mill and premises, it appeared that the lessee, being insolvent, had by deed, reciting his insolvency, assigned all his debts, stock, implements, crops, severed as well as not, and all other his personal estate and effects whatsoever and wheresoever, in trust to pay the rent due and accruing up to ——, and afterwards to distribute amongst his creditors; held, that the assignees having been found by the jury to have accepted it, the lease of the mill would pass under the assignment. *Ringer* v. *Cann*, 3 Mees. & W. 343.

The defendant had been discharged out of custody for a debt under 20*l.* after a twelvemonth's imprisonment, but whilst in prison the 1 & 2 Vict. c. 110, came into operation, and a creditor had obtained a vesting order from the Insolvent Court after the twelvemonth had expired; the Court having jurisdiction to make the order, the estate was vested in the assignees notwithstanding his discharge. *Kitching* v. *Croft*, 4 P. & D. 339.

The assignment made by an insolvent debtor on filing his petition, under the 7 Geo 4, c. 57, s. 10. 40, so fully vests his property in his assignees, that a statement subsequently made by him in his schedule will not be admissible in evidence to impeach the title of the assignees to the property assigned. *Elverd* v. *Foster*, 9 Dowl. 922.

(*Fraudulent Assignment*, p. 563.)

An insolvent, whilst in prison, without consideration or pressure, executed an assignment of all his property to trustees for the benefit of his creditors who should come in under the deed; it was held to be a voluntary deed, and void within the 7 Geo. 4, c. 57, s. 32. *Binns* v. *Towsey*, 3 Nev. & P. 88.

The insolvent, whilst in prison, reluctantly executed an assignment of his effects for the benefit of all his creditors, they refusing to consent to his discharge, and threatening him with bankruptcy unless he would execute it, held not to be a voluntary conveyance within the Act. *Davies* v. *Acocks*, 2 Cr. M. & R. 461.

A deed *bonâ fide* executed by an insolvent for the benefit of all his creditors, is not void (*dub.* Alderson, B.). *Davies* v. *Acocks*, 2 Cr. M. & R. 461.

The defendants were employed as the attorneys of a party in embarrassed circumstances, to effect an arrangement with his creditors, and under resolutions by them proceeded to sell his estate and received the proceeds, but the party afterwards took the benefit of the Insolvent Act; held, that the retainer of a sum to satisfy their bill of costs did not amount to a case of voluntary transfer within the Act, the money so received not originating with the insolvent, and entrusted to the defendants only as agents, and not for the benefit of any particular creditor. *Wainwright* v. *Clement*, 4 M. & W. 385.

Where a demand is made by a creditor *bonâ fide*, and a transfer is made in pursuance of that demand, it is not a voluntary transfer within the Insolvent Act. *Mogg* v. *Baker*, 4 M. & W. 348.

Where the consideration for the conveyance was partly an advance and partly a pre-existing debt, it was held, that if such consideration *bonâ fide* acted upon the mind of the party, it was not fraudulent and void as a voluntary conveyance within 7 Geo. 4, c. 57, s. 32. *Margareson* v. *Saxon*, 1 Younge, 525.

A party assigns an annuity bond to trustees for his wife and children, and in the event of dying without issue, in trust for himself, and afterwards becomes insolvent; the insolvent's assignee, under the stat. 1 Geo. 4, c. 119, has no interest in the bond. *Sims* v. *Thomas*, 4 P. & D. 233.

(*Liability of Insolvent*, p. 564.)

The surety pays money after the discharge of the principal under the Insolvent Act, he is entitled to sue the principal; the exception in 7 Geo. 4, c. 57, s. 51, being limited to any step which may affect the discharge under that Act. *Hocken* v. *Browne*, 4 Bing. N. C. 400.

An insolvent was ordered to be discharged, except as to two debts, and as to those not until after sixteen months from the filing his petition; held, that such debts were within the very words of s. 16 of 7 Geo. 4, c. 57, as to which an adjudication could be made; and that one of those creditors having subsequently commenced an action, the not proceeding to declare within two terms did not render the prisoner supersedeable. *Buzzard* v. *Bousfield*, 4 M. & W. 368; and 7 Dowl. 1.

An insolvent, in his schedule, states a debt due from him to be 10*l.*, and it is really 32*l.*; whether this misstatement, if arising from mistake, be aided by the 63d sect. of the Insolvent Debtors' Act, 7 Geo. 4, c. 57? *Lambert* v. *Hall*, 9 C. & P. 506.

A. covenants to insure his life and pay the premiums, and on default, to repay the premiums paid by the plaintiff; *A.* is liable in respect of premiums paid by *B.* after *A.*'s discharge as an insolvent. *Bennett* v. *Burton*, 4 P. & D. 313.

The drawer of a bill of exchange, accepted by the defendant for a sum consisting partly of a debt from which he had been discharged under the Insolvent Debtors' Act, 7 G. 4, c. 57, and partly of a new debt, is entitled to recover on the bill as to amount of the new debt; therefore a plea of discharge under sect. 61 of that Act, as to the old debt, is no answer to the whole of a count on such a bill. *Sheerman* v. *Thompson*, 11 A. & E. 1027.

Where the insolvent, being remanded for a period, agreed to give a bill for part of the debt of a particular creditor, and an I. O. U. for the costs to the attorney; held, that being in truth securities for an old debt, he could not be sued on either. *Ashley* v. *Killick*, 5 M. & W. 509.

The schedule of an insolvent, showing the date of his petition and statement of his liabilities, is inadmissible to prove that a previous assignment was executed with the intention of so petitioning. *Peacock* v. *Harris*, 6 Nev. & M. 854.

A prisoner remanded under the Insolvent Debtors' Act may be detained by a writ of *capias*, without a Judge's order, or a writ of summons having previously issued. *Growcock* v. *Waller*, 8 Dowl. 146.

By a provision in an agreement to purchase a business for a sum to be

paid by two instalments, the purchaser had a right, within a limited time before the completion of the contract, to give notice of abandonment, and to have the sum paid returned; held, in an action to recover it back, that it was no defence that the defendant had been discharged under the Insolvent Act, the notice having been given within the time limited, it being a contingency not capable of being valued at the time of such discharge. *Brown* v. *Fleetwood*, 5 M. & W. 19; and 7 Dowl. 386.

The right reserved to creditors of payment out of future effects, does not prevent the operation of the Statute of Limitations. *Browning* v. *Reid*, 5 M. & W. 117; and 7 Dowl. 398.

Where damages in an action of *tort* have been ascertained by verdict before filing the petition, under s. 50 of 7 Geo. 4, c. 57, the insolvent is entitled to be discharged from the damages and costs. *Goldsmid* v. *Lewis*, 3 Bing. N. C. 46; and 3 Sc. 369.

Where after a former, but previous to a second discharge, the insolvent became entitled to a legacy, held, that as future-acquired property, it could only be obtained by the first set of assignees by entering up judgment, with leave of the Court; and that it passed under the second assignment as a *chose* in action, to which the insolvent was then entitled. *Curtis* v. *Sheffield*, 8 Sim. 176.

Where, after an acquittal on an indictment against an insolvent for omitting specified articles out of his schedule, a second was preferred, in substance the same, but including the omission of additional articles; held, that the plea of *autrefois acquit* was not a good defence to the whole of the latter indictment; but the Judge strongly advised the jury to acquit, unless they were satisfied that the omission was under essentially different circumstances. *R.* v. *Champneys*, 2 Mo. & R. 26.

INSPECTION, p. 565.

A dispute arose between the freemen of the new corporation of Beverley and the corporation, with respect to the right of cutting down trees on certain pastures formerly granted to the burgesses of the old corporation of Beverley, and an injunction to restrain the cutting down of the trees having been obtained by the corporation, a mandamus was granted at the instance of the freemen to permit them to inspect the deeds, &c. concerning the pastures in question, and which were in possession of the new corporation, with a view to dissolve the injunction. *R.* v. *The Mayor of Beverley*, 8 Dowl. 140.

A lessee of a corporation elected to pay an increased rent pursuant to the finding of a jury under 5 & 6 Will. 4, c. 76, s. 97, and indorsed the finding of the jury on his part of the original lease. In an action for the increased rent, the lessee was compelled to produce his part of the lease for the inspection of the corporation, and to allow a copy of the indorsement to be taken, although it was admitted that the original lease was still in the possession of the corporation, as well as the inquisition taken before the jury. *The Mayor of Arundel* v. *Holmes*, 8 Dowl. 118.

A creditor on bond of a canal company, the act of incorporation entitling proprietors "and others interested in the said navigation," to inspect the books of the company, was held to be within the spirit of the enactment. *Pontet* v. *Basingstoke Canal Company*, 2 Bing. N. C. 370; and 2 Sc. 543.

Under the 5 & 6 Will. 4, c. 76, the town-clerk is not compellable to allow two persons at the same time to inspect the voting papers, or to give two of such papers at the same time to one person; but he is bound to allow a voter who brings a list of his own to compare it with the voting paper produced for inspection by the town-clerk, and marking his own list. *R.* v. *Arnold*, 6 N. & M. 152.

Inspection of a deed in the hands of the defendant will not be granted to a plaintiff for the purpose of moving for a new trial. *Wood* v. *Morewood*, 2 Scott, N. S. 204.

Where a Judge at chambers had made an order upon the plaintiffs to permit the defendant to inspect and take a copy of a promissory note upon which the action was brought, the Court refused to grant a rule to rescind that order, although it was sworn that no special grounds were stated at chambers upon which the order was founded. *Woolner* v. *Devereux*, 9 Dowl. 672.

Under the 101st section of the 6 Geo. 4, c. 16, in order to obtain inspection of the assignees' accounts, the course is to apply to the Commissioners to summon the assignees, and to require them to produce all books, &c., relating to the bankruptcy, *ex parte Granger*, 1 Mont. & M. 289.

To obtain the production of documents for the purpose of taking copies, the party applying must show that only one instrument was executed. *Griffith* v. *Smythe*, 8 Dowl. 491.

Where the lessee assigned his lease by way of mortgage, the lessor having no counterpart, he was held to be entitled to compel the mortgagee to produce it for inspection on an ejectment for forfeiture. *Doe* d. *Morris* v. *Roe*, 3 Cr. M. & R. 207.

Inspection was granted of an agreement on which the action for money had and received was founded. *Charnock* v. *Lumley*, 5 Sc. 438.

On an order for production of documents and papers, held that a case laid before counsel, as privileged, was to be excepted. *Nias* v. *Northern and Eastern Railway Company*, 2 Keene, 76. See *Bolton* v. *Corporation of Liverpool*, 1 M. & K. 88.

Plea in *assumpsit* on bills, that the defendant, if liable, was only so as surety; held, that he was not entitled to inspection of a deed, by which it was said time had been given to the principal, to which the surety was not a party. *Smith* v. *Winter*, 3 M. & W. 309; and 6 Dowl. 386.

Where the defendant on an application at chambers referred in his affidavit to a paper, but not annexed; held, that the plaintiff was, nevertheless, entitled to take a copy of such paper. *Tebbutt* v. *Ambler*, 7 Dowl. 674.

Where books of the plaintiff came into the defendant's hands as agent, inspection was ordered, but the Court refused an order for delivering them up. *Jones* v. *Palmer*, 4 Dowl. 446.

Where the papers and documents are numerous, the Court will qualify the order for production and inspection, &c. to be at the office of the party's attorney. *Crease* v. *Penprase*, 2 Younge & C. 527.

In an action for work and labour, a Judge has no power to make an order for the plaintiff and his witnesses to enter the defendant's premises, to inspect the work done. *Turquand* v. *Strand Union Guardians*, 8 Dowl. 201.

In an action upon a contract for building a chapel, the Court refused a view. *Newham* v. *Taite*, 6 Sc. 574.

In an action by the owner to recover contribution in respect of general average, held that the defendants (not underwriters), although entitled to inspection of the statement of such average, were not so of the documents from which it was drawn up. *Tunzell* v. *Allen*. 7 Dowl. 496.

The circumstance of an attorney being a corporator, does not entitle him to an order to inspect their books, with the view of proving his retainer. *Stevens* v. *Berwick Mayor*, &c., 4 Dowl. 277.

INTENTION, p. 571.

Where the defendant, indicted on 2 Will. 4, c. 45, s. 58 (Reform Act), for a false statement at the poll, that he had the same qualification for which his name was originally inserted on the register, and it appeared that he had ceased to occupy that tenement, but did at the time of the poll occupy another of the same value; held, that he had ceased thereby to have the right to vote, but that the term, "same qualification," being equivocal, the jury, in order to convict the party, must be satisfied that he was stating what he *knew* to be false. *R.* v. *Dodsworth*, 2 Mo. & R. 72.

Where a stamp distributor, on renewing a post-horse licence, altered the former as to the date of the year, held, that it was a question for the jury if fraudulently done, although by the words of the statute, 2 & 3 Will. 4, c. 120, fraud was not made an ingredient in the felony, yet, that to make it such, there must have been a guilty intention. *R.* v. *Allday*, 8 C. & P. 136.

Where an overseer wilfully disobeys the provisions of the Act, as in inserting the names of persons in the list not entitled to vote, it is not necessary that he does it from any corrupt motive. *Tarr* v. *M'Gahey*, 7 C. & P. 380.

Where the workmen of a mine proprietor by his orders stopped up an airway affecting an adjoining mine; held, that if they acted in the belief that he had the right, although they might be all guilty as trespassers, yet they could not be guilty of felony within 7 & 8 Geo. 4, c. 30, s. 6: *aliter*, if they knew that the act was maliciously directed by their employer. *R.* v. *James*, 8 C. & P. 131.

INTEREST.

A party is entitled to interest upon a judgment from the time that execution is delayed by a writ of error, and allowed at the rate of four per cent. *Langridge* v. *Levi*, 7 Dowl. 27; and 4 M. & W. 337.

Where, after the writ issued in an action on an attorney's bill, it was referred to taxation at the instance of the defendants, without any terms as to the allowance of interest, held that although under the 3 & 4 Will. 4, c. 42, s. 34, the jury only can give it, the plaintiff was not entitled to proceed in the action to have it assessed. *Berrington* v. *Phillips*, 3 Cr. M. & R. 48; 1 T. & G. 322; and 4 Dowl. 758.

Where, upon a contract of sale of an estate, the money was to be paid by instalments, with interest at 5 per cent., and it was afterwards agreed that the last instalment, if not paid at the appointed time, should remain on mortgage at 4½ per cent., held, that the prior instalments not being paid nor any mortgage executed, that the higher interest continued payable on

the last instalment. *Attwood* v. *Taylor*, 1 Man. & Gr. 279; and 1 Sc. N. S. 611. See further as to a mortgagee's title to interest pending the suit, *ex parte Pollard*, 1 M. D. & D. 264.

On a judgment affirmed on writ of error, the House of Lords gives interest from the day of its affirmance by the Exchequer Chamber pursuant to the provisions of the stat. 3 & 4 Will. 4, c. 42, s. 30. *Garland* v. *Carlisle*, 5 Clark & F. App. Cas. 354.

INTERPLEADER ACT, p. 579.

An issue under the Interpleader Act is for the purpose of informing the conscience of the Court as to whether the plaintiff or the defendant is entitled to the goods in dispute, therefore the Court will not allow either party to give in evidence the *jus tertii*. *Carne* v. *Brice*, 8 Dowl. 884.

The plaintiff sold to the defendant a rick of hay belonging to a deceased person; *S.* afterwards took out administration to the effects of the deceased and claimed the price of the hay; held that the defendant could not be relieved under the first section of the Interpleader Act. *Jones* v. *Pritchard*, 8 Dowl. 890.

IRELAND.

Where a local dock Act imposed a duty on goods imported from "parts beyond the sea," held, that goods imported from Ireland were liable to the duties. *Battersby* v. *Kirk*, 2 Bing. N. C. 585.

JURISDICTION, p. 579.

Where the quarter sessions of a county occur while the judge of assize is proceeding with the trial of prisoners in that county after the grand jury at the assizes have been discharged, the better course is (as is said) for the quarter sessions not to proceed with the trial of any prisoners, but to dispose of all their other business, and then to adjourn to a future day. 9 C. & P. 792.

The court of the mayor of Liverpool not being a superior court, a plea of a suit for the same cause pending there, is no answer to the action in the superior courts. *Laughton* v. *Taylor*, 6 M. & W. 695; and 8 Dowl. 776.

A statute (poor law) enacts that on application made to magistrates they shall proceed to adjudicate, &c.: on the trial of an indictment for disobedience of the order, it is essential to prove that such application was made in order to shew that the magistrates had jurisdiction so to adjudicate. *R.* v. *Stamper*; *Cor.* Parke B. York Spr. Ass. 1839.

JURY.

A jury are not bound to find any other than a general verdict, although the Judge direct them to find specially as to a particular fact, on which a legal question may be raised; and where they refused, the Court would not disturb the verdict. *Devizes, Mayor, &c.* v. *Clark*, 3 Ad. & Ell. 506.

The 6 Geo. 4, c. 50, (Jury Act,) does not affect the right of the Crown not to be put to be called on for cause of peremptory challenge until the panel is exhausted; a prisoner having challenged peremptorily twenty jurors, cannot be allowed to withdraw one, and challenge another remaining juror instead. *R.* v. *Parry*, 7 C. & P. 837.

The Crown is entitled to challenge until the panel is gone through, and then, if not a full jury, must show cause; but it is no cause of challenge that

the juror was a client of the prisoner (an attorney), nor that he had visited him whilst in prison; although a prisoner has had his full number of peremptory challenges, he may examine other jurors, subsequently called, as to their qualification. *R.* v. *Geach*, 9 C. & P. 949.

Where the defendant was aware of the mode in which the bill had been found by the grand jury, pleaded to it, and was found guilty, the Court afterwards refused to quash the indictment on the ground that twenty-five grand jurymen were sworn, and that thirteen were against the finding, as he might bring error either in law or in fact; but the Court will not receive affidavits of the jury of what passes at the time of the finding of the bill; held, also, that the correct number to be sworn is twenty-three only. *R.* v. *Marsh*, 1 N. & P. 187.

JUSTICES, p. 580.

The acts of a justice who has not taken the oath of the sessions, nor delivered the certificate required, are not void, and a person seizing goods under his warrant, is not a trespasser. *Margate Pier Company* v. *Hannam*, 3 B. & A. 266.

See further as to jurisdiction, *Sharpe* v. *Aspinall*, 10 B. & C. 47; *R.* v. *Sanders*, 1 Saund. 263; 2 & 3 Vict. c. 88.

(Page 581, note *a*.)

See in Trespass against Surveyors of Highways, *Witham Navigation Company* v. *Pedley*, 4 B. & Ad. 69. *Lowen* v. *Kaye*, 4 B. & C. 3.

Trespass against justices upon an illegal conviction under the Highway Act, 5 & 6 Will. 4, c. 50, s. 75; the clause giving 21 days' notice of action, does not supersede the necessity for the notice under the stat. 24 Geo. 2, c. 24. *Rix* v. *Boston*, 4 P. & D. 182.

(*Form of Conviction*, p. 585.)

A conviction under the Vagrant Act, 5 Geo. 4, c. 83, is not vitiated by the omission of the word "past" before "of Great Britain," in the recital of the title of the statute as directed in the form given by the Act; 2dly. pursuing that form, it is not necessary to state the evidence on which the conviction proceeded, and 3dly, an allegation that the person convicted was of sufficient ability to maintain his family, and did neglect to do so, whereby his wife became chargeable to the parish, is sufficiently certain. *Nixon* v. *Nanney*, 1 G. & D. 370.

Where a conviction on 11 Geo. 4, and 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, charged that the defendant kept his house open for the sale of beer, and did sell beer and permitted the same to be drunk on his premises, after the hours fixed by the justices, and was fined in the penalty of 40 *s.* for "the offence aforesaid;" it was held to be bad, as it charged three offences, and the party could not protect himself by it, if any fresh information were laid against him for any one of the same offences. *Newman* v. *Bendyshe*, 2 P. & D. 340; and 10 Ad. & Ell. 11.

A conviction under the Pilot Act, 6 Geo. 4, c. 125, s. 70, for continuing in charge of a ship after a licensed pilot had offered to take charge of it, is bad if it do not show knowledge of the offer. *Chaney* v. *Payne*, 1 G. & D. 348. See *R.* v. *Chaney*, 6 Dowl. 281. *Peake* v. *Cavington*, 2 Br. & B. 399.

If either the adjudication of the fact which constitutes the crime, or the judgment thereon, be imperfect, the conviction is bad; where therefore a conviction was framed on 1 Will. 4, c. 32 (Game), which directs the penalty

to be paid to the parish officer, and by him to be paid over for the use of the county rate, (but which, by 5 & 6 Will 4, c. 20, s. 2, was directed as to one moiety to be paid to the informer, and the other as before,) and adjudicated the whole penalty to be paid to the overseer, to be applied according to the direction of the statute in such case, &c.; held, that such conviction was bad, and that an imprisonment until so paid was illegal, and that the justices were liable in trespass. *Griffith* v. *Harries*, 2 M. & W. 325.

A conviction by justices upon their own view for a forcible detainer, under 8 Hen. 6, c. 9, not averring an unlawful entry, and none being proved, but only an unlawful ejection, is bad. *R.* v. *Wilson*, 5 N. & M. 164.

Justices have no jurisdiction under 6 Geo. 3, c. 25, to determine disputes between masters and household servants. *Kitchen* v. *Shaw*, 1 N. & P. 791.

(*Time of Drawing up*, p. 592.)

Where justices had returned a conviction which was supposed to be objectionable, they may draw up and return another, according to the truth, and supported by the facts of the case: the taking by the justices an indemnity from the party calling for the exercise of their jurisdiction, held improper (*per* Alderson, B.) *Selwood* v. *Mount*, 9 C. &. P. 75.

After a conviction by justices has been removed by *certiorari*, and quashed in Queen's Bench, or by sessions on appeal, another conviction cannot effectually be drawn up. P. C. *Chaney* v. *Payne*, 1 G. & D. 357.

Convictions have always been treated as records, and before the statute 4 Geo. 2, c. 26, were required, when filed to be in Latin. *Ib.*

(*Justification under a Commitment*, p. 593.)

An order in bastardy was made in duplicate, one regular and deposited in the parish chest, and the other, which was served on the reputed father, having inserted in it by mistake the mother's name, in lieu of the plaintiff's, but he was told at the time that he was ordered to pay, &c.; in trespass against justices for having committed him for disobedience of the order, it was held, that there being a valid order produced before the defendant, and upon which he acted, he was justified in the commitment. *Wilkins* v. *Hemsworth*, 3 N. & P. 55.

(*Commitment for Examination.*)

Where the defendant, a magistrate, meeting the constables having in custody the plaintiff on a charge of drunkenness, ordered him to be taken back to the lock-up house, and he would see him the next day, and the plaintiff was kept confined until then, when he was ordered by the defendant to be fined; held, that it was his duty either to have gone into the case, or, if he could not do so, not to have interfered, but have let the officer take him before another magistrate, and that the action of trespass was maintainable; he had no right to imprison for breach of the peace without hearing the charge. *Edwards* v. *Ferris*, 7 C. & P. 542.

Where a party was charged with felony in unlawfully cutting trees, although the value turning out to be under 20*s.*, and therefore the offence not amounting to felony, it was held that the magistrate was authorised to remand for a reasonable time for re-examination; the reasonableness is a question for the jury. *Cave* v. *Mountain*, 1 Sc. N. S. 132.

(*Previous Summons*, p. 589.)

Where rates were imposed by a local paving Act, and an appeal given to the commissioners, and from them to the sessions, and in case of refusal or neglect, it was declared that it should be lawful for any justice, by warrant, to authorise the collector to distrain; held, that it was not obligatory on the justices to issue such warrant without a previous summons, and a rule for a *mandamus* was discharged with costs. *R.* v. *Stafford Just.*, 5 N. & M. 94; S. C. *R.* v. *Hughes*, 3 Ad. & Ell. 425.

A warrant of distress against an overseer for not paying over the balance in his hands, omitting to set out the summons, hearing and refusal to pay, was held to be bad, and the magistrates and officers executing it, liable in trespass. *Harris* v. *Stuart*, 7 C. & P. 779; questioning the form in Burn's Justice, ed. 26.

(*Commitment, Warrant, Order, &c.*, pp. 591. 593.)

Where the warrant of commitment of parties charged with riot under 7 & 8 Geo. 4, c. 30, s. 8, only stated that they had begun to pull down and demolish "in part" a dwelling-house, charging also other acts of bailable misdemeanor; held, that as regarded the former charge, it was defective, and the parties therefore admitted to bail. *R.* v. *Lowden*, 7 Dowl. 538.

An order of justices for the payment of a weekly sum for the maintenance of a father by the son, describing the application to have been made to the justices of *K.* by the overseers of the parish of *M.* in the county of *K.*, to have an order made on *T. G.* of the parish of *M.* in the same county, &c., and proceeding to order the said *T. G.* to pay, &c., was held sufficiently to show that *T. G.* was dwelling within the jurisdiction of the justices, and it was held that, by making their order on the said *T. G.*, the justices had adopted those words, and adjudicated that he dwelt there. *R.* v. *Toke*, 3 N. & P. 323.

An order of justices made upon the complaint of churchwardens *de facto* although not *de jure*, is good; nor are they precluded from making it by the circumstance of a suit having been commenced for the rate in the Ecclesiastical Court, but abandoned before the complaint made. *R.* v. *St. Clement's (Ipswich) Justices*, 3 P. & D. 481.

An order of justices requiring the officer of a friendly society to pay money to a member, must expressly find that such party is a member entitled to the money, and that the party on whom the order is made is at the time an officer of the society; and held, that the order being directed to him, describing him as "steward," &c., and the recital of the complaint on oath, stating him such officer, was not sufficient; neither was such recital by the claimant, stating himself a member and entitled, and the money due, nor the direction to pay the amount "so due and owing as aforesaid," sufficient to dispense with such finding; and a distress founded upon an order so deficient being bad, the justices were held to be liable in trespass. *Day* v. *King*, 5 Ad. & Ell. 359.

To a writ of habeas corpus directed to the serjeant-at-arms of the House of Commons commanding him to bring up the bodies of *W. E.*, esq., and *J. W*, esq., the following warrant was returned: "Whereas the House of Commons have this day resolved that *W. E.*, esq., and *J. W.*, esq., sheriffs of Middlesex, having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the serjeant-at-arms attending

this House; these are therefore to take into custody the bodies of the said *W. E.* and *J. W.*, and them safely to keep during the pleasure of this House, for which this shall be your sufficient warrant. C. S. Lefevre, Speaker."—Held that the Speaker's warrant, stating the adjudication of the contempt generally, without setting out the particular facts from which the contempt arose, the Court had no power to discharge the sheriffs from custody; otherwise, where the facts consituting the supposed contempt are set out in the warrant, or upon the return. Held, secondly, that the adjudication of the contempt was sufficiently stated, though by way of recital. Thirdly, that it sufficiently appeared that the contempt was committed against the House of Commons, and that the Speaker had authority to issue his warrant. *R.* v. *Evans and Wheelton, Sheriffs of Middlesex*, 8 Dowl. 451.

Where on the face of the commitment it appeared that the party had engaged to perform a particular work, it was held to be a case wholly distinct from that of entering into a service in the ordinary sense, and not within 4 Geo. 4, c. 34, s. 3, and the justice therefore no jurisdiction. *Johnson, ex parte*, 7 Dowl. 702. And see *Hardy* v. *Ryle*, 9 B. & Cr. 603; and *Lancaster* v. *Greaves*, Ib. 628.

A commitment on 4 Geo. 4, c. 34, s. 3, for leaving work unfinished, omitted to state that the contract was entered into, the work not done, or the party found within the jurisdiction of the justice; held, that as being consistent with the plaintiff's never having appeared at all before the defendant, the latter had no defence in an action for false imprisonment. *Johnson* v. *Read*, 6 M. & W. 124.

(*Distress Warrant*, p. 591.)

A distress warrant for non-payment of costs is bad if it do not show on the face of it an order of sessions for the payment of a specific sum as costs. *Sellwood* v. *Mount*, 1 G. & D. 358.

A warrant of apprehension was issued by a Justice of Peace, which did not recite any information upon oath, and it appeared that in point of fact the information was not sworn in his presence. Held that he was liable in trespass. *Caudle* v. *Seymour*, 1 G. & D. 454.

Quære, Whether a warrant is not totally void which does not recite any information, and which directs an apprehension "to answer all such matters and things as in Her Majesty's behalf shall be objected against him by *A. B.* for an assault committed on," &c. *Ib.*

(*Defence by a Constable under a Warrant*, p. 594.)

The perusal of the original warrant (which has been retained by the gaoler for his own production) is dispensed with by a plaintiff, who on being informed of the fact, does not object to the non-production. *Atkins* v. *Kilby*, 4 P. & D. 145.

In an action of false imprisonment against constables who had carried the plaintiff to gaol on a justice's warrant for non-payment of arrears on an order of maintenance (stat. 49 Geo. 3, c. 68, s. 3), it was objected:—

1. That the warrant, though purporting to be made on a hearing at which plaintiff was present, had not been made then, but suspended for a month after (to give to plaintiff an opportunity of consulting his friends); and that it was issued at the end of the month, on plaintiff's default, after fresh demand, without further hearing, and when plaintiff was in a different county from that in which the justice acted.

2dly. That the warrant being indorsed by a justice of the county in which plaintiff was, that the indorsement did not purport to be made upon such proof on oath as stat. 24 Geo. 2, c. 55, s. 1, requires, nor was it shown by evidence that such proof had been given.

Quære, Whether these were valid objections; but it was held that, at all events, they resolved themselves into a denial of jurisdiction, and that the warrant, though made without jurisdiction, entitled the constables to the benefit of stat. 24 Geo. 2, c. 44, s. 6. *Atkins* v. *Kilby*, 11 Ad. & Ell. 777; S. C. 4 P. & D. 145.

The warrant required the constable forthwith to take plaintiff to the house of correction at *W.*, and there deliver him to the keeper, who was to keep him to hard labour for three months, unless he should sooner pay the maintenance to the overseers. Plaintiff tendered the arrears to the constable at *T.*, where he was arrested, and to the overseers of *B.* (the complaining parish), at *B.*, to which place he was taken on his way to *W.* Held, that the constable and overseer were not authorised to accept such tender.

B. was eighteen miles out of the direct road to *W.*, and the plaintiff desired to be taken by the direct road. The Judge, in summing up, left it to the jury to say whether the route by *B.*, though circuitous, was the most convenient; and they found that it was. Held, that the summing up was proper, and that the finding entitled the defendants to a verdict; it not having appeared by the evidence that plaintiff had in fact been put to any unnecessary inconvenience. *Atkins* v. *Kilby*, 11 A. & E. 777; 4 P. & D. 145.

(24 *Geo.* 2, *c.* 44, *s.* 6, p. 600.)

The plaintiff having demanded and received a copy of the warrant of distress under the Land-tax Act is not bound to join, as defendants, the commissioners who issued the warrant, the statute 24 Geo. 2, c. 44, s. 6, being inapplicable, though the commissioners were also acting magistrates for the division. *Charleton* v. *Alway*, 11 A. & E. 993.

The defendant, a police constable, took the plaintiff into custody on a charge of wilful and malicious trespass, he not having seen the fact; having acted under a *bonâ fide* and supposed authority of the statute, he is entitled to notice of action. *Ballinger* v. *Ferris*, 1 M. & W. 628; and 1 Tyr. & Gr. 920.

(*Arrest by Private Persons*, p. 603.)

A private person, who gives another into custody on a charge of having committed an offence against the statute 7 & 8 Geo. 4, c. 29, (the Larceny Consolidation Act) is not entitled to notice of action under the 75th section of that Act, as that section only applies to constables and other officers, and persons of that kind. *Brooker* v. *Field*, 9 C. & P. 651.

(*Costs.*)

The obtaining the certificate of the Judge who tries the cause is a condition precedent to the right of a magistrate who obtains a verdict in an action brought by him for an act done in his judicial capacity, for double costs, under 7 Jac. 1, c. 5. *Penney* v. *Slade*, 5 Bing. N. C. 469; and 7 Dowl. 440.

LARCINY, p. 604.

(*Venue.*)

Goods were feloniously stolen in France, and found in the prisoner's custody in this country; the jury have no jurisdiction to convict. *R.* v. *Madge*, 9 C. & P. 29.

And see *R.* v. *Prowse*, Ry. & M. 349.

(*Variance*, p. 607.)

An indictment for stealing "a sheep," was held to be supported by proof of stealing a ram or ewe, although 7 & 8 Geo. 4, c. 29, s. 25, specifies "ram, ewe, sheep or lamb," the word "sheep" being a generic term, including all the others. *R.* v. *M'Culley*, 2 Moody, 34.

(*Value.*)

To make a thing the subject of larciny it is necessary that it should be of some value, but it need not be of some assignable value in the coin of the realm, that is to say of a farthing at the least. *R.* v. *Morris*, 9 C. & P. 347.

(*Ownership*, p. 607.)

A prisoner was employed as master of a coal vessel. The custom of the trade was that he should receive two-thirds of the freight. He took the whole. Held that he was not a joint proprietor with the master, and that he was properly convicted of stealing the master's third. *Anon.* 2 Lew. Cr. Cases, 258.

A servant sent out to collect monies was robbed before he returned home; Alderson, B. was inclined to think that the money was improperly laid in the indictment for this robbery as the property of the master, seeing that it had never come to his hands. *R.* v. *Rudick and others*, 8 C. & P. 237. *Qu.*

(*Consent to part with the Possession*, p. 607.)

The prisoner, a servant of the prosecutor, gave away, without the authority or knowledge of his master, various articles of food; this was held to amount to larciny. *R.* v. *White*, 9 C. & P. 344.

So where the prisoner, the servant of a party drawing a cheque, received it to deliver to a third person, and appropriated the proceeds to his own use. *R.* v *Heath*, 2 Moody, 33.

So where the prisoner, not being the servant of the prosecutor, was entrusted to carry a parcel containing notes to a coach-office, and he opened the parcel and abstracted the notes. *R.* v. *Jenkins*, 9 C. & P. 38.

But where the prisoner, being a salesman as well as drover, had been entrusted to take cattle to the salesman of the prosecutor at Smithfield, but had authority to sell them on the road if he could, and he drove them to the market, and sold them there, and applied the money to his own use; it was held, that being the agent, and not the servant, he could neither be convicted of larciny nor embezzlement. *R.* v. *Goodbody*, 8 C. & P. 665.

So where the prisoner had received a horse from the prosecutor to agist, and been paid for one week, it was held that the subsequent sale of it did not amount to larciny. *R.* v. *Smith*, 1 Ry. & M. 473.

Where the owner intending to sell his horse, sent it to a fair by his servant, but with no authority to dispose of it in any way till he himself had arrived, and the prisoner having asked the price went up to two men with whom he talked, and the latter then came up and persuaded the servant to part with the possession on an exchange for another of little value, and a sum of money,

which they went away without paying and never returned; held, that if the jury believed the prisoner and the others to be acting together to obtain the possession from the servant under colour of an exchange, but intending all the while to steal the horse, it amounted to a stealing by the prisoner. *R.* v. *Sheppard*, 9 C. & P. 121.

So where the prisoner was hired to drive a heifer from *Y.* to *M.*, and he absconded with it after receiving the animal and the hire, sold it, and was not found for a long time after, it was held, that the possession being the possession of a servant only, he was properly convicted of stealing. *R.* v. *Jackson*, 2 Moody, 32.

So where the prosecutor sent the prisoner, a person not in his service, with pigs in a cart to show to a purchaser, and to state the price, but without authority to receive the price, and the prisoner went off with them and sold them elsewhere, Alderson, B. stated to the jury, that the question was whether he was a bailee merely or a servant; and that if the felonious intent arose whilst acting in the latter capacity, he was guilty of larciny. *R.* v. *Harvey*, 9 C. & P. 353.

Where the carter of the prosecutor took, beyond what was allowed for provender, two trusses of hay, which the ostler at a public-house where they stopped, assisted in removing from the cart; it was held to amount to a stealing by the carter, and a receiving by the ostler. *R.* v. *Gruncell and Another*, 9 C. & P. 365.

Where a person employed by the prosecutor as a town traveller, having no authority to sell goods, but merely to collect money, took an order for two articles, but entered one only in the order-book, and the prosecutor's carman delivered both, and entered the second in the invoice, the town traveller afterwards receiving the whole amount, but only accounting to the prosecutor for the price of the first; it was held to be larciny, and not embezzlement; and the prisoners were accordingly acquitted upon an indictment charging the former with embezzlement, and the latter with being an accessary after the fact. *R.* v. *Wilson and Another*, 9 C. & P. 27.

Where the prosecutrix hired a glass-coach for the day, of which the prisoner was the driver, it was held that he was not her "servant" within the 7 Geo. 4, c. 29, s. 46, relating to larciny by servants. *R.* v. *Haydon*, 7 C. & P. 445.

Where the prisoner, a boatman, received staves from the prisoner's vessel, to carry on shore, and he concealed some, and afterwards removed them to his mother's; held, that it was a case of bailment, although the prosecutor's servants went with the prisoner's boat, as they were under the prisoner's control; but that the secreting and removal amounted to breaking bulk, and if done with intent to convert to his own use, to constitute a larciny. *R.* v. *Howell*, 7 C. & P. 325.

So where the prosecutrix asked the prisoner, a casual acquaintance, to put a letter into the post containing money, and the latter broke the seal, and abstracted the money, it was held to be larciny. *R.* v. *Jones*, 7 C. & P. 151.

(*To part with the Property*, p. 607.)

Where in a case of ring-dropping the prosecutor parted with his money in the *purchase* of the prisoner's share, it was held not to be a case of larciny. *R.* v. *Wilson*, 8 C. & P. 111.

Where a party about to receive a sum of money took with him a receipt ready signed, and the party having to pay the money laid down part, and asked to look at the receipt, and then refused to pay the remainder of the money or to return the receipt, and the prosecutor stated that he should not have parted with it unless he had been paid in full; it was held to constitute a larciny of the receipt. *R.* v. *Rodway*, 9 C. & P. 784.

The prosecutor gave a sovereign to the prisoner to get changed, with which he never returned; held, that having parted with it, never expecting to receive it back, the case did not amount to larciny. *R.* v. *Thomas*, 9 C. & P. 741.

Where a party purchased at a sale by auction a bureau, which was found to have money in a secret drawer, it was held, that unless it was expressed to be a sale only of the bureau, the abstraction of the money could not amount to a larciny; *aliter*, if the buyer had such express notice, and he had no reason to believe that anything more than the article itself had been sold. *Merry* v. *Green*, 7 M. & W. 623.

(*Felonious Intention.*)

Upon a defence by a servant charged with stealing, that he pledged the property with intent to redeem and replace it, Gurney, B. left it to the jury to say whether the property was taken originally with a felonious intent, but intimated his disapprobation that the doctrine of an intention to redeem property should be allowed to prevail. *R.* v. *Phetheon*, 9 C. & P. 552.

Where the prisoner hired a horse and gig of the prosecutor, which he immediately offered for sale; held, that there having been no actual conversion of the property, the prisoner could not be convicted of larciny. *R.* v. *Brooks*, 8 C. & P. 295. *Qu.*

The prisoner selected as for purchase a pin, and it was set aside for him, and he afterwards was seen to take it away with him in the absence of the shopman; a bill was however sent, including the price of the pin; held, that the jury were to say whether it was taken with a felonious intent, or whether credit was not given for it. *R.* v. *Box*, 9 C. & P. 126.

The opening a letter, and detaining it, merely from curiosity or political motive, is a trespass only, and not a felony. *R.* v. *Godfrey*, 8 C. & P. 563.

(*Presumptive Evidence*, p. 614.)

Where the articles stolen were not such as pass from hand to hand, as ends of unfinished woollen cloths, their being found in the possession of the prisoner two months after they were stolen, was held to be sufficient to call upon him to show how he came by the property, and to be a circumstance for the jury. *R.* v. *Partridge*, 7 C. & P. 551.

(*Robbery.*)

On an indictment for robbery, the jury having found the prisoner "guilty of an assault, but without any intention to commit any felony;" it was held, that the prisoner might be convicted of the assault, and punished, under the 7 Will. 4, and 1 Vict. c. 85, s. 11. *R.* v. *Ellis*, 8 C. & P. 654.

So, where the indictment charged an assault, and the wilfully administering of deleterious drugs. *R.* v. *Sutton*, 8 C. & P. 660.

Where two persons were robbed, and violence used towards them, whilst in the same carriage, and there were separate indictments, it was held, that on the trial of the first, the prosecutor in the second might be asked as

to his loss of a watch found on one of the prisoners, but not as to the violence used towards him. *R.* v. *Rooney*, 7 C. & P. 517.

(*7 & 8 Geo. 4, c. 29, ss. 17 & 23.*)

The luggage of a passenger is within the 7 & 8 Geo. 4, c. 29, s. 17, against stealing goods and merchandize on board any vessel. *R.* v. *Wright*, 7 C. & P. 159.

On an indictment under the 7 & 8 Geo. 4, c. 29, s. 23, for stealing title deeds, the taking must be shown to be such as would be required to constitute larceny, if the deeds had been the subject of larceny. *R.* v. *John*, 7 C. & P. 324.

(*Sheep-stealing.*)

Where the prisoner inflicted a wound with intent to kill and steal the carcase; held, that the animal not dying until two days afterwards, did not alter the case, and that a conviction for killing, with intent to steal the carcase, was proper. *R.* v. *Sutton*, 2 Moody, 29; 8 C. & P. 291.

(*Stealing Fixtures.*)

On an indictment for stealing lead affixed to a building, &c. the jury found that the prisoner took the lead when severed and lying at a considerable distance from the building; held, under these circumstances, that the prisoner must be acquitted, and that he could not be found guilty of a simple larceny. *R.* v. *Gooch*, 8 C. & P. 294.

(*Stealing in Shops.*)

A shop, within the meaning of 7 & 8 Geo. 4, c. 29, s. 15, and 1 Vict. c. 90, must be more than a mere workshop; it must be a shop for the sale of articles. *R.* v. *Sanders*, 9 C. & P. 79.

(*7 & 8 Geo. 4, c. 64, s. 13.*)

The offence must be committed in or upon the coach, to bring it within 7 Geo. 4, c. 64, s. 13. *Sharpe's Case*, 2 Lew. Cr. Cases, 233.

(*Embezzlement*, p. 615.)

It is not sufficient to prove generally a deficiency in account, but some specific sum must be proved to have been embezzled. *R.* v. *Lloyd Jones*, 8 C. & P. 288.

Where it was the duty of the prisoner, a banker's clerk, to keep the money received in a box, and make entries of his receipts; and upon his being called on to produce his money, he threw himself upon his employer's mercy, and said he was 900*l.* short; it was held that upon an indictment for embezzling monies to a large amount, to wit, 500*l.*, he was properly convicted, although no evidence was offered of the persons of whom received nor the sort of money abstracted; and the judgment was afterwards affirmed by the Judges. *R.* v. *Grove*, 7 C. & P. 635; and 1 Ry. & M. 447.

A collector of the poor's-rates, church and rector's rates, appointed in vestry under a local Act, is properly described as servant to the committee of management, under 7 & 8 Geo. 4, c. 29, s. 47. *R.* v. *Callahan*, 8 C. & P. 154. And see *R.* v. *Jenson*, Mood. 434.

On an indictment against the clerk of a savings bank, held that he was properly described as clerk to the trustees, although he was appointed by the managers. *R.* v. *Jenson*, 1 Ry. & M. 434.

So where are secretary of a society received monies from a member to be paid over to the trustees, although usually received by a steward, and he fraudulently withheld it; held, that it might be stated as the property of the trustees, and he be deemed their clerk and servant. *R.* v. *Hall*, 1 Ry. & M. 474.

Where *A.*, a coach proprietor, horsed the coach from *H.* to *W.*, driving it himself, but was liable to his co-proprietors for the receipts, employed the prisoner to drive occasionally for him, giving him all the fees, and it was his duty to account for all the sums received to his employer; held, that the abstracting and not accounting for part was embezzlement, and that he was properly described as the servant of *A.*, and the monies embezzled as the property of *A.* *R.* v. *White*, 8 C. & P. 742.

The omission of a clerk to enter money received by him in his books is insufficient to support an indictment for embezzlement, where there has been no denial by him of the receipt. *R.* v. *Jones*, 7 C. & P. 833.

Where money was paid to the prisoner under a supposition that he was authorized to receive it, but which he was not; held, that the receiving did not amount to either larciny or embezzlement. *R.* v. *Hawtin*, 7 C. & P. 281. And see *R.* v. *Crawley*, cited ib.

Where the party charged with embezzling was clerk to a society, binding themselves by oaths of an unlawful nature, within the meaning of the 37 Geo. 3, c. 123, and 57 Geo. 3, c. 19; it was held, that the indictment laying the property in persons so unlawfully combined could not be supported. *R.* v. *Hunt*, 8 C. & P. 642.

The 7 & 8 Geo. 4, s. 29, c. 46, does not apply to the cases of clerks in the public service, but such offence is against 2 Will. 4, c. 4; and it is sufficient if the act of embezzlement takes place after the person guilty of it has ceased to be such clerk, if he received the property embezzled when in that capacity. *R.* v. *Lovell*, 2 Mo. & R. 236.

(*Receiver*, p. 617.)

Where an indictment charged in the first count, that two persons killed a sheep with intent to steal the hind leg, and in the second, that a third person received —lbs. of mutton, "so stolen as aforesaid," it was held, that the second count could not be supported, but that a third count, stating that such third person received the mutton stolen from "a certain evil-disposed person," was good. *R.* v. *Wheeler & others*, 7 C. & P. 171.

LIBEL, p. 617.

Slander for speaking of the plaintiff the following words: "I will bet 5*l.* to 1*l.* that Mr. J. (the plaintiff,) was in a sponging-house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself." And in answer to the following question from a bystander, "Do you mean to say, that Mr. *J.*, brewer, of Rosehill, has been to a sponging-house within this last fortnight for debt?" the defendant said, "Yes, I do." The jury found that the words were spoken of the plaintiff in the way of his trade; held, that the action was maintainable, and that the verdict was right, as it was plain from the conversation that the words were spoken of the plaintiff in his character of a brewer.

It seems also, that the words were actionable independently of that,

because they must necessarily affect the plaintiff in his trade and credit. *Jones* v. *Littler*, 7 M. & W. 423.

In an action for misdescribing the plaintiffs' vessel in a publication of the defendants, called "The Shipping Register," it appeared that the plaintiffs had requested the surveyor of the defendants to examine the ship; held, that they could not maintain an action against the defendants for what was done in consequence of his report; the remedy was against him if he made a false report. *Kerr* v. *Shedden*, 4 C. & P. 528; and see below, 1466.

Where the declaration alleged and set out a libellous paragraph in the defendant's newspaper, and afterwards, &c. (stating other libellous matters in subsequent newspapers), it was held that each allegation was to be considered a separate count; and one of the latter being in the terms, "we again assert the cases formerly put by us on record, we assert them against (the plaintiff); we again assert they are such as no gentleman or honest man would resort to," it was held that the words were to be construed not as used merely in denial of some assertion made by the plaintiff, but as an accusation of the plaintiff, and libellous. *Hughes* v. *Rees*, 4 M. & W. 204.

The words "he is a returned convict," are actionable, although importing that the punishment had been suffered, the obloquy remaining. *Fowler* v. *Dowdney*, 2 Mo. & R. 119.

(*Proof of Publication*, p. 619.)

As the Court in granting a criminal information for a libel performs the office of a grand jury, the rule, therefore, must be drawn up on reading the original newspaper, or on having it accounted for. *R.* v. *Woolmer*, 1 P. & D. 137.

If the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, although there be no evidence given to show that the printing and publication were by the direction of the defendant. *R.* v. *Lovett*, 9 C. & P. 462; and see *Bond* v. *Douglas*, 7 C. & P. 626.

The post-mark on a letter was held to be *primâ facie* evidence of a publication. *Shepley* v. *Todhunter*, 7 C. & P. 680.

Where the libel was contained in a newspaper, it was held that the defendant had a right to have other parts of the same paper, referred to in the libel, read as part of the plaintiff's case. *Thornton* v. *Stephen*, 2 Mo. & R. 45.

(*Amendment.*)

The declaration alleged that the defendant had spoken the following words of the plaintiff: "Smith has got himself into trouble; he is out on bail for 100*l.*, and it is to be tried at the Old Bailey next Monday, for buying cocks which have been stolen from Messrs. Pontifex & Co. by one of their apprentices," &c. At the trial the evidence was that the defendant had said that "he had heard that Smith had got into trouble," &c. Held, that the record was amendable under the 3 & 4 W. 4, c. 42, s. 24. *Smith* v. *Knowelden*, 9 Dowl. 402.

(*Prefatory Averments and Innuendoes, Proof of*, p. 626.)

Since the new rules of pleading, the inducement to a libel is taken to be admitted unless traversed. *Fradley* v. *Fradley*, 8 C. & P. 572.

Where the jury found the words "he has defrauded his creditors, and

been horsewhipped off the course at *D.*," spoken of an attorney, not to have been spoken of him in his character as an attorney, they were held not to be actionable. *Doyley* v. *Roberts*, 3 Bing. N. C. 835.

Allegations that the plaintiff had been "appointed" an assistant overseer, and had passed certain accounts "as such assistant overseer;" the former allegation is sufficiently proved by an appointment by the justices, and his having acted as such; and his book of accounts being headed "Overseer's Accounts," does not make them less his own; by his warrant of appointment he is required to verify. *Cannell* v. *Curtis*, 2 Bing. N. C. 228; and 2 Sc. 379.

A declaration in slander for speaking the following words of the plaintiff as clerk of a company, "you have done many things with the company for which you ought to be hanged, and I will have you hanged before," &c.; innuendo, that the plaintiff had been guilty of felonies punishable by law with death by hanging, held sufficient on motion in arrest of judgment. *Francis* v. *Roose*, 3 M. & W. 191.

In an action for a libel which imputed that the plaintiff's house was opened as a gaming-house, under the leadership of a woman of notorious character, the declaration alleged that the plaintiff's house was a club-house, and that divers persons paid annual subscriptions. The payment of subscriptions was denied by one of the defendant's pleas, and evidence was given that a book was kept for subscribers' names, and that two gentlemen wrote their names in this book; but no evidence was given of the payment of any subscription; it was held, that there was evidence to go to the jury in support of the allegation in the declaration. The defendant pleaded several pleas, but none of them at all referring to the plaintiff's wife; it was held, that the plaintiff could not go into evidence to show that his wife was a respectable person, as on these pleadings she must be taken to be so; also, that the plaintiff could not go into evidence to show that his wife had become ill, and died soon after the publication of the libel. *Guy* v. *Gregory*, 9 C. & P. 584.

(*Privileged Communication*, p. 630.)

Where the libel was contained in an advertisement, stating the issuing of process against the plaintiff, and that he could not be found, and offering a reward for such information as should enable him to be taken; plea, that a *capias* had been issued and delivered to the sheriff, and that the plaintiff kept out of the way, and that the advertisement had been inserted at the request of the party suing out the writ to enable the sheriff to arrest; it was held to be a sufficient defence. *Lay* v. *Lawson*, 4 Ad. & Ell. 795.

Where the defendant wrote a letter justifying himself and his conduct, and criminating the plaintiff's wife, who was a servant to the party to whom the letter was addressed, it is for the jury to say whether the defendant merely meant *bonâ fide* to defend himself, and throw the fraud imputed to him on the servant; if so, it is a privileged communication. *Coward* v. *Wellington*, 7 C. & P. 531.

Where the libel consisted of charges against the plaintiff, a constable, made in a letter to the rate-payers; it was held, that since it would have been a privileged communication if made to them by word of mouth, it was incumbent on the plaintiff to show that the defendant's absence from

the meeting, which was the reason of his writing, was wilful. *Spencer* v. *Ameston*, 1 Mo. & R. 470. *Qu.*

Where a party has a mutual interest with another, he is justified in prevailing on him to become party to a suit, and expressions of angry and strong animadversion on the conduct of the party to be proceeded against, unless malicious, are privileged; and, in the case of words, the jury merely take into consideration the whole conversation, to see whether particular words, which may be actionable in themselves, are qualified so as not to convey the primary meaning. *Shipley* v. *Todhunter*, 7 C. & P. 680.

Where the defendant, a son-in-law, addressed a letter to his mother-in-law, who was about to marry the plaintiff, containing slanderous imputations against him, it was held that the occasion justified the writing, and that the jury were to say whether the defendant acted *bonâ fide*, and under a belief of the truth, although the imputations were false; and that such communications were to be regarded liberally, unless a clearly malicious intention was manifest in the act. *Todd* v. *Hawkins*, 8 C. & P. 88; and 2 Mo. & R. 20.

A party is justified in stating his opinion *bonâ fide* of the respectability of a tradesman inquired about; *aliter*, it is said, where he volunteers the statement; held, also, that the loss of a customer is special damage, although if the dealing had taken place with him, it would have been a losing transaction. *Storey* v. *Challands*, 8 C. & P. 234.

Where the words were spoken by one subscriber of a charity to another, as to the conduct of the plaintiff, the medical attendant on the objects of the charity; it was held, that a claim of privilege to so large an extent could not be sustained. *Martin* v. *Strong*, 5 Ad. & Ell. 535; and 1 Nev. & P. 29.

A party interested in a building contract, on which the plaintiff had been engaged, applied to the defendant to recommend a surveyor to measure the work, when the defendant stated that he had seen the plaintiff take away some of the materials, upon which the plaintiff's employer applied to the defendant to know whether he had seen the plaintiff taking them away, when he alleged that he had seen the plaintiff taking them, and that he hallooed to him; held, that the Judge acted properly in directing the jury to say whether the words imputed felony; and in telling them that even if they did, the plaintiff was not entitled to recover, unless malice were expressly shown, or the jury believed, from the circumstances, that the defendant was actuated by malicious motives. *Kine* v. *Sewell*, 3 M. & W. 297.

The publishing remarks of a slanderous nature by an elector, of a candidate, is not within the principle of privileged communications; the libel contained two distinct charges against the plaintiff, and the plaintiff's counsel in his opening having stated evidence to disprove both, but called witnesses only as to one, it was held that he could only contradict the defendant's witnesses as to the other, and not give evidence in reply in support of his original statements (per Denman, L. C. J.), strongly disapproving the practice of counsel stating facts in their opening, and then not offering evidence thereon. *Duncombe* v. *Daniell*, 8 C. & P. 223.

The writing of the plaintiff, a florist, "the name of *G.* is to be rendered famous in all sorts of dirty work," is not within the privilege of fair criticism. *Green* v. *Chapman*, 4 Bing. N. C. 92; S. C. 3 Sc. 340.

(*Malice*, p. 635.)

Where the defendant had brought a charge against and caused the plaintiff to be searched for a missing brooch, which was afterwards found in the defendant's possession, it was held to be a question for the jury, whether the charge was made *bonâ fide*, and that the circumstances and occasion of making it should be left to their consideration. *Padmore* v. *Lawrence*, 3 P. & D. 209.

Hand-bills published by the defendant on the same subject as the libel for which the action was brought, and about the same time, and also the manner of their publication by being placarded and carried before the plaintiff's house, were admissible to show the *animus*. *Bond* v. *Douglas*, 7 P. & C. 626.

A libel published by the defendant subsequently to the commencement of an action for a previous libel, was held to have been rightly offered in evidence to the jury to show the *intention* of the defendant in the publication of such previous libel. *Barwell* v. *Adkins*, 2 Sc. N. S. 11.

Where libels by the plaintiff are offered in mitigation of damages, they must be shown clearly to apply to the defendant. *Tarpley* v. *Blabey*, 2 Bing. N. C. 437; 2 Sc. 642; and 7 C. & P. 395.

And see *May* v. *Brown*, 3 B. & Cr. 113; *Finnerty* v. *Tipper*, 2 Camp. 72; and *Wakley* v. *Johnson*, 1 Ry. & M. 422.

Papers in the handwriting of the defendant, found in the house of the editor of the newspaper in which the libel was published, are admissible, although in part erased, but not qualifying the libel. *Tarpley* v. *Blabey*, 2 Bing. N. C. 437.

In an action against the publisher of a magazine containing the libel, evidence of personal malice of the editor against the plaintiff was held to be inadmissible. *Robertson* v. *Wylde*, 2 Mo. & R. 101.

Where the defendant having reasonable cause of suspicion against the plaintiff, and for charging him with felony, went to his uncle and cousin, and uttered the words in question, it was held, that as it appeared that the communication was not made with a just intention of investigating, but of compromising the matter, the jury were improperly directed to consider merely whether the words were spoken maliciously. The existence of express malice is only a matter of inquiry, where the injurious expressions are spoken on a lawful occasion. *Hooper* v. *Truscott*, 2 Bing. N. C. 457; and 2 Sc. 672.

Although in slander, the plaintiff, to prove the *animus*, may show a repetition of the words, or of such as show the same train of thought, yet he cannot give in evidence other words which may be the subject of another action; held also, that it appearing that the plaintiff had recovered in another action against the defendant's son, what passed after the verdict by way of proposal on the part of the plaintiff to compromise the second one, was admissible to show that it was not vexatiously prosecuted. *Defries* v. *Davis*, 7 C. & P. 112.

(*Special Damage*, p. 637.)

In an action for a libel in respect of a ship, imputing unseaworthiness, the plaintiff may, it has been held, give evidence of special damage, although he has not averred it in his declaration, because a libel upon a chattel is not actionable, unless the owner sustain some damage thereby. *Ingram* v. *Lawson*, 9 C. & P. 326.

Words are actionable in respect of special damage where the defendant is the only wrong-doer, although another act on the words for fear of offending the defendant. *Knight* v. *Gibbs*, 1 Ad. & Ell. 43.

(*Defence—Mitigation*, p. 641.)

In an action against the editors of a newspaper for libel, the fact of the libel being published on the communication of a correspondent is not admissible in mitigation of damages. *Talbutt* v. *Clark*, 2 M. & R. 313.

(*Defence—Justification*, p. 643.)

Upon a plea of justification only to a libel, and replication *de injuriâ*, the plaintiff may show the manner of publication, with a view to the amount of damages. *Vines* v. *Serell*, 7 C. & P. 163.

Where the libel contained several distinct matters, part of which only was justified by the plea, but the part omitted to be justified would not form a distinct substantive ground of action, the jury having found a verdict for the defendant on the justification, the Court refused to permit the plaintiff to enter a verdict for the part not justified. *Clarke* v. *Taylor*, 2 Bing. N. C. 654.

In case for libel, pleas—not guilty, and a justification that the libel was a true report of what had passed in a court of justice on a charge of conspiracy against the plaintiff and others, the issues on both of which pleas were found for the defendant; the counsel, who moved the judgment against the plaintiff, being called as a witness, and having proved that he had stated the plaintiff to have (set out as an overt act of the conspiracy) written a letter which was alleged to have been written, not by him, but by a co-conspirator; held, that the plaintiff's own allegations making a necessary part of his case and proof, the character of the publication was part of the issue of not guilty, and that the question was properly left to the jury upon that plea. *Stockdale* v. *Tarte*, 4 Ad. & Ell. 1016.

In an action for libel, it appearing that five packets, addressed to individuals and enclosed in one addressed to the defendant, had been received at the coach-office where he was porter, and that he delivered them; held, that if the jury found that he did so in the course of his business, and in ignorance of the contents, he was not liable; but being *primâ facie* liable, it was for him to show such ignorance. *Day* v. *Bream*, 2 Mo. & Rob. 54.

Where the plea stated specific facts as justifying the publication, it was held that letters written by the plaintiff, not proving any of the facts alleged, were inadmissible for the defendant. *Moscati* v. *Lawson*, 7 C. & P. 32.

Where the defendant pleads the general issue and a justification, of which he gives no evidence, but succeeds on the first issue, the plaintiff is entitled to a verdict and costs on the latter. *Empson* v. *Fairfax*, 3 Nev. & P. 385.

Under an allegation in a libel that the defendant had crushed the Hygeist system of wholesale poisoning, and that several vendors had been convicted of manslaughter, it was held not to be necessary for the defendant to prove that the system had been entirely crushed, and that proof of the conviction of two vendors for manslaughter sufficiently proved the plea, although the evidence as to the death being occasioned by not complying with the printed regulations in some respects varied from the allegation, there being evidence for the jury as to the cause of death. *Morrison* v. *Harmer*, 3 Bing. N. C. 758.

(*Costs.*)

To an action for a libel, pleas—the general issue, and two special pleas, the issues on all of which were found for the plaintiff, with 1*s.* damages, and the Judge certified under 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs; held that, notwithstanding the seventh rule of Hil. Term, 4 Will. 4, the plaintiff was entitled to no more costs than damages. *Simpson* v. *Hurdiss*, 2 M. & W. 84; and 5 Dowl. 304.

The stat. 3 & 4 Vict. c. 24, applies to cases of libel, and therefore if in a case of libel nominal damages be given, and the Judge certify that the grievance was wilful and malicious, the plaintiff will be entitled to his costs. *Foster* v. *Pointer*, 9 C. & P. 718.

(*Indictment*, p. 644.)

Every man has a right to give every public matter a candid, full, and free discussion; but although the people have a right to discuss any grievances they have to complain of, they must not do it in a way to excite tumult: and if a party publish a paper on any such matter, and it contain no more than a calm and quiet discussion, allowing something for a little feeling in men's minds, that will be no libel; but if the paper go beyond that, and be calculated to excite tumult, it is a libel. *R.* v. *Collins*, 9 C. & P. 456.

If a paper, published by the defendant, have a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, it is a seditious libel; and with respect to the intent every one must be taken to intend the natural consequences of what he does. *R.* v. *Lovett*, 9 C. & P. 462.

A general attack upon Christianity is unlawful, because Christianity is the established religion of the country.

A person has a right to discuss the Roman-catholic religion and its institutions, but he has no right in doing so to libel individual members.

If a man puts forth a publication calculated to injure private character, he must be taken to have intended it to have that effect. *R. v. Gathercole*, 2 Lew. Cr. Cases, 237.

(*Province of Jury*, p. 646.)

In an action for libel, the Judge (it is said) is not bound to state to the jury, as matter of law, whether the publication complained of be a libel or not; but that the proper course is for him to define what is a libel in point of law, and to leave it to the jury to say whether the publication in question falls within that definition; and, as incidental to that, whether it is calculated to injure the character of the plaintiff. A publication may be a libel on a private person, which would not be any libel on a person in a public capacity; but any imputation of unjust or corrupt motives is equally libellous in either case. *Parmiter* v. *Coupland*, 6 M. & W. 105.

Upon the trial of an issue of not guilty, it is no misdirection if the Judge leave generally to the jury the question, whether the publication be libellous or not, without stating his own opinion as to the particular publication, or defining what generally constitutes a libel. *Baylis* v. *Lawrence*, 1 A. & E. 920.

(*Competency.*)

In an action against the printer of a newspaper, a proprietor is a competent witness, as he is not liable to contribution. *Moscati* v. *Lawson*, 7 C. & P. 32.

(*Witness—Privilege.*)

A defendant was tried for publishing a letter, purporting to be the resolutions of a body of persons calling themselves the General Convention, and which letter in one part of it stated that an outrage had been committed on the people of Birmingham by a force "acting under the authority of men who, when out of office, sanctioned and took part in the meetings of the people." A witness for the Crown stated in his cross-examination, that he had formerly belonged to the Convention, but had since resigned, and had become a town-councillor of Birmingham. It was proposed to ask him further in cross-examination, as to what he said at a meeting at which the Convention was agreed on, but which took place nearly a year before the publication of the alleged libel; held, that this could not be done. *R.* v. *Collins*, 9 C. & P. 456.

LICENCE.

Hay being sold at an auction on condition that it might remain on the premises and be removed as wanted, the licence is not revocable. *Wood* v. *Manley*, 3 P. & D. 5; 11 Ad. & Ell. 34.

A mere parol licence to enjoy an easement on the land of another is not binding on the grantor after he has transferred his interest and possession to a third party: nor is any notice of the transfer necessary to determine the licence: and a parol licence executory is countermandable at any time. *Wallis* v. *Harrison*, 4 M. & W. 538.

LIEN.

(*General Issue*, p. 646.)

Evidence of a lien is not admissible under the plea of the general issue in trover. *White* v. *Teale*, 4 P. & D. 43. For that plea by the New Rules denies the conversion only, and admits property and right of possession in the plaintiff, but the evidence of a lien denies the right of possession.

A lien may be given in evidence under the plea that the plaintiff was not lawfully possessed. *Brandao* v. *Barnett*, 2 Scott, N. S. 96.

(*When Existing.*)

No lien exists at common law for the agistment of cattle. *Jackson* v. *Cummings*, 5 M. & W. 342.

Where a horse was placed at an inn by a policeman, held, that not being left by one in the character of a guest, no lien existed for the keep. *Binns* v. *Pigot*, 9 C. & P. 208.

A custom of general lien of warehouse-keepers in London was found to exist. *Leuckart* v. *Cooper*, 7 C. & P. 119: but on a rule *nisi* for leave to enter up judgment for the plaintiffs *non obstante veredicto* being obtained, it was held bad in law, as highly prejudicial to foreign trade, and subjecting foreigners to liens for debts of their factors in respect of other goods. *Leuckhart* v. *Cooper*, 3 Bing. N. C. 99; and 3 Sc. 521.

And see *Wright* v. *Snell*, 5 B. & Ald. 350.

An owner retaining the possession of his ship, has a lien on the cargo for the freight due under a charter-party, and the fact of the goods having been consigned to third parties does not alter the principle. *Campion* v. *Colvin*, 3 Bing. N. C. 17; S. C. 3 Sc. 338.

And see *Saville* v. *Campion*, 2 B. & Ad. 503; and *Tute* v. *Meek*, 8 Taunt. 280.

Commissioners for taking the acknowledgments of married women have a lien on the instruments in their possession for the fees due in respect of the discharge of their duty. *Grove, ex parte*, 3 Bing. N.C. 304; S. C. 3 Sc. 671; and 5 Dowl. 355.

A. the bailor of goods to *B.*, sells them to *C.*, and gives notice of the sale to *B.*; *B.* cannot insist on a further lien in respect of a debt incurred by *A.* after the notice. *Barry* v. *Longmore*, 4 P. & D. 344.

The purchaser of an equity of redemption in premises, subject to a mortgage term, deposits the purchase deeds as a security. He afterwards pays off the mortgage and takes a surrender of the term, retaining the deeds of surrender in his own possession, and becomes bankrupt; the lien created by the deposit extends to the whole estate, freed from the incumbrance. Other deeds deposited at the same time, and forming part of the same security, related to an undivided share belonging to the bankrupt in other property. Between the times of the deposit and the bankruptcy, the entirety of a certain portion of the property was conveyed to the bankrupt, in lieu of his undivided share, he paying 100 *l.* for equality of partition. The lien affects the portion conveyed to the bankrupt, and the assignees have no claim in respect of the 100 *l.* *Ex parte Bisdee*, 1 Mon. D. & D. 333.

Where the plaintiff knowing that consignments made by *B.* to *C.*, and bills drawn on the plaintiff, were on credit of the goods generally, and, upon the plaintiff having been obliged to pay the acceptances, the effect of the correspondence with *B.* amounted in equity to a contract by *B.*, that the goods remaining in *C.*'s hands should be an indemnity to the plaintiff for the bills paid; held, that the plaintiff had a lien on them for his debt. *Burn* v. *Carvalho*, 7 Sim. 109.

Where *C.* in the usual course of dealing consigned a cargo of oats to *B.* and remitted bills which the latter accepted, but before the ship sailed *C.* became bankrupt, having sent the bill of lading indorsed in blank to *F.* without communicating the transactions with *B.*, and *F.* transmitted the bill of lading to *B.*, with instructions to act for him, who paid the freight and took possession of the cargo as a security for his own acceptances for *C.*, but which was afterwards taken under a foreign attachment by creditors of *C.*; held, that there was no transfer of the property to *B.* nor lien, and that he could not maintain trover. *Bruce* v. *Wait*, 3 M. & W. 15.

Where in trover for a deed, upon the issue that the plaintiff was not possessed, it appeared that the plaintiff having the legal title as mortgagee, had assented to its being delivered to the defendant to raise money for the discharge of a bill for which both were liable: held that the defendant being entitled to hold the papers in possession until the money advanced by the defendant was repaid, the plaintiff could not maintain the action. *Owen* v. *Knight*, 4 Bing. N. C. 54; 3 Sc. 307; and 6 Dowl. 244.

Where the defendants, carrying on a scribbling and fulling-mill, stipulated that all goods on hand should be liable to a lien for the general balance, and had received oil and dyeing materials from the plaintiff, which were kept in a room to which all customers had access, but were under the lock and key of the defendants every night; held that the words "goods on hand" did not apply to articles used upon goods in the progress of being manufactured and deposited there, on which the labour of the defendant's mill was not employed. *Cumpston* v. *Haigh*, 2 Bing. N. C. 449; S. C. 2 Sc. 684.

In trover for a policy of insurance, plea, retainer as a lien for a general balance due to the defendant as an insurance-broker, replication, a bill given and accepted as payment for such balance, and not due at the time of the conversion; held, that the lien being gone, the defendant could not desert his plea of lien, and rest his defence upon the distinct ground of a right to detain the policy for a balance due on a mutual credit, without having specially pleaded it. *Hewison* v. *Guthrie*, 2 Bing. N. C. 755.

Semble, that if a person covenant that he will, on or before a certain day, secure an annuity by a charge upon freehold estates, or by investment in the funds, or by the best means in his power, such covenant will create a lien upon any property to which he becomes entitled between the date of the covenant and the day so limited for its performance. *Wellesley* v. *Wellesley*, 4 M. & C. 561.

See further as to the lien of an attorney, *Bozon* v. *Bolland*, 4 M. & C. 354; *Warburton* v. *Edge*, 9 Sim. 508.

LIMITATIONS.

Stat. 3 & 4 Will. 4, c. 27.

Where an annuity was devised, charged on freehold, if certain leasehold property specified should be insufficient, held, first, that as against the devisee the will was not evidence that the testator died possessed of the leasehold; and, secondly, that he was not barred by the 3 & 4 W. 4, c. 27, ss. 2, 3, such devisee not being within either of the descriptions in the statute, in which the right shall be deemed to have first accrued within twenty years. *James* v. *Salter*, 2 Bing. N. C. 505; and 2 Sc. 750. But see *James* v. *Salter*, 3 Bing. N. C. 544; 4 Sc. 168; and 5 Dowl. 496, in which it was held that such devisee was within the statute; and that a distress or action for an annuity accruing by will and charged on land, must be resorted to within 20 years from the death of the testator.

A lessor permits his lessee, during the continuance of the lease, to pay no rent for twenty years; the lessor is not therefore barred by the stat. 3 & 4 W. 4, c. 27, s. 2, from recovering the premises in ejectment. The case falls within the latter branch of the 3d section, which, in the case of an estate or interest in *reversion*, provides that the right of action shall be deemed to have first accrued when it became an estate or interest in possession; the lessor, therefore, may recover in ejectment at any time within twenty years after the determination of the lease. *Doe* d. *Davy* v. *Oxenham*, 7 M. & W. 131.

A., in 1817, let *B.* into possession of lands as tenant at will; and in 1827 *A.* entered upon the land without *B.*'s consent, and cut and carried away stone therefrom: this entry amounted to a determination of the estate at will; and *B.* thenceforth became tenant at sufferance, until, by agreement express or implied, a new tenancy was created between the parties; and therefore, unless the fact of such new tenancy be found by the jury, an ejectment brought by *A.* in 1839, is too late, inasmuch as, by the stat. 3 & 4 W. 4, c. 27, s. 7, his right of action *first* accrued at the expiration of one year after the commencement of the original tenancy at will, *i. e.* in the year 1818. *Doe* d. *Bennett* v. *Turner*, 7 M. & W. 226.

Trespass for breaking and entering plaintiff's close, plea, stating a seisin in fee in *W.*, a demise by him for a term, which subsequently by devise came to *H.*, and defendant's entry as servant of *H.*, and giving colour to plaintiff; replication, that the entry of defendant was after the 3 & 4 W. 4, c. 27,

and no right of entry accrued to *H.* or the defendant within twenty years before the entry; rejoinder, that the possession by the plaintiff or any other was not at the time of the passing of the Act adversely to *H.*, and issue, that it was possessed adversely by one *S.*; it was held, that the dates being under a viz. and immaterial, the replication was not inconsistent, as admitting *H.*'s right of entry to have accrued since the Act, and denying the accruing of the right within twenty years; and the rejoinder admitting the right of entry not to have accrued within twenty years put the issue on the question of adverse possession: the jury having found the adverse possession at the time of the passing of the Act against the defendant, and the rejoinder admitting the right of entry not to have accrued within twenty years, it was held, that the defendant was not entitled to the additional period of five years given by s. 15, and that as against a wrong-doer the plaintiff was not obliged to plead specially title in himself; and lastly, that the surrejoinder was not contradictory to the declaration. *Holmes* v. *Newlands*, 3 Perr. & D. 128.

(3 & 4 *Will.* 4, *c.* 42, p. 656.)

Debt on covenant for payment of a rentcharge, being an action of debt on a specialty, may be brought at any time within 20 years, by 3 & 4 Will. 4, c. 42, s. 3, notwithstanding the limitation by 3 & 4 Will. 4, c. 27, s. 42, as to the recovery of rent payable out of land. *Strachan* v. *Thomas*, 4 P. & D. 229.

Semble, the 3 & 4 Will. 4, c. 27, applies only to rents in nature of a charge on the land, and not to mere conventional rents reserved on a lease; but held clearly, that under c. 42, s. 3, the action of covenant for rent in arrear might be brought within the time limited by the latter Act, and that the plea of six years was no bar to the action. *Paget* v. *Foley*, 2 Bing. N. C. 679.

A gift of residue is within the 3 & 4 Will. 4, c. 27, s. 49, and is barred after 20 years have elapsed after the present right of receiving it has accrued to a party capable of giving a release for it; in case of legacies, the presumption of payment cannot be drawn from mere lapse of time, where payment would be out of the ordinary course of payments by an executor. *Prior* v. *Horniblow*, 2 Younge, 200.

(*Non Accrevit*, *&c.* p. 657.)

The right of action for not indemnifying the lender of an accommodation acceptance accrues not when the bill becomes due, but when the lender pays the money. *Reynolds* v. *Doyle*, 2 Sc. N. S. 45.

A. B. and *C.* entered into a joint and several note for the payment of a sum of money with interest, and *A.* having been called upon, and paid the amount, brought two actions, one against *B.*, as the principal, for the whole amount, and another against *C.*, as his co-surety for *B.*; in the action against *B.*, an indorsement by the payee (then deceased) of the receipt of the money from *A.*, to which was added "the £. —— having been originally advanced to *B.*," was held to be admissible to prove not only the payment by the plaintiff, but the original advance to *B.* as the principal; held also, that the right of action accruing immediately upon the payment of any part on account of the principal, the plaintiff was only entitled to recover payments made within six years, upon a plea of the Statute of Limitations; in the action against *C.*, it was held that as the right of action against the co-surety for contribution, attached upon the payment by the plaintiff of anything

beyond his proportion, he could recover only what he had paid beyond that proportion within the six years. *Davies* v. *Humphreys*, 6 M. & W. 153.

To a note payable on demand, *non assumpsit infra sex annos* is a good plea, for the statute runs from the date; *secus*, if the promise were of a collateral thing. *Collins* v. *Benning*, 12 Mod. 444.

An agreement amounting only to an accord which does not extinguish the original debt, the statute runs from the original debt, and not from the agreement. *Reeves* v. *Hearne*, 3 C. M. & R. 323.

Where the statute began to run in the lifetime of the debtor, and after his death, the will being contested, there was for a considerable period no representative who could be sued, held that it did not suspend the operation of the statute. *Rhodes* v. *Smethurst*, 4 M. & W. 42.

Where a suit for an account of rents and profits abated by the plaintiff's death after answer, but before decree, and his representative, more than six years after, filed a bill of revivor, to which the personal representative of the defendant, also deceased, pleaded the Statute of Limitations, but did not state that more than six years had elapsed since the administration had been taken out, plea—overruled. *Perry* v. *Jenkins*, 1 Myl. & Cr. 118.

In courts of equity mistake is within the same rule with respect to the statute, as fraud, viz. from the discovery of the circumstances; where therefore trustees had transferred stock by mistake, which was not discovered until within six years before the filing of the bill, the statute was held to be no bar. *Brooksbank* v. *Smith*, 2 Younge & Cr. 58.

(*Part Payment, &c.*, p. 666.)

An acknowledgment of part payment is not sufficient unless it be in writing, and signed by the party chargeable. *Bayley* v. *Ashton*, 4 P. & D. 294; *Maghee* v. *O'Neil*, 7 M. & W. 531.

A debtor, in 1831, agreed with his creditor to pay him a composition of 5 *s.* in the pound upon the amount of his debt, by instalments. The first instalment was paid, when the creditor agreed to give the debtor a release in full, on his paying the balance of the composition. The debtor made default in payment of the balance; but in February 1839, being pressed for the payment "of the demand" of the creditor, he made a payment of 100 *l.* in part of the balance of the composition, and required a receipt as "for a composition of 5 *s.* in the pound, upon the balance of account owing by him." The creditor acknowledged the payment of the 100 *l.*, but declined signing a receipt in this form. In September 1839, the debtor became bankrupt. Held, that the agreement for the composition did not preclude the creditor from proving for the balance of the original debt, and that it was not barred by the Statute of Limitations. *Ex parte Bateson*, 1 Mon. D. & D. 289.

The delivery of goods in reduction of an existing debt, operates as part payment to take the case out of the statute. *Cooper* v. *Stevens*, 5 N. & M. 635.

The plaintiff, an attorney, had done professional business of various kinds for the defendant in 1827, and several subsequent years. In July, 1832, the defendant having been a witness on a lunacy inquiry, in which the plaintiff was concerned as solicitor, the plaintiff wrote to him to ask what were his expenses on that occasion. The defendant, in reply, requested the plaintiff to allow what was usual, *and place the same to his* (the defendant's) *account*. In March 1833, the plaintiff wrote to the defendant, informing him that the

sums allowed were 2 *l.* 2 *s.* and 10 *s.* 6 *d.*, inclosing receipts for those sums, for the defendant's signature, and concluded, "I will give you credit for the sums in my account against you, agreeably to your note of the 21st July last." The defendant returned the receipts signed by him, and the 2 *l.* 2 *s.*, and 10 *s.* 6 *d.* were paid to the plaintiff on the production of those receipts. In 1838, the plaintiff delivered to the defendant a bill of costs, amounting to 289 *l.*, the first item being in 1827, and the two last in 1830 and 1831. These two were charges for 3 *l.* and 5 *l.* cash lent; the rest of the bill was for professional business. In an action on this bill, commenced in January 1839, it was held that the letters given in evidence did not sufficiently show that the 2 *l.* 2 *s.* and 10 *s.* 6 *d.* were paid in part discharge of the debt for which the action was brought, so as to take the case out of the Statute of Limitations, as to any part of the demand. *Waugh* v. *Cope*, 6 M. & W. 824.

(*Stat.* 9 *Geo.* 4, *c.* 14. *By words only*, p. 665.)

The acknowledgment in writing, to take a case out of the Statute of Limitations, must either amount to a distinct promise to pay, or to a distinct acknowledgment that the sum is due. *Bucket* v. *Church*, 9 C. & P. 209.

Qu. Whether it is a question for the Judge or for the jury to determine, whether a letter written by the defendant, be or be not a sufficient acknowledgment for this purpose. *Ibid.* See *Morrell* v. *Frith*, 3 M. & W. 402.

Where by deed it was agreed by the defendant to pay a balance then unascertained, stipulating for the accounts being taken by arbitrators; it was held to be sufficient to take the case out of the statute, and that *extrinsic evidence* of the amount was receivable to ascertain the sum due. *Cheslyn* v. *Dalby*, 4 Younge & C. 238.

Where the equitable mortgagee received the rents of the mortgaged estate, it was held *primâ facie* to amount to a payment either of the principal or interest, within the proviso of the Statute of Limitations. *Brocklehurst* v. *Jessop*, 7 Sim. 442.

Where an executor separated from the testator's property a sum of money bequeathed to him on a trust, to which he for some time applied the interest of it, but afterwards converted the fund to his own use, it was held that he was liable as a trustee, and that the suit against him was not to be deemed a suit for a legacy, and that the right was not affected by the late Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 40. *Phillips* v. *Munnings*, 2 Myl. & Cr. 309.

The bequest of personalty upon trust for the payment of debts owing at the testator's decease, does not prevent the operation of the statute. *Evans* v. *Tweedy*, 1 Beav. 55; and see *Jones* v. *Scott*, 1 Russ. & Myl. 255; and *Rhodes* v. *Smethurst*, 4 M. & W. 42.

The judgment of the Master of the Rolls in *Scott* v. *Jones* was affirmed, reversing the decision of the Lord Chancellor, in *D. Pr.*, 4 Cl. & Fi. 382. It was also held, that the advertisement by an executor to creditors to send in their claims, was not sufficient to revive a debt already barred by the statute.

A letter of the defendant, in answer to the plaintiff's attorney's application for the debt, in the terms, "since the receipt of your letter I have been in daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of *M.* against me; I propose being at *O.* to-morrow, when I will call upon you on the matter;" was held not to be a sufficient acknowledgment to take the case out of the statute. Where there is

no evidence beyond the writing itself, its meaning is for the Court and not for the jury; *aliter*, where the words are used in a technical sense, as in mercantile documents. *Morrell* v. *Frith*, 3 M. & W. 402; and 8 C. & P. 246; questioning *Lloyd* v. *Maund*, 2 T. R. 760.

Where the defendant, on being applied to for payment, gave the plaintiff a list of debts due to himself, with a memorandum in the terms, "I give the above accounts to you, so you must collect them, and you and me will be clear;" it was held to be insufficient, as no promise to pay could be inferred therefrom. *Routledge* v. *Ramsay*, 3 N. & P. 319.

So where the defendant in a letter, in answer to an application for the debt, said, "I will see *D.*, or write to him; I have no doubt he has paid it; if by chance he has not, it is very fit it should be." *Poynder* v. *Bluck*, 5 Dowl. 570.

The plaintiff having refused to execute a composition deed, by which the defendant had conveyed all his property to his creditors, and having pressed for payment, the defendant replied that he had given up his affairs, and considered that he had nothing to do with the claim, nor should he have, and wished the plaintiff to make him a bankrupt, as it was in his power; held to have been properly left to a jury to say if a promise to pay could be implied: held also, that a sum less than the amount due given by the defendant to his trustee to pay over to the plaintiff if he would receive it in full discharge of his debt, being refused by the defendant, and the trustee having thereupon paid it to him on account only, being a payment made by a stranger, and not sanctioned by the defendant, was not a part payment so as to take the case out of the statute. *Linsell* v. *Bonsor*, 2 Bing. N. C. 241; S. C. 2 Sc. 399 *n.*

Where the defendant, who had taken the stock, and undertaken to satisfy the debts of an insolvent, and had been carrying on the business for a considerable time, in answer to the application of the plaintiff, a creditor, for payment of his account, expressed his regret in a letter at not being able to comply with the plaintiff's request, and stated that there was a prospect of an abundant harvest, which must turn into a goodly sum, "and reduce your account, if it does not, the concern must be broken up to meet it;" held a sufficient acknowledgment to take the debt out of the statute. *Bird* v. *Gammon*, 3 Bing. N. C. 883.

In an action of *assumpsit*, the defendant pleaded a set-off, to which the plaintiff replied the Statute of Limitations. Held, that a letter by the plaintiff giving the defendant credit for a sum of money received on his account, and requesting him to deduct the amount of his gross demand against him from his bill, but which did not specify that amount, was a sufficient acknowledgment to take the case out of the Statute of Limitations. *Waller* v. *Lacy*, 8 Dowl. 563.

(*Merchants' Accounts*, p. 671.)

The exception in the Statute of Limitations (21 Jac. 1, c. 16, s. 3), as to merchants' accounts, does not apply to an action of *indebitatus assumpsit*, but only to the action of account, or, *semble*, to an action on the case for not accounting. *Ingliss* v. *Haigh*, 9 Dowl. 817.

A. was a part-owner and manager of a ship, which was sold by *B.*, another part-owner, and there was evidence of ship accounts between *A.* and *B.* in the books of the latter, from 1799 to 1805; and, in 1811 and 1812,

two items appeared on the debit side, not appearing to relate to the ship, and there was evidence of frequent calls for the accounts, and evasions by *B.*; in a suit by *A.* for an account of the earnings and proceeds of the sale, the case was held to be within the exception of the Statute of Merchants' Accounts, and that there was no sufficient ground for presuming payment or satisfaction. *Robinson* v. *Alexander*, 2 Cl. & Fi. 717; 8 Bli. 352.

Where it appeared from the bankrupt's books that there were items of dealings between the parties within six years, it was held to be sufficient to take the case out of the statute, and that the account ought to be taken and the creditor admitted to prove for the balance found. *Seaber, ex parte*, 1 Deac. 543.

MALICIOUS PROSECUTION, p. 676.

In case for maliciously laying an information on the Game Laws, there having been a conviction and no appeal, it was held that the action was not maintainable. *Mellor* v. *Baddeley*, 2 Cr. & M. 675.

To a declaration for maliciously, and without probable cause, procuring the plaintiff to be indicted at the Central Criminal Court for felony, it is no answer that the defendant was bound over by recognizance to prosecute, if the jury believe that the defendant caused himself to be bound by making the charge maliciously, and without probable cause, before the magistrate who took the recognizance.

It is not incumbent on the Judge in such a case to call the attention of the jury specifically to the circumstance that the injury alleged in the declaration is the preferring at the sessions of the court, a charge which is *then* maliciously made. *Dubois* v. *Keats*, 11 A. & E. 329.

In case for maliciously giving information before a magistrate, and procuring a warrant to be issued against the plaintiff, it is not necessary to state in the declaration that there was an information, the gist of the action being the setting the magistrate in motion; but if the declaration allege an information, and that the warrant was granted thereupon, the information must be proved, and the recital in the warrant is not sufficient. *Gregory* v. *Derby*, 8 C. & P. 749.

The plea of not guilty, putting in issue the indictment, together with the absence of probable cause, a plea also that the defendant had probable cause for indicting, is not permitted. *Cotton* v. *Brown*, 4 N. & M. 831; S. C. 3 Ad. & Ell. 312.

(*Probable Causes*, p. 680.)

The defendant having reasonable and probable cause for giving the plaintiff in charge, persists in it after explanation given by the officer; the Judge directed the jury that on such explanation the probable cause ceased, and that the only question was whether his subsequent conduct amounted to malice; it was held that such direction was wrong; that the original facts remaining unaltered, the reasonable and probable cause could not be taken away by such explanation: and a new trial was granted. *Musgrove* v. *Newell*, 1 M. & W. 582; and 1 T. & G. 957.

Where the probable cause for charging the plaintiff with felony consisted partly of matter of fact and partly of matter of law, it was held that the Judge was warranted in leaving the question to the jury. *M'Donald* v. *Rooke*, 2 Bing. N. C. 217; S. C. 2 Sc. 359.

In an action for a malicious prosecution, the question whether there be or be not reasonable or probable cause, may be entirely for the Judge, or for the jury, according to the evidence in the particular case.

Where the prosecution was under the statute 7 & 8 Geo. 4, c. 30, s. 6, for maliciously and feloniously obstructing a mine, and the plaintiff was acquitted on the ground that he committed the obstruction under a claim of right by his employer, and by such employer's direction, on action brought, it was proved at the trial, that there had been disputes between the employer and the defendant on the subject, before the obstruction, and that defendant knew from the plaintiff that the obstruction was effected in assertion of his employer's alleged right; held, that the Judge was not justified in nonsuiting, or directing a verdict for the defendant, on the ground of there being reasonable and probable cause; but that the question was for the jury. *James* v. *Phelps*, 11 A. & E. 483; 3 P. & D. 231.

Where the plaintiff was given in charge in the evening for a malicious trespass in pulling down a chimney on premises formerly his own, and exchanged for others of which he had been dispossessed, but was liberated in the morning, a summons having been taken out for a hearing before magistrates; it was held that the statute 7 & 8 Geo. 4, c. 30, allowing the apprehension of such offenders, the jury were to say if, in such imprisonment, the defendants acted *bonâ fide* and believing that they had power to take the plaintiff into custody, and if so, there having been no notice of action under the 41st section of that statute, that the defendants were entitled to a verdict. *Reed* v. *Cowmeadow and another*, 7 C. & P. 821.

In case for maliciously indicting the plaintiff, the observations made by the Judge on the trial of the indictment, are not evidence for the plaintiff. *Barker* v. *Angell*, 2 M. & R. 371.

In an action for maliciously, and without reasonable cause, refusing to accept a tender of debt and costs, for which the plaintiff was in execution at the defendant's suit, the defendant may give evidence of probable cause, under the plea of not guilty. *Hounsfield* v. *Drury*, 11 Ad. & Ell. 98.

(*Malicious Arrest*, p. 686.)

In case for a malicious arrest, the action having been brought in an inferior court, and removed by *habeas corpus* into K. B., but no further proceedings had, it was held that the cause was not out of Court until the end of a year after the return of the *habeas*: where, therefore, no search had been made for a declaration after the second term, it was held that there was no proof that the suit was determined, and that the plaintiff was properly nonsuited. The rule 35 of Hil., 2 Will. 4, applies to all cases, whether commenced by serviceable or bailable process, or removed by *habeas*. *Norrish* v. *Richards*, 5 N. & M. 268.

In case for maliciously and without reasonable or probable cause arresting the plaintiff, he having been discharged out of custody on a former arrest, without leave of any Judge, by reason of the defendant not having declared in due time; it was held that the action was maintainable, and that the declaration disclosed a sufficient cause of action, although the allegation of malice was general; (*dub.* Denman, L. C. J.) *Haywood* v. *Collinge*, 1 P. & D. 202.

It is a sufficient arrest to entitle the defendant to relief under the 43 Geo. 3, c. 46, s. 3, if the officer state to the party that he has a warrant, and take

him to his own house, and a bail-bond be executed; and the execution of the bond *semb.* is a holding to bail within the statute; *sed quær.* if the *capias* be afterwards set aside for irregularity? *Reynolds* v. *Matthews*, 7 Dowl. 580.

The wrongful act being independent of the subsequent continuance or discontinuance of the suit, it is not necessary to produce the judgment roll, but the rule to discontinue on payment of costs, and proof that they were paid, is sufficient to support the averment of the discontinuance. *Watkins* v. *Lee*, 7 Dowl. 498.

A plaintiff is bound to show, in the first instance, a want of reasonable and probable cause; and if he show that the sum recovered falls very short of the sum for which the arrest was made, that is *primâ facie* sufficient; but a failure of evidence, as by the alleged death of a witness, is not an answer as a plaintiff arrests at his peril, if he has not legal evidence to support his demand. *Nicholas* v. *Hayter*, 4 N. & M. 882; S. C. 2 Ad. & Ell. 348.

Where the defendant informed the bail that his principal was likely to abscond, and procured directions to take the affidavit of justification off the file, but which being too late, an order for the render was obtained by means of them by the defendant from a Judge; it was held, that unless express malice were alleged and proved, no action could be maintained for such proceeding. *Porter* v. *Weston*, 5 Bing. N. C. 715; and 8 Sc. 25.

(*Costs*, 43 *Geo.* 3, *c.* 46, *s.* 3.)

The Court is not at liberty to go into the question, whether the jury have rightly come to a decision of the amount found to be due, but the *onus* of showing an absence of probable cause of arrest lies on the defendant. *Twiss* v. *Osborne*, 4 Dowl. 107.

The plaintiff arrested the defendant on an affidavit for 86 *l.* for goods sold, and the jury gave a verdict for 15 *l.* upon account of unliquidated damages, for not taking an engine; it was held that not being entitled to arrest upon that claim, he had no reasonable or probable cause, and that the defendant was therefore entitled to costs under the 43 Geo. c. 46, s. 3. *Beare* v. *Pinkus*, 4. N. & M. 846.

The original demand was under 20 *l.*, after which the plaintiff sent, in goods, which were returned, and he then sent in a further demand of two guineas, which made the two demands exceed 20 *l.*, the Court thinking that there was no reasonable ground for the arrest for the latter sum, held the defendant to be entitled to costs under the statute. *Sutton* v. *Burgess*, 4 Dowl. 376.

Where it was clear that the plaintiff could have had no reasonable ground to expect, from the nature of the evidence, that the whole amount for which the defendant was held to bail could be proved, and the verdict did not establish one-half of the demand, it was held that the defendant was entitled to costs under the statute. *Lewis* v. *Ashton*, 1 M. & W. 493.

The amount of the verdict being *primâ facie* proof of the want of probable cause to arrest for the amount sworn to, the Court refused to attend to affidavits against the rule for costs, under 43 Geo. 3, c. 46, s. 3, suggesting perjury of a witness. *Tipton* v. *Greaves*, 5 G. & M. 424.

MALICIOUS INJURIES, p. 691.

(*Malicious Wounding.*)

A wound inflicted by a bite is not within the st. 7 Will 4, & 1 Vict. c. 85, s. 2. *Jenning's Case*, 2 Lewin's C. C. 130; and see *R.* v. *Stevens*, 1 Moody's C. C. 409. *R.* v. *Harris*, cited 2 Lewin's C. C. 131. It need not be made with a sharp instrument. *Briggs' Case*, 1 Lewin's C. C. 67; 2 Lewin's C. C. 132. Nor need the instrument be stated. *Erle's Case*, 2 Lewin's C. C. 133.

Quære, whether a wound by the biting of a dog, be a wounding within the st. 9 Geo. 4, c. 31. *Elmsley's Case*, 2 Lewin's C. C. 126. But see *R.* v. *Hughes*, 2 C. & P. 420.

Where the wounding was by biting the hand, it was held not a wounding within the statute which requires that an intrument be used. *R.* v. *Stevens*, 1 Mood. C. C. 409.

So, of the throwing vitriol over the prosecutor's face with intent to disfigure. *R.* v. *Murrow*, 1 Mood. C. C. 456.

To constitute a wound, there must be a separation of the entire skin, and not a mere abrasio of the outward cuticle. *R.* v. *M'Loughlin*, 8 C. & P. 635.

A blow with an iron hammer, whereby the jaw of the prosecutor was broken, and the skin broken internally, is a wounding within the statute 7 Will. 4, & 1 Vict. c. 85. *R.* v. *Smith*, 8 C. & P. 173.

Where the wound was occasioned by the hard rim of the hat struck with the butt end of a gun held by the prisoner, it was held, that the wound was to be considered as inflicted with the gun, and that the conviction was right. *Sheard's Case*, 2 Moody, 13.

On an indictment, under 7 Will. 4, and 1 Vict. c. 85, s. 2, against husband and wife, for violently beating a child, with intent to murder, Patteson, J. told the jury that they must be satisfied of an actual intent to murder, and it was not sufficient that if death had ensued, the offence would have been murder; and that where a party is charged as aiding and abetting, the jury must find that such party was aware of the intent of the principal to commit the offence of murder: it was held also, on a case reserved for the Judges, that the jury convicting only of the assault, which was a mere misdemeanour, the wife was not protected from the presumption of having acted under coercion. *R.* v. *Cruse and wife*, 8 C. & P. 541.

But in the Case of *R.* v. *Jones*, 9 C. & P. 258, on a charge of shooting, with intent to murder, Patteson, J. held, that if the circumstances are such that if death had ensued it would have amounted to murder, it is a ground for a jury to infer such intent.

See also *R.* v. *Anon*, 2 Moody, 40, where on an indictment under the stat. 7 Will. 4, and 1 Vict. c. 85, for maliciously wounding, &c. it was held to be no defence that the offence, if death had ensued, would not have amounted to murder.

So, on a charge of feloniously cutting with intent to do grievous bodily harm. *R.* v. *Nicholls*, 9 C. & P. 267.

By the term maliciously, as used in the 7 Will. 4, & 1 Vict. c. 85, s. 4, is not intended malice aforethought. *R.* v. *Griffiths*, 8 C. & P. 248.

Where the prisoner shot at *H.*, mistaking him for *L.*, with intent to kill the latter, but did not hit him, and the indictment contained counts for shooting at *H.* with intent to kill *H.* and other counts for shooting at *L.*

with intent to kill *L.*, it was held that, being one act of shooting, the joinder was proper, but the jury finding that he did not shoot at *L.*, and that he had no intention to injure *H.*, but that he only fired at *H.*, intending to fire at *L.*, an acquittal was directed; in such case, the grand jury being discharged, the Judge refused to detain the prisoner until articles of the peace could be prepared. *R.* v. *Holt*, 7 C. & P. 518.

Where the prisoner had previously declared, that if any man struck him he would make him repent it, and armed himself with a sword-stick, with the blade open, and the prosecutor coming in and perceiving the prisoner creating a disturbance, struck him with his fist, upon which the prisoner stabbed him; it was held, that it was for the jury to say whether he used the words as an idle threat, or with the deliberate purpose of carrying his threat into execution, as such intention would constitute the *malus animus*, which the law terms "malice;" and although drunkenness would form no excuse, it might be taken into consideration upon the question of provocation in cases where the act may be attributed to passion excited by such provocation. *R.* v. *Thomas*, 7 C. & P. 817.

(*Malicious Shooting*, p. 691.)

Where the prisoner was prevented from drawing the trigger of a pistol which he had pointed towards the prosecutor, and had his finger on it, it was held not to be an attempt, by drawing the trigger, or *in any other manner*, to discharge loaded arms, within the statute 7 Will. 4, and 1 Vict. c. 85, ss. 3 & 4, which means an attempt *ejusdem generis*. But that the presenting a loaded fire-arm near the prosecutor constituted an assault involved in the act of felony, and of which the prisoner might be convicted under that Act. *R.* v. *St. George*, 9 C. & P. 483.

An indictment on the 7 Will. 4, & 1 Vict. c. 85, ss. 3 & 4, charged the prisoner with *attempting to discharge* at the prosecutor a certain blunderbuss, loaded with gunpowder and divers leaden shots. It appeared that the prisoner, on a refusal by the prosecutor to give him up some title-deeds, addressed him in these words: "Then you are a dead man," and immediately unfolded a great coat which he had on his arm, and took out a blunderbuss, but was not able to raise it to his shoulder, or point it directly at the prosecutor, before he was seized. The blunderbuss was found to be very heavily loaded, but the flint had dropped out, and was discovered between the lining of the great coat. Held, that the evidence was not sufficient to sustain the charge in the indictment. *R.* v. *Lewis*, 9 C. & P. 523.

(*Lawful Apprehension*, p. 691.)

Where the prisoner, being taken by warrant before a justice on a charge of assault, was ordered to find bail, and on his refusal, whilst his commitment was making out, he escaped, and the prosecutor was ordered verbally by the Justice to pursue and apprehend him, and in the attempt to do so, was cut by the prisoner; it was held, that the original warrant continued in force, and that the apprehension was lawful; and the conviction was held to be right. *R.* v. *Williams*, 1 Ry. & M. 387.

But where the prisoner, after apprehension under the Vagrant Act, had escaped, and was several hours afterwards attempted to be retaken, without warrant by the constable, in resisting which attempt he wounded the officer; it was held, that the conviction for stabbing with intent to resist lawful apprehension, could not be supported. *R.* v. *Gardener*, 1 Ry. & M. 390.

Where the prisoner, whilst taking away ashes, was detained on being charged with taking away part of a kettle, and in the scuffle wounded the prosecutor; it was held, that if the jury were satisfied that the prisoner had stolen the article, the prosecutor had a right to detain him, and the wounding would be felony. *R.* v. *Price*, 8 C. & P. 282.

(*For Poaching*, p. 691.)

The prisoner was met with game in his possession, in a plantation, at about eight o'clock in the morning, just after a shot fired, but there was no evidence of his having been in pursuit of game an hour before sun-rise; held, that as the prosecutor had no right to apprehend him, and the crime of the prisoner, if death had ensued, would have been manslaughter only, he could not be convicted of the capital offence of shooting at the prosecutor with intent to murder or do him grievous bodily harm, under 9 Geo. 4, c. 31, ss. 11 & 12. *R.* v. *Tomlinson*, 7 C. & P. 183.

(*Administering Poison, &c.* p. 691.)

Where poison was alleged to have been caused to be taken with intent to kill *A.*, the evidence showing the intent to have been to kill *B.*, it was held a fatal variance, but a fresh indictment directed, alleging the intent to be to murder generally. *R.* v. *Ryan*, 2 Mo. & R. 213.

(*Malicious Mischief*, p. 694.)

A steam-engine used in draining and working a mine, had been stopped and locked up for the night. The prisoner got into the engine-house and set it going, and there being no machinery attached, the engine went with great velocity, and received damage; held, that this was a damaging of the engine within the stat. 7 & 8 Geo. 4, c. 30, s. 7. *R.* v. *Norris*, 9 C. & P. 241.

A beginning to demolish by burning is within the eighth section of the same statute, although, by the interference of the police, further mischief is prevented; but injuring moveable shutters is not a demolishing of the house within that statute. *R.* v. *Howell*, 9 C. & P. 437.

If part of the object of the rioters be to demolish a house, the act of demolishing is equally within the statute, although there may also be a distinct and different injury intended. *Ibid.*

Where the indictment, on 7 Will. 4, & 1 Vict. c. 85, s. 2, described the means (*i. e.* striking and kicking on the head and back and throwing on the floor,) by which the bodily injury was occasioned, but did not state the nature and situation of the injury, it was held by the Judges to be sufficient, even assuming, for the sake of the argument, that it was necessary to state the nature and situation of the injury, as the description of the means in that indictment necessarily involved the nature and situation of the injury. *R.* v. *Cruse and Wife*, 8 C. & P. 541.

Where the charge of felony includes an assault, if one count be good the prisoner may be convicted of the assault although all the other counts are bad. *R.* v. *Nicholls*, 9 C. & P. 267.

MANDAMUS.

Is not grantable until the proceedings on the first record are complete. *R.* v. *Baldwin*, 8 Ad. & Ell. 947; and 4 P. & D. 124.

MANOR, p. 695.

The lord being *primâ facie* entitled to all waste lands within the manor, the *onus* of their being private property lies on the party claiming them; if the claim be made by a tenant of the adjoining premises, it will be presumed to have been made for his landlord's benefit, and the possession would not be adverse as against him: evidence of the public in general throwing rubbish on waste land, affords an inference in favour of the lord's, rather than of any individual's right, and where such waste has been inclosed above 20 years by a supposed licence, the party can only be turned out of the possession by the lord, upon evidence of some act done, from which a legal revocation of the licence may be inferred. *Doe* d. *Dunraven* v. *Williams*, 7 C. & P. 332.

Where in ejectment to recover waste enclosed within 10 years, the lessor of the plaintiff claimed as devisee under a will, whereby the testator devised certain lands subject to the charge of a gross sum payable to the testator's daughter, to trustees until his son (the lessor of plaintiff) should attain 23, and then to him, it was held, first, that parole evidence of holding courts for 35 years past, and appointment of gamekeepers by the trustees, was sufficient *primâ facie* evidence of a manor, and of the lessor of the plaintiff's being the lord, although no evidence of court rolls or other documents was produced; 2dly, that the Court could not infer that the legal estate was outstanding in the incumbrancer; and lastly, that as to the encroachment, however at first a licence might be presumed, it was sufficiently put an end to by entry and breaking down the enclosure a few days only before the action was brought. *Doe* d. *Beck* v. *Heakin*, 6 Ad. & Ell. 495.

MAP.

A lease professed to demise to the plaintiffs all mines and minerals "in, upon, or under all or any of the messuages or tenements, fields, closes, or parcels of land described and set forth in the map thereunto annexed; and also in, upon, or under all or any part of that large tract of land called Mold Mountain; all which premises are situate, &c., and are bounded, &c., and all which are particularly described, delineated, and distinguished in the map or plan thereof annexed to these presents, and which by agreement of all the said several parties thereto, was meant and intended to be taken as part of that indenture:" held, that the words of the demise were not to be controlled or restrained by the map, but might receive full effect, and be held to include a particular spot, the boundary of which could not be traced with strict accuracy upon the map, by reason of the smallness of the scale upon which it was drawn. *Taylor* v. *Parry*, 1 Scott, N. S. 576.

MARKET.

Upon evidence of a market immemorially holden in certain places within a manor by the lord, a jury may be warranted in inferring a grant of it to be held in any convenient place within the manor, and of course with the power incident thereto, of removal from time to time. *De Rutzen* v. *Lloyd*, 5 Ad. & Ell. 456.

A market may be held anywhere within the precinct of the original grant. *Vernon* v. *Salkold*, 3 East. 538; *Dixon* v. *Robinson*; 3 Mod. 108; *R.* v. *Cotterell*, 1 B. & Ad. 67.

Where the lord removed the market and demised the site of the new one to lessees, and by the terms of the lease a power was given of imposing tolls on all persons for selling or exposing goods to sale, there being no evidence that stallage had ever been paid at the old market: it was held that the removal was bad, as imposing restrictions on the liberty of erecting stalls; to render it valid, the site to which the market is removed ought to be on the soil of the lord, and it is essential that he should have the correction of it. *R.* v. *Starkey*, 2 N. & P. 165.

MARRIAGE, p. 698.

The provisions of the Marriage Act, authorising the Judges of the Court to give consent to the marriage of an infant, do not extend to the case of a father beyond seas unreasonably witholding his consent, but solely to the case of a father being *non compos*, and the guardian or mother mentioned in the Act. J. C. *ex parte*, 3 Myl. & Cr. 471.

Under the 4 Geo. 4, c. 76, the marriage cannot be declared void for undue publication of banns, unless both parties are cognizant of the false name and accessory to the fraud, the act of one not prejudicing the other, unless a participator, and there is no difference in cases where the undue publication amounts to an absence of all publication; where the banns had been published in the lifetime of the former husband of the wife, although the marriage was not solemnised until after his death, it was held to amount to *no* publication, but there being no evidence of knowledge by the second husband of the former marriage, that it fell within the rule above stated; it appearing also that the banns had been published in a false Christian name of the wife, alleged to have been assumed with the cognizance of both parties to deceive the guardian of the wife, who was alleged to be a minor, the Court discrediting the evidence as to the husband's knowledge, held the libel to have failed in proof. *Wright* v. *Elwood*, 1 Curt. (ARCHES) 662.

So where the marriage was solemnised under an invalid licence, it was held that it must appear to have been done with the knowledge of both parties, and there not being evidence of that, the libel was refused. *Dormer* v. *Williams*, *Ib.* 870.

Where the husband was a minor and the wife a person of advanced age, and sister of the party to whom the minor had been confided as a pupil, the banns published with the omission of part of the name of baptism, by which he was more generally known, and the marriage clandestine and kept secret above 12 months; it was held void under 4 Geo. 4, c. 7, as a knowingly and wilfully intermarrying without due publication of banns. *Tongue* v. *Allen*, 1 Curt. (ARCHES) 38, confirming the judgment below; and the judgment was afterwards affirmed by the Judicial Committee of the Privy Council.

In order to prove a Scotch marriage the assent of both parties must be very clearly and distinctly proved. *Graham's Case*, 2 Lewin's C. C. 97.

The marriage of a Protestant in Ireland to a Roman Catholic, by a Roman Catholic priest is void by the stat. (IRISH,) 19 Geo. 2, c. 33.

Where the marriage of an officer was in 1815 by a chaplain of the British army within the lines of the army serving abroad, although not in a country in a state of actual hostility, and although the authority of the officer's superior in command was not obtained; it was held valid within the 9 Geo. 4, c. 91. *Waldegrave Peerage*, 4 Cl. & Fi. 649.

A marriage between an Englishman and a domiciled French lady, at the house of the British ambassador at Paris, by the chaplain to the embassy, is a valid marriage, under the statute 4 Geo. 4, c. 91. By the law of France, the marriage of a son under the age of 25 years, being null and void without consent; *Quære*, whether an Englishman above the age of 21 years, but under the age of 25 years, contracting a marriage in France according to French forms with a French lady of full age can, in the court of this country, proceed for the purpose of annulling the marriage by reason of such minority, and want of consent. *Lloyd* v. *Petitjean*, otherwise *Lloyd*, 2 Curteis, 251.

The superintendent registrar has no power to grant his certificate pursuant to 6 & 7 Will. 4, c. 85, s. 7, in cases where it is proposed that the marriage shall take place out of his district. *Ex parte Brady*, 8 Dowl. 332.

In Ireland the marriage of two Roman Catholics by a Roman Catholic priest is good; and if a person at the time of such marriage declares himself to be a Roman Catholic, and the woman to be a Roman Catholic, this is a good marriage as against him; and if he be afterwards tried for bigamy on this marriage, (he having been before married to another wife who was still alive,) he will not be allowed to set up his supposed Protestantism as a defence to the charge. *R.* v. *Orgill*, 9 C. & P. 80.

(*Dissolution of*, p. 706.)

A foreign divorce cannot dissolve an English marriage. *M'Carthy* v. *De Caix*, 2 Russ. & M. 614.

An allegation in the libel as to the residence of the parties was expunged; the Court being expressly prohibited by the Act from inquiring into such residence, after a marriage once celebrated. *Ray* v. *Sherwood*, 1 Curt. (ARCHES) 193.

The wife's legal domicile is that of her husband, and she is amenable to the jurisdiction there in force: where the husband domiciled in Scotland, was married in England, and made a settlement on his Scotch estates, and they went to reside there after the marriage, but shortly afterwards returned to England, where articles of separation were executed, from which time she resided abroad, and the husband remained domiciled in Scotland, although residing occasionally in England where the duties of office required his attendance; held, that it was competent to the Scotch Courts to entertain a suit for dissolving the marriage, and that an edictal citation and actual intimation by personal service of a copy of the summons was a good citation. *Warrender* v. *Warrender*, 2 Cl. & Fi. 488; affirming the interlocutor of the Court below.

But see *Lolly's case* cited *ib.*, and Russ. & Ry. C. C. 237, as to the invalidity of a sentence of divorce pronounced in Scotland between parties married in England, to protect a husband from the consequences of bigamy where contracting a second marriage, whilst his first wife is living: and the case of *M'Carthy* v. *De Caix*, *supra*.

(*Breach of Promise*, p. 706.)

In *assumpsit* for breach of promise of marriage, pleas alleging that the plaintiff was unchaste, &c. and had intercourse with *H. P.*; and secondly with persons unknown; were held sufficient on demurrer. *Young* v. *Murphy*, 3 Bing. N. C. 54; and 3 Sc. 379.

A mere expression to a third person of an intention to marry the plaintiff is not sufficient to support the action. *Cole* v. *Cottingham*, 8 C. & P. 75.

If the declaration be coupled with a condition, *e. g.* "as soon as your business is settled," performance must be averred. *Ib.*

Qu. Whether an action be maintainable against a clergymen for not celebrating a marriage. *Davis* v. *Black*, 1 G. & D. 432.

MEDICAL WITNESS. See 6 & 7 Will. 4, c. 89.

MINE.

May be followed when, 2 Vent. 342.

MISNOMER, p. 708.

Where a plaintiff has sued a defendant by his wrong Christian name, but has declared against him by his right Christian name, the proceeding is regular under the stat. 3 & 4 Will. 4, c. 42, s. 11. *Hobson* v. *Wadsworth*, 8 Dowl. 601.

See above tit. ABATEMENT.

Where an illegitimate child, six weeks old, was baptised by the name of *E.*, after which for a few days only it was called by its name of baptism and its mother's name; it was held, to be sufficient evidence to go to a jury, whether it had acquired by reputation its mother's name, and to warrant their finding the child to be properly described by that name in the indictment. *R.* v. *Evans*, 8 C. & P. 765.

Where the child was illegitimate, and the only evidence of its surname being "Waters" was that of a person who took it to be baptised, and said at the time that it was Eleanor Waters's child; it was held to be insufficient proof of its having acquired that name. *R.* v. *Waters*, 7 C. & P. 250, and cited 8 C. & P. 766.

MISJOINDER.

Where an indictment for stabbing contained the usual counts, and one for a common assault, the verdict of guilty was allowed to be entered on the count for stabbing with intent to do grievous bodily harm; and it was held, by the 15 judges, on the objection for misjoinder, that the conviction was good. *R.* v. *Jones*, 8 C. & P. 776.

MORTGAGE, p. 789.

The 1 Will. 4, c. 60, explained by 4 & 5 Will. 4, c. 25, s. 2, applies to mortgagees or their heirs. *Whitton, ex parte*, 1 K. 278.

MURDER, p. 709.

(*Proof of Death, &c.* p. 709.)

On a charge of murder, the evidence showing the body to be that of a different party from the one charged in the indictment to have been killed, it was held, that until proof of the actual death of the party alleged to have been killed, the prisoner could not be called on to give any account. *R.* v. *Hopkins*, 8 C. & P. 591.

Where the indictment for the murder of a new-born child by strangling averred that the prisoner did bring the child forth of her body alive; it was held, that the jury must be satisfied that the child was entirely born before

the act committed by the prisoner: and Parke, B. thought that if so born, although attached by the umbilical cord, the prisoner might be convicted of murder. *R.* v. *Crutchley*, 7 C. & P. 814. And see *R.* v. *Reeves*, 9 C. &. P. 25, where Vaughan, J. held that the killing a child so attached was murder.

On an indictment for the murder of a new-born child, it must also be proved that the child was actually and entirely born in a living state, and proof of its having breathed is not decisive to show that it was born alive. *R.* v. *Ellis*, 7 C. & P. 850.

On a charge of child murder, it appeared that the child must have died before it had an independent circulation; held, that as the child had never had an independent circulation, the charge of murder could not be sustained. *R.* v. *Wright*, 9 C. & P. 754.

(*Principals and Accessories*, p. 710.)

Where, on an indictment for the murder of *A. B.*, by administering poison, the proof was that the prisoner gave it to an unconscious agent to administer as a medicine, having the intent to murder, and who neglecting to do so, it was afterwards accidentally administered by a third party in a larger quantity than directed by the prisoner, but the quantity directed by him was more than sufficient to cause death; it was held, that he was properly convicted. *R.* v. *Michael*, 2 Mood. 120; and 9 C. & P. 356.

If several persons act together with a common intent, every act done by each of them in furtherance of that intent is done by all. If a deadly weapon be used, an intention to kill is to be inferred, but not from a blow with a fist. From continued violence after much beating, an intention to kill may be inferred. *Macklin and others*, 2 Lew. Cr. Cases, 225.

Where two agree to commit suicide, and the means used only take effect on one, the survivor may be convicted of murder. *R.* v. *Alison*, 8 C. & P. 418.

(*Cause of Death*, p. 711.)

Where a wound is wilfully and without justifiable cause inflicted, and ultimately becomes the cause of death, the party who inflicted it is guilty of murder, though life might have been preserved if the deceased had not refused to submit to a surgical operation. *R.* v. *Holland*, 2 M. & R. 351.

A count which charges exposure as the cause of death, is not supported by proof that it only accelerated the death. *Stockdale's Case*, 2 Lew. Cr. Cases, 220.

Where the death was charged to be by suffocation by placing the hand over the mouth, it was held, that if death were caused by any violent means used to stop respiration, it was sufficient to support the indictment. *R.* v. *Waters*, 7 C. & P. 250.

(*Venue.*)

Where the injury was received in one county, but the death was in another, the inquest was rightly held in the latter. *R.* v. *Grand Junction Railway Company*, 3 P. & D. 57 *n.*

(*Malice prepense*, p. 711.)

Where the death is shown to have been occasioned by the hand of the prisoner, it lies on him to show by evidence, or inference from circumstances, that the offence does not amount to murder. *R.* v. *Greenacre*, 8 C. & P. 35. *Qu.*

Where the evidence of the death having been occasioned by the act of the prisoner arose from his own statements, and there was no proof of its having

been accidental; it was held, that the jury could not legally infer it. *R.* v. *Morrison*, 8 C. & P. 22.

Where there was no evidence of actual or intended violence to the prisoner, on the part of the deceased and his companions, who, in a drunken and turbulent state, met the prisoner at night, and who, apprehending violence, drew a knife, and inflicted the wound which occasioned the death; it was held, that there being nothing to show the killing was necessary in self-defence, it amounted to manslaughter. *R.* v. *Bull*, 9 C. & P. 22.

All contests in anger being unlawful, where death is occasioned by an act of the prisoner in a struggle of that kind, it amounts to manslaughter. *R.* v. *Canniff*, 9 C. & P. 359.

Where a party enters into a contest, being armed with a deadly weapon, with intent to use it, it will be murder in case of death ensuing; but if used in the heat of provocation, without such previous intent, it will only amount to manslaughter; if used in the necessary defence of his own life, it will be justifiable homicide. *R.* v. *Smith*, 8 C. & P. 161.

The master of an apprentice is bound to provide medical attendance for him during sickness, and is criminally responsible where death is occasioned by the want of such assistance: in the case of a servant, the master is not bound by law to provide such assistance. *R.* v. *Smith*, 8 C. & P. 153.

A mere negligent act of omission, as by a steersman or captain omitting to keep a good look out, held not such misconduct as to render them indictable for manslaughter. *R.* v. *Allen*, 7 C. & P. 153; see also *R.* v. *Green*, *ib.* 156.

If a driver, by racing with another carriage, lose the control of his own horses, and his own carriage is upset and a party thrown off it and killed, it is manslaughter in the driver. *R.* v. *Timmins*, 7 C. & P. 499.

(*Manslaughter*, p. 721.)

The conductors of steam-vessels navigating public rivers are as much liable for injury by improper management or negligence, as parties occasioning it by furious or negligent driving on the highway. *R.* v. *Taylor*, 9 C. & P. 672.

A medical man, though duly qualified to practice, yet if by gross unskilfulness he occasion death, will be guilty of manslaughter. *R.* v. *Spilling*, 2 Mo. & R. 107.

Where the prisoner, being in *loco parentis*, inflicted punishment on a child, and compelled it to work for an unreasonable number of hours and beyond its strength, and thereby accelerated consumption and death, but did so under a full belief that the illness was feigned, and that the deceased might really have done the work, it was held to be only a case of manslaughter. *R.* v. *Cheeseman*, 7 C. & P. 455.

So where the prisoner in anger with her child, but intending only to frighten it, threw a piece of iron at it, which accidentally struck another child, and caused its death, it was held to amount to manslaughter. *R.* v. *Conner*, 7 C. & P. 438.

An iron-founder having furnished cannon, one of which being imperfect and returned, he had filled the flaw with lead and returned it, and upon being fired, it burst and killed a man, it was held to be manslaughter. *R.* v. *Carr*, 8 C. & P. 163.

To reduce the offence to that of manslaughter, by showing previous provocation, the jury must be satisfied that the act was done in consequence of

such provocation, and not of previous malice. *R.* v. *Kirkham*, 8 C. & P. 115.

Where a policeman ordered a street musician, who had collected at night a number of disorderly persons around him, to move on, and on his refusal laid his hand on his shoulder to remove him, and the party drew a razor and wounded the officer; it was held, that upon a provocation so slight, if death had ensued it would have been murder; *aliter*, if the party had been struck a blow or knocked down by the policeman, as he would have exceeded his duty in so doing. *R.* v. *Hagan*, 8 C. & P. 167.

If a man kill his wife or the adulterer in the act of adultery, it is manslaughter, and not murder. *Pearson's Case*, 2 Lew. Cr. Cases, 216.

One convicted of manslaughter is liable to transportation, although the indictment does not conclude *contra formam*, &c. *R.* v. *Chatham*, 1 Ry. & M. C. C. 403; and *Ib.* 404.

(*Concealment of Birth.*)

The mother may be found guilty of concealing the birth of her child, although she may have before communicated the fact of her pregnancy. *R.* v. *Douglas*, 1 Ry. & M. 480.

To constitute the offence of concealment, under 9 Geo. 4, c. 31, s. 14, it is essential that some act have been done by the prisoner towards disposal of the body; where it slipt from the mother whilst on the privy for another purpose, it was held not to be enough, although the prisoner denied the birth. *R.* v. *Turner*, 8 C. & P. 755.

Where the prisoner was only in the act of proceeding with the body of the child towards the place of intended concealment, but was stopped before the act was complete, held insufficient to constitute the offence under 9 Geo. 4, c. 31, s. 14. *R.* v. *Snell*, 2 M. & R. 44.

On an indictment for child-murder, no one but the mother can be convicted of a concealment of the birth of the child. *R.* v. *Wright*, 9 C. & P. 754.

On an indictment for concealing the birth of a child, a final disposing of the body must be shown; hiding the body in a place from which a further removal is contemplated will not support the indictment. *R.* v. *Ash*, 2 Mo. & R. 294.

On an indictment for child-murder, bad for not stating the name of the child, or accounting for the omission, no conviction for concealing the birth can take place. *R.* v. *Hicks*, 2 Mo. & R. 302.

(*Witness—Coroner.*)

In a case of manslaughter, it is the duty of the coroner to bind over all those witnesses who prove any material fact against the party accused, and not those who are called for the purpose of exculpating him. *R.* v. *Taylor*, 9 C. & P. 672.

If, however, the coroner bind over all the witnesses on both sides, no blame is imputable to the clerk of indictments if he require them all to be put on the back of the bill, and examined before the grand jury. *Ib.*

NEGLIGENCE.

In an action against the proprietors of a steam-vessel, to recover compensation for damage done to goods sent by them as carriers, if, on the whole, it be left in doubt what the cause of the injury was, or, if it may as well

be attributable to perils of the seas as to negligence, the plaintiff cannot recover; but if the perils of the seas required that more care should be used in the stowing of the goods on board than was bestowed on them, that will be negligence, for which the owners of the vessel will be answerable. *Muddle* v. *Stride*, 9 C. & P. 380.

In an action by a patient against his medical man, for an injury by improper treatment; the latter being bound to bring to the exercise of his profession a reasonable and competent degree of art and skill, the question for the jury is whether the injury is to be attributed to the want of that degree of skill or not. *Lanphier* v. *Phipos*, 8 C. & P. 475.

If *A.* place a dog with *B.*, and the dog be received by *B.*, to be kept by him for reward, to be paid to him by *A.*, *B.* is not answerable for the loss of the dog, if he took reasonable care of it; but if the dog be lost, the *onus* lies on *B.* to acquit himself by showing that he was not in fault with respect to the loss. *Mackenzie* v. *Cox*, 9 C. & P. 632.

Where the plaintiff hailed an omnibus, which stopped for him, and he was on the step of it, in the act of getting in, when he sustained injury by the sudden going on by the driver, it was held, that the stopping of the omnibus implied a consent to take the plaintiff as a passenger, and was evidence to go to the jury in support of the allegation in the declaration that he was so. *Brien* v. *Bennett*, 8 C. & P. 724.

The plaintiff went into the defendant's (a surgeon's) shop, to be bled; he was bled by an apprentice; the master is liable for the consequences of the apprentice's want of skill. *Hancke* v. *Hooper*, 7 C. & P. 81.

Where, at the time of shipping goods on board, the shipper knew that the ship was chartered, held that the consignees could not maintain any action against the owners for injury by bad stowage, nor where the shipper was warned as to the way in which the goods were to be stowed. *Major* v. *White*, 7 C. & P. 41.

(*Variance—Damages.*)

The plaintiff, in an action against an attorney for negligence in conducting a suit, alleges that he was "forced to pay" certain sums in consequence of the defendant's negligence; he can recover only the amount actually paid by him, although a liability to a greater amount, on the part of the plaintiff, has been incurred in consequence of the alleged negligence. *Jones* v. *Lewis*, 9 Dowl. 143.

NONSUIT.

Where the plaintiff elects to be nonsuited, he cannot afterwards move to set aside the nonsuit. *Barnes* v. *Whiteman*, 9 Dowl. 181. See Vol. I. tit. NONSUIT.

NOT GUILTY.

Where a statute enables defendants to plead the general issue and give the special matter of defence in evidence, the plea of Not guilty so pleaded is not affected by the New Rules of Hil. 4 Will. 4, but operates as before they were framed, putting in issue, not only defences peculiar to the statute, but all that would have arisen at common law. Therefore the Court, in the exercise of its discretion under stat. 4 Ann, c. 16, s. 4, will not give leave to plead Not guilty "by statute," together with a special plea, although such special plea raise a defence quite independent of the statute. *Ross* v. *Clifton*, 11 A. & E. 631.

NOTICE.

In trespass for shooting a dog, the Judge received a copy of a notice that all dogs found trespassing would be shot, painted on a board fixed in the plantations, without notice to produce the original. *Bartholomew* v. *Stephens*, 8 C. & P. 728.

Grant of a licence to mine and search for, and also to carry away and convert to their own use, the minerals raised; the deed provided that in case of failure, after notice to work, to keep six able miners constantly employed, it should be lawful, after one month from such notice, for the grantors to re-enter, and that the licence should be absolutely determined and void; held, first, that such grant passed an interest capable of being assigned; secondly, that a notice in the terms, "that *unless* the grantee kept six miners at work, the grantor would re-enter at the expiration of one month," containing no intimation of an election to determine the grant on account of the forfeiture which had been incurred, but only that if a further breach of the covenant should be committed, the grantor would enter, &c. was not sufficient to avoid the licence and render the re-entry lawful; and, lastly, that upon such re-entry and exclusion the plaintiff might properly sue in case. *Muskett* v. *Hill*, 5 Bing. N. C. 694; and 7 Sc. 855.

(*Notice of Action*, p. 729.)

The clause in the Highway Act, 5 & 6 W. 4, c. 50, s. 109, requiring twenty-one days' notice of action to justices, &c. does not affect the month's notice required by the 24 G. 2. c. 44. *R.* v. *Boston*, 4 P. & D. 183.

Where the Act declared that no action should be brought against any *person* for anything done in pursuance of it, without twenty-one days' notice given to the intended defendant, it was held to include the company, and that they were entitled to notice of an action for obstructing a road which the plaintiff claimed to use. *Boyd* v. *Croydon Railway Company*, 4 Bing. N. C. 669; 6 Sc. 461; and 6 Dowl. 721.

Where a gamekeeper was appointed and registered before the passing of 1 & 2 Will. 4, c. 32, it was held that he was not entitled to notice of action under s. 47. *Lidster* v. *Borrow*, 1 P. & D. 447.

(*Of Appeal*, p. 731.)

Where notice of appeal against an order of two justices, under 53 Geo. 3, c. 127, had been served upon one only, it was held to be sufficient; and the Act being silent as to notice, the justices at sessions could not engraft the requirement of notice upon the Act of Parliament. *R.* v. *Staffordshire Just.* 6 N. & M. 477; and 4 Ad. & Ell. 842.

Where a township, having a church and its own churchwardens, was wholly independent of the parish, except contributing a small sum to the repair of the church, it was held, that the churchwardens of the township were not by virtue of their office overseers of the poor; and that a notice under the 4 & 5 Will. 4, c. 76, s. 73, signed by the overseers of the township only, was valid: upon an objection that the notice was not signed by the assistant overseer, it was held that the party must show that it was his duty to sign. *R.* v. *Yorks., North Riding*, 6 Ad. & Ell. 86

(*Service*, p. 731.)

A party convicted by two justices in special sessions, under the General Highway Act, 5 & 6 Will. 4, c. 50, ss. 47. 103, on information by one of the

surveyors, cannot be heard on appeal to the quarter sessions under s. 105, unless he have served notice on both the convicting justices.

It is not sufficient that he has served notice on the surveyors, and has also served a notice on one of the justices, addressed to both, which that justice has transmitted to the clerk of the special sessions, with an observation to him that he will know how to act upon it. *R.* v. *Bedfordshire Justices*, 11 A. & E. 134; and 3 P. & D. 21.

So, although at the time of giving notice the conviction had in fact been signed only by one justice; at least if there be no proof that the conviction so signed was communicated to the appellant before he gave notice, so that he might have been misled thereby. *R.* v. *Cheshire*, 11 A. & E. 139.

So on a conviction under 9 Geo. 4, c. 64 (Alehouses). *R.* v. *Cheshire Justices*, 3 P. & D. 23, *n.*

Where an order of sessions has been returned to the Queen's Bench under a *certiorari*, and a rule is then obtained to quash the order, it is a good preliminary objection to an argument on such rule that no notice of it has been served on the justices who made the order, although served on the parties interested in supporting it. *R.* v. *Spackman*, 9 Dowl. 1060.

Plea in trespass justifying the entry under a judgment and execution in the Court of Requests, the local Act authorising service either personally or by leaving at the dwelling-house, lodging, or place of abode; held, first, that where the party was a seafaring man, usually absent for six months, service at the lodging of the wife was sufficient, and that the action was to be deemed to be brought against the defendant "on account of an order, determination, or decree of the commissioners," entitling him to give the special matter of defence in evidence under the general issue. *Culverson* v. *Milton*, 2 Mo. & R. 200.

Notice of appeal against a borough rate, served on the town-clerk, is sufficient, as being on the servant of the parties making the rate: the Act giving the appeal, and empowering the recorder to hear and determine, as in the case of appeals against county rates. *R.* v. *The Recorder of Carmarthen*, 3 N. & P. 19.

(*Constructive*, p. 732.)

Where the solicitor employed both by mortgagor and mortgagee, obtained the execution of a deed in such an irregular and informal manner as, if he had been an innocent person, ought to have excited his suspicion, and to have put him upon making inquiries; it was held to amount to constructive notice to his client of the fraud by which it was obtained, and a re-assignment was decreed; and affirmed upon appeal, but without costs. *Kennedy* v. *Green*, 3 Myl. & K. 699.

In trespass for taking goods, the question was as to the bankruptcy of the plaintiff; it was held, that letters found in his possession after the bankruptcy, with post-marks of a date previous thereto, were evidence that he received them before, and to show, in explanation of his conduct, that he had received intimation of the facts mentioned in the letters having taken place, although they were not evidence that the facts stated really did so. *Cotton* v. *James*, 1 Mo. & M. 276.

Devise for life, remainder to *A.*, the testator's heir, upon condition that within three months after the testator's death he should convey certain leasehold premises, and in default then over; on a special case, stating the will and facts, it was held that, it not being expressly stated that the heir had notice of the condition within the period limited, the heirs of *A.* were

not precluded by the conditional limitation, and that the Court could not infer the fact of *A.* having had such notice. *Doe* v. *Crisp*, 1 P. & D. 37.

(*Sufficiency of Notice.*)

Where it is questionable whether sufficient notice has been given to the defendant of a declaration having been filed, the plaintiff must sign judgment for want of a plea at his own peril, and the Court will not assist by giving him leave to take such a proceeding. *Spriggins* v. *White*, 9 Dowl. 1000.

NUISANCE.

Case for a nuisance to adjoining premises, the plaintiff must, under the general issue, not only show the existence of the nuisance, but that the defendant was the person who occasioned it. *Dawson* v. *Moore*, 7 C. & P. 25.

In case upon an issue whether the plaintiff was possessed of the "messuage and premises," &c. in which the injury was committed, it was held that proof of his being in the separate occupation of *part of the house* was sufficient to support it. *Fenn* v. *Grafton*, 2 Bing. N. C. 617.

(*Agency*, p. 737.)

In case for an injury by negligent driving, the ownership of the carriage, and the fact of its being driven by the defendant's servant, as alleged in the inducement, are admitted by the plea, not guilty. *Emery* v. *Clarke*, 2 Mo. & R. 260. And see *Tuverner* v. *Little*, 5 Bing. N. C. 678.

The bargemen navigating a barge are to be taken *primâ facie* to be employed by the owner. *Joyce* v. *Capel*, 8 C. & P. 370.

If a servant, without his master's knowledge, take his master's carriage out of the coach-house, and with it commit an injury, the master is not liable, because he has not in such case entrusted the servant with the carriage. But whenever the master has entrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it; but the master in such case will be liable, because he has put it in the servant's power to mismanage the carriage, by entrusting him with it. Therefore, where a servant, having set his master down in Stamford-street, was directed by him to put up in Castle-street, Leicester-square, but instead of so doing went to deliver a parcel of his own in the Old-street Road, and in returning along it drove against an old woman, and injured her, it was held that the master was responsible for his servant's act. *Sleath* v. *Wilson*, 9 C. & P. 607; 2 Mo. & R. 181.

A van was standing at the door of *A.*, from which *A.*'s goods were unloading, and *A.*'s gig was standing behind the van. *B.*'s coachman, who was driving *B.*'s carriage, came up, and there not being room for the carriage to pass, the coachman got off his box, and laid hold of the van horse's head; this caused the van to move, and thereby a packing-case fell out of the van upon the shafts of the gig, and broke them; held, that *B.* was not liable for this, as the coachman was not acting in the employ of *B.* at the time this matter occurred. *Lamb* v. *Lady Elizabeth Palk*, 9 C. & P. 629.

Where the defendants, having a carriage of their own, were in the habit of hiring horses for the drive or the day of the same job-mistress, and giving a gratuity to a driver of the latter, for whom they also provided a coat and hat, which were used on each occasion of his accompanying them, and the injury happened during his leaving the horses unattended whilst he went to deposit the hat; it was held, that he was not to be deemed the servant of the defendants, so as to render them liable for the injury arising from such negligence. *Quarman* v. *Burnett*, 6 M. & W. 499.

Where to the declaration for an injury by negligent driving by the defendant, the general issue was pleaded; it was held, that the issue of negligent driving by the defendant was sufficiently made out by proof of his having permitted another to drive, by whose mismanagement the injury was occasioned. *Wheatley* v. *Patrick*, 2 M. & W. 650.

Where the defendants hired a master porter to remove a barrel of flour from their warehouse, and the latter hired a carman, and both their men were engaged in loading it, in doing which it fell upon and injured the plaintiff, through the defectiveness of the rope furnished by the porter; it was held, that the defendants were liable, it being immaterial whether they employed their own servants or engaged others more expert, and left the removal to their superintendence. *Randelson* v. *Murray*, 3 Nev. & P. 239.

A foreign vessel in the Thames had employed a pilot in removing the ship from one dock to another, in the course of which a collision took place, and the plaintiff's barge was injured; in an action for the damage against the owner, it was held, on a plea that the vessel was at the time under the charge of a pilot, under and in pursuance of the provisions of 6 Geo. 4, c. 125, that the owner was not liable, although the circumstances might not have been such as would have rendered it compulsory on the owner to have employed the pilot: the terms of the statute, "wanting a pilot," were to be taken as applying to any case in which the owner thinks fit to employ one. *Lucey* v. *Ingram*, 6 M. & W. 302.

(*Proof of Injury*, p. 740.)

A declaration in case against a canal company stated that, by the Canal Act (stat. 32 Geo. 3, c. 101), the company was formed to make and maintain the canal, with power to take tolls, and all persons had free liberty to navigate the canal; and if any boat should be sunk in the canal, and the owner or person having care of it should not without loss of time weigh it up, it was, by the statute, to *be lawful* for the company to weigh it up, and detain it till payment of expenses; that the company completed the canal, and took tolls on it; that a boat sunk in the canal, so that vessels passed with difficulty in the day, and at night were in danger of running foul of it; that although the company could and ought to have requested the owner, &c. to weigh it up, and if that was not done without loss of time, could and ought to have weighed it up, and in the meantime have caused a light or signal to be placed to enable boats to avoid it, yet the company did not cause the owner, &c. to weigh it up, nor did themselves weigh it up, nor place a light or signal, whereby plaintiff's boat, navigating the canal, ran foul of the sunken boat, and was damaged; held, by the Court of Exchequer Chamber (affirming the judgment of the Court of Q. B.), that the declaration disclosed a sufficient duty and breach. By the Court of Exchequer

Chamber: such duty was not created by the clause enabling the company to weigh the boat, but arose upon a common-law principle, that the owners of a canal, taking tolls for the navigation, were bound to use reasonable care in making the navigation secure, the want of which reasonable care might be collected from the declaration, although the complaint was ostensibly founded on the statute. *Parnaby* v. *Lancaster Canal Company*, 11 A. & E. 223; and 3 N. & P. 623.

The owners of a vessel disabled by the negligence of its crew are answerable for damage done by its accidentally drifting, when so disabled, against another vessel. *Seccombe* v. *Wood*, 2 M. & R. 290.

Where upon a grant of lands, houses, and premises, reserving all mines, &c., with liberty of ingress and egress for working the same, making compensation for damage, &c., the defendant worked so near the surface, without leaving proper supports, that the plaintiff's houses, lands, &c. fell in; it was held, that a plea, alleging the right to all mines, &c., and that the defendant was not bound to leave any support, could not be sustained, the defendant being bound to work in a reasonable mode. *Harris* v. *Ryding*, 5 M. & W. 60.

In case for causing offensive stenches to pass over plaintiff's land from a mixen made on the defendant's premises; plea, the occupation for twenty years before by the defendant of his land, and use of the mixen at all times, but not stating that the stenches therefrom had during all that time passed over the plaintiff's land; held that, *non obst. vered.* the plaintiff was entitled to judgment. *Flight* v. *Thomas*, 2 P. & D. 531; and 7 Dowl. 741.

In case for running down vessels, the question is, whether the plaintiff, by his negligence or improper conduct, substantially contributed to the *occurrence* of the injury of which he complains; *not* to the *amount* of it, but to its occurrence. Therefore, where a brig was carrying the anchor in a position contrary to the bye-laws of the river Thames, at the time when she came in collision with a barge, it was held, that the improper carrying of the anchor would not of itself be sufficient to make the owner of the brig responsible in damages, if the barge, by departing from the known rule of the river, brought herself into the situation in which the brig struck her, although but for the position of the anchor the collision would not have produced the injury complained of. *Sills* v. *Brown*, 9 C. & P. 601.

A nautical witness cannot be asked whether he thinks, having heard the evidence in the cause, that the conduct of the captain was correct or not. *Ib.*

The rule of the river is, that, if a light vessel is going free, and a loaded vessel is coming close hauled to the wind, it is the duty of the loaded vessel to keep her course, and of the vessel going free to bear away. *Ib.*

A steamer going with the usual speed during a fog, in a frequented channel, and after being hailed her speed is not diminished nor course altered, the owner is liable for the damage by collision, and the costs; vessels of this class being bound to use the utmost care. *Perth*, 3 Hagg. 414.

In a cause of collision, where it appeared that the vessel running down the other was on the larboard tack, and the latter on the starboard tack, and that a good look-out was not kept, the former was condemned in damages and costs. *Chester*, 3 Hagg. 316.

And where both vessels were beating to windward, but on contrary tacks, it was held that the one on the starboard tack ought to have held on her course, and that the damage having been occasioned by the wearing, she had no ground of action. *Jupiter*, 3 Hagg. 320.

The law of keeping on the proper side of the road applies to horses as well as carriages, but if a party be advancing furiously towards another who is on his proper side, the latter ought, nevertheless, if the road be sufficiently wide, to give way, for the purpose of preventing an accident, although in so doing he goes a little on to what would otherwise be the wrong side of the road. *Turley* v. *Thomas*, 8 C. & P. 103.

In case against commissioners of sewers for injury to the plaintiff's premises, by making a sewer by tunnelling, which it was found was proper to be made, and was skilfully and properly made, but that by proceeding with the work by open cutting, a greater chance of escape from injury would have been afforded; it was held that the court could not balance possibilities, and that to fix the commissioners, it should have been shown that the injury would not have happened if the sewer had been constructed by the latter mode of working. *Grocers' Company* v. *Donne*, 3 Bing. N. C. 34; and 3 Sc. 356.

(*For continuing a Nuisance.*)

Action on the case for continuing a nuisance to the plaintiff's market, by a building which excluded the public from a part of the space on which the market was lawfully held. It appeared that the building was erected in October 1838, under the superintendence and direction of the defendants, not on their own land, but on that of the corporation of K. (of which corporation they were members). The Earl of L. was the owner of the market in October 1838, and, in February 1839 he demised it to the plaintiff; and the market being afterwards obstructed by the building, this action was brought: held, that the defendants were liable for continuing the nuisance, although they had no right to enter upon the land to remove it, and that the action was therefore maintainable. *Thompson* v. *Gibson*, 7 M. & W. 456.

(*Damages*, p. 740.)

In case for injury to the plaintiff's horse by negligent driving, which after remaining six weeks at a farrier's was found to be permanently injured to the amount of 20*l.*, it was held, that the proper measure of damage was the amount of the farrier's charges for keep and attendance, and the difference in the value at the time of injury and at the end of the six weeks; but that the plaintiff could not claim the hire of another in the interval. *Hughes* v. *Quentin*, 8 C. & P. 703.

Under the 53 Geo 3, c. 159, limiting the extent of the liability of the owner to the value of the ship doing damage to another, such value must be by valuation and appraisement, and not of cost price and deduction: and the value of the ship occasioning the injury is to be ascertained at the time of the injury. *Dobree* v. *Schroeder*, 2 Myl. & Cr. 489. S. C. 6 Sim. 291.

(*Defence*, p. 741.)

In case for damage by the negligent driving of a cart by the defendant, it was held, that under the plea "not guilty," under the rule of Hil. 4, W. 4, the defendant could not show that the cart was not at the time driven by

him nor in his possession, those being facts stated in the inducement, of which the plea could not operate as a denial, and the misconduct in driving being the only wrongful act put in issue thereby. *Taverner* v. *Little*, 5 Bing. N. C. 678; and 7 Sc. 796.

In case for keeping a ferocious dog, which bit the plaintiff, it was held that the defendant might under the general issue avail himself of the want of proof that he ever knew that the dog was accustomed to bite. *Hogan* v. *Sharpe*, 7 C. & P. 755.

In case against *A.* and *B.* for burning sulphur, &c. in a place where the plaintiff was, thereby choking and injuring him; plea, that the plaintiff was wrongfully in the said place, and that after being requested by *A.* to depart, *B.*, by command of *A.*, placed and lighted, &c. to cause him to depart; held, first, that to sustain the plea the request to depart, and *A.*'s authority to *B.* must be proved; but that to entitle the plaintiff to a verdict on the general issue, the plaintiff must show that he had sustained some substantial damage. *Evans* v. *Lisle*, 7 C. & P. 562.

Action for negligence in not properly securing a cow of the defendant in a slaughter-house,—the declaration stated, that by means thereof the cow "ran at, butted at, gored, *killed and destroyed*" a cow of the plaintiff; plea, a payment of 30 *s.* into court, and that the plaintiff had sustained no greater damages; replication, that the plaintiff had sustained greater damages; held, that the defendant could not go into evidence to show that his cow had not killed the plaintiff's cow, as the contrary was admitted by the defendant's plea. *Lloyd* v. *Walkey*, 9 C. & P. 771.

In an action to recover a compensation in damages for an injury occasioned by an obstruction in a highway, it is for the jury to say whether or not the plaintiff was himself in any degree the cause of the injury—whether he had acted with such a want of reasonable and ordinary care as to disentitle him to recover. *Marriot* v. *Stanley*, 1 Scott, N. S. 392.

In a cause of collision for damage done by a foreign vessel whilst in charge of a pilot in the river Thames, for which pilotage had been previously paid before the ship could be cleared at the Custom-house, it was held, that as a proceeding *in rem* the jurisdiction was not affected by 6 Geo. 4, c. 125, and that the having a pilot on board did not exempt the owners from the liability, and that if the fault was wholly with the pilot, they might have their remedy over against him; also, that a foreigner cannot set up in a suit here as a defence a municipal law made to regulate municipal courts only, and contrary to the general rule of international law. *Girolamo*, 3 Hagg. 169.

A foreign ship, under charge of a pilot, running foul of a ship at anchor, was held liable for the injury, but not for the consequential damage to the cargo, where there was great negligence on the part of the crew of the latter ship. *Eolides*, 3 Hagg. 367.

Where in a cause of collision it appeared that the injury arose from the mismanagement of the vessel lost, but in the opinion of the Masters of the Trinity House, the master of the other vessel was guilty of great and culpable omission to render assistance after the collision, the Court, in dismissing the suit, condemned the latter in all costs and expenses. *Alt*, 3 Hagg. 321.

In case for injuring a bridge, by negligence in navigating, the plea, after alleging that the plaintiffs had wrongfully narrowed the channel, traversed that the injury was occasioned by any carelessness of the defendant; held,

that they were at liberty under such plea, upon failing to establish any default in the plaintiffs, to show also that they themselves had not been guilty of negligence. *Cross Keys Co.* v. *Rawlings*, 3 Bing. N. C. 71; and 3 Scott, N. S. 490.

In an action on the case for an injury occasioned to the plaintiff by the negligence of the defendant's servant in driving, it was held that if the injury were attributable in any degree to the incautious conduct of the plaintiff herself in crossing the road, the defendant would not be liable. *Hawkins* v. *Cooper*, 8 C. & P. 473.

In case by a servant against his employer, for injury by the breaking down of a van belonging to such employer, about which the plaintiff was employed in the carriage of goods, and which was alleged to be overloaded, it was held, that as the plaintiff must have known, probably better than his master, whether the van was likely to proceed safely, and as the making the master responsible would lead to the omission of the caution which a servant is bound to use in the service of his master, the action was not maintainable. *Priestley* v. *Fowler*, 3 M. & W. 1.

(*Indictment*, p. 748.)

Upon an indictment for obstructing a navigable river by the erection of a projecting embankment and causeway for landing, &c., the verdict of the jury being that they considered it to be a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration by the defendant, it was held, that the Crown was entitled to the verdict; the Court disapproving of the principle of considering whether the act indicted as a nuisance was productive of more public benefit than public inconvenience. *R.* v. *Ward*, 6 N. & M. 38; overruling the *dictum*, in *R.* v. *Russell*, 6 B. & Cr. 566, of Bayley, J.

Upon an indictment for a nuisance in a public harbour, by erecting piles, and thereby obstructing and rendering it insecure, the verdict finding that, by the defendant's works, the harbour was, in some extreme cases, rendered less secure, it was held, that the Court could not necessarily infer that the works must be a nuisance for which the defendants were criminally responsible. *R.* v. *Tindall*, 1 Nev. & P. 719.

The prosecutor of an indictment was ordered to give the defendant notice of the nuisances intended to be proved; and a rule for that purpose may be obtained without any affidavit, upon reading the indictment only. *R.* v. *Curwood*, 5 N. & M. 369.

A party is liable to be indicted under the stat. 3 & 4 Vict. c. 97, s. 15, if he designedly place on a railway substances having a tendency to produce an obstruction of the carriages, though he may not have done the act expressly with that object. *R.* v. *Holroyd*, 2 M. & R. 339.

OATHS, p. 542.

Declaration in lieu of the test, see 9 Geo. 4, c. 17.

By Roman-catholics, see 10 Geo. 4, c. 7, s. 14; abolition of unnecessary oaths, 5 & 6 Will. 4, c. 62; Mutiny Acts, 1 & 2 Vict. cc. 17 & 18.

Although the jury may use their general knowledge on the subject of any question, yet if any of the jurors have a particular knowledge as to which he can speak, arising from his being in the trade, he must be sworn as a witness. *R.* v. *Rosser*, 7 C. & P. 648.

Affirmations when permitted to be used in lieu of, in certain cases, see 1 & 2 Vict. c. 77.

OFFICER, p. 749.

See Com. Dig. tit. *Officer*, D. (2); 3 Mod. 150, as to a ministerial officer's appointing a *deputy*.

Where by the charter it was necessary that the constable of a borough should take the oath of office before he could be himself legally mayor of the borough and appoint a deputy, and he duly took the oath and appointed such deputy during the life of the then late king, and after the succession of his then present majesty he received a new grant of the office, it was held, that not having been sworn in before appointing the deputy, that appointment was invalid. *R.* v. *Roberts*, 5 N. & M. 130.

Where the Crown in a lease of lot and cope granted also to the same lessee the office of barmaster or steward of the barmote court, a judicial officer, regulating amongst other things the measure to be rendered by the miners to the lessee; it was held, that the grant of the office being to a party who was incapable of holding it, on the ground of his peculiar interest, was void. *Arkwright* v. *Cantrell*, 2 N. & P. 582; S. C. 7 Ad. & Ell. 565.

By charter the right of appointing a chaplain is in the governors, "*una cum assensu*" of the major part of the "inhabitants" of the vill; it was held, that it is not essential that the assent should be given at the same time as the nomination by the governors; assent at a meeting called subsequently is a sufficient compliance with the charter. The term "inhabitants" may receive its interpretation from the usage, and an usage restricting the right of assent to the payers of church and poor-rates, would be intended to be according to the charter. *R.* v. *Davie*, 6 Ad. & Ell. 374.

ORDER, p. 750.

Where impeachable by collateral evidence, see *R.* v. *Justices of Somersetshire*, *R.* v. *Justices of Cambridgeshire*, K. B. Mich. 1835; *Welsh* v. *Nash*, 8 East. In *R.* v. *Justices of Lancashire*, an order of removal was quashed on the ground of collateral affidavits showing that one of the justices making the order was interested in the removal. And see *R.* v. *Bolton*, 1 Ad. & Ell. N. S. 66.

An order to remove a clerk of the peace must set out the evidence. *R.* v. *Lloyd*, Str. 996.

OVERSEER.

An omission by an overseer to sign the burgess list under the 5 & 6 W. 4, c. 76, s. 15, whether it be wilful or not, subjects him to the penalty of sec. 48. *R.* v. *Burrell*, 4 P. & D. 207. *Semble*, that all the overseers should sign the list, and that where several overseers are appointed for several divisions of a parish, each acting separately for each division, it is not sufficient that each overseer should sign a separate list for his own division only. *Ibid.*

Trespass for levying a poors-rate under a warrant of distress issued by the defendants as justices, the rate being alleged to be void on the ground of the overseers having been unduly and fraudulently appointed at a meeting of borough justices; the jury having negatived the fraud, a new trial was refused; the appointment being a judicial act, and the validity of the appointment questionable on an appeal to the sessions, it cannot be questioned in a collateral way. *Pinney* v. *Slade*, 5 Bing. N. C. 319.

As to the appointment of overseers in a parish containing several chapelries, see *R.* v. *Worcestershire Justices*, 3 Nev. & P. 434.

The party having paid rent for the last three years to the parish officers for the tenement, and after having been once turned out having received the key again from them, it is not a case in which the justices have jurisdiction to expel him under 59 Geo. 3, c. 12, s. 24. *R.* v. *Midd. Justices*, 7 Dowl. 767.

The 4 & 5 Will. 4, c. 76, prohibiting a parish officer from supplying goods by way of relief to *any person* in the parish, repeals the penalty under the former Act, 55 Geo. 3, c. 137, s. 6; *semble*, therefore, an action cannot be maintained under the latter Act against an officer for a supply to an individual pauper, *Henderson* v. *Sherborne*, 2 M. & W. 237; supporting *Proctor* v. *Mainwaring*, 3 B. & Ad. 145.

An assistant overseer being a servant of the vestry, though with a limited authority, an appeal lies against his accounts; the time for giving notice of appeal to the next general sessions is to be calculated from the time of the parish having the opportunity of knowing the contents of the account, and the allowance of the account is to be considered as published at the time when deposited (according to 17 Geo. 2, c. 38, s. 2,) with the parish officers for public inspection; where, therefore, that was done on the 8th of May, the June sessions were the proper sessions to which the appeal was to be made. *R.* v. *Watt*, 2 N. & P. 367. See further, as to the liability of an overseer, *Eaden* v. *Titchmarsh*, 1 Ad. & Ell. 691.

PARLIAMENT.

Since the 3 Vict. c. 9, upon the certificate by the Speaker that an action is brought in respect of a publication made by the order of the House, it is imperative on the Court to stay the proceedings. *Stockdale* v. *Hansard*, 3 P. & D. 330; and 8 Dowl. 669.

PAROL EVIDENCE.

(*Inadmissible where, as superseding, &c.* p. 753.)

In covenant on a lease for breach in not repairing a greenhouse erected during the term, a plea that by an agreement, that in consideration of the erecting, &c. the party should be at liberty to remove, is bad, on motion in arrest of judgment. *West* v. *Blakeway*, 9 Dowl. 846.

Where, in the body of the bill it appeared as drawn for 200 *l.*, but the figures in the margin expressed it to be for 245 *l.*; it was held, that the words in the body must be taken to be the amount to be paid, and that the ambiguity being patent on the bill, evidence could not be received to explain it (*diss.* Coltman, J.). *Saunderson* v. *Piper*, 5 Bing. N. C. 425.

Where the local Act, empowering proprietors to contract for and convey lands, directed such contracts, &c. to be enrolled, and copies to be evidence; it was held, that such conveyances of land could only be in writing. *Doe* v. *Warwick Canal Co.* 2 Bing. N. C. 483; and 2 Sc. 717.

(*To contradict, &c.* p. 757.)

Where premises were conveyed "with the appurtenances thereto belonging," it was held that the deed, being sufficient to include a strip of garden, used with the house sold, the conditions of sale, excepting it, were inadmissible to contradict the deed. *Doe* v. *Wheeler*, 4 P. & D. 273.

(*In the case of a Will*, p. 762.)

Devise to *A.* for life, with remainder to her three daughters, *M. E.* and *A.* in fee; *E.*, a legitimate daughter of *A.*, had died six years before, but *E.*, an illegitimate daughter, was living at the date of the will. Evidence is admissible to show that the testator, not knowing of the death of the legitimate daughter, intended her as his devisee. *Doe v. Beynon*, 4 P. & D. 193.

Devise to *J. A.* the grandson of my brother *T. A.* in fee, charged with 100 *l.* to each of the brothers and sisters of the said *J. A.* *T. A.*, the brother, had two sons, Richard and Thomas; Richard had six children, sons and daughters, living at the date of the will, of whom *J. A.*, the lessor of the plaintiff, was one; Thomas had two sons, of whom *J. A.*, the defendant, was one, and one daughter; evidence of delarations by the testatrix, some months after making the will, that she had left her property to the defendant, are admissible for him. *Doe* v. *Allen*, 4 P. & D. 220.

Where a testatrix, by a codicil, gave specific stock, "now standing in my name," and was possessed at the time of sufficient to satisfy that bequest, but not to satisfy other bequests charged on the same fund; it was held to be a case in which evidence ought to be received as to the state of the testatrix's funded property, and that, considered in connexion with the context of the several testamentary papers, it was to be construed a pecuniary and not a specific legacy. *Boys* v. *Williams*, 2 Russ. & M. 689.

(*As explanatory, &c.* p. 775.)

Where a doubt is raised by evidence upon the meaning of a mercantile contract, evidence of the usage or course of trade at the place where the contract was made, is admissible; as where in an action for freight of cotton from Bombay, the usage was to calculate it at the screw there; but where the usage appears unreasonable, on account of the difference between the measurement on the merchant's premises and at the time of shipment, evidence of such difference ought to be received as having weight with a jury, as to whether the usage does or does not exist. *Bottomley* v. *Forbes*, 5 Bing. N. C. 121; and 8 Sc. 866.

Assumpsit, for not receiving lead on a contract, deliverable in "*I.*" plea, that the plaintiff was not ready to deliver within a reasonable time, in manner and form, &c., on which issue was joined; held, that the evidence of the broker of the defendant, that at the time of the contract the lead was said to be "ready for shipment," was admissible, not to vary the contract, but as material to the issue, what was a reasonable time for delivery; held also, that the usual places of shipment being at *G.* or *L.*, it was rightly left to the jury to say whether one or other of those places was not to be intended as the place where the goods were ready to be shipped. *Ellis* v. *Thomson*, 3 M. & W. 445.

Where a parish consisted of a royal burgh and a landward district, both of which had been always considered as one district for the management of the poor, and no distinction ever made as to questions of settlement or assessment; it was held, that in questions turning upon statutory enactments, although where the enactments are clear, usage can have no effect, yet that when silent, or expressed in terms of doubtful import, it may afford the construction, as being a contemporaneous exposition, and that,

in the particular case, the usage having been uninterrupted, the poor were entitled to relief indiscriminately from the parish funds. *Dunbar Corporation* v. *Duchess of Roxburghe*, 3 Cl. & Fi. 335.

A conveyance was made to the husband and wife, and their heirs, as joint tenants, the deed expressing the consideration as "now in hand duly paid *by the husband and wife*;" it appeared that the money was actually a legacy given to the wife, and paid by the executors to the vendor; in an action by the wife against the husband's assignees, he having become bankrupt shortly before his death, it was held that evidence of its being the wife's money was properly admitted as explanatory, and not contradictory, of the deed; the expression "by the husband and wife," raising a doubt as to whom the money really belonged. *Doe* d. *Bambridge* v. *Statham*, 7 D. & Ry. 141.

Where, in a covenant, in a lease of coal mines, the word *level* was used in reference to the raising coals, which, according to the nature of a trade, might have a peculiar meaning, it was held that evidence ought to have been received as to the meaning of the term among miners. *Clayton* v. *Gregson*, 4 N. & M. 602.

Where, by a memorandum on the margin of a lease of premises from Michaelmas, it was stated, that "it is hereby understood that he is to be tenant and pay rent from the preceding 12th August; it was held, that in an action for money alleged to have been paid upon a mistaken account, such memorandum ought to have been received in evidence, and a new trial was granted. *Cowne* v. *Garment*," 1 Bing. N. C. 318; and 1 Sc. 275.

A sold note is "18 pockets of hops at 100*s.*:" parol evidence is admissible to show that 100*s.* means the price per cwt. *Spicer* v. *Cooper*, 1 G. & D. 52.

(*In case of Fraud*, p. 768.)

Although the terms of a written contract cannot be varied by parol, yet if one party is induced to enter into the contract by the false representations of the other, it is competent to him to prove that fact by evidence *aliunde*. *Wright* v. *Crookes*, 1 Sc. N. S. 685.

(*As collateral*, p. 785.)

In ejectment by the grantee of an annuity to recover the premises on which it was secured, a covenant that the premises were of greater value than the annuity does not prevent the defendant from showing the contrary, in order to take the deed out of the exemption of the Act requiring enrolment. *Doe* v. *Ford*, 3 Ad. & Ell. 649.

Where a deed of feoffment, describing lands as situate in a particular parish, was produced on an appeal against an order of removal, to show a settlement in the appellant parish, it was held, that it was competent to the respondent parish to show, by parol evidence, that the particular lands were situate in the appellant parish, and not in the one where described by the deed. *R.* v. *Wickham*, 2 Ad. & Ell. 517.

Where the defendant, in order to prove an agreement with the plaintiff and other creditors for a composition, put in a letter containing the terms of such agreement, it was held, that evidence of a previous conversation and inquiry by the plaintiff, as to the probability of the other creditors concurring, was admissible to show the motive and intention of writing the letter, and entering into the agreement. *Reay* v. *Richardson*, 2 Cr. M. & R. 422.

Where the terms of hiring were by a third person written down, but never signed by the parties, nor proved to have been read over to them, it was held that parol evidence was admissible. *R.* v. *Wrangle*, 2 Ad. & Ell. 514.

PART

Of an entire claim is not transferable. The holder of a bill of exchange cannot indorse it for part. *Hawkins* v. *Gardner*, 12 Mod. 214. 72. 84; Co. Litt. 385 a.; 2 Wils. 262; *Hunt* v. *Brainer*, 6 Mod. 402.

PARTICULARS.

(*Affidavit for*, p. 793.)

In order to obtain a particular in the action of trespass, trover or case, an affidavit should be made that the defendant does not know what the plaintiff is going for. *Snelling* v. *Chennells*, 5 Dowl. 80.

(*Granted when*, p. 793.)

Assumpsit for money had, &c., to recover back the deposit, on the ground of objection to the title, the Court will oblige the plaintiff to give a particular of all objections to the abstract arising upon matters of fact, but not of law; those they must find out themselves. *Roberts* v. *Rowlands*, 3 M. & W. 543.

Where the plaintiff, after delivering a bill to the defendant as the attorney of *A.*, by which *A.* was made debtor, obtained possession of the bill surreptitiously, and delivered another, making the defendant debtor, the Court stayed the proceedings until a copy of the first bill should be delivered, and directed it to be evidence. *Edgington* v. *Nixon*, 2 Bing. N. C. 316; and 2 Sc. 507.

In an action on two bills for 250 *l.* each, with counts on each, the particulars only stated the action to be brought for 500 *l.*, the amount of the bills set out in the declaration, and it appeared that the defendant had been arrested only for 240 *l.*, and that the bills were given as a security for money paid by the drawer, the Court (*Alderson*, B. *diss.*) granted a rule for further and better particulars. *Dawes* v. *Anstruther*, 5 Dowl. 738.

Upon a plea of payment of a sum in satisfaction of the plaintiff's demand, the defendant was ordered to furnish particulars, as in case of set off. *Ireland* v. *Thompson*, 4 Bing. N. C. 716, and 6 Sc. 601.

(*In case of an Indictment*, p. 793.)

Where the counts are framed in general terms, a Judge will order a particular of the charges to be given, so as to disclose the same information to the party as would be given by a special count, but not so as to disclose specific facts, dates or places; a particular ought not to state that the prosecutor will also go into other evidence. *R.* v. *Hamilton and others*, 7 C. & P. 448.

(*Refused when*, p. 793.)

The Court has no power to compel a party to give credits. *Randall* v. *Ikey*, 4 Dowl. 682.

The Court refused to compel a particular of sums paid, under a plea of payment. *Phipps* v. *Southern*, 8 Dowl. 208.

In *assumpsit* to recover damages sustained by the non-performance of an agreement to assign premises, the Court refused to compel the plaintiff to furnish a particular of the special damage. *Retallick* v. *Hawkes*, 1 M. & W. 573; and 1 Tyr. & Gr. 1134.

In debt by the assignee of a lease against the tenant, for breaches of covenant, non-payment of rent, and non-repair, the Court refused to compel a particular as to sums and dates. *Sowter* v. *Hitchcock*, 5 Dowl. 724.

Where the particulars omitted to give credit for sums received, the Court refused to compel it, to enable the defendant to pay the balance into Court. *Penprase* v. *Crease*, 3 Cr. M. & R. 36; 1 Tyr. & Gr. 468; and 4 Dowl. 711.

The declaration in an action against attornies by the plaintiff, their client, for negligence in permitting him, upon an assignment of leasehold premises, to enter into unqualified covenants, stated the grounds *per quod* the plaintiff sustained damages; the Court refused to compel a particular of the plaintiff's demand. *Stanard* v. *Ullithorne*, 3 Bing. N. C. 326; 3 Sc. 771; and 5 Dowl. 370.

A particular of a bill of exchange will not be given where the declaration contains only one count, unless under special circumstances. *Brooks* v. *Fairlar*, 5 Dowl. 361; 3 Bing. N. C. 291; and 3 Sc. 654.

A defendant cannot be compelled to deliver the particulars, pursuant to a Judge's order; but the refusal to obey has the effect of preventing his proceeding in the cause. *Cane* v. *Spinks*, 7 Dowl. 27.

In an action for the breach of a warranty of soundness of a horse, the Court will not compel the plaintiff to deliver particulars of the unsoundness. *Pylie* v. *Stephen*, 6 M. & W. 813.

(*Sufficiency and effect of*, p. 794.)

Particulars of set-off improperly intitled in another Court, were held to be sufficient. *Lewis* v. *Helton*, 5 Dowl. 267.

A., a broker, introduced a merchant and a shipowner together, to treat for a charter party: they finally made the charter party through *B.*, another broker. In an action by *A.* for his commission, the particulars of demand were "for commission due to the plaintiff for *procuring* a charter for a vessel called the W.:"—Held, sufficient. *Burnett* v. *Bouch*, 9 C. & P. 620.

In an action to recover back a deposit, the particulars stated it to be, for the defendant not being able to make a good title; and a summons for a better particular having been dismissed on the ground that the objections consisted in matter of law only, a notice was afterwards delivered that the objections were set forth in the plaintiff's answer to a bill in equity, filed by the defendant, and at the trial it appeared that the objection was matter of fact; the Court refused a new trial, the defendant's attorney declining to swear he had been misled. *Correll* v. *Cattle*, 5 Dowl. 598.

In *assumpsit* on an undertaking by the defendant to pay such costs as the plaintiff (an attorney) might be subjected to in an action brought by him against *G.*, a third party, on a bill, the second count was as against the indorser of the bill, and there were counts for money paid and on an account stated; the plaintiff first delivered a bill of particulars in general terms as for a balance of money due and for interest, and afterwards, under a

Judge's order for particulars "of the bill of costs, charges and expenses mentioned in the first count," he delivered a second bill of particulars applicable only to such first count, in respect of which the defendant paid into court a sum covering the costs out of pocket; held first, that as the defendant could not be misled, the plaintiff was entitled under such particulars to recover the rest of his bill of costs upon the account stated; but secondly, that an unsigned account, including the plaintiff's bill of costs, which had been sent in for the purpose of proving under *G.*'s bankruptcy, was not such evidence of an account stated by the defendant as would entitle the plaintiff to recover on that count. *Fisher* v. *Wainwright*, 1 M. & W. 480.

Where the order for a particular of set-off required it to be with dates, and the one delivered stated only "from January 1828 to January 1834," the Judge refused to allow evidence to be gone into of the set-off. *Swain* v. *Roberts*, 1 Mo. & R. 452.

The plaintiff, in his declaration and particulars, claimed damages for certain articles deposited with the defendant, which had not been returned, and of which due care had not been taken; under the former description in his particulars he set out certain articles of glass, which, however, turned out to have been destroyed: held, that under such particulars he was not entitled to recover damages in respect of those articles. *Moss* v. *Smith*, 8 Dowl. 537.

Assumpsit for money had and received, alleged in the particulars to be deposits in the defendant's hands as a stakeholder, on a wager *won* by the plaintiff; the plaintiff failing to prove this is not entitled to recover even his own deposit on proof of having demanded back his stake before it was paid over. *Davenport* v. *Davis*, 1 M. & W. 570; 1 T. & G. 931.

In debt for 180 *l.* for two years' rent, plea, as to 135 *l.*, parcel, &c., payment to a superior landlord to avoid a distress, which the replication admitted, but alleged to have been allowed and deducted from previous rent due, and that 135 *l.* was still due over and above the sum so deducted, on which issue was taken; the particulars of demand gave credit for payment of two years' rent, *minus* 16 *l.* 6 *s.* 2 *d.*, and the plaintiff established in evidence, that after allowing the defendant all payments, a sum of 106 *l.* 16 *s.* 6 *d.* was due to him; held (before Reg. Trin. 1838), that the particulars were not to be taken as embodied in the declaration, but that the plea was not to be taken as pleaded to the balance remaining after deduction of the sum for which credit was given in the particular, and that the plaintiff was entitled to a verdict for such balance. *Ferguson* v. *Mahon*, 1 P. & D. 194.

On a declaration for goods sold to the amount of 883 *l.* 10 *s.*, admitting 664 *l.* 3 *s.* 6 *d.* to have been paid, and claiming a balance remaining unpaid; one plea pleaded generally payment of all the sums in the declaration mentioned; the replication new assigned as to 175 *l.* 17 *s.*, that the sum so paid was in respect of other sums than the causes of action stated in the declaration, and denied the payment of the residue; and issues were taken on the general plea of payment, and denial that the causes of action were other and different: held, that the plea to the declaration was not to be taken as pleaded to the balance only, and that the replication did not admit the payment of the sum stated, as part of the balance, so as to enable the defendant, by proof of payments, making up the difference between the sum claimed and the payment admitted, to be entitled to the verdict; and

the jury having found that the defendant had not paid all that was due, a rule for a nonsuit was refused. *Alston* v. *Mills*, 1 P. & D. 197. See the Rule, T. T. 1838.

All that is necessary under Rule Trin. 1 W. 4, is, that the particular shall state the balance claimed to be due, and it need not specify sums received on account; although the plaintiff had not complied with the rule, and the cause was referred, the Court refused to interfere as to the costs occasioned by breach of the rule. *Smith* v. *Elridge*, 5 N. & M. 408.

The particulars were to recover "a sum of 27 *l.* 13*s.*, being the balance due after giving credit for all payments on account, and for such sums as the defendant might have to set off against the plaintiff"; and they stated items of the plaintiff's demand to the amount of 120*l.* These are not within the meaning of the rule of T. T. 1 Vic. *Morris* v. *Jones*, 1 G. & D. 13.

A plaintiff erroneously inserted in the particulars of demand, as among the payments for which he gave credit, an article which in fact had not been paid for, but returned; held that the Judge rightly left it to the jury to say whether in fact the balance of the whole account was or not in the plaintiff's favour. *Lamb* v. *Micklethwaite*, 9 Dowl. 531.

(*Amendment*, p. 797.)

Where the plaintiff's attorney gives credit in the particulars for a sum set up as a cross-demand, the Court will allow them to be amended. *Preston* v. *Whiteheart*, 5 Dowl. 720.

In debt for double rent on 11 Geo. 2, c. 19, s. 18, with a count for use and occupation, the particulars claiming only the double rent, the Court refused to strike out the latter count, as the defendant could not be misled, and the defendant might amend his particulars. *Thoroton* v. *Whitehead*, 3 Cr. M. & R. 14; 1 Tyr. & Gr. 313; and 4 Dowl. 747.

Where the particular delivered was calculated to mislead the defendant as to the real nature of the demand, and to which he might have pleaded specially, the Court granted a new trial, with liberty to the plaintiff to amend the particulars, and the defendant to plead *de novo*. *Stevens* v. *Willingale*, 4 Sc. 255; and 7 C. & P. 702.

In *assumpsit* for money had and received, as the plaintiffs' clerk abroad, and particulars delivered according to an account stated by the defendant, but the suit having been suspended for several years, by the bankruptcy of one of the plaintiffs and absence of the other, the Court allowed the particulars to be amended, by inserting items of demand accruing in the interval. *Staples* v. *Holdsworth*, 4 Bing. N. C. 717; 6 Sc. 605; and 8 Dowl. 715.

PARTIES.

Three persons were indicted for a rape, and were also indicted for the murder of the party alleged to be ravished. Before the trial on the indictment for the rape, the counsel for the prosecution asked to have one of the prisoners acquitted, that he might call him as a witness against the others. This was opposed by the prisoners' counsel: held, that in cases of this kind the Court will, if it sees no cause to the contrary, entrust it to the discretion of the counsel for the prosecution to determine whether he will have one of the prisoners acquitted before the trial commences, in order that he may be enabled to call such prisoner as a witness against the other prisoners. *R.* v. *Owen and others*, 9 C. & P. 83.

It is almost of course to permit one of several indicted to be acquitted, and to give evidence, notwithstanding the finding of the bill against him. *R.* v. *Owen*, 9 C. & P. 83.

A written declaration of a deceased corporator seems to be evidence of a custom to exclude foreigners, although he could not have been called if alive. *Davies* v. *Morgan*, 1 C. & J. 587.

PARTNERS.

(*By what Terms constituted*, p. 800.)

See *Brown* v. *Tapscott*, 6 M. & W. 119.

(*Proof of being*, p. 800.)

The defendant advanced money to one *W.*, with the avowed intention of becoming interested jointly with him in a market which *M.* was in the course of erecting. The defendant was consulted by *W.* upon every occasion during the progress of the work; but no definite share in the concern was allotted to him, nor was there any *express* contract between him and *W.* as to a partnership, until the 15th October 1833, when an agreement was entered into between them, to the effect that the market should be valued by a surveyor, and that the defendant should be interested in a seventh share. Profits had been made of the market prior to the date of the agreement, but had not been accounted for to the defendant, nor had he received any interest upon the sums advanced by him. Held, that the defendant was not a partner until the 15th October 1833, and consequently was not responsible to the builder for work done before that day. *Howell* v. *Brodie*, 8 Scott, 372.

A partner in a firm contracted to give his clerk one-third portion of his (the partner's) own share in the profits: the other parties knew of and assented to the arrangement; held, that this did not make the clerk a partner. *Holmes's Case*, 2 Lew. Cr. Cases, 256.

Where the action on a contract was brought by the directors of a mining company, and it appeared that there had been another who, on becoming bankrupt, had ceased to act; held, that as his ceasing to become such could only be under the provisions of the deed, it ought to be produced. *Phelps* v. *Lyle*, 2 P. & D. 314; and 10 Ad. & Ell. 113.

In an action by two plaintiffs, as attornies, who carried on the business as partners, the defendant cannot object that by a contract *inter se*, one was to be secured a certain part of the profits at all events, the debt in the first instance being the joint property of both. *Bond* v. *Pittard*, 3 M. & W. 357. And see *Waugh* v. *Carver*, 2 H. Bl. 246.

(*Pleading by*, p. 802).

Where the count stated the defendant to be indebted to the plaintiffs and their deceased partner on an account then stated between *them*, and after alleging a promise to all, assigned as a breach that the defendant had not paid, it was held to be sufficient. *Debenham* v. *Chambers*, 6 Dowl. 101; and 2 M. & W. 128.

(*Action by*, p. 807.)

In an action brought in the name of the public officer of a banking co-partnership company, established under 7 Geo. 4, c. 46, it is not necessary

to allege in the declaration that the plaintiff is a member of the company, that he is resident in England, or that he has been duly registered as required by the 4th section of that Act; it is sufficient to describe the plaintiff as one of the public officers of the company duly appointed. *Spiller* v. *Johnson*, 6 M. & W. 570.

The plaintiff sued as the payee of a note made payable on demand to "the manager of the National Provincial Bank of England," but did not sue as public officer; it was held, that upon proof that he was in fact the manager, and that a demand had been duly made on behalf of the bank, the plaintiff was entitled to recover; and that in the absence of a plea that the bank was established under the provisions of the 7 Geo. 4, c. 46, and that the plaintiff was not the public officer, it was not necessary for the plaintiff to show that he *was*, nor competent to the defendant to show that he *was not* such public officer. *Robertson* v. *Sheward*, 1 Scott, N. S. 419.

(*Action by the Bank of England.*)

The London Joint-stock Bank (under circumstances which would have made it illegal in them as a company, and a violation of the privileges of the Bank of England, to accept bills payable at a less date than six months), agreed with a bank in Canada, that *G. P.*, the manager of the London Joint-stock Bank, but not a partner or shareholder therein, should accept bills drawn by the Canadian bank payable at a date short of six months, and that the London Joint-stock Bank would provide funds for the due payment of such bills; the money transactions arising therefrom being, in the accounts between them, to be treated in all respects as transactions between the two banks; it was held, first, that the acceptance of such bills, in execution of such agreement, was unlawful, regard being had to the Acts in force respecting the Bank of England. Secondly, that the acceptance of such bills would not have been lawful, even if the London Joint-stock Bank, at the time of such acceptances, had in their hands funds of the Canadian bank equal to the amount of the bills so accepted. Thirdly, that the acceptance of such bills would have been equally unlawful, if the London Joint-stock Bank had not, at the time of such acceptances, any funds in hand belonging to the bank in Canada, but that such bills were accepted on the credit of a contract by the Canadian bank to remit such funds to meet the acceptances. Fourthly, that the Bank of England might maintain an action against the London Joint-stock Bank, founded on such transactions, under either state of circumstances above supposed. *Booth* v. *Bank of England*, 1 Scott, N. S. 701.

(*By one of several*, p. 803.)

The plaintiff and his co-partners employed the defendants as accountants, to make out the accounts of the firm, and also the separate balance of each partner, which were so erroneously made out that the plaintiff individually suffered a considerable loss; he may maintain the action alone, and that the allegation that he had retained the defendants was not a variance. *Story* v. *Richardson*, 6 Bing. N. C. 123.

(*Actions against—Notice of Action*, p. 804.)

Where a Railway Act declared that no action should be brought against any *person* for anything done in pursuance of it, without twenty-one days' notice given to the intended defendant, it was held to include the company, and that they were entitled to notice of an action for obstructing a road which the plaintiff claimed to use. *Boyd* v. *Croydon Railway Company*, 4 Bing. N. C. 669; 6 Sc. 461; and 6 Dowl. 721.

(*Action against several*, p. 804.)

In *assumpsit* on a contract for the delivery of coals from a colliery, it appeared that the agreement (for supplying such coals, and for the demise of a coal wharf) purported to be made between the plaintiff and the partners in the colliery, three in number, and was executed by plaintiff and two of the partners; held that, admitting such contract to be one by which the partners might bind an absent co-partner, yet that the Judge, on trial, ought not to direct the jury as matter of law that the contract signed by two bound them, but should desire the jury to say whether it was intended to do so or not, if there are circumstances from which an intention can be inferred that no party should be bound unless all the partners signed: such as the nature and terms of the agreement; the distance of time at which it was to come into operation; the declarations and conduct of the parties respecting it: and the manner in which previous contracts between them, of the same kind, had been executed. *Latch* v. *Wedlake*, 11 A. & E. 959.

An agreement was entered into between the plaintiff and *A.* and *B.* by name (not as a firm), by which it was stipulated that the plaintiff should serve *A.* and *B.* as foreman in their business of type-founders for the period of seven years, if *A.* and *B.* or either of them should so long live. The plaintiff having subsequently discovered that, at the time this agreement was entered into, one *C.* was a dormant partner with *A.* and *B.*, declared upon it as an agreement to serve *A.*, *B.*, and *C.*, or the survivor of them, for the period and on the terms therein mentioned; held, that this was a total misdescription of the contract. *Beckham* v. *Knight*, 1 Scott, N. S. 675.

Where it was clearly established that there was a joint interest between the printer and publisher, in particular works, for which paper was furnished by the plaintiffs, and delivered to the printer by orders from the publisher, who afterwards became bankrupt; held, that if the jury were satisfied that at the time when the goods were furnished the defendants were partners in the concern for whose benefit they were furnished, the plaintiffs were entitled to recover, otherwise not. *Gardiner* v. *Childs*, 8 C. & P. 345.

In an action by the solicitor of an intended company for preparing their copartnership deed, a person may be liable without being one of the directors. The persons who are directors are liable, and other persons may be liable also, if they interfere in the management, and hold themselves out as persons giving the order; and in such a case the question will be, whether such persons as were not directors so acted as to become employers of the solicitor in preparing the deed. *Bell* v. *Francis*, 9 C. & P. 66.

Where the question was whether the defendant's liability accrued as trustee or shareholder; held, that it was essential to produce the deed creating the character of trustee, and that it was not sufficient to dispense with the production of it in evidence that the plea admitted the trust deed referred to in the recital of the deed of covenant. *Gillett* v. *Abbott*, 3 Nev. & P. 24; and see *Phelps* v. *Lyle*, *supra*, 1505.

There is no distinction between trading and mining companies: and where a party takes shares in a concern, on a prospectus holding out that a certain capital is to be raised for carrying it on, he will not be liable as a partner unless the terms of the prospectus be fulfilled, or it be shown that he knows and acquiesces in the directors carrying it on with a less capital; where the jury negatived such knowledge or acquiescence, and found the defendant not liable, the Court held the finding to be right. *Pitchford* v. *Davis*, 5 M. & W. 2.

It appears from the rules of a club, that the members are to provide funds to be administered by the committee, and to provide the means of carrying it on without dealing on credit; the committee cannot pledge the credit of individual members. *Flemyng* v. *Hector*, 2 M. & W. 172.

(*Partner by Representation*, p. 805.)

A club was formed, by the regulations of which the members paid entrance-money, and an annual subscription, and cash was paid for provisions supplied to the house. The funds of the club were deposited at a banker's, and a committee was appointed to manage the affairs of the club, and to administer the funds, but no member of the committee had authority to draw cheques, except three who were chosen for that purpose, and whose signatures were countersigned by the secretary; held, in an action brought against two of the committee by a tradesman who had supplied wine on credit, ordered by a member of the committee for the use of the club, that the tradesman was not entitled to recover, without proving either that the defendants were privy to the contract, or that the dealing on credit was in furtherance of the common object and purposes of the club. *Todd* v. *Emly*, 7 M. & W. 427.

Where a partner accustomed to issue notes on behalf of the firm indorses a particular note in a name differing from that of the partnership, and not previously used by them, which note is objected to on that account in an action brought upon it by the indorsee, the proper question for the jury is, whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the indorser must be taken to have issued the note on his own account, and not in the exercise of his general authority as partner. *Faith* v. *Richmond*, 11 A. & E. 339. So where a partner in "The Newcastle and Sunderland Wall's End Coal Company" drew a note in the name of "The Newcastle Coal Company," and made it payable at a bank where the first-mentioned company had no account. *Ib.*

Where the jury found that the defendant was not a member of a joint-stock company when the order for the goods for which the action was brought was given, although they were delivered after his becoming so, it was held that he could not be made liable for what was supplied on the credit of others. *Whitehead* v. *Barron*, 2 Mo. & R. 248.

A mining concern is a trading concern, and the members of the company, unless a limited authority be shown, have power to bind each other by dealings on credit for the purpose of working them when it appears to be necessary or usual in the management of them; and where a shareholder by letter interfered, by requiring a meeting to be called for the purpose of changing a director, held that it amounted to an acquiescence in the concern going on, although the full number of shares originally held out had not been subscribed for. *Tredwen* v. *Bourke*, 6 M. & W. 464.

(*Defence—Illegality, &c.*, p. 810.)

The 6 Geo. 4, c. 42, s. 2, enables partnerships in Ireland, of more than six persons, and not having establishments at places at less than 50 miles from Dublin, to carry on the banking business, and provides that actions might be brought in the name of the registered officer "against any person or bodies politic or corporate or others, whether members of such co-partnership or otherwise;" on a plea, in *assumpsit*, for money had and received to the use of the Commercial Bank of Ireland, and for an account stated, that the establishment of the company had been "from the time of the formation thereof until the commencement of the suit, and then were, at places in Ireland less than 50 miles from Dublin, contrary, &c.;" held, that it was not sufficient to show that at any time there had been such a branch bank, but that it must have been in existence for the whole time, viz. from the time of the formation of the company down to the time of the commencement of the suit, and that the whole allegation in the plea ought to be proved: *qu.* whether the action be maintainable against the defendant, as a member of a banking company. *Hughes* v. *Thorpe*, 5 M. & W. 656.

A joint-stock company, the shares of which might be increased to an unlimited extent, and be assigned or disposed of by deed or will to any persons at the discretion of the holders, is fraudulent and illegal. *Blundell* v. *Windsor*, 8 Sim. 601.

The trade of a banker is within the meaning of 57 Geo. 3, c. 99, and a plea that spiritual persons holding benefices were partners in the banking company, (the plaintiffs being the indorsers of the bill,) and the promise laid in the declaration void in law as against the statute, held good. *Hall* v. *Franklin*, 3 M. & W. 259.

But by the provisions of the stat. 4 Vict. c. 14., contracts by co-partnerships in trade are not to be invalidated by reason of any of its members being spiritual persons.

Actions and suits by companies against individuals, being co-partners, and *vice versâ*, are further regulated by 1 & 2 Vict. c. 96.

(*Actions* inter se *for Calls, &c.*, p. 815.)

By the Cheltenham and Great Western Union Railway Act, 6 Will. 4, c. lxxvii, it is enacted, that in an action for calls on shares in that company, the book of shares, under the seal of the company, shall be *primâ facie* evidence that a party is proprietor of shares. It appeared that a call was made in October 1836, and that the book of shares, which contained the name of the defendant as a shareholder, was made up before the end of September 1836, from claims sent in by different parties, but that the seal was not affixed to it till November 1836: it was held, that this book was no evidence

that the defendant was a proprietor of shares at the time of the call in October 1836. *The Cheltenham Union Railway Company* v. *Price*, 9 C. & P. 55.

Where the Act gave a general form of declaration for calls, and provided that it should only be necessary to prove the defendant to be a proprietor at the time of the calls being made, the fact of their being made, and notice, the Court allowed only the pleas, of *nunq. indeb.*, that the defendant was not a proprietor, and that the shares were forfeited, and disallowed others raising issues, as to the legality of the meetings of the directors when the calls were made; of no notice, according to the Act, nor time nor place of payment appointed; of the calls not being made for the purposes of the Act, nor made upon all the shareholders, nor by competent persons. *S. Eastern Railway Company* v. *Hebblewhite*, 4 P. & D. 247.

In debt for calls on shares in the general form given by the Act, it was held that it is to be taken as if all the facts necessary to be proved were alleged, and that the defendant may by his plea deny a fact material to be proved, but must then conclude to the country; so, if the defence be a matter subsequent, he may show it by plea: it was held also, that in order to show that the company had exercised the right of option of declaring the shares forfeited, the plea must distinctly allege the acts required by the Act to be done to establish the forfeiture. *Edinburgh and Leith Railway Company* v. *Hebblewhite*, 6 M. & W. 707; and 8 Dowl. 892.

By the 84th section of the Act of Incorporation of the Southampton Dock Company, it is enacted, amongst other things, that in an action against a shareholder for calls, "in order to prove that the defendant was a proprietor of such shares in the undertaking as alleged, the production of the book in which the secretary of the company is by the Act directed to enter and keep a list of the names and additions and places of abode of the several proprietors of shares in the said undertaking, with the number of shares they are respectively entitled to hold, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number or amount of his shares therein;" and by s. 89, the company are required "from time to time to cause the names and additions and places of abode of the several persons who shall be from time to time respectively entitled to shares in the said undertaking, with the number of shares which they are respectively entitled to hold, and the amount of the subscriptions paid thereon, and also the proper number by which every such share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the secretary of the said company:" held, that this latter clause was directory only, and that a failure literally to comply with the directions as to the mode of making the entries —an omission to insert the numbers of the shares or the addresses of some of the proprietors—did not render the book inadmissible in evidence. *The Southampton Dock Company* v. *Richards*, 1 Scott, N. S. 219.

The 63d section enacts, that "the minutes or entries thereinafter provided to be kept of the orders and proceedings of the directors, when signed as thereinafter ordered, shall be deemed original orders and proceedings, and shall be allowed to be read in evidence in all courts, and before all judges, justices, and others, and that without proof of such meeting having been duly convened, or of the persons making or entering such orders or proceedings, being proprietors or directors of the said company, as the case may be;" and the 75th section enacts, "that the said directors shall keep a

regular minute and entry of the orders and proceedings at every meeting of the said directors, which shall be *signed by the chairman at each respective meeting*:" held, that a signature by the chairman, at a subsequent meeting at which the minutes of the former meeting were read over and confirmed was a sufficient compliance with the Act. *The Southampton Dock Company* v. *Richards*, 1 Scott, N. S. 219.

(*Calls—Railway Act—Form of Notice.*)

As to the form of a *notice* of calls under a Railway Act, see *Great North of England Railway* v. *Biddulph*, 7 M. & W. 243; *Sheffield, Ashton-under-Lyne, and Manchester Railway Company* v. *Woodcock*, 7 M. & W. 574.

(*Liability of Partners, inter se*, p. 815.)

Where the defendant, the inventor of a machine, but wanting capital to carry it into execution, applied to the plaintiff for the advance of a sum, which, by an agreement, he expressly promised to repay, and undertook that if the invention succeeded and became in general use, the plaintiff should be entitled to one-third of the profit; held, in an action to recover the money advanced, that the express promise to pay the specific sum prevented its constituting any part of the partnership fund. *Elgie* v. *Webster*, 5 M & W. 518.

Where, upon an agreement for dissolution of partnership, the stock was to be left in the hands of the continuing partner, who was to pay the debts, and enter into a bond with the defendant as surety, to indemnify the plaintiff; in an action on the bond, the breach assigned was, that the plaintiff had been arrested for a partnership debt, for which the plaintiff had been sued with the continuing partner; the defendant pleaded that if the plaintiff had been dammified, it was through his own default; held, that upon such plea the defendant could not give in evidence that the bond to indemnify was made conditional upon an adjustment of the partnership accounts, and that the plaintiff had not paid over a balance alleged to be due, nor that the costs of the other partner defending the action were less than those of the plaintiff. *White* v *Ansdell*, 1 M. & W. 348.

Where the Act constituting a joint-stock company expressly directed that the money to be raised should be applied in the first instance in discharging the costs of obtaining the Act; held, that as soon as the sums subscribed came to the possession of the company, they became liable to pay those costs, and that the plaintiff, although a member of the company, might sue them in debt for the amount. *Carden* v. *General Cemetery Company*, 5 Bing. N. C. 253; and 7 Dowl. 275.

The plaintiff contracted to do certain work for a joint-stock company for a given sum; he afterwards caused his name to be inserted in the books of the company as a holder of shares therein; held, that this did not affect his right to sue the company in respect of the prior contract. *Lucas* v. *Beach*, 1 Scott, N. S. 350.

Where several of a company of proprietors of a steam-boat running during the summer months, by a memorandum, signed by the plaintiff, defendant, and others, authorized the plaintiff to charter a boat and make arrangements for its running during the winter months "on our joint account," each taking a portion of the profits proportionate to the amount of their subscriptions, and undertaking to pay their instalments by a certain

time; held, that although an action for money paid might not lie for the instalments payable by the defendant advanced by the plaintiff, yet that a special *assumpsit* would lie for non-performance of the undertaking, founded on the consideration of the plaintiff's undertaking the management, and that a promise to pay was sufficient evidence to support the Court on an account stated, and the rule for a nonsuit discharged. *Brown* v. *Tapscott*, 6 M. & W. 119.

(*Execution.*)

On a judgment against the registered public officer of a banking co-partnership execution may issue against him without a *scire facias*. Parke, B. *dubitante*. *Harwood* v. *Law*, 8 Dowl. 899; 7 M. & W. 203; *Cross* v. *Law*, 8 Dowl. 789; *Bosanquet* v. *Ransford*, 3 P. & D. 296; *Whittenbury* v. *Law*, 8 Scott, 661.

(*Competency*, p. 817.)

Two partners being sued on a bill as indorsees, one pleaded his discharge by bankruptcy and certificate, and a *non pros.* was entered as to him; held, that as since the 49 Geo. 3, c. 121, s. 8, the solvent partner, after payment of the partnership debt, might prove against his insolvent partner's estate, and the certificate be a bar to any action for contribution, the bankrupt was an admissible witness for him. *Afflalo* v. *Fourdrinier*, 6 Bing. 306; and see tit. PARTIES; and Vol. I. tit. INTEREST.

Where *B.*, a partner and acting director procured shares in a joint stock company for a party not a partner, and received the purchase-money, but the party afterwards refused to accept the transfer of the shares and to pay the calls, alleging that he had been induced to purchase the shares by false representations, and fraudulent concealment as to the solvency of the company; held, that on an issue to try the truth or falsehood of those allegations, partners of the company were not incompetent witnesses for *B.* *Syme* v. *Brown*, 3 Cl. & Fi. 412.

PART-OWNER.

Where the names of two partners only were named in the register, and they were sworn as sole owners, it was held that under 6 Geo. 4, c. 110, s. 32, a third partner could claim no interest in it or equitable title. *Slater* v. *Willis*, 1 Beav. 354.

PAWNBROKERS.

See TROVER. *Tregoning* v. *Attenborough*, 7 Bing. 9; *Cowie* v. *Harrison*, 1 Mo. & M. 141.

Trover by assignees for watches belonging to the bankrupt, plea that they were deposited as pledges with the defendant as a pawnbroker, for monies advanced, replication, alleging a corrupt contract for the loan, and for forbearance, to wit, one whole year from the making such loan, at illegal interest, the evidence being that they were deposited from time to time, without any agreement as to the time; held, that it must be inferred that the contract was meant to be on the usual terms of a pawnbroker. *Nickesson* v. *Trotter*, 3 M. & W. 130.

A pawnbroker is not entitled, under the 39 & 40 Geo. 3 c. 99, s. 2, allowing the rate of $\frac{1}{2}d.$ a month for the loan of $2s.\ 6d.$, to charge by monthly rests as on a monthly contract; and, *quære*, where the interest involves the fraction of $\frac{1}{4}d.$, if he can demand the full farthing. *R.* v. *Goodburn*, 3 Nev. & P. 468.

PAYMENT.

(*Right to begin*, p. 818.)

Assumpsit, plea of payment as to part, and a set-off as to the residue, the defendant is to begin; and payments in part only being proved, the plaintiff is bound to go into evidence to show how much he was entitled to; and it was held the delivery of the particulars before plea made no difference. *Coxhead* v. *Huish*, 7 C. & P. 63.

(*Proof as to, under particular Pleas.*)

The particulars of the plaintiff's demand in an action of *assumpsit* on a bill of exchange and for goods sold and delivered, stated goods sold and delivered to the amount of 42 *l.* 5 *s.*; they then gave credit for a bill of 36 *l.* 8 *s.*, and to the balance of 5 *l.* 17 *s.* added a further sum of 10 *l.* 18 *s.* for goods; and to the amount, 16 *l.* 15 *s.*, added the amount of 36 *l.* 8 *s.* for the bill mentioned in the declaration and indorsed by the defendant. It was held, that the defendant could not avail himself of the transfer of the bill to the plaintiff, without an appropriate plea, as the two items in the particulars with respect to the bill destroyed each other, so that there was no admission of payment. *Green* v. *Smithies*, 1 G. & D. 395.

Assumpsit for not receiving goods made to order, plea, payment into Court and that the plaintiff had not sustained damages beyond; held, that upon such a plea, the defendant could not give in evidence a countermand of the order, when only in part executed. *Stevens* v. *Ufford*, 7 C. & P. 97.

Assumpsit on an agreement for wages as a courier for five months certain, at five guineas a month, and, in case of discharge before that period, to pay fifty guineas and the expenses of return, assigning a double breach, the dismissal before the expiration of the five months, and the refusal to pay the fifty guineas, or any sum for expenses; there was also a count for wages generally; pleas, first, except as to 21 *l.*, that the defendant wrongfully quitted the service; 2dly, as to the first count, except as to 21 *l.*, dismissal for improper conduct. 3dly. As to the second count, except as to 21 *l.*, *non assumpsit*; and 4thly, payment into Court on the whole declaration: replications joining issue on the first and third pleas; to the second, *de injuria*; and to the fourth, damages *ultra*: at the trial the jury found for the plaintiff on the first and fourth issues, and for the defendant on the others. Held, that there being no complete answer to the first issue, without referring to the plea of payment into Court, which was to be taken to go to the whole declaration, and admitted the contract as stated in the first count, and that something was due on both the causes of action therein stated, on each of which an undefined portion, not exceeding 21 *l.*, was left unanswered, the plaintiff was entitled to nominal damages. *Fischer* v. *Aide*, 3 M. & W. 486.

Debt, with several counts, plea, that the defendant had paid to the plaintiff several sums, in the whole amounting to a large sum, to wit, the amount of the several debts in the declaration alleged; the plaintiff need not new assign, but is entitled to recover the balance betweeen the amount of debt proved and payment made. *Freeman* v. *Crofts*, 4 M. & W. 1, and 6 Dowl. 698.

Where a plaintiff gives credit in his particulars of demand for payments, whether made before or after action brought, and goes only for the balance, a plea of payment is to be taken as pleaded to such balance; and if the defendant proves payments to that amount, independently of the sums credited in the particulars, he is entitled to a verdict. *Eastwich* v. *Harman*, 6 M. & W. 13.

Where the particulars delivered claimed a balance, and alleged that a full particular, exceeding three folios, had been already delivered, and acknowledging the receipt of various sums; the payment was held not to be an admission within the rule of Trin. 1 Vict. preventing the necessity of a plea of payment. *Bosley* v. *Moore*, 8 Dowl. 375.

As to payments available under the plea of being in arrear, see *Sapsford* v. *Fletcher*, 4 T. R. 511; *Taylor* v. *Zamira*, 6 Taunt. 524; *Carter* v. *Carter*, 5 Bing. 406; *Davies* v. *Stacy*, 4 P. & D. 159.

(*Credit given by Particulars.*)

The admission of money received, in a bill of particulars, cannot be taken as evidence of payment without a plea of payment. *Ernest* v. *Brown*, 3 Bing. N. C. 674; 4 Sc. 385; and 5 Dowl. 637.

(*Payment by whom, &c.* p. 819.)

The payment of rates required under 5 & 6 Will. 4, c. 76, s. 9, is deemed to mean a payment by the burgess himself, and not by another, although with his sanction. *R.* v. *Bridgnorth Mayor*, 2 P. & D. 317; and 10 Ad. & Ell. 66.

(*To whom*, p. 819.)

On a sale of tallow by auction the purchaser was, by the conditions of sale, to pay down a deposit, and the remainder of the purchase-money by a given day, and if desirous to pay before that day, to be allowed a discount, and, if required, to enter into an agreement and bond with one or more sureties for the performance of such conditions; the defendant, as the purchaser, a few days after the sale gave a bill dated on the day of the sale at six months, and indorsed it to the auctioneer, who, being in difficulties, indorsed it to a third person, to whom he was indebted on his own account, and it was duly paid; held, not to be a valid payment under the agreement of purchase, the auctioneer not being authorised to receive payment by a bill. *Sykes* v. *Giles*, 5 M. & W. 645.

Where an insurance broker or mercantile agent is employed to receive money for another in the general course of his business, and the known general usage is for the agent to keep a running account with the principal, and to credit him with sums received by credits in accounts with the debtors, with whom he also keeps running accounts, and an account is *bonâ fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor according to the intention and with the authority of the principal. *Stewart* v. *Aberdein*, 4 M. & W. 211.

(*Evidence of the Fact*, p. 822.)

On the issue of payment and a receipt in satisfaction, a receipt, signed by the London agent for the attorney, of the debt and costs indorsed on the writ of summons, is admissible, without calling the agent. *Weary* v. *Alderson*, 2 M. & R. 127.

In an action by a passenger against the captain for an insufficient supply of good and fresh provisions, an allegation of the passage money having been paid by the plaintiff was supported by showing that it was paid by the charterers, his employers. *Young* v. *Fewson*, 8 C. & P. 55.

Where on an agreement of demise, the defendants were to pay all rates, &c., land-tax excepted; held, that an extraordinary assessment by the commissioners of sewers, for works producing a permanent benefit to the land,

was within the agreement; but the rate being made in proportions upon the owners and occupiers, and the tenant having for four years paid both, and in settling with the landlord's agent, who was ignorant of that agreement, deducted the former, and receipts were given for the balance; held, in an action on the agreement to recover the amount so deducted as arrears of rent, that the facts supported a plea of payment. *Waller* v. *Andrews*, 3 M. & W. 302.

A creditor is entitled to exercise his discretion whether he will treat a cheque as payment; *à fortiori*, if it be conditional, as when expressed to be for the balance of an account. *Hough* v. *May*, 6 N. & M. 535; and 4 Ad. & Ell. 954.

In support of a replication of payment of interest, in answer to a plea of the statute, a witness stated that he had settled all kinds of accounts for the defendant; he admitted his handwriting to an account having the item of a payment by the defendant for interest; and although he swore he did not recollect the fact, this was held to be evidence to go to a jury. *Trentham* v. *Deverill*, 3 Bing. N. C. 397; and 4 Sc. 128.

(*Presumptive Evidence of*, p. 823.)

On separation, in 1797, the husband granted an annuity, determinable on payment of a sum to the wife; the annuity was paid up to 1803, but discontinued ever since, and evidence was given of a bond having been executed by the husband about that time in a larger amount than the sum stipulated, but alleged to include it, to a party with whom the wife was then living in adultery; proof was also given of judgment having been entered up on the bond, and of another bond given for a lesser sum to the same party, which was shown to have been satisfied by payment; under such circumstances, after the lapse of 30 years a Court of Equity will presume payment of a stipulated sum in satisfaction of the annuity, with the approbation of the wife, and for her use. *Haworth* v. *Bostock*, 4 Younge & C. 1.

Where a judgment was obtained in 1805, and duly docketed, and upon the sale of the defendant's real estate in 1806, notice of the judgment remaining unsatisfied was given to the purchaser in 1806, after which for 28 years no steps were taken by the judgment-creditor for enforcing payment, although he might have resorted to a sufficient fund in equity; held, that after such unexplained laches, a Court of Equity, acting upon the principles of limitation of suits at law, would adopt the same inference as to satisfaction, and the bill to enforce the charge was dismissed with costs. *Grenfell* v. *Girdlestone*, 2 Younge & C. 662.

And it was held that the inference was not repelled by evidence of the debtor's insolvency during the lapse of time. An acknowledgment by the debtor to a third person will not take the case out of the statute. *Ib.*

(*Application of*, 824.)

One of two bankrupts, *W. M.*, being a partner in another firm of *M. & S.*, gave a security to the petitioners for any moneys that might become due, either from the house of the bankrupts or from the firm of *M. & S.*; held, that the proceeds of the security might be applied first in discharge of the debt due from the firm of *M. & S.* *Ex parte Glyn & Masterman*, 1 Mont. D. & D. 25.

Where upon one of two partners retiring, the other entered upon the same business with another, and it was agreed that, the continuing partner bringing into the business — *l.* of good debts of the late firm to meet the

debts transferred to the new one, he should be entitled to two-thirds, and the new partner to one-third; no settlement of accounts was made for 14 years, and during the last five years an amount equal to the stipulated sum was paid in by the debtors to the old firm, although not so if subsequent advances to them by the new firm were deducted from the payments; held, that the agreement was performed, the monies so paid in, without appropriation, being to be applied in discharge of the oldest debts; (reversing the judgment below). *Tralmin* v. *Copeland*, 2 Cl. & Fi. 681; and 8 Bli. N. S. 918.

Where *D.*, one of two partners, was also the private agent of a client of the firm, and upon the dissolution and a settlement, the latter assigned all the outstanding partnership debts to *P.*, the other; but the latter, both before and after the dissolution, continued to receive moneys and rents of the client, and there was no evidence of any direction by him to appropriate them either to the partnership or private debt; in a suit by *P.* for the debt due to the firm, held that *D.*'s evidence was admissible to explain an ambiguous payment, and negative the appropriation; the presumption of law, that in the absence of any direction at the time of payment, priority of obligation prevails, is not extended to cases where the parties claim *diverso jure*. *Nottidge* v. *Pritchard*, 2 Cl. & Fi. 493, and 8 Bli. 493, affirming the judgment below, reversing that of the Master of the Rolls; *see* 1 Russ. & M. 199.

(*Payment in Reduction of Damages.*)

Evidence of partial payments, are held admissible in *assumpsit*, in mitigation of damages, but not as an answer to the action, the issue raising two points for the jury, viz., as to which party to be found, and, secondly, the amount of damages sustained. *Lediard* v. *Bouchier*, 7 C. & P. 1. S. P. *Shirley* v. *Jacobs*, ib. 3.

Where a payment had been made after action brought, but which was not pleaded, the Court, it not being denied, allowed the damages to be reduced; and *semble*, evidence may be given of such payment, though not specially pleaded. *Richardson* v. *Robertson*, 1 M. & W. 463.

In *assumpsit*, the defendant having proved a payment, there being only the general issue pleaded, the Court refused a new trial, the objection not being taken at the time, and no affidavit of surprise. *Wright* v. *Skinner*, 1 Tyr. & Gr. 277; and 4 Dowl. 741.

(*Payment, demand of.*)

Where money is ordered by rule of Court to be paid to a party or his agent, the demand made by a person acting for the plaintiff must be by power of attorney. *Brown* v. *Jenks*, 4 Dowl. 581.

(*Payment into Court, plea of*, p. 828.)

To a count on a bill of exchange or promissory note, a defendant cannot pay a smaller sum into Court, and plead that he was never indebted to a larger amount, but should show a failure of consideration, or some other valid defence as to part, and then pay the residue into Court. *Armfield* v. *Burgin*, 8 Dowl. 247.

(*Admission by*, p. 829.)

A plea of payment into Court on the general counts, merely admits a cause of action to that amount on one or more of the counts. *Archer* v.

English, 2 Scott, N. S. 156; 9 Dowl. 21. And see *Dolby* v. *Iles*, 3 P. & D. 287; *Armfield* v. *Burgin*, 6 M. & W. 281; 8 Dowl. 247; *Kingham* v. *Robins*, 7 Dowl. 352; 5 M. & W. 94. But see *Meager* v. *Smith*, 4 B. & Ad. 673; *Walker* v. *Fawson*, 5 C. & P. 486.

Where in *assumpsit* against two, for work and labour as an attorney for them as trustees, with the common *indebitatus* count, the defendants pleaded, except as to —*l.*, *non assumpsit*, and as to that sum payment into Court, as to which the plaintiff took the money out of Court; held, that the latter plea, only admitting a liability to that amount on some contract, the plaintiff was bound to go on and prove a contract by which the defendant was further liable beyond the money paid in: where money is paid in on a count on a special contract, it is an admission of such contract. *Archer* v. *Walker*, 9 Dowl. 21.

A plea of payment into Court, by two defendants, pleaded to one or more *indebitatus* counts, admits only that the plaintiff has a cause of action on one or more of the contracts declared on, to the amount of the sum paid in; and does not admit the defendants' *joint* liability to any greater amount, although the plaintiff gives evidence *aliunde* to fix one of the defendants with liability to a greater amount. *Stapleton* v. *Nowell*, 6 M. & W. 9; and 8 Dowl. 196.

PEDIGREE.

The probate of the will of a deceased ancestor is inadmissible as evidence of a declaration by the testator of matter of pedigree. *Doe* v. *Ormerod*, 1 Mo. & R. 466.

A document found amongst an ancestor's papers, in the custody of a stranger in blood, and not signed by the ancestor, nor by any of his family, is inadmissible evidence in a case of pedigree. *Vaux Peerage*, 5 Cl. & Fi. 526.

A funeral certificate from the MS. in the Heralds' College, intituled "Funeral Certificates of the Nobility," is admissible as evidence of the statements therein. *Ib.*

Where the ancestor had seven sons, and proof was given of the issue of the first and second having become extinct, and of reputation of the four next having died without issue, there being no contemporaneous account of them nor any claimant through them in the course of a long contest for the dignity, held that it was to be presumed that they died without issue. *Ib.*

PEER.

On a claim by coheirs to the dignity of a baron, created in the reign of Hen. 8th, and in abeyance from the reign of Car. 2d, they proved that their ancestor sat among the peers in Parliament in the 25th of Hen. 8th; that he was duly summoned to and sat in the Parliament of the 28th of Hen. 8th; and that he and his heirs male, who were also his heirs general, were summoned to and sat in several succeeding Parliaments, by the style and title of Lord Vaux. To account for the want of evidence of a writ of summons prior to the sitting in the 25th of Hen. 8th, they showed that there were no Lords' Journals extant from the 7th to the 25th of Hen. 8th; that the enrolments of writs during that period were very imperfect, and that, although the Patent Rolls were complete, no patent or charter of creation of a barony of Vaux, nor any record or trace of such patent, was discovered, after the most diligent searches in all the offices for records. Held that the barony

of Vaux was created by writ of summons and sitting in Parliament, and was therefore descendible to heirs general. *Vaux Peerage*, 5 Cl. & Fi. 526.

In the same case the following matters were resolved :

The statements of chroniclers or contemporary historians are not admissible as evidence of the creation of a peerage.

The admission of an inscription in a church-yard, by a former Committee of Privileges, does not make a copy from their minutes necessarily admissible in another case. A paper writing, found among an ancestor's papers in the custody of a stranger in blood, and not signed by the ancestor nor by any of his family, is not admissible to show the state of the family.

A manuscript book, intitled "Funeral Certificates of the Nobility," produced from the Heralds' College, is admissible evidence of the state of the deceased's family, and other statements contained in it. *Ib.* 5 Cl. & Fi. App. Cas. 526.

A monumental inscription, admitted in one case, is not as of course admissible in another. *Ib.* 541.

Upon a claim to a Scotch peerage, where no patent of creation can be found, but it appears from the record of the Parliament that the ancestor, from whom the dignity is alleged to have descended, sat in Parliament, an original instrument, purporting to be under the great seal of Scotland, and produced from the repositories of the heir of entail of the family estates, will be received as evidence of the creation of such peer, with a limitation to him and his heirs male therein stated. *Huntley Peerage*, 5 Cl. & Fi. 349.

B. claiming, of right, to be Lord Baron of Slane, in the peerage of Ireland, as heir general of the last Lord Slane, and alleging that the same was a barony in fee, showed by his statement and proofs, that from the first creation of a peerage in his ancestors to the year 1597, four such peers, dying at various periods without issue male, but leaving daughters or sisters, were severally succeeded in the dignity by the heirs male, uncles, or cousins, who were in possession of the family estates. The claimant further showed, that a Lord Baron of Slane, whom he alleged to be the last peer of the family, and of whom he stated himself to be sole heir general, left a daughter, an only child, who long survived him, but did not claim the peerage; and also two sisters, the elder of whom he stated to have died without issue, and from the younger the claimant derived his descent as her sole heir. Held that the claimant, though he might be heir general, had failed to make out his claim to the dignity, as it appeared by his own statement to have gone uniformly to the heirs male in exclusion of the heirs female, who had never made claim to it. *Slane Peerage*, 5 Cl. & Fi. 23.

In the same case the following points were ruled :—

In a claim of peerage, where there is no patent of creation or enrolment of such patent, and the contemporaneous Lords' Journals are not in existence, an old MS. book, purporting to be copied from the Journals by an officer whose duty it was to prepare lists of peers present and absent, will be received as evidence of a peer sitting in Parliament.

A return to a royal commission, not signed nor sealed by the commissioners, is not admissible to prove any matter therein stated.

A pedigree, made by a person with a view to a suit respecting property, is not receivable in a claim of peerage by his son, to prove his descent; nor is a case, stated for the opinion of counsel, produced from the family papers of a distant relation of the claimant.

Entries in a family missal are admitted as evidence of births, deaths, and marriages of members of the family, just like similar entries in a family Bible.

To make a copy of a record admissible in evidence, it is not enough that it was held by a witness while another read the original to him; there must be a change of hands, or the witness must himself read the copy with the original. *Slane Peerage*, 5 Cl. & Fi. App. Cas. 24.

Where the claim to vote in the election of Irish representative peers is in doubt or claimed adversely, the House will require a printed case, pedigree, and reference to proofs, to be given in. Where the right to the same dignity has been before investigated in the Irish House of Lords, the minutes of proceedings, evidence, and depositions of witnesses (since dead) were held to be admissible as against all parties. ***Roscommon, Earl of, Case of,*** 6 Cl. & Fi. 97.

(*Sufficiency of description of, in an Indictment.*)

The proper mode of describing a peer in an indictment is by his Christian name, and degree in the peerage; the describing him as "lord," not "baron," was held to be insufficient. *R.* v. *Pitts*, 8 C. & P. 771; *Roscommon's Peerage Case*, 6 Cl. & F. 97.

Peers against whom any indictment of felony found, are to plead, and upon conviction, to be liable to the same punishment as any other subject, by 4 Vict. c. 22.

A personal dignity (where there is no failure of issue or corruption of blood) held not to have been taken away by 28 H. 8, c. 3 (against the decision 12 Co. Rep.) The House of Peers is the only tribunal to determine claims to dignities; and where a question of law arises, the course is by petition to the Crown claiming the dignity, in order that it may be referred by the Crown to the House, with the report of the Crown law-officers annexed, when the House adjudicate on the right, and report to the Crown. *Waterford, Earl of, Case*, 6 Cl. & Fi. 134.

An adjudication in that form by the Irish House of Peers is as binding on that of the United Kingdom, as one by the latter on the claims to the British peerage; but a resolution of the House affirming the report of its Committee, is not equivalent to an adjudication upon a reference from the Crown. *Lord Waterford's Case*, 6 Cl. & Fi. 134.

PENAL ACTION.

As to proof of the commencement of the action, see *Time*.

Where the penalty results from want of qualification, the plaintiff is not bound to prove the negative. *Apoth. Co.* v. *Bentley*, R. & M. 159.

Where, in a penal action, counsel are regularly retained, the plaintiff cannot himself interpose and claim to be nonsuited. *Marks* v. *Benjamin*, 2 Mo. & R. 225.

(*Hawker, sale by, &c.*)

A party who lives and manufactures goods at *B.*, and sends them to *S.* at an inn there, and employs an auctioneer to sell them, is liable to an information under the statute 50 Geo. 3, c. 4, s. 7, charging him as a trading person going from town to town, &c. The Act clearly contemplates other persons than hawkers, &c. selling at other towns and houses than that of the dealer's residence. *Attorney-general* v. *Tongue*, 12 Pri. 51; and see *Attorney-general* v. *Woolhouse*, Ib. 65, and 1 Y. & J. 463; and *Dean* v. *Scholes*, 12 Price, 58.

Where the defendant, a servant, was employed in going round the neighbourhood every fortnight in obtaining orders for tea, and at a subsequent round delivered the parcels as ordered, neither he nor his master having a hawker's licence; held, that it was not carrying "to sell or expose to sale" without a licence, for which he was liable to penalties within 50 Geo. 3, c. 41. *R.* v. *Irie M'Knight*, 10 B. & C. 734.

The exception in sec. 23 of 50 Geo. 3, c. 41, of the real "worker or makers of the goods sold," is not to be confined to parties actually engaged in the manual labour of the manufacture, but a party really a partner is within the protection; and a sale by an auctioneer in his presence as of the goods of the firm, held to be a sale by the principal. *R.* v. *Faraday & Wood*, 1 B. & Ad. 275.

(*Fraudulent Removal, &c.—General Issue.*)

In a penal action to recover the double value of goods removed to avoid a distress; the plea of the general issue (*nil debet*) puts all the facts in issue, as the new rules do not apply to penal actions; held, also, that the 21 Jac. 1, c. 4, s. 4, is applicable to subsequent statutes. *Jones* v. *Williams*, 4 M. & W. 375; and 7 Dowl. 207.

(*Harbouring Goods.*)

On an information upon 6 Geo. 4, c. 108, s. 45, for harbouring goods liable to the payment of duties, held that it was not supported by proof of receiving goods which, by reason of the quantities in which they were packed and imported, were expressly prohibited. *Attorney-general* v. *Key*, 1 Cr. & J. 159; and S. C. *Attorney-general* v. *Bell*, 1 Tyrw. 52.

(*Master of Ship.*)

The 6 Geo. 4, c. 125, s. 66, imposes a penalty on a pilot acting in that capacity without first producing his licence; held that the master of a ship was not subject to the penalty under s. 58, for refusing to employ him, the licence not having been produced by the pilot, although not demanded. *Hammond* v. *Blake*, 10 B. & C. 424.

(*Officer.*)

Where the only evidence of the voter being an excise officer was that he kept an inn, over the door of which were the words "Excise-office," and some loose parol evidence of a commission having been produced before the revising barrister, who rejected the claim, and that the defendant had formerly made entries, but it was also proved that he had been expressly directed by the superior officer not to make any more entries after a certain day; held insufficient to sustain the action for penalties under 4 & 5 Will. 4, c. 51: and *quær.* if the keeper of an excise office is necessarily an excise officer within the Act. *Gooday* v. *Clark*, 2 Cr. M. & R. 277.

Where the corporation (Gravesend Pier Act) were empowered to appoint clerks, a treasurer, &c., but prohibited from appointing the clerk to be treasurer, and imposed a penalty on any clerk or his partner, or his clerk, who should officiate for the treasurer, and the corporation had appointed the clerk to be assistant treasurer, with a salary, and he had discharged some of the duties of the treasurer; held, that it was for the jury to say whether he acted *bonâ fide* in the belief of his being appointed an independent officer, or only colourably, and that in the latter case only he would be liable to the penalty. *Hawkings* v. *Newman*, 4 Mees. & W. 613.

(*Overseer*, p. 850.)

In debt for a penalty, under 5 & 6 Will. 4, c. 76, ss. 15, 48, it was held that the neglect by an overseer to sign the burgh list rendered him liable, and that the word "wilful" was not to be imported in sec. 48; it is the duty of all the overseers to sign the parish list, and if one omits to sign that portion of the list which it is his duty to do, and which is necessary to make the list complete, he is liable, and the fact that the other overseers have signed particular portions of the list will not excuse him. *King* v. *Burrell*, 4 P. & D. 207.

(*Pilot—Agent.*)

Where the master of a coasting-vessel hired a steam-tug *bonâ fide* for the purpose of towing her up the river, held, that although the employing such power necessarily confides the selection of the course and management of the ship, yet the object being solely the employment of the moving power, the party so employed is not within the meaning of the 6 Geo. 4, c. 125, s. 70, as a pilot, and that he could not be deemed to have the charge or conduct of the vessel, and that no penalty was incurred under s. 70; held also, that such penalty might be sued for by a common informer; the consent of the Trinity House or warden respectively being necessary only in case of the pilots licensed by them, and not with reference to pilots not within the jurisdiction of either. *Beilby* v. *Scott*, 7 M. & W. 93.

(*Plays.*)

The 5 Geo. 4, c. 83, repealing all former Acts relating to rogues and vagabonds, and containing no enactment against stage-playing without licence, held not to affect the 10 Geo. 2, c. 28; held also, that proof of the defendant being the acting manager, paying and dismissing the performers, was sufficient evidence of his causing the performance to render him liable to the penalties, whether he acted as the agent of others or not. *Parsons* v. *Chapman*, 5 C. & P. 33.

(*Post-office.*)

Letters having arrived at a post-office, addressed to a party who had become bankrupt, the assignee (in that character) demanded them of the postmaster, and he believing *bonâ fide* that the assignee was entitled to have them for the purpose of the commission, delivered them up, this having been the practice of the office under similar circumstances for more than 30 years; held that the postmaster was not liable under the Act 9 Anne, c. 10, s. 40, for *wittingly, willingly, and knowingly* detaining letters, and causing them to be detained and opened. *Meirrelles* v. *Banning*, 2 B. & Ad. 909.

Where a trustee under a Turnpike Act accepted the office of treasurer, but allowed the clerk to receive the rent of the tolls, &c., and never himself exercised any control or made any profit of the money; held, in an action for penalties upon 3 Geo. 4, c. 126, s. 65, that the question for the jury was, not whether the defendant made any profit, but whether the average balance in the hands of the clerk was such that a man might reasonably be expected to make a profit. *Delane* v. *Hillcoat*, 9 B. & C. 310.

(*Prohibited Goods.*)

Where a vessel, having discharged prohibited goods beyond the prescribed limits, afterwards, and during the same voyage, enters within them, to assist in the landing or to receive back the crew, held liable to for-

feiture within 3 & 4 Will. 4, c. 53, s. 2. *Attorney-general* v. *Schiers*, 2 Cr. M. & R. 286.

In an action for penalties under 25 Geo. 2, c. 36, s. 2, for keeping a house for public dancing, music and other entertainments, without a licence; held that it must be kept with the knowledge of the plaintiff, and for the purpose, and habitually so, and to which all persons may have access, whether by payment or gratuitously; but that where the defendant let a room of his house (a public-house) to a dancing-master, who sold tickets, and took money at the door, and music, dancing, and masquerades were occasionally held there, but there was no evidence of the defendant's knowledge of the practice of taking money, there was evidence to go to a jury as to the letting a house by the defendant for the purposes mentioned in the statute. *Marks* v. *Benjamin*, 5 M. & W. 565.

(*Slaves*, p. 850.)

Under the 5 Geo. 4, c. 113, s. 7, to render parties liable to the penalties for having or receiving on board money or goods to be employed in the objects of the slave trade, it must be proved that they had a guilty knowledge of such purpose and object of the vessel, and the onus lies on the Crown of establishing such knowledge; and a conviction of felony under the Act is no bar to an appeal against the sentence of the Vice-Admiralty Court for penalties. *R.* v. *Sherwill*, 2 Moore, 1; S. P. *Barton* v. *Sheriff*, Ib. 19.

The offence being joint, and not several, only one penalty, under s. 7, can be sued for against the owner and master; held also, that the owner of a foreign vessel, and being a foreign subject residing without the jurisdiction, was liable to the forfeitures and penalties of the Act if the vessel came within a British port. *Del Campo and others* v. *Rex*, 2 Moore, 15.

The new rules of pleading do not apply to any penal action within the stat. 21 Jac. 1, c. 4, s. 4, and *nil delict.* is still a good plea to such an action. *Earl Spencer* v. *Swannell*, 3 M. & W. 154. See *Faulkner* v. *Chevell*, 5 Ad. & Ell. 213.

PERJURY, p. 854.

A. was indicted for perjury, alleged to have been committed on the trial of *B.* for perjury. The indictment against *A.* averred that the evidence he gave on the trial of *B.* was material, and that *B.* was convicted. It appeared that *B.* was convicted and sentenced, but that the judgment against *B.* was afterwards reversed on writ of error: the reversal of the judgment against *B.* is no ground of defence for *A.*, as showing that his evidence could not have been material, and does not negative the allegation that *B.* had been convicted. *R.* v. *Meek*, 9 C. & P. 513.

On a charge of *perjury*, alleged to have been committed before commissioners to examine witnesses in a Chancery suit, the indictment stated that the four commissioners were commanded to examine the witnesses. Their commission was put in, and by it the commissioners, *or any three or two of them*, were commanded to examine the witnesses; held to be a fatal variance, and the Judge would not allow it to be amended under the stat. 9 Geo. 4 c. 15. *R.* v. *Hewins*, 9 C. & P. 786.

One witness in perjury not sufficient, unless supported by circumstantial evidence of the strongest kind. *Champney's Case*, 2 Lew. Cr. Cases, 258.

Where one of several defendants in an action which had been tried, was offered as a witness on an indictment for perjury preferred against a witness

in the action, it was held that he was not rendered incompetent merely on the ground of the debt and costs not having been paid, and that a bill in equity had been filed; but that if the witness expected that the party would be called on a similar action coming on for trial, it would be such an immediate interest as would disqualify. *R.* v. *Hulme*, 7 C. & P. 8; questioning *R.* v. *Dalby*, Peake N. P. C. 12; and *R.* v. *Eden*, 1 Esp. N. P. C. 97. The witness, however, was not examined.

PERSONAL ESTATE.

Shares in the Chelsea Waterworks Company are personal estate; and so wherever real property is held for the purposes of a trading company, although a corporation, and the shares assignable, and the proprietors not answerable for the acts of one another as to acts relating to the concern. *Bligh* v. *Brent*, 2 Younge, 268.

A real estate held for partnership purposes, is held to be in the nature of personal estate. *Morris* v. *Kearsley*, 2 Younge, 141.

The personal property of a bankrupt, wherever situated, is considered as accompanying his person. *Sill* v. *Worswick*, 1 H. B. 665.

PEW, p. 861.

A possessory title to a pew is sufficient against a mere intruder; the Court will decide upon the admissibility of a plea according only to the facts stated therein. *Spry* v. *Flood*, 2 Curt. 356.

The churchwardens have a discretionary power to appropriate the pews in a church amongst the parishioners, and may remove persons intruding on seats already appropriated. *Reynolds* v. *Monkton*, 2 Mo. & R. 384.

POLICY.

(*Right to begin*, p. 867.)

Declaration of a policy of insurance alleged that the same was effected in pursuance of a declaration by the plaintiff, averring, amongst other things, that the party whose life was insured was not accustomed to any habits prejudicial to health, and was in a sound state of health, and the policy was to be void in case of misrepresentation; pleas, first, that the party was accustomed to habits prejudicial to health, to wit, of drunkenness; second, that the party was in a bad and unsound state of health; replication *de injuria*; held that the defendant was entitled to begin. *Pole* v. *Rogers*, 2 M. & R. 287.

Where the affirmative of any one material issue is on the plaintiff, and he undertakes to give evidence upon it, he is entitled to begin. *Rawlins* v. *Desborough*, 2 Mo. & R. 328.

(*Construction of Terms*, p. 867.)

It is for the Court to put a construction on what are "perils of the seas," which are terms of general import. Where casks of oil, which had not been shifted or damaged, had leaked, a witness may be asked to what he attributes it, but not whether, in such case, it is in practice considered as leakage, or loss by perils of the seas. *Quære*, whether counsel can refer to the authority of books on insurance, written by mercantile men? *Crofts* v. *Marshall*, 7 C. & P. 597.

The term "cargo" being of mercantile construction, that given by dictionaries is of no authority. *Houghton* v. *Gildart*, 7 C. & P. 701.

(*Insurable Interest*, p. 867.)

A mere moral certainty that a bounty will be paid to a vessel employed in the whale fishery is not an insurable interest. *Devaux* v. *Steele*, 8 Scott, 637.

(*Description of the Interest.*)

A policy was effected on freight from *C.* coast to *B.*, and the ship put in for repair at a port on the *C.* coast, at seven miles from which the plaintiff procured a cargo ready to be loaded, but the ship was lost by accident in going out of dock; the risk attached, and the plaintiff's interest was properly described as freight; and the policy covering perils of the seas, and all other perils, losses and misfortunes, the loss was within the terms of the policy. *Devaux* v. *Janson*, 5 Bing. N. C. 519.

(*Deviation*, p. 873.)

Upon a policy at and from a *port* of lading, held that a proceeding from the port of *C.* to *B.* within the same bay, but having different port offices, although subject to the jurisdiction of the same custom-house, was a deviation avoiding the policy. *Brown* v. *Tayleur*, 5 Nev. & M. 472.

(*Damages*, p. 880.)

In an action on a time-policy for a year, and loss by perils of the seas, upon the question whether the defendant was entitled to deduct one-third new for old, upon the ground of the ship at the time being on her first voyage; held that the rule had grown up to avoid controversy, but that the voyage was not to be determined by the policy; and *semb.*, it would be better to have a time specified in the policy, depending on the age of the ship. *Pirie* v. *Steele*, 8 C. & P. 200.

It appeared that the ship, newly built, was chartered from England to New South Wales, where the freight was payable, and, as was the custom, not being able to get a homeward cargo there, she proceeded to Madras, and was lost on the homeward voyage; held that it was to be deemed a new ship on her first voyage, and that the rule, allowing a deduction of one-third, as new for old, did not apply. S. C. 2 Mo. & R. 49.

(*Defence*, p. 885.)

Since the 3 & 4 Will. 4, c. 42, Reg. Hil. 4 Will. 4, want of interest must be specially pleaded. *Mills* v. *Campbell*, 2 Younge & C. 397.

Action for loss by perils, &c., plea that the ship was unseaworthy at the commencement of the voyage, it was proved that there had been considerable repairs done, and the jury found that the ship was seaworthy, but was abandoned by the crew too soon after a leak sprung, which the learned Judge said was a verdict for the plaintiff, to which no objection was made, a verdict passed for the full value of the goods, and the Court refused a new trial; *semb.* the intention of the new rules of pleading was, and the rule has been that proof of unseaworthiness lies on the party pleading it; held also, that the proof of deviation lies on the insurer; and that a policy "on goods valued at —*l.*" was a valued policy. *Franco* v. *Nalusch*, 1 T. & G. 401.

(*Fraud, Misrepresentation, &c.*, p. 885.)

A false representation in answer to parol questions, held to vitiate a policy, although only voidable by the articles of the office in case of false answers to written inquiries. *Wainwright* v. *Bland*, 3 Cr. M. & R. 32; and 1 T. & G. 417.

Where, by the rules of an insurance association the insurances were to commence from the time of acceptance, and continue in force for 12 months; held, that a policy executed within that period, although the ship was known to be lost by all parties at the time, was binding, and that an authority to execute policies in conformity with the rules applied to such a policy. *Mead* v. *Davison*, 4 Nev. & M. 701; and 3 Ad. & Ell. 303.

In an action on a policy of insurance, effected by the husband on the life of his wife, it appeared that she had been sent to the office to be examined, and had given general answers to the printed questions, and the jury found that the husband had no personal knowledge; it was held, that the allegations in the plea, as to the husband's knowledge of certain facts material to be disclosed, could not be considered as allegations that he had knowledge through the wife as his agent; but it appearing that before her marriage she had been long attended by a medical person, who ceased to be so upon her marriage, and subsequently the husband's usual family attendant had prescribed for her, once or twice, on slight indispositions, and she, to the inquiry, who was her *usual* medical attendant, had given the name of the latter; held, that it ought to have been left to the jury to say if he could be considered her medical attendant at all; and that, if in answering the question, she was aware that he could not be the proper person to give the account the office were desirous of obtaining, the answer must have been intended to deceive, and a new trial was granted. *Huckman* v. *Fernie*, 3 M. & W. 517.

A party whose life is insured is not the general agent for the assured, and therefore the policy is not void by reason that such party failed to communicate a material fact as to which he was not interrogated by the insurers, unless he was aware of the materiality of the fact, and studiously concealed it.

It is a question of fact for the jury, whether a fact not communicated was, under the circumstances, one which the assured ought to have communicated. *Rawlins* v. *Desborough*, 2 Mo. & R. 328.

(*Warranty*, p. 889.)

Where the policy contained a warranty that the mills insured should be worked by day only, upon a plea in an action, that the mill was worked by night and not by day only; held that it was to be confined to the usual manufacture carried on therein, and that it was no breach of the warranty that a steam-engine in the mill had on one occasion been used at night to turn machinery in an adjacent building; held, also, that a plea that a certain steam-engine and shafts, "these being respectively parts of the said mills," were worked at night, was bad. *Mayall* v. *Milford*, 1 N. & P. 732.

So in an insurance policy of a cotton-mill with a steam-engine, described as "worked by day only," the description was held to apply only to the working of the mill, and that a plea, alleging that after the making of the insurance the steam-engine was worked by night and not by day only, whereby a greater risk was incurred, was bad. *Whitehead* v. *Price*, 2 Cr. M. & R. 447.

A warranty that the assured has not been subject, amongst other things, to *fits*, means that he was not *naturally* so subject, and that having had fits once or more in consequence of an accident did not vacate the policy. *Chattock* v. *Shaw*, 1 Mo. & R. 498.

In an action upon an insurance policy against fire, upon a dwelling-house and a kiln attached to a granary for drying corn, it appeared that, a cargo of bark having been sunk near the premises, the plaintiff had permitted it to be dried *gratis* at his kiln, in the course of which the fire occurred; held, that such single act did not amount to an alteration in the business, of which, by one of the conditions, notice was to be given, or a misdescription in the policy of the trade carried on, although the jury found that corn-drying and bark-drying are different trades, and that the latter was more dangerous than the former; that there was nothing in the policy amounting to an express warranty that nothing but corn should ever be dried in the kiln; and lastly, that, in the absence of all fraud, there is no distinction between the fire having been occasioned by the negligence of servants or strangers, or of the assured himself. *Shaw* v. *Robberds*, 1 Nev. & P. 279. And see *Dobson* v. *Sotheby*, 1 Mo. & M. 90.

(*Change of Interest.*)

A *change in the interest after the policy* effected, still less after the loss has happened, is no answer by the underwriters to a claim for such loss. *Sparkes* v. *Marshall*, 2 Bing. N. S. 761.

(*Non-payment of Premiums*, p. 893.)

Upon a policy of assurance on the life of A., the premium became due on the 15th of March, but was not paid until the 12th of April, when the country agent of the insurance company, through whom the insurance had been effected, gave a receipt for the amount of the premium. The instructions given by the company to the agent were, that the premium on every life policy must be received within fifteen days from the time of its becoming due; if not paid within that time, he was to give immediate notice to the office of that fact, and in the event of his omitting to do so, that his account was to be debited for the amount, after the fifteen days had expired. No notice was given to the company of the non-payment of the premium within the fifteen days; it was therefore entered in their books as paid on the 15th of March, and the agent was debited for the amount: held, first, that the mere debiting the agent with the premium could not be considered as a payment to the company by the assured; secondly, that as the agent had no authority to contract for the company, the fact of his receiving the money after the expiration of the fifteen days, and the entry in the company's books debiting him with the amount, were no evidence of a new agreement between the company and the insured. *Accy* v. *Fernie*, 7 M. & W. 151.

(*Implied collateral Contract*, p. 893.)

Where, upon a capture by a foreign government for breach of blockade and offer of abandonment refused, an arrangement was entered into, that upon payment by the underwriters of a per-centage on the sum insured the policy should be cancelled, which was done, and some years after, upon a convention made between this and the foreign government, the goods were ordered by the latter to be restored, and compensation made, a claim was made by the underwriters for the whole or part of the compensation; held, that having originally refused the offer of abandonment, the payment made by them was to be deemed a compromise of their liability on the policy.

and that they were not entitled to receive any part of such compensation. *Brooks* v. *M'Donnell*, 1 Younge, 500.

One of several partners, after the dissolution, effected a policy of insurance on goods upon premises of the plaintiff, and received the amount of loss; held, that it not having been effected by any authority or in pursuance of any duty towards the partnership, the receipt of the money by him could not render the former partners liable on any implied contract to indemnify the landlord, or as for money received to his use. *Armitage* v. *Winterbottom*, 1 M. & G. 130; and 1 Sc. N. S. 23.

POLYGAMY, p. 893.

The prisoner after contracting a marriage in England was married to a Roman-catholic in Ireland by a Roman-catholic priest there, declaring himself to be a Roman-catholic; part of the ceremony was in English, part in Latin, after which the priest having respectively asked if each would take the other as man and wife, and on their answering in the affirmative, pronounced them married; it was held to be sufficient proof of the second marriage, and that the prisoner could not set up in defence that he was a protestant. *R.* v. *Orgill*, 9 C. & P. 80. And see *R.* v. *Hanley*, and *Swift* v. *Swift*, there cited.

A reputed first wife is not competent as a witness for her supposed husband. See *Peat's Case*, 2 Lew. C. C. 111.

To bring a party within the proviso of 9 Geo. 4, c. 31, s. 22, it must be shown to the satisfaction of the jury, not that the party must have known at the time of contracting the second marriage that the first wife had been alive during the seven years, but that he must have been ignorant during the whole of the period that she was so. *R.* v. *Cullen*, 9 C. & P. 681.

POSSESSION, p. 896.

A testatrix, seised of customary lands, made a dormant surrender to the use of her will, and devised them to her son, but without words of inheritance, and the dormant surrenderee, considering that the son took a fee under the will, afterwards surrendered to the use of the son, his heirs, &c., who surrendered them to a purchaser who had notice of the will; the son died 40 years before the filing of the bill by the equitable heir; held, that after so long an adverse possession he was barred, and the bill was dismissed with costs. *Collard* v. *Hare*, 2 Russ. & M. 675.

Possession is *primâ facie* evidence of a seisin in fee, until it be shown that the party has a less estate. *Doe* v. *Penfold*, 8 C. & P. 536.

POWER.

A lease made under a power, is referable to the deed creating the power, and has the same effect as if made under the instrument itself. *Rogers* v. *Humphreys*, 5 N. & M. 511.

Under a power to demise premises, or any part, a demise of part, with liberty of sporting over the whole, is not a good execution: a plea justifying under a leave from a tenant for life is bad, if it does not aver his continuing life. *Daycell* v. *Hoare*, 4 P. & D. 114; S. P. *Fryer* v. *Coombes*, Ib. n.; and 11 Ad. & Ell. 407. And see *Thursby* v. *Plant*, 1 Wm. Saund. 235, n. (8).

PRESCRIPTION.

(*Reputation—Public Right*, p. 907.)

Reputation being admissible evidence to establish a public right, is equally admissible to show that they have not that right; upon a question, therefore, whether land on a river was a public landing-place or not, reputation that it was the private landing-place of the defendant and his predecessor held admissible. *Drinkwater* v. *Porter*, 7 C. & P. 181.

Stat. 2 & 3 *Will.* 4, *c.* 71, p. 919.

Under the stat. 2 & 3 Will. 4, c. 71, sects. 3 & 4, a party is prescriptively entitled to the access and use of light, if his enjoyment commenced 20 years next before the bringing of an action in which the right is contested, provided such enjoyment has not at any time been interrupted, and the interruption acquiesced in for a whole year.

The clause sect. 4, requiring that the interruption to bar a prescriptive title shall have been acquiesced in for more than a year, is not limited to obstructions preceded and followed by portions of the 20 years, but applies to an obstruction ending with that period: therefore a prescriptive title to the access and use of light may be gained by an enjoyment for 19 years and 330 days, followed by an obstruction (not acquiesced in) for 35 days. *Flight* v. *Thomas*, 11 A. & E. 688.

Flight had raised a wall by which the light was partially excluded from the window of Thomas (the plaintiff below,) after an uninterrupted enjoyment of the light for 19 years and 330 days. Thomas had notice of the erection, and had brought his action within one year after the raising of the wall complained of. These acts were in substance disclosed in one of the defendant's pleas, and proved at the trial, when the learned Judge (Baron Parke) held that the plaintiff Thomas was entitled to recover. A bill of exceptions was tendered, and in the Court of Exchequer Chamber, and afterwards in the House of Lords, the ruling of the learned Judge was affirmed.

Plea, in trespass for taking cattle, damage *feasant*, first, prescribing for a right of pasture, under 2 & 3 Will. 4. c. 71, alleging enjoyment for 30 years next before, &c., and 2dly, a right of *turning on* cattle for 20 years; and it appeared, that although acts of depasturing were shown more than 30 years ago, that 28 years before the action commenced, a rail had been erected to interrupt the enjoyment, and which had been removed during that period; held, that the first plea was not proved, and that it did not lie on the defendant to prove that the erection of the rail was adverse to the plaintiff's right; 2dly, that the second plea was demurrable, for not showing the purpose for which the cattle were turned on, and the sole object of the evidence being to prove the right of pasture, which was a *profit à prendre*, and not a mere easement, the right claimed was neither definite nor supported by the evidence; and since the Act, the proof must be of actual enjoyment during the prescribed period, and no presumption is admissible. *Bailey* v. *Appleyard*, 3 Nev. & P. 257.

A plea, in trespass for chasing, and taking, and detaining sheep, prescribing for defendant and other occupiers of a messuage, &c., for 30 years before, &c., in a right of common of pasture in the place in which, &c., and justifying

the taking as distress damage *feasant*; was held to be bad on demurrer, as being framed on the 2 & 3 Will. 4, c. 71, it did not allege the user to have been for that time before the commencement of the action; but held, that such a plea need not allege the user to have been "without interruption." *Richards* v. *Fry*, 3 Nev. & P. 67.

The grant to a person, his heirs and assigns, of "free liberty, with servants or otherwise, to come into and upon lands, and there to hawk, hunt, fish, and fowl," is a grant of a license of profit, and not of a mere personal license of pleasure; and therefore it authorizes the grantee, his heirs and assigns, to hawk, hunt, &c., by his servants in his absence.

Such a liberty is, therefore a profit *a prendre* within the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2. *Wickham* v. *Hawker*, 7 M. & W. 63.

A plea of 40 or 20 years' user, under ss. 2 & 4, is not supported by proof of user from a period of 50 years before the commencement of the action down to within four years of it; and if the evidence go no farther, there is no case for the jury. *Parker* v. *Mitchell*, 11 Ad. & Ell. 788.

Facts showing that the user was not such as would before the statute have been sufficient to prove a claim by non-existing grant, must be replied specially, and cannot be given in evidence under a traverse of a right of way alleged in a plea. *Kinlock* v. *Nevile*, 6 M. & W. 795.

PRESUMPTIONS, p. 927.

Proof (before a Committee of Privileges in the House of Lords) that the claimant's ancestor sat in Parliament, and that no patent or charter of creation can be discovered, affords a presumption of creation by writ of summons. *Braye Peerage*, 6 C. & F. 657.

In a suit to enforce payment of certain sums in lieu of tithes, it being proved that the occupiers of certain houses, whether ancient or built on ancient sites, had for above one hundred years paid them, but that such sums had never been paid for houses built on new sites within the parish; such payments varying, and in no proportion to the value of the houses *inter se:* held, that the Court were warranted in inferring that such payments had been immemorial, and that a legal origin might be assigned, and that they might be enforced. *Beresford* v. *Newton*, 1 C. M. & R. 901.

Where by the custom a surrender by a feme covert could only be made with the consent of the husband, expressed in the surrender and admission, and if made by attorney, that it should be mentioned in the surrender as so made by the attorney duly authorized; held, that in the absence of his consent so expressed, the Court would not presume his consent against a person not claiming under the surrender, even where the husband had no personal interest in the premises. *Doe* d. *Shelton* v. *Shelton*, 4 Nev. & M. 857; and 3 Ad. & Ell. 265.

(*Omnia rite esse acta*, p. 935.)

Where the plaintiff being sheriff, a writ of *ca. sa.* at his suit, was directed to, and indorsed by, one of the coroners, and lodged as a detainer; held, that it need not appear on the writ that the sheriff was a party, nor (since the rule H. 2 Will. 4), that the proceedings should be entered on the roll in order to charge the defendant in execution; nor was it necessary that the

coroner should make out a warrant to the gaoler; the Court would presume that the writ reached the coroner, and was duly lodged by him. *Bastard* v. *Trutch*, 3 Ad. & Ell. 451; and 5 Nev. & M. 109; S. C. 4 Dowl. 6.

Where a suit for non-payment of church-rates, instituted in the Ecclesiastical Court, had been appealed against, and referred to the Judicial Committee, no erroneous proceeding being shown there, the Court of King's Bench would not assume that the Ecclesiastical Court had acted incorrectly, and refused a motion for a prohibition, on the ground that the rate was bad. *Chesterton* v. *Farlar*, 7 Ad. & Ell. 713. And see *St. Pancras Auditors, ex parte*, 6 Dowl. 534.

See further *Attorney-general* v. *Mayor, &c. of Norwich*, 2 M. & C. 409.

(*Natural Presumption*, p. 937.)

Where a husband and wife perished in the same wreck, the Court held that it could not presume that he survived, but that there must be some evidence that he did so to entitle his representative to take administration to property vested in the wife. *Satterthwaite* v. *Powell*, 1 Curt. 705.

Less evidence is ordinarily sufficient where the adversary occasions a defect in proof. *Retemeyer* v. *Obermuller*, 2 Moore, 93.

PRIVILEGE.

(*Copyright*, p. 939.)

The question of piracy does not necessarily depend upon the quantity of the matter extracted; and if there be any doubt as to the exclusive legal title of the party claiming the interference of the Court, it will not exercise its jurisdiction until the title be first established at law. *Bramwell* v. *Halcomb*, 3 Myl. & Cr. 737.

(*Patent*, p. 939.)

In an action for infringing a patent, and plea alleging the user of the invention by other persons; held, that under 5 & 6 Will. 4, c. 83, s. 5, a Judge has jurisdiction to order a further notice of objections, but not to order the names and addresses of all those alleged so to have used it. *Bulnois* v. *Mackenzie*, 4 Bing. N. C. 127; and 6 Dowl. 215.

See further as to the sufficiency of the specification, *De Rosne* v. *Fairie*, 2 Cr. M. & R. 476; and 5 Tyrw. 393.

A patent for an improvement cannot be sustained as for an original invention. *Minter* v. *Mower*, 1 Nev. & P. 595.

To an action for the infringement of a patent for certain improvements in a cabriolet, three pleas were pleaded: 1st, the general issue; 2d, that the alleged improvements were not new; and, 3d, that the plaintiffs were not the true and first inventors of the improvements; held, that on this state of the pleadings it could not be contended that the patent was illegal as being a monopoly. *Gillett* v. *Wilby*, 9 C. & P. 334.

Held, also, that though all the improvements claimed must be shown to be new, yet it need not be shown that the defendant's cabriolet was an imitation of the whole of them, but an imitation of one was sufficient to maintain the action. *Ibid.*

Held, also, that the validity of the patent might be considered as having come in question under the second plea, so as to entitle the plaintiff to a certificate to that effect under the third section of the statute 5 & 6 Will. 4, c. 83. *Ibid.*

Where the plaintiff, afterwards the assignee of a patent for an improvement, had one of the machines made at his own manufactory, and at his own expense, but under the direction of the patentee, and under an injunction of secresy, which was taken abroad, and used in a concern of which the plaintiff was a proprietor and principal manager; held not to be such a publication as to avoid the patent for the invention. If a patent be for several improvements, and the jury find one not to be so, the patent is void altogether. *Morgan* v. *Seaward*, 2 M. & W. 544.

The patentee of a patent, originally void, entered a disclaimer and memorandum of alteration of part of the specification, under 5 & 6 Will. 4, c. 83; held, that the Act was not retrospective, so as to enable him to maintain an action for the infringement, previous to the time of such amendment. *Perry* v. *Skinner*, 2 M. & W. 471.

In an action on a contract between the plaintiff and three defendants, stating that the plaintiff and each of the defendants were severally interested in patents, and that it had been agreed that they should mutually enjoy the benefit in certain proportions, and pay the plaintiff a certain annuity; it appearing that the plaintiff was only interested in his own patent with others not joined, held, on demurrer, that a plea showing that the subject of the plaintiff's patent was not at the time of the grant a new invention, whereby the grant was void, and which the plaintiff at the time of the agreement well knew, was a bar to the action; held, also, that the action ought to have been brought in the names of all the parties for whose benefit the contract was made, although the plaintiff only was to receive the consideration, and that the variance between the declaration and contract was a fatal objection, and ground of nonsuit. *Chanter* v. *Leese*, 4 M. & W. 295.

QUARE IMPEDIT, p. 941.

Where the plaintiff, in *quare impedit*, after tracing his title, and averring the death of a party, a joint-tenant with him for a term of years in the advowson, alleged that he became and was possessed thereof as of an advowson in gross for the remainder, &c., and the bishop took issue in terms of the traverse; held, that a fine, showing the title to be in third persons, was inadmissible, the parties to the suit not both claiming under the parties to the fine. *Bishop of Meath* v. *Marquis of Winchester*, 3 Bing. N. C. 183.

Declaration in *qu. imp*, alleging that the plaintiffs, being a majority of parties entitled to present, nominated *W.*; plea, that the defendants were the majority, and nominated *P.*, traversing that the plaintiffs were the majority; a replication, that the defendants did not duly nominate *P.*, was held to be had, on demurrer. *Harrington, Earl of* v. *Bishop of Lichfield*, 4 Bing. N. C. 77; and 3 Sc. 371.

Upon a sale by the Commissioners of Woods and Forests, under the stat. 57 Geo. 3, c. 97, of a manor, with all courts, fines, reliefs, rents, profits, &c., and all other rights, members, emoluments, and appurtenances thereto belonging, it was held that an advowson found afterwards to be appendant to the manor, does not pass; *semble aliter*, if the contract had been between subject and subject, although at the time of the contract it was not known to be appendant to the manor, nor intended to be included in the sale; held, also, that upon a sale under the statute, the issuing a special warrant from the Treasury to the Commissioners is not a condition precedent to the

making any contract with purchasers; it is sufficient if it be issued before the certificate of sale be granted to the purchaser. *Attorney-general* v. *Sitwell*, 1 Younge, 559.

(*Presentation*, p. 942.)

In debt for penalties under 31 Eliz. c. 6, for a simoniacal contract to present, the declaration alleged a contract by the clerk to buy the advowson if he were presented to the living, and a presentation in pursuance of such contract; held, that proof of presentation was essential to the action; and that for that purpose it was not enough to show that the defendant prepared a presentation and tendered it to the bishop's secretary, but which never was in fact used or acted upon, the clerk having been afterwards instituted on his own petition as equitable owner of the advowson. *Greenwood* v. *Woodham*, 2 Mo. & R. 363.

QUO WARRANTO.

(*Title of elector*, p. 948.)

In *R.* v. *Hughes*, 4 B. & C. 368, it was held that the titles of electors to corporation offices cannot be impeached through the medium of the elected, and that the distinction as taken by Lord Kenyon in *R.* v. *Mein*, 3 T. R. 596, was between cases where the electors are members of a corporation, whose titles might have been questioned on *quo warranto* information, and those where it could not; and see *R.* v. *Corporation of Penryn*, 8 Mod. R. 216.

But upon the issue taken whether *T. H.* was mayor at the time of the defendant's election, evidence is admissible to impeach his title *de jure* as well as *de facto*. *R.* v. *Smith*, 5 M. & S. 280.

The omission to summon any one member of a corporate body avoids the meeting. *Kynaston* v. *Mayor of Shrewsbury*, Str. 1051.

Since the 5 & 6 W. 4, c. 76, the election of mayor must be the first business done on the 9th November, and the election of aldermen previously is void, but the outgoing aldermen may vote for the election of mayor, but not of the new aldermen. *R.* v. *M'Gowan*, 3 Perr. & D. 557; *R.* v. *Maddy*, *R.* v. *Dudley*, *R.* v. *Stanley*, ib.

RAILWAY COMPANY.

Powers of how far restrained by Courts of Equity. *Webb* v. *Manchester and Leeds Railway Company*, 4 Myl. & Cr. 116; *Stone* v. *Commercial Railway Company*, 4 Myl. & Cr. 122.

Lands required to be taken for the purposes of a railway, had been taken after an inquisition by the sheriff; in ejectment by the owner, it was held, 1st, that such inquisition need not state the compliance with every preliminary required by the Act, as a proviso and defeazance, and that, to do away with the effect of the inquisition, the non-compliance ought to come from the other side; 2dly, that a power to deviate from the intended line involved in it the power to make all necessary and incidental cuttings and embankments reasonable and proper thereto; 3dly, that the plaintiff could not object that the name of a third party, whose lands were taken, was omitted in the reference-book, and his consent was sufficient; and lastly, that the powers of taking such inquisition being under the original Act, which had expired, but its power revived, as if re-enacted in a subsequent Act, it was sufficient, although the payment of the value found had not

been made into the Bank until after the expiration of the time limited by the original Act; and that the last Act gave effect to all the proceedings taken under the first Act. *Doe* v. *Bristol and Exeter Railway Company*, 6 M. & W. 320.

RAPE, p. 950.

The prisoner under the age of 14, was charged with carnally knowing and abusing a child under 10 years, the same rule applies as to the case of rape, and he cannot be convicted, although proved to be of full puberty. *R.* v. *Jordan*, 9 C. & P. 118.

Where the prisoner charged with an assault, with intent to commit a rape, was himself under 14; held, that he could not be convicted, nor was evidence admissible to show that he was capable of committing the offence of rape. *R.* v. *Philips*, 8 C. & P. 736.

A boy under the age of 14, when acquitted under the direction of the Judge of the crime of rape, is liable to be convicted of the assault under 1 Vict. c. 35, s. 11. *R.* v. *Bromilow*, 2 Mo. 122; and 9 C. & P. 366. But see *R.* v. *Banks*, 8 C. & P. 574.

Although it is not necessary that the hymen should be ruptured where penetration is proved, yet the jury may hesitate to conclude the latter, where the rupture is not proved. *R.* v. *M'Rue*, 8 C. & P. 641.

If the jury find penetration, although it may not have proceeded so far as to rupture the hymen, they ought to convict of the offence of rape. *R.* v. *Hughes*, 9 C. & P. 752.

Since 9 Geo. 4, c. 31, s. 18, proof of penetration alone is sufficient to the completion of the offence of rape; and proof of the prisoner being disturbed immediately after penetration, and before completion of his purpose, is immaterial. *R.* v. *Allen*, 9 C. & P. 31; S. P. *R.* v. *Jordan*, ib. 120.

If the jury are of opinion that non-resistance arose from being overpowered by actual force, or from intimidation by numbers, the jury ought to convict of the capital charge; but if after some resistance in the first instance, the party in a degree is afterwards consenting, then of the assault only. *R.* v. *Hallett*, 9 C. & P. 748.

(*Present Complaint*, p. 950.)

On the trial of an indictment for a rape, the person alleged to have been ravished (since dead) had come home evidently suffering from recent violence; on her return home she made a statement as to the injury she had received, and named the persons who had committed it; it was held that the particulars of this statement could not be given in evidence, as independent evidence, to show who were the persons who committed the offence, and that statements of this kind were only admissible to confirm the evidence of the prosecutrix, by showing that she made a recent complaint of the injury she had received. *R.* v. *Megson*, 9 C. & P. 420.

Counsel can only examine generally whether the prosecutrix made complaint of the ill-treatment; the particulars may be asked on cross-examination. *R.* v. *Walker*, 2 Mo. & R. 212.

In a case of rape, if it were proved on the part of the prosecution that the party alleged to have been ravished had been kept out of the way by the prisoner, the Judge would allow her deposition before the magistrate to be given in evidence; but where that was not proved, and the prosecutrix was not at the trial, evidence of complaints made by her recently after the out-

rage was rejected, as such evidence is received as confirmatory evidence only. *R.* v. *Guttridges*, 9 C. & P. 471.

The criminal intent of the prisoner cannot be shown by proof of former attempts, and the jury must be satisfied that he intended to complete the offence at all events, and notwithstanding any resistance. *R.* v. *Lloyd*, 7 C. & P. 318.

Where the female consented, believing the prisoner to be her husband, it was held that the offence did not amount to a rape, but that he might, under 1 Vict. c. 85, s. 11, be convicted of assault, and sentenced to imprisonment and hard labour. *R.* v. *Saunders*, 8 C. & P. 265; S. P. *R.* v. *Williams*, ib. 286.

Where the party was between the ages of ten and twelve, and the offence a misdemeanor only, it was held that the consent would put the charge of assault out of the question. *R.* v. *Meredith*, 8 C. & P. 589.

A count for an attempt, alleging that the prisoner assaulted, &c., was held to be bad; and a second count not alleging the age of the child, was also held to be bad, and not to be aided by the word "said" before the name of the party, as referring to the same party in the first count in which the age was stated. *R.* v. *Martin*, 9 C. & P. 213; and 2 Moody, 123.

But that in such a case, no penetration being proved, the prisoner is liable to be indicted, convicted of the attempt to commit a statutable misdemeanor. *Ib.*

RATE.

(*For Relief of the Poor*, p. 953.)

Shoots growing from the roots of oaks cut down, and which were regularly weeded, and, after 50 years' growth, cut regularly for colliery and firewood, which the sessions had decided not to be saleable under-wood, the Court refused to disturb the decision: whether such are to be deemed within the statute 43 Eliz. c. 2, must depend on the mode of treatment by the owner and the limits of the period in cuttings, and which are facts entirely for the decision of the sessions. *R.* v. *Narberth N.* 1 P. & D. 590; and 10 Ad. & Ell. 815.

Real property is to be rated according to its actual value, as combined with the machinery attached to it, without considering whether such machinery be real or personal property, so as to be liable to distress or seizure under a *fi. fa.*, or whether it would belong to the heir or executor, landlord or tenant, at the expiration of the lease. *R.* v. *Guest*, 2 Nev. & P. 663; 8 Ad. & Ell. 950. And see *R.* v. *Birmingham and Staffordshire Gas Comp.*, 6 Ad. & Ell. 634.

(*On Corporation Lands.*)

Where the rents and profits of lands vested in the corporation, by the 5 & 6 Will. 4, c. 76 (Municipal Corporation Act), were received by the treasurer of the borough to the account of the borough fund, and under s. 92, applicable to public purposes, they were held not to be rateable to the poor. *R.* v. *Liverpool Mayor, &c.*, 1 P. & D. 334.

(*On Canals.*)

Upon the construction of the several Acts regulating the Leeds and Liverpool Navigation Company, held that they were liable to be rated for the

land occupied by the canal, basins, and towing-paths, according to the general value of the land immediately adjoining them; that for branches, not being part of the original line, but communicating therewith, they were to be considered as part of the whole navigation, and to be rated according to their amount in value as mere land at the time of rating; and that the wharfs and quays, as well as warehouses, &c., were to be rated according to the value of similar property in the parish. *R.* v. *Leeds and Liverpool Navigation Company*, 2 N. & P. 540; and 7 Ad. & Ell. 671; reviewing and supporting the case of *R.* v. *Monmouthshire Canal Company*, 3 Ad. & Ell. 619; 5 N. & M. 68.

Where a gas company had laid down pipes, &c. for the supply of gas, through various parishes and certain colleges, &c., extra parochial, held, 1st, that the principle of rating the company in one parish upon what amount a responsible tenant would give for the whole apparatus, after making deductions for the wear and tear of machinery, &c., was the correct criterion of rating; 2dly, that the proper deduction from such rent was such an annual sum as would replace the works when worn out; 3dly, that a claim of deduction for "the profits in trade," of the company, being independent of and beyond the rent, was properly disallowed; 4thly, that the distribution of the assessment in each parish, in proportion to the amount of profits received in each respectively, was wrong, the company being liable to be rated in respect of its occupation in each parish, and that none could be imposed upon such parts as were in extra-parochial places, the proportion of which was to be deducted. *R.* v. *Cambridge Gas Company*, 3 N. & P. 262.

Where a bridge, standing in the parishes of *A.* and *W.*, consisted of a wooden structure resting on piles in the bed of the river and brick abutments on the sides, and in the parish of *A.*, resting on piles in the river, was a toll-house, occupied by the collector of the bridge tolls; the repairs had been from time to time done by the appellant, who repaired also the planking of the carriage way, but not the road itself upon the bridge, and who, as grantee from the Crown, received the bridge tolls. It appeared that he demised them by parol agreement to *E.* from year to year, at a rent to be paid by monthly instalments, and secured by a warrant of attorney, but there was no grant or demise executed; and held, that there being no demise of land *eo nomine*, and the tolls passing only by deed, no interest passed out of the appellant, who was to be considered as still in possession of them, and therefore properly rated; held, also, that as it appeared he took under a grant by the description of a toll traverse, and that it was so described in ancient documents, the sessions were warranted in so treating it. *R.* v. *Marquis of Salisbury*, 3 N. & P. 476.

RECEIPT, p. 954.

A receipt was given by one of several partners, without the knowledge of the others; in an action to recover the partnership debt, evidence is admissible to show that the receipt was fraudulently given by a co-plaintiff: in all cases a receipt is only *primâ facie* evidence, which admits of explanation. *Farrar* v. *Hutchinson*, 1 P. & D. 437.

RECEIVERS.

An ostler assisted in removing from a waggon, which stopped at the inn where he was employed, a quantity of hay which had been taken by the waggoner from his master's stables and put into the waggon, such hay not being allowed for the horses on the journey; held, that the ostler was properly indicted for receiving, because, as the hay was not allowed for the horses, the moment it was removed by the waggoner to the stable *animo furandi*, the larceny was complete. *R.* v. *Gruncell*, 9 C. & P. 365.

RECOGNIZANCE.

(*Estreat of*, p. 957.)

Where a party entered into a recognizance to keep the peace before a single justice, and was subsequently convicted of an assault before a petty sessions, and paid a fine; held, that the forfeiture of the recognizance not having taken place at the quarter sessions, that court had no power to estreat it, the course being by removal into the superior court, and proceeding by *sci. fa.*; held, also, that although the order of the quarter sessions might be a nullity, yet that the party was entitled to remove it by *certiorari*, in order to its being quashed: held, also, that since the 3 Geo. 4, c. 46, the Court of Exchequer no longer retains jurisdiction over recognizances forfeited, taken either before justices out of sessions or at the quarter sessions; and as to the latter, it is the duty of the clerk of the peace to put the law in motion in order to levy the amount. *R.* v. *West R. Yorks. Justices*, 2 Nev. & P. 457.

RELEASE, p. 966.

A release has no operation unless some debt, or demand, or cause of action, exist at the time. *Ashton* v. *Freestone*, 2 Scott, N. S. 273.

Upon the sale of a policy of insurance, one of the conditions being for payment of interest on the purchase-money, if the completion of the purchase-money should be delayed; held, that being in the nature of an additional price, a release executed by the plaintiff, whereby he exonerated the defendant from the purchase-money and every part thereof, was a bar to an action for interest; so, on the purchase-money. *Harding* v. *Ambler*, 3 M. & W. 279.

(*Pleading*, p. 967.)

Plea, in debt on simple contract, that the plaintiff covenanted to forbear suing; held, that although the breach might render him liable to action, it was not pleadable in bar. *Thimbleby* v. *Barron*, 3 M. & W. 210.

A covenant by one partner not to sue, cannot be set up as a release in an action for the partnership debt. *Walmsley* v. *Cooper*, 3 P. & D. 149. See further, *Wilkinson* v. *Lindo*, 7 M. & W. 81.

(*Fraudulent Release*, p. 967)

The Court will not set aside a plea of release given by one of several plaintiffs, unless a clear case of fraud is made out between the releasor and the defendant. Fraud upon the releasor is not a ground for setting aside the plea, since that may be replied. *Wild* v. *Williams*, 6 M. & W. 490.

Where one of several assignees of a bankrupt released, which was pleaded, the Court, upon the circumstances, set aside the plea, the plaintiff being indemnified by his co-assignees. *Johnson* v. *Holdsworth*, 4 Dowl. 63.

(*Presumption of*, p. 968.)

To a bill filed for payment of a rent-charge, a plea of 26 years' possession of the lands out of which the same was claimed to be payable, without accounting for or payment over of any part of the rents and profits, allowed; courts of equity presuming a release after the same period, as juries are directed to presume it, whether the Statute of Limitations be applicable or not. *Baldwin* v. *Peach*, 1 Younge & C. 453.

Where upon an arrangement between a father and son for the payment of the debts of the latter, the father executed a bond which was agreed to be deposited in the hands of certain referees, being intended as a security for the son's future behaviour, and they were empowered within a certain period to direct it to be cancelled if they thought fit, which they omitted to do during the life-time of the father; the Court, under the circumstances, being of opinion that the bond was not intended to operate as a security for the debt, but for collateral purposes merely, which had been fully satisfied, and that, if that were doubtful, the conduct of the obligor during a long period and dealing with the instrument amounted in equity to a release, decreed it to be delivered up to be cancelled. *Flower* v. *Marten*, 2 Myl. & Cr. 459.

(*Effect of*, p. 968.)

By the release of a debt by a composition deed, the creditor loses the right to retain a written instrument deposited with him by the debtor as a security for the debt. Therefore the relinquishment of such security, for the benefit of the debtor, forms no consideration for a parol promise by the debtor to pay the residue of the debt, beyond the amount of the composition received under the deed. *Cowper* v. *Green*, 7 M. & W. 633.

(4 & 5 *Vict. c.* 21.)

Makes a deed of release executed after 15th May 1841, and expressed to be made in pursuance of that Act, as effectual for the conveyance of freehold estates, as a lease and release by the same parties; and enacts that the recital of a lease for a year in a release executed before the passing of this Act shall be evidence of the execution of such a lease for a year.

REPLEVIN, p. 969.

Debt by the assignee of a replevin bond, may be brought in another court than that in which the *re. fa. lo.* is returnable. *Wilson* v. *Hartley*, 7 Dowl. 461; overruling the *dictum* in Sellon's Pr. 367.

In replevin, upon the issue, no rent in arrear, the plaintiff must begin. *Cooper* v. *Egginton*, 8 C. & P. 748.

A replevin-bond may be taken and assigned by *one* of the sheriffs of London in his own name only. *Thompson* v. *Farden*, 1 Scott, N. S. 275.

Non Tenuit, p. 878.

Avowry for rent arrear, pleas, 1st a tender, 2d non-tenuit. The plaintiff proves a tender of the rent, this does not prove the tenancy for the defendant without the aid of the plea of tender, which cannot be allowed as evidence of it. *Knight* v. *M'Dowall*, 4 P. & D. 168.

Note, that Patteson, J., doubting whether the allegation in a plea can be evidence at all in the cause in which it is pleaded, except as an admission

(*i. e.* it is presumed for the purposes of the issue on that plea), says, "in other proceedings between the parties, perhaps it may sometimes be made available for certain purposes, but it is not necessary to discuss this point at present." See *Harrington* v. *M'Morris*, 5 Taunt. 228.

In replevin against the assignee of the reversion of part of the premises in respect of which the rent accrued, the defendant may avow generally, and, stating the special facts, leave the apportionment of the rent to the jury, or may avow generally under the statute; and the Court may amend by substituting an avowry at common law, or by altering the rent avowed for, according to the fact. *Roberts* v. *Snell*, M. & Gr. 577.

Avowry, for 20 *l.*, a half-year's rent, pleas *non-tenuit*, and as to part, *riens* in arrear; it appeared that by the lease the rent reserved was 40 *l.*, but that under the signatures was written a memorandum, before the execution, "the allowance for the road to be made as usual;" held not to be an alteration of the rent, but to operate as a mere covenant, and that it did not support the plea *non-tenuit*. *Davies* v. *Stacy*, 4 Perr. & D. 157.

(*Coverture.*)

Where the plaintiff in replevin, after suing out the writ, became *coverte*, it was held that the defendant could not give the coverture in evidence under the general issue, but should have pleaded it in abatement. *Hollis* v. *Freer*, 2 Bing. N. C. 719.

(*Satisfaction*, p. 795.)

Avowry for rent, a plea as to part, alleged that a note had been given, payable at a time which had not expired, but did not state it to have been accepted in satisfaction, nor that by any agreement or circumstance, the right of distraining had been suspended; this was held to be insufficient; a debt due for rent ranks with a specialty debt, and is not extinguished by a note which constitutes a debt of inferior degree. *Davis* v. *Gyde*, 2 Ad. & Ell. 623. See also *Gage* v. *Acton*, Carth. 511; 1 Salk. 236.

REPUDIATION.

Where a party, in entire ignorance of his legal right, and on a representation of a state of things which there was reason to believe was known to be very different by the party making it, renounced all right to interfere with or reserve money legally due to him, it was held that his representative was not bound thereby. *M'Carthy* v. *Decaix*, 2 Russ. & M. 614. (Reversing the judgment below.)

RES INTER ALIOS.

In *assumpsit* for a quarter's salary, for taking away a child from the plaintiff's school without giving a quarter's notice, according to the prospectus delivered to the defendants; it was held, that another person could not be called to prove the taking away a child without notice, or being called upon to pay the quarter's salary, but that she might prove that no prospectus had been given to her. *Delamotte* v. *Lane*, 9 C. & P. 261.

RESTITUTION.

Where the prisoner had left in the care of another a horse which had been clearly purchased with the proceeds of a bill which he was found guilty of stealing, the Court ordered the horse to be delivered to the prosecutor. *R.* v. *Powell*, 7 C. & P. 640.

REVERSION, p. 177.

(*Action for Injury to, by whom brought.*)

A lease was granted to the plaintiff and his wife, and the premises were underlet by the plaintiff to the defendant, and by him underlet for a part of the term; an action for an injury to the reversion is properly brought by the plaintiff alone; if the objection were valid, the objection could only have been taken advantage of by plea in abatement. *Wallis* v. *Harrison*, 5 M. & W. 142; 7 Dowl. 395.

(*Nature of the Injury*, p. 978.)

Where the plaintiff had demised cottages without any exception of mines, and the defendant, by excavating mines under the premises, had injured the walls, it was held, that the plaintiff was entitled to maintain case for the injury to his reversionary interest. *Raine* v. *Alderson*, 4 Bing. N. C. 702; and 6 Sc. 691. And see *Wells* v. *Ody*, 1 M. & W. 452.

An action may be maintained by a reversioner in respect of an injury by raising a permanent obstruction, to the diminution of light. *Jesser* v. *Gifford*, 4 Burr. 2141. *Tomlinson* v. *Brown*, cited ib. And per Lord Tenterden in *Shadwell* v. *Hutchinson*, 3 C. & P. 617. See further, *Bell* v. *Twentyman*, 1 G. & D. 223.

A reversioner cannot maintain an action on the case for non-repair of a road, which might easily be repaired, although the value of the premises may be thereby deteriorated for the time, the injury not being of a permanent nature. *Hopwood* v. *Schofield*, 2 Mo. & R. 34.

In case for injury to the plaintiff's reversionary interest, the defendants relied on the provisions of the Building Act; on a motion to amend the plea of not guilty, by adding "by statute," and to retain other pleas in defence not furnished by the statute, it was held, that the plea given by the statute remained unaffected by the new rules, and had the same operation as before they were made, and put in issue all defences which would arise at common law, and leave was therefore given to amend as prayed, and that the other pleas might be struck out. *Ross* v. *Clifton*, 11 Ad. & Ell. 631; and 1 Gale & D. 72.

(3 & 4 *Will.* 4, *c.* 27.)

Where a party interested in a long term, sold the premises in fee to a railway company, having been in possession above twenty years without having paid any rent, it was held that the reversioner was barred; and *semble*, the provisions of 3 & 4 W. 4, c. 27, s. 9, apply to cases where no rent is paid, but not to those where no rent is reserved. *Jones, ex parte*, 4 Younge & Cr. 466.

RULES.

(*New.*)

If a defendant plead not guilty "by statute" to the declaration, that plea also extends to a new assignment. *Mason* v. *Newland*, 9 C. & P. 575.

If a defendant does not add the words "by statute" on the margin of the plea of not guilty, he cannot give special matter in evidence to bring himself within an Act of Parliament which allows a plea of not guilty; but if it, at the end of the plaintiff's case, appear that the defendant was entitled to notice of action and to have the venue laid in the proper county, and the plaintiff gave no notice of action, and the venue be in a wrong

county, this is not aided by the defendant having omitted to add the words "by statute" on the margin of his plea. *Mason* v. *Newland*, 9 C. & P. 575.

The effect of the general issue by statute is not altered by the new rules. *Ross* v. *Clifton*, 1 G. & D. 72; 9 Dowl. 1033; 11 Ad. & Ell. 631.

SEAL.

Where an Act of Parliament constitutes a court with a seal, it is not necessary to prove the seal, but the Court will take judicial notice of it, the seal itself being the instrument of proof. *Doe* v. *Edwards*, 1 P. & D. 408.

SEDUCTION.

The daughter at the time of her seduction, was in the service of another person, but was to return home to her father's house when she quitted her place, unless she should immediately obtain another service; the father cannot support an action for her seduction. *Blaymire* v. *Haley*, 6 M. & W. 55.

Evidence of looseness of character is admissible. *Carpenter* v. *Wahl*, 3 P. & D. 457; 11 Ad. & Ell. 803.

The daughter may be cross-examined as to particular acts of unchastity, and witnesses be called to prove the facts and the time and place of their occurrence, in mitigation of damages, if the jury believe the plaintiff to have had such intercourse as caused him to be the father of the child. *Verry* v. *Watkins*, 7 C. & P. 308.

SEQUESTRATION.

In debt for penalties under 18 Geo. 2, c. 20, for acting as a justice without being duly qualified, it appeared that the defendant was vicar of a living under sequestration, but resided in the vicarage-house; held, that a sequestration is a charge within the Act, and that it is immaterial how the sequestrator has disposed of the profits, and that the receipt by the vicar of the stipend assigned is not a freehold qualification, being held not as vicar, but under the bishop's licence; held, also, that production of the judgment roll and writ of sequestration was sufficient evidence of the sequestration, although the writ was not awarded on the entry. *Pack* v. *Tarpley*, 1 P. & D. 478; and 9 Ad. & Ell. 468.

SET-OFF.

(*Subject of.*)

The defendant cannot set off sums received by the one plaintiff as clerk to the other, before the partnership, and still remaining in the hands of the other plaintiff. *France and Hill* v. *White*, 8 Dowl. 53; 6 Bing. N. C. 33.

If the contract declared on be such as would entitle the plaintiff to recover special damages, no set-off is given by the statute, although no special damage be alleged. P. C. *Hardcastle* v. *Netherwood*, 5 B. & A. 95.

A debt due from a testator cannot be set off in an action by the executor for money had and received to his use as executor. *Schofield* v. *Corbett*, 6 N. & M. 527.

Where the defendant in his set-off sought to avail himself of overcharges paid to the plaintiff by a third party, who settled the previous bills for the defendant, it was held, that such third party being dead, the accounts could not, in the absence of fraud, be opened. *Lawes* v. *Eastmure*, 8 C. & P. 205.

(*Without Plea*, p. 994.)

In *assumpsit* on a *quantum meruit* for labour, the defendant may give in evidence the amount of beer supplied to the plaintiff's men, although not pleaded as a set-off, as it may be that the plaintiff deserves to be paid less if the defendant supplied his men with beer. *Grainger* v. *Raybould*, 9 C. & P. 229.

Debt for work and labour, an agreement having been made to do the work for 40*l.*, and all, except to the amount of 2*l.* 13*s.* 4*d.*, having been disposed of under pleas of payment, &c., the defendant may, under the plea of *non-indebitatus*, show that the work, to the amount of 2*l.* 13*s.* 4*d.*, was done by himself, without pleading this by way of set-off. *Turner* v. *Diaper*, 2 Scott's N. S. 447.

On a contract for repairs it was stipulated, that if not completed within a certain time, the builder should forfeit 5*l.* for every week, to be deducted from what might remain due on the completion of the works; the party may either deduct the penalty as a set-off, or recover it in an action. *Duckworth* v. *Alison*, 1 M. & W. 412.

(*Under particular Pleas*, p. 994.)

Since the Rule of Hil., 4 W. 4, a defendant cannot give evidence of a set-off upon a mere notice; it must be specially pleaded, and the Judges are not restrained by the proviso contained in the 3 & 4 W. 4, c. 42, s. 1, from making the rule as to pleading such matter of set-off. *Graham* v. *Partridge*, 1 M. & W. 395.

Pleas in *assumpsit*, of part payment and set-off, which the plaintiff consented to allow; held, that he was entitled to a verdict on the count for goods sold, but that the amounts allowed should be indorsed on the *postea*. *Butt* v. *Burke*, 7 C. & P. 806.

The new rules of pleading do not apply to replications; where, therefore, the plaintiff replies *non indeb.* to a set-off pleaded, and which the defendant established, it is not competent to the plaintiff to prove that the sum so proved had been paid, as being beside the issue. *Brown* v. *Daubeny*, 4 Dowl. 585. S. P. *Jackson* v. *Robinson*, 8 Dowl. 622.

It being no longer necessary in the action of debt to consider the plaintiff's demand as a precise sum, and a defendant being in the same condition, as to pleas of set-off, &c. in debt, as in *assumpsit*, he is not entitled under a plea of set-off to the whole declaration, where the defendant proves a less sum to be due to him from the plaintiff than the latter has established, to have the verdict on the issue found for him as to the part which he has proved; but he is only so entitled where the sum proved under the plea of set-off covers all that is not met by the other pleas. *Tuck* v. *Tuck*, 5 M. & W. 109; and 7 Dowl. 373. And see *Cousins* v. *Paddon*, 2 Cr. M & R. 547.

In an action by a banker as indorsee, against his customer as acceptor of a bill of exchange for 67*l.*, the defendant pleaded to the whole declaration a plea of set-off for money had and received; it was proved that the banker had a balance of 37*l.* in his hands belonging to the defendant, for which latter amount the banker refused to honour the defendant's cheque, alleging that he held the 37*l.* on account of this overdue acceptance: held, that the issue on the plea of set-off must be found for the plaintiff, because it was pleaded to the whole declaration, and not pleaded as to 37*l.* only; but that

the jury ought to allow the 37 *l.* in reduction of the damages. *Barnes* v. *Butcher*, 9 C. & P. 725.

In *indebitatus assumpsit* for work and services, the defendants pleaded that the claim was in respect of wages for work done by plaintiff as master of a boat used by defendants for the carriage of goods, they being common carriers, and that it was agreed that the plaintiff, as master of the boat, should be chargeable for all pilferings, losses and damages to goods under his charge, and that the amount should be deducted from his wages, and might be pleaded as a set-off; the plea then alleged the pilfering of a pipe of wine while under plaintiff's charge, and claimed to set off the damage sustained by defendants in consequence thereof against the plaintiff's claim: held that the replication, *de injuriâ*, was bad; held also, by Abinger, C. B, that the plea was bad as amounting to the general issue. *Clewerth* v. *Pickford & others*, 8 Dowl. 873.

Debt for goods sold and delivered and on an account stated; the particulars claimed 9*l.* 17*s.* 6*d.*; the defendant pleaded as to all except two sums of 1*l.* 0*s.* 6*d.* and 8*l.* 17*s.*, *nunquam indebitatus*; as to 1*l.* 0*s.* 6*d.*, payment into court; and as to 8*l.* 17*s.*, a set-off. Issue on the first and third pleas; the plaintiff took out of court the money paid in under the second. *Semble*, that upon this record the plaintiff had nothing to prove, and that the only issue was on the defendant. *Newhall* v. *Holt*, 6 M. & W. 662.

SETTLEMENT.

(*By Birth*, p. 998.)

The appellants prove that the mother of the child has a place of settlement; this put an end to the *primâ facie* settlement of the child by birth. *R.* v. *St. Mary's, Leicester*, 5 N. & M. 215.

The sessions book containing a regular caption, stating the authority of the sessions, and having the order set out, (it not appearing that there was ever any other record,) is admissible to prove the quashing of the order of removal of the pauper's parent to the appellant parish; and such an adjudication in 1824 is *primâ facie* evidence of the parent's settlement being in some other parish; and it appearing that the child was unemancipated in 1817, the Court will presume that he continued so, although it was not shown that he had returned to his parent's family whilst under 21. *R.* v. *Veaveley*, 1 P. & D. 60.

(*Hiring and Service—Contract of Hiring*, p. 998.)

Several hirings for less periods than for a year, were held to be sufficient for the purpose of gaining a settlement, under 3 & 4 W. & M. c. 11, if the master obtained the dominion over the servant for an entire year. *R.* v. *Ravenstondale*, 3 P. & D. 469.

Service under a hiring for a year, during which the * 4 & 5 Will. 4, c. 76, passed, was held not to be united with previous service, although completing a year before the passing of the Act. *R.* v. *St. John the Evangelist*, 6 Ad. & Ell. 300 *n.*

So where the pauper served under a monthly hiring until Michaelmas 1833, when she engaged for a year (the 4 & 5 Will. 4, c. 76, s. 65, coming into operation on 14 August 1834), it was held that, the contract of hiring

* This statute abolishes settlements by hiring and service or by office.

and service not having been completed at the time of the Act passing, no settlement was obtained. *R.* v. *Rettenden*, 1 Nev. & P. 448.

A party appointed turnkey to a county bridewell, being hired by the keeper, subject to the approbation of the visiting justices, and paid by the county treasurer, is not a *servant* either of the justices or of the keeper. *R.* v. *Sharsholt*, 6 N. & M. 8.

Where, upon the hiring, the servant told his master he should want some time to go to his feast, and the master agreed that he should have a holiday for that purpose, it was held to be an exceptive hiring. *R.* v. *Threkingham*, 8 Ad. & Ell. 866.

The pauper was hired from 5th April to 5th April, to do the work of a colliery, and was to forfeit the same pay for the days he should lay himself idle as he should receive when laid idle by the proprietors, except on pay Saturdays (every alternate one), when the pit was going single shift; and he was to do a full day's work on every working day, except a single shift pit on pay Saturdays, (a day of twelve hours being single shift, and when working all the twenty-four hours being double shift), or to forfeit 2*s.* 6*d.* for every default; when the pit was working double shift, the men made twelve shifts of twelve hours in alternate fortnights respectively, and the proviso as to working single shift on pay Saturdays applied only to men working twelve shifts in the fortnight; the pauper worked sometimes single and sometimes double shift; held, that the hiring was exceptive. *R.* v. *Cowpen*, 5 Ad. & Ell. 333; and 6 N. & M. 559.

As to defective contracts of apprenticeship, see below, *Apprenticeship*.

Where, by the terms of the contract with the father, the son was to serve the master for a certain period in his business of a wheelwright, the master to pay 5*l.* to the son at the expiration of the term, the father to find his son clothes and other necessaries, and the master to provide him meat and lodging, it was held to amount to a contract of hiring and service only, and not of apprenticeship. *R.* v. *Billinghay*, 1 N. & P. 149.

Where the sessions lay before the Court a written document, it is a question of law as to what is its effect; where the hiring and service are made *vivâ voce*, it is a question of fact; and the Court cannot attend to anything which takes place at the sessions which is not stated in the case; as whether conversations at the time of the contract were receivable or not. *Ibid.*

(*Service*, p. 1001.)

A residence by a servant at his father's house, in a different parish, having left his master's house during illness, is a sufficient residence. *R.* v. *East Winch*, 4 P. & D. 342; and see *R.* v. *Sutton*, 5 T. R. 657; *R.* v. *Dremerchion*, 3 B. & Ad. 420.

Secus, in case of residence from accident. *R.* v. *St. James in Bury St. Edmunds*, 10 East, 25. *R.* v. *St. Lawrence, Ludlow*, 4 B. & Ald. 660.

(*Apprenticeship—Proof of Contract*, p. 1001.)

It is a question for the sessions whether a contract be one of hiring or apprenticeship; the test being, what was the object of the parties? If that be, of one to teach and the other to learn, it will be a contract of apprenticeship; and it is not necessary that the word "teach" or "learn" should be expressly used. *R.* v. *Great Wishford*, 5 N. & M. 540.

At the time of the binding to a carpenter, the master declared he would take no apprentice unless he would agree to work on the land as well as

at the trade, and the sessions found that it was a contract of hiring and service; the Court, upon the facts, held that it was a defective contract of apprenticeship, and quashed the order of sessions. *R.* v. *Ightham*, 6 N. & M. 320; and 4 Ad. & Ell. 937.

The pauper, being of age, entered into a contract of apprenticeship in a foreign country, under which he served and resided in this country 40 days; he gained a settlement. *R.* v. *Closworth*, 1 N. & P. 437.

Where the binding was within a local jurisdiction, but over which the county justices had a concurrent one, an order of allowance by two county justices only, was held to be sufficient; and the Court will presume notice to have been duly proved before them, without which they would not have properly allowed the indentures. *R.* v. *Witney*, 6 Nev. & M. 552; and 5 Ad. & Ell. 191.

Where 10*l.*, part of the premium, were paid by charity trustees, and alone expressed as the consideration in the indenture, and by a private agreement between the grandfather of the apprentice and the mistress, the former was to make it up 25*l.*, but the transaction was unknown to the trustees, it was held, that such agreement was a binding agreement, and avoided the indenture for not stating the full consideration, as required by 8 Anne, c. 9, s. 39. *R.* v. *Amersham*, 6 N. & M. 12. See *R.* v. *Baildon*, 3 B. & Ad. 427.

Indentures fraudulently ante-dated, with the view of contravening 5 Eliz. c. 4, s. 31, are altogether void, although the appellant parish was no party to the fraud. *R.* v. *Barmston*, 3 N. & P. 167.

Where the service was under the indenture with a second master, expressly with the assent of the original one, it is immaterial whether the second master knew of the pauper being an apprentice or not. *R.* v. *Sandhurst*, 1 Nev. & P. 296. And see *R.* v. *Banbury*, 5 B. & Ad. 176.

Where the pauper returned to his father in consequence of illness, and resided above forty days, until the indentures were cancelled, during which time his master occasionally visited him, and asked him to carry about and sell tickets for the disposal of articles manufactured by him, by way of lottery, giving him 1*s.* a ticket, it was held, that such residence and service were connected with the apprenticeship, and that a settlement was gained in the father's parish, and was not affected by any illegality of such employment. *R.* v. *Somerby*, 1 P. & D. 180.

The pauper, an illegitimate child, resided with his mother and a man whom she married, in parish *B.*, and was maintained by them. While so resident he was apprenticed (by a charitable institution) to his mother's husband for seven years, to learn the trade of a bricklayer. He resided with his mother and her husband as before, during the seven years. During that time he never was taught nor served in the trade of a bricklayer, but worked at odd jobs about the house when he liked, and sometimes did work in the trade of a potter, under contracts of hiring entered into by his master's consent, with various persons in *B.*, paying his master a part of his wages for maintenance, and disposing of the rest as he chose. The pauper gained a settlement by residence in *B.* during the apprenticeship, under the stat. 3 & 4 W. & M. c. 11, s. 8. *R.* v. *Burslem*, 11 A. & E. 52.

A parish apprentice, bound for seven years to *A.*, served him for four years, when *A.* agreed with *B.*, who carried on the same business in another parish, that the pauper should work for *B.*, *B.* paying 5*s.* a week to *A.* out of the pauper's earnings. The pauper accordingly went and continued to

work for *B.* till the end of his apprenticeship, with the exception of ten days, when he was sent for by *A.* to assist him during illness. *B.* paid *A.* at the rate agreed upon, deducting the ten days' absence during *A.*'s illness. There being no consent of justices, this was a "placing out" or "putting away" of the apprentice, within 56 Geo. 3, c. 139, s. 9, and no settlement was gained by the service under *B.* *R.* v. *Wainfleet All Saints*, 3 P. & D. 72; 11 A. & E. 656.

Where a parish apprentice received a general permission from his master to seek work where he could, and he did so, and resided above 40 days in the appellant parish prior to the passing of the 56 Geo. 3, c. 139, after which his master was made acquainted with and expressed his assent to such service; it was held, not to be an assent (by relation back) to the particular service prior to the statute, and after the statute no valid assignment could take place but with assent of justices. *R.* v. *Maidstone*, 6 N. & M. 545; and 5 Ad. & Ell. 326.

(*Serving an office*, p. 1003.)

A verbal appointment by the rector to the office of parish-clerk and sexton is sufficient, and the execution of the duties and receipt of the emoluments were held to give a settlement, although at the time of the appointment the party was not settled in the parish; and *semble*, no notice need be given to the parish. *R.* v. *Bobbing*, 1 N. & P. 166.

(*Renting a Tenement—Separate and Distinct, &c.*, p. 1004.)

Under the words "separate and distinct," in 6 Geo. 4, c. 57, the tenant must be unconnected with any other person, and be a separate occupier; no settlement is gained where the tenement is hired by distinct persons as joint tenants, although the quota paid by the pauper amount to 10 *l.* *R.* v. *Caverswall*, 1 P. & D. 426.

Where the pauper hired a granary, consisting of an entire floor above another, but having no communication with it, and only entered externally by a ladder from the ground, it was held not to be a separate and distinct tenement to confer a settlement. *R.* v. *Henley-upon-Thames*, 1 N. & P. 445.

But where a house consisted of three floors, and the access to each was by separate outer doors, it was held, that the occupier of one floor had a distinct tenement within the statute. *R.* v. *Usworth and Biddick*, 5 Ad. & Ell. 261.

(*Occupation*, p. 1004.)

Upon the construction of 1 Will. 4, c. 18, the subject-matter which forms the tenement must be occupied; where, therefore, the pauper hired two cottages and three acres of land at an entire rent, and let off one cottage, the one he occupied himself with the land, although of the value of 10 *l.*, was held to be insufficient to gain a settlement. *R.* v. *Berkswell*, 1 N. & P. 432.

Where the pauper hired a house and land, and let the growing crops, it was held that he was not an occupier of the tenement for the whole year within the St. 1 W. 4, c. 18; and where the pauper before the end of the year removed his family and goods, but a son who had previously resided with him, but boarded with his master in another part of the parish, by the direction of his father continued to sleep in the house until the year

expired, it was held not to be a continuance of the father's occupation. *R.* v. *Pakefield*, 6 N. & M. 16.

So, where the father left a portion of his goods which he could not conveniently remove; and the payment of the rent by a trustee to whom the pauper had assigned his goods in trust to pay the rent and taxes and his debts, was held not to be a payment by the tenant within the statute. *Ibid.*

A tenement of the annual value of 17 *l.* is let to *A.* and *B.* *A.* alone occupies and pays all the rent; he gains no settlement. *R.* v. *Aberdaron*, 1 G. & D. 178.

A party hiring and residing in a house of sufficient value for a year, does not defeat a settlement under 1 Will. 4, c. 18, by permitting persons to occupy beds for the night, where he retains the control over the whole house. *R.* v. *St. Giles-in-the-Fields*, 6 N. & M. 1.

Where an agreement throughout had reference to wages and service, and the sessions had found that the occupation of a cottage was in the character of servant and not of tenant, the Court refused to interfere with their decision. *R.* v. *Snape*, 1 N. & P. 429.

Where the owner of flax-mills was the proprietor of the cottage of the pauper, whose children worked at the mill, and the rent agreed to be paid by the pauper was to be deducted from the children's wages, but the pauper never was the servant of the employer, it was held, that although the occupation was ancillary to the service of his children, yet, it not being found to have been for the purpose of the service, the pauper gained a settlement. *R.* v. *Bishopton*, 1 P. & D. 598; S. C. 10 Ad. & Ell. 824.

Where the pauper occupied and paid 10 *l.* rent, it was held that his settlement was not invalidated by the fact that the tithe, amounting to 6 *s.*, was paid by the landlord. *R.* v. *St. John's Bedwardine*, 3 N. & P. 302; and see *R.* v. *Thurmaston*, 1 B. & Ad. 731.

The pauper rented a cottage and garden (of less value than 10 *l.* by themselves), together with a ferry and the use of a boat and line, for which together he paid 10 *l.*; the *right* of ferry ought to be included in estimating the value of the cottage. *R.* v. *Fladbury*, 2 P. & D. 471.

(*Coming to settle*, p. 1004.)

The "coming to settle" *animo morandi*, is a fact to be determined by the sessions, and with whose finding the Court will not interfere, unless they see such finding to be necessarily wrong on the facts stated; where such finding was repugnant to the facts stated, the Court held that it was not concluded by the finding of the sessions. *R.* v. *Woolpit*, 3 N. & M. 526.

(*By payment of rates*, p. 1005.)

The 1 Will. 4, c. 18, extends to settlements by payment of rates, as well as by renting; where, therefore, the pauper had occupied for a year a tenement exceeding 10 *l.* a year, and had paid all the parochial rates made during such occupation, it was held that the settlement was gained, although he had not paid the rent due for the last quarter. *R.* v. *Brighton*, 1 G. & D. 54.

Where the occupation of the tenement rated is such as to satisfy the provisions of 6 Geo. 4, c. 57, the settlement is not affected by the 1 Will. 4, c. 18. *R.* v. *Stoke Damarel*, 1 N. & P. 453.

(*Order, production of*, p. 1005.)

Where on an appeal against an order of removal, the sessions having, according to the old rule in Burn, required the appellants to produce the

original order, or if only a copy were served, to give notice to produce the original, which had not been done, refused to receive the copy in evidence; it was held to be correct, and that the 4 & 5 W. 4, c. 76, had not altered the law so as to render the ancient practice no longer applicable or legal. *R.* v. *Sussex Justices*, 9 Dowl. 125.

(*Effect of*, p. 1005.)

An appellant having given a statement of the grounds of appeal rightly signed by the parish officers, is not estopped from showing that it is by the proper number, although the notice of appeal may have been signed by a greater number; the order, good on the face of it, having been quashed at the instance of the respondents, from not being prepared with proof of facts, is to be taken as having been quashed on the merits, and the decision of the sessions is conclusive. *R.* v. *Church Knowle*, 2 N. & P. 359.

The pauper was removed by an order not appealed against, from *A.* to the parish of *B.*, in the county of *S.*, that parish consisting of two townships, *C.* and *D.*, in the county of *S.*, jointly maintaining their own poor, and of a third township in the county of *W.* maintaining its poor separately; *semble*, the order would be conclusive, on that part of the parish of *B.*, which was in the county of *S.*; and the townships of *C.* and *D.* having afterwards been directed by mandamus to maintain their poor separately, and the pauper having been subsequently removed to the township of *C.*, it was held that the latter township was not concluded by the former order. *R.* v. *Oldbury*, 5 Nev. & M. 547.

Where the order of removal was founded upon a statement in the examination of renting a tenement during a particular period, which proved to be erroneously stated, and the order was quashed, such order of sessions is conclusive, and a subsequent order made upon a fresh examination stating the period correctly, was quashed. *R.* v. *Clint*, 11 Ad. & Ell. 624, n.

A pauper was removed with his wife and six children (named) by an order confirmed on appeal, and by a subsequent order, a child born during the marriage, but not named in the first order, and unemancipated, was removed to the same parish; held, on appeal against the latter order, that although the former one was conclusive as to all the facts stated in it, it was competent to the appellants to show a state of facts which had arisen subsequently, viz. that by a decision of the Ecclesiastical Court the marriage had been declared void *ab initio*—and so to defeat the derivative settlement. *R.* v. *Wye*, 3 N. & P. 6.

(*Notice of Appeal, &c.*, p. 1008.)

Under the 4 & 5 Will. 4, c. 76, s. 79, the notice of chargeability must be served by the removing parish, together with the copy of the order of removal. *R.* v. *Brixham*, 3 N. & P. 408.

The statement of the grounds of appeal, signed by the majority of the parish officers, is sufficient; and so *semb.*, service on one only, if without fraud. *R.* v. *Warwickshire Justices*, 2 Nev. & P. 153; and 6 Ad. & Ell. 873.

And see *R.* v. *Derby Justices*, 1 Nev. & P. 703; and 6 Ad. & Ell. 885.

An order of removal was served on the 18th of March, the next sessions were held on the 8th of April. By the practice of the sessions, seven days' notice of appeal was required; held, that since the 4 & 5 W. 4, c. 76, s. 78, the Midsummer sessions following was the next practicable sessions for the purpose of appealing. *R.* v. *The Justices of Herefordshire*, 8 Dowl. 638.

Service of the notice of appeal on an attorney, although appearing to be the attorney of the respondent parish, is insufficient; but the sessions having a power to adjourn, they may receive the appeal, although no statement of the grounds have been given; the 4 & 5 Will. 4, c. 76, s. 81, only prevents the appeal being *heard:* the statement of grounds, and notice of appeal, are to be considered separate instruments. *R.* v. *Kimbolton*, 1 Nev. & P. 606.

On appeal against an order of removal, the appellants (under stat. 4 & 5 W. 4, c. 76, s. 81,) served a statement of grounds of objection, which only impugned the alleged settlement. On the hearing of the appeal, the bench, being equally divided, adjourned the case to the next sessions. Before the next sessions, the appellants served another statement, containing an objection to the notice of chargeability under sect. 79. The sessions having quashed the order of removal, on the objection last mentioned, it was held, that the objection ought not to have been entertained, since it was not mentioned in the original statement of grounds of appeal; and the Court sent the case back to sessions to be heard on the merits. *R.* v. *Arlecdon*, 11 A. & E. 87.

The grounds of appeal required to be stated in the notice are not confined to those on which evidence is to be given, and the sessions were therefore held to be justified in refusing to hear objections as to defects on the face of an order of removal. *Quære*, if the omission to state the names and ages of children removed be *necessarily* bad? *R.* v. *Witheenwick*, 1 Nev. & P. 423.

(*Requisites of Notice, particularity.*)

By sect. 81 of the 4 & 5 W. 4, c. 76, the grounds of appeal must be expressly stated in the notice; where, therefore, the notice only states that the pauper is settled in the appellant parish, evidence of a settlement by hiring and service is inadmissible. *R.* v. *Eastville*, 1 G. & D. 150.

Where the statement of the grounds of appeal alleged that the pauper gained a settlement by hiring and service in a third parish, it was held to be too general and insufficient, and the sessions having refused to hear the appeal, the Court refused a *mandamus* to them to enter continuances and hear it; it was also held, that the notice and statement signed by the two overseers was sufficient, although there was also one churchwarden. *R.* v. *Derbyshire, Justices of*, 4 N. & P. 703.

But in a later case, where the notice only stated the grounds to be, that the paupers were settled in another parish, without going on to state the nature of that settlement, it was held to be a sufficient compliance with 4 & 5 Will. 4, c. 76, s. 81. *R.* v. *Cornwall Justices*, 5 Ad. & Ell. 134; and 1 Nev. & P. 20.

A notice of appeal on an order of removal, alleging a hiring and service, must state the date and time of such service; though, *semble*, where it cannot be ascertained, the sessions may determine whether it is so essential as that the omission shall vitiate the notice or examination. *R.* v. *Bridgewater*, 10 Ad. & Ell. 693.

The stat. 56 Geo. 3, c. 139, ss. 1, 2, provides several requisites to the due binding of parish apprentices; among others, that the binding be ordered, and indenture allowed and signed, by particular justices; and where the child is bound by a parish to a party residing in another parish, that notice be given to the overseers of the latter, and proved or admitted before the

justices by one of such overseers personally, before the indenture be signed. Sect. 5 enacts that no settlement shall be gained by such apprenticeship, unless such order be made, and such allowances signed, "as hereinbefore directed." An appellant parish stated (under sect. 81, of stat. 4 & 5 Will. 4, c. 76), as the ground of appeal against a removal founded on a settlement by parish apprenticeship, "that the requisites of stat. 56 Geo. 3, c. 139, and more particularly sect. 5, were not complied with." Held, that the appellant parish could not, under this statement, dispute the settlement at sessions, on the ground that their overseers had no notice, and were not present at the binding. *R.* v. *Upper Whitley*, 11 A. & E. 90.

Where the grounds of appeal, setting up a settlement by being rated to a tenement, omitted to state the name of the landlord, it was held to be insufficient to let in the evidence of such settlement. *R.* v. *Sussex Justices*, 3 P. & D. 42.

A ground of appeal was stated to be, that the respondent parish acknowledged the pauper to be an inhabitant of and legally settled in that parish, by relieving him and his family during the last six years out of the parish, and particularly during the years 1839 and 1840, while he and his family resided at Liverpool. This was held to be sufficiently explicit, the facts stated being more within the knowledge of the respondents than of the appellants. *R.* v. *Justices of Carnarvonshire*, 1 G. & D. 423.

(*Variance*, p. 1008.)

The notice stated that the contract of service in *S.* contained a stipulation that the pauper should be allowed "two days' holidays at *S.* club-feast," and, at the hearing, the pauper proved that he bargained "for one day's holiday to go to *H.* fair;" held, that such evidence was inadmissible, the parties being held strictly to the notice given; and the sessions having found it an exceptive hiring, quashed the order, and the Court quashed the order of sessions. *R.* v. *Holbeach*, 1 N. & P. 137.

Where the copy of the examination sent with the order of removal stated a hiring and service in 1813, but the proof at the hearing of the appeal was, that it took place in 1810, it was held to be a fatal variance, and that the sessions were right in rejecting the evidence of the hiring in 1810. *Broseley, ex parte*, 2 N. & P. 355.

(*Objections to the Examination*, p. 1008.)

The examination must show on the face of it such circumstances as are essential to give the justices jurisdiction to make the order; but where it is on the face of it regular, evidence will not be received afterwards to impeach its validity, as by showing the incompetency of the examinant, he being a convicted felon at the time. *R.* v. *Alternon*, 10 Ad. & Ell. 699.

Where the examination and order stated that the pauper's father rented, &c., but did not go on to state the sufficiency of such renting as to time to confer a settlement, it was held to be a substantial objection, as not showing that the justices had jurisdiction to make the removal. *R.* v. *Middleton-in-Teesdale*, 3 P. & D. 173; and 10 Ad. & Ell. 688.

The parish on which the order of removal is made is entitled to have the whole of the examinations on which it is founded, and not part only, and on which the justices may have adjudicated as to the particular settlement. *R.* v. *Outwell*, 1 P. & D. 610; and 10 Ad. & Ell. 836.

The justices having no jurisdiction to make an order of removal, unless the pauper be chargeable, it was held, that the examinations must state the fact of chargeability. *R.* v. *Black Callerton*, 2 P. & D. 475.

The same strictness is not to be applied to the pauper's examination and the statement of objections in the notice, but the sessions are to decide whether variances are substantial or immaterial, and such as could not mislead, and the Court will not interfere with their decisions in that respect. *R.* v. *Yorkshire, W. Riding, Justices of*, 10 Ad. & Ell. 685; and 3 P. & D. 462.

Where, from the copy of the examination, it appeared that the pauper stated that his father belonged to the parish of *C.*, and that he was a certificated man from *C.*, it was held, that under this notice, a settlement of the father by apprenticeship in *C.* might be shown. *R.* v. *Helvedon*, 1 Nev. & P. 138.

Where the pauper had been removed, with a copy of his examination, in which he had stated a hiring with Mr. *P.*, and service with his wife, on which statement a notice of appeal was given, and the ground alleged was that no settlement appeared on the examination, it was held, that the respondents could not introduce a new state of facts, which if communicated might have induced the appellants to have withdrawn their appeal, or to have prepared themselves with fresh evidence. *R.* v. *Misterton*, 2 Nev. & P. 109; and 6 Ad. & Ell. 878.

It is a good ground of appeal that the examination upon which it was made, though it sets forth facts which show a settlement, does not disclose any legal evidence of such facts. Therefore, where an order of removal was made upon the examination of the pauper and his father, in which the father stated that the place of his father's settlement was *E.*, as he had heard his father say, and believed to be true, and that he had heard his father say he had received relief from the overseers of *E.*; and the pauper himself stated that his father's place of settlement was at *E.*, as he had heard him say, and believed to be true, it was held, that such order was bad on an appeal, stating, as one of the grounds, that the order was "bad and inoperative," and the examinations on which it was made "defective and insufficient to ground and support the same." *R.* v. *Ecclesall Bierlow*, 11 A. & E. 607.

See *R.* v. *Tetbury*, *Ibid.* 615.

Under sect. 81 of stat. 4 & 5 W. 4, c. 76, (precluding respondents from going into other grounds of removal than those set forth in the order and examination,) the sessions must reject evidence of any grounds of removal which do not appear, on the face of the examination, to have been proved before the removing justices by some legal evidence, provided the defect of evidence be pointed out by the notice of objections. Where, therefore, a a birth settlement of the pauper's husband was proved only by the husband stating that he was born in the appellant parish, "as I have heard and believe," and the objection was, that it was not proved or set forth "upon the oath of any credible witness" when or where the husband was born, it was held that the evidence of the birth was merely hearsay, that the objection was sufficiently taken, and that *all* evidence of the birth was inadmissible at sessions; although it appeared in the examination that the husband, when examined, was "confined in *W.* gaol for felony," and the respondents contended that the objection pointed only to the inadmissibility of a convicted felon. *R.* v. *Lydeard St. Lawrence*, 11 A. & E. 616.

An examination stated an apprenticeship, and a service in the appellant parish with a party other than the master, but did not state the master's consent; it was held, that the examination was bad on the face of it, so far as regarded a settlement by apprenticeship; although the examinant (the apprentice) stated that it was agreed in the indenture that he should serve the last forty days of his apprenticeship in *L.*, the appellant parish, "and I served the last forty days" in *L.*, "with *A. H.*, my master's father." It was held also, that the objection was sufficiently taken by objecting that it did not appear that the examinant served *A. H.* with the consent of the master, or in any other manner, under any indenture of apprenticeship, alleging some additional defects, and then proceeding thus, "and the said examinations are too general, and are wanting in sufficient particularity in each of these last mentioned respects."

Semble, per Patteson, J., that, where the settlement relied on is a derivative one from the pauper's father, whose alleged settlement is by apprenticeship, the examination should give the date of the apprenticeship. *Ibid.*

(*An Order not supersedable.*)

After an appeal against an order of removal had been entered, and notice of trial given, it was held, that the power of the justices making the order was at an end, and that they had no power to supersede the order at the instance of the respondents. *R.* v. *Middlesex Justices*, 3 P. & D. 459; and 11 Ad. & Ell. 809.

(*Relief*, p. 1008.)

Where a female, born in England of Irish parents, became the mother of a bastard child whilst living unemancipated with her parents, it was held, first, that relief to her, rendered the father removable to Ireland under 3 & 4 W. 4, c. 40, s. 2; and that the 4 & 5 W. 4, c. 76, having objects purely and exclusively English, did not affect the father's liability to maintain her, and to render him chargeable by the relief given to her; and, secondly, that the child could not be removed with the mother to Ireland. *R.* v. *Mile End Old Town*, 5 Nev. & M. 581. And see *R.* v. *Bennett and Broughton*, 2 B. & Ad. 712.

SEWERS.

Where a parish consisted of two districts which had been assessed immemorially towards the repairs of a sea-wall, protecting both districts, under one assessment, collected by one dyke-reeve, and the commissioners of sewers, without any presentment, appointed separate officers, and made a rate on one district exclusively for the repairs of the wall, it was held, that the jurisdiction of the commissioners to make a rate being founded on the presentment of a jury, without which the rate was utterly void, the warrant to levy was also void, and the commissioners liable in trespass. *Wingate* v. *Wayte*, 6 M. & W. 739. See the 3 & 4 W. 4, c. 22, amended by the 4 & 5 Vict. c. 45.

The commissioners have power to amerce a township for neglect to repair works which by custom they are bound to repair, although they cannot tax a township in respect of the benefit they receive from drainage; and in the former case they may levy the rate by distress against one of the parties liable. *Ramsey* v. *Nornabell*, 3 P. & D. 253.

SHERIFF.

(*Arrest*, p. 1015.)

The plaintiff was arrested whilst returning from the Court of Chancery, where he had been engaged as a barrister in a cause, and he obtained a Judge's order for his discharge in that suit only; the sheriff was justified in detaining him on other writs at the suit of other parties, the Judge's order having reference only to the particular application; but it seems that the action might be maintainable against the sheriff if any oppressive conduct were shown. *Watson* v. *Carroll*, 4 M. & W. 592; and 7 Dowl. 217.

A party having been arrested by a sheriff's officer without any warrant, another officer obtained his name to be put in the warrant, which was directed to a different officer, it being in accordance with the practice of the office, and done without any collusion with the sheriff; held not to invalidate the arrest, nor to entitle the party to his discharge from that warrant or other detainers. *Robinson* v. *Yewens*, 5 M. & W. 149; and 7 Dowl. 377.

But where the defendant was arrested on a warrant from the late sheriff (but on none from the present one), at the suit of *M.*, by his officer *S.*, there being at the time another writ against him at the suit of *R.*, the warrant on which from the present sheriff was in the hands of *N.*, who delivered it to *S.*, and the under-sheriff altered it to insert the name of *S.*, and detained the defendant at the suit of the plaintiff; it was held, that the original caption of the defendant was illegal, and that he was entitled to be discharged, and was not precluded from showing the original illegality of the caption by his having removed himself from the original custody by suing out a *habeas corpus*. *Pearson* v. *Yewens*, 5 Bing. N. C. 489; and 7 Dowl. 451.

(*Escape*, p. 1015.)

A party, whilst in mesne custody, was taken after the return of the writ, in the gaoler's custody, to a distant place to attend before a revising barrister, and returned into gaol the same day; it was held to amount to an escape; but that the action was not maintainable without proof of some damage in fact or law. *Williams* v. *Mostyn*, 4 M. & W. 145; and 7 Dowl. 38; questioning *Barker* v. *Green*, 2 Bing. 317. And see *Plancke* v. *Anderson*, 5 T. R. 37.

In debt, by the assignee of *A.*, a bankrupt, for an escape of a party in execution at the suit of *A.* before his bankruptcy, it was held, that the attorney on the record had no authority to direct the discharge, and a plea by the marshal that he discharged the party before notice of the bankruptcy, in pursuance of the requirement and direction of such attorney, was held to be bad, on demurrer. *Savoury* v. *Chapman*, 8 Dowl. 656; 3 P. & D. 604; and 11 Ad. & Ell. 829.

In an action for an escape, the marshal pleaded that the prisoner escaped without his knowledge, and to places unknown, and afterwards, and before the commencement of the suit, voluntarily returned into the custody of the defendant; the plea is insufficient, in not averring that the defendant had no such knowledge during any period of his absence, but leave to amend given. *Davis* v. *Chapman*, 5 Bing. N. C. 453; and 7 Dowl. 429.

In an action for an escape against the marshal, the plaintiff is bound to give a particular of the precise day of the escape if he is aware of it, and if not, to give such information as is in his power. *Davis* v. *Chapman*, 1 Nev. & P. 699.

A return of *cepi corpus et paratum*, &c. with evidence of no bail-bond in the office, is evidence for the jury in support of the count for an escape. *Neck* v. *Humphrey*, 3 Ad. & Ell. 130; and 4 N. & M. 707.

(*False Return*, p. 1009.)

The sheriff is bound by his return, both as to the fact of arrest, and also as to the day on which it was made. *Cook* v. *Round*, 1 Mo. & R. 512.

Where the sheriff levied and sold under a *fi. fa.*, and, after notice of the defendant's having petitioned for his discharge under the Insolvent Act, returned *fieri feci*, it was held that he was bound by such return, notwithstanding the defendant's subsequent discharge. *Field* v. *Smith*, 2 M. & W. 388; and 5 Dowl. 735.

The sheriff's return is only conclusive in the same action, and may be traversed in any other. *Jackson* v. *Hill*, 2 P. & D. 455.

Case for a false return of *nulla bona*: under a plea that the party had no goods whereof the sheriff could levy the damages mentioned, the sheriff may show that the proceeds of the goods seized were exhausted by satisfaction of a year's rent, the expenses and a sum due under another writ of *fi. fa.* previously delivered to him. *Wintle* v. *Freeman*, 11 Ad. & Ell. 539; 1 Gale & D. 93.

A recovery in the original action is no bar to an action for a false return of *nulla bona*. *Pilcher* v. *King*, 1 P. & D. 297.

In case against the sheriff for a false return of *nulla bona* to a *fi. fa.*, the defence being that the goods had passed to the assignees of the debtor, it was held to be unnecessary to put in the deposition of the petitioning creditor to show what the debt was, and that the defendant might show a different debt. *Birt* v. *Stephenson*, 8 C. & P. 741.

The acceptance by a plaintiff of part of a debt, under a return that part only has been levied, is no waiver of an action for a false return. *Holmes* v. *Clifton*, 4 P. & D. 112 (overruling *Beynon* v. *Garratt*, 1 C. & P. 154). See *Watson* v. *Wace*, 5 B. & C. 153; 7 D. & R. 633.

(*Special Bailiff*, p. 1011.)

A mere request to the sheriff to direct his warrant to a particular officer, does not make such officer a special bailiff of the plaintiff and so relieve the sheriff, nor is the latter relieved from the obligation to return the writ by the circumstance of a compromise between the parties. *Balson* v. *Meggatt*, 4 Dowl. 557.

Where the plaintiff's attorney requested the writ of *ca. sa.* to be executed by a particular bailiff, and himself accompanied such bailiff and directed him to do an act which constituted the arrest illegal, it was held, the defendant having afterwards escaped, that it amounted to making such officer a special bailiff, and that the plaintiff could not sue the sheriff for an escape from custody which was illegal, and rendered so by the conduct of the plaintiff's own attorney. *Doe* v. *Trye*, 5 Bing. N. C. 573; 7 Sc. 704; and 7 Dowl. 636.

A mere request that a particular person named should be employed, held not to constitute him a special bailiff of the party and to relieve the sheriff. *Corbet* v. *Brown*, 6 Dowl. 794.

(*Damages*, p. 1014.)

The sheriff being only liable to pay the plaintiff the damages which he

has sustained, the Court will stay the proceedings in an action against the acceptor of a bill of exchange on payment of debt and costs in that action only, although another action against the drawer may also be pending. *Vaughan* v. *Harris*, 3 M. & W. 542.

(*Money had and received*, p. 1023.)

The sheriff seized goods in the possession of *S.*, to satisfy a *fi. fa.* issued against him upon a judgment of nonsuit for 67 *l.* *S.* had previously conveyed all his estate and effects to *H.* by a deed which it was contended was fraudulent and void as against creditors: and *H.* gave notice to the sheriff's officer not to sell, and demanded the goods. The officer refused to deliver them except on payment of 97 *l.*, (the additional 30 *l.* being claimed for poundage, expenses, &c.) which the person sent by *H.* to demand the goods paid under protest. The sheriff, being ruled to return the writ, returned that he had levied of the goods and chattels of the plaintiff *S.* the sum of 67 *l.* In an action for money had and received, brought by *S.* against the sheriff to recover back the 30 *l.*, it was held not to be necessary to prove a tender of the 67 *l.* *Scarfe* v. *Halifax*, 7 M. & W. 288.

Original writs having been wholly executed, ought not to be transferred to the new sheriff, under 3 & 4 Will. 4, c. 99, s. 7, and the balance of the proceeds constituting a debt from the former sheriff to the debtor, cannot be taken in execution under 1 & 2 Vict. c. 110, s. 12, and the defendant is not rendered liable by having employed the same under-sheriff. *Harrison* v. *Paynter*, 6 M. & W. 387.

(*Insufficient Sureties*, p. 1025.)

In case against the sheriff for taking insufficient sureties in replevin, he is liable to the extent of the penalty of the bond given by them, and not merely of the value of the goods distrained. *Paul* v. *Goodluck*, 2 Bing. N. C. 220: and 2 Sc. 363.

(8 *Ann*, *c.* 14, *s.* 1, p. 1027.)

The sheriff is liable to the landlord, if he levy on the goods not of the tenant but a stranger, although he have been compelled to pay the whole amount to the owner. *Forster* v. *Cookson*, 1 G. & D. 58.

In an action against a sheriff for removing goods taken under a *fi. fa.* without paying a year's rent, which was due to the landlord, the defendant pleaded that no rent was in arrear, and that the sheriff had no notice that any rent was in arrear, thus admitting the execution and the taking by the defendant. It was proved that the goods were actually taken by *M.*, and had never been taken except on that occasion; held, that as there had been no other seizure, this sufficiently showed *M.* to have acted by the authority of the defendant, without proof of any warrant. *Read* v. *Thoyts*, 9 C. & P. 515.

In the same action there was, in addition to the special count, a count in trover, to which the defendant pleaded not guilty, and that the plaintiff was not possessed; and the plaintiff, in addition to the proof that a year's rent was due, gave in evidence an absolute bill of sale, by which the tenant, before any rent had become due, assigned all his goods (including those taken in the *fi. fa.*), to the plaintiff for a debt, the tenant remaining in possession of the goods; held, that there being no evidence on the latter count to connect the sheriff with the taking of the goods, the plaintiff must fail on that count;

but that if the jury thought the bill of sale void, as against the execution creditor, they might find for the plaintiff on the first count for the amount of the year's rent; and the jury having found for the plaintiff on the first count, and for the defendant on the second count, the Judge would not certify under the stat. 4 Anne, c. 16, s. 5, to exempt the defendant from costs on the pleas pleaded by him to the first count of the declaration. *Read* v. *Thoyts*, 9 C. & P. 515.

It was held also that the party against whose goods the execution issued was a competent witness. *Ibid.*

(*Defence by Sheriff.*)

The sheriff is not liable when he acts judicially only. *Pilcher* v. *King*, 1 P. & D. 297.

(*Property seizable—Lien*, p. 1028.)

The sheriff cannot take goods which the debtor holds as a lien only. *Legge* v. *Evans and another*, 8 Dowl. 177.

Goods purchased by a married woman out of the proceeds of property settled to her sole and separate use may be taken in execution on a judgment against her husband. *Carne* v. *Brice and another*, 8 Dowl. 884.

Declarations made by the officer whilst in possession under a *fi. fa.* are evidence against the sheriff, although they are made after the return of the writ. *Jowles* v. *Humphrey*, 2 C. & M. 413.

And a letter from the under-sheriff to the officer in possession, directing him to demand only the 67 *l.*, if *S.*, whose goods had been seized on a *fi. fa.* against them, came to pay the amount of the execution, is not admissible in evidence on behalf of the sheriff. Held, however, that it was a question for the jury, and ought to have been left to them, whether the money paid to redeem the goods was the money of *S.* or not, and that if it was not, he was not entitled to recover: and that the sheriff was not estopped by his return to say that the excess beyond the 67 *l.* was not the money of *S.* *Searfe* v. *Hallifax*, 7 M. & W. 288.

In trover for goods against the sheriff, an affidavit made by the sheriff's officer on a motion by the defendant under the Interpleader Act, is admissible to prove the seizure of the goods by the servant of the sheriff, having full knowledge of its contents, and using it for his own purposes. *Burchell* v. *Hulse*, 7 A. & E. 455; S. C. 2 N. & P. 426.

(*Extortion*, p. 1031.)

The statute of 23 Hen. 6, c. 10, regulating the fees to be taken by the sheriff on an arrest, being in force at the time of the action brought (prior to 7 Will. 4, & 1 Vict. c. 55), was held not to be repealed by any usage or practice in taxation, and that the liability of the officer for extortion was not varied by the fact of the party having appointed his own bailiff. *Plevin* v. *Prince*, 10 Ad. & Ell. 494.

The sheriff, although put to extra trouble and expense, &c., in making the levy on an execution, is entitled only to the fees allowed in the table under 7 Will. 4, & 1 Vict. c. 55. *Slater* v. *Haines*, 7 Mees. & W. 413; and 9 Dowl. 221.

(*Poundage*, p. 1023.)

Where the amount of the execution is tendered to the sheriff before actual levy, he cannot claim poundage; and where it was paid under protest, it was ordered to be refunded. *Colls* v. *Coates*, 3 P. & D. 511.

The right to poundage under 29 Eliz. c. 4, is not affected by the 7 Will. 4, and 1 Vict. c. 55, or the table of fees made under it. *Davies* v. *Griffiths*, 4 Mees. & W. 377; and 7 Dowl. 204.

STAMP, p. 1034.

(*Time and Mode of objecting to.*)

Plea, to an action on a bill, that it was not duly stamped, is ill, on special demurrer. *Howard* v. *Smith*, 4 Bing. N. C. 684; and 6 Sc. 438.

Where an I O U instrument had, whilst counsel were engaged, been inadvertently read, it was held that it was too late afterwards to object to the want of a stamp and withdraw it from the jury. *Foss* v. *Wagner*, 6. Ad. & Ell. 116.

Where, until inspection of the cheque on which the action was brought, it could not be known that it required a stamp, being post-dated, it was held that it was not too late to take the objection after it had been read, and that the fact of post-dating need not be specially pleaded. *Field* v. *Woods*, 2 Nev. & P. 117; and 6 Dowl. 23.

Where it is sought to draw up a rule for an attachment, it is competent for the officer of the Court to object to the absence of a stamp on an award, and therefore to refuse to draw up the rule. *Hill* v. *Slocombe*, 9 Dowl. 339.

An agreement for the sale of a house referring only to the title deeds, if it come to the knowledge of the Court that an agreement is not stamped, it is not competent to the parties to waive the objection, and no decree will be made until the instrument is produced to the registrar properly stamped. *Owen* v. *Thomas*, 3 M. & K. 353.

(*Stamp, single, when Sufficient*, p. 1052.)

A deed conveying lands in trust, and containing a declaration of a similar trust as to stock, requires but one stamp. *Doe* v. *Fereday*, 4 P. & D. 287.

Where an agreement was entered into pending disputes as to the boundaries of mining lands, declaring that a surveyor residing out of the neighbourhood should be appointed by the agent of the lord of the manor, to set them out, and subsequently a memorandum was executed, reciting that the parties not having been able to appoint a competent surveyor residing out of the neighbourhood, had agreed to appoint a particular surveyor for the purpose; it was held that the two memoranda constituted but one agreement, and that one stamp was sufficient. *Taylor* v. *Parry*, 1 Sc. N. S. 586; and 1 M. & G. 604.

So where the defendant, trading separately, and also in partnership, had goods consigned to him on both accounts and the bills of lading transmitted to him, and being desirous of receiving both consignments, signed an agreement in the name of the firm, containing an undertaking to be answerable for the amount of freight for his own goods, and another for that of the goods of the partnership, it was held, that having an interest in both, it was competent for him to make himself personally liable for the freight of both; and that although the agreement might contain a plurality of contracts, it did not require more than one stamp. *Shipton* v. *Thornton*, 1 P. & D. 216.

(*Ad valorem.*)

In debt on a bond, conditioned for the payment of a sum of money secured to be paid by a certain indenture, it was held, that it was necessary to

produce the deed, in order to see whether it was such as required an *ad valorem* stamp, to exempt the bond from a higher stamp than 1*l.*, with which only it was stamped. *Walmesly* v. *Brierley*, 1 Mo. & R. 529.

(*Affidavit*, p. 1035.)

Affidavits used in answer to an application to set aside an award made pursuant to a submission to arbitration by deed, must be stamped, notwithstanding the 5 Geo. 4, c. 41, which repeals the 54 Geo. 3, c. 184, as to stamps on legal proceedings in general. *Templeman* v. *Reed*, 9 Dowl. 962.

(*Agreement*, p. 1035.)

An agreement for the sale of a house stated that the sale was subject to the covenants set forth "in a draft lease delivered this day;" held, that in calculating the number of words with reference to the stamp upon the agreement, the covenants in the lease were not to be included; and, the agreement containing less than 1,080 words, and being stamped with a 1*l.* stamp, that the stamp was sufficient. *Sneezum* v. *Marshall*, 7 M. & W. 417; and 9 Dowl. 267.

A letter in the terms "I have received the sum of ——*l.*, which I borrowed of you, and I have to be accountable for the said sum, with legal interest;" is an agreement, and not a promissory note, and admissible with an agreement stamp. *Horne* v. *Redfearne*, 4 Bing. N. C. 433.

Where the defendant having money of the plaintiff's wife in his hands, the plaintiff gave a memorandum that he consented to take it in weekly payments, and to give a receipt in full upon the whole being paid, it was held to be inadmissible without a stamp. *Remon* v. *Hayward*, 2 A. & E. 666.

Where to the I O U were added the words, "to be paid on," &c., it was held to be either a note or an agreement, and a stamp therefore necessary. *Brooks* v. *Elkins*, 2 M. & W. 74.

A deed, purporting to be a surrender of a lease in consideration of a new one at an increased rent, does not require an agreement stamp, the agreement being incident to and part of the new conveyance. *Doe* v. *Phillips*, 3 P. & D. 603; and 11 Ad. & Ell. 796.

An agreement to make an engraver's press, without any contract as to fixing it, is a contract for the sale of goods within the exception of the Stamp Act. *Pinner* v. *Arnold*, 2 Cr. M. & R. 613; and 1 Tyrw. & Gr. 1; holding the case of *Buxton* v. *Bedall*, 3 East, 313, to have been overruled by those of *Wilks* v. *Atkinson*, 6 Taunt. 11, and *Garbutt* v. *Watson*, 5 B. & Ald. 613.

And an agreement for a sale of goods and goodwill is not a sale merely of goods within the exemption of the Stamp Act, and requires a stamp. *South* v. *Finch*, 3 Bing N. C. 506; and 4 Sc. 293.

A resolution of a company or association for the appointment of a clerk or secretary at a certain salary, is not an agreement or a minute or memorandum of an agreement that need be stamped, within the 55 Geo. 3, c. 184. *Vaughton* v. *Brine*, 1 Scott, N. S. 258.

A minute of a resolution entered in the books of a joint stock company for the acceptance of a tender for work to be done for the company, is not a minute or memorandum of an agreement that need be stamped, within the 55 Geo. 3, c. 184. *Lucas* v. *Beach*, 1 Scott, N. S. 350.

An agreement signed by the plaintiff only, is as against him valid in point of law as an agreement, and must therefore be stamped. *Hughes* v. *Budd*, 8 Dowl. 478.

A plaintiff in ejectment having adduced oral evidence of the terms of the defendant's tenancy under him, the defendant put in the following memorandum, signed by himself:—"July 13, 1838.—I acknowledge that I have held the estate," &c., "as tenant to *T. F.*" (the lessor of the plaintiff), "at a yearly rent of 60 *l.*, from 4th July 1837, the rent to be paid quarterly; and I further acknowledge to stand indebted to the said *T. F.* in 60 *l.* for the first year's rent, which was due on the 4th July instant. I have, on the signing hereof, paid the attorney of *T. F.* 6 *d.* in part of the rent so due." Held, that this paper was not a mere acknowledgment or attornment, but a contract or evidence of a contract within stat. 55 Geo. 3, c. 184, sched. Part I. tit. *Agreement*, and inadmissible without a stamp. *Doe dem. Frankis* v. *Frankis*, 11 A. & E. 792.

An I O U, which contains special terms that the sum to be paid shall be reduced in a certain event, and that part of the sum shall be disposed of in a particular manner, requires an agreement stamp, unless it relate to an amount under 20 *l.* *Evans* v. *Philpotts*, 9 C. & P. 270.

An agreement by an execution creditor to the sheriff to indemnify him on the sale of goods, requires a stamp, although the value of the goods be under 20 *l.*, unless the indemnity be limited to a sum under that amount. *Shepherd* v. *Wheeble*, 8 C. & P. 534.

(*Annuity.*)

Where the grantor, in consideration of the marriage and of the portion of the intended wife, covenanted to pay an annuity to the plaintiff in trust for the inten'ed husband and wife, it was held that the deed did not require to be stamped, as upon the sale of an annuity, with an *ad valorem* stamp. *Massey* v. *Hanney*, 3 Bing. N. C. 478; and 4 Sc. 258.

(*Apprentice*, p. 1040.)

The exemption from the stamp-duty under 37 Geo. 3, c. 111, was held to apply only to contracts for valuable consideration, and not to extend to an indenture of apprenticeship, where no premium was given. *R.* v. *Mabe*, 5 Nev. & M. 241; and 3 Ad. & Ell. 531.

By an indenture of apprenticeship, the apprentice was bound to serve his master for five years and a half; a deed of assignment transferred the services of the apprentice to a new master for the remainder of the term of five years and a half, and the deed recited that instead of providing the apprentice with certain wages stipulated for in the original indenture, the new master would find him in food, lodging and washing, for the remainder of the said term and one year more; the deed then bound the apprentice to his new master for that additional term: the deed of assignment is liable only to a 1 *l.* assignment stamp, and no additional duty is payable on the creation of the new term of service. *Morrice* v. *Cox*, 9 Dowl. 661.

Where no consideration was expressed in the indenture, it was held not to be within the 8 Ann. c. 9; and the 55 Geo. 3, c. 144, only varying the amount of duty, and not limiting the imposition of the stamp to any particular period, it was held to be receivable in evidence, although stamped more than a year after its execution. *Smith* v. *Agett*, 8 Dowl. 411.

(*Assignment*, p. 1040.)

Where a party entitled to receive commission as architect of works in progress, assigned it in trust to pay a debt, with a power to receive it, and

a covenant to pay the debt and not to receive the commission or do any act whereby the assignee might be hindered receiving it, it was held to operate as an absolute conveyance of the commission, and not as a mortgage, and that a stamp calculated upon the amount of commission eventually received, was sufficient. *Pooley* v. *Goodwin*, 5 N. & M. 466.

(*Attorney*, p. 1041.)

The non-payment of stamp-duty at the time of admission, though it may subject the party to penalties, does not render the admission void. *Middleton* v. *Chambers*, 1 Scott, N. S. 99.

(*Authority*, p 1041.)

Where the town clerk of a corporation was authorized in writing by the trustees to vote on their behalf, in respect of lands vested in them by the Municipal Reform Act, it was held that such writing required a stamp. *R.* v. *Kelk*, 4 P. & D. 185.

(*Bill of Exchange*, &c. p. 1042.)

"August 25th, 1837.—Memorandum, that I, Benjamin Payne, had 5*l.* 5*s.* for one month of my mother and Shrivell, from this date, to be paid by me to her.—*Benjamin Payne*," is a promissory note, and requires a stamp. *Shrivell* v. *Payne*, 8 Dowl. 441.

(*Bond*, p. 1044.)

A bond conditioned to secure a principal sum, with interest at 5*l.* per cent. commencing from a previous day, is only liable to stamp duty on the principal sum. *Barker* v. *Smart*, 7 M. & W. 590. And see 9 Dowl. 211.

(*Charge on Land*, p. 1045.)

Where, by a resolution in vestry, that the plaintiff should be reimbursed sums which he had paid for church repairs out of the rents of certain church lands, it was held that if such consent amounted to a charge on the land, the entry was inadmissible in evidence, for want of a stamp, in an action against the churchwardens to recover the rents received; and *semb.* the churchwardens would have no power to bind their successors in charging the land. *Wrench* v. *Lord*, 3 Bing. N. C. 672; and 4 Sc. 381.

(*Deed*, p. 1046.)

By indenture, to which *A.*, executor and devisee in trust, and *C.* and *D.* were parties, it was agreed and declared that certain stock, formerly the testator's, should be transferred to *C.* and *D.* in trust, according to the dispositions of the will; and in pursuance of an agreement, which was recited, *A.* by the same indenture, bargained, sold, released, &c., lands of *A.* to *C.* and his heirs, in trust that *C.* should out of the proceeds make certain payments directed by the will; the indenture bore a 1*l.* 15*s.* stamp: it was held that such stamp was sufficient, under the stat. 55 Geo. 3, c. 184, sched. Part I., and that the indenture did not require to be stamped but "as a deed not otherwise charged," &c. in respect of the disposition of stock, and as a "conveyance not otherwise charged," &c. in respect of the bargain, sale, and release of lands. *Doe* v. *Fereday*, 12 A. & E. 23.

(*Lease*, p. 1047.)

A. being owner of a farm, let it for seven years to *B.*, and by a written agreement of the same date as the lease it was agreed that *A.* should manage the farm for *B.*, *B.* allowing *A.* 12*s.* a week, "and allowing him

and his family to reside and have the use of the dwelling-house and furniture therein, free of rent," and this agreement was to be put an end to by three months' notice or three months' wages; it was held that this agreement did not require a lease stamp, as it did not contain a demise of the house, the occupation being the mere remuneration for services. *Doe* d. *Hughes* v. *Derry*, 9 C. & P. 494.

(*Mortgage*, p. 1048.)

On a mortgage of premises held for lives, for 130*l.*, with power to the mortgagee to expend not exceeding 70*l.* for a renewal, it was held, that a 2*l.* stamp was sufficient. *Doe* d. *Jarman* v. *Larder*, 3 Bing. N. C. 92; and 3 Sc. 407.

An assignment of a mortgage as a mere transfer of an old security for money previously due, was held to be sufficiently stamped with a 35*s.* stamp, although the seisin of the mortgagor was not proved. *Doe* v. *Maple*, 3 Bing. N. C. 832.

Where a mortgage term was transferred upon a further advance, and the fee conveyed as a further security, it was held that the deed required only an *ad valorem* stamp on the further sum advanced. *Doe* v. *Gray*, 3 Ad. & Ell. 89; and 4 N. & M. 719.

(*Surrender*, p. 1051.)

Where by agreement, dated in May, between *A.* and *B.*, an estate was to be sold by auction, in lots, and if not all sold, then after — August and before — September, the part remaining unsold was to be divided into equal lots between them, and a sum to be paid by *B.* to *C.*, the principal tenant on his giving up possession at Michaelmas, which he had consented to do, it was held that the agreement stamped with a 1*l.* stamp was sufficient, the instrument not amounting to a surrender, at the time of its being executed, of the tenant's term. *Weddall* v. *Capes*, 3 Cr. M. & R. 50; and 1 Tyrw. & Gr. 430.

(*Trust*, p. 1051.)

A memorandum signed by the defendant in the terms "I hold of *M. T.* 37*l.* to put into the savings' bank for her," is evidence of a debt, and not of a trust, although there was evidence that it was deposited in his hands to be applied to the use of *M. T.* at the defendant's discretion. *Remon* v. *Hayward*, 2 A. & E. 666.

STATUTE, p. 1059.

Words of, when compulsory. *R.* v. *Leeds*, 4 B. & A. 498.

Where a private Act incorporating an insurance company provided that it should be judicially taken notice of, and without being specially pleaded; it was held that it was sufficient to produce a copy from the King's printer. *Beaumont* v. *Mountain*, 4 M. & Sc. 177.

(*Repeal of*, p. 1059.)

The law does not favour the doctrine of repealing a statute by implication. *Foster's Case*, 11 Rep. 73, (*a*). *Doe* v. *Grey*, 2 T. R. 365; Dyer, 347.. *R.* v. *Downes*, 3 T. R. 569. *Goldson* v. *Buck*, 15 East, 376; Fortescue, c. 18.

A repealed statute has no operation, &c. See further, 2 M. & W. 848.

STOCK.

(*Dividends.*)

Where the tenant for life of stock dies on the day of the dividends becoming due, they belong to his residuary personal estate. *Paton* v. *Sheppard*, 10 Sim. 186.

STOCK-JOBBING.

Assumpsit for stock sold and transferred by plaintiff, and accepted by defendant; plea, stating an agreement for such sale, &c., and that at the time of making such agreement the plaintiff was not possessed of or entitled to the stock in his own right, &c.: held, that such contract was not void under 7 G. 2, c. 8, s. 8. *Mortimer* v. *M'Callan*, 7 M. & W. 20; and see S. C. 6 Id. 58.

See tit. ASSUMPSIT—ILLEGALITY.

SUICIDE.

A person cannot be tried for feloniously inciting another to commit suicide, although that other commit the suicide. *R.* v. *Leddington*, 9 C. & P. 79.

SURETY.

(*Liability of*, p. 1062.)

Where a bond was given by a merchant to his bankers as a security for a balance and for future advances, to which the respondent became a party as surety, and afterwards, the bond being defective, a fresh one was executed in a larger sum, to secure, as was alleged, a floating balance, with interest from the date of the execution, but was in the common form, which was also signed by the respondent as surety, but the purpose was not explained to him, it was held that he was liable only for the balance then actually due, subject to an account of payments subsequently made to the bankers by his principals. *Walker* v. *Hardman*, 11 Bli. N. S. 229.

In debt upon a bond given by a surety for the due performance of his duties by a collector of taxes, it was held, 1st, that such bond being given to the commissioners was good, although conditioned to pay the monies collected to the receiver-general and to the commissioners, notwithstanding the latter are required by the statute to pay over such monies to the receiver; 2dly, that payment of monies collected in one year to the account of a different year, in order to cover deficiencies, was a breach of the condition duly to pay over, &c.; 3dly, that the sale of the lands and goods of the defaulter, was a condition precedent to any action against the surety, (*diss.* Abinger, L. C. B., and Parke, B.), but that to make such condition available, the surety is bound to aver and prove notice to the commissioners, or that they had knowledge of the existence of such lands, &c. (*diss.* Denman, L. C. J., and Williams, J.); and, lastly, that upon the plea of general performance by the principal, one of the breaches being the failure to pay on the days and times appointed by the Act (which in fact did not appoint any, but empowered the receiver to do so), it would be presumed that the receiver had appointed days for such payment. *Gwynne* v. *Burnell*, 2 Sc. 16.

This judgment was reversed on error, in Dom. Pr., the Judges differing as to whether the property of the principal which only came to the know-

ledge of the commissioners, or the whole, was to be exhausted before the surety could be called upon; but the defendant having joined issue upon that plea (which would have been a good defence), in a manner which rendered it an immaterial one, and upon which he could not have judgment, and the plaintiff not being entitled to judgment, *non obst. verec.*, the House reversed *simpliciter* the former judgment. *Gwynne* v. *Burnell*, 1 Sc. N. S. 711; and 6 Bing. N. C. 453.

In an action against a surety on a contract for works, to be paid for as the work proceeded, the contractor becoming bankrupt, and having received advances beyond what he was entitled to under the contract, and for which extra advances security had been taken, it was held that, in respect of the latter, the surety was not liable for the loss sustained by the non-fulfilment of the works. *Warre* v. *Calvert*, 2 N. & P. 126.

A. joins with *B.* as his surety in a joint note for money advanced by the payee to *B.*; an indorsement by the payee (since deceased) of the receipt of the money, and that it was money advanced to *B.*, is evidence for *A.* in an action against *B.* for the money. *Davies* v. *Humphries*, C. M. & W. 153.

(*Discharge of*, p. 1064.)

Plea, to debt on bond, conditioned for the trustee of a bankrupt's estate in Scotland, appointed by the commissioners, faithfully, &c., that by the neglect of the obligees for thirteen years, and connivance, they had caused and permitted the trustee's default, but of which averment there was no proof; held that the defendant was not discharged: reversing the judgment below. *M'Taggart* v. *Watson*, 3 Cl. & Fi. 525.

J. H., being indebted on simple contract to *W.*, prevailed on his father to execute a bond for the payment within four years, within which period the father died, and *W.* obtained from the son and representative of the father, a fresh bond for payment by yearly instalments: upon a creditor's suit for administering the father's estate, *W.* having claimed to come in upon the original bond, which he had retained, it was held, that the second bond was to be presumed to be a satisfaction of the first, and that the father was to be considered only as surety for the son, and that by giving time to the principal debtor, the creditor had discharged the surety. *Clarke* v. *Henty*, 3 Younge & C. 187.

On a bill for an injunction to stay proceedings at law against the sureties in a bond given by the principal on a contract for works, alleging that the defendants, by making advances beyond the value of the work done, had varied to the prejudice of the sureties, it was held that the sureties were thereby released, and entitled to have the injunction made perpetual. *Calvert* v. *London Dock Co.*, 2 Keene, 638.

SURRENDER, p. 1067.

Where it was shown to be the practice in the office of the bishop's steward to have old leases returned, before a renewal or re-grant, a lease produced with the seals torn off, was held to be admissible in evidence, as a foundation for the jury to presume a surrender, by operation of law, of the former lease. *Walker* v. *Richardson*, 2 M. & W. 882.

TAXES.

(*Land Tax.*)

The plaintiff, being vicar of *E.*, and owner and occupier of the vicarial tithes, and being also occupier of the rectorial tithes, which belonged to *B.*,

and on which the land tax had been redeemed, was assessed to the land tax in a gross sum for vicarial and rectorial tithes. The whole sum, up to the quarter-day last past, being demanded by defendant, who was collector, the plaintiff refused to pay the sum at which the rectorial tithes had been redeemed, but paid the residue of the assessment. The collector distrained on him, under stat. 38 G. 3, c. 5, s. 17, for the amount withheld. The distress warrant did not specify the property. Held, that the distress was illegal, as being for a sum not due, and because the assessment should have separated the tithes belonging to different proprietors, under stat. 20 G. 3, c. 17, s. 3. That trespass lay for the distress, and that the plaintiff was not bound to appeal, under the sect. 8 of stat. 38 G. 3, c. 5. And that the demand having been for the sum alleged to be due for a quarter then expired, the defendant could not justify the distress by showing that a sum was due at the expiration of the current quarter for vicarial tithes, which would cover the sum distrained for. *Charlton* v. *Alway*, 11 Ad. & Ell. 993.

As to collectors' bonds, see *Gwynne* v. *Burnell*, 1 Scott, N. S. 711.

TENDER.

(*When sufficient*, p. 1067.)

If a tender be made by a cheque contained in a letter requesting a receipt in return, and the plaintiff sends back the cheque, and, without objecting to the nature of the tender, demands a larger sum, it is a good tender. *Jones* v. *Arthur*, 8 Dowl. 442.

"I am instructed by the defendant, to say that 15 *l.* is more than is due, but that you may have it," is a good tender, the money being produced. *Thorpe* v. *Burgess*, 8 Dowl. 693.

A witness tells the plaintiff that he comes with the amount of *D.*'s bill, the plaintiff says he will not take it, that it is not his bill; the witness swears that he offered it as the amount of the bill: this is a good tender, the plaintiff might have accepted the amount without admitting that no more was due. *Henwood* v. *Oliver*, 1 G. & P. 25; *qu.* as to *Sutton* v. *Hawkins*, 8 C. & P. 259.

Though a party tendering money, demand a receipt for the sum tendered, if no objection be made on that account, the tender is good. *Richardson* v. *Jackson*, 9 Dowl. 715.

Where the plaintiff's attorney wrote to the defendant, that unless the debt and charge of the letter were paid at his office by ——— next, at 12 o'clock, proceedings would be commenced, and before that day an agent tendered the debt at the office, to a person who refused to receive it unless the charge for the letter was also paid, it was held to be a good tender. (Parke B. *dub.*) *Kirton* v. *Braithwaite*, 3 Cr. M. & R. 310.

Where the defendant's attorney tendered a sum, saying, "I tender you £.——, for your claim on *M.*," which the plaintiff refused to accept in discharge of his bill; and the former again said, "I tender you £.——;" the tender was held to be unconditional and sufficient. *Jennings* v. *Major*, 8 C. & P. 62.

A sum tendered, if the party will take it in full of the demand, is insufficient. *Gordon* v. *Cox*, 7 C. & P. 172.

Where the words of the tender were, "I have called to tender £.——, in settlement of *R.*'s bill," it was held, that it was for the jury to say if the offer was conditional or not. *Eckstein* v. *Reynolds*, 2 Nev. & P. 256.

(*Pleading.*)

To an action by payee against maker of a promissory note for 15*l.* 9*s.* 4*d.* payable on demand, the defendant pleaded as to 3*l.* parcel, &c., a set-off at the time of demand. And as to 12*l.* 9*s.* 4*d.* residue, &c., a tender of that sum, at the time of demand. The replication to the first plea denied the set-off at the time of the commencement of the suit: to the second plea, that before the making of the tender, the sum of 15*l.* 9*s.* 4*d.* including the said sum of 12*l.* 9*s.* 4*d.* was due upon the note, which sum the plaintiff demanded, but the defendant refused to pay the same, and that no set-off, or other just cause existed for the non-payment; held, that the replication was good. *Cotton* v. *Godwin*, 9 Dowl. 763.

(*Costs.*)

In debt for a sum above 20*l.*, the defendant pleaded a tender as to part, and *nunquam indebitatus* as to the residue. The plaintiff confessed the tender, and obtained a verdict for 13*l.*, which, together with the sum tendered, exceeded 20*l.*; held, that the plaintiff was only entitled to costs upon the lower scale. *Dixon* v. *Walker*, 8 Dowl. 887.

THREATS.

Upon an indictment for threatening to accuse of an infamous crime, the jury may take into their consideration, in reference to the expressions used before obtaining the money, if those expressions are equivocal, what was said afterwards by the prisoner relating thereto, when in custody. *R.* v. *Kain*, 8 C. & P. 187.

On an indictment under 7 & 8 Geo. 4, c. 29, for threatening to *accuse*; it was held, that the words were not confined to an accusing by course of law, but were to be taken to mean, threatening to charge before any third person. *R.* v. *Robinson*, 2 M. & Rob. 14.

Where the threat was to accuse "of having taken indecent liberties," it was held not to be within 7 Will. 4, and 1 Vict. c. 87, s. 4, under which the threat must be to accuse of having committed the complete crime; but the prosecutor having parted with his money under the combined fear of personal violence and of the attack on his character, it was held to be not the less a robbery, because, in addition to the violence, there was the threat to accuse. *R.* v. *Norton*, 8 C. & P. 671.

Where the prisoner was indicted and convicted in the common form for robbery from the person, and it appeared that the property had been obtained under threats of charging the prosecutor with an infamous offence, it was held that such conviction was wrong, for as the stat. 7 W. 4, and 1 Vict. c. 87, created the obtaining property by means of such threats a distinct offence, it could no longer be charged as robbery under 7 & 8 Geo. 4, c. 29. *R.* v. *Henry*, 2 Moody, 118; and 9 C. & P. 309.

It is for the jury to say whether the terms of the letter amount to threats within the statute. *R.* v. *Tyler*, 1 Ry. & M. 428.

Sending a letter to *A. B.* threatening to burn a house of which he is owner, but let by him to and occupied by a tenant, is not an offence within the 4 Geo. 4, c. 54, s. 3. *R.* v. *Burridge*, 2 M. & R. 296.

TIME.

(*Calculation exclusive, when*, p. 1073.)

The rule is inflexible to construe "ten days' notice at least," to mean ten clear days. *Mitchell* v. *Foster*, 4 P. & D. 150; see also in the matter of

Prangley, 4 Ad. & Ell. 781; 6 N. & M. 421; *Blunt* v. *Heslop*, 3 N. & P. 553; *R.* v. *Jus. of Salop*, 8 Ad. & Ell. 173. And where a clear ten days' summons is required to warrant a conviction, a conviction upon a shorter summons is without jurisdiction. *Mitchell* v. *Foster*, supra.

Under the 3 Geo. 4, c. 39, s. 1, which requires that every warrant of attorney to confess judgment, shall be filed "within twenty-one days after the execution," a warrant executed on the 9th day of the month may be filed on the 30th. *Williams* v. *Burgess*, 9 Dowl. 544.

A rule to plead was entered at the Rule-office on the 23d of May at three o'clock in the afternoon; on the same evening at six o'clock, a declaration and demand of plea were delivered to the defendant; on the 28th at half past eleven o'clock in the morning, the plaintiff signed judgment for want of a plea; held, that the judgment was regular. *Chapman* v. *Davis*, 8 Dowl. 831.

An order was obtained upon terms of seven days' time to plead; held, that the seven days commenced from the date of the order, and not from the expiration of the four days in which he was originally required to plead. *Simpson* v. *Cooper*, 2 Sc. 840.

The six days, in the case of notice of moving for the writ to remove an order of justices, under 13 Geo. 2, c. 18, s. 5, are to be reckoned one day inclusively and one exclusively. *R.* v. *Goodenough*, 2 Ad. & Ell. 463.

A party obtaining a Judge's order should serve it "forthwith;" that is, before the opposite party is entitled to take a fresh step. *Kenny* v. *Hutchinson*, 8 Dowl. 171.

A clause giving an appeal required the party to enter into a recognizance "forthwith;" it was held to mean "without unreasonable delay," and that a delay of nine days after notice of appeal, was not a sufficient compliance with the Act. *R.* v. *Worcester Justices*, 7 Dowl. 789.

In an action on an attorney's bill, the day on which it is delivered is not to be reckoned as one of the days of the month given to the client by the statute. *Blunt* v. *Heslop*, 9 Dowl. 982.

In a notice of action against a magistrate under the 24 Geo. 2, c. 44, s. 1, the time must be computed exclusive both of the day of giving notice and of the day of bringing the action. *Young* v. *Higgon*, 8 Dowl. 212.

By an agreement of reference to arbitrators with power to appoint an umpire, it was covenanted that the umpire should make his award two calendar months *after* his appointment. He was appointed on the 29th of June, and afterwards the time for making his award was enlarged by consent for three months further. The Court held, that the 29th of June was to be excluded from the calculation of time, and therefore that the award being made on the 29th of November, was made in due time. *In re Higham and Jessop*, 9 Dowl. 203.

Where the will appointed a person executor, provided he should apply for probate within three calendar months after the death of the testator, it was held that the day of the death was excluded. *Wilmot, in the goods of*, 1 Curt. 1.

Property is to be transferred to a party when she attains her 25th year; it is to be transferred when she becomes 24 years old. *Grant* v. *Grant*, 4 Younge & Cr. 256.

Goods were sold on the 5th October, to be paid for in two months; an action cannot be brought till after the 5th of December. *Webb* v. *Fairmaner*, 3 M. & W. 473.

And it seems that now the general rule is, that in giving notice, the day of giving the notice is to be excluded. *R.* v. *Justices of Cumberland*, 4 N. & M. 378; *Pellew* v. *Inhabitants of Wonsford*, 2 B. & C. 134; *Lester* v. *Garland*, 15 Ves. jun. 248; *Hardy* v. *Ryle*, 9 B. & C. 603; 4 M. & R. 295.

The rule laid down in *Pellew* v. *Inhabitants of Wonsford*, is (per Alderson, J.) a very excellent criterion, viz, to reduce the time to one day, and see whether you do not obtain an absurdity except by extending the first day.

(*Day, Fraction of*, p. 1079.)

Where a defendant died between eleven and twelve o'clock in the morning, and a writ of *fi. fa.* was sued out against his goods between two and three o'clock the same day, the Court set the writ aside as irregular. *Chick* v. *Smith*, 8 Dowl. 337.

(*Evidence of—Fiat*, p. 1079.)

The time of delivering out a fiat in bankruptcy as an operative instrument, is "the date and issuing," within 2 & 3 Vict. c. 29; and *primâ facie* the time of delivering it out of the Bankrupt-office is that time. *Pewtress* v. *Arman*, 9 Dowl. 828.

(*Date*, p. 1079.)

In an action by assignees for goods sold, &c., the defendant offered in evidence an account stated and settled, showing a balance to the defendant, and which was dated prior to the bankruptcy; held, that it was to be presumed to have been written at the time it bore date, and that it was properly received in evidence; if the fact were otherwise, or the paper a fraudulent contrivance, it was open for the plaintiff to show it. *Sinclair* v. *Baggaley*, 4 M. & W. 312.

Since the new rules the writ of trial is conclusive of the date of the writ of summons, and cannot be contradicted at the trial; although where there has been a mistake, the Court will allow the writ of trial to be amended. *Whipple* v. *Manley*, 1 M. & W. 432.

(*Time of making an Appointment, &c.* p. 1079.)

Where justices met in petty sessions to appoint overseers in due time after the 25th of March, pursuant to the 54 Geo. 3, c. 91, and in consequence of a difficulty with respect to certain appointments, they adjourned the consideration of those appointments to a day more than fourteen days from the 25th of March, an appointment made with respect to them, on such day of adjournment, was held to be good, as the sessions had become possessed of the subject-matter; and other appointments made for the same township, by other justices, within fourteen days after the 25th March, were held to be invalid. *R.* v. *Sneyd*, 9 Dowl. 1001.

Where the councillors of a borough did not immediately after the first election of aldermen, appoint who should go out of office in the year 1838, as required by 5 & 6 Will. 4, c. 76, s. 25, but delayed such appointment until the 29th October 1838, it was held that such delay vitiated the election of the aldermen chosen to succeed the aldermen so appointed to go out of office. *R.* v. *Alderson*, 1 G. & D. 429.

(*Sundays and Holidays*, p. 1079.)

In *assumpsit* for goods sold and delivered, plea, a sale on Sunday; replication, the subsequent retainer of the goods, whereby the defendant became

liable to pay for them on a *quantum valebant*; the replication was held to be bad, on demurrer, no subsequent promise being alleged after such retainer. *Simpson* v. *Nicholls*, 6 Dowl. 355; and 3 M. & W. 240.

The law of Scotland prohibiting all work on Sundays, "except works of necessity and mercy," a master (a barber) cannot employ his apprentice in shaving his customers on any part of that day; and by a covenant in the indenture by the apprentice not to absent himself on "*holidays* or week days without leave," the term *holiday* does not apply to Sunday, but to other days, directed to be kept as holidays in Scotland. *Phillips* v. *Innes*, 4 Cl. & Fi. 234. Reversing the judgment below.

TITHES.

See as to time of claim, &c., stat. 2 & 3 Will. 4, c. 100.

(*Title to*, p. 1080.)

A conveyance is of a house and land, "with all profits, hereditaments and appurtenances to the said premises belonging," the grantor having acquired at the time of the execution of the deed both the land and the tithes; held, 1st, that the tithes were not extinguished by the unity of possession; and, 2dly, that the word *hereditaments* being bound down by "belonging and appertaining to the said premises," passed only what was appurtenant to the land, which could not be predicated of tithes, and that in the absence of sufficient words appropriate to the transfer of tithes, they did not pass. *Chapman* v. *Gatcombe*, 2 Bing. N. C. 516; and 2 Sc. 738.

Where the ancient documents only showed an endowment of the vicarage, but not its character or extent, and the ecclesiastical survey recognised "privy tithes" as well as small tithes, but a subsequent terrier mentioned privy tithes in contradistinction to tithes in general, as payable to the vicar, and he had always received payments denominated privy tithes, it was held, that under such description, he was entitled to the small tithes. *Hall* v. *Godson*, 2 Younge, 153.

An ancient document, in the nature of a terrier, produced from the proper custody and under the proper authority, although without date, and signed by various persons, without designating their character, is admissible. *Hall* v. *Farmer*, 2 Younge, 145.

In a suit for tithe of oysters landed on a perch within a parish, the omission to rate property so situated, is insufficient evidence of its not being within the parish. *Perrott* v. *Bryant*, 2 Younge & C. 61.

The mere nonpayment of tithes is not a sufficient answer to the claim by a lay impropriator, against whom there can be no prescription in *non decimando*. *Andrews* v. *Drever*, 2 Sc. 1.

Where the evidence of money payments extended to the reign of C. 1, but more ancient documents made no mention of them, it was held that the origin of such payments was to be deemed subsequent to the time of legal memory, and an account was decreed. *Lord Graves* v. *Fisher*, 3 Cl. & Fi. 1; and 8 Bli. N. S. 937. Affirming the judgment below.

Where the defence set up was a distinct modus paid to the rector (the lord of the manor receiving the tithes from the terre tenants), which was proved to have been paid from the year 1690, and probably from an earlier period, under the name sometimes of "seizin or modus," and in some cases as "a rent," it was held that the prescription not being illegal, but improbable, and there being evidence of payment of some tithes

within the district, the prescription going with tithes, and the evidence tending rather to show a lease and usurpation on the part of the lord, against ecclesiastical persons under his control and influence as patron, it was held, that such prescription was not made out, and an account was decreed. *Knight* v. *Marquis of Waterford*, 4 Younge & Co. 283.

A modus in lieu of tithes is inconsistent with the receipt of tithes in kind by another. *Ib.*

The rankness of a modus is not strictly an objection to it in point of law, but only a ground upon which the Court will determine, from the gross absurdity that any such bargain should ever have been made. *Ib.*

The reasonableness of a custom to set out for tithe every tenth turnip, instead of every tenth heap, depends upon the fact whether the parson has thereby an opportunity of seeing it set out fairly, and was disallowed. *Clarke* v. *Clarke*, 2 Younge & Co. 245.

Where at the time of the sale of an advowson, it was only voidable by reason of the incumbent having been instituted to another benefice, it was held that the right of presentation passed under the conveyance, and that the presentee of the vendee was therefore entitled to the tithes. *Alston* v. *Atlay*, 6 Nev. & M. 686. This case was reversed in the Exchequer Chamber, and removed into the House of Lords; but an arrangement having been made, was not argued there.

Upon an issue whether a farm modus was payable for a particular farm, it was held that a former occupier, who had always paid a sum as a modus, could not be admitted to prove what he had heard his father, who had also occupied the farm, say respecting it; as this would be evidence of reputation of a mere fact only. *Wells* v. *New College, Oxford*, 7 C. & P. 284.

See as to the recovery of tithes of small amount, 4 & 5 Vict. c. 36; as to the recovery of tithes from Quakers, 4 & 5 Vict. c. 37; Tithe Commutation Acts, 5 & 6 W. 4, c. 71; 1 Will. 4; and 1 Vict. c. 69.

TOLL.

The waggons of a wharfinger carrying goods brought by a canal to the defendants, the consignees, and in return collecting goods to carry to the wharf, are not stage-waggons within the meaning of a proviso in a local Turnpike Act, that, *inter alia*, stage-waggons conveying goods for hire should pay toll every time of passing and repassing. *Semble*, the description applies only to conveyances which carry goods, &c. for hire from one fixed point to another. *R.* v. *Ruscoe*, 3 N. & P. 428.

Bones uncrushed, carried to the plaintiff's farm to be there crushed for the purpose of manure, were held to be manure within the exemption from toll under 3 Geo. 4. c. 126, s. 32, and 5 & 6 Will. 4, c. 18, s. 1. *Pratt* v. *Brown*, 8 C. & P. 244.

Where the tolls were fixed gross sums for given distances, it was held that the principle of rating parishes through which the navigation passed was by a mileage calculation, and, the repairs being equal throughout the line, that the deduction from the gross receipts was to be in the same proportion, and a further deduction of 10 per cent. for tenants' profits. *R.* v. *Woking*, 5 Nev. & M. 395. And see *R.* v. *Kingswinford*, 7 B. & Cr. 236; and *R.* v. *Trustees of the Duke of Bridgewater*, 9 B. & Cr. 68.

Where the toll was clearly imposed on the horses drawing the carriage, and by a subsequent section it was provided that no person should pay more than once in a day for passing or repassing with the same horses or carriage, but that every person having paid toll once and producing a ticket, should pass, with the same horses and carriage, toll-free during that day, it was held that the latter clause did not control the previous one, which was clear, and that a stage-coach which had paid the toll, but changed horses before arriving at the next gate, was liable to a second toll. *Hopkins* v. *Thorogood*, 2 B. & Ad. 916.

TRAVERSE.

If a person be indicted for a misdemeanor, and it be a different misdemeanor from that for which he has been committed or held to bail, he is entitled to traverse, although he has been committed or bailed more than twenty days. *R.* v. *Howell*, 9 C. & P. 437.

TREASON, p. 1095.

An objection to a witness on the score of misdescription, must be taken in the first instance. *R.* v. *Watson*, 2 Starkie's C. 158.

The description of a witness as of the parish of W., in the borough of W., was held sufficient, although the parish extended far beyond the bounds of the borough. *R.* v. *Frost*. 2 Mo. 147.

But where the description was of *C.*, in the parish of *L.*, and there were two places named *C.*, and the witnesses lived between both, it was held insufficient. *Ibid.* 151.

And where the witness was well described as of the parish of W., in the county of *M.*, "sometimes abiding at the house of his son *J.*, in the parish of *B.*, in the said county," it was held, that although the former part of the description, standing alone, would have been good, yet that the description of the son being incorrect, it vitiated the whole. S. C. 9 C. & P. 151.

A witness is described as lately abiding at a specified place; it appears on the *voir dire* that he had a later and different place of residence; the description is not sufficient. *R.* v. *Watson*, 2 Starkie's C. 116.

On a trial for high treason it was objected, after the jury had been charged with the prisoner, but before the first witness was examined, that the prisoner had had no list of witnesses delivered to him under the stat. 7 Anne, c. 21. It appeared that the indictment was found on the 11th of December, and that on the 12th of December a copy of it, and of the panel of the jurors intended to be returned by the sheriff, were delivered to the prisoner, and that on the 17th of December the list of witnesses was delivered to him. The prisoner was arraigned on the 31st of December. The objection to the delivery of the list of witnesses was, that the copy of the indictment and the lists of jurors and witnesses should have been all delivered *at the same time, simul et semel*; it was held, by a majority of the Judges, nine to six, that the delivery of the list of witnesses was not a good delivery in point of law; but it was held, by a majority of nine to six, that the objection to the delivery of the list of witnesses was not made in due time; and the Judges agreed that if the objection had been made in due time, the effect of it would have been a postponement of the trial, in order to give time for a proper delivery of the list. *R.* v. *Frost*, 9 C. & P. 162; 2 Moody, C. C. 140.

On a trial for high treason, any objection to the description of the wit-

ness in the list of witnesses must be taken on the *voir dire*, and comes too late after the witness is sworn in chief. *Ibid.* 9 C. & P. 183.

(*Proof of the Crime.*)

In a case of high treason or conspiracy, the prosecutor may either prove the conspiracy which renders the acts of the co-conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy: therefore, in a case of high treason, where it appeared that a party met, which was joined by the prisoner on the next day, the counsel for the prosecution was allowed to ask what directions one of the party gave on the day of their meeting as to where they were to go, and for what purpose. *R.* v. *Frost*, 9 C. & P. 149.

Where the treason charges an insurrection, it is necessary to show that there was force accompanying it, and that the object of it was of a general nature; and the onus of showing the object and meaning of the acts done lies on the prosecutors, and not on the prisoner. *Ibid.* 129.

In a case of high treason, evidence had been given for the prosecution that an armed party attacked the *W.* hotel, in which the magistrates and troops were stationed. To show that the intention of the party was not treasonable, but was merely to procure the release of certain prisoners, a witness was called to prove that on the party arriving at the hotel gate, they were asked by a special constable what they wanted, when one of them answered, "surrender up your prisoners:" it was proposed to call evidence in reply to show that that was not said at the hotel gate; held, that this was properly evidence in reply. *Ibid.* 159.

The Crown cannot recall witnesses to contradict matters offered in defence, unless they arise *ex improviso*, and the facts be new and which the Crown could not foresee; and then the evidence in reply must be confined to such matter only. *Ibid.* 160.

If, in an indictment for treason, it be stated as an overt act that the prisoner discharged at the Sovereign a pistol *loaded with powder and a certain bullet*, and thereby made a direct attempt on the life of the Sovereign, the jury must be satisfied that the pistol was a loaded pistol; that is, that there was something in it beyond the powder and wadding; but it seems that it is not necessary for them to be satisfied that it was actually loaded with that which is generally known by the name of a bullet. *R.* v. *Oxford*, 9 C. & P. 525.

TRESPASS.

(*Variance*, p. 1099.)

The plaintiff was possessed of a plot of ground called Hall Close, to which he added a strip of land from an adjoining highway, which was known by the name of Cow Lane; in an action to recover damages for a trespass committed on the newly inclosed land, it was held that it was properly described in the declaration as Hall Close. *Brownlow* v. *Tomlinson and others*, 8 Dowl. 827; 1 Scott's N. S. 426.

A description of the *L. I. Q.* as part of the sea beach, lying between high and low water mark, and abutting landward on five closes specified, is disproved by evidence of a waste strip of shingle, no part of the sea beach, intervening between their abuttals and the *L. I. Q.* *Webber* v. *Richards*, 1 G. & D. 114.

(*Possession*, p. 1099.)

Upon the expiration of the tenancy, the tenant is bound to give up the entire possession, unless by the custom he is entitled to hold over any part; which custom it lies on him to prove. Where the custom was to have one-third on tillage, which the tenant was entitled to hold until the harvest, and also, if there were an excess, when it was divided, and it was not clear whether a whole field was an excess or not, and the tenant might have a lien for the expenses of sowing; it was held that the outgoing tenant was entitled to maintain trespass for cutting and taking away the corn. *Caldecot* v. *Smythies*, 7 C. & P. 808.

A verbal permission by the landlord to sow beyond the one-third, would be good as against him and his in-coming tenant. *Griffith* v. *Tombs*, 7 C. & P. 810.

Where overseers enclosed common lands for the use of the poor, it was held that they might maintain trespass against a stranger and wrong-doer, although they had not obtained the consent of the lord, as required by 1 & 2 Will. 4, c. 42, s. 2, to perfect their title. *Mayson* v. *Cook*, 4 Bing. N. C. 392; 6 Scott, 179.

(*Joint Trespass*, p. 1104.)

In trespass against several, the plaintiff proved acts by two defendants only on one day, and acts by all on another day; the plaintiff, although he elected to rely on the former trespasses, may prove also other trespasses against those two, but cannot, it seems, recover as against them for trespasses in which they were implicated with others: where the defendants had pleaded specially, those against whom the plaintiff has abandoned his case are not entitled to acquittal, until the issue on those pleas is disposed of, as they might, by the new rules of pleading, be still subject to the costs of the special pleas. *Hitchen* v. *Teale*, 2 Mo. & R. 30.

The plaintiff, a sailor, lodged with one of the defendants, an innkeeper, and whilst in a state of intoxication the other defendant desired a party to take out what money he had in his pocket, which the other received, desiring the plaintiff to be told when he awoke that his money was lost, although he was afterwards told it was all right, and he desired 1*l.* of it to be given to a female, which was done, and the next morning the defendant, the landlord, offered him a small balance, after deducting his demand for lodging, &c.; held, that the one directing the money to be taken and the other taking advantage of it as soon as done, they were jointly liable in trespass, and that the plaintiff was entitled to recover back the whole sum taken, *minus* the 1*l.* directed by him to be given. *Peddell* v. *Rutter*, 8 C. & P. 337.

Trespass for an expulsion by *A. B.* and *C.*; *A.* pleads not guilty, *B.* and *C.* admit the expulsion, but pay 20*s.* into Court, and plead that no greater damages had been sustained; if the jury (the 20*s.* being found by them to be a sufficient compensation for the expulsion, and being received from *A.*'s co-defendants) find *A.* to have sanctioned the expulsion, he is liable only to nominal damages. *Walker* v. *Woolcott*, 8 C. & P. 352.

Trespass is maintainable against husband and wife for their joint act. *Vine* v. *Saunders*, 4 Bing. N. C. 96; 3 Sc. 359; and 6 Dowl. 233.

(*Assault, Proof of*, p. 1104.)

In trespass for assault, and threatening to shoot the plaintiff with a pistol loaded with powder and ball, it appearing that the defendant was commander, and the plaintiff a mariner on board a ship, and that whilst the latter was fighting with another person, the defendant had laid his hands on the plaintiff to restrain him, and threatened, &c. for the preservation of discipline and order on board, it was held, that the plaintiff was bound to prove the allegation of the pistol being loaded, and that unless it was, there could be no assault; so, if at the time of presenting, the defendant added words showing he had no intention of shooting. *Blake* v. *Barnard*, 9 C & P. 626.

(*When the proper Form of Action*, p. 1108.)

The action for seduction of the plaintiff's servant may be either in case or trespass. *Chamberlain* v. *Hazlewood*, 5 M. & W. 315; and 7 Dowl. 816.

Case does not lie for arresting a plaintiff whilst attending as a witness on a trial. *Stokes* v. *White*, 1 C. M. & R. 223; and malice makes no difference as to the form of action. See *Newton* v. *Constable*, 1 G. & D. 408.

(*By Agent*, p. 1109.)

In trespass and false imprisonment against the Marshal of the Queen's Bench, proof was given that the act was done by the direction of the deputy marshal, but there was no evidence of the appointment of that person; held, that it was insufficient unless the defendant was proved to be cognisant of the acts of the deputy marshal. *York* v. *Chapman*, 3 P. & D. 496; and 11 Ad. & Ell. 813.

(*Damages*, p. 1114.)

In trespass for removing the plaintiff's soil, the measure of damages is not what it would cost to restore the premises to their former state, but what is the actual loss to the plaintiff. *Jones* v. *Gooday*, 8 M. & W. 146. Case of *Regent's Canal Co.* cited by Alderson. *Ib.*

If a trespasser let in the sea on the land of another, the land being worth 20 *l.*, he is not to pay the expense of restoration by an engineering process. Per Alderson, B. *Ib.*

In trespass, the question of damages is peculiarly for the jury, they are not bound to weigh very accurately the quantum of damage sustained from a trespass. *Lockley* v. *Pye*, 8 M. & W. 133.

In trespass for breaking a dwelling-house, and assaulting and imprisoning, &c.; pleas, 1. not guilty; 2. justification under a *ca. sa.* except as to the breaking, &c., alleging the outer door to have been open; replication, *de injuriâ*; held that the outer door being open, being a condition precedent to the defendant's right to enter and arrest, it was a material averment, and that the plea was sufficiently traversed by the general replication. Secondly, it being proved that the defendants broke open the outer door, and so were trespassers *ab initio*, the Judge properly directed the jury that they might give damages in respect of the whole injury complained of. *Kirbey* v. *Denby*, 3 Cr. M. & R. 336.

In trespass for an assault, the defendant is entitled to offer in mitigation the publication of a libel upon him by the plaintiff; but the defendant having brought an action for such libel, he ought to derive no advantage from it in diminution of damages; held also, that the work of the defendant, on which the libel was a criticism, need not be read, but that the plaintiff

might in reply read parts of the work as part of his speech, to show that the criticism was fair. *Frazer* v. *Berkeley*, 7 C. & P. 621.

In trespass for false imprisonment, by giving plaintiff in charge of a peace officer, the defendant, in mitigation of damages, may show the previous annoying conduct of the plaintiff towards him. *Thomas* v. *Powell*, 7 C. & P. 807.

(*Defence—General Issue*, p. 1117.)

Where in trespass, *quare clausum fregit*, the defendant pleads the general issue, intending to give the special matter in evidence by virtue of an Act of Parliament, if the jury find less than 40*s.* damages the plaintiff is entitled to costs, unless the defendant in pleading the general issue has inserted in the margin of the plea "by statute," pursuant to the rule of T. T. 1 Vict. *Jones* v. *Thomas*, 8 Dowl. 99.

And the Judges having, by 3 & 4 Will. 4, c. 42, power to regulate the practice and pleading of the Courts, the non-compliance with such rule, precludes the defendant from giving special matter of defence in evidence under that plea. *Bartholomew* v. *Carter*, 9 Dowl. 896.

In trespass for taking goods as a distress for poor-rates, notwithstanding the new rules, the whole defence, and consequently that the goods were not the plaintiff's goods, may be gone into under the general issue. *Haine* v. *Davey*, 6 N. & M. 356; and 4 Ad. & Ell. 892.

(*Plea, admission by.*)

Trespass for assault on the plaintiff's wife, the defendant pleaded that the person assaulted was not the wife; held, not to involve an admission of battery on the record, or to prevent the effect of the Judge's certificate for costs under 43 Eliz. c. 6. *Wilson* v. *Lainson*, 3 Bing. N. C. 307; 3 Sc. 670; and 5 Dowl. 307.

(*Lib. Tenementum*, p. 1123.)

The plea of *liberum tenementum* admits the plaintiff's possession, and renders it incumbent on the defendant to prove title, either by deed or by showing twenty years' actual possession. *Grice* v. *Lever*, 9 Dowl. 246.

The plea is not supported by evidence of acts of ownership for a period less than twenty years, where the estates, previously to and during that period, were shown to have been in a third party. *Brest* v. *Lever*, 7 M. & W. 593.

(*Denial of possession of Property*, &c., p. 1127.)

Trespass for assault and battery; plea, that the defendant was in possession of a dwelling-house, and that the plaintiff disturbed him, and entered into it, wherefore, &c.; it appeared from the evidence that the defendant merely lodged in one room, the landlord keeping the key of the outer door; held, that the replication putting the whole plea in issue, the plea was not sustained by the evidence. *Monks* v. *Dykes*, 4 M. & W. 567.

Plea, in trespass for entering the plaintiff's house and taking his goods, that the house was not the house of the plaintiff, nor the goods his: on the trial, the jury found that certain parts of the goods only belonged to the plaintiff: held, that the issue as to the property in the goods was divisible, and the *postea* was ordered to be amended, as to the goods found not to be his. *Routledge* v. *Abbott*, 3 N. & P. 560.

On issue joined upon the plea of not possessed, in trespass *quare clausum fregit*, the defendant may use as evidence the deposition of a witness, for-

merly called by the plaintiff to prove his possession in a proceeding before justices for an alleged trespass on the same close. It makes no difference that the witness is still alive. *Cole* v. *Hadley*, 11 A. & E. 807.

Trespass for throwing down a wall; plea, first, that it was not the plaintiff's wall; secondly, that it was a party-wall, which latter issue was found for the defendant; he is entitled also to a verdict on the first. *Marley* v. *M' Dermott*, 3 N. & P. 356.

Upon a justification, in trespass, of force to remove the plaintiff from the defendant's house, when making a noise and disturbance, and replication, *de injuriâ*; held, 1st, that the general proposition, that *motive* and *intention* may be the subject of inquiry on the general traverse, cannot be supported; and 2dly, that the plea not justifying the excess of violence and wounding used towards the plaintiff, she was entitled to a verdict on the general issue. *Oakes* v. *Wood*, 2 M. & W. 791; questioning *Lucas* v. *Nockells*, 10 Bing. 182.

Plea, that the defendant was lawfully possessed of a dwelling-house, and that the plaintiff unlawfully, in the said house, at the said time when, &c. justifying the removal of the plaintiff after request, &c.; it appeared that the plaintiff had been tenant of apartments in the defendant's house, and continuing in possession after the determination of the tenancy by notice to quit, the defendant had turned the wife of the plaintiff out of possession, using no more force than was necessary to compel her to quit the premises; it was held, that if the entry of the defendant was with such force as to subject him to indictment for a forcible entry, and so his possession obtained by criminal means not lawful, that that point ought to have been expressly put and found by the Judge, (*diss.* Coltman, J.) *Newton* v. *Harland*, 1 Sc. N. S. 474; and 1 M. & Gr. 644.

(*De Injuriâ*, p. 1131.)

The right to follow goods fraudulently removed to avoid a distress, is one annexed by law to the contract, and *de injuriâ* is a bad replication to a plea justifying under such right, according to the resolution in Crogate's Case. *Bowler* v. *Nicholson*, 4 P. & D. 16.

(*Son Assault*, p. 1134.)

Where the trespass and assault alleged was, a beating with a bludgeon; and the pleas, as to the assaulting, beating, and ill-treating, first, a justification of *molliter manus* to remove the plaintiff from the defendant's house; and secondly, *son assault demesne*, and the Judge directed the jury that the striking with a bludgeon would not be justified on those pleas; it was held to be a misdirection; *dub.* whether the pleas justifying only the *beating* were an answer to the aggravated battery laid in the declaration. *Oakes* v. *Wood*, 3 M. & W. 150.

(*Leave and Licence*, p. 1137.)

Goods which were upon the plaintiff's land were sold to the defendant; by the conditions of sale to which the plaintiff was a party, the buyer was to be allowed to enter and take the goods; held, that after the sale, the plaintiff could not countermand the licence. And that the defendant having entered to take, and the plaintiff having brought trespass, and the defendant having pleaded leave and licence and a peaceable entry to take, to which plaintiff replied *de injuriâ*: the defendant was entitled to the verdict, though it appeared that the plaintiff had, between the sale and the entry, locked the

gates and forbidden the defendant to enter, and defendant had broken down the gates and entered to take the goods. *Wood* v. *Manley*, 11 A. & E. 34.

Trespass *q. c. f.*; pleas, freehold in the defendant and leave and licence; replication to the first plea a demise (16 November 1836) by the defendant to the plaintiff; rejoinder denying the demise; an agreement to give up the possession whenever the defendant should require cannot be gone into, but should have been rejoined, nor, as being part of the original bargain, can it be received in support of the plea of leave and licence. *Tomkyns* v. *Lawrence*, 8 C. & P. 729.

In trespass for taking the plaintiff's goods, plea, leave and licence; it appeared that the plaintiff, an ignorant young person, on his father's bankruptcy, being told by the commissioners at an examination, the defendant not being present, that the goods were his father's, said, "he would give them up;" the Court granted a new trial, on the ground that the evidence did not sustain the plea. *Roper* v. *Harper*, 4 Bing. N. C. 20; and 3 Sc. 250.

Plea, in trespass for entering plaintiff's close, that the plaintiff had entered defendant's close and seized goods against his will, and placed them on the close in the declaration mentioned, and that the defendant made fresh pursuit and entered to retake the goods; held to be a good plea, the plaintiff giving an implied licence to enter for the purpose of recaption. *Patrick* v. *Colerick*, 3 M. & W. 483; and *see* Vin. Abr. tit. Trespass, 1 *a*.

A party is justified in entering and placing on the plaintiff's close goods wrongfully placed by the plaintiff on the adjoining premises of the defendant. *Rea* v. *Sheward*, 2 M. & W. 425.

Premises were surrendered to a trustee for a mortgagee, with power, in default of payment, to sell when the mortgagee should think proper; in trespass against the latter, he pleaded that default was made, and that he entered, but did not allege that it was for the purpose of selling, nor any request made to the trustee; held on demurrer that the deed did not operate as a licence to enter, so as to afford a justification of the trespasses; and leave to amend, by putting on the record a request by the mortgagee, was refused. *Watson* v. *Waltham*, 2 Bing. N. C. 485.

(*Justification.— Process*, p. 1139.)

The serjeant of a court of requests may justify under a warrant for the arrest of a defendant for not paying an instalment directed by the commissioners of a court of requests, although the execution is illegal, not having been awarded by commissioners present in court on proof of the default. *Andrews* v. *Marris*, 1 G. & D. 268.

His situation is analogous to that of a sheriff acting under the process of a superior court, *Ib.*; and see *Cotes* v. *Michill*, 3 Lev. 20; *Moravia* v. *Sloper*, Willes, 30. *Seeus*, where the officer joins in pleading with the party. *Morse* v. *James*, Willes, 122; *Smith* v. *Boucher*, 2 Str. 993; *Phillips* v. *Biron*, 1 Str. 509.

But where commissioners entertained a claim of debt against one not resident within their jurisdiction, it was held that the commissioners were liable. *Carratt* v. *Morley*, 1 G. &. D. 275. But that the party who had merely stated the facts of the case to the Court were not liable, *Ib.* And that the officer executing the process would not have been liable had the warrant been perfect in form; but that he was liable, the warrant being void, for not

truly describing the Court of Requests, nor following the style and form prescribed by the Act. *Ib.*

Where the sheriff executed a *fi. fa.* after notice of the defendant's discharge under the Insolvent Act, it was held, that although the issuing the writ might be irregular, he could not be made a trespasser by obeying it. *Whitworth* v. *Clifton*, 1 Mo. & R. 531.

A party cannot justify under a warrant which describes the arrested party by a wrong Christian name. *Hoye* v. *Bush*, 2 Scott, N. S. 86.

Under a plea justifying detention by the defendant (the marshal of the King's Bench) for chamber rent, it was held that if proved, the defendant would have been entitled to a verdict; but the evidence being that the rent was demanded in connexion with another claim for fees, &c., the plea failed. *Stockdale* v. *Chapman*, 7 C. & P. 363.

Trespass against justices for false imprisonment, upon a conviction under 5 & 6 Will. 4, c. 76; it appeared that the plaintiff had been removed, under sec. 65, by the council from his office of town-crier, and required to deliver up the bell used by him in such office: held that the justices, under sect. 60, had authority to commit the plaintiff for the refusal to deliver up such bell, as in case of any officer originally appointed by the council. *Baylis* v. *Strickland*, 1 Sc. N. S. 540; 1 M. & G. 591.

A warrant by commissioners to apprehend a bankrupt, directed to "*J. A.* and *W. S.*, our messengers, *and their assistants*," does not justify the apprehension of the bankrupt by a party acting as an assistant, but not in the presence, actual or constructive, of *J. A.* or *W. S.*, although with the warrant in his possession; and if death had ensued in the attempt to take the bankrupt, the crime would have amounted to no more than manslaughter. *R.* v. *Whalley*, 7 C. & P. 245.

Sheriffs' officers, in executing a *ca. sa.*, entered through an opening in the outer wall of the house, leading into a small closet, where was a staircase window roughly boarded up; held, that if such opening had been intended to have had a door or window put therein, it was to be considered as the outer fence, which being open, the defendants might enter; but that if intended to be left open, then that the staircase window was to be deemed the fence of the house, and which the defendants could not justify the breaking of for the purpose of entering. *Whalley* v. *Williamson*, 7 C. & P. 294.

The defendant, the mayor of a borough, acting under the 92d section of the 5 & 6 Will. 4, c. 76, issued a warrant against the plaintiff, as overseer of a township, part of which was within and part without the borough, to levy the proportion of a borough-rate for that part of the township which was within the borough. In trespass against the mayor for a seizure of the plaintiff's goods under this warrant, it was held that the mayor had no jurisdiction to issue such warrant, and that trespass was the proper remedy. *Fernley* v. *Worthington*, 1 Scott, N. S. 432.

To justify a chairman of a meeting in giving a party in charge for disturbing the proceedings, it must be shown that the conduct of the party amounted to a breach of the peace, and mere cries of "hear," or asking questions, and making observations tending to throw ridicule on the meeting, will not be sufficient. *Wooding* v. *Oxley*, 9 C. & P. 1.

Where a local waterworks company were authorised to erect works within certain parishes named, making compensation for damages, but were not to deviate from a stated plan, it was held, that damages occasioned by works erected from a point within the plan to a mile beyond it,

but within one of the parishes, was within the provision for compensation, and that the Act would be an answer to an action for such damages. *R.* v. *Nottingham Old Waterworks Co.*, 5 N. & M. 498.

The defendant, an ostler, charged the plaintiff, a cab-driver, with having cruelly ill-used the horse, and gave him in charge to a police-officer; he not being the owner of the horse nor having seen the alleged cruel treatment, is liable for false imprisonment, as he had no right to give the plaintiff in charge, nor would the officer on such a statement have been justified in taking the party into custody of his own authority: held also that the defendant, having no right to apprehend the plaintiff, was not entitled to any notice of action under the 5 & 6 W. 4, c. 59, s. 19. *Hopkins* v. *Crowe*, 7 C. & P. 373.

The prosecutor was creating a disturbance and attempting to fight in a public-house, when the defendant interfered, and upon the former attempting to pass into a private parlour, the police, without being desired by the landlord to prevent him, collared him to prevent his so doing, when blows passed on each side; held, that unless the jury were satisfied that a breach of the peace was likely to be committed by the prosecutor in the place where he was going, it was no part of the officer's duty to prevent him entering; and if not, or if more violence was used by the defendant than was necessary, he was liable to be convicted of a common assault. *R.* v. *Mabel*, 9 C. & P. 474.

Trespass for an assault on and false imprisonment of the plaintiff, who was liable to be taken by the defendant upon a *ca. sa.*; held that the defendant having taken him when in custody of his bailiff, upon an unfounded charge of felony, he was liable for the illegal detention. *Humphery* v. *Mitchell*, 2 Bing. N. C. 619.

Where the defendant (a private person) had, without a previous application to a magistrate, given the plaintiff into custody on a charge of felony, which was afterwards dismissed on the hearing, it was held, in an action for the imprisonment, that the defendant was bound to show clearly that a felony had been committed, and that the circumstances were such as would induce a reasonable and dispassionate person to suspect the plaintiff guilty thereof. *Allen* v. *Wright*, 8 C. & P. 522.

In trespass for shooting a dog, a plea that he was ferocious and had attacked the plaintiff, is not supported where it appeared that the animal, after having attacked the defendant, was running away: the circumstance of the animal being of a ferocious disposition, will not justify the shooting him, unless actually attacking the party at the time. *Morris* v. *Nugent*, 7 C. & P. 572.

Where one defendant in an action for trespassing in pursuit of game, justified under the authority of the other, who being owner of the lands, had demised them, with an alleged reservation of the game, and it appeared that the former had been summoned before a magistrate for the trespass, and on being called, the case was dismissed, it was held that the other defendant having never actually entered on the lands, but only given leave to the former to do so, the proceedings before the magistrate, under 1 & 2 Will. 4, c. 32, s. 46, were a bar to the action against both. *Robinson* v. *Vaughton & Southwick*, 8 C. & P. 252.

Threats of personal violence to the captain will justify the latter in excluding a passenger from the cuddy-table, although it may be difficult to say what degree of discourteous or vulgar behaviour would do so; and

where a husband was so excluded, the voluntary withdrawal of the wife, so far as regards the wife, was held not to be a breach of the captain's contract as to the treatment of the passengers. *Prendergast* v. *Compton*, 8 C. & P. 454.

Where a police officer, although not present at any assault, afterwards, on the renewal of threats to break into a house forcibly, took the plaintiff into custody at the defendant's instance, and, in an action for the assault and false imprisonment, the defendant pleaded the previous violence, and that he was forced and obliged, "in order to preserve the peace," to give the plaintiff in charge, it was held that such plea was good after verdict. *Ingle* v. *Bell*, 1 M. & W. 516; and 1 T. & G. 801.

In an action for false imprisonment against a magistrate and two constables, the notice of action being, of imprisonment in the lock-up house, evidence of what passed before the magistrate is admissible, as part of the alleged illegal transaction; but what was said by the constables before proof of any joint act by the defendants, is not receivable. *Edwards* v. *Ferris & others*, 7 C. & P. 542.

Down lands, although private property, but not fenced off, are not "inclosed" lands, within the 3 Geo. 4, c. 126, s. 97. And the surveyor taking materials therefrom without the 'justices' order under s. 98 of that Act, is not liable in trespass. *Tapsell* v. *Crosskey*, 7 M. & W. 441.

(*Defence—Former Recovery.*)

Trespass for breaking, &c. plaintiff's close, and keeping up erections thereon without the plaintiff's licence, he having previously recovered damages with satisfaction in an action for the erecting; this was held to be distinguishable from the payment of the value, as in case of personal chattels, and did not operate as a purchase of the right to continue; and after notice to remove buttresses erected by turnpike trustees on the plaintiff's land, and refusal, a second action may be maintained for continuing the buttresses so erected. *Holmes* v. *Wilson*, 10 Ad. & Ell. 503.

(*Defect of Fences.*)

Plea, in trespass for chasing plaintiff's sheep from a certain close belonging to the defendant into the highway, and leaving them there, that the sheep were doing damage in the said close: replication, that they erred and escaped from the plaintiff's close into the defendant's through defect of defences, which the latter was bound to repair, and issue thereon: held, on a motion in arrest of judgment, that the replication was good, and that it was the defendant's duty to replace the sheep, and not to leave them in the highway, although it might be the proper road for them to return. *Carruthers* v. *Hollis*, 3 N. & P. 246.

(*New Assignment*, p. 1141.)

Trespass for arrest and false imprisonment; plea, a judgment and the taking in execution thereon; replication, new assigning another and different arrest, &c. than that justified; held, that although it was not essentially necessary to prove two arrests, and that it might be sufficient to prove an arrest different in its circumstances from the one pleaded, yet, that where the facts showed the arrest to have been founded on the same writ, such writ having been only altered in consequence of part payment, the jury might presume it to be the same arrest. *Darby* v. *Smith*, 2 Mo. & R. 184.

Plea, in trespass *q. c. f.*, that the entry was under a search-warrant for goods

clandestinely removed by *W. F.* to the plaintiff's house to avoid a distress; new assignment, that it was on another occasion, at a different time; to which the defendant pleaded the tenancy of *W. F.* at the rent of —— *l.*, that one year's rent was due, and that *W. F.* fraudulently removed the goods as before; held that the new assignment was not an admission of the truth of the matter previously pleaded, which was to be taken to relate to another trespass, and that the defendant was bound to prove the demise at the rent stated, and the rent in arrear, as alleged in the new assignment. *Norman* v. *Wescombe*, 2 M. & W. 349.

Costs.

In trespass for an assault and false imprisonment, the defendant pleaded, as to the seizing and laying hold of the plaintiff, that it was done to prevent a breach of the peace. The jury found a verdict for the plaintiff, with 1 *s.* damages, and the Judge certified under the 43 Eliz. c. 6, s. 2. Held, that as a battery was admitted on the face of the record, the Judge had no power to certify, and therefore that the plaintiff was entitled to his costs. *Scraton* v. *Taylor and another*, 8 Dowl. 110.

The plea, denying the close in which, &c. to be the plaintiff's, was held to bring the title in issue within 22 & 23 Car. 2, c. 9, s. 136, and the plaintiff succeeding, was entitled, although with only one farthing damages, to full costs. *Pugh* v. *Roberts*, 6 Dowl. 561.

In trespass, *quare clausum fregit*, where there are several issues, and amongst them one on the plaintiff's possession of the close, the plaintiff has a right to a trial of all the other issues, although it appears on the opening of the evidence that he was not in possession of the close. *Fry* v. *Monckton*, 2 M. & R. 303.

TRIAL.

In a criminal case where the prosecutor has removed the record by certiorari, if the trial be put off by reason of the act of God, the defendant is not liable to the costs of the day. *R.* v. *Barrett*, 2 Lew. C. C. 263.

It is in the discretion of the Judge to bail the prisoner or not, when his trial is postponed on account of the absence of the prosecutor. *Anon.* 2 Lew. C. C. 260.

Where a party was incapacitated from giving evidence by a conviction for bigamy, the Judge allowed a trial for murder to be postponed, in order that, in case of a pardon obtained, the witness might be examined. *R.* v. *Owen*, 9 C. & P. 83.

It is competent for the Court to receive the affidavits of persons who swear of their own knowledge to the fact of jurymen misconducting themselves by drawing lots for their verdict, although statements by the jurors themselves could not be received. *Harvey* v. *Hewitt*, 8 Dowl. 598.

Where a jury have misconducted themselves in their demeanour during the trial, in such a way as to lead to the presumption that justice has not been properly administered, the Court will grant a new trial. *Hughes* v. *Budd*, 8 Dowl. 315.

Motions respecting causes tried by writ of trial must be made on affidavit verifying the Judge's notes, as well where the trial took place before the Judge of an inferior court of record as before the sheriff. *Eden* v. *Bretton*, 9 Dowl. 245.

Where a new trial is obtained *ex debito justitiæ*, on one of several issues,

the rule for a new trial re-opens the whole record. *Earl of Macclesfield* v. *Bradley*, 7 M. & W. 570.

A notice of countermand given to a defendant residing in the country, whose cause is conducted by an attorney in London only, is insufficient. *Margettson* v. *Rush*, 8 Dowl. 388.

(*Motion for New Trial*, p. 1144.)

Where, from the pressure of business, the intended motions for new trials are put into the usual list to be made after the first four days, it is necessary to give notice to the other side, or judgment signed on the fifth day before the motion is made will be regular. *Doe* v. *Edwards*, 7 Dowl. 547.

The motion for a new trial, if made within four days after the return of the *distringas*, is sufficient, although more than that after the trial. *Aymes* v. *Lettice*, 8 Dowl. 202, and 6 M. & W. 216.

(*Amount of Damages, &c.* p. 1144.)

Where the jury found only 20*s.* damages in a case of slander, although very gross, the Court refused a new trial on the ground of the smallness of the damages. *Rendall* v. *Hayward*, 5 Bing. N. C. 424.

Where in trover the jury found for the plaintiff, but accompanied their verdict with a statement in writing, that whether the goods were delivered to the defendant as a loan or gift, they ought to have been returned, which statement the associate refused to receive, it was held that he was right, it amounting to a mere expression of private opinion. *Whittett* v. *Bradford*, 5 Sc. 711.

(*Reception of Copy*, p. 1144.)

Where the copy of an ancient grant in the chartulary of an abbey had been received, among other documents, to establish the antiquity of a weir on a public river, and objection was made to the whole class of evidence (which was afterwards held to have been properly received), and the objection as to the reception of the copy (no search having been first proved to have been made for the original) was not particularly pressed, the Court would not allow it afterwards to prevail, it being one of many other documents which were unquestionable, and its rejection not being sufficient to have varied the verdict. *Williams* v. *Wilcox*, 3 Nev. & P. 606. But see Vol. I. p. 532.

No objections can be taken at the trial for defects cured by 7 Geo. 4, c. 64, ss. 20, 21, but only by demurrer. *R.* v. *Law*, 2 Mo. & R. 197.

Where a prisoner has been arraigned on several indictments, and tried on one or more which have failed, it is against principle, as holding out a premium for getting fresh evidence, to permit the trial of the remaining ones to be postponed until the next session. *R.* v. *Fuller and Others*, 9 C. & P. 35.

TROVER.

(*Fixtures*, p. 1145.)

Fixtures, parcel of the freehold, although as against the landlord the tenant may have a right to remove them, cannot be deemed recoverable as goods and chattels in trover. *Mackintosh* v. *Trotter*, 3 M. & W. 184.

And see *Minshull* v. *Lloyd*, 2 M. & W. 450.

(*Proof of Title*, p. 1146.)

Where a customary heriot of the best beast is due, the property does not vest in the lord previously to selection. *Abington* v. *Lipscombe*, 1 G. & D. 230.

A selection of seven, where five only are due, will not vest property in any. *Ib.*

The plaintiffs were lessees of all mines and minerals under a large tract of waste land called Mold Mountain. In trover for ore wrongfully extracted by the defendant from a spot which the plaintiffs alleged to be part of Mold Mountain, it is not necessary for the plaintiffs to prove the title or seisin of their lessors, but it is enough, as against the defendants, who were wrong-doers, to show a possession and enjoyment by themselves under the lease; and for this purpose, acts of ownership exercised by the plaintiffs, by working mines on other parts of the mountain, are evidence of their right under the spot in question, being part of the waste. *Taylor* v. *Parry*, 1 Scott, N. S. 576.

Where large stones (probably fallen from adjoining cliffs, but uncertain when) were embedded in the land of the copyholder at the time of his admission, held that he could not remove them, and that the lord might maintain trover for such as he had removed and sold. *Dearden* v. *Evans*, 5 M. & W. 11.

Where a memorandum described the deeds deposited as of "my *B.* estate," it was held not to include the furniture in the house thereon. *Hunt, ex parte*, 1 Mont. D. & D. 139.

The plaintiff had authorised a party to purchase a cow, which he had done, but before the cow came to the plaintiff's hands, or she had assented to the purchase, it was taken away by the defendant; by bringing the action the plaintiff elected to take the bargain, and had a sufficient right of property to maintain the action. *Thomas* v. *Philips*, 7 C. & P. 573.

(*Gift*, p. 1148.)

A gift by a father to his son under age, made absolutely and accepted, cannot be reclaimed without the consent of the son. *Smith* v. *Smith*, 7 C. & P. 401.

(*Bill of Exchange*, p. 1149.)

Where a bill drawn by defendant and delivered to the plaintiff was stolen, and with the plaintiff's indorsement forged thereon was paid by the defendant's bankers, and returned to the defendant, it was held, that no title passing by the forgery, the plaintiff was entitled to recover the bill in trover, there being no negligence found on the part of the plaintiff, although six weeks elapsed before the loss was discovered and notice was given to the defendant. *Johnson* v. *Windle*, 3 Bing. N. C. 225; and 3 Sc. 606.

A., the drawer, residing abroad, indorsed the bill specially to *C.* and remitted it to his agent, who got it accepted by the drawees, informed *C.* that he had been directed to pay her money on account of it, and desired to know how it should be remitted, but whilst the bill remained in the agent's hands, *A.* desired him not to pay the proceeds, until the accounts of *C.* had been investigated, and after that to pay what might appear to be due; no such investigation took place, and the agent retained the bill; it was held that no change of the property having taken place, but it still remaining the property of the drawer, *C.* could not maintain trover for it. *Brind* v. *Hampshire*, 1 M. & W. 365.

(*Factor*, p. 1149.)

The relaxation of the former rule, as to pledges by agents, factors, &c., by 6 Geo. 4, c. 94, s. 2, applies only to cases where the factor is entrusted with the documents as the means of effecting the sale, &c. on behalf of his principal: where, therefore, the bill of lading only was transmitted, upon which the factors, not for the purpose of such sale, &c., but without authority, obtained dock-warrants which they pledged as securities for personal advances, it was held that the principals were entitled, on the factors becoming bankrupt, to recover from the parties with whom the dock-warrants had been pledged, the proceeds of the goods; also, that the amount for which such pledge was made, being in satisfaction of a former debt from the factor, and as it would not have been made except upon the understanding of its being so applied, that it was not an advance within the statute. *Phillips* v. *Huth*, 6 M. & W. 572.

Where a factor had goods consigned to him and the bills of lading indorsed, and received the dock-warrants and wharfinger's certificates in his own name, which he pledged for advances on his own account, it was held that the 6 Geo. 4, c. 94, did not extend to documents created by the factor himself, but only to pledges by him of documents entrusted to him by the owner; and that it made no difference that the pledgee knew that the goods were not the property of the factor. *Close* v. *Holmes*, 2 Mo. & R. 22.

I., a merchant in Ireland, employed the plaintiffs as his factors at Liverpool, and shipped a full cargo of oats on board a boat, No. 604, and took a boat-receipt or bill of lading from the master, acknowledging the receipt of the oats deliverable in Dublin in care for and to be shipped to the plaintiffs in Liverpool; on the same day *I.* received from the master of another boat, No. 54, a like receipt, but no part of the cargo was shipped, although prepared for loading, and he wrote to the plaintiffs that he "had valued on them for —— *l.* against *those* oats," and enclosing the receipts, and they accordingly accepted the bill, and remitted it to *I.*; in the meantime the defendant, a creditor of *I.*, pressing him for security, he consented to give an order on his agent in Dublin to deliver the cargo of No. 604; held, that on the acceptance of the bill, the plaintiffs acquired a complete title to the cargo of that boat, but that, as to the second cargo, there being nothing at the time on which the undertaking of the boat-master could operate, and the intended cargo being afterwards otherwise appropriated by *I.*, the plaintiffs could only support trover for the former cargo. *Bryant* v. *Nix*, 4 M. & W. 775.

(*Sale*, p. 1149.)

A sale within the city of London, in an open shop, of goods usually dealt in there, is a sale in market overt, although the premises are described in evidence as a warehouse, and are not sufficiently open to the street for a person on the outside to see what passes within. *Lyons* v. *De Pass*, 11 A. & E. 326; 9 C. & P. 68.

Semble, that the master of a ship has authority, when, in consequence of injury to the ship during the voyage, there is no prospect of bringing her to the termination of the voyage, to sell her for the benefit of all parties interested. At all events, where the proceeds of such sale have been received by the owner, that is a sufficient ratification by him of the act of the master in selling her, so as to prevent him from afterwards recovering back the

ship from the purchaser or one claiming under him. *Hunter* v. *Parker*, 7 M. & W. 322.

So, it is equally a ratification of a sale by an auctioneer, acting under a parol authority from the master. *Ib.*

And where, under such circumstances, the ship was transferred by an instrument executed by the auctioneer, *under seal*, but in other respects complying with the requisitions of the Registry Act, 3 & 4 Will. 4, c. 55, s. 31, it was held, that the ratification of the owner was sufficient to give validity to the transfer; for that, as the statute does not require a transfer *under seal*, the instrument might have the effect of a written transfer by the master according to the statute, as well as that of the deed of the auctioneer. *Ib.*

The purchaser of a vessel under such circumstances cannot set up any defence of lien against an action of trover by the owner. *Ib.*

The vessel having sprung a leak, put into a foreign port, and the master was advised by the agent of the charterer that he would take charge and do everything necessary for the vessel, but the master consigned her to a party, and then executed a bottomry bond, which was put up to public sale, and purchased by the claimant without inquiry as to the necessity, &c.; held, that the bond being clearly an imposition on the owner, was invalid, and that the purchaser, although *bonâ fide*, could not recover. *Prince of Saxe Coburg*, 3 Hagg. 387.

(*Lien*, p. 1148.)

If the possession of one entitled to a lien be unlawfully determined, the right remains, and trover lies. *Dicas* v. *Stockley*, 7 C. & P. 587. A lien is not destroyed, although the debt be barred by the statute of limitations. *Spears* v. *Hartley*, 4 Esp. C. 81. Nor although the vendor of the goods recover against the vendee for goods bargained and sold. *Houlditch* v. *Desanges*, 2 Starkie's C. 337.

(*Demand*, p. 1155–1161.)

A written demand by *A. B.* states that he has the plaintiff's power of attorney to make it; the defendants' attorney, in the presence of the defendants, says he will admit the service of the demand; it is not necessary to produce the power of attorney. *Leuckart* v. *Cooper*, 7 C. & P. 119.

(*Conversion*, p. 1155.)

A count alleging a delivery by *Y.* of a horse to the defendant, to be kept and delivered by the defendant on the request of *Y.*, and satisfaction of all claims, and stating a request by *Y.* to the defendant to deliver it to the plaintiff, who paid all claims, and alleging that the defendant wrongfully detained the horse; held bad, in arrest of judgment, the duty arising to deliver to *Y.* only; and as a refusal is not a conversion in itself, although evidence of it, it could not be taken as a count in trover. *Tollit* v. *Shenstone*, 7 Dowl. 457.

In trover for chalk dug from plaintiff's wastes, it appearing that the plaintiff's bailiff had demanded payment for it, but whether as for a rent was not shown, and the refusal being on the score of poverty and not showing any disclaimer of the plaintiff's title, a new trial was granted on the defendant's motion. *Williams* v. *Plumridge*, 2 Sc. 799.

Where goods lent to a party, since deceased, came into defendant's possession, who, upon their being demanded of him, said he should do nothing

but what the law required, and did not afterwards deliver them up, it was held to be a sufficient conversion. *Davies* v. *Nicholas*, 7 C. & P. 339.

Where the wife of the plaintiff, having pawned goods with the defendant in a false name, and lost the duplicate, having subsequently obtained two memorandums, and the plaintiff afterwards claiming them on the original duplicate, the defendant refused to deliver them up on account of the memorandums which had been delivered out, it was held, that it was a question whether the refusal was on a *bonâ fide* doubt of the plaintiff's title, and whether a reasonable time had elapsed for satisfying himself. *Vaughan* v. *Watt*, 6 M. & W. 492.

A horse being for sale, *A.* asked the agent of the vendor to let him have the horse for the purpose of trying it, and the agent did so; held, that *A.* was entitled to put a competent person on the horse for the purpose of trying it, and was not limited to merely trying it himself. *Lord Camoys* v. *Scurr*, 9 C. & P. 383.

(*Damages*, p. 1164.)

The declaration in trover being general, the plaintiff must show what goods the defendant took into his possession, the value of which goods is the proper measure of damages. *Cook* v. *Hartle*, 8 C. & P. 568.

(*Defence*, p. 1165.)

Under the general issue in trover, evidence of lien is inadmissible. *White* v. *Teale*, 4 P. & D. 43; 12 A. & E. 106.

(*Not possessed.*)

Under the plea in trover that the plaintiff was not possessed, &c., the defendant may give in evidence a right of lien. *Brandao* v. *Barnett*, 2 Sc. N. S. 96.

(*Fraud.*)

A. brought trover for a dog against *B.*, and also against *C.*, to whom *B.* had parted with it: in the former action *A.* recovered a verdict and 50*l.* damages, to be reduced to 1*s.* on the dog being given up; in the latter action *C.* recovered a verdict, and after the trial he allowed possession to be given to *A.*, but at the same time claimed the property and required the delivery, which was refused: held, in trover by him against *A.*, that as he had not by his conduct induced *A.* to enter into any disadvantageous compromise, he had not precluded himself from maintaining the action. *Sandys* v. *Hodgson*, 2 P. & D. 435.

The true owner of fixtures stood by and permitted a party to represent them as his own, in a transaction with a third party, who afterwards sold them to the defendant; he cannot maintain an action against the latter. *Gregg* v. *Wells*, 2 P. & D. 296; and 10 Ad. & Ell. 90.

(*Estoppel.*)

Where the plaintiff in trover for goods, was proved to have sworn that the goods described in her schedule, upon taking the benefit of the Insolvent Act, belonged to others, it was held that such oath did not estop her from claiming them in the action, although the contradiction was for the consideration of the jury. *Thornes* v. *White*, 1 T. & G. 110.

(*New Assignment.*)

Trover by assignees for four hundred bales, of cotton, plea as to the converting of three hundred and four bales, parcel, &c., that they were pur-

chased by *T. B. M.* as agent for the bankrupts, and paid for by him, and shipped for and on account of the bankrupts, and that, they becoming insolvent, and the cottons coming to the hands of the defendant as owner of the vessel on board of which they were shipped, *T. B. M.* the consignor, stopped them *in transitu*. To this plea the plaintiffs new-assigned that they issued their writ, and declared thereupon, not for the supposed conversion in that plea mentioned, but for that the defendant converted and disposed to his own use of divers bales of cotton, "different to and other than the said bales of cotton in the introductory part of that plea mentioned;" and also for that the defendant converted and disposed of the *last-mentioned* bales of cotton "on other and different occasions and times, and for other and different purposes, and in another and different manner than in the said plea mentioned." Plea, not guilty:—It was held, that, however objectionable in point of *form*, the new assignment in *substance* alleged another and different conversion of the same subject-matter as that mentioned in the plea: and, a verdict having passed for the defendant on the trial, upon the assumption that the plaintiffs were bound to prove a conversion of cottons other than the three hundred and four bales mentioned in the plea to the declaration—the court directed a new trial. *Brancker* v. *Molyneux*, 1 Scott, N. S. 553.

Where in trover by assignees of an insolvent for five horses, harness, &c., one plea alleged that they were delivered to the insolvent by the defendant, on an agreement for a lien thereon by the defendant until the price paid; and it appeared that, of the five originally delivered, three had died, and others were substituted by the insolvent, who, upon his going to prison, sent an order for delivering the five to the defendant; the plaintiff having new-assigned that the conversion was of other horses, &c. than in the plea mentioned, it was held that, under this assignment, the plaintiff was entitled to prove the taking of horses, &c., not justified under the lien; and that the circumstances made out a sufficient *primâ facie* case for a jury, that the transfer, as regarded the three horses, was voluntary. *Bolton* v. *Sherman*, 2 M. & W. 395.

TRUSTEES.

Money having been embezzled by a clerk of a savings bank, no action lies against the trustees; the remedy is by arbitration under the statute 9 Geo. 4, c. 92. *R.* v. *Mildenhall Savings Bank*, 2 N. & P. 278. See *Crisp* v. *Bunbury*, 8 Bing. 394.

UNLAWFUL ASSEMBLY.

Any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly; and in viewing this question, the jury should take into their consideration the hour at which the parties met, and the language used by the persons assembled and by those who addressed them, and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace; as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage. *R.* v. *Vincent*, 9 C. & P. 91.

Any assembly of persons attended with circumstances calculated to excite alarm is an unlawful assembly, and it is not only lawful for magistrates to disperse an unlawful assembly, even when no riot has occurred, but if they do not do so, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty. *R.* v. *Neale*, 9 C. & P. 431.

On the trial of an indictment for a conspiracy to procure large numbers of persons to assemble, for the purpose of exciting terror in the minds of her Majesty's subjects, evidence was given of several meetings at which the defendants were present, and it was proposed to ask a witness, who was a superintendant of police, whether persons complained to him of being alarmed by these meetings; held, that the evidence was receivable, and that it was not necessary to call the persons who made the complaint. *R.* v. *Vincent*, 9 C. & P. 275.

USE AND OCCUPATION.

Debt will lie for use and occupation although there be no express demise, if it be not by deed. *Gibson* v. *Kirk*, 1 G. & D. 252.

Debt for use and occupation, on a parol demise, by the assignee of the reversion, is not maintainable as to the rent accruing for the occupation before the assignment. *Mortimer* v. *Preedy*, 3 M. & W. 602.

(*Agreement, proof of*, 1175.)

A., himself a leaseholder of a house, entered into an agreement with *B.* to grant him an under-lease of the house for twenty years and a fraction, from Midsummer 1836. *B.* entered into possession, and paid rent to *A.*, and underlet a portion of the house to *C.* from Michaelmas 1836, and received from *C.* the first quarter's rent, due at Christmas 1836. On the 11th of January 1837, *B.*, wishing to part with his interest before the execution of the lease, wrote to *A.* requesting him to insert the name of *D.* instead of his. *D.*, a few days after, sent to *A.* a written consent to become his tenant, on the same terms as *B.* had agreed to; and, in consequence, the lease was, on the 15th of March 1837, granted by *A.* to *D.*, instead of to *B.* *D.* brought an action for use and occupation against *C.*, to whom *B.* had underlet a part of the house, and claimed the quarter's rent due at Lady-day 1837; held that he was entitled to recover. *Green* v. *London Cemetery*, 9 C. & P. 6.

A. let premises to four persons, *B.* *C.* *D.* and *E.*, for a year certain, ending at Midsummer 1839, with a proviso that if, a month at least before the termination of the year, a request were made to him to that effect, *A.* would grant them a lease for seven, fourteen, or twenty-one years. The lessees were directors of a joint stock bank, and occupied the premises for the purpose of its business. *B.* ceased to be a director in January, and *C.* in March 1838. On the 31st of May, the solicitor of the directors applied to *A.* to renew the tenancy for another year to the then directors; but no agreement to that effect was finally executed. On the 20th of June, the solicitor applied for a renewal of the agreement for a quarter of a year; to which the plaintiff, on the 23d, replied "that he should consider of it." Nothing further passed between the parties, but at the Michaelmas following the premises were delivered up to *A.*; held, that the four original lessees were liable to *A.*, in an action for use and occupation, for the rent of the quarter from Midsummer to Michaelmas. *Christy* v. *Tancred*, 7 M. & W. 127.

A house is demised by writing for a year and six months certain, from the date, at a yearly rent, payable at the usual periods, with a proviso that three calendar months' notice should be given on either side previous to the determination of the tenancy. The holding having been continued without any new express agreement, a notice to quit ending with the second year is sufficient. *Doe* v. *Dobell*, 1 G. & D. 218.

The yearly holding refers to the time of entry.

Where a yearly tenancy is continued for a number of years, it may be considered, after the expiration of the tenancy, as an original demise for the whole of the period; the liability during the time to determine the tenancy by notice makes no difference in the legal effect of the occupation. See *R.* v. *Hurstmonceaux*, 7 B. & C. 551; and the reporter's note, 1 G. & D. 229.

A party let into possession under a contract of sale, is liable for use and occupation from the time of breaking off the contract. *Howard* v. *Shaw*, 8 M. & W. 118.

A. B. and *C.* (being unmarried) entered into a contract in December 1834, for a term of seven years, at a rent payable quarterly, under which contract they entered, but which (the plaintiff not having executed it) could not operate as a demise; in the following September, *C.* married one of the defendants, and *A.* afterwards became bankrupt, and his assignees paid the quarter's rent at Michaelmas 1835, but it did not appear by whom the previous rent was paid, although admitted to have been paid; and there was no evidence of any payment having been made before *C.*'s marriage, or with her assent afterwards; held, that there was not sufficient evidence to raise an implied new tenancy, so as to charge the defendants (*A. B.* and *C.*, and *C.*'s husband) in an action for use and occupation on a joint demise. *Doidge* v. *Bowers*, 2 M. & W. 365.

In debt for rent by a survivor, upon a joint demise by joint tenants; plea, that the parties were tenants in common, was held to be a good bar on demurrer. *Berne* v. *Cambridge*, 1 Mo. & R. 539; and see *Doe* v. *Errington*, 1 Ad. & Ell. 750; and 3 Nev. & M. 646.

Where the only evidence of the plaintiffs' title as owners was, that one of them told the defendant, the tenant, that he had bought the reversion, on which the defendant wished him joy of the purchase; but upon afterwards sending to demand the rent, the defendant refused to pay, saying he had notice to quit, and an action brought against him for the rent; held, that it was a question for the jury, whether the conduct of the defendant amounted to an admission of the plaintiffs' title, so as to render him liable to them: the jury found for the defendant. *Stephens and Lemon* v. *Lynn*, 8 C. & P. 389.

Upon a letting by auction, although there was nothing to show that the defendant, the lessee, was to hold of the plaintiff, the owner, and there was an express condition that the rent was to be paid to the auctioneers or their order, but the owner signed the conditions as approving of them, it was held that the auctioneers were to be considered only as agents, and that the plaintiff was entitled to maintain the action of debt for the use and occupation. *Evans* v. *Evans*, 3 Ad. & Ell. 132.

It appeared that lodgings let at a rent payable quarterly had been burnt down; held that, in use and occupation, the landlord was entitled to the rent accruing from the last quarter to the time of the fire taking place. *Packer* v. *Gibbins*, 1 G. & D. 10.

Stamped as a Lease.—Agreement, matter of, p. 1177.)

In all the cases where agreements have been held to amount to leases, there have been words of present demise, or both the parties have contemplated that possession should be taken, and the relation of landlord and tenant should commence before the final lease was executed; per Patteson, J. *Jones* v. *Reynolds*, 1 G. & D. 69.

The defendant by letter offered to take a lease for 40 years from June next, of the iron and manganese ore, at a sleeping rent, and a royalty of 1 *s.* per ton, and to work them in relative proportions together, as fixed by a competent person; to which the plaintiff replied, "I agree to the terms contained in your letter, and shall be ready to grant a lease conformable thereto from myself and all proper parties, whenever you require me;" this was held to constitute an agreement only, and not a demise. *Ibid.*

By an agreement for a demise of premises, to hold from a future day, at a rent payable quarterly, and to execute a lease, with the usual covenants for payment of rent, &c., it was stipulated that until such lease should be executed, the grantor might distrain for rent in arrear; held, that as such stipulation would have been nugatory if the instrument were intended to operate as a demise, it amounted only to an agreement, and that a lease stamp was unnecessary. *Bicknell* v. *Hood*, 5 M. & W. 104.

So if an agreement for a lease contain an express stipulation that it shall not operate as a demise. *Perring* v. *Brook*, 7 C. & P. 361.

So where after the execution of an agreement to make and execute a lease with stipulated terms and covenants, to be prepared at the cost of the lessee, and approved of by the lessor's solicitor, the intended lessor assigned the premises for a long term on mortgage, and afterwards became a bankrupt, and the mortgagee gave the lessee notice to pay the rent to him, it was held that the instrument was properly stamped as an agreement for a lease, and that after such notice he might maintain the action for use and occupation, for the occupation after the mortgage to him. *Rawson* v. *Eicke*, 2 Nev. & P. 423.

A memorandum, in the terms, "I, *D. B.*, hereby certify that I remain in the house, at, &c., upon sufferance only, and agree to give immediate possession to him at any time he may require:" was held not to amount to an agreement for a tenancy, or to require a stamp. *Barry* v. *Goodman*, 2 M. & W. 768.

Where the terms of the agreement under which the defendant was to occupy the premises rent-free, taken altogether, amount only to a mode of remunerating him as bailiff, and not to a lease, a 1 *l.* stamp is sufficient. *Doe* d. *Hughes* v. *Derry*, 9 C. & P. 494.

Upon an agreement for a demise of premises for 99 years to a committee in trust for the parishioners of *H.*, for the purpose of a poor-house, with a clause for purchasing in fee, and agreements by the committee to pay the rent, and keep in repair, &c., and to execute a lease, &c., but none was ever executed, it was held that the agreement operated as a demise from the date thereof, and not as a mere agreement for a lease, and that it vested in the overseers for the time being, by force of the 59 Geo. 3, c. 12, s. 17, and that they were liable to the covenants. *Alderman* v. *Neate*, 4 M. & W. 704.

Upon a sale by auction of the "herbage of closes" for five months for 46 *l.*, paying a deposit of 10 *l.* and giving a joint note for the remainder payable within that period, and if not given to the satisfaction of the

vendor, that he should be at liberty to relet the premises, the instrument was held to be properly stamped with a 1 *l.* stamp as a conveyance or lease, upon the sale of any lands or tenements under 50 *l.* *Cattle* v. *Gamble*, 5 Bing. N. C. 46; 6 Sc. 733; and 7 Dowl. 98.

(*Defence*, p. 1180.)

As to the proper plea, *see* tit. Assumpsit—Debt—New Rules.

Action for refusing to perform a contract for taking a furnished house, plea, that the defendant was induced to enter into such contract by fraud and misrepresentation; the agreement was made with the plaintiff's agent, who, to a question whether there was anything objectionable about the house, replied, "that there was no objection whatever," but it was proved that the plaintiff knew of the adjoining house being a brothel; held (*diss.* Lord Abinger), that it was necessary to show the representation to have been fraudulently made; and the agent not knowing of the objection, and that the representation not being embodied in the contract, the circumstances did not constitute fraud sufficient to support the plea. *Cornfoot* v. *Fowke*, 6 M. & W. 358.

Where the conduct of a landlord was such as to justify the abrupt departure of the tenant of furnished lodgings, it was held that the landlord could only recover for the actual time of occupation, although the period of tenancy was not expired, and that he could not insist on the want of notice. *Kirkman* v. *Jervis*, 7 Dowl. 678.

Where trustees of an insolvent, to whom he had assigned all his effects, put in a person to carry on the trade and dispose of the stock, but it was never intended by them, nor was any act done to induce the landlord to believe that they intended to take possession as tenants, and the jury found that there was no occupation, it was held that they were not liable in an action for use and occupation. *How* v. *Kennett and another*, 5 N. & M. 1; questioning *Carter* v. *Warne*, 1 M. & M. 479. And see *Nation* v. *Tozer*, 1 Cr. M. & R. 172; and 4 Tyrw. 561.

Where premises were demised for a term, at a certain rent, and the landlord agreed to enlarge the buildings, the tenant agreeing to pay 10 *l.* per cent. on such outlay, it was held that it was to be deemed to be a collateral agreement, and not a contract running with the land, for which on the bankruptcy of the tenant his assignees were liable *Lambert* v. *Norris*, 2 M. & W. 333. And see *Donellan* v. *Read*, 3 B. & Ad. 899.

Where the tenant had with another person given a joint note to his landlord for the rent due, and in ejectment by the landlord, a verdict for the lessor of the plaintiff was agreed to be taken, he consenting that the defendant should remain in possession for a fortnight, and "not be called on for any rent now due," it was held that such agreement extinguished the claim on the note for rent. *Howell* v. *Lewis*, 7 C. & P. 566.

Where the defendant had been tenant to parties who entered into an agreement for a lease to the plaintiff, and afterwards, in the expectation that it would be carried into effect, the defendant paid to the plaintiff a quarter's rent, it was held, the agreement having been put an end to, that the defendant might, in an action brought against him by the plaintiff for subsequent use and occupation, show that the owners of the legal reversion were remitted to their original rights, and that the plaintiff had no title to the rent. *Brook* v. *Biggs*, 2 Bing. N. C. 572; and 2 Sc. 803. And see *Waddelove* v. *Barnett*, *Ib.* 538.

(*Action for Double Value*, p. 1185.)

The plaintiff, being the owner of a woollen mill and steam-engine, let to the defendant a room in the mill, together with a supply of power from the steam-engine by means of a revolving shaft in the room; in an action for double value, under stat. 4 Geo. 2, c. 28, against the tenant for holding over after the expiration of a notice to quit, in estimating such double value, the value of the power supplied cannot be included. *Robinson* v. *Learoyd*, 7 M. & W. 48.

In debt for double value for holding over, a notice to quit in the usual form at a given day, "or at such time as your holding shall expire after the expiration of half a year from the receipt of this notice," is a sufficient demand of possession to render the party holding over liable under 4 Geo. 2, c. 28, s. 1; a statement of a co-tenant, who had always paid the rent although he had not occupied, "that he had nothing to do with the land," is not admissible to show that there was no wilful holding over on his part. *Hirst* v. *Horn*, 6 M. & W. 393.

(*Competency*, p. 1185.)

Where, in an action for use and occupation, a witness was called by the plaintiff, who stated that he held the premises of the plaintiff, it was held that he could not, without being released, be asked whether he had not given up the premises to the defendant, as he had a direct interest that the money for their use and occupation should be obtained from the defendant, since that would put an end to all claim for rent against himself; and that the 3 & 4 Will. 4, c. 27, s. 42, did not apply. *Hodson* v. *Marshall*, 7 C. & P. 16.

USURY.

Where, after a refusal to advance a sum of money on mortgage of leasehold premises, it was agreed that in consideration of 400*l.* the borrower should grant two annuities of 20*l.*, to be issuing out of the premises, it was held, that as the money to be paid would clearly exceed five per cent. on the sum advanced, the transaction was usurious. *Chillingworth* v. *Chillingworth*, 8 Sim. 404.

Where, by the terms of dealing between an English house and a foreign merchant, 6*l.* per cent. was to be paid on future balances, which by the foreign law was legal, it was held that the questions were, first, whether the contract was to be performed in England, and that it was a fit case for an issue to be tried by a jury as to the intention of the parties, and if it was to be performed in England, that it was to be deemed an English contract; secondly, that, to constitute the agreement usurious, the jury were to be satisfied that the substance of the contract was that the interest was to be taken for the loan or forbearance of money. *Guillebert, ex parte*, 2 Deac. 509; and 3 Mont. & Ayr. 455.

The statute 3 & 4 Will. 4, c. 98, s. 7, which protects bills of exchange payable at three months or less from the usury laws, was held to extend also to warrants of attorney, given to secure payment of such bills. *Connop* v. *Meaks*, 2 Ad. & Ell. 326.

But where the inference to be drawn by the Court from the facts stated was, that a loan was agreed upon and made upon the security of the deposit of a lease, and that the security of a note and warrant of attorney were added for the purpose of legalising the demand of interest beyond five per

cent., it was held that the transaction was not within 3 & 4 Will. 4, c. 98, s. 7, or 7 Will. 4 & 1 Vict. c. 80, those Acts contemplating the case of interest taken upon or secured by a bill or note, as the real and *bonâ fide* ground of the debt. *Berrington* v. *Collis*, 5 Bing. N. C. 332.

In *ex parte Terrewest*, cited in *Holt* v. *Miers*, 5 M. & W. 168, the Judge of the Court of Bankruptcy held that a bill of exchange given to secure an usurious loan, was not within the protection of the statute 3 & 4 Will. 4, c. 98; but the Court in *Holt* v. *Miers* held otherwise; and see *Connop* v. *Meaks*, 2 Ad. & Ell. 326.

The statute 7 Will. 4 & 1 Vict. c. 80, protects a bill of exchange payable three months after date, although it be given to secure a debt due, and more than five per cent. interest. *King* v. *Braddon*, 10 Ad. & Ell. 675; *Holt* v. *Miers*, 5 M. & W. 168.

According to *Vallance* v. *Siddell*, 6 Ad. & Ell. 932, a warrant of attorney taken as a security for a debt and usurious interest, would have been void; but if taken *bonâ fide* to secure a bill of exchange, or if the latter were given as the original security for usurious interest, it would have been good. *Berrington* v. *Collis* turned entirely on the question of fact, whether the security for the original loan was the lease or bill of exchange; the Court considered it to be the former, and consequently that the transaction was not at all protected or made valid by the 3 & 4 Will. 4, c. 98, s. 7; see the observation of Parke, B. in *Holt* v. *Miers*, 5 M. & W. 174.

As to pawnbrokers, *Cowie* v. *Harrison*, 1 Mo. & M. 141; *Tregoning* v. *Attenborough*, 7 Bing. 97.

The statute 7 Will. 4 & 1 Vict. c. 80, was amended and continued until 1st January 1842, by 2 & 3 Vict. c. 37; was further continued to 1st January 1843, by 3 & 4 Vict. c. 83; and is further continued to the 1st January 1844, by 4 & 5 Vict. c. 54.

VAGRANT.

The 3 & 4 Will. 4, c. 40, and 7 Will. 4 & 1 Vict. c. 10, as to the removal of Irish and Scotch vagrants, further continued by 3 & 4 Vict. c. 27.

VENDOR AND VENDEE.

As to the protection of purchasers against judgments, &c., see 2 & 3 Vict. c. 11.

(*Action by Vendor of Real Property*, p. 1188.—*Contract.*)

Assumpsit on a contract for the sale of railway shares, to be conveyed on or before the ——; on the first issue, *non assumpsit*, it was held, that the option of time was to be with the party who was to do the first act, viz. the purchaser, and that the verdict ought to be entered for the plaintiffs; and being a matter that would have been material to the parties, it was not a subject of amendment of the record by the Judge at Nisi Prius. *Hare* v. *Waring*, 3 M. & W. 362.

In the same action, on the plea that the plaintiffs were not the proprietors of, and had no title to convey the shares, the mere entry of their names in the transfer book is no proof of title, although their title would have been incomplete without: upon the plea, that the plaintiffs tendered certificates of the shares, it was held that the meaning of the contract was, that the party was to convey, and deliver certificates, showing either on the face of them, or from the indorsements, that the title was in the party conveying. *Ibid.*

(*Condition Precedent*, p. 1188.)

It being the duty of the purchaser to procure the proper conveyance, it is not necessary, in an action by the vendor for not completing the purchase, to aver a conveyance or offer to convey, but only that the vendor was ready and willing to execute a conveyance. *Poole* v. *Hill*, 9 Dowl. 300; and 6 M. & W. 835.

Upon a demise of premises by agreement, stipulating *inter alia* that the lessor would, at the request and costs of the lessee, grant and execute a lease thereof, the landlord cannot charge the latter with the expense of a counterpart if he (the landlord) require one. *Jennings* v. *Turner*, 8 C. & P. 61.

(*Usual Covenants*, p. 1190.)

Upon an agreement for a lease with the *usual* covenants, and with one that the premises shall not be converted into a school, the former are not to be extended to covenants in restraint of trade, and it is immaterial whether or no the lessee had notice of the nature of the lessor's own tenure. *Van* v. *Corpe*, 3 M. & K. 269; S. P. *Propert* v. *Parker*, Ib. 280.

Where a party agreed for an underlease, and took possession of the premises, his attorney having had an opportunity of inspecting the original lease, it was held that the under lessee was bound to accept a lease with the covenants in the original lease, although of an unusual nature, it being his duty to have informed himself thereof; and a specific performance was decreed, with costs. *Cosser* v. *Collinge*, 3 M. & K. 283.

(*Title*, p. 1190.)

The purchaser may refuse to take a conveyance executed under a warrant of attorney, for it multiplies proofs. *Coore* v. *Calloway*, 1 Esp. C. 116; and *Richards* v. *Barton*, Ib. 268.

In an action to recover back the deposit and expenses, upon the ground of the vendor's having failed to make out a good title, a Court of Law will not consider whether the title be so doubtful that a Court of Equity would not compel a purchaser to take it, but only whether the party has a *legal title* to convey. *Boyman* v. *Gutch*, 7 Bing. 379; and 5 M. & P. 222.

Where there is only such a kind of doubt as to render it probable that the purchaser's right may become matter of investigation, the Court will not compel him to complete the purchase; where, therefore, a mortgaged policy was advertised by the mortgagee for sale as under a power, and the mortgagor refused to concur in the conveyance, and there was a reasonable doubt whether the power might not, in a Court of Equity, be deemed suspended for not being mentioned in a subsequent mortgage-deed of further charge, it was held that the purchaser might recover back the deposit-money, but that no interest could be claimed unless it were proved that the auctioneer made interest of it. *Curling* v. *Shuttleworth*, 6 Bing. 121; and 3 M. & P. 368. But see *Boyman* v. *Gutch*, *supra*.

Where the words of a devise, relied on as giving a fee, were much too doubtful to be settled without litigation, the Court would not compel a purchaser to take a title depending thereon. *Sharp* v. *Alcock*, 4 Russ. 374.

Upon the purchase of an entire estate, the Coust would not compel a purchaser to take six undivided seventh parts; it appearing also that, by the sale under a decree, a party was represented in the abstract as heir of *D.*, which the vendor's solicitor confirmed, and the title was approved by the Master, but it afterwards turned out that the real heir was a different person,

information of which had been given to the solicitor, and he concealed it, and only produced certain registers, without going further back than that of the alleged heir, the Court refused to compel the purchaser to take the title, notwithstanding a release had been obtained from the true heir. *Dalby* v. *Pullen*, 3 Sim. 29.

Where a policy, good at the time it was effected, was afterwards assigned, and it was subsequently sold for a valuable consideration, it was held that the purchaser was entitled to stand in the place of the original assignor, so as to bring an action in his name for the sum insured, and that he was therefore bound to complete his purchase. *Ashley* v. *Ashley*, 3 Sim. 149.

Upon a devise to trustees and their heirs of premises, the rents to accumulate until *M. P.* should attain twenty-one, and then to suffer her to take the rents, &c. for life, for her sole and separate use, and after her death to her heirs for ever, it was held that the equitable estate for life was not executed, and could not unite with the legal remainder in fee; the Court would not therefore compel a purchaser to take the title. *Playford* v. *Hoare*, 3 Y. & J. 175.

After the contract, but before acceptance of the title, the deeds were destroyed by fire, and it was admitted that no evidence could be furnished that the deeds mentioned in the abstract had been duly executed and delivered, it was held that the purchaser was entitled to be discharged. *Bryant* v. *Bush*, 4 Russ. 1.

Where the purchaser had been in possession for twenty years, and the objections made from time to time to the title appeared to be rather excuses for not completing the purchase than serious, it was held, that the continuing for so long a time in possession was to be taken to be a waiver of the objections, and that he was to be considered as having accepted the title. *Hall* v. *Laver*, 3 Younge & Cr. 191.

Where a party is either agent for the vendor or purchaser, or is himself vendor and also agent for the purchaser, whatever notice he may have will affect the purchaser; and where the latter takes a conveyance from a vendor, who has not the title-deeds, he is to be taken as having notice of the claim of the party who has the possession of them; and *semble*, the lien of the vendor for the unpaid purchase-money may be assigned by parol to a third party. *Dryden* v. *Frost*, 3 Myl. & Cr. 670.

1190, note (*l*).

In *Morgan* v. *Bissell*, 3 Taunt. 7, Mansfield, C. J. observes, the landlord thinks that he is injured by a breach of covenant, and brings his action, and then it is to be gone into, what are the proper covenants according to the custom of the country; in like manner they must *go to a jury* to see what is the rent of the excepted land.

(*Damages*, p. 1191.)

Where a party let into possession under a contract to purchase land, refuses to complete the purchase or pay the purchase-money, the vendors are not entitled to recover the whole of the purchase-money, but only the damages actually sustained by breach of contract. *Laird* v. *Pim*, 7 M. & W. 474.

Upon an agreement for the purchase of an estate, the purchase-money to be paid by yearly instalments, with interest, but the four last to be retained by the purchaser as an indemnity until the title should be made, it was held

that the vendor was not entitled to compound interest on such instalments, where it appeared that until the filing of a bill for specific performance, no good title could be made. *Stratton* v. *Symon*, 2 Moore, 125.

(*Action by Vendee of Real Property*, p. 1191.)

See further as to the expense of investigating a title, *Metcalfe* v. *Fowler*, 6 Mees. & W. 831.

On a bill filed by a legatee, and a sale directed by the Court of real estate, the purchaser, on a good title not being made, was held entitled to recover the costs and expenses of investigating the title and confirming the purchase from the plaintiff, who might recover them in the suit. *Berry* v. *Johnson*, 2 Younge & C. 564.

The vendor is liable to the expense of the purchaser's solicitor going from place to place to compare the abstract with the deeds, and he is not bound to send the abstract to an agent in a country town for that purpose. *Hughes* v. *Wynne*, 8 Sim. 85.

(*Action by Vendee of Real Property, Deposit*, p. 1193.)

Where the defendant's answer to the plaintiff's demand, to transfer shares agreed to be bought, admitted his inability to do so, and requested time to arrange matters, it was held that no tender of the price was necessary; and *semb.* a tender to the broker employed in the sale would be good. *Jackson* v. *Jacob*, 3 Bing. N. C. 869.

In *assumpsit* against an auctioneer to recover back the deposit paid on the sale of premises, of which the title had not been completed, it was held that, as it appeared that the defendant was in the character of stakeholder between the parties, he was not entitled to notice of the contract having been rescinded. *Duncan* v. *Cafe*, 2 M. & W. 244.

Premises liable to be taken under the provisions of a local Act, being sold without notice of such liability, the purchaser is entitled to rescind the contract. *Ballard* v. *Way*, 1 M. & W. 520; 1 T. & G. 851.

On the sale of premises by auction, the memorandum of agreement to purchase and sell was signed by the auctioneer as agent for the purchaser, and by the vendor's attorney, subscribing himself as "agent for the said *S. S.*" the vendor. The purchaser paid his deposit to the attorney, who gave a receipt, signed by himself as "agent for *S. S.*" The sale going off through the vendor's default, and the deposit money not being returned, it was held, that the purchaser could not bring an action for money had and received against the attorney, for that he was not a stakeholder, but merely the vendor's agent, and that payment of the deposit to him was payment to the vendor. *Bamford* v. *Shuttleworth*, 11 Ad. & Ell. 926.

In *assumpsit* to recover back the deposit paid by the plaintiff upon a contract for the purchase of an estate from the defendant, on the ground of the latter's being unable to make a good title, it appeared that being devisee in remainder after his mother's death, subject to a small annuity to his sister, in the conditions of sale it was stated that the sister claimed under a deed of assignment of the premises to her in trust, but which deed was alleged to be a forgery; and that it was stipulated that the purchaser should not make any objection on account of the alleged indenture, and that part of the purchase-money might remain on mortgage as an indemnity; held, that the plaintiff having purchased, with notice of the defect, and precluded himself from objecting at all to the supposed deed, he could not insist upon it as a defect in the title which he had agreed to take, and was

therefore not entitled to recover back the deposit on that ground. *Corrall* v. *Cottell*, 4 M. & W. 794; and a specific performance was afterwards decreed, 3 Younge & C. 413.

On an agreement for the purchase of premises, a sum was to be paid down by way of deposit and in part of the purchase-money, and it was stipulated that in default by either the vendor or vendee in completing the purchase, the one making default should pay the other 1,000 *l.* liquidated damages; the purchaser having thrown up the contract, on the ground of the vendor being unable to complete it on the day stated, sued the vendor for the penalty, and for the deposit as money had and received, but the defendant obtained the verdict, and afterwards sold the premises to another; held, first, that the former action having failed on the ground that it was prematurely brought, the plaintiff might sustain a second action; and, secondly, that in the absence of any specific promise, the question whether the deposit shall be forfeited depends on the intent of the parties, to be collected from the whole instrument; and that, in the principal case, as a particular forfeiture was stipulated, the vendee could not retain the deposit. *Palmer* v. *Temple*, 1 P. & D. 379.

(*By Vendor of Goods*, p. 1195.)

In *assumpsit* for goods sold and delivered, where the price is above 10 *l.* and nothing was paid as earnest to bind the bargain, nor was there any memorandum in writing signed by the defendant or his agent, two things must be proved to entitle the plaintiff to recover: first, that the defendant in fact ordered the goods; and secondly, that he accepted them with an intent to take them as owner. *Smith* v. *Rolt*, 9 C. & P. 696.

(*By Vendor of Goods; Condition precedent*, p. 1199.)

The defendants contracted for fifty tons of palm-oil, to arrive by a particular ship, and on non-arrival or not having so much on board after delivery of former contracts, the contract to be void; the ship was originally laden with a cargo sufficient to satisfy the contract in question, but previously to arrival, the defendants' agent transhipped part into another vessel, leaving sufficient to fulfil the contract: held, in an action for not delivering fifty tons, that the contract was entire, and that the arrival in the particular vessel was a condition precedent, and that the plaintiff could not recover for that which did arrive in it. *Lovatt* v. *Hamilton*, 5 M. & W. 639.

Where in *assumpsit* for clothes, &c., and on proof of their having been supplied, the defendant put in an agreement between him and the plaintiff, that he should procure customers for the plaintiff and be allowed a percentage on their accounts, to be paid in clothes as he should want them, and that a settlement of accounts should take place every six months, or twelve months at the farthest; held, that it lay on the plaintiff to show that a debt existed and that a settlement of accounts had taken place; and that no action could be maintained until the end of twelve months. *Garey* v. *Pike*, 2 P. & D. 427.

Where there was an agreement to print a certain number of copies, and before the delivery of the whole the printing premises were destroyed by fire, and the remaining copies consumed, it was held that, unless the whole number were printed off, the party was not entitled to recover for those delivered. *Adlard* v. *Booth*, 7 C. & P. 108.

(*Damages—not accepting*, p. 1200.)

Assumpsit for not accepting wheat, "to be delivered at *B.* as soon as vessels could be obtained for the carriage;" the measure of damages is the difference between the contract price and the market price of the day when tendered and refused. *Phillpotts* v. *Evans*, 5 M. & W. 475. And see *Leigh* v. *Paterson*, 2 Moore, 588.

By the custom of the tea trade, when teas are sold at a given prompt or future day of payment, the buyer pays a deposit in part of the purchase-money, and the vendor retains the teas or the warrant representing them, until the day of prompt, when, if he fails to pay the balance of the purchase-money, the vendor is at liberty to resell the teas and to charge the purchaser with any deficiency, together with interest from the prompt day, warehouse rent, &c.; held, that where the vendee became bankrupt before the day of prompt, and the assignees refused to take the teas, or pay the balance of the purchase-money, the vendor might resell them, and prove for the amount of the deficiency. *Ex parte Moffatt*, 1 Mo. D. & D. 282.

(*Goods sold and delivered*, p. 1202.)

After a previous negotiation and trial, the defendant wrote to the plaintiff to say he would purchase his mare at —— guineas, "of course warranted," which, not being attended to, he, by a second letter, desired the mare to be sent, with a receipt, including "sound and quiet in harness," on which the plaintiff wrote to say that he would send it, and that it was warranted sound and quiet in double harness, never having been tried in single; he accordingly sent it to the place appointed, and left it, with injunctions not to be parted with unless the price was paid; but the defendant's son afterwards came, and took her away without payment, and in the course of two days she was sent back as unsound; held, that there was no evidence of a final contract, nor of a delivery accordingly, so as to entitle the plaintiff to recover. *Jordan* v. *Norton*, 4 M. & W. 155.

(*Waiver of Tort*, p. 1203.)

Where an intestate, lessee of coal mines, had improperly worked parts expressly excepted, and sold the coal raised together with the proceeds of his own parts, it was held that the lessor might waive the tort, and sue the representative of his lessee for money had and received for the coal so taken from such excepted places. *Powell* v. *Rees*, 7 Ad. & Ell. 426; and 2 N. & P. 571.

(*Value*, p. 1207.)

On a count on a *quantum valebant*, the plaintiff may give evidence of an agreed price for the goods, and the defendant, in such a case, on a plea of *non assumpsit*, may also go into evidence to induce the jury not to give that price, by showing that the articles delivered were inferior to those that the price was agreed to be paid for. *Pegg* v. *Stead*, 9 C. & P. 636.

(*Reduction of Plaintiff's Claim*, p. 1210 (*q*).

And see *Duncan* v. *Blundell*, 3 Starkie's C. 6; *Montriou* v. *Jefferys*, R. & M. 317.

(*Defence by Vendee*, p. 1212.)

An order (in equity) for a resale, made in consequence of the purchaser's default in completing his purchase, should not discharge him from his purchase. 4 Myl. & Cr. 514.

(*Fraud and Misdescription*, p. 1213.)

A policy of insurance on the life of *A.* had been assigned to *M.*; *N.* having privately ascertained that *A.* was dangerously ill, treats with *M.* for the purchase of the policy for a small sum, representing such sum to be the then value of the policy, *M.* not being aware of *A*'s illness; held, that the sale was void, and that *M.* might recover the value of the policy in an action of trover. *Jones* v. *Keene*, 2 M. & R. 348.

Where any substantial part of the property purporting to be sold turns out to have no existence, or cannot anywhere be found, or if the description be so exagerated as to be quite beyond the truth, and the vendor not acting *bonâ fide* in giving it, the purchaser is entitled to rescind the contract, notwithstanding a clause that any mistake in the description shall not vitiate the contract, but be a ground of compensation. *Robinson* v. *Musgrove*, 2 Mo. & Rob. 92.

A yard, being an essential part of the premises, being held only from year to year, instead of for a term of 21 years, as stated in the particulars, amounts to a misdescription, rendering the sale void. *Dobell* v. *Hutchinson*, 5 N. & M. 251; and 2 Ad. & Ell. 355.

Where the printed particulars of sale and plans fully set out roads, &c., but disclosed a right of footpath only by reference to a lease of other premises, which might be seen at the office, and was calculated to mislead bidders who could not by ordinary vigilance discover that any such right existed, it was held to amount to such a misdescription as entitled the purchaser to rescind the contract; and the purchase of two lots having been included in one agreement for the sale at one aggregate price, and as the purchaser might have been led into the contract for both by the power he might obtain from unity of seisin of extinguishing rights of way, and rendering the whole more valuable, he was held to be entitled to annul the contract as to both lots. *Dykes* v. *Blake*, 4 Bing. N. C. 463.

At the auction, premises are represented as good and substantial, although unfinished buildings, being in fact in so ruinous a state as only fit to be pulled down; the sale is void. *Robinson* v. *Musgrove*, 8 C. & P. 469.

Where the conditions of sale described the manor as entitled to fines arbitrary, and it turned out that they were so only on alienation, but fixed in case of descents; it was held to be a case for compensation, the conditions providing so, in the case of error in description of the property. *Cudden* v. *Cartwright*, 4 Younge & C. 25.

In *assumpsit* to recover back the deposit paid by the plaintiff upon a contract for the purchase of an estate from the defendant, on the ground of his being unable to make a good title, it appeared that being devisee in remainder after his mother's death, and subject to a small annuity to his sister, in the conditions of sale it was stated that the sister claimed under a deed of assignment of the premises to her in trust, but which deed was alleged to be a forgery; and it was stipulated that the purchaser should not make any objection on account of the alleged indenture, and that part of the purchase-money might remain on mortgage as an indemnity; held, that the plaintiff having purchased, with notice of the defect, and precluded himself from objecting at all to the supposed deed, he could not insist upon it as a defect in the title which he had agreed to take, and was therefore not entitled to recover back the deposit on that ground. *Corrall* v. *Cottell*, 4 M. & W. 794; and a specific performance was afterwards decreed, 3 Younge & C. 413.

Where the purchaser of leaseholds omits to inquire into the covenants of the original lease, he will be bound by his contract, notwithstanding variations therefrom in the description by the particular of sale. *Pope* v. *Garland*, 4 Younge & C. 394.

But where such variation consisted in an unseen projection of adjoining premises, it was held to be an objection sufficient to avoid the contract. *Pope* v. *Garland*, 4 Younge & C. 394.

(*Defence by Vendee of Goods—Payment*, p. 1216.)

Where, upon the sale of a ship to *A.* and *B.*, in which *A.* was to be interested in one-third, and *B.* in two-thirds, and upon the execution of the bill of sale, although expressing that *B.* had paid two-thirds of the purchase-money, only one-third was actually paid, and *A.*'s acceptances given for the remainder, which were, from *A.* becoming bankrupt, dishonoured, it was held that *B.* remained liable for the payment of the unpaid purchase-money, notwithstanding the form of the bills given for the amount. *Lynn* v. *Chaters*, 2 Keene, 521.

(*Defence by Vendee of Goods—Illegality*, p. 1216.)

It is no answer to an action for not accepting stock, that at the time of the contract the plaintiff was not actually possessed or entitled to the stock in his own right. *Mortimer* v. *M'Callan*, 7 M. & W. 20.

On a treaty for the sale of a public-house between the defendant and *B.*, the defendant made a false representation as to the profits, which *B.* afterwards, with the defendant's knowledge, communicated to the plaintiff, who became the purchaser in his stead; the contract is as much vitiated by the fraud as if actually repeated by the defendant to the plaintiff. *Pilmore* v. *Hood*, 5 Bing. N. C. 97; 6 Sc. 827.

It is no objection to a contract for the sale of goods, that the vendor had not possession at the time of the bargain, nor entered into any contract for procuring them, nor had ground of expectation of obtaining them. *Hibblewhite* v. *M'Morine*, 5 M. & W. 462; overruling *Bryan* v. *Lewis*, Ry. & M. 386.

Although the plaintiff has not the stock sold in his possession at the time of sale, it is not illegal under 7 Geo. 2, c. 8, s. 8, which applies only to fictitious sales, and not where stock is actually transferred; held, also, that what passed, immediately after the transfer, as to the giving the broker's cheque in payment was admissible as part of the *res gestæ*. *Mortimer* v. *Callan*, 6 M. & W. 58.

The object of the provision in 17 Geo. 3, c. 50, s. 8, for making void the contract of sale upon neglect or refusal by the purchaser to pay the auction duty, being to protect the revenue, avoids the contract only at the option of the vendor, and the purchaser cannot by his own wrong avoid his own contract. *Malins* v. *Freeman*, 4 Bing. N. C. 395.

(*Goods sold and delivered; Credit to whom given.*)

The defendant employed a stock-broker to procure him stock, which the broker did from the plaintiff, a stock-jobber, who procured it from a third party, and it was transferred by the last into the defendant's name; it is for the jury to decide whether the plaintiff gave credit for the price to the broker or to the principal, and a verdict against the defendant (the principal) will be supported. *Mortimer* v. *Callan*, 6 M. & W. 58; see also *Rose* v. *Edwards*, 1 M. & W. 734; 1 T. & G. 975.

(*Trover by Vendee*, p. 1221.)

Where oats were sold to be paid for in twelve weeks from the date of the contract, with liberty for them to remain on the vendor's premises, it was held, that although he had a right to detain the goods until the price was paid, he could not rescind the contract, and, by a notice before the end of the twelve weeks, justify a resale after the end of the twelve weeks. *Martindale* v. *Smith*, 1 G. & D. 1.

The vendee, on tender of the price after the expiration of the credit, may maintain trover. *Ib.*

Upon a contract for a ship then building, specifying the description and particulars, for a certain sum, "and payment as follows opposite each name subscribed," and which was signed by several, and amongst the rest by the plaintiff for one-fourth, it was held not to amount to a present bargain and sale, but of the ship when finished, and that until then no part vested so as to enable the plaintiff to maintain trover. *Laidler* v. *Burlinson*, 2 M. & W. 602.

The defendant having sold wheat to the plaintiffs, to be paid for by a draft, which not being remitted, the defendant took back the wheat from the carmen to whom he had delivered it for the plaintiffs, it was held that the plaintiffs could not maintain trover for the wheat. *Wilmshurst* v. *Bowker*, 5 Bing. N. C. 541.

Where, upon the sale by the defendant of wheat in the warehouse of his agent, he gave directions for the transfer, and the wheat was accordingly transferred into the plaintiff's name, it was held, that the property passed thereby, and that the defendant could not give evidence that others were jointly interested with the plaintiff in the purchase. *Kieran* v. *Sandars*, 1 N. & P. 625.

(*Fixtures*, p. 1224, note *i.*)

See also *R.* v. *Inhabitants of St. Dunstan*, 4 B. & C. 686.

(*Stoppage in Transitu*, p. 1226.)

The vendors directed the defendants (wharfingers) to deliver 1,028 bushels of oats, bin 40, to the purchaser, and "to weigh and charge the expense" to them; the oats comprised the whole in the bin, and were transferred in the defendants' books, and the price paid, but no weighing ever took place; held, that being only for the satisfaction, and not with the view of ascertaining the quantity or price, the right of stoppage was at an end. *Swanwick* v. *Sothern*, 1 P. & D. 648; and 10 Ad. & Ell. 815.

(*Competency*, p. 1228.)

Where the business was carried on in the names of the father and son, and bills and receipts were given in their joint names, it was held that the former not being precluded from showing that his son had no interest in the trade, the son was a competent witness in an action by the father for goods sold. *Barker* v. *Stubbs*, 1 M. & G. 45; and 1 Sc. N. S. 131.

VENUE.

Where, in an action on a warranty of a horse, the venue had been changed from *M.* to *W.*, it was held that a letter written by the plaintiff's attorney in *M.*, informing the defendant of the breach of warranty, and that the

horse was standing at his expense, the receipt of which letter was admitted by the defendant's agent in *M.*, was a sufficient compliance with the undertaking to give material evidence in *M.*, on bringing back the venue. *Collins* v. *Jenkins*, 4 Bing. N. C. 225.

An undertaking to give material evidence of some matter in issue arising in a particular county, is satisfied by evidence arising in that county, which bears on the amount of damages. In an action for breach of warranty of a horse, in which the issue raised on the pleadings was, whether the plaintiff bought the horse of the defendant or not, payment in Middlesex of the keep of the horse, after notice to the defendant of its unsoundness, was held sufficient to satisfy the undertaking to give material evidence in that county. *Quære*, whether a letter of the plaintiff's attorney to the defendant, written in Middlesex, but posted in London, giving notice of the unsoundness, and requiring the defendant to take back the horse, otherwise it would be sold by a certain day (verbal notice to the same effect having been previously given to him), was sufficient to satisfy such undertaking? *Greenway* v. *Titchmarsh*, 7 M. & W. 221; 9 Dowl. P. C. 279.

On an information, under the stat. 6 Geo. 4, c. 108, for being concerned in the unshipping of prohibited goods, which were received on board on the high seas, in prosecution of an agreement arranged at *R.* and in London, and carried strictly into effect, and the goods landed in Ireland; held, that the latter was an unshipping, in which the defendant was concerned, in England, within the meaning of the Act, and the offence properly triable in England. *Attorney-general* v. *Catt*, 3 M. & W. 7.

VERDICT.

In an action against the owner of a brig for an injury done to a sloop belonging to the plaintiff, the amount of damage proved was upwards of 500*l.*, the jury gave a verdict for 250*l.* only, and on being asked how they made up their verdict, replied, that in their opinion there were faults on both sides; held, that notwithstanding this, the plaintiff was entitled to the verdict, as there might be faults in the plaintiff to a certain extent, and yet not to such an extent as to prevent his recovering. *Raisin* v. *Mitchell*, 9 C. & P. 613.

It is hard that a party should be compelled to elect at *Nisi Prius*, in the heat of the cause, on what count he will take a verdict. P. C. *Lee* v. *Muggeridge*, 5 Taunt. 42.

VESTRY.

The rector has the right to preside at a vestry for electing churchwardens, to grant a poll if demanded, and fix the time and place. *R.* v. *Doyley*, 4 P. & D. 52.

Where a vestry is to nominate a number of persons, from whom the justices are afterwards to select one, a poll being demanded on the meeting to nominate, may lawfully be had at a future day, when inhabitants may vote, though not present at the meeting to nominate. *R.* v. *Hedger*, 4 P. & D. 61.

On the nomination of eight inspectors to act in the election of vestrymen, under the stat. 1 & 2 Will. 4, c. 60, the decision of the chairman, on a show of hands, that one or the other party has a majority, is not conclusive; he is bound, on requisition from either side, to take steps for ascertaining the numbers. *Quære*, whether the proper course, on such requisition, be to

divide, or at once to take a poll. *Semble*, that under stat. 1 & 2 Will. 4, c. 60, s. 14, a division is proper. The mere existence of party feeling in the chairman is not a sufficient ground for impeaching a nomination of inspectors under the statute, but if, after improperly refusing to ascertain the numbers voting, he has declared certain persons to be the inspectors nominated by the meeting, and the election of vestrymen has thereupon taken place, the Court will grant a mandamus for a new election, although a considerable time has elapsed. *Ex. gr.* where the election took place May 6th, and a mandamus was moved for on June 6th, and cause was shown November 4th, the rule was made absolute November 21st. If four inspectors have been improperly declared to be nominated by the meeting, such mandamus will be granted, although the other four inspectors were duly nominated by the churchwardens, and officiated at the election. *R.* v. *St. Pancras Vestrymen, &c.* 11 A. & E. 15.

Sect. 51 of the local statute, 51 Geo. 3, c. 151, enacts, "That the said vestrymen (of St. Marylebone) shall set out and appropriate such a number of seats for the gratuitous accommodation of the poor of the said parish for the time being, and also such other pews or seats for the use of the parishioners of the said parish, as the said vestrymen shall think necessary, proper, and convenient;" the clause is imperative upon the vestrymen, and empowers them to set out and appropriate the pews (other than those for the poor) without restriction, and not subject to the superintendence of the ordinary. *Spry* v. *Flood*, 2 Curt. 362.

The right to demand a poll is by law incidental to the election of a parish officer by a show of hands, where there is no special custom to exclude it; and the demand of a poll may be properly made after the show of hands; at any rate, if a poll be afterwards taken, it is a waiver of any irregularity as to the demand. Where, although the usual mode of election had always been by show of hands, yet there being no evidence of a poll ever having been demanded, and so no custom to *exclude* a poll, held that the right existed. A local Act for government of the parish having specially reserved the powers of the vestry, and of any ancient or special usage, and thereby reserved the right of demanding a poll; held, that the taking of it was to be governed by the law then in being (58 Geo. 3, c. 69), which gives a plurality of votes according to the quantity of the voter's estate. *Campbell* v. *Maund*, 1 N. & P. 558; and see *Anthony* v. *Seger*, 1 Hagg. Cons. Rep. 9.

VOTING

For an incapacitated Candidate.

See *R.* v. *Hawkins*, 10 East, 211.

WAGER.

A wager of 50 *l.* to 1 *l.* that a horse named had not won a by-gone horse-race, is lawful. *Pugh* v. *Jenkins*, 1 G. & D. 40.

So, a wager on the price of foreign stock is not void at common law, or within the 14 Geo. 3, c. 48, which is confined to wagering policies of insurance. *Morgan* v. *Pebrer*, 3 Bing. N. C. 457; and 4 Sc. 230.

WAIVER.

On the sale of a real estate, it was stipulated in the agreement of purchase, that it should be void if the money was not paid on a day stated, and the vendor authorised to resell; the purchaser continuing in possession, and giving a warrant to confess judgment in ejectment, is a waiver of the forfeiture. *Gardner, ex parte*, 4 Younge & C. 503; as to the waiver of an agreement, see further *Jenkins* v. *Portman*, 1 K. 435.

Where the purchaser had been in possession for twenty years, and the objections made from time to time to the title appeared to be rather excuses for not completing the purchase than serious; it was held, that the continuing for so long a time in possession was to be taken to be a waiver of the objections, and that he was to be considered as having accepted the title. *Hall* v. *Laver*, 3 Younge & Cr. 191.

Where the terms of a composition deed were not complied with as to the petitioner, and no absolute release executed, it was held that the original debt revived, it being competent to the debtor to waive the release, and for the parties, by subsequent agreement, to keep alive the original security. *Crosbie, ex parte*, 2 Mont. & Ayr. 393; and 1 Deac. 107.

WARRANT OF ATTORNEY.

The omission to take out judgment or file the warrant of attorney within twenty-one days after the execution, renders it liable to be treated as a secret warrant of attorney, and void as against assignees, where the party subsequently becomes bankrupt, although there might not at the time be a good petitioning creditor's debt. *Everett* v. *Wells*, 9 Dowl. 424; S. P. *Williams* v. *Burgess*, Ib. 544; and see *Ex parte Fallon*, 5 T. R. 283.

A warrant of attorney given by an attorney to induce the plaintiff to stay proceedings against him, on a rule to strike him off the rolls, is illegal and void. *Kirwan* v. *Goodman*, 9 Dowl. 330.

A party jointly executed a warrant of attorney; it was held to be no objection that the other had been taken in execution on a judgment for a larger sum, including the debt secured by the warrant, which had not been satisfied, or that no appearance had been entered prior to signing the judgment. *Bircham* v. *Tucker*, 8 Sc. 469.

Where on a *bonâ fide* loan the defendant executed a lease for 99 years of his living, and on the same day executed a warrant of attorney for the same amount, reciting in the defeasance that it was given as a collateral security, and that the sum was further secured by the demise; held, that the lease being void, did not affect the validity of the warrant, and that the warrant being an independent security for a loan, was not a charging the benefice within the stat. 13 Eliz. c. 20; and the sequestration issued was the ordinary one of execution, and not affected by the statute. *Bendry* v. *Price*, 7 Dowl. 753.

And in determining whether such security amounts to a charging the benefice within the statute, the Court will not look for the intention of the parties beyond the instruments, nor receive affidavits for that purpose. *Bishop* v. *Hatch*, 7 Dowl. 763.

Where an attesting witness to a warrant of attorney refused to make an affidavit of the execution, to support a motion for judgment upon it, and it appeared that he was colluding with the defendant, the Court made a rule

absolute, with costs, to compel him to do so. *Ex parte Morrison* in *Croft* v. *Lord Perciral*, 8 Dowl. 94.

The mere fact of a plaintiff's attorney mentioning the name of another attorney to the defendant, is no ground of objection to a cognovit under the 1 & 2 Vict. c. 110, s. 9, if the defendant freely adopt him. *Pease* v. *Wells*, 8 Dowl. 626.

If a defendant inform the attorney attending on his behalf, that the warrant has been read over to him, and that he understands it, the attorney need not read it over to, and explain it to the defendant. *Taylor and another* v. *Nicholl*, 8 Dowl. 242.

Where a defendant who is about to execute a warrant of attorney, declines the attendance of his own usual attorney, but adopts freely an attorney suggested by the plaintiff's attorney, that is a sufficient nomination of an attorney by the defendant, pursuant to 1 & 2 Vict. c. 110, s. 9. *Hale* v. *Dale*, 8 Dowl. P. C. 599.

Where it appeared that an attorney was acting both for the plaintiff and the defendant in a transaction, in the course of which a warrant of attorney was given, and that the instrument was attested by a clerk of the attorney, he being also an admitted attorney, it was held, that the attestation was insufficient within the 1 & 2 Vict. c. 110, s. 9. *Durrant* v. *Blurton*, 9 Dowl. 1015.

A warrant of attorney to confess judgment for 1,000*l.* was executed by the defendant, and an attestation of the execution was subscribed by an attorney, pursuant to the stat. 1 & 2 Vict. c. 110, s. 9. An alteration was afterwards made by consent in the sum by substituting 2,000*l.*, and the defendant retraced his signature with a dry pen, and redelivered the instrument. The attorney, who was present, wrote his initials opposite to the alteration, and drew a dry pen over the attestation and over each letter of his own signature; held, that the warrant of attorney was not duly attested under the 9th section of the statute. *Bailey* v. *Bellamy and others*, 9 Dowl. 507.

To render a warrant of attorney void as against the assignees of a bankrupt under the provisions of the 3 Geo. 4, c. 39, ss. 1 & 2, on the ground of its not having been filed, or judgment signed within twenty-one days of the date of its execution, it is not necessary that the petitioning creditor's debt shall have accrued within the same twenty-one days. *Everett* v. *Wells*, 9 Dowl. 424.

When on the execution of a warrant of attorney there was but one attorney present, who had previously acted for the plaintiff, and who on that occasion made out his bill to the plaintiff, but delivered it to the defendant, and was paid by him; held, that he was not such an attorney acting on behalf of defendant as required by 1 & 2 Vict. c. 110, s. 9. *Sanderson* v. *Westley*, 8 Dowl. 412.

The attorney for the defendant must, under the statute and new rules, be an attorney *other* than the attorney of the plaintiff, otherwise the cognovit is void. *Mason* v. *Kiddle*, 5 M. & W. 513; and 8 Dowl. 207.

Where the clerk of the plaintiff, at the request of the defendant, procured an attorney to act for him, and a request was written by the plaintiff's attorney on the margin of the cognovit; held, that under the circumstances, the party not having had an opportunity of exercising his own discretion, the instrument was invalid under 1 & 2 Vict. c. 110, s. 9. *Barnes* v. *Pendrey*, 7 Dowl. 747; distinguishing the cases of *Bligh* v. *Brewer*, 3 Dowl. 266; and *Oliver* v. *Woodruffe*, 7 Dowl. 166.

The attestation only described the party as the defendant's attorney, and attending at his request, without declaring that he subscribed as such attorney; this is not a compliance with the 1 & 2 Viet. c. 110, s. 9. *Poole* v. *Hobbs*, 8 Dowl. 113.

Where the party was in custody in execution for the same debt, held that the release from custody was a good consideration for the cognovit as a new security, but that a new writ must be sued out; and it lies on the party impeaching its validity to show that in fact no new writ has been sued out. *Shanley* v. *Colwell*, 6 M. & W. 543; and 8 Dowl. 373.

The defendant having agreed to give the plaintiffs a warrant of attorney to secure his debt to them, the plaintiffs employed *P.*, an attorney, to prepare it. *P.* called with it on the defendant, and told him it must be signed in the presence of some professional man, and that he should procure Mr. *S.* to attest it; and the defendant accordingly went to procure *S.*'s attendance, but met him in the street, when *P.* told him they were coming to his, *S.*'s office, that he might witness the execution of a warrant of attorney by the defendant. The defendant then suggested that they had better go to *P.*'s office, which was nearer. They went there accordingly; *P.* placed the paper in *S.*'s hands, and *S.* then read over and explained the warrant of attorney to the defendant, and asked him whether he wished him to witness the execution of it as his attorney. The defendant replied that he did, and then he signed it, and *S.* attested it; *P.* offered to pay *S.* for his attendance, but he said, as it would come out of the defendant's pocket, he should make no charge; for which the defendant expressed himself obliged; held, that *S.* was not expressly named by the defendant and attending on his behalf, so as to satisfy the stat. 1 & 2 Viet. c. 110, s. 9; and the warrant of attorney and judgment signed thereon were set aside. *Gripper* v. *Bristow*, 6 M. & W. 807; 8 Dowl. 797; and see *Kemp* v. *Matthew*, 8 Scott, 799.

Semble, that this is an objection which cannot be *waived* by the defendant. *Gripper* v. *Bristow*, 6 M. & W. 807.

The witness to a cognovit executed since the 1 & 2 Viet. c. 110, s. 3, must not only declare himself in the attestation to be the attorney for the party, but also that he subscribes his name as such. *Potter* v. *Nicholson*, 9 Dowl. 808.

WARRANTY.

Parol evidence may be given of the warranty, although the memorandum given of the price is silent as to that point, being merely a receipt, and not containing the terms of the contract. *Allen* v. *Pink*, 4 M. & W. 140; and 6 Dowl. 668.

(*Implied*, p. 1239.)

It seems that a warranty is to be implied in all cases where an article is supplied for a particular purpose, that it will answer the purpose, if the buyer rely on the skill and judgment of the seller, whether the seller be or be not the manufacturer. *Brown* v. *Edgington*, 2 Scott, N. S. 496.

As where a wine merchant orders a crane rope for the purpose of raising pipes of wine from a cellar, and the seller not having one to answer the purpose, undertakes to get one made. *Ib.*

Where the defendant sold a gun to the plaintiff's father, with a warranty that it was of a certain maker, and knowing that it was purchased for the plaintiff's use: the plaintiff having sustained injury by its bursting, being

of an inferior make, and not according to the warranty; held, that he might sustain an action on the case for the injury consequent upon the defendant's fraud, although (*semb.*) he could not upon the contract, it being made with another party. *Langridge* v. *Levy*, 2 M. & W. 519.

(*Breach of Warranty of Soundness*, p. 1242.)

In an action on the warranty of a horse sold, alleging that it was unsound, to which the defendant pleaded only that it was sound; the plaintiff is entitled to begin. *Osborne* v. *Thompson*, 9 C. & P. 337; and 2 Mo. & R. 255.

A bone spavin existing at the time of sale is a breach, although not occasioning lameness until some time after. *Watson* v. *Denton*, 7 C. & P. 85.

A slight disorder, as *influenza*, at the time of sale of a horse, not diminishing the usefulness, and of which he ultimately recovered, does not constitute a breach of warranty of soundness. *Bolden* v. *Brogden*, 2 Mo. & R. 113.

Defective formation which has not produced lameness in a horse at the time of the sale (*e. g.* curly hocks), is not an unsoundness, although it may tend to produce future lameness. *Brown* v. *Elkington*, 8 M. & W. 132.

(*Damages*, p. 1242.)

The plaintiff having purchased a picture, warranted by the defendant as a *Claude*, sold it with a similar warranty, and upon an action brought by the purchaser, paid damages and costs; held, in an action against the defendant for the breach of the warranty, that if the sale to such third party was *bonâ fide* and in the ordinary course of business, the plaintiff was entitled to recover such damages and costs, and also his own costs. *Pennell* v. *Woodburn*, 7 C. & P. 117.

In a declaration on a warranty of a horse sold to the plaintiff, which he had resold at an advanced price, and had returned upon his hands, there was no allegation that the increased price arose from improvement in the interval, by money laid out by the plaintiff; it was held that the plaintiff could not recover for the mere loss of a good bargain, nor could he recover the expenses of taking a veterinary surgeon's or counsel's opinion, or his attorney's charges, which were steps taken for his own safety in bringing the action. *Clare* v. *Maynard*, 1 N. & P. 701; and 7 C. & P. 741. And see *Walker* v. *Moore*, 10 B. & Cr. 416.

Upon a breach of warranty of a horse, and refusal to receive it back when tendered, it was held, that the purchaser may keep it a reasonable time, with the view to effect a better sale, and recover for the keep. *Ellis* v. *Chinnock*, 7 C. & P. 169.

(*Defence*, p. 1243.)

Declaration on a warranty of a horse, sound and quiet in harness, plea *non assumpsit*, "*modo et formâ*," held, that proof of the warranty being that the horse was sound and quiet in all respects, supported the declaration, and that upon the issue the defendant could not go into the fact of soundness. *Smith* v. *Parsons*, 8 C. & P. 199.

Assumpsit on the breach of a warranty of seed to produce certain crops, with the common counts, the particulars being only of the price of the seed, and applying only to the common counts, evidence of the value of the crops is admissible, as applying to the damage stated in the first count. *Page* v. *Parcy*, 8 C. & P. 769.

Where the declaration on a contract for the sale of a horse, with a verbal warranty alleged to have been falsely and fraudulently made, was in substance an action to recover back the price paid, under 20*l.*, it was held to be within the 3 & 4 Will. 4, c. 47, s. 17.

WASTE.

(*Messuage*, p. 1244.)

A covenant by a lessor to repair the external parts of the demised messuage comprises the boundary walls of it, though they adjoin other buildings. At all events, the lessor is liable under it to compensate the lessee for the damage arising from non-repair of such a wall which arises after the adjoining building has been pulled down, though the damage be a consequence of such pulling down, he having made no attempt to prevent the damage arising from the further sinking of the wall, and though the adjoining building was pulled down in execution of powers given by an Act of Parliament which contained a clause for the compensation of persons sustaining damage from the execution of them. *Quære*, whether in such a case an action will lie against the lessor before a reasonable time has elapsed for the restoration of the wall by him? and held, that even if so, an action would be maintainable before such reasonable time had elapsed, he having on application contested his liability to do repairs, and given an unqualified refusal to do them. In such an action the lessee, after such refusal, having rebuilt an external wall, is entitled to recover the cost thereof, the jury having found that this was the proper mode of restoring it.

He may also recover the price of damage done to plate-glass and fixtures, in consequence of the sinking of the wall. But the lessee cannot recover the rent paid by him for the occupation of other premises during the progress of the repairs, though during that time the demised premises were not safely habitable. *Green* v. *Eales*, 1 G. & D. 468.

(*Farm*, p. 1244.)

Where the defendant entered into a bond with his creditors, stipulating for not selling or carrying any manure off the farm, and having sold off his stock, he permitted the purchaser to let two cows remain on the farm, the latter finding them provender, and who removed the manure made by them to his own land; held a breach of the condition of the bond. *Hindle* v. *Pollett*, 6 M. & W. 529.

Where the defendant entered on premises under an assignment of a void lease, and continued to occupy and pay the rent until the term expired, he was held to be liable to the stipulations in the lease to repair, the damages to be estimated according to the state at the end of the lease. *Beale* v. *Sanders*, 3 Bing. N. C. 850.

Where allotments, fenced in by the commissioners, were made to an incumbent upon an inclosure, which at his death were out of repair; held that such allotments followed the same rule as the ancient glebe land, and that his executors were liable for such dilapidations. *Bird* v. *Relph*, 2 Ad. & Ell. 773; 4 Nev. & M. 878.

Case for mismanaging a farm, &c. contrary to the custom of the country, plea traversing that the defendant was such tenant to the plaintiff, *modo et formâ*; held, that upon this issue, which put only in issue a tenancy in fact, the plaintiff was not obliged to produce the lease to show that the terms

of it were consistent with the alleged obligation to cultivate according to the custom. *Hallifax* v. *Chambers*, 7 Dowl. 343; and 4 M. & W. 661.

Where the declaration, in case against a tenant from year to year, charged a voluntary waste, and the evidence was of permissive waste only, the Court made a rule for a nonsuit absolute. *Martin* v. *Gilham*, 2 N. & P. 568; and 7 Ad. & Ell. 540.

(*Removal of Fixtures*, p. 1245.)

The defendant's testator was the surviving lessee, under a renewed lease, of certain salt-works, which renewed lease recited the former lease, and also the fact that the lessees "had erected and set up divers engines, machines, roads, and other conveniences, as well for the use and for the convenience as for the managing and carrying on at, in, or upon the said demised premises the trade or business of rock salt, or rock salt getters and refiners, or manufacturers of white salt," and contained a demise of "all and every the messuages, dwelling-houses, wick-houses, *salt-works*, *erections*, *buildings*, *and other matters and things since made at*, *in*, *or upon*, *or under the said demised premises for the use and convenience of carrying on the said demised trades*," and a covenant by the lessee to keep and maintain in good and sufficient repair "the buildings, kays, and *works* then standing and being on the premises, and all and every other such edifices and engines as should be at any time during the term erected, set up, built or made in or upon the demised premises," and, at the determination of the term, to deliver up "all the premises mentioned to be thereby demised, and all such buildings, kays, *works*, edifices and engines, in good and complete repair and condition;" held that salt pans in which the brine was manufactured into salt, and pipes by which the brine was conveyed from the salt springs to the brine pits —the salt pans being made of plates of iron, supported upon brick-work, and having rings on their sides by which they were lifted off to be repaired —the pipes being metal pipes, partly carried under ground and partly along troughs supported by tressels—were not removable by the lessees at the expiration of the term. *Earl Mansfield* v. *Blackburne*, 8 Scott, 720.

Where the tenant erected staddles with stone caps, and placed thereon a wooden and thatched building, connected in no other way than by resting the beams on the staddles, and might be taken to pieces and removed without injury to the soil; held, that the tenant was entitled to remove them, and might maintain trover for the materials. *Wansborough* v. *Maton*, 6 N. & M. 367; and 4 Ad. & Ell. 884; and see *R.* v. *Otley*, 1 B. & Ad. 161.

In trespass by a lessor against the lessee, the issue being whether a cornice of wood fixed by screws was removable by law; held that it raised a question of fact, and not of law, and that the Judge properly directed the jury as to the fact of removal without substantial injury as a test of its being so affixed that it could be removed without injury to the freehold. *Avery* v. *Chesslyn*, 5 Nev. & M. 372; 3 Ad. & Ell. 75.

The right of a tenant to remove tenant's fixtures continues only during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant. Where, therefore, the term, pursuant to a proviso in the lease, was forfeited by the bankruptcy of the lessee, and the lessor entered upon the assignees, in order to enforce the forfeiture, and three weeks afterwards the assignees of the lessee, still continuing in possession, removed and sold a fixture put up by the lessee for the purposes of trade; and the jury found that it was not removed within a reasonable time after the entry of the lessor; it was

held, that they had no right so to remove it, and that the lessor might recover it in trover. And *semble*, such would have been the case even without such finding of the jury. *Weeton* v. *Woodcock*, 7 M. & W. 14.

Fixtures in a leasehold pass under a devise of a testator's household furniture. *Paton* v. *Sheppard*, 10 Sim. 186.

(*Wastes*, p. 1248.)

The presumption is that strips of land adjoining on highways belong to the owners of the adjoining inclosures. *Scoones* v. *Morrell*, 1 Beav. 250; *supra*, 1125.

Where a tenant annexes to his farm part of the waste, it enures to the benefit of the landlord. *Doe* v. *Murrell*, 8 C. & P. 135; *supra*, 696.

WATERCOURSE.

In the absence of a special custom, artificial watercourses are not distinguishable in law from natural ones; and a title may be gained by twenty years' user, as well to the former as the latter. Mine-owners made an adit through their lands to drain the mine, which they afterwards ceased to work, and the owner of a brewery through whose premises the water flowed for twenty years after the working had ceased, had during that time used it for brewing; it was held, that he thereby gained a right to the undisturbed enjoyment of the water, and that mines could not afterwards be so worked as to pollute it. *Quære*, whether a universal practice in the neighbourhood to resume the use of such adit waters, for mining purposes, after a long interval, might not have been set up in answer to the claim of easement, thereby raising the inference that the party claiming used the water, not of right, but only during the accidental disuse of the adit, and with knowledge that the mine-owners reserved to themselves a power to recommence working, and thereby disturbing the waters. *Mayor* v. *Chadwick*, 11 A. & E. 571; and 3 P. & D. 367.

The use of a right to water, claimed for the purpose of watering cattle, and also for the more convenient use and enjoyment of a messuage, is not, it seems, a *profit à prendre* from the soil of another, but a mere easement, and claimable by custom. *Manning* v. *Wasdale*, 1 N. & P. 172.

(*Sea Shore*, &c., p. 1254, note (*x*).

For *Spring Tides*, read *High Tides*.

(*Sea-shore*, p. 1254.)

By an Act of Parliament, reciting that a certain tract of land, daily overflowed by the sea, and to which the King, in right of his Crown, claimed title, might be rendered productive if embanked, and that his Majesty had consented to such embankment, a part of the said land, called Lipson Bay, was granted to a company for that purpose; on one side of the bay was the northern side of an estate called Lipson Ground, forming an irregular declivity, in parts perpendicular, and in parts sloping down to the seashore, and overgrown with brushwood and old trees. The company, in embanking the bay, made a drain on this side in the same direction with the cliff, cutting through it in parts, but leaving several recesses of small extent between the projecting points. These recesses used to be overspread with sea-weed and beach, and were covered by the high water of the ordinary spring tides, but not by the medium tides. Held, in the absence of

proof as to acts of ownership, that the soil of these recesses must be presumed to have belonged to the owner of the adjoining estate, and not to the Crown, and did not therefore pass to the embankment company by the Act of Parliament. *Lowe* v. *Govett*, 3 B. & Ad. 863.

Upon an issue whether certain defendants had wrongfully fished for salmon, by means of stake-nets placed in situations prohibited by statute, where the question was, what was to be considered "river," and what "sea," a direction that the thing to be looked to is the fact of the absence or the prevalence of the fresh water, though strongly impregnated with salt, is erroneous. The mouth of a river comprehends the whole space between the lowest ebb and the highest flood mark. *Horne and another* v. *Mackenzie and another*, 6 Cl. & Fi. 628.

Where the sea had, by gradual encroachment upon the land of a subject, covered and washed away the part formerly uncovered, so as to render it undistinguishable from the foreshore; held, that it became the property of the Crown. *Hull and Selby Railway, in re*, 5 M. & W. 327. And see *R.* v. *Lord Harborough*, 3 B. & Cr. 91; and *Scratton* v. *Brown*, 4 B. & C. 485.

In trespass, the plaintiff claimed to the whole extent of the bed of a river between his and the defendant's close; evidence of acts of ownership by the plaintiff as to adjoining parts being a continuous part of the plaintiff's estate is admissible. *Jones* v. *Williams*, 3 M. & W. 327; and see *Doe* v. *Kemp*, 2 Bing. N. C. 102.

A right of ferry is a matter in which the public are so interested as to make evidence of *reputation* relating thereto admissible. *Price* v. *Currell*, 6 M. & W. 234.

The establishment of a new ferry is actionable, whether the party intend to defraud the grantee of the ferry or not. *Huzzey* v. *Field*, 2 C. M. & R. 432.

(*Fishery*, p. 1254.)

In trespass for breaking, &c., it appearing that the plaintiff's close, in which, &c. was a public navigable river, plea, justifying the taking under a public right of fishing and dredging for oysters and oyster spat, replication that oyster spat was unfit for food; a rejoinder that the public had a right of fishery for oyster spat in a public river, was held bad on demurrer, oyster spat being in the nature of spawn, and within the prohibition of 13 Ric. 2, st. 1, c. 19. *Maldon Mayor, &c.* v. *Woolvet*, 4 P. & D. 26.

(*Fishery several, what*, p. 1254.)

See Salk. 637. *Smith* v. *Kemp*; *Seymour* v. *Lord Courteney*, 5 Burr. 2814. It is a several fishery where no other has a co-extensive right. *Qu.* Whether the right of soil be essential.

(*Sea-Wall*, p. 1254.)

The liability to repair a sea-wall, *ratione tenuræ*, may not be limited to such as are sufficient to resist ordinary tides and weather, and the orders of commissioners, made long back, are admissible evidence of the extent of the liability of those who are bound by precedent, prescription, customs, and tenures. *R.* v. *Leigh and others*, 2 P. & D. 357.

WAY.

(*Title*, p. 1255.)

See as to the presumption of a grant, *R.* v. *Scarisbrick*; *Doe* v. *Kemp*, 2 Bing. N. C. 102.

From a covenant in the defendant's lease to contribute, with other occupiers of the lessor's property, a rateable proportion of the expense of keeping up paths used in common between them, coupled with the fact that the plaintiff had always used a path between his house and the defendant's, from a period anterior to the defendant's lease, and that there was no other path to which the covenant could apply, the Court inferred that the soil of the path which was included in the demise to the defendant, was demised, subject to a right of way, to the plaintiff. *Oakley* v. *Adamson*, 8 Bing. 356.

On a plea of right of way to a certain close, formerly part of an uninclosed common, the defendant proved the use of the way long before and since the Inclosure Act, under which the close had been allotted to the defendant's ancestor, the jury found the immemorial right; held, that it might fairly be inferred that the lord originally had the right, and that it passed, with the allotments, and the Court would not disturb the verdict. *Codling* v. *Johnson*, 9 B. & C. 933.

A reservation in a lease of a right of way on foot, and for horses, oxen, cattle, and sheep, does not give any right of way to load manure. *Brunton* v. *Hall*, 1 G. & D. 207.

See the distinctions of the Roman law as to the rights of "iter actus" or "via." "Qui sellâ aut lecticâ vehitur ire non agere dicitur, jumentum vero ducere non potest qui iter tantum habet. Qui actum habet et plaustrum ducere, et jumentum agere potest. Sed trahendi lapidem aut tignum neutri eorum est." L. vii. Off. de Serv. Præd. Rust.; and the note of the Reporters, 1 G. & D. 210.

In trespass *quare clausum fregit*, it appeared that *B.*, being the owner of the *locus in quo*, and also of certain other land, with houses, and a stable, loft, and chaise-house, conveyed to *A.* a part of the premises, consisting of a house and land comprehending the *locus in quo*, reserving to himself, his heirs, &c., occupiers for the time being of a messuage (not conveyed) a right of way and passage over the *locus in quo* to a stable and loft over the same, and the space or opening under the loft, and then used as a woodhouse, and to the chaise-house standing on the side of the *locus in quo* (the stable, loft, woodhouse, and chaise-house, not being conveyed), and also the use of the *locus in quo* in common with *A.*, his heirs, &c., and their tenants for the time being; it being expressed to be the intent of the parties that the whole of the yard comprehending the *locus in quo* should lie open and undivided, as the same then was, and be used in common by the occupiers of both messuages as the tenants thereof had been accustomed theretofore to use them. Afterwards *B.* built a cottage on the site of the opening under the loft: it was held, 1st. That the reservation of the use of the *locus in quo* did not authorise *B.* to use it for the purpose of passing to the cottage; 2d. That the reservation of the right of way was not limited to a right of passage to the space so long as it was used as a woodhouse, but gave a way generally to the space so described, while it was open; 3d. But that *B.* was not entitled to use that way for the purpose of passing to a newly erected cottage on that space. The defendant pleaded also a justification, under the use of the right of passing to the stable, loft, and chaise-house. The plaintiff new assigned, that the defendant had converted the loft and opening into the cottage, and ceased to use it as a woodhouse, and passed to the cottage, and broke, &c., for other purposes than in the plea mentioned. To which the defendant pleaded that such passing was done for the purposes mentioned in the reservation, and as the tenants of the messuage not conveyed had

been accustomed to use the *locus in quo*, without this, that the defendant committed the trespasses newly assigned in manner, &c.; held, 1st. That the facts proved supported the new assignment; 2d. That, even if the facts had justified the use described in the new assignment, the defendant could not have had the verdict, inasmuch as the plea to the new assignment amounted only to not guilty, and not to a justification. *Allan* v. *Gomme*, 11 A. & E. 759.

The words, "with all ways thereto belonging, or in any wise appertaining," will not pass a way not strictly appurtenant, unless it can be collected that the parties intended to use the words in a larger than their ordinary legal sense; and it seems that such intention cannot be collected from anything *dehors* the deed. *Barlow* v. *Rhodes*, 1 Cr. & M. 439.

Where vacant land had been let on a building lease, which expired in 1824, and the plaintiff had become possessed of a house erected thereon, from an under-lessee, and had enjoyed therewith a right of using a passage adjoining for shooting coals into his cellar, and laying waterpipes thereto, and the original lessor had, pending the lease, granted a reversionary lease of the plaintiff's house to him, with all and singular the appurtenances, to hold from the day, &c. at which the original lease would end and determine; held, that the right of passage, and of using it for such purposes, passed under the reversionary lease as a necessary incident to the subject-matter demised, although not specially named in it, and that upon the expiration of the original lease, the lessor never having for a moment a right of possession, such easement was not extinguished by any unity of possession. *Hinchliffe* v. *Earl of Kinnoul*, 5 Bing. N. C. 2; and 6 Sc. 650.

Trespass for entering a close, &c.; plea, that before the plaintiff had any title therein, *A.* was seised in fee of that and certain other closes, of which the plaintiff's close was then parcel, and by himself and tenants, during all that time, used and enjoyed a right of way over the part, being plaintiff's close, to the other closes, and that *A.* afterwards conveyed the defendant's closes, "together with all ways and appurtenances whatsoever thereunto belonging;" it was held, that the way not being appurtenant at the time of the conveyance the defendant should have pleaded that he was enfeoffed of the close and way, or that there was no way appurtenant *in alieno solo*. *Wilson* v. *Bagshaw*, 5 M. & Ry. 448.

(*Stat.* 2 *&* 3 *W.* 4, *c.* 71, p. 1257.)

Pleas in trespass, claiming a foot and carriage-way enjoyed for 20 years, under 2 & 3 Will. 4, c. 71; replication traversing so much of the plea as claimed the carriage-way, and as to the residue of the plea, before the commencement of the 20 years, the making of a haling-path by a navigation company under a private Act across the *locus in quo* into *B.* field, and that the occupiers enjoyed a way along the said path, under and by virtue of the said Act, and that after the commencement of 20 years, under the powers of another Act, a towing-path nearer the river was made, also across the said *locus in quo* into *B.* field, and that the company thereupon abandoned the former path, and which ceased to be used; the replication then alleged that before and at the commencement of the 20 years, the occupiers of *B.* field used as of right, &c. a way along the first haling-path, by and under the provision of the first Act, which ceased and determined on the abandonment, but from that time until when, &c. the occupiers of the *B.* field continued to use the same way as a continuation of the former

right; held, on demurrer, that the replication was good, as pleading facts showing that the right claimed was not such as would be inferred to exist by custom, prescription or non-existing grant, within the meaning of the 2 & 3 Will. 4, c. 71. ss. 2, 3: the right of way along the haling-path continuing only so long as that existed, and ceasing with it. *Kinloch* v. *Neville*, 6 M. & W. 795.

In trespass, the plea alleged the user of a way for 40 years as of right without interruption, the replication traversed the user *as of right*; held that evidence of the user having been by leave and license was admissible, and a new trial was refused. *Beasley* v. *Clarke*, 2 Bing. N. C. 705.

Where the Act authorised the commissioners to divert and stop up public and private roads, and to prepare and sign a map describing them, and to hold a meeting for hearing objections in which they were to be assisted by a justice of the division, who, with the commissioners, might alter or confirm the map; and it provided that all roads not so set out and confirmed, should be extinguished, but by a proviso, no roads passing through old enclosures were to be diverted or stopped up, but by an order of two justices, under their hands and seals, which was to be subject to appeal; held that old roads not set out and confirmed by the commissioners, but which passed partly through old enclosures and partly over the lands to be enclosed, were not extinguished by not being set out in the map or award. The Act requiring also, that the order of justices should stop up, &c., if upon the view they were satisfied of their being unnecessary: held, that an order stating that the justices had particularly viewed, &c. and *being satisfied*, that they unnecessarily did order, &c., was invalid, if not appearing on the face of it that they were upon the view satisfied, &c., the allegation of a particular view not necessarily extending over the whole. *R.* v. *Marquis of Downshire*, 6 N. & M. 92.

Where a canal company originally erected a bridge for the use of the tenants of particular lands, but for 10 years the public had crossed it without interruption: held, that it was properly left to the jury to say whether the company intended or not to dedicate it to the public, and the jury having so found, the Court, in the absence of any misdirection in law, refused to interfere with such finding. *Surrey Canal Company* v. *Hall*, 1 Sc. N. S. 264; and 1 M. & G. 382.

(*Variance*, p. 1258.)

It is not necessary to describe all the intervening closes between the premises; plea that defendant was seised in fee of land next adjoining to one of the said closes in which, &c., and in right of said land claimed a way from the said land unto and into, through, over, and along the said closes in which, &c., to a common highway, proof of a presumptive right of way from the defendant's land over the land of third persons, and thence into the plaintiff's land, and into a common highway; it was held that the plea was proved, although it also appeared that part of the defendant's land adjoined to one of the plaintiff's closes, and that the defendant had by permission sometimes used a way from that part of his land over the plaintiff's adjoining closes as well as the way in question.

Description of a footpath as "a road towards and unto the parish church of *O.*," sufficient, although it in fact made a circuitous angle, no part of it being to be retraced in going to the church. *R.* v. *Downshire, Marq. of*, 5 N. & M. 662.

To a declaration in trespass *quare clausum fregit*, the defendant pleaded a right of way in the close in which, &c.; the plaintiff new assigned extra the way *in the plea* mentioned, to which the defendant pleaded that the plaintiff obstructed *the way in the plea mentioned*, wherefore the defendant deviated; the plaintiff replied *de injuriâ*; held, that on this record, the plaintiff was entitled to apply the evidence to a way across the close which he admitted, and which had not been obstructed; and that the defendant could not prove his case by showing that another way which he claimed across the close, which was disputed by plaintiff, had been obstructed. *Ellison* v. *Isles*, 11 A. & E. 665.

Where in trespass, issues were joined, 1st, on a right of public carriage-way; 2d, of a bridle-way; and 3d, of a footway, and the jury found on the first for the plaintiff, and on the third for defendant, and were discharged as to the second without the plaintiff's consent; held, that the second issue was material, and a new trial was granted, although the plaintiff had consented to merely nominal damages. *Tinkler* v. *Rowland*, 4 A. & E. 808.

(*Public Way.*)

An action cannot be maintained for a nuisance to a public highway, unless some special damage can be alleged and proved. *Fineux* v. *Horendon*, Cro. Eliz. 664; *Hubert* v. *Groves*, 1 Esp. C. 148.

But it is sufficient to show that the business of a shopkeeper, whose shop adjoins the obstructed highway has been injured by the unlawful obstruction of passengers. *Wilkes* v. *Hungerford Market Company*, 2 Bing. N. C. 281; or that the plaintiff has been compelled to use a more circuitous or difficult way. *Griesley* v. *Codling*, Com. Dig. tit. Action on the Case for Nuisance.

And see *Baker* v. *Moore*, and *Iveson* v. *Moore*, 1 Lord Raym. 486; *Rose* v. *Miles*, 4 M. & S. 101; and *Greasley* v. *Codling*, 2 Bing. 263; questioning *Hubert* v. *Groves*, 1 Esp. C. 148.

(*Competency.*)

Per Patteson and Coleridge, Judges. On issue upon claim of way in right of occupation of the messuage and land of *G.*, the occupier of a part of the house occupied by *G.* is not a competent witness to support the affirmative, though his part of the house have no communication with the part which *G.* occupies. *Parker* v. *Mitchell*, 11 A. & E. 788.

WILL.

(*Secondary Evidence*, p. 1268.)

Where a will, dated above thirty years, was produced from one of the testator's family, although not strictly a proper custody, and never proved; held, that it was not necessary to produce the subscribing witness. *Doe* v. *Pearce*, 2 Mo. & R. 240.

(*Capacity*, p. 1276.)

On an issue from the Court of Chancery to try whether *A. B.* was at a certain time of sound mind, the party affirming the soundness is entitled to begin. In such issues it will be presumed that the party ordered to be plaintiff was intended to begin. *Frank* v. *Frank*, 2 M. & R. 314.

On an issue as to the sanity of *A.*, it cannot be asked whether a sister of *A.* was not insane. *Doe* v. *Whitefoot*, 8 C. & P. 272.

On an indictment for seditious words, and, upon the arraignment, an inquest being taken whether the prisoner were insane or not; held, that the jury might form their opinion from his demeanour without calling in the evidence of a medical man, and that it was not necessary for him to be asked if he would cross-examine the witnesses, or make any remarks to the jury on the evidence. *R.* v. *Goode*, 7 Ad. & Ell. 536.

The will dated and executed on the 15th November 1839, of a testator who was labouring under certain delusions on the three previous days to its execution, and who destroyed himself on the day following (the 16th) while under temporary insanity, pronounced for, and the costs of the Queen's Proctor, who opposed the will on behalf of the Crown, refused. *Chambers & Yatman* v. *the Queen's Proctor*, 2 Curt. 415.

Provisions made for the safe custody of persons insane, and having the purpose of committing indictable offences, by 1 & 2 Vict. c. 14.

(*Revocation*, p. 1285.)

The testator in a fit of displeasure threw his will, contained in an envelope, into the fire, but it was secretly withdrawn, and no part of the will itself burnt, of which he was afterwards aware, and expressed great annoyance, and an intention to make a new will instead thereof; held, in ejectment, by the heir for copyhold premises, that although, to satisfy the Statute of Frauds, there must have been a burning of the instrument to some extent to effect a revocation as to a devise of freehold, yet in the case of property not within the statute, it being a case of revocation at common law, it was a question of intention, evidence of which might be found in an imperfect act, or mere attempt, and that it was the province of a jury to say whether the facts proved amounted to a revocation. *Doe* v *Harris*, 2 N. & P. 615; and see S. C. 1 N. & P. 495.

Where the *animus revocandi* was clear, and the deceased had requested a friend to write to the executor in whose custody the will was, to destroy it, and it was accordingly forwarded to him, but did not arrive until after death; held to amount to a revocation reduced into writing in the deceased's lifetime, and satisfying the Statute of Frauds. *Walcott* v. *Ochterlony*, 1 Curt. 580.

Where a testatrix devised to a trustee and his heirs, estates, upon the trust and confidence that he would receive the rents, and pay the same to *S.* for life, and after her decease convey the estates to such uses as *S.* should appoint, and *S.* died in the lifetime of the testatrix, it was held, first, that the events did not operate as an implied revocation of the will; secondly, that the legal estate being vested in the trustee, the devise did not lapse; and, lastly, that as the trust could not cease until the conveyance by the trustee, the legal estate remained in him, and that the lessor of the plaintiff claiming as heir-at-law, could not recover in ejectment. *Doe* d. *Shelley* v. *Edlin*, 1 Nev. & P. 582.

(*Implied Revocation, &c.*, p. 1287.)

The deceased died, on the 20th of April 1836, possessed of real and personal estate, together of the value of about 1,000,000*l.* Two papers (A.) and (B.), alleged to have been found, at the deceased's death, in his fast-locked repositories, annexed together by wafers, and sealed up in an envelope, indorsed, "The Will of James Wood, Esq., 2d and 3d December, 1834," were propounded as together containing the will. (A.), which was headed, "Instructions for the Will of me, James Wood, Esq., of Gloucester," was

dated 2d of December 1834, and was signed by the deceased, but not attested, purported to appoint four gentlemen by name executors, to desire them to take possession of his personal estates, subject to the payment of debts, and "such legacies as I may hereafter direct," and to declare he would dispose of his real estates by writing indorsed thereon. Paper (B.), a separate paper, dated 3d December 1834, signed by the deceased and attested by three witnesses, began, "I, James Wood, Esq., do declare this to be my will, for disposing my estates, as directed by my instructions," gave all his real and personal estates "which I may not dispose of," and "subject to my debts, and to any legacies or bequests, of any part thereof, which I may hereafter make," &c. "to my executors," not naming or otherwise describing them. Both papers were very informal; were in the handwriting of one of the executors (the deceased's attorney), and ultimately appeared to have been, by such attorney, annexed together, sealed up in the envelope, indorsed, and locked up in the deceased's bureau during his last illness, and, without his directions or knowledge; it was held, that the *presumption of law* that instructions are superseded by the execution of a will was not repelled; that the two papers, not being published together as the will of the deceased, nor annexed with his knowledge, and (A.) not being unequivocally referred to in (B.), (A.) formed no part of the deceased's will; that, consequently, the interest of the four parties named in it as executors was at an end, and that there was no party before the Court with an admitted interest, who could propound (B.), pray probate of it, or administration with it annexed: the Court, therefore, pronounced against it, made no decree as to (B.), and condemned the parties propounding (A.) and (B.) in the costs of one of the next of kin. Another paper propounded as a codicil, by legatees named in it, opposed by the asserted executors and by all the next of kin, dated July 1835, alleged to be an holograph of and signed by the deceased, and to have been sent in an anonymous note, by the threepenny-post, to one of the legatees, leaving legacies amounting altogether to 210,000 *l.*, and referring to a legacy in another codicil, not forthcoming; which paper was partially torn and partially burnt, and was alleged to have been so done, and other testamentary papers to have been destroyed, after the deceased's death, or in his lifetime unknown to him; held, that as the evidence of handwriting was contradictory, though the affirmative preponderated and the disposition was probable, the Court could not judicially pronounce the codicil to have been the act of the deceased, and consequently would not inquire whether it were cancelled or not, or, if cancelled, whether such cancellation was the act of the deceased. *Wood & others* v. *Goodlake & others*, 2 Curteis, 82. The judgment as to the third paper was afterwards reversed by the judicial committee of the Privy Council.

Where a will, traced to the testator's possession, is not forthcoming at his decease, the presumption is that he has destroyed it, and must prevail, unless there be evidence to repel it by raising a higher probability to the contrary, and the *onus* lies on the party propounding the revoked will. *Welch* v. *Phillips*, 1 Moore, 299 (reversing the judgment below).

Where, after executing a will of real and personal estate, the testator married, having made a settlement of the real estate, it was held that the marriage and birth of a child amounted to a revocation of the entire will. *Israell* v. *Rodon*, 2 Moore, 51.

Revocation of a will by marriage and the birth of a child (previously to the

7 W. 4 & 1 Vict. c. 26), was held to take place in consequence of a principle of law, independently of any question of intention of the testator himself, consequently no evidence is admissible to rebut the presumption of law, nor can the circumstance of after-acquired property descending upon the child have any effect. *Marston* v. *Roe*, 2 Nev. & P. 504; affirming the judgment below, 8 Ad. & Ell. 14.

(*Presumed Influence*, p. 1829.)

The will of an aged person of doubtful capacity, prepared by a solicitor, who was appointed an executor and one of the residuary legatees, was pronounced against, and the parties propounding it condemned in costs. Bare execution in such a case is not sufficient. *Durling & another* v. *Loveland*, 2 Curt. 225.

(7 W. 4 & 1 *Vict.* c. 26, p. 1289.)

Where the will disposing of residue was executed in 1830, and a codicil was found at the death of the testatrix, who died in 1839, without date, containing a direction and referring to the execution of a power as to part of such residue, it was held, that in the absence of anything to show that it was executed after the passing of the 7 W. 4 & 1 Vict. c. 26, the Court would presume it to have been executed previously to the statute, and probate was decreed. *Pechell* v. *Jenkinson*, 2 Curt. 273.

Probate having been granted at the Cape of Good Hope of a will and an unattested codicil thereto, made there in March 1838 (the 7 W. 4 & 1 Vict. c. 26, having come into operation on the 1st January of that year), by an officer in the East India Company's service, probate of both papers was also allowed to pass here. *Foy, Wm. Henry, in the Goods of*, 2 Curt. 328.

(*Signing at the Foot, &c.* p. 1290.)

Probate was allowed of a will, concluding, "Signed and sealed as and for the will of me C. E. T. Woodington, in the presence of us Thomas Hughes, Ellen Hughes," as being signed at the foot or end thereof. *Woodington, C. E. T., in the Goods of*, 2 Curt. 324.

A testatrix signs her will with a mark, but her name does not appear; this is a sufficient signing under the stat. 7 W. 4 & 1 Vict. c. 26, s. 9. *Bryce, Eleanor, in the Goods of*, 2 Curt. 325. And see *Taylor* v. *Dening*, 3 N. & P. 229.

Where a party at the request of the testator (he being too ill to do it himself) signed the will for him, but in his own name, and not in that of the testator, which was duly attested, it was held to be a sufficient compliance with the statute. *Clarke, in the Goods, &c.*, 2 Curt. 329.

The appointment of the executors in a will, being made in a clause after the signature of the testator, administration with the will annexed was granted to the residuary legatee, the clause appointing the executors not being part of the will. *Howell, Thomas, in the Goods of*, 2 Curt. 342.

(*Acknowledgment of Signature*, p. 1290.)

The testatrix signed her will, and on a subsequent day sent for two witnesses to attest the same; upon their arrival they said that they were come for the purpose of signing their names as witnesses to her will, which was then produced, upon which the testatrix said, "I am glad of it, thank God," and they subscribed the will as witnesses; held, to be an acknowledgment of her signature by the deceased, under the 7 W. 4 & 1 Vict. c. 26, s. 9. *Warden, Mary, in the Goods of*, 2 Curt. 334.

The deceased signed her will, by a mark, in the presence of one witness who subscribed the will as attesting it, and on a subsequent day she acknowledged her signature in the presence of that witness and of another who also subscribed the will, but the former witness did not again subscribe the will; probate was refused. *Allen, Ann, in the Goods of*, 2 Curt. 331.

The deceased signed her will, not in the presence of witnesses, and subsequently produced her will before two witnesses, and said to them, "Sign your names to this paper," held not to be an acknowledgment of her signature under the 9th section of stat. 7 W. 4 and 1 Vict. c. 26. *Rawlins, Ann, in the Goods of*, 2 Curt. 326.

(*In Presence, Sect.* 9, p. 1290.)

A testator intending to execute a codicil, signed the same while lying in bed, there being present in the room two witnesses who attested the codicil; the curtains at the foot of the bed being drawn at the time, one of the witnesses could not actually see the testator sign his name, nor could the testator see that witness subscribe the codicil as attesting it; held, that the testator and the witness signed their names in the presence of each other, as required by the stat. 7 W. 4 and 1 Vict. c. 26, s. 9. *Newton & another* v. *Clarke*, 2 Curt. 320.

A motion for probate of a will signed by the deceased in the presence of two witnesses, present at the same time, who went into an adjoining room and signed their names, was rejected. *In the Goods of Alexander Ellis, Esq.*, 2 Curt. 395.

(*Sect.* 10. p. 1290.)

Where by a settlement the wife had a power of disposing by any will "signed and published by her, and attested by two or more credible witnesses," and the attestation clause was as to her execution only, it was held, that evidence *aliunde* of actual publication not being admissible, the power was not well executed, and that the will therefore could not be pronounced for. *George* v. *Reilly*, 2 Curt. 1.

(*Sect.* 11, p. 1290.)

Where the purser of a man-of-war, whilst at sea, executed a codicil not attested, it was held to be within the exception of the 11th sect. of the 7 W. 4 and 1 Vict. c. 26, the term marine or seaman including superior officers. *Hayes, in the Goods, &c.*, 2 Curt. 339.

The will of a seaman who went on shore, and there died in consequence of an accident, was allowed to pass as that of a seaman "at sea," under the stat. 7 W. 4 and 1 Vict. c. 26, s. 11. *In the Goods of E. J. Lay, deceased*, 2 Curt. 375.

An unattested will made by an officer on service at Berbice, was allowed to pass as that of a "soldier in actual military service," under 7 W. 4 and 1 Vict. c. 26, s. 11, at the prayer of the party whose interest was prejudiced by such will. *In the Goods of Constantine Edward Phipps*, 2 Curt. 368.

(*Competency, Sect.* 15.)

The testator's wife, being an executrix, is a good witness, although she would lose her legacy under the 15th sect. of the 7 W. 4 and 1 Vict. c. 26. *Clarke, in the Goods of*, 2 Curt. 330.

(*Sect.* 20, *Revocation*, p. 1291.)

A cancellation of a will is not a revocation thereof, under the words "otherwise destroying" the same, in the stat. 7 W. 4 and 1 Viet. c. 26, s. 20. *Stephens* v. *Taprell*, 2 Curt. 458.

A testator having left two substantive wills, the latter disposing of the whole of his property, although not expressly revoking the former will, nor the appointment of executors therein, was held to have revoked the former, and to be alone the will of the testator. *Henfrey* v. *Henfrey*, 2 Curt. 468.

Cheques written in 1833 by the deceased upon his bankers, but not intended to have effect until after his death, pronounced for as part of the testamentary disposition of the deceased, he having in 1834 formally executed a will disposing of the whole of his property, and containing a full clause of revocation. *Gladstone* v. *Tempest and others*, 2 Curt. 650.

(*Sect.* 21, *Alteration—Erasure*, p. 1291.)

A testator, after the execution of his will, having partly erased the word *four* and substituted the word *five*, (the alteration not being attested as required by the statute 7 W. 4 and 1 Viet. c. 26,) probate of the will passed as it originally stood, the word *four* being sufficiently apparent upon the paper. *In the Goods of James Beavan, deceased*, 2 Curt. 369.

A testator duly executed his will with a legacy therein of *fifty* pounds to *S. S.*; subsequently to the execution the testator erased the word *fifty* and substituted the word *thirty*; this alteration being unattested, probate of the will passed in blank, the word *fifty* having been entirely erased. *Rippin, Chas. N., in the Goods of*, 2 Curt. 332.

Where the testator gave a legacy to his sister, the wife of *F. B.*, or to such persons as *E. B.* should appoint, to the intent that the same might be for the separate use of *E. B.*, and the receipt of the said *E. B.* to be a sufficient discharge, and the name "*E. B.*" was afterwards drawn through with a pen, but as the description, and in some cases the name of *E. B.* remained uncancelled, it was held not to amount to a revocation. *Martins* v. *Gardiner*, 8 Sim. 73.

Where the testator having erased certain words and inserted others, wrote a memorandum stating what the words erased had been, but such memorandum was not attested, it was held to be inoperative, and the Court refused probate of the will as it originally stood. *Brooke, in the Goods, &c.* 2 Curt. 343.

(*Execution of Power*, p. 1292.)

A power in a married woman to dispose of certain property by will, to be *signed* and *published* by her in the presence of two witnesses, is not duly exercised by a paper (executed before the 1st January 1838) purporting to be signed and sealed as a will, in the presence of two witnesses, omitting to state in the attestation clause that it was *published*: but as the power did not require that the will should be *attested*, parole evidence was admitted to show that publication had taken place; the evidence, however, on that point being insufficient, the Court pronounced against the paper. *Walters* v. *Mayford*, 2 Curt. 221.

A married woman having under her marriage settlement a power to dispose of property "by will to be published by her in the presence of and to be attested by two *credible* witnesses," published her will in the presence of two witnesses, who attested the same, one of those witnesses being the

wife of the executor, who was also a legatee under the will, and had not renounced or released his legacy. Probate granted, leaving the question as to the due execution of the power open. *Biggar, Sarah, in the Goods of,* 2 Curt. 336.

(*Presumptive Evidence of due Attestation*, p. 1294.)

Probate was allowed of a will executed in India, and attested by two witnesses, but without a full attestation clause, the Court presuming that the statute had been complied with. *Johnson, John, in the Goods of,* 2 Curt. 341.

(*Donatio Causâ Mortis.*)

Where the obligee of a bond, five days before his death, gave it to a niece and signed a memorandum amounting to an immediate and absolute assignment of it, it was held, that in the absence of evidence of how it came into the donee's possession, and the assignment being unconditional and not importing that it was to be restored if the donor should recover, it was not to be deemed a *donatio causâ mortis,* and a bill praying that the donee might be declared entitled, was dismissed. *Edwards* v. *Jones,* 7 Sim. 325; affirmed, 1 My. & Cr. 226.

Where *A.* the donor, delivered a cash box to *B.*, the donee, desiring him to go after his death to his son for the key, and stating that the box contained money to be entirely at *B.*'s disposal, but that he should want it every three months as long as he lived, and it was twice delivered back, but was in *B.*'s possession at the time of the death, the key being in the son's possession, ticketed in the name of *B.*, it was held not to be a sufficient *donatio causâ mortis,* nor such a trust for *B.* as the Court would execute. *Reddel* v. *Dobree,* 10 Sim. 244.

WINDOWS.

In case for a nuisance against the occupier of adjoining premises, the plaintiff is bound, upon the general issue, to show that the defendant occupied, and was the party causing the nuisance. *Dawson* v. *Moore,* 7 C. & P. 25.

In case for obstructing ancient lights, it was held that a party might so alter the mode in which he had been permitted to enjoy the easement, as to lose the right altogether; where evidence as to the alteration in the mode of enjoyment had not been put for the consideration of the jury, a new trial was granted. *Garritt* v. *Sharpe,* 4 Nev. & M. 834; and 3 Ad. & Ell. 325.

In case for darkening windows by building against them, it appeared that, in 1816, the land whereon the plaintiff's windows were, had been conveyed as a parcel of *arable* land, and that it was, two or three years afterwards, sold to a party, who built a cottage thereon; that such party having entered without any conveyance, afterwards contracted to sell it, and the vendee obtained from the owner of the adjoining land a few feet additional on one side of the cottage, and that a conveyance of the entire premises was, in 1822, made by all proper parties, and the purchaser carried out his building to the extremity of the land, and inserted a window at one end, and substituted, where there had before been only a passage, windows at the other end, not in the same places, but in the same direction as before; held that there not having been acquiescence for 20 years, there was nothing in the grant made by the owner of the adjoining lands which could be con-

verted into a licence, or preclude him from building on his own land, although, in so doing, he obstructed the newly-erected window. *Blanchard* v. *Bridges*, 5 N. & M. 567.

WORK AND LABOUR.

Special Contract.

If an agreement cannot be read in evidence for want of a stamp, the plaintiff cannot recover the value of the work and labour to which the agreement refers, although the defendant may have had the benefit of it. *Hughes* v. *Budd*, 8 Dowl. 478.

(*Indebitatus Assumpsit*, p. 1296.)

R. having undertaken, by a written contract, to build for the Corporation of Henley a house on a farm occupied by *A.*, engaged *S.* to do the carpenter's work; and the following agreement was made and signed by *R.* and *S.*, and witnessed by *A.*:—"It having been arranged that *A.* shall build a new house on the farm occupied by Mr. *A.*, it is hereby agreed and understood between the said *R.* and *S.*, that *S.* shall do all the carpenter's work, &c. under the inspection and control of the said *A.*, and that the amount of the said work shall be paid by Mr. *A.* to *S.* only, and that this agreement shall be his guarantee for so doing." On the same day, *A.* wrote to *S.* as follows: "It having been agreed that *R.* shall build a new house on the farm occupied by me, and that by an agreement this day shown me between you and *S.* you are to do the carpenter's work, &c., and that the payment, when done, is to be made by me to you, and to no other person, according to plan and specification, I hereby undertake to pay the same, by having a proper discharge": held, that *S.* having done the work, could not maintain an action of *indebitatus assumpsit* for work and labour against *A.* for the value of it. *Sweeting* v. *Asplin*, 7 M. & W. 165.

Where the plaintiff has contracted to do certain work for a specified sum, he cannot maintain an action for the value of the work done, on the ground of fraud in the representation by the defendant of the quantity; for, as to the work, he must recover on the contract, although he might sue for the deceit. *Selway* v. *Fogg*, 5 M. & W. 83.

In *assumpsit* on a contract for services, at a salary after the rate, &c. per annum, determinable at a month's notice, alleging a dismissal without notice, whereby the plaintiff lost all wages which he might have earned if continued in the service, he can only recover as damages the wages of one month, and for the arrears due he can only recover in a separate count for work and labour. *Hartley* v. *Harman*, 3 P. & D. 567; and 11 Ad. & Ell. 798.

After an agreement at an annual salary, proof of acceptance by quarterly payments, is sufficient to authorize a jury to infer *an agreement* to pay quarterly; held also, that a master may avail himself of a lawful cause of dismissal, whether the dismissal proceeded on that ground or not; it is sufficient that he should have sufficient cause previously to the dismissal. *Ridgway* v. *Hungerford Market Co.*, 4 N. & M. 797; and 3 Ad. & Ell. 171.

In an action for works done extra, upon a building contract, the plaintiff must produce the written contract, to enable the jury to see what are *extras*. *Jones* v. *Howell*, 4 Dowl. 176.

Where the jury found the hiring to be by the year, but that the wages were payable quarterly, and the plaintiff having been dismissed had, after tender and refusal of his services, brought an action before the quarter for

which he claimed to be paid had expired, it was held, that he could not maintain the action for service done and performed. *Smith* v. *Hayward*, 2 Nev. & P. 432; and see *Archard* v. *Hornor*, 3 C. & P. 349; *Gandell* v. *Pontigny*, 4 Campb. 375.

In debt, for work and labour as a performer at the defendant's theatre, a letter from the defendant, "that the plaintiff must be contented with his present salary until I know what turn the season takes;" was held to be an admission of the plaintiff's being in his service, and not requiring any stamp as an agreement. It appeared also that the plaintiff was to be paid for certain nights, although there should be no performance; held that he should have declared for arrears of salary as a hired performer, but the Judge permitted the declaration to be amended; and a payment having been made without expressing it to be on any particular account, it was held that the plaintiff was at liberty to apply it to any part of his demand really due, and to recover for the rest of his claim. *Frazer* v. *Bunn*, 8 C. & P. 704.

The causing a servant to be sent to prison on a charge afterwards abandoned, was held not to amount to a dissolution of the contract, and that the party was therefore entitled to the wages which would have accrued in the interval, until actual dismissal. *Smith* v. *Kingsford*, 3 Sc. 279.

A contract for service at a yearly salary is, by resignation on the part of the plaintiff and acceptance on the part of the defendant, put an end to in the middle of a quarter; whether the servant be or be not entitled to recover *pro rata*, is a question for the jury. *Lamburn* v. *Cruden*, 2 Scott's N. S. 533.

By a memorandum contained in a letter, the plaintiff agreed to enter into the defendant's service as manager, and "the amount of payment I am to receive I leave entirely to you to determine;" it was held, (*diss.* Parke, B.) to imply that, at all events, something was to be paid, and that on a *quantum meruit*, it was for the jury to decide the value of the services performed. *Bryant* v. *Flight*, 5 M. & W. 114.

Where there was no proof of any hiring, but only of service, and payments had been made without reference to any definite period or yearly amount, and the plaintiff left in the middle of the year from sickness, and was never required to return, it was held, that the plaintiff was entitled to recover upon a *quantum meruit*. *Bayley* v. *Rimmell*, 1 M. & W. 506; and 1 T. & G. 806.

(*Credit to whom, &c.*, p. 1301.)

Where a local committee is formed for the purpose of forwarding the project of an intended railway, they are the persons who are liable to pay the salaries of their secretary, &c., unless it be shown that the secretary &c. agreed to look to some other fund for payment. *Kerridge* v. *Hesse*, 9 C. & P. 200.

Where the captain alone of the owners signed the articles, and the seamen agreed thereby to sue him alone, it was held that they could maintain no action against the other owners, although such owners received and sold the proceeds of the voyage, and adjusted and paid the seamen their wages; held also, that the seamen having, after remonstrance against certain deductions, usual in trading voyages, accepted the balance struck, and signed a receipt for the whole wages, they could not afterwards sue for such deductions, and that it was not necessary that such deductions should be made the subject of a set-off. *M'Auliffe* v. *Bicknell*, 2 Cr. M. & R. 263.

Where a father, on the marriage of his daughter, executed an appointment of a sum which was settled on the marriage, the expense of the settlement was paid by the husband, but he refused to pay for the expense of the deed of appointment, it was held not to be a matter of usage, but for the jury to say to whose credit the business was done. *Hayward* v. *Fiott*, 3 C. & P. 59.

(*Performance*, p. 1303.)

Where the ship was in extreme danger, and the service occupied five days, and was performed with great perseverance and skill, 1,000*l.* were awarded out of a value of 4,600*l.*, and 100*l.* to a second smack, with the expenses. *Almon*, 3 Hagg. 254.

See further as to salvage, case of the *Thetis*, 3 Hagg. 14; *William Hamilton*, ib. 168; *London Merchant*, ib. 394; *Nicholaas Witzen*, ib. 369; *Dantzig Packet*, ib. 383.

Where a ship was chartered for an outward voyage to *I.*, and homeward, either from a port or ports in *I.*, or from a port in *S.*, to a port in the United Kingdom, and provided that if she should be required to go to *two* or more ports in *I.*, 25*l.* more should be paid, and in case she should be ordered to *S.*, 4*l.* should be paid for every day after the twenty-fifth day of arrival at *I.* until dispatched from the loading port, it was held, that the going to *S.* from *I.* was not to be deemed an intermediate voyage, but that having gone for the homeward voyage to *S.*, that was to be deemed the homeward voyage, and that the 4*l.* per day extra time was payable. *Crozier* v. *Smith*, 1 Sc. N. S. 338; and 1 M. & G. 407.

Where the ship was detained after the loading was complete, by the ice preventing her sailing, it was held that the charterer was not liable for the detention. *Pringle* v. *Mollett*, 6 M. & W. 80.

See further as to freight, *Cockburn* v. *Wright*, 6 Bing. N. C. 223; *Capper* v. *Forster*, 3 Bing. N. C. 938; *Tobin* v. *Crawford*, 5 M. & W. 235; *Mitchell* v. *Darthez*, 2 Bing. N. C. 555; 2 Scott, 771.

Where the contract was silent as to demurrage, it was held, that damages occasioned by unreasonable detention could only be recovered under a special count. *Horn* v. *Bensusan*, 9 C. & P. 709; and 2 Mo. & R. 326.

(*Commission, Custom, &c.* p. 1307.)

The practice was found by the jury to be for the broker to receive five per cent. commission for obtaining freight, where there is no special agreement, or unless the ship be chartered on a tender. *Brown* v. *Nairne*, 9 C. & P. 204.

The usage is, that when a broker has introduced the captain of a ship and a merchant together, and they by his means enter into some negotiation as to the intended voyage, the broker is entitled to commission, if a charter-party be effected between them for that voyage, even though they may employ another broker to prepare the charter-party, or may write the charter-party themselves. *Burnett* v. *Bouch*, 9 C. & P. 620.

If a broker be authorized by both parties, and acting as the agent of each, communicate to the merchant what the shipowner charges, and also communicate to the shipowner what the merchant will give, and he name the ship and the parties, so as to identify the transaction, and a charter-party be ultimately effected for that voyage, this broker is entitled to his commission; but if he do not mention the names so as to identify the transaction,

he does not get his commission to the exclusion of another broker, who afterwards introduced the parties personally to each other. *Ib.*

Where the jury found the usage for architects, employed to provide plans and estimates, to be assisted by surveyors to make out the quantities, who are paid by the successful competitor, it was held, that the defendants, who employed an architect and made no objection to the charge, having, by declining to go on with the work, prevented competition, were liable for the surveyor's charges on the implied authority of their architect to employ him. *Moon* v. *Witney Guardians*, 3 Bing. N. C. 814.

In *assumpsit* for work and attendances at Somerset House, on the inspection of patterns of goods, for the sale of which the plaintiff was the defendant's commission agent, it was held, that if the jury considered such attendances to be within the course of the plaintiff's duty as agent, he was paid by his commission, and not entitled to recover beyond; the jury found for the defendant. *Marshall* v. *Parsons*, 9 C. & P. 656.

The plaintiff was employed so sell ground rents by auction, on the terms of receiving a commission of one per cent "on sale." After he had advertized the sale, but before the day of sale, the defendant sold the ground rents by private contract. Three auctioneers proved the custom of the trade to be that after an auctioneer was employed and the property advertized by him, he was entitled to the full commission on a sale being effected, although not effected through his direct agency. The question left to the jury was, whether this custom was *so notorious* that the defendant must have known it; and that if so, it was engrafted on the contract. The jury found for the plaintiff for the full commission. *Rainy* v. *Vernon*, 9 C. & P. 559.

Where the plaintiff with others was employed as land agent to sell the defendant's estates, and a party inquiring of the plaintiff as to one estate, was told that it was out of the market, but the plaintiff mentioned that of the defendant being to be sold, and gave him a particular, and the party afterwards concluded a bargain for it with another agent, it was held, that the plaintiff might be said to have found the purchaser, and was entitled to such commission as the jury should think proper. *Murray* v. *Currie*, 7 C. & P. 584.

Where one broker procured the cargo, and afterwards obtained the freight, and another, also referred to by the shipowner, cleared out the ship, and paid the charges, it was held that, by the usage, he must share the commission, and could not sue the shipowner. The usage and general course of business must be proved by witnesses speaking to instances in which, to their own knowledge, it has been acted upon. *Hall* v. *Benson*, 7 C. & P. 711.

The broker was held to be entitled to his commission on the sale of a ship, where up to a certain point he acted as middleman, although the contract was completed without his instrumentality: but the mere fact of his having introduced the parties, unless the negotiation proceeds thereupon, would not be sufficient to entitle him to it. *Wilkinson* v. *Martin*, 8 C. & P. 1.

The custom is that when butty colliers leave off working a coal mine, without giving notice, they are not entitled to be paid for gate roading, air heading or coals undergone; but if they leave after having given notice, they are entitled to be paid for these things by the owner of the mine; and if the mine be not worked, they are not bound to wait till the working is recommenced, and to be then paid by the succeeding butty collier. *Bannister* v. *Bannister*, 9 C. & P. 743.

(*Defence, Dismissal, &c.* p. 1308.)

Upon a special plea in an action for dismissing the plaintiff under a contract for service, justifying the dismissal, the defendant was held to have the right to begin. *Harnett* v. *Johnson*, 9 C. & P. 206.

Where the defendant had retained the plaintiff as French teacher in his school, at a yearly salary, it was held, that his having absented himself for two days on the expiration of the vacation, was not such a breach of duty arising out of the contract, express or implied, as could justify the defendant in putting an end to it. *Fillieul* v. *Armstrong*, 2 N. & P. 406.

Where an acting manager conducted himself so indifferently and improperly as to make his continuance in the duties injurious to the success of the concern, it was held that he might be lawfully dismissed; held also, that the representation made by the stage-manager to the audience, as to the success of the season, was admissible against the lessee or proprietor upon that subject. *Lacy* v. *Osbaldiston*, 8 C. & P. 80.

Where a salaried clerk claimed to be recognized as a partner with his employer, it was held to be a sufficient ground for dismissal, and that without notice. *Amor* v. *Fearon*, 1 P. & D. 398.

In case for wrongfully discharging from the defendant's service, a plea, that the party obstinately refused to work, wherefore he discharged, &c., was held to be bad, as not showing a disobedience of reasonable commands of the defendant. *Jacquot* v. *Bourra*, 7 Dowl. 348.

If a master carpenter send his men from London to work at a gentleman's house in the country, he may dismiss them for improper conduct, although it does not amount to either moral misconduct, wilful disobedience, or habitual neglect; and where, in such a case, a journeymen was found in one of the preserves of the gentleman at whose house the work was done, after a caution had been given to him to keep the paths, and upon complaint by the gentleman, the master dismissed the journeyman, the Judge left it to the jury to say whether the master was not justified in such dismissal. *Read* v. *Dunsmore*, 9 C. & P. 588.

Where the plaintiff ordered specifically a machine of which the plaintiff was the patentee, "to be put up in his brewhouse," which the plaintiff accordingly put up, but it was found not to answer the purpose of a brewhouse, it was held, that there being no fraud, and the contract containing no guarantee that it was fit for such purpose, the plaintiff was entitled to recover the stipulated price. *Chanter* v. *Hopkins*, 4 M. & W. 399.

By the stat. 1 & 2 Will. 4, c. 37, s. 5, in an action brought by any of the artificers enumerated in that statute for the recovery of his wages, no set-off or claim to reduction by his employer shall be allowed, by reason or in respect of goods supplied, or on account of wages, or of any goods, &c. sold, delivered, or supplied to such artificer at any shop kept by or belonging to such employer, or in the profits of which he shall have any share or interest.

(*Order to View, &c.*)

In an action for work and labour, a Judge has no power to make an order for the plaintiff or his witnesses to enter the defendant's premises, in order to inspect the work done. *Turquand and another, Assignees of Taylor, a Bankrupt*, v. *The Guardians of the Strand Union*, 8 Dowl. 201.

(*Summary Jurisdiction.*)

It is not necessary to show a yearly hiring to bring a party within the benefit of the 6 Geo. 4, c. 16, s. 48; but it must be more than a weekly one. *Collier, ex parte*, 4 D. & Ch. 520; denying the accuracy of *ex parte Skinner*, 3 ib. 332.

Upon an information before Justices for non-payment of wages, under 20 Geo. 2, c. 19, and 4 Geo. 4, c. 34, it was held, 1st, that it must appear upon the information that the relation of master and servant exists, and 2dly, that the 5 Geo 4, c. 18, applying only to penalties and forfeitures, justices have no power to commit for non-payment of the sum adjudged to be due. *Wiles* v. *Cooper*, 5 N. & M. 276; and 3. Ad. & Ell. 524.

The jurisdiction under 5 & 6 W. 4, c. 19, s. 15, extends only to the case of *quantum* of wages, and not to questions of law, as of forfeiture, &c., and appearance under protest was overruled. *Edwin*, 3 Hagg. 365.

WRITS, *Forms of.*

See R. G. 1 Scott, N.S. 7.

WRIT OF INQUIRY.

When a counsel has been present at the trial of an issue on a writ of trial, the Court will take a statement of what occurred at the trial, from the counsel, on moving to set aside the verdict, without the production of the notes taken by the presiding officer. *Flower* v. *Adams*, 8 Dowl. 292.

The Court will not, at the instance of the sheriff, stay the execution of a writ of inquiry on a judgment by default, in an action for a libel, on the ground that the House of Commons has voted the libel to be a privileged publication, and that all persons concerned in bringing any action in respect of such publication are guilty of a breach of the privileges of that House. *Stockdale* v. *Hansard*, 8 Dowl. 148.

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